

## Part 27 Unit Trusts and Offshore Funds

### CHAPTER 1 *Unit trusts*

- 731 Chargeable gains accruing to unit trusts
- 732 Special arrangements for qualifying unit trusts
- 733 Reorganisation of units in unit trust scheme
- 734 Taxation of collective investment undertakings
- 735 Certain unit trusts not to be collective investment undertakings
- 736 Option for non-application of *section 735*
- 737 Special investment schemes
- 738 Undertakings for collective investment
- 739 Taxation of unit holders in undertakings for collective investment
- 739A Reorganisation of undertakings for collective investment

### CHAPTER 1A *Investment undertakings*

- 739B Interpretation and application
- 739BA Personal portfolio investment undertaking
- 739C Charge to tax
- 739D Gain arising on a chargeable event
- 739E Deduction of tax on the occurrence of a chargeable gain
- 739F Returns and collection of appropriate tax
- 739G Taxation of unit holders in investment undertakings
- 739H Investment undertakings: reconstructions and amalgamations
- 739HA Investment undertakings: amalgamations with offshore funds
- 739I Common contractual funds
- 739J Investment limited partnerships

### CHAPTER 2 *Offshore funds*

- 740 Interpretation (Chapter 2 and Schedules 19 and 20)
- 741 Disposals of material interests in non-qualifying offshore funds
- 742 Offshore funds operating equalisation arrangements
- 743 Material interest in offshore funds
- 744 Non-qualifying offshore funds
- 745 Charge to income tax or corporation tax of offshore income gain
- 746 Offshore income gains accruing to persons resident or domiciled abroad
- 747 Deduction of offshore income gain in determining capital gain

### CHAPTER 3 *Offshore funds: supplementary provisions*

- 747A Capital gains tax: rate of charge
- 747AA Treatment of certain offshore funds

### CHAPTER 4 *Certain offshore funds – taxation and returns*

747B Interpretation and application

747C Return on acquisition of material interest

747D Payment in respect of offshore funds

747E Disposal of an interest in offshore fund

747F Reconstructions and amalgamations in offshore funds

747FA Offshore funds: amalgamations with investment undertakings

#### CHAPTER 5 *Relevant UCITS*

747G Tax treatment of a relevant UCITS or a relevant AIF

## PART 27 UNIT TRUSTS AND OFFSHORE FUNDS

### CHAPTER 1 *Unit trusts*

#### Overview

This Chapter, in *section 731*, provides for the general capital gains tax treatment of unit trusts. The Chapter then, in *sections 732, 734, 737 and 738*, provides for a number of differing tax regimes to apply to various types of unit trusts and similar type entities. *Section 739* sets out the taxation treatment which applies to investors in certain unit trust type entities. The Chapter also provides for a number of ancillary measures. However, the provisions of the Chapter are to a large extent redundant as most unit trusts and similar collective investment vehicles together with their investors are now taxed under *Chapter 1A* of this Part.

#### 731 Chargeable gains accruing to unit trusts

##### Summary

This section provides for the charge and assessment of unit trusts with regard to capital gains tax. Chargeable gains accruing to a unit trust are to be assessed and charged on the trustees. The section also set out rules for establishing the residence of the trustees. Distributions of capital by the unit trust to unit holders are treated as part disposals of the units in the same way as capital distribution by a company in respect of shares in the company are regarded as part disposals of the shares. Provision is made for certain exemptions in respect of the disposal of units and in respect of gains accruing to a unit trust itself.

##### Details

“capital distribution” from a unit trust is any distribution in money or money’s worth from the trust including a distribution in the course of terminating the trust, other than a distribution, which in the hands of the recipient, constitutes income for the purposes of income tax. (1)

Gains accruing to a unit trust are assessed and charged on the trustees and the trustees are not regarded as merely acting as nominees of the unit holders. (2)

The trustees are treated as a continuing body of persons distinct from the individuals who may from time to time be acting as trustees. A body of persons is chargeable as a separate entity distinct from the individuals making up that body of persons. The trustees, as a body, are regarded as resident in the State unless the general administration of the unit trust is ordinarily carried on abroad and a majority of the trustees are not resident or not ordinarily resident in the State. (3)

A distribution of capital by the unit trust to unit holders is treated as a part disposal of units by the unit holders. (4)

Where all the units in a unit trust, which is not an authorised unit trust scheme within the meaning of the Unit Trusts Act 1990, are held by capital gains tax exempt persons throughout a year of assessment the gains accruing in that year to the unit trust are not chargeable. Neither are such unit trusts liable to income tax or deposit interest retention tax (5)

in that year. This does not apply where exemption of the unit holder is by reason of residence or by virtue of the exemption afforded to individuals by *section 739(3)*. An annual declaration and reporting arrangement for such unit trusts applies for the year of assessment 2010 and subsequent years.

Capital gains are not treated as chargeable gains where they arise from the disposal of units (6) in a unit trust which is administrated by a licensed life assurance company and which requires a policy of life assurance to be affected for participation in the trust. The exemption is subject to the conditions that the trustees of the unit trust have at all times been resident and ordinarily resident in the State and the units do not at any time become the property of the owner of the policy. The exempt disposals would arise if units had to be cancelled because of, for example, contraction in the unit linked business.

From the 6th of April 1994, the exemption of tax on gains arising on a disposal of units in (7)(a) unit trusts which invest only in exempt assets was abolished. This mainly impacted on unauthorised unit trusts. The exemption is preserved in respect of the part of the gain accruing up to the 5th of April 1994. This necessitates computing the gain on disposal of units on the basis that their cost equals their value as at 5 April 1994.

However, the 5 April 1994 valuation is not used where using it in place of the actual (7)(b) consideration on a disposal results in —

- an increased gain,
- an increased loss,
- a gain instead of a loss,
- a loss instead of a gain.

In the latter two scenarios the disposal is assumed to give rise to neither a gain nor a loss.

## 732 Special arrangements for qualifying unit trusts

### Summary

This section enables the Revenue Commissioners to enter into arrangements with certain unit trusts (“qualifying unit trusts”) having substantial public participation to ensure that there will not be any disadvantage to an individual small investor through purchasing units instead of investing directly in quoted securities.

The unit trusts to which the section applies are those registered under the Unit Trusts Act, 1972, which satisfy certain conditions.

In relation to such trusts one half of the normal capital gains tax rate applies to —

- disposals of investments of the unit trust itself, and
- capital gains realised by unit holders on the disposal of units in those unit trusts.

### Details

#### Definitions

“securities” and “quoted securities” are defined for the purposes of reference to them in (1) *subsection (6)*.

#### Application

The section applies to a unit trust (called a “qualifying unit trust”) which complies with (2)(a) certain conditions. These conditions are —

- the trust must be a registered unit trust within the meaning of section 3 of the Unit Trusts Act, 1972,

- the trustees must be resident and ordinarily resident in the State,
- the price of units must be published regularly by the managers,
- all units must be equal in value and have the same rights, and
- the trust must, since it was registered, have satisfied the conditions set out in *subsection (6)*, subject to the relieving provisions of *subsection (7)*.

The section applies to disposals of units (called “qualifying units”) in a unit trust which is a **(2)(b)** “qualifying unit trust”.

The additional conditions which a unit trust must fulfil in order to be a qualifying unit trust **(6)** are —

- the general public must hold at least 80 per cent of the units,
- the number of unit holders must not fall below 50 and each holding must be relatively small (not more than 5 per cent of all issued units – units of connected persons are to be taken as one holding for this purpose),
- at least 80 per cent by value of the investments of the unit trust must be quoted securities, and
- the proportion of the trust’s funds invested in any one company must not exceed 15 per cent by value of the entire securities held.

A 2 year period from the date of registration can be allowed to a unit trust to enable it to **(7)** comply with these conditions.

### ***Tax treatment***

Chargeable gains accruing to a qualifying unit trust in any year of assessment are **(3)** chargeable to capital gains tax at one-half of the normal capital gains tax rate.

The effective capital gains tax rate applicable to the disposal of qualifying units is one-half **(4)** of the normal capital gains tax rate.

The effective corporation tax rate applicable to disposals of qualifying units by a company **(5)** is also equal to one-half of the normal capital gains tax rate.

## **733 Reorganisation of units in unit trust scheme**

### **Summary**

The provisions of *section 584* (reorganisation or reduction of share capital) are extended to unit trusts so as to allow a switching of units from one sub-fund to another within an “umbrella” unit trust without giving rise to a disposal for capital gains tax purposes.

### **Details**

A reorganisation of units in a trust scheme includes — **(1)**

- a situation where persons are, whether for payment or not, allotted units in the scheme in respect of and in proportion to their holding of units in the scheme or of any class of units in the scheme, and
- any case where there is more than one class of units and the rights attached to any units are altered.

*Section 584* applies in relation to a reorganisation or reduction of units in any unit trust **(2)(a)** scheme registered under the Unit Trusts Act, 1972 or authorised under the European Communities (Undertakings for Collective Investment in Transferable Securities) Regulations, 1989.

However, *section 584* is not to apply to a reorganisation of units in a scheme where the **(2)(b)** units are exempt from capital gains tax. [Units in a sub-fund of a unit trust scheme

composed of exempt assets are themselves exempt].

**Section 584** as it is applied by **section 585** (conversion of securities) and **section 586** (3) (company amalgamations by exchange of shares) do not have relevance for the reorganisation of units in unit trust schemes and are disappplied.

## 734 Taxation of collective investment undertakings

### Summary

This section sets out a taxation regime for collective investment undertakings (CIUs) such as unit trusts. Since 1994 the taxation regime set out in **section 738** has applied to non-IFSC and non-Shannon CIUs. This section, therefore, only has application in respect of IFSC and Shannon CIUs. The taxation regime which it provides is one where taxation takes place by reference to the status of the unit holder or investor. Non-resident investors are largely free of tax in the State, but are, of course, subject to tax in their country of residence. Irish resident investors are subjected to a withholding tax on payments from a CIU and the withholding tax also applies to the undistributed income of the CIU. However, CIUs in the IFSC and Shannon which have only non-resident investors are free from the withholding tax provisions. However the taxation of most collective funds (both IFSC and domestic) are, since January 2001, addressed in **Chapter 1A** of this Part.

### Details

#### Definitions

“accounting period” is defined so as to identify the period at the end of which a CIU must pay over withholding tax on any income which it has not paid out to unit holders. Because of the structure of the income tax code it is possible for the same period to be included in 2 income tax basis periods or to be in no income tax basis period. Rules for dealing with this situation are set out. Where the same period falls into 2 income tax basis periods it is treated for withholding tax purposes as falling into the first period only. If it is not part of any income tax basis period it is treated for withholding tax purposes as falling into the next tax basis period. (1)(a)

“appropriate tax” is a reference to the withholding tax system being applied to distributions to Irish residents and to income which is not distributed in the case of funds in the IFSC and Shannon which have Irish investors. Where a distribution is made, either out of income or capital gains, to an Irish resident, tax at the prevailing income tax standard rate must be withheld. Similarly (except for investment funds in the IFSC or Shannon which have non-resident investors only) if income (but not capital gains) is accumulated instead of being distributed, tax at the standard rate must be withheld from any balance of income remaining at the end of the accounting period to which the income relates. In arriving at the amount of the tax to be withheld, credit can be claimed for any Irish tax already deducted (for example, under this section or under the deposit interest retention tax – “DIRT”).

“the Area” is the International Finance Services Area in the Custom House Docks.

“the Airport” is the area of the Shannon Customs-free Airport.

“collective investor” is defined for the purpose of its use in **paragraph (iv)(II)(B)(cc)** of the definition of “collective investment undertaking”.

“collective investment undertaking” is —

- a unit trust scheme authorised under the Unit Trusts Act, 1990,
- a collective investment vehicle set up under the European Communities (Undertakings for Collective Investment in Transferable Securities) Regulations 1989 – known as the “UCITS Regulations” (this could include investment companies

having a fixed or variable capital),

- a limited partnership (these are capitalised by limited partners who are non-resident and managed by a “general partner” management company operating from the IFSC or Shannon) other than an investment limited partnership within the meaning of the Investment Limited Partnerships Act 1994,
- investment companies authorised and designated by the Central Bank,
- certain non-designated authorised investment companies in the IFSC and the Shannon Airport Area.

“qualified company” is a company holding a Shannon or IFSC certificate entitling it to a 10 per cent rate of corporation tax in respect of certified activities.

“qualifying management company” is an IFSC or Shannon company which manages the affairs of a collective investment undertaking in the course of its certified activities.

“relevant payment” is a payment to investors out the income or gains of a collective investment undertaking to which the investors are entitled as unitholders (but does not include payments for the repurchase, cancellation or redemption of a unit). Such payments are to be subject to tax in the hands of an Irish resident investor.

“return” is the return which the collective investment undertaking is required to make of the amounts from which it has deducted withholding tax.

“specified collective investment undertaking” is essentially a collective investment undertaking which, subject to certain exceptions, has only non-resident investors and is located in the IFSC or Shannon Airport Area. Certain limited liability companies used by specified collective investment undertakings (SCIUs) can also be specified collective investment undertakings. The requirements which such a company must meet are —

- that the company be limited by shares or guarantee and wholly owned by a SCIU – in the case of a unit trust the limited company would be owned by the trustee for the benefit of the unit holders;
- the SCIU must own the limited liability company solely for the purpose of limiting the SCIU’s liability in respect of certain high risk financial investments – this condition relates to the purpose of the SCIU’s ownership of the company and not the objects of the company itself; and
- that most of the Irish operations of the company are carried on in the Custom House Docks or Shannon Airport Area.

“specified company” is defined for the purpose of its use in *paragraph (ii)* of the definition of “specified collective investment undertaking”.

“undistributed relevant income” is the relevant income of the investors which is not distributed to them and which is liable to withholding tax in the case of collective investment undertakings outside of the IFSC and Shannon Airport Area and all such undertakings which have Irish resident investors.

As a collective investment undertaking can be a unit trust or, under the UCITS Regulations, a company, “unit” is defined so as to cover any instrument, including a share in a company, under which the investor is entitled to share in the investments of the undertaking.

Because certificates for IFSC and Shannon companies expired on 31 December 2005 or, in certain cases, 31 December 2002, management companies in the IFSC and Shannon Airport Area would cease to be qualifying management companies after the expiry date of the certificate. However, this is addressed by ignoring the deletion of *sections 445 and 446* and the time limit set out in those section to the application of the certificate when construing the meaning of qualifying management companies in the definition of specified collective investment undertaking. (1)(c)

An apportionment rule applies to cater for situations where a payment to a unitholder (2)(a)

consists of only part of the income from which tax has been deducted by the CIU. The amount of tax deducted which is to be attributed to the payment is the amount which bears to the total tax the same proportion as the payment bears to the total amount of the income.

References in the section to the amount of a relevant payment is to be taken as a references (2)(b) to the gross amount, namely, the net payment and the withholding tax. A taxpayer is charged to tax on the gross payment with credit for the withholding tax element.

