

# LAW SOCIETY SUBMISSION

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## **BUDGET 2023**

**DEPARTMENT OF FINANCE  
DEPARTMENT OF PUBLIC EXPENDITURE & REFORM  
DEPARTMENT OF SOCIAL PROTECTION  
DEPARTMENT OF ENTERPRISE, TRADE & EMPLOYMENT  
DEPARTMENT OF HOUSING, LOCAL GOVERNMENT & HERITAGE**

**20 July 2022**

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#### ABOUT THE LAW SOCIETY OF IRELAND

The Law Society of Ireland is the educational, representative and regulatory body of the solicitors' profession in Ireland.

The Law Society exercises statutory functions under the Solicitors Acts 1954 to 2011 in relation to the education, admission, enrolment, discipline and regulation of the solicitors' profession. It is the professional body for its solicitor members, to whom it also provides services and support.

The headquarters of the organisation are in Blackhall Place, Dublin 7.

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## 1 EXECUTIVE SUMMARY

The economic backdrop of Budget 2023 (and ultimately Finance Bill 2022) is one of the most challenging in some years with external events creating significant macro and micro risks to the economy through increased costs in the domestic and international sectors and ever increasing pressures on housing stock and accommodation in Ireland. Added to this, the economy is contending with the challenges of emerging from a global pandemic, the supply chain squeeze arising from this and the continuing changing international tax landscape.

In our submission, we are focusing on areas of topical and real importance to the people of Ireland which we consider can, and should, be incorporated into Budget 2023.

We have also included certain technical measures in the appendix for consideration.

In our **Budget 2023 Submission**, we therefore focus on three key areas of tax reform:

1. Improving Housing and Accommodation Supply in Ireland;
2. Countering Climate Change; and
3. Keeping Ireland Competitive Internationally.

We also include, as in previous years, a list of technical amendments that are, in the view of the Society, required to achieve greater fairness and efficiency in taxation matters.

## 2 IMPROVING HOUSE AND ACCOMMODATION SUPPLY IN IRELAND

The Law Society of Ireland ("the **Society**") strongly supports the objective of ensuring access to housing for all and a fair and equitable residential letting sector. In this regard, we recommend the following measures which will increase supply and stability in the areas of home ownership and the rental sector.

### ***Help to Buy Scheme – Extension of qualifying period and renovating town centres***

This scheme, which assists first time buyers to get on the housing ladder, was extended in Budget 2022 under the Housing for All initiative. The scheme is increasingly important to incentivise private home ownership in tandem with other measures - in both the alternative and local authority housing areas - as well as the cost rental schemes.

The scheme extends to incentivise the purchase of new properties and also new builds by first time buyers. It does not however extend to refurbishment of properties that were ever used for residential purposes (irrespective of when such use occurred). Even in the case of the purchase of sites with a derelict house, the scheme may not apply.<sup>1</sup>

The Society recommends that the scheme is extended a further 12 months to the end of 2023 to provide certainty, both to purchasers and builders.

Additionally, the Society recommends that the Department of Finance consider extending the application of the scheme to renovation of previously occupied residential property<sup>2</sup>. This could open the scheme to first time buyers seeking to renovate older disused properties which would offer a real incentive to rejuvenate the centres of country towns, which sits well with the modern concepts of remote working and the government-backed approach to local hubs. In turn, it would also relieve some pressure from the new housing stock. Such a measure would enhance the

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<sup>1</sup> Revenue indicates in its guidance that qualification falls to be determined on a case by case basis.

<sup>2</sup> The scheme currently only extends to new properties and properties which may be second hand but they cannot have been used at any time for residential purposes.

Town Centre First Policy in the Housing for All strategy and supplement same by encouraging property ownership in town centres and central areas.

This extension of scope has considerable merit under the climate change strategies insofar as it has the potential to increase populations in existing towns and encourage the development of local business hubs.

### ***Extension of Living City Initiative***

The living city initiative is a scheme of property tax incentives for both lessors and owner occupiers. It is aimed at the regeneration of certain areas in the historic centres of Cork, Dublin, Galway, Kilkenny and Waterford.

The reliefs apply to residential properties for both owner occupiers and lessors in the residential sector as well as commercial and retail relief.

The relief is only available for refurbishment or conversion work carried out during the qualifying period, which is due to expire on 31 December 2022.

The relief targets refurbishment or conversion work on pre-1915 properties.

