This technical query paper was submitted to Revenue via the TALC Direct/Capital Taxes sub-committee in advance of the September 2021 TALC Direct/Capital Taxes sub-committee meeting and was discussed at meetings of the TALC Direct/Capital Taxes sub-committee from September 2021 to December 2022. The discussions are reflected in the Minutes.

A Precedent 28 Subgroup was established and convened its initial meeting on 28 July 2022. The Subgroup met again on 22 November 2022 to discuss amendments introduced in Finance Bill 2022. Prior to the November meeting a paper was circulated outlining Revenue's position on the tax treatment of foreign pension lump sum amounts which are paid to individuals who are resident in the State for tax purposes. The Revenue paper is included as an addendum to the Minutes of the TALC Direct/Capital Taxes sub-committee meeting of 1 September 2022.

ITI submission to Revenue seeking clarification regarding the basis of taxation on the commutation of a foreign pension which accumulated from contributions out of foreign income

27 August 2021

- Precedent 28[1] (PREC/28) provided that tax free lump sums in commutation of foreign pensions were not taxable in Ireland should the individual come to reside in the country following their retirement. We understand that Revenue's current position is that the commutation of such lump sums is subject to income tax under Case III as they are a "foreign possession". As this is a fundamental change in practice from the historic position set out in PREC/28, practitioners request clarification on the technical basis for Revenue's current approach which would appear to conclude that such lump sums are income from a foreign possession.

- Practitioners do not consider references to a 'qualifying overseas pension plan', as outlined in Chapter 2B of Part 30 (sections 787M – 787N) TCA 1997, to be relevant in this context, as paragraph 17.10 of the Revenue Pensions Manual confirms its purpose is to provide relief for pension contributions made by EU migrant workers.

- Prior to 2005, the established position was that no lump sums were subject to income tax in Ireland. Whilst s790AA TCA 1997 introduced a tax charge in relation to funds that had qualified for Irish relief, it did not otherwise alter this long-established practice.

- Practitioners would like to understand the basis of taxation for the commutation of a foreign pension which accumulated from contributions out of foreign income and in respect of which no Irish tax relief was provided. We would suggest that Revenue's current approach, which would appear to conclude that such lump sums are income from a foreign possession, is contrary to the principle that capital accumulated before

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Occupational pensions: Are tax free lump sums in commutation of foreign pensions taxable in Ireland should the individual come to reside in this country following their retirement? No. Originally published: 30/07/1987 File ref:PREC/28 someone becomes resident in Ireland is outside the scope of Irish tax. For example, if the accumulation of the fund had come from foreign rent earned before the individual became resident in Ireland, it would be capital and exempt from Irish tax on remittance. The basis for treating a pension fund differently is not clear. Practitioners request clarification on the domestic charging provision in Irish law which imposes income tax treatment.

- It is submitted that income tax can only be imposed if there is a domestic charging provision on that income payment. Income tax is a tax on income, it is not a tax on capital. There is a longstanding Revenue precedent to the effect that there is no Irish tax charge on income accrued before an individual becomes Irish tax resident and, where the income is remitted here after an individual becomes resident, even if a pension lump sum is considered to be an accumulation of income, there is no Irish charging provision.

- Revenue has issued comprehensive guidance dealing with the taxation of pensions. None of these publications suggests an exposure to tax under Case III. Indeed, it would appear from Revenue's Pensions Manual that if lump sums are to be taxed at all it is under section 790AA TCA 1997.

- It would appear that Revenue distinguishes between foreign jurisdictions that impose tax on lump sums and those that do not, in determining the tax treatment in Ireland. In addition, it would appear that Revenue accept funds accumulated overseas, which did not get tax relief in Ireland on contributions, are not liable to Excess Fund Tax. Practitioners are aware of cases where Revenue has specifically confirmed this approach, even where those benefits had been transferred into an Irish pension arrangement and had been mixed with other benefits accruing in Ireland.

- The tax treatment of annuity-type pensions is clear, given most treaties will provide for exemption in the source country and taxation rights in the country of residence. However, uncertainty remains in relation to the tax treatment of both lump sums in commutation of foreign pensions and irregular payments following commutation that are not annuities (i.e. the foreign equivalent of an ARF structure in Irish terms).

- Recent caselaw in the UK suggests that subjecting lump sums from other EU jurisdictions to full income tax, whilst exempting lump sums from Ireland to such tax, has the potential to fall foul of EU law.[2]

- Practitioners have experienced inconsistency in Revenue's approach to the taxation of overseas pension payments as illustrated by the examples set out in the attached Appendix. Practitioners would welcome clarification regarding Revenue's approach given any liabilities arising could be regarded as "offshore matters" in respect of which a qualifying disclosure cannot be made.

[2] See BAV-TMW-Globaler-Immobilien Spezialfonds [2019] TC 06995

APPENDIX

Practitioner Examples:

1. A client with a 401K pension fund in the US requested the agent to seek confirmation from Revenue that capital treatment would apply rather than income tax treatment. Revenue replied to the effect that Precedent 28 no longer applies and the payment should be declared as Case III income in the individual's Form 11 for that tax year. No technical basis was provided for this assertion.

2. A client was in receipt of a lump sum from a pension in a foreign jurisdiction after encashing the entire fund. All the duties of the employment from which the pension arose were performed outside the State. An expression of doubt as to its tax treatment was included in the client's Form 11 to the effect that it was a capital receipt. Revenue raised an assessment to income tax on the payment under Schedule D Case III.

3. A client drew down both of their entire UK pensions in one lump sum from two different UK pension schemes. These originated from two separate UK employments while the client was living and working in the UK. All contributions were made while the client was in the UK. They were partially exempt in the UK and part taxable. Revenue confirmed that the two lump sums were not subject to tax in Ireland. Both payments were greater than €200,000. Precedent 28 was quoted in the submission to Revenue in 2019, along with details of the amounts. This position was accepted by Revenue.

4. An Irish resident, non-domiciled individual drew down their Australian pension fund, and remitted part of the lump sum to Ireland when resident here. The tax agent undertook a detailed analysis of the historic position on the taxation of lump sums and indicated that the rules regarding taxation of lump sums applied to qualifying overseas pension plans (EU pension) and did not apply to non-qualifying overseas pension plans, including Australian pensions. However, the agent indicated that PREC/28 applied so the lump sums from such pensions are not taxable. Revenue responded to indicate that from a taxing perspective, only approved pension schemes which fall under the definitions of Part 30 TCA 1997 (occupational pension schemes, retirement annuities, purchased life annuities and certain defined pensions) are deemed to be pensions from a Revenue perspective. Therefore, if the income does not fall within the definition of an overseas pension plan in section 787M TCA 1997 it is not a pension under Part 30 TCA and so, the precedent regarding tax free lump sums of pensions would not apply. The tax agent is continuing to review the case and engaging with Revenue.

5. An Irish resident non-domiciled individual received a lump sum from a US pension arrangement. Tax was initially paid under section 790AA TCA 1997 on a self-assessment basis. Revenue received details of the payment from the US authorities under the Exchange of Information process and initially formed the view that the payment was liable to full income tax. However, following subsequent communication

with Revenue in which the position outlined in Precedent 28 was raised, Revenue agreed to refund the tax already paid.

6. In July 2009, Revenue looked at a case involving an Australian national who had become resident in Ireland and had queried the Irish tax treatment of a lump sum received from an Australian scheme. Revenue concluded that there was no Irish tax liability.