This technical query paper was submitted to Revenue via the TALC Direct/Capital Taxes sub-committee following a discussion on the matter at the February 2020 TALC Direct/Capital Taxes sub-committee meeting and the subsequent publication of Revenue's updated Pensions Manual: Chapter 23 – Approved Retirement Funds in June 2020. There was a further discussion on the matter at the September 2020 TALC Direct/Capital Taxes sub-committee meeting and the discussion is reflected in the Minutes.
Revenue's response to this technical query paper is attached at Appendix I.

ITI Submission to Revenue Seeking Further Clarification on Revenue's Pensions Manual: Chapter 23 - Approved Retirement Funds

05 August 2020

Background - Distributions from Approved Retirement Funds (ARFs) to non-residents
Practitioners expressed concerned at a TALC Direct/Capital Taxes meeting in September 2019 over uncertainty within the industry regarding the basis on which Ireland has taxing rights over ARFs where a person is not resident in Ireland. Practitioners raised the issue of treaty relief being denied. Revenue advised that an internal communication was sent to Revenue staff in December confirming that treaty relief should apply. There was a discussion regarding the requirement to segregate distributions between income and capital and also the basis for operating PAYE in cases where there is no underlying income tax charge where a person is resident in another country.

At the February 2020 TALC Direct/Capital Taxes meeting, Revenue advised that an internal memo had issued to staff and that the Tax and Duty Manual (TDM) on this matter would be published shortly confirming that treaty relief applies.

Revenue updated the TDM Pensions Manual "Approved Retirement Funds – Chapter 23" in June 2020, to explain how a distribution is treated in light of the terms of the relevant double taxation agreement. Owners of ARFs, vested PRSAs and AMRFs who are not resident in Ireland may be subject to taxation on this income, both in Ireland and their country of residence and subsequently tax relief may be available under the terms of a DTA. To claim relief, the guidance states:

> *"To ascertain the amount of relief due, information must be provided by the taxpayer indicating how the income arose within the ARF, including the date when the income arose. Once the distribution is broken down into its constituent parts (for example, interest income, dividend income, return of capital, etc.) each part should then be examined to see if DTA relief is available under the different articles of the treaty with the country of residence. Accordingly, full or partial refunds of Irish tax deducted under PAYE may be due to these taxpayers."*

In a case encountered by a practitioner, the ARF distribution suffered 52% PAYE at source in Ireland and was taxed again in Spain where the individual was resident. The practitioner received a note through MyEnquiries from the caseworker dealing with the case, confirming:

"as the Ireland/Spain DTA grants taxation rights on both income and capital gains to the state of residence, and as your client is resident there, taxation rights rest with Spain. Consequently, Ireland does not have taxation rights and your client can claim a refund of PAYE withheld from her ARF distribution".

It was understood from the February TALC Direct/Capital Taxes meeting (and from this outcome) that this is Revenue's position. However, the updated TDM which issued in June 2020 continues to require distributions to be analysed between original capital, income and capital gains in order to determine the basis on which to eliminate double taxation.

Further guidance is essential regarding the level of analysis that is actually required if Revenue asserts this position. For example, if some of the assets within the ARF comprise of offshore funds, does a further analysis need to be done in that context?

The Tax Appeals Commission (TAC) Determination 36TACD2019 dealt with a case of an individual who asserted he was treaty resident in Malta and accordingly entitled to treaty relief on an Irish ARF distribution. The TAC held the appellant was treaty resident in Ireland but also expressed an opinion on the availability of DTR under the DTA if it had found him to be treaty resident in Malta. The TAC concluded that to the extent that the distribution comprised of income, DTR could be claimed under the appropriate article (e.g. dividends, interest etc.) but that no relief was available for the capital as the Maltese treaty did not provide for DTR on capital.

The updated TDM sets out Revenue's view on the taxation of, and DTR for, distributions from Irish ARFs to non-residents, requiring an analysis of income, gains and capital to determine appropriate double tax relief under individual articles. This more or less aligns with the TAC determination.

If a distribution is income or capital, and both the income and capital DTR articles provide for an exemption from Irish (source) tax and tax in the country of residence, we believe the analysis is not necessary and imposes disproportionate administration and costs on all stakeholders.