The Society considers that the scheme, which is focused on the renovation of areas of the city centres, should be central to the Housing for All strategy as it permits disused or underused properties in city centre areas to be brought back into use<sup>3</sup>. The central location of these properties also serves to limit the pressure on road infrastructure and reduce the carbon footprint of occupiers of such properties, all of which is positive from a climate change perspective.

The Society accordingly recommends that the qualifying period for the scheme should be extended by a further 3 years as this period would be required to maximise its entire potential.

We further recommend that the Department of Finance extend the scheme to areas in cities and larger towns which would be targeted for renovation and refurbishment by local authorities. Targeting in this manner would prevent the indiscriminate use of tax incentivised property reliefs and ensure that tax expenditures achieve a required purpose.

This extension of scope of the living city initiative would supplement the Croi Conaithe policy in the Housing for All strategy through renovation of existing stock (in the case of the former) and new developments (in the case of the latter).

### ***The taxation of the (re)development of existing buildings or structures***

Section 21A TCA provides that corporate profits from a trade of dealing in/developing land are, in general, taxed at a corporation tax rate of 25%. Profits from 'construction operations' are taxed at a corporation tax rate of 12.5%, as are profits from 'qualifying land'. In general, 'qualifying land' is land on which a (new) building or structure has been developed by/for the developer company and which is 'fully-developed' at the time of sale.

This means that profits from the development and/or redevelopment of pre-existing/old buildings do not qualify for the 12.5% corporation tax rate. Clearly this means that it is commercially less attractive for developers to redevelop/renovate/refurbish pre-existing properties.

In light of our other commentary in relation to the renovation and rejuvenation of cities and towns, and the benefits thereof from a climate change strategy perspective, it should, in the Society's

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<sup>3</sup> Campaigners have identified 700 derelict properties within a 2km radius of Cork city centre – Irish Examiner – 4 May 2022.

view, be a priority of government to facilitate and encourage such renovation and rejuvenation. This includes a revision of the tax consequences of same.

As such, we recommend that the (re)development of existing buildings and structures should be encouraged and facilitated by providing that all profits from a trade of dealing in/developing land are taxed at a corporation tax rate of 12.5%. This can be achieved by the removal of limb (a) from the definition of "excepted operations" in section 21A TCA (and other consequential changes to section 21A TCA). Alternatively, at a minimum, the definition of "qualifying land" in section 21A TCA should be amended by the removal of limb (a) therein.

This change would also be of benefit in the context of the implementation of urban regeneration projects (e.g. Cork's docklands and various parts of Dublin) in a manner which retains historic buildings and structures of importance and in the completion of the development of "ghost estates".

On a separate – but related - point, Part 22 TCA contains "*Provisions Relating to Dealing in or Developing Land and Disposals of Development Land*". The original provisions in that part of the tax legislation were introduced (in 1968) prior to the introduction of capital gains tax in Ireland (in 1975). In particular, section 643 TCA charges certain gains of a capital nature obtained from the disposal of land or of property (such as shares) deriving its value from land, as income under Schedule D, Case IV. This provision is complex and anomalous, particularly now in light of the development of capital gains tax law and principles, and also general anti-avoidance law, in Ireland. It gives rise to unnecessary uncertainty and complexity for taxpayers that deal in/develop land, and for their advisors. It is beyond time for duplicative provisions of this nature to be removed from the Irish tax code, including on the basis of simplification alone, and also to facilitate the development of land for much-needed housing and accommodation.

Accordingly, the Society recommends that sections 643 and 644 TCA be deleted.

### ***Rent Certainty Leases***

The Housing Agency Report on the Private Rental Sector of October 2014 contained a number of recommendations in relation to both encouraging security for tenants in the sector and encouraging new supply into the sector.

While the Society is aware of the increased State investment in funding housing bodies to take long-term leases of residential property under the HAP scheme, which assists with meeting the housing need, it is clear that the private rental sector will continue to provide important housing supply in the medium and long-term. As such, measures are required to both incentivise supply remaining in the sector and to ensure that rental of property can, insofar as possible, act as a substitute for ownership.

A significant issue for tenants – particularly those with young families of school-going age – is the security of tenure, the need to offer stability in a location and rent certainty into the future.

While rent freezes and rent caps under RPZs provide some measure of relief to hard-pressed tenants, it is clear that a more long-term and sustainable model (for both landlords and tenants) is required in the private rental sector.