### ***Tax treatment***

The CIU is exempt from tax in respect of relevant profits (that is, the income available for (3) distribution to or reinvestment on behalf of, unit holders and the capital gains of the undertaking). The exemption of the undertaking is subject to the withholding tax provisions. The charge to tax on the unit holder applies on a “transparency basis” by looking through the CIU and charging only those amounts of income and gains which would have been chargeable to Irish tax if the unit holder has received them directly. Any reliefs in respect of Irish or foreign taxes deducted from the profits before receipt by the undertaking are to flow through to the unit holder as if he/she had received the profits direct from the source. Accordingly, non-resident unit holders are not liable to resident tax and Irish unit holders are liable to tax subject to the reliefs, credits and exemptions to which they would have been entitled if they had received the profits directly.

Where a unit holder is to be charged to tax on a relevant payment from a CIU, other than a (4) SCIU, the charge is under Case IV of Schedule D for the year in which it is paid, in so far as it is paid out of income. In so far as it is paid out of capital the charge is to capital gains tax, subject to personal exemption and indexation provisions.

### ***Withholding tax***

Where a CIU, other than a SCIU, makes a payment to an Irish resident unit holder, it must (5)(a) deduct the appropriate tax. If at the end of an accounting period it has not paid over all of its income for the period to its unit holders, it must deduct tax from the income that it has not paid over. The exclusion of SCIUs from this provision ensures that the withholding tax does not apply to IFSC and Shannon undertakings which have only non-resident investors.

Provisions regarding accounting for and paying over to Revenue tax so deducted are set out (5)(b) in *Schedule 18*.

### ***Credit for withholding tax***

Where a unit holder has received a payment from which withholding tax has been deducted (6)(a) or out of profits from which withholding tax has been deducted, he/she is entitled to a refund of the tax if he/she is not resident in Ireland for tax purposes. Resident unit holders are entitled to full credit (and refund if necessary) of withholding tax against their Irish tax liability, if any, in respect of the payment.

A tax credit is apportioned where it relates to 2 or more assessments in respect of the same (6)(b) payment from a fund (for example, where a payment is part income and part capital so that it gives rise to both an income tax and a capital gains tax assessment).

### ***Non-application of section 732***

The one-half capital gains tax charge under *section 732* which applied to the capital gains (7) of certain unit trusts and to gains on disposals of units in the trust units is disappled.

### ***Non-application of surcharge***

The surcharge on the undistributed income of discretionary trusts (*section 805*) is (8) disappled in the case of a trust which is a CIU.

### ***Companies as CIUs***

Two obstacles to the setting up of a CIU as a company are removed. Under the regulations on UCITS it is possible to structure collective investment undertakings as companies with a fixed or variable capital. A payment from a collective investment undertaking which is a company is not treated as a distribution, and thereby is brought outside the ambit of Advance Corporation Tax. Also the surcharge on the undistributed income of investment companies is not to apply to such companies. (9)

### ***Non-resident investors***

The exemption of non-resident investors in a CIU in respect of payments out of the undertaking is protected by ensuring that *section 1034* cannot be used to tax the payments on the basis that the undertaking or any other Irish entity can be treated as the agent of the investors. (10)

### ***Investment funds***

Investors whose only involvement in a trade carried on in the State is their investment in an investment partnership fund actively managed in the IFSC or Shannon Airport Area are not to be treated as trading in the State. This provision does not apply to IFSC and Shannon companies managing investment funds. To the extent that income from managing IFSC and Shannon investment funds accrues to such management companies it is within the 10 per cent scheme of corporation tax. (11)

### ***Commencement***

The section applies to collective investment funds which are set up in the IFSC or Shannon Airport Area with effect from the 24th of May, 1989. It applies to other undertakings with effect from 6 April, 1990. However, since 1994 the taxation regime set out in *section 738* applies to such undertakings. (12)

## **735 Certain unit trusts not to be collective investment undertakings**

Life assurance companies manage and own almost all the units of certain unit trust schemes which are nevertheless legal entities separate from those companies. The life companies use the unit trusts to fix the value of “unit linked” life assurance policies. If a life company’s sales of unit linked policies were to decline to the extent that payments on matured policies exceeded receipts from new policies issued it would have to dispose of units to the manager of the trust. The trustees might then have to sell assets of the trust to fund redemption of the units. Under *section 731(6)* life companies are exempted for any capital gain tax charge on the disposal of units. *Section 735* deems unit trusts used for the purpose of unit linked business not to be collective investment undertakings and accordingly a tax charge arises when such a trust itself disposes of an asset.

## **736 Option for non-application of *section 735***

### **Summary**

As a result of *section 735* the tax regime in respect of a life company’s unit linked business is that gains on the disposal of units are exempt from tax (*section 731(6)*), but the disposal of assets in the unit trust gives rise to a tax charge. However, since 1992 the annual increase in value of a life companies chargeable assets has generally been subjected to tax. Life companies can opt, using this section, to bring their unit linked business within this regime if certain conditions are met. This essentially means that the unit trust is, despite *section 735*, deemed to be a collective investment undertaking.

## Details

There are 3 conditions for a unit trust to be allowed “collective investment undertaking” status — (1)

- it must be an authorised unit trust scheme within the meaning of the unit Trusts Act, 1990 and accordingly would be a “collective investment undertaking” but for **section 735**,
- its trustees must pay by 1 November, 1992 capital gains tax on a notional disposal of all its assets at 31 March, 1992, and
- its trustees must notify the Revenue Commissioners that the capital gains tax payment has been made.

When the 3 conditions are fulfilled the unit trust is deemed to have been a collective investment undertaking from 31 March, 1992 for the purposes of **section 734** and **Schedule 18**.

The life company is thereafter liable to tax on the annual increase in value of the units held by it. (2)

The notional disposal of assets on 31 March, 1992 is deemed to have been for a consideration equal to the market value of the assets on that day. (3)

## 737 Special investment schemes

### Summary

This section makes provision for special investment schemes that are essentially unit trusts which invest a significant proportion of their funds in Irish equities. This requirement ceased on 31 December 2000. The annual income and gains (both realised and unrealised) arising for the benefit of unit holders are liable to a 20 per cent tax charge. No further tax charge arises on the disposal of units by a unit holder. Units in such schemes cannot be issued after 31 December 2000.

### Details

#### Definitions

“inspector”, “ordinary shares”, and “qualifying shares” have the meanings set out in **section 723**. (1)(a)

“special investment scheme” is defined in terms of an authorised unit trust scheme in respect of which the conditions set out in **subsection (2)** are met.

“special investment units” are units of the special investment scheme issued to an individual on or after 1 February, 1993 and before 1 January, 2001 by the management company or trustee under an authorised unit trust scheme. The funds of a special investment scheme must be wholly derived from units which fulfil the conditions set out in **subsection (3)** and in respect of which the unit holders make a declaration of the kind provided for in **subsection (4)**.

“units” although this definition allows for the possibility that participation in a scheme might be evidenced by shares which are not called units, strictly units issued by a special investment scheme should be known as “special investment units” by virtue of **subsection (3)(a)**

The meaning of “management company” and “trustee” reflect the provisions of section 1(2) of the Unit Trusts Act, 1990. (1)(b)

### ***Special Investment Schemes***

The features of a special investment scheme which distinguish it from any other authorised unit trust are — (2)

- participation in the special investment scheme is restricted exclusively to participation by means of the holding of special investment units, and
- up until 31 December 2000 a certain minimum percentage must be invested in Irish equities.

### ***Special Investment Units***

The conditions necessary for special investment units are — (3)(a)

- the units must be designated as “special investment units” for the purpose of the unit trust scheme,
- an individual can only invest up to €63,500 in the scheme,
- special investment units must be owned by an individual who is either married or is eighteen years or older,
- the special investment units must be beneficially owned by the purchaser (they must be solely owned except where they are jointly owned by a married couple),
- a married couple can invest jointly in 2 schemes (otherwise an individual is only permitted to invest in one scheme).

References in these conditions to ownership of special investment units are references to the beneficial ownership of such units. (3)(b)

For the purposes of identifying which units are disposed of, where units are acquired at different times, a “last in, first out” rule is applied. (3)(c)

### ***Declaration by investor***

The declaration required to be made by the purchaser of special investment units must — (4)

- be signed by the declarer (that is, the unit holder),
- be made on a Revenue approved form,
- declare that at the time of the declaration – the payee is of full age and is beneficially entitled to the investment return on the units; the units are not held jointly where not permitted and the unit holder has made only one special investment (or two such investments where each investment is jointly made with his/her spouse),
- set out the name and address of the beneficial owner,
- contain an undertaking to notify the management company if any required conditions cease to be fulfilled,
- give any further information reasonably required by the Revenue Commissioners.

The management company must retain the declarations for a certain period and if required make them available for inspection by the inspector. (5)

### ***Tax treatment of Special Investment Schemes***

Special investment schemes are not collective investment undertakings for the purposes of **section 734**. Special Investment Schemes are subject to a special taxation regime which ensures that an effective 20 per cent rate of tax applies to the income and gains accruing to the benefit of the unit holders. Special Investment Schemes are not to be charged to the 20 per cent surcharge under **section 805** in respect of retained distributable income of discretionary trusts. To ensure that the effective rate of charge is, in fact, no more than 20 per cent, all credits, reliefs and deductions due to the special investment scheme are allowed after the reduction in the charge to tax which ensures an effective 20 per cent rate of charge. The expenses of the special investment scheme that reduce the income or gain of the scheme available for distribution or investment on behalf of unit holders are to be allowed (6)

in charging such income or gains to tax.

DIRT is not applied to any interest accruing to a special investment scheme. (7)(c)

Certain adjustments apply to the normal capital gains tax rules so as to broaden the base of the charge in the case of special investment schemes as follows — (8)(a)

- there is a deemed disposal and reacquisition at market value on 31 December each year of all trust assets (this means that unrealised gains are taxed and unrealised losses are allowed each year),
- indexation does not apply,
- gains on Government securities are not exempt (likewise losses on such assets are allowable),
- gains arising on sale of BES shares are exempt (loss relief, however, is preserved for such shares),
- excess allowable capital gains tax losses can be set off against income,
- the provisions of *section 581* relating to the “28 day rule” are to continue to operate as if the first 2 measures had not been enacted.

### ***Treatment of capital losses***

Net capital losses of a year of assessment can be set off against income of that year. An excess of such losses can be carried forward to the next year and treated as having accrued in that year. Where the business of a special investment scheme ceases, the unused capital losses of the final year can be carried back and set off in sequence against capital gains of the 3 preceding years. (8)(b), (bb)

Dividends received by a special investment scheme in respect of BES shares are not taken into account as income. A special investment scheme cannot be a designated fund for BES purposes. (9)

### ***Tax treatment of unit holder***

As regards the unit holder — (10)

- any payment received in respect of the units is exempt from tax,
- any gain arising on the disposal of units is not a chargeable gain, and
- any income tax or capital gains tax paid by the management company can not be imputed to the unit holder.

## **738 Undertakings for collective investment**

### **Summary**

This section sets out the taxation regime for non-IFSC collective investment vehicles, which replaced the regime set out in *section 734*. However, the *section 734* and *738* provisions have themselves been replaced with a new taxation regime for most collective funds (refer to *Chapter 1A* of this Part).

### **Details**

#### ***Definitions***

“chargeable period” is defined according to the undertaking to which it refers since the section addresses both incorporated and unincorporated entities. (1)(a)

“designated assets” are essentially illiquid assets, being land or unquoted Irish shares.

“designated undertaking for collective investment” is an undertaking which on the 25th of May, 1993 has laid out 80 per cent or more of its funds on acquiring designated assets.

“guaranteed undertaking for collective investment” defines undertakings, generally organised as unit trusts, which offer “guaranteed” returns to investors. The funds of such undertaking would be fully invested in securities entitling the undertaking to receive on a specified date a guaranteed amount plus an amount linked to the increase, if any, in a selected stock market capital index on combination of indices.

“undertaking for collective investment” is defined to ensure that reference to such undertakings include trustees or management companies who habitually carry out acts on behalf of the undertaking and who are authorised to do so.

Excluded from the tax regime provided by the section are —

- special investment schemes (*section 737* provides for the taxation treatment of such schemes),
- authorised units trusts wholly owned by pension funds, charities and other exempt unit holder (*section 731(5)* provides for the tax treatment of such unit trusts),
- collective investment undertakings managed in the IFSC or Shannon Airport Area and selling to non-residents (*section 734* originally provided for the tax treatment of such undertakings – they are now dealt with under *Chapter 1A* of this Part),
- offshore funds (*Chapters 2 to 4* of this Part provide for the tax treatment of such funds).

“unit” and “unit holder” are defined in broad terms so as to include units, shares or similar interests in unit trust, UCITS or companies.

“standard rate” provides a rate for the purposes of *subsection (2)(b)*. For the tax year 2002 this rate was “20 per cent”.

“standard rate per cent” provides a figure for the purposes of *subsection (2)(b)*. For the tax year 2002 this figure was “20”.

### ***Construction***

To avoid difficulties of including references to trustees and management companies throughout the section references to an undertaking for collective investment is construed as including such references. (1)(b)

### ***Apportionment***

Provision is made for the apportionment of accounting periods straddling 5 April, 1994. Time apportionment is not to apply except to the extent that it is required for the purposes of the anti-bond washing provisions of *section 815*. (1)(c)

### ***Commencement***

The provisions of this section apply from different dates depending on whether or not an ongoing undertaking or a new undertaking is concerned. *Subsections (7), (8) and (9) of section 734* continue to have effect for “undertakings for collective investments” – each of which is also a “collective investment undertaking” within the meaning of *section 734*. (2)(a)

### ***Tax treatment***

The rate of corporation tax on the profits of an undertaking for collective investment that is structured as a company is increased to 30 per cent with effect from 8 February 2012. The tax is calculated before the application of any other credit, relief or deduction. Where the company’s accounting period straddles the effective date of the rate increase, that is, 8 February 2012, the 20 per cent rate applies to income arising and gains accruing before that date. (2)(b) & (c)

In the case of an unincorporated undertaking, the tax liability on income arising and chargeable gains accruing is increased to 30 per cent before any other credit, relief or (2)(d)

deduction. For the year of assessment commencing on 1 January 2012, payments made and gains realised in the period 1 January 2012 to 7 February 2012 are chargeable at the rate of 20 per cent. Relief is effectively allowed for management expenses since, that part of income or gains that is not to be paid to, accumulated or invested for the benefit of unit holders, is not liable to tax.

