

Irish Tax Treaties

Section 130(2)(d)(iv) TCA 1997

ITCGTCT Manual – Part 35-01-07

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Executive Summary

This manual clarifies the operation of section 130(2)(d)(iv) TCA 1997 in relation to payments of interest to residents of Tax Treaty Countries and EU Member Countries.

Extract from Tax Briefing Issue 45* (October 2001)

**Please note that since the publication of Tax Briefing 45, Ireland has concluded a number of treaties, including treaties with all EU Member States and two further treaties without non-discrimination Articles (Saudi Arabia and UAE). The texts of all treaties are available on the Revenue website.*

With reference to Footnote 1 of Tax Briefing 45, the following pre-1976 treaties have been renegotiated and new treaties are in place: Canada, Germany, Norway, Pakistan and Zambia. The treaty with the Netherlands is in the process of being renegotiated.

With reference to Footnote 3 of Tax Briefing 45, the treaty with India is now in force.

Payments to Residents of Tax Treaty Countries and EU Member Countries.

Revenue has reviewed the operation of Section 130(2)(d)(iv) TCA in relation to payments of interest to residents of countries with which Ireland has a double taxation treaty and to residents of EU member countries. This has been undertaken in response to a number of questions, which tax practitioners have raised concerning these issues following the recent legislative changes introduced by Sections 87 and 88 of Finance Act 2001. As a result, it has been decided to issue the following points of clarification in relation to the matter.

1. For pre-1976 tax treaties¹, in line with Revenue's established practice, interest which is treated as a distribution under Section 130(2)(d)(iv) will continue to be regarded as interest for tax deductibility purposes. Such interest payments will also be treated as interest for the purpose of the "interest" article in the relevant Double Taxation Agreement unless they are treated under the relevant tax treaty as a dividend (see OECD model tax convention commentary on Article 10 - paragraph 25). Therefore Irish dividend withholding tax (DWT), when it applies,² will normally be limited by the rate of source taxation applicable to interest in the relevant treaty.

¹ There are 14 pre-1976 treaties: Austria, Belgium, Canada, Cyprus, France, Germany, Italy, Japan, Luxembourg, Netherlands, Norway, Pakistan, Switzerland and Zambia. However, the definition of "dividends" in the Austrian and Swiss treaties was amended and broadened in post-1976 Protocols, placing them in the same position as other post-1976 treaties with broader definitions of dividends.

² As a result of the legislative changes introduced by Sections 87 and 88 of the Finance Act 2001 (incorporated as Sections 452 and 845A TCA respectively), the potential instances where Section 130(2)(d)(iv) may apply have been considerably reduced.

2. For post-1976 tax treaties, DWT treatment will depend on the definition of “dividends” in the dividend article of the relevant treaty. Where the definition of “dividends” is broader than the OECD model definition and allows for assimilation of interest treated as a distribution under Section 130(2)(d)(iv), then DWT, when applicable, will apply up to the limit prescribed in the dividends article. Where the treaty does not contain a broad definition of dividends,³ the position outlined above in relation to pre-1976 treaties will apply, namely, DWT will be limited by reference to the provisions of the interest article.
3. Concerning the interest deduction provisions in the non-discrimination articles of post-1976 Irish tax treaties, the majority of the treaties include provisions based on paragraph 4 of Article 24 of the OECD model tax convention. Where this is the case, deduction of interest which would otherwise be disallowed as a result of the application of Section 130(2)(d)(iv) will be permitted. It should be noted however that in Ireland’s treaties with Israel, Poland, Switzerland and Sweden there are references in paragraph 4 that permit the application of Section 130(2)(d)(iv). Also, Ireland’s tax treaty with Australia does not have a non-discrimination article. While there is no paragraph based on paragraph 4 of the OECD model convention in the Russian treaty, there are provisions in the Exchange of Letters that allow for deductibility.
4. In the case of payments to residents of EU Member States, Section 130(2)(d)(iv) will not be applied. This will not depend on any provisions in a tax treaty with such a Member State (for example, Ireland does not yet have a tax treaty with Greece).
5. Accordingly, interest payments to the following tax treaty countries will continue to be treated as distributions for tax deductibility purposes: Australia, Israel, Poland and Switzerland.
6. It should be noted that the provisions of Section 130(2)(d)(iii)(II) will apply in all cases in relation to interest which is paid in excess of arms-length rates.
7. Advance application is not necessary where a deduction for interest is sought on the basis set out above.
8. Where a company elects under Section 452 or Section 845A that interest should not be characterized as a distribution under Section 130(2)(d)(iv), then it will not be so re-characterised and will accordingly be treated as interest for Irish tax purposes. DWT will not

³ There are 4 post-1976 treaties which have a definition of “dividends” in the dividend article that was not broadened to cover interest recharacterised on the basis of 130(2)(d)(iv) - China, India (not yet in force), Israel and Romania.

apply as the payment will not be regarded as a distribution, but regard should be had to the question of withholding tax under Section 246.