In this regard, the 2014 Report highlighted a rent certainty model which could be opted into. It might offer a long-term lease model for the private rental sector that would incorporate:

- Rent certainty with rent increases linked to CPI for the full term of the lease; and
- Security of tenure for a longer period than is usual in the sector.

The ability to promote this in the private rental sector with landlords could be achieved (as recommended in the 2014 Report) by giving a reduction in the rental income liable to income tax (as is the case with leases of farmland for longer periods of time) and also incorporating a measure of CGT exemption on the sale of units which enter into such arrangements.

The arrangements could operate through an 'opt-in' model where landlords would agree to offer a long-term lease to tenants (say 7 to 10 years) at a rent which could, during the tenancy, only increase at the maximum of CPI or 2%. Such a lease model would offer security to tenants with families and allow for certainty on school attendance and location into the future.

As an incentive, property owners would be permitted either a level of income tax relief on rent or an ability to treat the period of ownership of the property when the lease is in place as a period in respect of which CGT relief would apply. This relief would represent an efficient tax expenditure when contrasted with the level of capital cost incurred in rehousing families in units which have been removed from the private rental sector.

Additionally, the level of tax expenditure cost is likely to be very low when contrasted with the capital cost of providing rental accommodation under the 'cost rental' schemes, having regard to the increased development cost of new properties.

### ***Tackling Unfairness in Rent Levels in Rent Pressure Zones***

At present, there is a divergence between the terms enjoyed by existing tenants of properties subject to leases and new tenants. In this regard, a two-tier market has opened up<sup>4</sup> between tenants remaining in properties (who have experienced low increases in rent) and tenants seeking new accommodation (who have experienced much higher rents due *inter alia* to the fact that the rent pressure zone legislation does not cap rents of new properties).

Relevant figures in this regard show the impact of the RPZ caps on rent increases for existing properties. What they do not show however, is the impact of the rent caps on landlords of premises where rents were sub-market rent on the introduction of rent cap legislation. Such property owners were (and remain) unable to increase rents to market rates as the rent cap legislation applies the percentage increases, not to market rents, but to the rent that was applied by the property owner on the introduction of the legislation.

Leaving aside the detrimental impact on mobility of tenants and also investment into the private rental sector, the rent cap provisions have unfairly treated 'good' landlords, who did not charge market rents, and other landlords who did. They may not increase their rent above the annual increases and have, in certain cases, little option but to sell the properties to realise a return on investment.

The outcome of this may explain, to some extent, the drop in private landlords by some 20,000 between 2016 and 2020,<sup>5</sup> but other factors are, of course, involved.

The Society considers that, whilst the focus on new supply into the rental sector is clearly required, preservation of the existing supply is equally important when one considers the replacement cost of a single residential unit for government – when funding local authorities or AHBs – as well as the impact on lives of tenants and their families who suffer the drop in supply.

In order to encourage landlords to remain in the market, we would suggest that income tax relief would be considered for landlords who let properties at rents at or below 75% of market rents in the area. This may be due to the effect of rent caps on such landlords or, if applicable, by choice

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<sup>4</sup> See Daft.ie Rental Price Report Q1 2022 – page 3 to 4

<sup>5</sup> RTB Rental Sector Survey 2020.



on the part of landlords who are already charging market rents. Statistics are now available through the RTB (and indeed other providers) which make the monitoring of same less cumbersome.

The cost of any such tax expenditure would, in the Society's view, assist with retention of supply in the sector as well as addressing a likely cause of landlords departing the sector.

Reliefs could be time limited to allow for new supply to enter the market.

***Partial Rebate of Stamp Duty on Purchase of Land used for Residential Development (Section 83D Stamp Duties Consolidation Act 1999)***

Finance Act 2017 introduced Section 83D Stamp Duties Consolidation Act 1999 (Section 83D) which is a relief that counterbalanced the increase in the rate of Stamp Duty on non-residential property. It sought to ensure that increases in the rate of stamp duty for conveyances of non-residential property would not apply to building land which was acquired/developed for residential purposes.

At the time the Minister stated that:

*"I am keen to ensure that if land is to be acquired for homes and that land is currently classed as non-residential commercial property, then the higher rate does not lead through to the price of the homes going up at the other end or that the rate would not be used as a reason to push up the price of the land."*<sup>6</sup>

The Minister went on to state that:

*"This is not only about ensuring that it does not have inadvertent but likely consequences, such as pushing up the price of homes when they are built, but also serves to provide another incentive or reason to use land that has been acquired to supply residential development as opposed to other forms of development."*<sup>1</sup>

Section 83D essentially provides a partial refund where the higher rate of stamp duty is paid on the acquisition of land which is subsequently used for the development of residential property.