Dividends and other distributions received from Irish resident companies are chargeable to tax when received by the undertaking. Undertakings that are not companies (for example, authorised unit trusts) are exempt from DIRT. (Companies, by means of a declaration procedure, can escape DIRT – see *section 265*). (3)

In addition to being taxed on income and gains arising, undertakings for collective investment are also taxed annually on the unrealised change in value of their assets with any resulting gain being spread over 7 years. This does not in general apply to Government gilts or strips within the meaning of *section 55*. Where a loss, computed by reference to the latest valuation, is incurred on the actual disposal of an asset, the part of the loss that is attributable to the revaluation is to be spread forward and is not available for immediate offset. The balance of the loss (which cannot exceed the actual loss) is available for immediate offset. (4)

In computing chargeable gains indexation is not available and gains on Government securities are included. (5)

Net capital losses for a chargeable period can be set off against income of the undertaking. (6)

Provision is made to prevent a timing difference between allowing a capital loss on the disposal of securities and the taking into account of any income received in respect of those securities. (7)

#### **Example**

If securities are bought for €105 (that is, “cum-div”) with €5 accrued interest on the last day of a year of assessment and sold on the same day for €100 (that is, “ex-div”), a loss of €5 arises. This loss could be set off, for tax purposes, against income in that year of assessment. However, the accrued interest of €5 is not payable and would therefore not be taxed until the following year of assessment. The loss is only allowed for tax purposes in the year of assessment in which the interest becomes payable.

Non-corporate unit holders are not entitled to a credit in respect of any tax paid by an undertaking. (8)

#### ***Transitional arrangements***

Transitional arrangements are provided in relation to the replacement of the tax regime of *section 734* by the tax regime of this section. (9)

### **739 Taxation of unit holders in undertakings for collective investment**

#### **Summary**

This section sets out the taxation regime for investors in authorised unit trusts, UCITS and designated investment companies. The section complements *section 738* which provides the tax regime for these entities themselves where they do not come within the tax regime provided by *section 734*.

Under *section 738* the entity itself suffers an annual tax charge at the standard rate of income tax on a measure of income and gains. An individual who is a unit holder in such an entity is not liable to any further tax whether on payments received from the entity or on the proceeds of disposal of units.

A corporate unit holder, on the other hand, on the receipt of a payment is treated as having received an amount which has been subjected to tax at the standard rate of income tax. A

credit is given for this tax. Similarly any chargeable gain accruing to a corporate unit holder from the disposal of units is treated as an amount of gain from which capital gains tax at the standard rate of income tax has been deducted.

### Details

Payments made on or after the 6th of April 1994 by an undertaking for collective investment are tax free in the hands of a unit holder who is an individual but are liable to corporation tax in the hands of a corporate investor. In the case of a corporate investor, the investment income from the undertaking is grossed up at a 30 per cent rate of income tax, the grossed up amount is liable to corporation tax and a credit is allowed for the income tax treated as having been deducted from the gross amount. (1)

Where the units are held by a company in the course of a financial trade (for example, banking) the charge under Case I of Schedule D in respect of investment returns from an undertaking for collective investment is the “regrossed” amount of the income attributable to the investment return. The regrossing is at the rate of tax applied to the investment returns of the undertaking itself. Where the investment returns are dividends, the entire payment received is regrossed. Where, however, the investment return is a profit or gain on a disposal of units by the unit holder, whether to the undertaking or to a third party, only the profit element of the payment received is regrossed. The regrossed amount is charged under Case I or Case II, as appropriate, and credit allowed. The construction of “A” in the formula in *subsection (2)(d)* is amended to reflect the increase in the applicable rate from the standard rate of income tax to 30 per cent. (2)

Gains on the disposal of units by individuals are exempt from capital gains tax where the units were acquired on or after the 6th of April, 1994. If the units were acquired before the 6th day of April, 1994 the appreciation in value up to that date will be a chargeable gain. (3)

Gains on the disposal of units by corporate investors are regrossed at the rate of 30 per cent before being brought into the company’s profit computation in accordance with *section 78*. The tax treated as having been deducted from the gross amount is allowed as a credit. (4)

In determining whether units were acquired before or after the 6th day of April, 1994, account is to be taken of the date of acquisition by a person who is treated as having disposed of them to the current owner on a no gain no loss basis. (5)

There is no charge on unit holders’ income receipts or capital gains referable to units in an undertaking which started after 25 May, 1993. (6)

## 739A Reorganisation of undertakings for collective investment

### Summary

This section allows a reorganisation of domestic collective funds without the triggering of a tax charge.

What the section does is that it allows one fund to transfer all its assets to another fund in exchange for the issue by that other fund of units. There is no capital gains tax charge on the transfer of those assets, but when the units acquired in return for the transfer are themselves disposed of, the cost of the units for capital gains tax purposes will be —

- the cost of the assets transferred, or
- where any of those assets have been subject to a deemed disposal and reacquisition under *section 738(4)*, the value thereof of such assets at the time of the latest such disposal.

## Details

The term “undertaking for collective investment” has the same meaning as it has in *section (1)(a) 738(1)*.

Where one fund transfers all its assets to another fund in exchange for the issue by that other fund of units, a capital gains tax charge does not arise on the transfer of those assets. *(1)(b)*

Where the units acquired in return for the transfer are themselves disposed of, the cost of the units for capital gains tax purposes will be — *(2)*

- the cost of the assets transferred, or *(a)*
- where any of those assets have been subject to a deemed disposal and reacquisition under the Tax Acts, the value of such assets at the time of the latest such disposal. *(b)*

## CHAPTER 1A *Investment undertakings*

### Overview

*Chapter 1A* and *Schedule 2B* provide for a “gross-roll-up” taxation regime in respect of the taxation of collective funds categorised as investment undertakings. This regime applies to all IFSC funds in existence on 31 March 2000 and to all other funds set up after that date. Domestic funds existing on that date and their investors continue to be taxed under the provisions of *sections 738* and *739*. The gross-roll-up regime does not impose an annual tax on the profits of the fund but requires the fund/fund manager to deduct and account for the tax (known as “exit tax”) out of payments made to unit holders – except for certain classes of unit holder who can, by use of a declaration procedure, be paid gross (see also – “Investment Undertakings – General Guidelines for Calculating Tax Due and for Completing Declaration Forms” available on the Revenue website – [www.revenue.ie](http://www.revenue.ie)).

*Schedule 2B* sets out the terms of the various declarations referred to in *Chapter 1A*.

### 739B Interpretation and application

#### Summary

This section is an interpretation section. It also sets out the application of *Chapter 1A* and *Schedule 2B*.

#### Details

##### *Main Definitions*

“chargeable event” is an occasion on which a tax charge can arise in respect of a unit holder in an investment undertaking. Such occasions are—

- the making by the investment undertaking of a regular payment to a unit holder (e.g. an annual dividend);
- the making of any other payment by an investment undertaking to a unit holder (e.g. on redemption of units);
- the transfer by a unit holder of his or her entitlement to a unit in an investment undertaking;
- the appropriation or cancellation of units by an investment undertaking for the purposes of meeting appropriate tax payable on a gain arising from a transfer of units by a unit holder;
- the ending of an 8-year period beginning with the acquisition of a unit in an investment undertaking, and each subsequent 8-year period beginning when the

- previous one ends, where such ending is not otherwise a chargeable event; and
- a chargeable event is deemed to occur on 31 December, 2000 in respect of an investment undertaking which commenced on or after 1 April, 2000, or which on 31 March, 2000 was located in the IFSC.

### ***Exclusions from chargeable event***

A chargeable event does not occur on-

- the occasion of an exchange of units in a sub-fund of an umbrella fund for units in another sub-fund of that umbrella fund or to a switch between different classes of units in the same fund;
- any transaction in relation to units which are held in a recognised clearing system – see **section 246A(2)** for the meaning of recognised clearing system;
- transactions arising only because of a change in the manager of funds administered by the Courts Service;
- the transfer of units in an investment undertaking from one spouse to the other spouse. This also applies where such transfer is by virtue of an order made following the granting of a divorce, or a judicial separation in the State, or following a similar process in a foreign territory but which is recognised as valid in the State;
- the transfer of units between civil partners, and between civil partners by virtue of an order made following the granting of a decree of dissolution in the State, or following a similar process in a foreign territory but which is recognised as valid in the State.

However, the transferee takes the units at their original cost to the transferor.

“investment undertaking” is the name given to the “investment vehicle” which comes within the gross-roll-up regime. The vehicle can be either—

- a unit trust scheme authorised under the Unit Trusts Act, 1990;
- a collective investment vehicle set up under the European Communities (Undertakings for Collective Investment in Transferable Securities) Regulations, 1989 as amended or extended from time to time – referred to as the “UCITS Regulations”;
- investment companies authorised and designated by the Central Bank; and
- an investment limited partnership within the meaning of the Investment Limited Partnership Act, 1994 which was granted an authorisation before 13 February 2013.

“qualifying management company”: This definition was revised with effect from 3 April 2010 so as to ensure that a payment by a fund to a “qualifying management company” does not trigger exit tax under this Chapter.

### ***Inclusion of person authorised to act on behalf of an investment undertaking***

Because, for example, investment undertakings which are unit trusts do not act on their own behalf, but rather through trustees, references to investment undertakings in the Chapter are, where necessary, taken to include references to a trustee, management company or other such person who is authorised to act on behalf of the investment undertaking and habitually does so.

### ***The Courts Service***

The Courts Service is inter alia responsible for the administration of moneys under the control or subject to the order of the Courts. Where the Courts Service invests those moneys in an investment undertaking they are required to—

- “stand in the shoes” of the investment undertaking or its manager when it comes to deducting and accounting for tax; and
- make an annual return to the Revenue Commissioners giving details of gains from such investment, its allocation between the beneficiaries and certain other details.

### ***Application of the Chapter***

The provisions of the Chapter and ***Schedule 2B*** apply—

- from 1 April, 2000, to investment undertakings which on 31 March, 2000 were specified collective investment undertakings (i.e. funds in the IFSC (known as “SCIUs”) – see ***section 734(1)***); and
- from the day an investment undertaking first issued units in the case of an investment undertaking commenced on or after 1 April, 2000.

[Non-IFSC funds (i.e. domestic funds) which were in existence prior to 1 April 2000 do not come within the new regime. Such funds and their investors continue to be taxed under the provisions of ***sections 738*** and ***739***.]

## **739BA Personal portfolio investment undertaking**

### **Summary**

This section provides special rules for the taxation of the proceeds of personal portfolio investment undertakings in relation to payments to individuals who are unit holders of investment undertakings or who have a material interest in certain offshore funds.

A personal portfolio investment undertaking is a type of investment that allows investors to place personal investments within an investment undertaking or certain offshore funds. The general “gross roll-up” treatment was designed for funds that are genuine collective investment entities. However, there is no element of a collective investment in these personal portfolio products. Essentially, such a product is a contrived vehicle to allow the investor to gain access to the “gross roll-up” regime whereby the income or gains are allowed to be rolled-up within a fund without suffering tax. In the normal course, when a fund makes a payment to a unit holder, the payment is generally subject to an exit tax rate of 33 per cent (the rate effective from 1 January 2012). No further charge to tax applies on the payment.

By placing selected personal assets in a personal portfolio investment undertaking, an investor could limit the taxation of income from those assets to this flat rate of 33 per cent. On the other hand, if a high-income investor had invested directly, the tax charge on the income arising on the investment would be 41 per cent per annum plus PRSI and levies.

This section provides for a definition of “personal portfolio investment undertaking”. The tax rates applying under these rules for a personal portfolio investment undertaking are as follows:

- ***Section 739E(1)(ba)*** provides that payments from an investment undertaking will be taxed at the relevant rate specified in the Tables in ***section 739E***.
- ***Section 747D(a)*** provides that payments from an offshore fund will be taxed at the relevant rate specified in ***Table 1*** in ***section 747D*** where the income is correctly included in the individual’s tax return, and at the relevant rate specified in ***Table 2*** in ***section 747D*** where it is not.
- ***Section 747E(1)(b)*** provides that gains on a disposal of an interest in such an offshore fund will be taxed at the relevant rate specified in the Table in ***section 747E***.

Each of these sections apply with effect from 20 February 2007.

In this section, a personal portfolio investment undertaking is defined in broad terms as a domestic undertaking where the selection of the property of the undertaking was, or can be

influenced by the unit holder or certain connected persons. It also includes an offshore fund in an EU Member State, an EEA country or a member of the OECD with which Ireland has a double taxation agreement where the selection of the property was, or can be, influenced by such persons.

However, the scope of the definition of a personal portfolio investment undertaking is reduced by allowing exceptions where the opportunity to select the property concerned is widely available to the public at the time the property is actually available for selection by the individual. This wide availability must be evidenced in marketing or promotional material published by the fund.

To ensure that the exceptions are not exploited – with a view to avoiding the higher rates – some additional requirements apply. These are:

- the fund must deal with everyone interested in selecting the property on a non-discriminatory basis, and
- where the property to be selected is primarily land and buildings and the fund is seeking to raise a pre-determined amount in investments, each investment by the individual will be limited to 1 per cent of the amount being sought by the fund.

## Details

### *Definitions*

An “investor” is defined as an individual who is a unit holder in an investment undertaking or who has a material interest in an offshore fund to which **Chapter 4** applies (i.e. an offshore fund in an EU Member State, an EEA country or a member of the OECD with which Ireland has a double taxation agreement).

“Land” is given the same meaning as in **section 730BA** and includes any buildings on the land. This includes land and buildings situated both in the State and elsewhere. Expressly included within the meaning of land is any interest in land. This is intended to be as wide as possible so as to minimise any possibility of persons circumventing the reference to land by means of lease holdings, licences, or anything else. Also expressly included is the holding of land indirectly through a company except where the company is a quoted company.

“Public” is given the same meaning as in **section 730BA** and is intended to be flexible enough so that a distinction can be made between the corporate sector and individuals. The term is used in **subsections (5) and (6) of section 739BA** to require that the marketing of a particular product is directed at the public generally rather than a pre-selected group of persons.

“Material interest” and “offshore fund” are as defined in **section 743** (which deals with material interest in offshore funds).

### *Meaning of Personal Portfolio Investment Undertaking*

A “personal portfolio investment undertaking” is defined for the purposes of **Chapter 1A** (investment undertakings) and **Chapter 4** (certain offshore funds). It means, in relation to an investor in such an undertaking or offshore fund, an undertaking or fund where some or all of the property concerned was or can be influenced by specified persons. These include the investor, a person acting on behalf of the investor, a person connected with the investor, a person connected with a person connected with the investor, the investor and the person acting on behalf of the investor, or a person acting on behalf of both the investor and a person connected with the investor. Whether or not a person is considered connected with another person is to be determined in accordance with the rules of **section 10**.

The general rule as to what constitutes a personal portfolio investment undertaking is subject to certain exceptions to the rule – see below. It is to be noted that, where the

investment undertaking or offshore fund retains complete discretion over the property selected, then the investment would not be a personal portfolio investment undertaking.

### ***Deemed selection by the investor***

The selection, by the investor or a person connected with the investor, of the property underpinning the benefits to be delivered by the fund is an integral feature of a personal portfolio investment undertaking. To counter an attempt to cloak what in substance is the exercise of the power to select by the investor etc. in a form which apparently confers the power of selection to some other unconnected person the terms of the investment undertaking or offshore fund are treated as allowing the selection by the investor etc. in certain specified circumstances whereas a strict analysis of the terms of the fund might not give such a result. These rules also apply where any such agreement, rather than forming part of the terms of the fund, is implemented in some other fashion. The reference to an “investment advisor (no matter how such a person is described)” is deliberately left undefined so as to allow the term to take on as wide a meaning as possible. The intention is to catch anyone who is given the authority to select or advise on the selection of the assets, which are to determine the fund benefits.

