

## 59. Tax Aspects of Mortgage Enforcement

### Overview

The creation of a mortgage and other security has no tax consequences under Irish or UK legislation. The transfer of an asset by way of the security or charge is exempt from capital gains tax, VAT and Stamp Duty in Ireland and the UK. Similarly the transfer back of the security on repayment is exempt from the taxes that otherwise arise on the transfer of assets.

There are taxation consequences when security is enforced in both Ireland and the UK. The revenue rules in both jurisdictions place responsibilities for the collection of certain taxes on mortgagees, receivers, liquidators, bankruptcy officers and administrators. A lender enforcing security or an insolvency officer may have to withhold or account for tax on the borrower's behalf. The underlying tax liability may be complex. Much will depend on the circumstances.

The possible liability of the enforcing lender or insolvency officer to account for tax in Ireland and in the United Kingdom should be considered in each case. There are a

number of general provisions in the taxation legislation whereby a representative or agent, which includes insolvency officers in enforcement, can be assessed with the tax liability of the underlying borrower. In many cases the insolvency officer has a duty to account on behalf of the borrower, but is not personally liable. In other cases, the insolvency officer may in effect be made personally liable.

The borrower's ultimate tax liability to the Ireland and UK revenue may be complicated and may depend on its overall income position in both countries and the double taxation agreement.

### Value Added Tax

Irish value added tax will not arise on disposal of security situated in England and Wales. Tax due to the UK Revenue (Her Majesty's Revenue and Customs or HMRC) is not a preferential debt in an Irish insolvency process. Debts due to the UK Revenue are due under the Cross Border insolvency as a general unsecured creditor.

UK VAT arises on the sale of residential property, including new residential property in the UK at zero rate. The sale of new commercial property is subject to UK VAT at 15%. In the case of other commercial property, it is possible to elect each property

to VAT so that VAT is chargeable on the rents. VAT must be accounted for on rents and sale proceeds.

A liquidator, receiver or administrator (insolvency officers) over the affairs of a company who intends to trade or dispose of assets must register for UK VAT within 21 days. This does not apply to a fixed charge receiver. If a new insolvency officer is appointed after the Official Receiver (as can happen in various insolvency processes) he must register within 21 days.

HMRC calculate historical VAT liability as at date of notification of the insolvency. An assessment may be made on the company in respect of the outstanding tax liabilities. This is the company's liability so that the insolvency officer has no personal liability for historical liabilities.

AN insolvency officer must account for VAT in respect of ongoing supplies of goods and disposals subject to VAT. The normal quarterly VAT returns are required of insolvency office holders. Repayments may be claimed for VAT refunds due to the company.

In their case of a fixed charge receiver, the receiver is unlikely to be entitled to register separately. He is deemed agent of the company, which continues to have the VAT

liability. If a LPA receiver makes continuing supplies such as leasing or selling property, VAT should be accounted for on the mortgagor's account. If the assets are sold, VAT should be accounted for using VAT form 833.

### **Taxes on Income and Disposals**

The appointment of a liquidator has certain tax consequences for the company concerned. Certain termination rules apply in respect of the assessment of tax. The company ceases to own its assets (including its subsidiaries) on appointment of a liquidator and this may have the consequences of breaking up a tax group of companies triggering withdrawal of previous tax reliefs.

The appointment of a receiver does not have the same tax consequences as the appointment of a liquidator. It does not cause the company to lose ownership of its assets. A receiver may transfer assets to a subsidiary for the purpose of sale of the subsidiary free from liabilities. They are stamp duty and other tax exemptions available which facilitate company reorganisation of this nature.

The appointment of an administrator has no particular taxation consequences, unless

and until schemes of arrangement or reconstruction are put in place

Certain of the historic tax liabilities pre-insolvency are preferential claims in the process. The insolvency officer has no direct responsibility for them. The appointment of a liquidator, administrator or receiver does not necessarily mean that the company's trade ceases. The insolvency officer is likely to dispose of assets to realise the security.

The underlying debtor company is charged to corporation tax on profits arising in the insolvency. The insolvency liquidator must account for corporation tax on income received and capital gains tax on disposals made. The Taxes on income and disposals are deemed necessary expenses of the liquidator and have corresponding priority. The same applies to PAYE deductions for employees.

A receiver has fewer tax obligations. He is not responsible for the tax affairs and returns of the company to the same extent as a liquidator would.

When rents are paid out of the United Kingdom, the tenant or agent paying it is obliged to deduct tax at the standard rate. If the payment is through an agent, such as a receiver, then that party is obliged to deduct tax. It is possible to apply to HMRC for a

declaration that income may be paid net of tax. Generally this involves showing that there is no underlying income tax liability for the borrower.

## Capital Gains Tax

Irish resident companies and individuals are subject to Irish capital gains tax on their world wide disposals. Persons who are not resident or ordinarily resident in the United Kingdom are not subject to UK Capital Gains Tax. See our guides to UK tax and our guides to the Irish cross border aspects of taxation.

Broadly similar rules apply to enforcement by a receiver, liquidator or other such officer.

Where any person holds assets of a company or person by way of security (liquidator, receiver, mortgagee etc) Irish capital gains tax is assessable directly on that person for the liability the mortgagor would have been liable for on the disposal of the asset. There are no equivalent provisions in respect of income or corporation taxes. These remain the liability of the company.

Because Capital Gains Tax looks at the borrower's whole liability for a year, the sale on a single transaction there are special rules to deal with capital gains on the single

transaction. Effectively, it is necessary to estimate Capital Gains Tax liability for all borrower's transactions in a year and to apportion them

In an Irish liquidation, certain preferential creditors including certain Irish taxes, rank ahead of the holders of a floating charges in terms of entitlement to the proceeds of their sale.

When a creditor disposes of an asset to give effect to a security, he does so as nominee of the debtor. The gains and losses are those of the debtor. Gains accruing on disposable disposals by a trustee or assignee are assessable.

*Lavelle Coleman is an Irish firm of solicitors with an England and Wales legal practice. Our England and Wales qualified and regulated solicitors provide a wide range of legal services from our Dublin offices. We have written legal guides in relation to a broad range of England and Wales legal matters as they relate to Irish based individuals and businesses. These guides are available on our website at <http://www.lavellecoleman.ie/England-Wales-Law.aspx>*

*This is an extract from our "Legal Guide to the Management and Enforcement of Security in England and Wales for Irish Lenders (2009). The Guide is intended as an overview and broad outline of the matters covered in it. Its purpose is to inform and raise awareness. We are happy to offer specific legal advice on particular circumstances. It should not be relied on as a substitute for comprehensive legal advice with reference to the particular circumstances. While we have taken due care in the preparation of this publication, we do not accept legal liability as a result of any reliance placed on anything in it. The reader should rely only on specific legal or taxation advice. This extract is based on the law as of 1<sup>st</sup> August 2009.*

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