The provision includes various time limits around the relief which were designed to incentivise the timely construction of residential properties. These time limits have been amended in Finance Act 2020 to take account of some impacts of COVID restrictions on the construction industry. However, notwithstanding these amendments, the time limit to complete construction is not practically achievable in many cases. This means that the provision does not meet its intended policy objectives.

The challenges with the construction time limit is include:

- Covid restrictions continued to impact the ability to meet the relevant deadlines after their extension. Section 48 of the Finance Bill 2020 (as initiated) extended the deadline for completion of construction from 24 months to 30 months. This amendment was introduced on 20 October 2020. The impact of COVID extended well beyond October 2020 and it is was not possible to foresee the significant further delays which would be encountered. Such delays were exacerbated by the material disruption caused by the unplanned cessation and recommencement of works and not just limited to periods of

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<sup>6</sup> Finance Bill 2017: [Report Stage \(Resumed\) and Final Stage](#) – Dáil Éireann (32nd Dáil) – Thursday, 23 Nov 2017 – Houses of the Oireachtas

lock down (given that it takes time to reopen sites, mobilise construction teams, organise supply chains and generally operate at full capacity).

- The defined start and end date of the 30 month construction period means - in practice - that the period available for construction can be significantly less than 30 months. This is because the 30 month clock starts on acknowledgement of the Commencement Notice when, in practice, construction may not ramp up to full capacity for several months after this date. In a similar vein, the time period ends when a Completion Certificate (as defined) issues. In reality, there will be many months between practical completion of a residential development and issuing a Completion Certificate. This can take anywhere from a few months to nine months with the exact period largely outside the control of the developer.
- The approach of applying the time limits to individual “Commencement Notices” provides some flexibility to manage the time limits by essentially allowing the taxpayer elect to apply the time limit to specific phases of a development. However, this approach provides significantly less flexibility than one may expect. In particular, large scale high rise apartment developments are at a significant disadvantage compared to smaller apartment developments and low rise housing schemes. This is because a high rise development cannot use multiple Commencement Notices to manage compliance with time limits.

The nature of such schemes means that it is not possible to phase the development. This is because the piling works and construction of the common basement/ground floor podium that supports all apartments must be completed before any apartments in the block can be completed. Moreover, all apartments in a block must be completed before any are considered completed. For example in a ten story block it is not possible to phase the construction such that the first five floors are completed and a Completion Certificate issued in respect of same. That will not be possible until all ten floors are completed. It is difficult to see why a particular sector of the residential development market should be discriminated against in the application of this provision. The Minister made no reference to a policy decision to exclude high rise apartment complexes from the provision, but the application of the time limits delivers that outcome, in practice.

The current demand for resources, both labour and raw materials, means that the time involved in delivering projects is currently longer than when these time limits were decided on.

In order to ensure that Section 83D meets its policy objective we recommend that:

- The 30 month period to complete a development is extended to 48 months to fully reflect the significant impact COVID delays have had on projects and to also reflect the inability for high rise apartment developments to be completed within the current time scales. Alternatively, consideration could be given to a general extension of the time limit to 36 months, with an extended timeline of 48 months for apartment developments above a certain height; and
- The end of the construction time limit is amended to the practical completion of the residential development (as certified by the Architect of the development) with a proviso that the Completion Certificate is issued within nine months of the date practical completion is so certified.

### 3 COUNTERING CLIMATE CHANGE

#### *Introduction*

The use of tax incentives changes behaviour and, in light of the urgency concerning measures to reduce carbon emissions in both domestic and international economies, tax incentives should be central to any fiscal policy.

Such measures could serve two purposes:

1. Encouraging changes in behaviour in Ireland; and
2. Encouraging the positioning of Ireland internationally as a leader in countering climate change.

In the following sections of this submission, we have identified tax incentive and fiscal policy measures that the Department of Finance might consider in relation to achieving these purposes.