### ***Exceptions***

Certain investment undertakings or offshore funds, which might otherwise be personal portfolio investment undertakings, are not to be treated as such where certain conditions are met. This treatment applies where the only property selected satisfies the condition set out in **subsection (5)**. Also, further requirements apply before such a fund will not be treated as a personal portfolio investment undertaking. These requirements relate to the terms under which the investment undertaking or offshore fund is offered and are set out in **subsection (6)** (see below).

### ***Condition in relation to selection of property***

The condition which property must comply with in order for the fund not to be treated as a personal portfolio investment undertaking is that, at the time the property is or was available for selection (the test will not apply at any other time), the chance to select the property must be or must have been made available to the public generally. The definition of the term “public” makes it clear that this can include funds which have been specifically devised for particular groups, for example, individuals only, companies only or a combination of these groups. Making the opportunity available generally to the public has to be evidenced by marketing or other promotional literature published at the time the opportunity to select the property is available. A distinction is made between land and other property in relation to the ability to select.

In the case of land, the actual property available for selection must be made available generally for selection by the public at the time the selection is being made (that is, everyone interested must have the chance to select the same property as the basis for determining the benefits under the fund).

In the case of other property, it will be sufficient that property of the same description be available for selection generally at the time the selection is being made (for example, a portfolio of shares will require that the opportunity to select a portfolio of shares of the exact same companies be available generally to the public at the time the portfolio is being selected).

### ***Additional requirements***

The following additional requirements under **subsection (6)** must be complied with in relation to such funds —

- the offer must be made on a non-discriminatory basis,
- where the offer involves the selection of property which is primarily land/buildings (more than 50 per cent) and the fund has indicated in its marketing material the amount of money it is seeking from investors, the offer must limit the amount that any one investor may invest to 1 per cent of the amount of the capital requirement set out by the fund (exclusive of any borrowings).

### 739C Charge to tax

This section provides that an investment undertaking will not be chargeable to tax otherwise than under *Chapter 1A*. The section also provides that investment undertakings have an exemption from deposit interest retention tax.

### 739D Gain arising on a chargeable event

#### Summary

This section sets out how to compute a gain arising on a chargeable event in respect of which the investment undertaking may be liable to account for tax. It also provides exemption from the exit tax for certain unit holders through a declaration procedure. However, the declaration procedure may be deemed to have been complied with in certain circumstances – for further details, refer to *subsection (7B)* below.

#### Details

For the purposes of the declaration procedure, the concept of an investment undertaking being associated with another investment undertaking is introduced. This implies that both undertakings are set up and promoted by the same person. (1)(a)

Since the switching of units between sub-funds of an umbrella fund is not a chargeable event, the acquisition cost of units in a sub-fund of an umbrella fund is taken to be the acquisition cost of units in the original sub-fund of that umbrella fund where such switching has taken place. (1)(b)

A similar provision pertains in relation to the changing of investment manager in respect of funds administered by the Courts Service. As this is not a chargeable event, the acquisition cost of the original units are taken into account when such units have been subsequently exchanged for other units as a result of a change of the court funds manager. (1)(bb)

Where an existing IFSC fund becomes, on 1 April 2000, an investment undertaking the acquisition cost of units in the investment undertaking are taken to be the acquisition cost of the original units in the IFSC fund. (1)(c)

#### Gains arising on a chargeable event

The gains which arise on a chargeable event are as follows —

- on the making of a regular payment (otherwise than on the cancellation, redemption or repurchase of a unit), the gain is the amount of the payment; (2)(a) & (b)
- on the making of a payment on the cancellation, redemption or repurchase of units, the gain is the amount of the payment less the cost of the units concerned, calculated on an average cost basis or, at the election of the investment undertaking, on a first-in first-out basis; (2)(c) & (3)
- on the transfer of units by the unit holder, the gain is the value of the units transferred less the cost of the units concerned, calculated on an average cost basis, or at the election of the investment undertaking, on a first-in first-out basis; (2)(d) & (4)
- on the appropriation or cancellation of units consequent on a transfer, other than a cancellation of units to pay any exit tax on an 8-year deemed disposal, the gain is (2)(dd), (5A) &

calculated using the formula in **subsection (5A)** (*The rate used in the formula will depend on when the chargeable event occurs – see Tables in section 739E*). This is based on the principle that the amount of appropriate tax represents some proportion of the total gain, so the full gain can be worked out by grossing up the tax liability on the transfer. In the case of a company, the lower of the two rates will apply only where the investment undertaking is in possession of the declaration referred to in **subsection (5AA)**;

- where the chargeable event is the ending of an 8-year period or is deemed to happen on 31 December, 2000, the gain is the value of the units concerned at that time, less their cost. However, as regards the calculation of the amount in an 8-year deemed disposal, the investment undertaking has the option of making an irrevocable election to value the units in respect of all of its unit holders at the later of the previous 30 June or 31 December prior to the date of the deemed disposal rather than at the date of the deemed disposal itself. (2)(ddd), (e) & (5B)

#### **Calculation of gain subsequent to a gain arising on the ending of a relevant period**

Where a chargeable event (including a chargeable event consisting of the ending of an 8-year period) occurs after a chargeable event on an 8-year deemed disposal, a previous “8-year event” is disregarded in calculating the gain. (2A)

#### **Election for first-in first-out basis of costing units**

An investment undertaking can elect to cost units on a first-in first-out basis instead of costing units on an average cost basis. The method of computation of gain used – by an investment undertaking on the first occasion that they are required to undertake such a computation – is the method that must subsequently be used in all circumstances (see also – “Investment Undertakings – General Guidelines for Calculating Tax Due and for Completing Declaration Forms” available on the Revenue website – [www.revenue.ie](http://www.revenue.ie)). (5)

#### **Gains treated as not arising in certain cases**

A chargeable event in respect of a unit holder does not arise to an investment undertaking in the case of certain persons/entities that comply with a declaration procedure. The persons/entities concerned are— (6)(a)-(m)

- pension schemes;
- life assurance companies;
- another investment undertaking;
- an investment limited partnership to which **section 739J** applies;
- special investment schemes;
- unit trusts to which **section 731(5)(a)** applies;
- charities;
- certain IFSC companies;
- approved retirement funds, approved minimum retirement funds and special savings incentive accounts;
- personal retirement savings accounts;
- credit unions;
- companies, in the case of money market funds;
- the National Asset Management Agency;
- the National Pensions Reserve Fund (NPRF) Commission; or, an NPRF Commission vehicle (as defined in the NPRF Act 2000, as amended by section 2 of the Investment of the National Pensions Reserve Fund and Miscellaneous Provisions Act 2009; or the State acting through either;

- securitisation companies;
- an intermediary acting on behalf of any of the foregoing; and (9A)
- persons who are neither resident nor ordinarily resident in the State or an intermediary acting on such a person’s behalf. (7) & (9)

Provisions in relation to the format that a respective declaration must take, where this has been prescribed by the Revenue Commissioners, are set out in **Schedule 2B** (see also – “Investment Undertakings – General Guidelines for Calculating Tax Due and for Completing Declaration Forms” available on the Revenue website – [www.revenue.ie](http://www.revenue.ie)).

Whereas the Revenue Commissioners are not required to prescribe/authorise a format for the declaration required to be made by either a securitisation company or by a company investing in a money market fund, either entity is required to declare to the investment undertaking that it is chargeable to corporation tax on the investment return and to provide its tax reference number. Similarly, the Revenue Commissioners are not required to prescribe/authorise a format for the declaration required to be made to the investment undertaking by NAMA, the NPRF or an NPRF vehicle.

These unit holders need only make one declaration to an investment undertaking and other investment undertakings associated with it, rather than being required to make a declaration each time units are acquired in those investment undertakings. The requirement is to make an appropriate declaration in respect of the first acquisition of units in an investment undertaking. That declaration will also satisfy the declaration requirements in respect of any subsequent acquisition of units in that investment undertaking and any other investment undertaking associated with it. (7A), (9) & (9A)

#### ***Exemption from declaration procedure in certain circumstances***

Section 31(1)(b) of the Finance Act 2010 inserted a new **subsection (7B)**. The subsection is designed to facilitate the international funds industry operating in Ireland and to ease the administrative burden for investment undertakings that are focused on the international market rather than on domestic Irish investors. (7B)

A gain is not to be treated as arising on the happening of a chargeable event if the investment undertaking has a written notice of approval from the Revenue Commissioners to the effect that the non-resident declaration requirements of **subsection (7) or (9)** are deemed to have been complied with in respect of a unit holder. This allows for exemption from exit tax where approval has been given (and not subsequently withdrawn) and removes the requirement for a non-resident declaration from each non-resident unit holder or from an intermediary investing on behalf of such non-resident unit holders. (7B)(a)

The Revenue Commissioners may give the approval: (7B)(b)

- as respects any unit holder or class of unit holder, and
- subject to such conditions as the Revenue Commissioners consider necessary to satisfy themselves that unit holders in the undertaking are not resident or ordinarily resident in the State. Further details of these conditions are published in “Investment Undertakings – General Guidelines for Calculating Tax Due and for Completing Declaration Forms” available on the Revenue website – [www.revenue.ie](http://www.revenue.ie).

The Revenue Commissioners are empowered to withdraw the approval where the undertaking has failed to comply with any of the conditions for approval. Where such approval is withdrawn, the treatment under **section (7B)(a)** will not apply from the date mentioned in the notice of withdrawal. (7B)(c)

The Revenue Commissioners may delegate any acts or functions under the subsection to any of their inspectors or officers nominated by them. (7B)(d)

The declaration procedure is removed from non-resident investors who first invested in IFSC funds up to 30 September 2000. Instead, certain reporting obligations were imposed on the undertaking itself. (This transitional arrangement gave such funds time to redesign their application forms so as to comply with the new declaration procedure.) (8) & (8A)

Where an unauthorised unit trust (whose units are held by resident but tax exempt persons) becomes an authorised unit trust and thereby comes within the investment undertaking tax regime, and a list of the then investors is forwarded to the Collector-General within 30 days, the requirement that its investors make individual declarations under *subsection (6)* is removed. (8B)

Where the unit holders in such an unauthorised unit trust exchange their units for units in an investment undertaking under a scheme of amalgamation, the declaration requirements can be dispensed with if the investment undertaking, within 30 days, forwards a list of the investors concerned to the Collector-General. (8C)

As a direct consequence of the implementation of the UCITS IV Directive, “scheme of migration and amalgamation” has been extended to mean an arrangement under which the underlying assets of an offshore fund are transferred to an investment undertaking in exchange for the issue by the investment undertaking of units in the investment undertaking, to persons with a material interest in the offshore fund, or directly to the offshore fund. The declaration procedure, which would otherwise be required to be complied with by those unit holders, is removed. Instead, the investment undertaking is required, within 30 days, to make a declaration to the nominated officer of the Revenue Commissioners, to the effect that to the best of its knowledge and belief it did not issue units to resident persons other than those (if any) identified in an accompanying schedule. Exit tax will be applied to gains on future chargeable events where an investor who was non-resident at the time of the scheme of migration and amalgamation later becomes resident in the State. (8D)

Section 31 of the Finance Act 2012 inserted a new *subsection (8E)*. This subsection is consequent on the insertion of *section 256F* into the *Companies Act 1990*. *Section 256F* provides that an investment company migrating to Ireland from a relevant jurisdiction may apply to the Central Bank for authorisation to carry on business in the State under *section 256(1) of the Companies Act 1990*. The Central Bank similarly decided that a unit trust, migrating to Ireland from a relevant jurisdiction, may also apply to the Central Bank for authorisation to carry on business in the State either as an authorised unit trust scheme under the Unit Trusts Act 1990 or as a unit trust under the UCITS Regulations (as defined in *section 739B(1) TCA 1997*). (8E)

This subsection provides that, once authorised by the Central Bank, the holder of such an authorisation may make a declaration to the Revenue Commissioners, which will ensure that exit tax will not be applied to future payments by the investment undertaking to unit holders existing at the time of migration (other than Irish resident unit holders). The subsection also provides that, where an existing non-resident unit holder later becomes resident in the State, exit tax will be applied to any gains arising on subsequent chargeable events.

Investment undertakings are required to keep all declarations for a period of 6 years from the time the unit holder of the units, in respect of which a declaration was made, ceases to be a unit holder in the investment undertaking and any associated investment undertaking. (10)

### **739E Deduction of tax on the occurrence of a chargeable gain**

#### **Summary**

This section provides for the rate of tax to be applied to a “gain”. Provisions to allow for

the refunding of tax, where the final amount due is less than what was paid to Revenue, are also included.

### Details

Where a gain arises on the happening of a chargeable event, investment undertakings are required to account for tax on that gain, referred to as appropriate tax - subject to the exception as outlined in *subsection (2A)* below. The rate applicable (see *Tables 1(a)* and *1(b)* below) will depend, on whether or not the unit holder is a company, and if so, on whether or not the investment undertaking is in possession of a declaration from the company. The distinction between a company unit holder and other unit holders is of relevance only in respect of chargeable events arising on or after 1 January 2012. (1), (1B) & (2)

**Table 1(a):**

<i>Chargeable event arising on or after 1 January 2012</i>	<b>Unit holder is a company and has made a declaration</b>	<b>No declaration and chargeable event between 1 January 2013 and 31 December 2013</b>	<b>No declaration and chargeable event on or after 1 January 2014</b>
<b>Regular payment</b> (i.e. made annually or at shorter intervals)	25%	33%	41%
<b>Non-regular payment</b>	25%	36%	41%
<b>Disposal</b>	25%	36%	41%
<b>PPIU section 739BA</b>	N/A	N/A	N/A

**Table 1(b):**

<b>Chargeable event arising –</b>	<b>Regular payment (i.e. made annually or at shorter intervals)</b>	<b>Non-regular payment</b>	<b>Disposal</b>	<b>PPIU – see section 739BA – applicable from 20 February 2007</b>
<b>Before 1 January 2009</b>	Standard rate of income tax (20%)	Standard rate of income tax (20%) plus 3%	Standard rate of income tax (20%) plus 3%	Standard rate of income tax (20%) plus 23%
<b>Between 1 January 2009 and 7 April 2009</b>	Standard rate of income tax (20%) plus 3%	Standard rate of income tax (20%) plus 6%	Standard rate of income tax (20%) plus 6%	Standard rate of income tax (20%) plus 26%
<b>Between 8 April 2009 and 31 December 2010</b>	25%	28%	28%	Standard rate of income tax (20%) plus 28%
<b>Between 1 January 2011 and 31 December 2011</b>	27%	30%	30%	Standard rate of income tax (20%) plus 30%
<b>Between 1 January 2012 and 31 December 2012</b>	30%	33%	33%	Standard rate of income tax (20%) plus 33%
<b>Between 1 January 2013 and 31 December 2013</b>	33%	36%	36%	Standard rate of income tax (20%) plus 36%
<b>On or after 1 January 2014</b>	41%	41%	41%	60%

Where a chargeable event occurred on or before 31 December 2000 (not being a regular payment to a unit holder), the rate of tax is 40 per cent.