We are also seeking guidance on the taxation of, and DTR for, distributions from the foreign equivalent of ARFs or post-retirement pension funds to an Irish resident fund-owner. **Is it expected that a similar analysis should be carried out and income tax or CGT, as appropriate, be imposed, or is the distribution within the scope of income tax, as it would be for an Irish ARF distribution?**

APPENDIX I

Revenue's response to Institute technical query paper dated 5 August 2020 referred to in the Minutes of the TALC Direct/Capital Taxes sub-committee meeting on 3 September 2020.

TALC Direct and Capital Taxes Sub-Committee

Meeting on 3rd September 2020

Agenda Item 2.f. – Distributions from ARFs to non-resident taxpayers

Update note

This matter was raised at a number of recent sub-committee meetings. Most recently the ITI submitted a submission on 5th August in relation to the matter.

ITI had queried the correct application of DTA relief to ARF distributions for non-resident taxpayers. The treatment, outlined at the December meeting, confirmed that distributions must be broken down into their constituent parts and the applicability of DTA relief examined on each part.

Revenue also undertook at this meeting to examine the Revenue guidance on this matter with a view to providing further clarification and aid to taxpayers and practitioners on the Revenue treatment, i.e. the application of DTA relief to constituent parts of the distribution from an ARF to a non-resident taxpayer.

A specific taxpayer case was referred to at the meeting which Revenue took details of to follow up and examine.

That specific case was resolved in December and was referred to as such at the February meeting. The fact that the outcome in this specific case was a refund to the taxpayer of all taxes deducted did not indicate a change in treatment by Revenue of this type of case, although it appears to have been mistaken as that. That outcome was simply the appropriate outcome for that specific case.

Revenue also advised that an internal Revenue update had issued to caseworkers in relation to the treatment and that manual changes were in process. The manual was published in June 2020.

The most recent submission asks 3 main questions:

1. Can the requirement to provide a breakdown to Revenue of ARF distributions be removed or removed for some taxpayers?

It is not possible to do this. The applicability of DTA relief must be examined by reference to the constituent parts of how the income or gains arose within the ARF. Without this information it is not possible to ascertain if DTA relief applies. Revenue has examined a number of DTAs there is invariably a mix of taxing rights on different incomes. No one particular treaty country can be green-lit so to speak. Even in the specific case referenced by ITI there could have been a mix of incomes where a different outcome would arise under the same DTA.

It is also not within the remit of Revenue to be fully briefed on every type of investment an ARF may invest in and pre-empt its treatment under multiple DTAs.

2. Further guidance is required on the level of breakdown required.

Revenue's requirement is that a breakdown of the constituent parts of the income/gains arising is provided. This necessitates classification as to the type of income, the date it arose and profit arising. This information should be available from the ARF provider; indeed an attraction of the ARF is that the investor has choice over investments so would generally be aware how the funds are invested and the outcomes to those investment decisions.

Revenue are aware of a couple of isolated instances where taxpayers have indicated to Revenue that obtaining a breakdown from their QFM was difficult; however, breakdowns have subsequently been provided and refunds processed. Refunds continue to be processed generally where the required breakdown is provided and is appropriate under the relevant DTA.

Revenue would like to point out that this has been the requirement for almost three years and that engagement occurred with a number of QFMs at the time the guidance

was changed. There have not been any representations made to Revenue by any ARF provider indicating a problem with meeting this requirement for their customers.

3. Guidance on the taxation of, and DTR for, distributions from the foreign equivalent of ARFs or post-retirement pension funds to an Irish resident fund-owner.

Taxpayers are required to make a return to Revenue of all foreign sources of income or gains, and they are assessed as such. If a taxpayer is the ultimate owner of a personal investment fund it follows that the income or gains arising within that fund are broken down and returned as such. Revenue are not aware of a foreign equivalent but will examine one if it is brought to our attention. However, we would point out that this is an extraneous matter to the treatment of Irish ARF's and the guidance and practice in relation to non-resident holders of such.

RAPP Branch, PTPLD, 22/09/2020