#### *Encouraging Changes in Behaviour in Ireland*

- **Incentives to retro-fit housing stock** – although the grant based system operated by SEAI is generous, the grants will, in most cases, only cover a percentage of the costs incurred which discourages people from taking-up the scheme. Wider uptake of the scheme would be possible if the residual cost to house-owners could qualify for a form of tax relief. An appropriate relief might be modelled on the owner/occupier relief that affords an annual relief over 10 years at a rate of 5% of the cost.
- **CGT relief –renovation of older properties in rental sector** – the introduction of rent pressure zone legislation has effectively introduced a cap on increases in rent. The anecdotal effect of this cap on rents has been that improvement of standards of rental accommodation will be impacted as landlords will not be able/willing to fund the cost of such work. This also applies to investment in improving the energy efficiency of rental stock. With the increase in energy costs, and such increases disproportionately affecting those living in the rental sector, it is critical that a scheme can be devised to incentivise increases in energy efficiency in the sector. Realistically, this cannot be a tenant-based incentive, as the incurring of capital costs is not a tenant-type expense. It will have to be focused on the landlord (who will incur the cost). One cost efficient means to incentivise such work might be to consider a form of relief from CGT that would apply on a later sale where this sale occurs no earlier than 10 years following the work being done and where the work has improved the BER rating of the property to no less than B2 standard.

## **4 KEEPING IRELAND COMPETITIVE**

Ireland has built a strong reputation globally as one of the most attractive jurisdictions in which to establish business operations. In order to keep Ireland competitive, it is important to encourage development and increase skills to grow the indigenous economy and encourage inward investment, particularly in this period of change arising from the pandemic, ongoing proposed international tax reforms and post-Brexit considerations.

The Society strongly supports the objective of making Ireland's tax regime competitive and attractive to job creation. We also support the establishment of the Commission on Taxation and Welfare to consider how Ireland can maintain a stable taxation policy to sustain Ireland's attractiveness to foreign direct investment. However, we are of the view that certain existing tax provisions are counter-productive to this aim and amendments to these provisions would assist in achieving the objective of keeping Ireland competitive.

Section 2 of the Appendix includes a list of recommendations which have been included in previous Society submissions and which - for the reasons set out above - we are again recommending that they be legislated for. Again, many of the changes should not give rise to any cost to the Exchequer but will be helpful from the perspective of competitiveness and should therefore encourage inward investment.

Issues we would like to highlight include:

### **i. Improving Ireland as a holding company location**

Ireland, as an EU Member State with a wide double tax treaty network, is regarded as a leading destination to establish a holding company. However, when comparing Ireland as a holding company location to other EU countries and the UK, there are a number of provisions either in, or missing from, the tax regime which place Ireland at a competitive disadvantage. Key items which could be changed include:

- Ireland's regime for the taxation of foreign dividends is unnecessarily complex. The tax treatment of dividends received can vary depending on whether the dividend is derived from trading profits or otherwise and whether the company paying the dividend is located in an EU Member State, a double tax treaty partner jurisdiction or elsewhere. In particular, the operation of Schedule 24 is overly cumbersome. We note the public consultation on a proposed move to a territorial based tax system. Per the responses to the Coffey/ATAD consultation, we strongly support the proposal that the Irish rules should be revised to introduce a participation exemption. It is vital that this is introduced as a matter of urgency.
- Providing for an exemption to a withholding tax charge on interest paid by Irish companies to Irish companies such that interest can be paid without withholding tax. This would bring Ireland into line with the UK which provides a full exemption and would encourage the free-movement of capital within Ireland. Further details are included at section 2.5 of the Appendix.
- Extending the application of section 626B TCA 1997 to companies located in non-treaty partner jurisdictions by amending the definition of 'relevant territory' would be a welcome development. Further details on this issue are included at section 2.7 of the Appendix.
- Extending the application of section 626B TCA 1997 to where activities of subsidiaries are engaged in R&D or ESG projects.

## ii. **Stamp Duty**

In order to ensure ongoing investment in Irish companies, we support a review of the current rate of stamp duty on the transfer of stocks or Irish marketable securities and a reduction of the rate of stamp duty on such transfers to 0.5% in line with the stamp duty rate in the UK. In addition, we would support a review of section 31D SDCA in light of TAC Determination 08TACD2021.

## **5 TECHNICAL ISSUES**

In the Appendix, we have detailed a number of legislative changes many of which we have suggested in previous pre-budget submissions. Some of these include legislating for existing published Revenue extra-statutory concessions. Where the proposed recommendations are to legislate for existing Revenue practice then, by definition, there will be no loss to the Exchequer but there will be more clarity and certainty for the taxpayer.

## **6 CONCLUSION**

The Society, through its various policy Committees, wishes to engage constructively with the relevant Departments and State Agencies, to ensure that Ireland positions itself as an attractive jurisdiction for the business community, mobile talent and - most importantly - for its citizens.