The rates in **Table 1** also apply where the investment undertaking has made an election **not** to account for the appropriate tax (see **subsection (2A)** below), and the details of the payment are **correctly included** in a timely tax return by the unit holder to Revenue.

However, where the election is made and the details are **not correctly included** in the tax return by the unit holder, the relevant rate specified in **Table 2** below will apply:

**Table 2:**

<b>Chargeable event arising –</b>	<b>Not a PPIU</b>	<b>PPIU – see section 739BA – applicable from 20 February 2007</b>
<b>Before 1 January 2009</b>	Marginal rate (i.e. 20% or 41% as appropriate)	Marginal rate (i.e. 20% or 41% as appropriate) plus 20%
<b>Between 1 January 2009 and 7 April 2009</b>	Marginal rate (i.e. 20% or 41% as appropriate)	Marginal rate (i.e. 20% or 41% as appropriate) plus 23%

<b>Between 8 April 2009 and 31 December 2010</b>	Marginal rate (i.e. 20% or 41% as appropriate)	Marginal rate (i.e. 20% or 41% as appropriate) plus 25%
<b>Between 1 January 2011 and 31 December 2011</b>	Marginal rate (i.e. 20% or 41% as appropriate)	Marginal rate (i.e. 20% or 41% as appropriate) plus 27%
<b>Between 1 January 2012 and 31 December 2012</b>	Marginal rate (i.e. 20% or 41% as appropriate)	Marginal rate (i.e. 20% or 41% as appropriate) plus 30%
<b>Between 1 January 2013 and 31 December 2013</b>	Marginal rate (i.e. 20% or 41% as appropriate)	Marginal rate (i.e. 20% or 41% as appropriate) plus 33%
<b>On or after 1 January 2014</b>	Marginal rate (i.e. 20% or 41% as appropriate)	80%

Appropriate tax already paid in connection with the ending of an 8-year period may be set off (1A) against appropriate tax calculated using the provisions of *section 739D(2A)* (which provide that the 8-year event is disregarded when the gain from a subsequent event is being calculated). Where tax is overpaid, the investment undertaking repays the excess to the unit holder and includes the amount in the return. However, an investment undertaking can elect for the Revenue Commissioners to instead make the repayment to the unit holder where the value of the chargeable units does not exceed 15% of the value of the total units at that time. The investment undertaking must advise the unit holder, in writing, of this and supply that person with the necessary information to enable the claim to be made to the Revenue Commissioners.

The investment undertaking does not have to account for the appropriate tax on the gain where (2A) it has made an election in certain circumstances, (and in such circumstances, the unit holder must then account for the tax directly to the Revenue Commissioners) as follows:

- The investment undertaking can make an election where the value of the chargeable units is less than 10% of the value of the total units in the investment undertaking, or sub-fund as the case may be, at the calculation date.
- The investment undertaking is deemed to have made the election once it has advised the unit holder, in writing, that it (the investment undertaking) will report certain details to the Revenue Commissioners. The unit holder is then deemed to be a chargeable person for that chargeable period for the purposes of Chapter 3 of Part 41A (obligation to make a return) and 1084 (surcharge for late returns) and is obliged to include in the return the name and address of the investment undertaking and the gains arising.
- The investment undertaking will make an annual statement, in the required electronic format (including, where applicable, a nil return) to the Revenue Commissioners on or before 31 March in the following year outlining the name and address of each unit holder, the value of the unit holding to which the person is entitled at that time and such other information as the Revenue Commissioners may require.

The investment undertaking is entitled to deduct appropriate tax from payments to a unit (3) holder or, where necessary, to cancel sufficient units to cover such liability.

### **739F Returns and collection of appropriate tax**

## Summary

This section makes provision for returns and payment of tax by investment undertakings. In the case of investment by the Courts Service in an investment undertaking, it is the Courts Service itself which is required to account for tax and to make the return.

## Details

Investment undertakings are required to make two returns of appropriate tax each financial year in a form prescribed by the Revenue Commissioners. The first one is to be within 30 days after 30th June and must include details of appropriate tax deducted in the year up to that date. The second return is required to be made within 30 days of 31st December and should include details of appropriate tax deducted in the 6 months to that date. Amounts of tax credited under the provisions of *section 739E(1A)* are included in the returns. The payment of appropriate tax is required to be paid within the same period in which the returns are required, without the making of an assessment. However, an assessment can be made if the tax is not paid on time or the inspector is dissatisfied with the return.

Revenue has the power to make any required adjustments where any item has been incorrectly included in a return. Revenue is also empowered to repay to the investment undertaking an amount of appropriate tax paid which was correctly included in a return but which, within one year, has been proved by the investment undertaking as just and reasonable that such tax should now be repaid.

The normal income tax provisions apply to the assessment (including appeals against assessments) and collection of appropriate tax. Interest may be charged on overdue tax at the rate of 0.0322 per cent for each day or part of a day from the due date up to 30 June 2009 and at the rate of 0.0274 per cent for any day or part of a day on or after 1 July 2009.

## 739G Taxation of unit holders in investment undertakings

### Summary

This section provides that an individual is not liable to any further tax on receipt of a payment from an investment undertaking, if tax has been deducted from the payment. If tax has not been deducted, the payment will constitute income of the individual. The section also provides for the various scenarios in which a payment is made to a company. However, where a company is not resident or an individual is neither resident nor ordinarily resident no tax liability arises in the State. Situations where the investment undertaking elects not to account for the appropriate tax on any gain arising on the ending of an 8-year period are also provided for.

### Details

Where the chargeable event is deemed to have happened on 31 December 2000, and in accordance with *section 739D(8)* a gain would be treated as arising to an investment undertaking in respect of a resident unit holder, that gain shall not be a gain of the investment undertaking, but rather the amount of the gain is treated as a chargeable gain accruing to the unit holder and is liable to capital gains tax at a rate of 40 per cent. (1)

The tax treatment of payments to the various types of investors in investment undertakings is set out in summary form below — (2)(a) to (g)

<i>Category of unit holder and payment</i>	<i>Was exit tax deducted from payment?</i>	<i>Treatment of payment in the hands of the unit holder</i>
non-corporate/any payment	Yes	The net payment not reckoned in computing total income nor as giving rise to a chargeable gain.
non-corporate/any payment	No	Payment treated as an amount of income chargeable to tax under Case IV of Schedule D but, where the payment is in respect of the disposal of units, the cost of the units concerned is deducted. The tax rate applicable is the same as if the payment were from an EU fund as per <b>Chapter 4</b> of this Part.
investment corporate/relevant payment	Yes	Net payment treated as a net amount of an annual payment (chargeable to tax under Case IV of Schedule D) from the gross amount of which tax at the relevant rate (see <b>Table 1(a)</b> in <b>section 739E</b> ) has been deducted.
investment corporate/relevant payment	No	Payment treated as income chargeable to tax under Case IV of Schedule D.
investment corporate/not a relevant payment	Yes	Payment not otherwise taken into account for tax purposes.
investment corporate/not a relevant payment	No	Payment treated as income chargeable to tax under Case IV of Schedule D but, where the payment is in respect of the disposal of units, the cost of the units concerned is deducted.
trading corporate/ <b>section 110</b> company	Yes/No	The amount of the payment (and where exit tax is deducted the gross amount) is treated as income; but, where the payment is in respect of the disposal of units, the cost of the units concerned is deducted; and a credit is given for exit tax (if any) deducted from the gross payment.

Where a unit holder in an investment undertaking is —

(2)(h)

- a non-resident company, or
- neither resident or ordinarily resident in the case of a non-corporate unit holder,

then the unit holder is not chargeable to income tax or capital gains tax on any payment made to the unit holder by the investment undertaking. Where such a non-resident unit

holder receives a payment, on the transfer by way of sale or otherwise of entitlement to a unit, other than from the investment undertaking (e.g. where units are traded on a stock exchange), the unit holder is not chargeable to income tax or capital gains tax on such payment.

Apart from where errors are being corrected in accordance with *section 739F(5)*, a repayment of tax deducted by an investment undertaking can only be made by Revenue where the unit holder in question is entitled to claim income tax exemption under *section 189, 189A or 192*. (2)(i) & (j)

In such a situation the payment to the unit holder by the investment undertaking is treated as a gross amount from which the exit tax has been deducted and that gross amount is treated as an amount of income chargeable to tax under Case III of Schedule D.

Any gain arising on the ending of an 8-year period, where *section 739E(2)* does not apply by virtue of *section 739E(2A)* (i.e. where the investment undertaking has elected **not** to account for the exit tax), will be chargeable under Case IV of Schedule D at the relevant rate specified in *Table 1* within *section 739E*. The gain will not be reckoned in computing total income and there will be no entitlement to the age exemption limit or the various tax allowances, reliefs and credits. (2A)

Where units in an investment undertaking are held in a recognised clearing system then a chargeable event cannot occur in relation to such units and therefore no exit tax can be applied. However, references in *subsection (2)* to situations where appropriate tax has not been deducted from a payment to a unit holder include situations where payments are made to unit holder in respect of units held in a recognised clearing system. (3)

Some investment undertakings use a foreign currency as their operational currency. Investors purchase units in and receive payments from those investment undertakings in that currency. Any foreign exchange gain/loss on the amount invested by a unit holder is a capital gain of the unit holder. (4)

Under section 104 of the Capital Acquisitions Tax Consolidation Act 2003, where inheritance tax is charged in respect of property on an event happening and the same event constitutes the disposal of an asset for capital gains tax purposes, any resulting capital gains tax paid is allowed to be deducted from the net gift or inheritance tax as a credit. On a disposal/transfer of units resulting from the death of the unit holder exit tax will generally be payable. That amount of tax is treated as an amount of capital gains tax for the purposes of section 104 of the Capital Acquisitions Tax Consolidation Act 2003. (5)

### **739H Investment undertakings: reconstructions and amalgamations**

This section provides that where, in furtherance of a scheme of reconstruction or amalgamation, an investment undertaking transfers to another investment undertaking, or a sub-fund in one umbrella fund transfers to a sub-fund in another umbrella fund on or after 13 March 2008, all its assets and liabilities in exchange for units (new units) being issued by that other undertaking to unit holders of the first mentioned undertaking, the cancellation of the original units will not give rise to a chargeable event. However, the cost and date of acquisition of those new units will be taken to be the cost and date of acquisition of the original units. The exchange between sub-funds of different umbrella funds will only qualify for relief where it is effected for bona fide commercial reasons and not primarily for tax avoidance purposes. (1), (1A), (1B) & (2)

The provisions of the section also apply to Common Contractual Funds (CCFs) established pursuant to the Investment Funds, Companies and Miscellaneous Provisions Act 2005 – i.e. such CCFs may reconstruct or amalgamate with each other without giving rise to a tax charge. (3)

## 739HA Investment undertakings: amalgamations with offshore funds

### Summary

This section was inserted by section 33, Finance Act 2012 and is consequent on the implementation of the UCITS IV Directive, which provides for the cross-border merger of two or more UCITS funds.

### Details

#### *Definitions*

This subsection sets out how specific terms used in this new section are to be interpreted. (1)  
“material interest” is to be construed in accordance with **section 743**; “offshore fund” has the meaning assigned to it by **section 743**; “offshore state” has the same meaning as in **section 747B(1)**. The subsection also provides a definition for “scheme of amalgamation”.

In the context of a scheme of amalgamation, the cancellation of units in an investment undertaking, as a result of the transfer of its assets to an offshore fund shall not be a chargeable event. On the occurrence of future chargeable events, the date and cost of the acquisition of the material interest will be the same date and cost as the original units in the investment undertaking. (2)

## 739I Common contractual funds

### Summary

This section makes provision for the tax treatment of an investment vehicle called a Common Contractual Fund (CCF). A CCF is a form of investment fund structure based on a contractual relationship between the participating investors. The purpose of a CCF is to allow for the pooling of assets in order to achieve lower costs and investment efficiencies. A limited type of CCF, formed under the EU UCITS Regulations, has been available in Ireland since 2003. The Investment Funds, Companies and Miscellaneous Provisions Act 2005 subsequently allowed for the setting up of a general form of CCF, not confined by the UCITS regulations, in the State.

The section sets out the taxation regime in respect of all types of CCF. The core provision of the taxation regime is that all CCFs will be tax transparent, as long as the unit holders are institutional investors (in other words, not individuals) and that certain reporting requirements are met. CCFs may also avail of existing withholding tax exemptions available to other collective investment undertakings.

### Details

#### *Definitions*

A common contractual fund (CCF) covers both the general CCF vehicle provided for under the Investment Funds, Companies and Miscellaneous Provisions Act 2005 and the CCF vehicle formed under the EU UCITS Regulations that has been available in Ireland since 2003. (1)

The definitions in **section 739B** of relevant income, etc. (as listed in this section) all relate to “investment undertakings” (as defined). Their meanings are modified in relation to CCFs because the proposed CCFs are outside the scope of **section 739B** (as they are a new form of investment undertaking that is not defined in **section 739B**). (1)(b)

A CCF is not chargeable to tax and the entities are tax transparent. This means that the (2)

profits (income and gains) arising or accruing to it are treated as arising or accruing to the unit holders in proportion to the value of the units beneficially owned by them, as if such profits did not pass through the hands of the CCF.

The provisions apply only where each unit in the CCF is held by institutional investors (3) such as pension funds, life assurance companies, etc.

Information reporting arrangements provide that the CCF must make annual electronic (4) returns to the Revenue Commissioners in respect of profits made and benefits accruing to each unit holder.

CCFs are exempt from deposit interest retention tax (DIRT), as is the case with other (5) investment undertakings.

## **739J Investment limited partnerships**

### **Summary**

The Finance Act 2013 provided for the tax treatment of an investment limited partnership (ILP), authorised under the Investment Limited Partnerships Act 1994 on or after 13 February 2013, by removing such ILPs from the definition of investment undertaking in *section 739B* and inserting this new section. It distinguishes an ILP from other collective investment funds and allows an ILP to be explicitly treated as a tax-transparent entity. Consequential amendments were required in *sections 246(1), 734(1)(a), 739B(1) and 739D(6)*.

### **Details**

#### **Definitions**

An investment limited partnership (ILP) is an investment limited partnership as provided (1) for in the Investment Limited Partnerships Act 1994.

The definitions of “relevant gains”, “relevant income”, “relevant payment”, “relevant profits”, “unit”, and “unit holder” in relation to an investment undertaking in *section 739B*, are modified to apply to an ILP.

An ILP is not chargeable to tax and the income and gains arising to an ILP are treated as (2) arising directly to the unit holders in the partnership, in proportion to their interests in the partnership. This is the principle of tax-transparency.

An ILP must make an annual return to Revenue, by 28 February in the year following the (3) year of assessment, providing information regarding the relevant profits of the ILP and specified details in relation to the unit holders in the ILP.

An ILP is exempt from deposit interest retention tax (DIRT) as is the case with other (4) investment undertakings.

