

*Clawback of relief in death cases - extract from Tax Briefing*

Introduction

The purpose of this article is to outline the treatment of the clawback of Section 23/43 relief on the death of a spouse and to give details of a new Revenue practice.

Transfer of Section 23/43 properties

Where the owner of a Section 23/Section 43 property dies within 10 years of first letting the property, a clawback of the relief already granted arises.

The clawback arises even though the property does not cease to be a qualifying premises - Section 23(5)(b) Finance Act 1981 and Section 43(4)(b) Finance Act 1994 apply. This clawback is equal to the deduction already given and takes the form of rent which is deemed to be received immediately prior to the passing of the deceased person's interest in the property.

Where the beneficiary of the estate is treated as succeeding from the date of death, the interest is deemed to pass on death.

Married Couples

Where such a property passes to a spouse, the surviving spouse is entitled to a Section 23/43 deduction in the tax year in which the property passes.

Where the surviving spouse is the assessable spouse for the year of death, the loss arising due to the section 23/43 relief for the post-death period may be set against other Case V profit for the year, including the pre-death profit arising as a result of the clawback. In effect, no additional liability arising for the year of death as a result of the transfer of the property.

Where the deceased was the assessable spouse, the surviving spouse becomes chargeable for that year on the income from the date of death. There is no provision for setting a loss arising due to

the section 23/43 relief for the post-death period against the pre-death liability of the deceased. Accordingly, a tax liability is likely to arise on the estate of the deceased spouse.

Liability is also likely to arise where the couple are taxed as single persons for the year of death.

#### New Revenue Practice

In all such cases where the clawback applies, the Revenue Commissioners are prepared to allow a set-off of the Section 23/43 deduction due to the surviving spouse against the amount assessable on the deceased in the year of death in respect of the Section 23/43 property. The maximum set-off will be equivalent to the amount of the rent deemed to have been received by the deceased in accordance with Section 23(5) or Section 43(4).

A formal undertaking will have to be given by the surviving spouse to the effect that if, within the 10 year period from the date the property was first let, any event occurs which gives rise to a clawback, the amount of the clawback on the surviving spouse will be the full amount of the Section 23/43 deduction allowed in relation to the property, including any amount of such relief set off against the income of the deceased spouse from whom the property was transferred.

The new practice will apply where the ownership of the property passes on or after 6 April 1995. The Revenue Commissioners are also prepared to apply the new practice where a property passes to a spouse as a result of a maintenance arrangement (as defined in Section 3 Finance Act 1983) or in circumstances where a property is transferred from the sole name of one spouse into the joint names of both spouses.