## CHAPTER 2 *Offshore funds*

### **Overview**

This Chapter, together with *Schedules 19 and 20*, deal with the taxation of offshore funds, other than those addressed in *Chapter 4* of this Part.

## **740 Interpretation (Chapter 2 and Schedules 19 and 20)**

This section gives guidance to the meaning or construction of certain terms used in this

Chapter and in *Schedules 19* and *20*. Key concepts in relation to the taxation of disposals of interests in offshore funds are defined or developed throughout the Chapter and Schedules. *Section 740* provides an index to the meaning or particular construction assigned to the most frequently used terms in the legislation. It does not define or qualify the meaning of the terms in question but merely refers to the provisions which so do.

## **741 Disposals of material interests in non-qualifying offshore funds**

### **Summary**

This section applies the provisions of the Chapter to the disposal of a material interest in an offshore fund which is or has been at any time after 5 April, 1990 a non-qualifying offshore fund, which is essentially a non-distributing offshore fund. The Chapter also applies to a disposal of a material interest in an onshore fund if the fund has not come onshore before 1 January, 1991, that is, if it is or has been a non-qualifying offshore fund at any time on or after that date.

The capital gains tax definition of a disposal applies, with two modifications. Firstly, death is an occasion of charge – the gain being calculated by reference to the market value of the deceased’s interest in the fund. Secondly, the provisions covering exchange of securities (on take-overs, reconstructions and amalgamations) are modified so as to prevent their use for avoidance of the charge imposed by the Chapter and Schedules.

### **Details**

The type of disposal to which the Chapter and *Schedules 19* and *20* apply is specified. (1) [Paragraph 5 of *Schedule 20* sets out the gain which is to be treated as arising on such disposals. *Section 745(1)* provides that such gains are to be charged to tax as income.] The disposal may be made by an individual, a company or any other person.

The following terms are referred to in *paragraph (a)* —

- a “material interest” in a fund is essentially an interest which can be realised as a share of the market value of the assets of the fund,
- an “offshore fund” is a non-resident company, a unit trust scheme with non-resident trustees or some other foreign fund,
- a “material time” in respect of an interest in an offshore fund is any time after 6 April, 1990 or any time after a later date if the investor acquired the interest at that later date, and
- a “non-qualifying offshore fund” is essentially a non-distributing fund.

The provisions of the Chapter apply to a disposal of a liquid or realisable interest in a foreign fund where for any period after 6 April, 1990 the fund was not a distributing fund.

A non-distributing foreign company or unit trust is prevented from getting around the provisions of the Chapter by becoming resident in the State prior to shareholders or unit holders disposing of their shares or units. If an offshore fund “comes onshore”, by becoming resident in the State before 1 January, 1991, the provisions of the Chapter do not apply to it. However, if a non-qualifying offshore fund delays coming onshore until, on or after 1 January, 1991, it will not prevent the provisions of the Chapter applying to disposals of interests in the fund by coming onshore before the disposals are made. In other words if a fund comes onshore on or after 1 January, 1991, a gain to an investor who subsequently disposes of an interest which he/she acquired in the fund while it was still a non-qualifying offshore fund are to be charged as income.

It will not be possible for offshore funds to avoid the provisions of *paragraph (b)* by reorganising shares, units or other interests in the fund after coming onshore. For example, investor X might own 1,000 units in a non-qualifying offshore unit trust. The

unit trust might come onshore after 1 January, 1991 and convert each existing unit into 2 new “A” units. [The reorganisation of units would not be treated as a disposal by virtue of *section 733*.] The investor will not be able to argue that he/she is disposing of 2,000 “A” units which were never units in an offshore fund. The investor is denied this argument because *subsection (1)* applies *section 584* (as applied by *section 733*) which treats the original units and the replacement “A” units as the same asset.

As a general rule “disposal” has the same meaning as it has for capital gains tax purposes. (2) The exceptions, considered in detail below, are that disposals are treated as arising on the death of an investor or on reorganisations, reconstructions or amalgamations of companies.

One of the major differences between the charge to tax on offshore gains and the normal capital gains tax charge is that in the former case a charge arises on the death of an individual entitled to a material interest. Under the capital gains tax legislation, assets are deemed to be acquired, but not disposed of, on an individual’s death. A material interest in a non-qualifying offshore fund of which the deceased was “competent to dispose” is deemed to be disposed of by the deceased for a consideration equal to its market value at the date of death. This does not, however, apply to disposals to which the Chapter applies only by virtue of *section 742*, that is, disposal of interests in funds which are distributing offshore funds but which operate “equalisation arrangements”. (3)

The subsection prevents the deemed disposal on death from being taken into account in determining any other question for the purposes of the Chapter – such as determining whether the deceased investor could reasonably have expected to realise the value of an interest within 7 years so as to render it a “material interest” in the terms of *section 743 (2)*.

*Section 573* is otherwise applied for the purposes of the Chapter so that “competent to dispose” refers to assets of the deceased which (other than by power of appointment or under statutes regarding entails) he/she could, if of full age and capacity, have disposed of by his/her will, assuming the assets to be situated in the State. This includes severable shares in assets to which he/she was beneficially entitled as joint tenant. (4)

The remaining provisions of *section 573* are also applied to offshore gains. These provisions relate to allowable losses in the year of death, deemed acquisition by personal representatives and legatees, and alterations of the distribution of the deceased’s estate within 2 years after death.

Certain capital gains tax provisions are excluded. These provide that certain company take-overs and amalgamations by exchange of shares are removed from the capital gains tax charge by treating the new shares as the same asset as the old shares. For the purposes of tax on offshore gains, such “paper-for-paper” transactions are put back into charge as disposals where they would otherwise have the effect of taking the ultimate disposal of an interest outside the scope of the Chapter. (5)

An exchange of shares in an offshore fund which is the subject of a take-over or amalgamation is to be treated as a disposal at market value. (6)

Provisions are made for transactions which are disregarded for the purposes of capital gains tax. For example, a transfer from a husband to his wife is not treated as a disposal and vice versa. The husband’s acquisition of the asset is treated as the wife’s acquisition of the asset. If the wife ultimately disposes of the asset she is to be charged on a gain calculated by reference to the acquisition cost to the husband. Provision is made to ensure that in such instances a material time is any time on or after the giving of consideration to acquire the asset by either husband or wife. Accordingly, if an interest was an interest in a non-qualifying or non-distributing offshore fund while owned by a husband, the Chapter would apply to a disposal of that interest by his wife even if the fund were a qualifying (7)(a)

fund after the interest had been transferred to her.

A “material time” means on or after 6 April, 1990, in the case of assets already owned by the investor at that date. In the case of assets acquired by the investor after that date, it means on or after the earliest date on which the investor gave consideration which would be taken into account in computing a gain or loss on disposal of the asset. (7)(b)

## 742 Offshore funds operating equalisation arrangements

### Summary

This section applies the provisions of the Chapter to offshore funds which are 85 per cent distributing funds where those funds operate equalisation arrangements.

A fund operating equalisation arrangements pays to an investor who redeems his/her investment the amount of the dividend accruing to him/her up to the date of the redemption of the investment as part of the overall redemption payment. If the investor who leaves is replaced by a new investor, the fund will have paid out part of the distribution, due to be paid to that new investor, to the departing investor as part of the redemption proceeds. Accordingly, unless the new investor makes a payment to the fund, when he/she first invests in the fund, to replace the part of the distribution paid out to his/her predecessor, he/ she will not get the full distribution of income or dividend when it is paid by the fund. Funds operating equalisation arrangements are able to pay an equal distribution of income or dividend in respect of all shares or investments units by requiring new investors to pay for the part of the distribution accruing to the date of their investment in the fund. The new investors make the required payments into the equalisation account of the fund. Therefore, part of the first distribution or dividend the new investor receives from the fund cannot be regarded as income of the investor. It is merely a refund of the investor’s payment into the equalisation account. The equalisation account, as the name suggests, enables the fund to pay an equal dividend to all investors irrespective of the date of their investment.

For the sake of consistency, the Chapter charges as income the part of redemption proceeds in respect of an interest in a fund operating equalisation arrangements which represents the distribution or dividend accruing to the date of redemption.

For the purposes of the 85 per cent distribution test, the 2 investors are treated as having shared a full distribution or dividend between them (see *paragraph 2* of *Schedule 19*).

A number of special provisions are necessary to adapt the offshore fund legislation in respect of funds which operate “equalisation arrangements”. The significance of a fund operating equalisation arrangements lies in the nature of the payments which investors receive on the occasion of a distribution and on the occasion of redemption of their interest. When an investor receives his/her first distribution after acquiring the interest, part of that sum is treated as capital. It is this point – the treatment of the distribution as capital in the shareholder’s hands – which would make it difficult for a fund operating equalisation arrangements to satisfy the distributor test, which requires distributions in the form of income. The primary aim of the special rules is, therefore, to enable such funds to obtain distributor status. This aim is achieved by treating the equalisation element in the redemption proceeds as income. The fund is thus enabled to meet the distributor test; however, the corollary is that the investor is charged to income tax on a sum which would otherwise have been capital. By this means a measure of consistency is achieved as between funds operating equalisation arrangements and other offshore funds.

It should be noted that this special treatment of equalisation funds applies only to funds which meet, in all other respects, the conditions for exemption as distributing funds, and have met them since the investor acquired his/her interest (or since 6 April, 1990, if later).

It only applies to disposals on or after 6 April, 1990 and does not apply to a disposal if the proceeds are taken into account as a trading receipt.

### Details

Equalisation arrangements are defined as arrangements which have the result that (1) where —

- an investor acquires (by subscription, allotment, or otherwise directly from the fund managers) a “material interest” in the fund, and
- the fund makes a distribution for a period beginning before the investor’s acquisition of his/her interest,

the amount of that distribution which is paid to him/her includes a capital element which is debited to an equalisation account (maintained specifically for the purposes of such arrangements) and which is calculated as the part of the distribution which has accrued before the investor acquired his/her interest. The capital element of the distribution which is debited to the equalisation account matches that part of the payment made by the investor on acquiring the interest which would have been credited to the equalisation account.

Acquisition is defined by “initial purchase”. Equalisation arrangements would not be a feature of purchases other than transactions involving the fund or the managers of the fund in their capacity as such. (2)

The charge under the Chapter is extended to disposals of material interests in funds which are 85 per cent distributing funds but which operate equalisation arrangements. The provision does not apply to trading transactions since the profits from such transactions would be charged as income apart from the provisions of the Chapter. (3)

Where investors would be treated as chargeable in respect of the income (as income from a foreign possession) of an offshore fund as it accrued to the fund, the investors will not also be charged under the provisions of the Chapter as applied to funds operating equalisation arrangements. (4)

Certain reorganisations, take-overs, reconstructions and amalgamations of companies which involve exchanges of shares are treated as giving rise to disposals of the original shares for the purposes of determining whether the offshore fund provisions are to be applied to a disposal of an interest in a fund which is a distributing fund but which is operating equalisation arrangements. (5) & (6)

## 743 Material interest in offshore funds

### Summary

This section lists the offshore funds to which the Chapter applies as being —

- non-resident companies,
- unit trusts with non-resident trustees, and
- arrangements which, under the laws of a foreign territory, create rights in the nature of co-ownership.

An interest is a “material interest” if, when it was acquired, it was reasonable to expect that the value of the interest could be realised within the next 7 years. A person is deemed to be able to realise the value of an interest in an offshore fund if an amount which is approximately equal to the proportion, represented by the interest, of the underlying assets of the company (or assets subject to the unit trust scheme or arrangements) can be realised. Realisation of an amount can be in money or in assets to the value of the amount.

Certain interests are excluded from the definition of “material interest”. They include an

interest in respect of loan capital or other debt incurred for money lent in the ordinary course of banking business, and rights under an insurance policy. Substantial shareholdings by companies in overseas companies held for the development or maintenance of trade are also excluded where the shareholding company could only expect to realise their value due to either a buyout agreement, or an agreement to wind up the overseas company, or both. Certain majority shareholdings in overseas companies are also excluded.

### Details

References to an interest in an offshore fund mean references to an interest in any of the following — (1)

- a company resident outside the State (in general, a company managed and controlled outside the State),
- a unit trust scheme, the trustees of which are not resident in the State, or
- any other arrangements taking effect under foreign law which create rights in the nature of co-ownership (without restricting that expression to its meaning under Irish law).

The legislation defines offshore funds by reference to the structure of investors' rights. (2) Without a "material interest", an investor cannot be charged to tax by reference to the offshore fund provisions; further, without at least one material interest existing, an overseas concern cannot be an offshore fund at all. For example, holdings of shares in a public company quoted and resident in the United Kingdom would not normally be material interests because the value of such shares are not normally expected to vary consistently with the asset value of the company.

The factor which determines whether or not a material interest exists is the investor's prospect of realising or not realising the interest in question. If, at the time the interest was acquired, it could reasonably be expected that the value of the interest could be realised within 7 years, the interest is a "material interest". The 7 year period is intended to exclude venture capital funds which normally have a life of just under 10 years. It should be observed that the test of the investor's expectation is objective, that is, it is not sufficient for the investor to argue that he/she personally did not expect to realise his/her interest within 7 years.

Provision is made to clarify what is meant by being "able to realise the value" of the investor's interest. The investor must, to be within the section, be able to obtain, in cash or in kind, an amount which is reasonably approximate to the proportion which his/her interest represents of the market value of the assets of the fund. (3) & (4)

If the value of the investor's interest is disproportionately high by reference to the proportion of total assets which he/she owns, this is not regarded as an ability to realise the value of his/her interest. This provision is intended to prevent investors in overseas companies which are not offshore funds from being charged under these rules.

Where shares in an overseas company are listed on a stock exchange, it is possible that the quoted price will on occasions correspond to underlying net asset value. This, however, will not of itself make the shares a material interest in an offshore fund. The shares would be considered a material interest only if, at the time they were acquired, the investor had a reasonable expectation of a future sale at or near net asset value. However, if historically the shares have been habitually traded at or near net asset value, an investor is likely to have acquired a material interest.

The interest arising in respect of lending by a bank or the issue of a policy of insurance are not to be treated as a material interest. (5)

Normal commercial loans or other debt interests which entitle the lender to no more than a fixed return of principal on redemption, and which are not geared to the underlying asset value of the borrower's business, are not to be regarded as a material interest within the legislation.

An overseas fund might offer a charge over assets as security for borrowing or an insurance policy issued. It is not intended that such transactions would be caught by the offshore funds legislation.

An exemption is made to the definition of “material interest” to ensure that interests in joint trading ventures, carried on through the medium of a foreign company, are not brought within the charge. The 2 situations which might give concern are — (6)

- buy-out agreements between participants in a trading venture, and
- short-term overseas trading operations.

In each of these cases it could be argued that the investors had a reasonable expectation of realising the value of their interests within 7 years. To prevent such interest from being chargeable, it is provided that shares in an overseas company do not constitute a material interest if the following conditions are satisfied —

- the shares are held by a company and the holding is necessary or desirable for the maintenance and development of its trade or of that of an associated company,
- the shares carry at least 10 per cent of the voting rights in the overseas company, plus a right to at least 10 per cent of its assets on winding up,
- not more than 10 persons hold shares in the overseas company, and all its shares confer voting rights and a right to assets on winding up, and
- at the time when it acquired the shares, the Irish company had a reasonable expectation of realising them within 7 years only because of either a buy-out agreement or because of provisions of an agreement between the parties or the constitution of the overseas company under which the overseas company would be wound up in less than 7 years.

A company is associated with another company if one controls the other, or if both are controlled by the same person or persons. **Section 432** is applied in respect of the meaning of “control”. (7)

An interest in an overseas company is not a material interest at a time when the holder has the right to have the company wound up and, in that event, would be entitled to more than 50 per cent of the assets remaining after discharge of all liabilities having priority over his/her interest. (8)

The capital gains tax rules apply for the purpose of determining the market value of any asset for the purposes of the offshore fund provisions. (9)

## 744 Non-qualifying offshore funds

### Summary

This section and **Schedule 19** set out the requirements for a fund to be certified as a distributing fund and the certification procedure.

Essentially, a fund is to be certified as a distributing fund for an “account period” if it distributes 85 per cent of its income in that period. The detailed rules are set out in **Part 1** of **Schedule 19**. **Section 744** ensures that a company is not to be treated as a distributing fund even though it satisfied the 85 per cent distribution requirement itself if it holds substantial interests in companies or other offshore funds which do not distribute. Without such a provision, offshore funds could satisfy the 85 per cent distribution requirement by simply accumulating the bulk of their income in subsidiary companies or funds.

## Details

An offshore fund is a non-qualifying fund except during an account period – defined in *(1)* **subsections (8), (9) and (10)** – for which the Revenue Commissioners have certified the fund as a distributing fund. A fund is only to be so certified if it has pursued a full distribution policy during the period, that is, if it has distributed 85 per cent of its income of the period in question.

The provisions of **Part 1 of Schedule 19** apply for the purposes of determining whether a fund has pursued a full distribution policy for any period. *(2)*

[**Part 1 of Schedule 19** provides that a fund is to be treated as pursuing a full distribution policy for an account period if —

- a distribution is made for the account period or for some other period which falls, in whole or in part, within the account period,
- the amount of the distribution made to holders of material or other interests in the fund represents at least 85 per cent of the fund’s income for the period, and not less than 85 per cent of the fund’s “Irish equivalent profits” (defined in **paragraph 5 of Schedule 19** as the profits, other than capital gains, in respect of which the fund would be chargeable to corporation tax if it were an Irish resident company),
- the distribution is made in the account period or within the following 6 months, and
- the distribution is made in such form that it would be chargeable under Case III of Schedule D if it were received by an Irish resident who did not receive it in the course of a trade or profession.

In applying test two above, half of any income of an offshore fund which is derived from dealing in commodities is left out of account, so that commodity funds deriving their income wholly from such dealing must only distribute 42.5 per cent of their income to be certified as distributing funds. The application of test four above is also relaxed to enable funds operating equalisation arrangements, under which some of their income is distributed in capital form, to obtain distributor status.

The distribution test will be satisfied if there is no income in an account period but not if a fund fails to make up accounts. Allowance is made for legal restrictions on the amount which a fund may distribute.]

The possible avoidance of the charge under the offshore fund legislation by the rolling up of gains at one further remove from the investor is addressed. For example, Fund A, which receives investors’ money could reinvest it in Fund B. Provided Fund B rolled up the income accruing, Fund A would have no income to distribute and would pass the distributor test. Therefore, when the investors disposed of their interests in Fund A the gain would not be chargeable as income. To prevent the 85 per cent distribution requirement being circumvented by such arrangements, it is provided that a fund is not to be certified as a distributing fund — *(3)*

- if interests in other offshore funds amount to more than 5 per cent of the value of assets of the fund,
- if the fund’s interests in a single company amount to more than 10 per cent of the value of its total assets,
- if the fund owns more than 10 per cent of the issued share capital of any company or of any class of that share capital, or
- if there are different classes of participants in the offshore fund and they do not all receive full distributions of income.

[**Part 2 of Schedule 19** modifies these general conditions in the case of reinvestment in another fund which distributes 85 per cent of its income, investment in a trading company, investment in a wholly-owned subsidiary, investment in a company providing *(4)*

management and administrative services, and de minimis holdings in companies.]

A fund investing a sum in a company could, at the time of investment, be within the 10 per cent limit in *subsection (3)(b)*, but subsequently exceed the limit because of an appreciation in the company's value. Thus, the fund could lose its distributor status merely because it has made a successful investment. To prevent this, it is provided that the 10 per cent limit is to be applied by reference to values of the fund's interest in the company and the funds total assets valued at the most recent time when the fund acquired an interest in the company. In this way a company cannot be treated as having more than 10 per cent of its value in one company simply because the value of shares in that company rises. In deciding when the fund last acquired shares in the company, reorganisations of shares, not involving new subscriptions, are ignored.

A fund is not to be treated as having 10 per cent of its value in one company if the investment in question is merely a normal current or deposit account with a bank. (5)

There is an exception to the requirements of *subsection (3)(d)*. A fund is disqualified under *subsection (3)(d)* if it does not pursue a full distribution policy in respect of all classes of material interest. However, this does not apply to interests held by employees and fund managers which carry no right or expectation to participate in fund distribution policy in respect of all classes of material interest. However, this does not apply to interests held by employees and fund managers which carry no right or expectation to participate in fund profits or to receive anything on winding up other than the return of the price which they paid. Such persons, therefore, may be given different distribution benefits from those of ordinary investors. (6)

An offshore fund is not to be treated as pursuing a full distribution policy in respect of each class of its investors unless it pursues an 85 per cent distribution policy for each class of investor in respect of the income arising from the assets held on behalf of that class of investor. (7)

The concept of an "account period" in terms applicable to companies, unit trusts and other offshore funds is defined. In general, an account period in a 12 month period for which a fund makes up accounts. (8) to (10)

Effect is given to the provisions of *Schedule 19* which are concerned with the certification procedure as initiated by a fund (*Part 3*) or by an investor in a fund (*Part 4*). (11)

[In order to be certified as a distributing fund in respect of an account period a fund must apply to the Revenue Commissioners within 6 months of the end of the account period in question. If certification is refused, then the fund (or, as the case may be, its trustees) may appeal against the refusal within 30 days of the date of the notice of the refusal. Where the fund fails to apply for certification and as a result is not certified, an investor in the fund, who might otherwise be subject to the charge imposed by the Chapter, may require the Revenue Commissioners to invite the offshore fund concerned to apply for certification. If the fund declines to apply, the Revenue Commissioners are to determine the matter on the basis of the available information including any accounts or other information supplied by investors.]

## **745 Charge to income tax or corporation tax of offshore income gain**

### **Summary**

This section and *Schedule 20* provide for the charging of offshore income gains as income and the calculation of the amount of those gains. The gains are to be treated as income chargeable under Case IV of Schedule D. The charge is on persons who are resident or ordinarily resident in the State during the year of assessment in which the income gain arises and also on persons who are not so resident but who trade in the State

through a branch or agency. Non-domiciled individuals who are resident or ordinarily resident are charged only on a remittance basis. Charities are exempted from the charge so long as the income gain is applied for charitable purposes.

### Details

The offshore income gain, computed in accordance with *Schedule 20*, is treated for all purposes of income tax and corporation tax as income arising at the time of the disposal and chargeable under Case IV of Schedule D for the accounting period (in the case of a company) or the year of assessment (in the case of an individual) in which the disposal is made. (1)

The capital gains tax rules are applied to determine the application of the offshore fund provisions to individuals and companies resident outside the State. In general, offshore fund gains realised by persons who are neither resident nor ordinarily resident in the State are not chargeable. (2)

Offshore fund gains realised by a person resident outside the State are chargeable to corporation tax only if the person carries on a trade in the State through a branch or agency, and then only in respect of assets used for the purposes of the trade carried on in the State. (3)

Offshore fund gains realised by individuals who are resident or ordinarily resident in the State but domiciled outside the State are taxed on the part of the gains remitted into the State. (4)

Charities are exempt from tax on offshore fund gains. This exemption applies so long as the offshore fund gains are applicable and applied for charitable purposes. There is provision against the abuse of this exemption. (5)

Trustees are only chargeable if the general administration of the trusts is ordinarily carried on in the State or the trustees or a majority of them are resident and ordinarily resident in the State. (6)

## 746 Offshore income gains accruing to persons resident or domiciled abroad

### Summary

This section applies, with suitable adaptations, certain provisions of the capital gains tax code for the purposes of charging gains on disposals of interests in offshore funds where the disposals are made outside the State for the benefit of individuals resident in the State. Under the capital gains tax code, capital gains realised by non-resident settlements may be attributed to Irish beneficiaries. Similarly, capital gains realised by a non-resident company can be attributed to Irish participators. This section ensures that offshore income gains realised by non-resident settlements or companies are, in similar circumstances, attributed to Irish resident beneficiaries and participators respectively. In the case of offshore income gains realised by a non-resident company and attributed to a participator, the amount of tax charged is treated as allowable expenditure in computing the gain or loss on any subsequent disposal by the participator of his or her interest in the non-resident company. The section also clarifies the interaction of the offshore fund provisions with the provisions which deal with income derived by Irish residents from assets transferred abroad.

### Details

The provisions of *sections 579* and *579A* (capital gains of non-resident trusts) are adapted for the purposes of offshore income gains. References in those sections to chargeable gains are to be construed as a reference to offshore income gains and references to capital (1)

gains tax is to be construed as a reference to income tax or corporation tax. Thus, a proportionate part of an offshore income gain accruing to a non-resident trust can be attributed to an Irish resident and domiciled beneficiary.

Where a beneficiary receives a discretionary capital payment from a non-resident trust after the gain arose, an offshore income gain is attributed to the payment in priority to a chargeable gain. (2), (2A)

Where a non-resident company would be treated as a close company if it were resident in the State, any offshore income gains which it realises are chargeable in the hands of Irish resident participators in proportion to their interest as participators. This is done by applying the provisions of *section 590* with appropriate adaptations. In applying *section 590, subsections (7)(a)* and *(7)(b)* (which exempt gains on disposals of trade assets) and *subsection (11)* (which allows losses to be set off against gains) of that section are omitted. (3)

The power of the Revenue Commissioners to obtain information from participators of non-resident companies and beneficiaries of non-resident trusts in relation to chargeable gains are adapted for the purposes of obtaining information in relation to offshore income gains. (4)

Offshore income gains which would be outside the charge imposed by this section (for example, because the person realising the gain is not a trustee) may be chargeable under *sections 806–807C* – anti-avoidance legislation relating to the transfer of assets abroad. These provisions are to apply to offshore income gains as if the gains constituted income of the recipient. An Irish resident individual may, therefore, be chargeable on offshore income gains realised by and retained by a person resident or domiciled abroad. However, these provisions apply only where the individual concerned has power to enjoy the offshore income gains realised by the person resident or domiciled abroad. (5)

Where an Irish resident is charged to tax under the offshore fund provisions, either because a company in which he/she is a participator realises an offshore income gain or because a trust of which he/she is a beneficiary receives an offshore income gain, then a further charge to tax cannot arise under *sections 806 – 807C* or *Part 31*. (6)

## **747 Deduction of offshore income gain in determining capital gain**

### **Summary**

This section ensures that there will be no double taxation of gains on disposals of material interests in offshore funds. A disposal which gives rise to an offshore income gain will usually also be a disposal for capital gains tax purposes. In order to avoid a double charge to tax, the sale proceeds or redemption proceeds taken into account when computing the capital gain are reduced by the amount of the offshore income gain. [The result of this is that while, in the case of a material interest acquired before 6 April, 1990, the gain attributed to the period since that date is taxed as an offshore income gain, the gain attributed to the period of ownership before 6 April, 1990 is taxed as a capital gain.]

### **Details**

The section applies to disposals to which the offshore fund provisions apply and to which the provisions of the Capital Gains Tax Acts may also apply. An example would be a disposal of a material interest in a non-distributing offshore fund where the interest was acquired before 6 April, 1990. The capital gains tax provisions would be relevant to the part of the gain which arose on the interest up to 6 April, 1990, while the offshore fund provisions apply to the part of the gain arising after 6 April, 1990. (1)

Specific provisions, set out in *subsection (3)* and *(4)*, are applied to prevent a double (2)

charge to tax on offshore gains. These provisions apply in place of **section 551(2)**. [That section requires the sale or redemption proceeds or other consideration for a disposal of assets which are taken into account for income tax purposes to be ignored for capital gains tax purposes. This would be inappropriate in the case of a disposal of a material interest in an offshore fund since it would mean that although only the part of the gain arising since 6 April, 1990 would be charged to income tax as an offshore income gain, the part of the gain arising before that date could not be charged. The sale proceeds would have to be ignored for capital gains tax purposes since they would have been taken into account for income tax purposes.]

These provisions do not apply where the offshore fund provisions only affect the equalisation element of disposal proceeds. In such instances the general capital gains tax rule, that is, ignore the equalisation element of the disposal proceeds, will give satisfactory results because the balance of the disposal proceeds will be brought into account for capital gains tax purposes.

In computing the chargeable gain arising on any disposal, the amount of any offshore income gain arising on the disposal is deducted from the disposal proceeds brought into the computation of the chargeable gain. In this way no part of the gain arising on the disposal is charged as both an offshore income gain and also a capital gain. No part of the gain suffers double taxation. (3)

In computing chargeable gains arising where part only of an asset is disposed of, the expenditure incurred by the disponer in acquiring the asset has to be apportioned to the part disposed of and the part retained. The apportionment of the acquisition expenditure reflects the consideration received for the part disposed of and the market value of the part retained. The provisions of **subsection (3)** could distort that apportionment by reducing the amount of the consideration for the part disposed of, used in the apportionment, by the amount of an offshore income gain arising. The distortion is prevented by requiring the apportionment to be made by reference to the full amount of the consideration for the part disposed of. (4)

Where a business is transferred to a company as a going concern in consideration for the issue of shares by the company and other consideration such as cash (see **section 600**), only part of the total chargeable gain is immediately chargeable – the balance being effectively deferred. The part which is immediately chargeable reflects the consideration other than the shares and the part which is deferred reflects the consideration in the form of shares. The deferred chargeable gain is determined by the formula — (5)

$$\text{total chargeable gain} = \frac{\text{value of shares}}{\text{total consideration}}$$

If one of the assets being disposed of gives rise to an offshore income gain, then, in accordance with **subsection (3)**, that gain is deducted from the “total chargeable gain” in the formula and, therefore, the formula would not give the correct result for the deferred gain. In order to prevent this, the offshore income gain is also deducted from the “total consideration” in applying the formula.

In general share-for-share exchanges are not charged for capital gains tax purposes. If the new shares acquired in a share-for-share exchange are subsequently disposed of, they are charged as if they were the same asset as the old shares for the purposes of computing the gain arising. Accordingly, only the cost of acquisition of the old shares is allowed. In order to prevent a double charge to tax, any offshore income gain charged on the occasion of the share-for-share exchange is deductible as consideration given in calculating the gain on a subsequent disposal of the new shares. (6)

In relation to funds operation equalisation arrangements, a double charge could arise (7)

where an interest is disposed of to a person other than the fund or the fund managers, for example, where it is to a connected person, or is a deemed disposal by a trustee. However, the amount of the offshore income gain on the disposal is set against subsequent distributions made to the disponent or to persons connected to the disponent until the gain is exhausted. Thus, no double charge can arise on the occasion of those subsequent distributions.

## CHAPTER 3

### *Offshore funds: supplementary provisions*

#### **747A Capital gains tax: rate of charge**

This section provides for a capital gains tax rate of 40 per cent on the disposal of units in certain offshore funds by a unit holder. The type of fund referred to is known as a distributing fund and is one which distributes at least 85 per cent of its income on an annual basis. In this case, capital gains on the disposal of units in the fund are subject to capital gains tax, and annual income from the units is subject to income tax.

In the case of non-distributing offshore funds, which accumulate income and gains rather than distributing them, gains on the disposal of units are subject to income tax under the provisions of *Chapter 2* of *Part 27*.

#### **747AA Treatment of certain offshore funds**

This section provides for the treatment of offshore funds in the EU, the European Economic Area or in OECD countries with which Ireland has a double tax treaty that fall outside the scope of the gross roll up regime by virtue of *section 747B(2A)*. Such funds do not qualify for offshore fund treatment of any sort. Instead, income and gains are taxed under general taxation principles. This is similar to the treatment of income and gains in the case of Irish entities that do not come within the scope of the domestic “gross roll up” regime.

## CHAPTER 4

### *Certain offshore funds – taxation and returns*

#### **Overview**

*Chapter 4*, which was introduced into *Part 27* by section 72 of the Finance Act 2001, provides a new regime for the taxation of investors in certain offshore funds.

#### **747B Interpretation and application**

##### **Summary**

This section is an interpretation section. It sets out the application of *Chapter 4*.

##### **Details**

The taxation regime applies to offshore funds (as defined in *section 743*) that fall into one or other of the following 4 categories — (1), (2) & (2A)

- an undertaking for collective investment formed under the law of an offshore state that is similar in all material respects to an investment limited partnership (ILP) and that holds a certificate authorising it to act as such,
- an undertaking for collective investment in transferable securities (UCITS),

- a company formed under the law of an offshore state that is similar in all material respects to an authorised investment (i.e. “Part XIII”) company, that holds a valid authorisation in respect of same, and that either issues shares to the public or has shareholders that, if it were a “Part XIII” company, would be collective investors, or
- a unit trust scheme with non-resident trustees that is similar in all material respects to an authorised unit trust scheme, that holds a valid authorisation in respect of same, and that provides facilities for the participation by the public in the trust.

An offshore state means a state which is —

- a fellow Member State of the European Communities,
- a fellow contracting party to the EEA Agreement, or
- a member state of the OECD with which Ireland has a double taxation agreement.

The capital gains tax provisions governing when there is a disposal of an asset also apply (3) to determining when there is a disposal of an interest in an offshore fund.

An interest in an offshore fund is treated as having been disposed of and reacquired immediately before the death of the person with that interest.

An income from or details of a disposal of, an interest in an offshore fund is treated as having been correctly included in a return where the income or details of the disposal are included in a return of income made on or before the date on which it is required to be made.

#### **747C Return on acquisition of material interest**

Where in a chargeable period a person acquires an interest in an offshore fund, the person is treated as being a chargeable person (whether or not the person is otherwise so treated) and is obliged to give details of the interest acquired in the return of income required to be made in respect of that chargeable period. The details required are —

- the name and address of the offshore fund,
- a description (to include the cost) of the interest acquired, and
- the name and address of the person through whom the interest was acquired.

#### **747D Payment in respect of offshore funds**

Where an investor (who is an individual) in an offshore fund receives a payment therefrom, (otherwise than on the disposal of all or part of his or her interest) then, if the amount of the payment is correctly included in a timely return, it will be liable to income tax at the relevant rate specified in *Table 1* below:—

**Table 1:**

<b>Chargeable event arising –</b>	<b>Regular payment</b> (i.e. made annually or at shorter intervals)	<b>Non-regular payment</b>	<b>PPIU – see section 739BA – applicable from 20 February 2007</b>
<b>Before 1 January 2009</b>	Standard rate of income tax (20%)	Standard rate of income tax (20%) plus 3%	Standard rate of income tax (20%) plus 23%
<b>Between 1 January 2009 and 7 April 2009</b>	Standard rate of income tax (20%) plus 3%	Standard rate of income tax (20%) plus 6%	Standard rate of income tax (20%) plus 26%
<b>Between 8 April 2009 and 31 December 2010</b>	25%	28%	Standard rate of income tax (20%) plus 28%
<b>Between 1 January 2011 and 31 December 2011</b>	27%	30%	Standard rate of income tax (20%) plus 30%
<b>Between 1 January 2012 and 31 December 2012</b>	30%	33%	Standard rate of income tax (20%) plus 33%
<b>Between 1 January 2013 and 31 December 2013</b>	33%	36%	Standard rate of income tax (20%) plus 36%
<b>Between 1 January 2014 and 31 December 2014</b>	41%	41%	60%
<b>On or after 1 January 2015 *</b>	41%	41%	60%

\* See additional Note following *Table 2* below.

However, if the payment is not correctly included in such a return, it will be liable to income tax at the relevant rate specified in *Table 2* below:—

**Table 2:**

Chargeable event arising —	Not a PPIU	PPIU – see <i>section 739BA</i> – applicable from <b>20 February 2007</b>
<b>Before 1 January 2009</b>	Marginal rate (i.e. 20% or 41% as appropriate)	Marginal rate (i.e. 20% or 41% as appropriate) plus 20%
<b>Between 1 January 2009 and 7 April 2009</b>	Marginal rate (i.e. 20% or 41% as appropriate)	Marginal rate (i.e. 20% or 41% as appropriate) plus 23%
<b>Between 8 April 2009 and 31 December 2010</b>	Marginal rate (i.e. 20% or 41% as appropriate)	Marginal rate (i.e. 20% or 41% as appropriate) plus 25%
<b>Between 1 January 2011 and 31 December 2011</b>	Marginal rate (i.e. 20% or 41% as appropriate)	Marginal rate (i.e. 20% or 41% as appropriate) plus 27%
<b>Between 1 January 2012 and 31 December 2012</b>	Marginal rate (i.e. 20% or 41% as appropriate)	Marginal rate (i.e. 20% or 41% as appropriate) plus 30%
<b>Between 1 January 2013 and 31 December 2013</b>	Marginal rate (i.e. 20% or 41% as appropriate)	Marginal rate (i.e. 20% or 41% as appropriate) plus 33%
<b>Between 1 January 2014 and 31 December 2014</b>	41%	80%
<b>On or after 1 January 2015</b>	41%	80%

**Note:** With effect from 1 January 2015, the distinction between ‘correctly included’ and ‘not correctly included’ is removed for other than a PPIU, and, any payment, whether regular or non-regular, (excluding from a PPIU), will be liable to income tax at the rate of 41% (i.e. one percentage point higher than the higher rate of income tax (40%) that comes into effect from that same date).

A company carrying on a financial trade is taxed on any payment or gain arising from its investment at the corporation tax trading rate where the investment is part of its trading stock. Otherwise, the payment to a company is chargeable to tax under Case III of Schedule D.

## **747E Disposal of an interest in offshore fund**

### **Summary**

This section sets out the treatment, for tax purposes, of a disposal of an interest in the

offshore funds to which the Chapter applies. It also covers the deemed disposal of a material interest at the ending of each period of 8 years beginning with the acquisition of the interest.

### Details

Subject to *subsection (1A)*, where an individual has an interest in an offshore fund to which the Chapter applies, and disposes of the whole or part of that interest, then the amount of the gain on disposal, if correctly included in a timely return, will be liable to income tax at the relevant rate specified in the following *Table*:

Chargeable event arising —	Gains (excluding PPIUs)	PPIU – see <i>section 739BA</i> – applicable from 20 February 2007
Before 1 January 2009	Standard rate of income tax (20%) plus 3%	Standard rate of income tax (20%) plus 23%
Between 1 January 2009 and 7 April 2009	Standard rate of income tax (20%) plus 6%	Standard rate of income tax (20%) plus 26%
Between 8 April 2009 and 31 December 2010	28%	Standard rate of income tax (20%) plus 28%
Between 1 January 2011 and 31 December 2011	30%	Standard rate of income tax (20%) plus 30%
Between 1 January 2012 and 31 December 2012	33%	Standard rate of income tax (20%) plus 33%
Between 1 January 2013 and 31 December 2013	36%	Standard rate of income tax (20%) plus 36%
Between 1 January 2014 and 31 December 2014	41%	60%
On or after 1 January 2015	41%	60%*

\* With effect from 1 January 2015, any gain from a PPIU which is not correctly included in a return, will be liable at the rate of 80%.

In the case of a company disposing of an interest in such an offshore fund, the company is taxed on any payment or gain arising from its investment at the corporation tax trading rate where that company is carrying on a financial trade and the investment is part of its trading stock. Otherwise the gain is chargeable to tax under Case IV of schedule D.

This subsection defines “umbrella scheme” as an offshore fund which is divided into a number of sub-funds and in which persons who have a material interest in one sub-fund are entitled to exchange the whole or part of that interest for a material interest in another sub-fund of that umbrella scheme. Such exchanges are not disposals for the purposes of *subsection (1)*.

The gain on the disposal of an interest in an offshore fund is computed on the same basis as it would be for capital gains tax purposes but without regard to indexation relief. Furthermore, the amount of gain, that is to be taxed as income, cannot be sheltered by

trading or other losses, nor can it be of a negative amount. Where a gain is treated as nil and tax was chargeable in respect of an earlier deemed disposal of the material interest, the overpaid amount is refundable/available for set-off.

The amount of any income tax paid by an individual on an amount of gain generated by the disposal of an interest in an offshore fund is treated as being that amount of capital gains tax for the purposes of section 104 of the Capital Acquisitions Tax Consolidation Act 2003. Under that section where an event constitutes both a disposal of an asset for capital gains tax purposes and also gives rise to a CAT liability in respect of property, the capital gains tax paid is allowed as a credit against the net gift or inheritance tax. (5)

### ***Deemed disposal/reacquisition of material interest in offshore fund***

There is a deemed disposal and reacquisition of a material interest in an offshore fund at the ending of each period of 8 years beginning with the acquisition of the interest and each subsequent 8-year period. For the purposes of the section, the person is deemed to have disposed of his/her material interest immediately before the ending of the period and to have immediately reacquired it at market value at that time. (6)

## **747F Reconstructions and amalgamations in offshore funds**

### **Summary**

This section sets out the treatment, for tax purposes, of reconstructions or amalgamations of offshore funds to which the Chapter applies. It provides that, where such funds are reconstructed or amalgamated, the disposal of the original units or shares will not be taxable and the new units or shares will be treated as being acquired at the same time and cost as the original units or shares.

### **Details**

A reconstruction or amalgamation scheme is defined as meaning an arrangement where each person who has a material interest in an offshore fund gets, in place of that interest, a material interest in another offshore fund which is proportional to the value of the original interest and the value of the original interest becomes negligible as a result. (1)

Where, in connection with a reconstruction or amalgamation scheme, a person disposes of an interest and receives a new interest in its place, the disposal will not give rise to a gain and the new interest is treated as being acquired at the same time and cost as the interest that was disposed of. (2)

## **747FA Offshore funds: amalgamations with investment undertakings**

### **Summary**

This section was inserted by section 33 of the Finance Act 2012 and is consequent on the implementation of the UCITS IV Directive, which provides for the cross-border merger of two or more UCITS funds.

### **Details**

#### ***Definitions***

**Subsection (1)** sets out how the term “investment undertaking” is to be interpreted. The subsection also provides a definition for “scheme of amalgamation”. (1)

In the context of a scheme of amalgamation, the disposal of a material interest in an offshore fund and the acquisition of units in an investment undertaking, will not give rise (2)

to a chargeable event. On the occurrence of future chargeable events, the date and cost of the units will be the same date and cost as the original material interest in the offshore fund.

## CHAPTER 5 *Relevant UCITS*

### Overview

This Chapter was first inserted into **Part 27** by *section 31(1)(c)*, Finance Act 2010 and focused solely on the tax treatment applicable to a relevant UCITS. The Chapter was replaced in its entirety by *section 30*, Finance Act 2014 and now sets out the tax treatment applicable to —

- A relevant UCITS (as before); and
- A relevant AIF (as a consequence of the transposition into Irish law, in mid-2013, of the Alternative Investment Fund Managers Directive).

### 747G Tax treatment of a relevant UCITS or a relevant AIF

#### Summary

The provisions of this Chapter originally facilitated the management, from within Ireland, of foreign funds, under the EU management company passport regime provided for under EU Directive 2009/65/EC, which deals with Undertakings for Collective Investment in Transferable Securities (also known as the UCITS IV Directive).

The legislation transposing the UCITS IV Directive into Irish law provides that a UCITS formed under the laws of one Member State may be managed by a management company regulated under the laws of another Member State. This section, in turn, provides that —

- a UCITS formed under the law of a Member State – other than Ireland – will not be liable to tax in Ireland by reason only of having a management company that is authorised under Irish law; and
- Irish resident unit holders in a relevant UCITS are to be treated as unit holders in an offshore fund.

Section 30, Finance Act 2014 extends this tax treatment to a non-Irish-resident Alternative Investment Fund (AIF) where such an AIF is managed either by an AIF Manager (AIFM) authorised by the Central Bank, or, through a branch or agency of an AIFM authorised in an EEA state.

#### Details

Subsection includes the following definitions:—

(1)

“AIF” is defined as an alternative investment fund within the meaning of the relevant AIFM Directives;

“AIFM” is defined as alternative investment fund manager;

“alternative investment fund manager” is defined as a person whose regular business is managing one, or more than one, AIF;

“management company” in relation to a relevant UCITS is defined as a management company within the meaning of Directive 2009/65/EC;

“relevant AIF” is defined as an AIF which is formed under the laws of a jurisdiction other than the State and which is not a domestic UCITS;

“relevant AIFM Directives” is defined as Directive 2011/61/EU and any directive amending that directive;

“relevant UCITS Directives” is defined as Directive 2009/65/EC and any amending directives;

“relevant profits” is defined as the profits that would be relevant profits within the meaning of *section 739B* if the relevant UCITS or the relevant AIF were an investment undertaking as defined in that section;

“relevant UCITS” is defined as an undertaking for collective investment in transferable securities—

- to which Directive 2009/65/EC applies,
- that is formed under the laws of a Member State other than Ireland, and is not a domestic UCITS.

A relevant UCITS or a relevant AIF is not chargeable to tax in Ireland in respect of its relevant profits. (2)

An Irish-resident unit holder who invests in a relevant UCITS or a relevant AIF continues to be within the charge to Irish tax on income and gains from investments in such funds and is deemed to be a unit holder in an offshore fund. (3)