The proposals highlighted in this submission (some of which are set out more comprehensively in the attached Appendix) are pragmatic and based on the practical experience of our member practitioners.

We would again ask for an opportunity to discuss the Finance Bill at an early stage of deliberations in respect of same on issues which are relevant to members and the citizens they represent.

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## 1 INEQUALITIES IN LEGISLATION

### 1.1 QUALIFYING BENEFITS OF PERMANENTLY DISABLED INDIVIDUALS

- 1.1.1 Section 84 CATCA 2003 exempts benefits taken exclusively for the purposes of discharging qualifying expenses of certain individuals. In the past, once it could be verified that benefits are being applied for such purposes, the benefits were then treated as exempt.
- 1.1.2 However, Revenue has now formally taken the view that the section refers to benefits made (as opposed to taken) exclusively for the relevant purposes and it is the Revenue's view that there must be intention in the mind of the disponent for the exemption to apply. In this way Revenue requires evidence from the disponent that s/he provided the benefit exclusively for that purpose. The effect of this is that a general bequest without conditions attached, or indeed a benefit taken on intestacy would not, in Revenue's view, qualify for exemption according to Revenue's guidelines.
- 1.1.3 The view taken by Revenue appears to be a change in policy, relying on an unreported Appeal Commissioners case and, in any event, appears to be contrary to the legislation, which refers to benefits taken, not benefits made. It is also contrary to a recent decision of the Tax Appeal Commission.
- 1.1.4 Given the nature of the exemption sought by a beneficiary who is clearly exposed to medical expenses which could be somewhat alleviated by a gift or inheritance, it would seem inappropriate for such a restrictive approach to be taken. Given that the qualifying expenses are defined, it would seem unlikely that this matter could be open to abuse and, in any event, Revenue has the right under the section to satisfy itself that the benefit has been or will be applied for the appropriate purpose.
- 1.1.5 The conditions regarding applying the benefits to qualifying expenses can be agreed by the beneficiary (or his trustee or attorney on his behalf) to ensure compliance with the legislation.
- 1.1.6 Section 84 (2) CATCA 2003 provides that a gift or inheritance which is taken by a permanently incapacitated individual exclusively to discharge qualifying expenses is exempt from Capital Acquisitions Tax. Qualifying expenses are quite narrowly defined as relating to medical care and the cost of maintenance of such medical care.

#### **Law Society Recommendations**

That it be clarified in legislation that there is no requirement to restrict the exemption in the manner outlined above but that the beneficiary would be allowed (or those acting on behalf of the beneficiary in cases where the disability is of a cognitive nature) to take the benefit free from CAT, subject to Revenue's power to audit where deemed appropriate.

That the definition of 'qualifying expenses' be expanded to provide for general maintenance of the donee to include general carer and therapy costs and further that the requirement of the donee to provide evidence of the intention of the donor be dispensed with.

## 1.2 TAXATION OF SURVIVING QUALIFYING COHABITANT

- 1.2.1 Item 27 of the Third Schedule to the Finance (No. 3) Act, 2011 inserted Section 88A CATCA 2003. Section 88A provides that any gift or inheritance received by a qualified cohabitant under a Court Order under s. 175 of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act, 2010 shall pass free from CAT. There is no other provision in the Finance (No. 3) Act, 2011 for any tax relief for cohabitants.
- 1.2.2 Where a cohabitant feels it just that he or she should make financial provision for a financially dependent cohabitant and does so either by will or deed, such provision is taxable on the basis of a gift / inheritance from a stranger. The exact same provision, if ordered by a Court, would pass free from tax. This anomaly can only have the effect of encouraging financially secure cohabitants to deliberately fail to make such provision in the knowledge that any order of the Court, which may well not be challenged by their estate, would pass free from tax to their financially dependent cohabitant.

### Law Society Recommendation

That any provision made by a person by will or by deed, for the benefit of a qualified cohabitant, should have the benefit of a Group A Threshold, save where an order of the Court under s. 175 of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act, 2010 applies, in which case such provision ordered by the Court should continue to be free from tax.

## 1.3 DWELLINGHOUSE EXEMPTION AND QUALIFYING COHABITANTS

- 1.3.1 Dwellinghouse Exemption was originally introduced by s.151 of Finance Act, 2000, replacing Close Relative Relief, which in its turn replaced Sibling Relief. S.151 inserted s.59C to the CAT Act, 1976, which in turn became s. 86 CATCA 2003.

All these reliefs and exemptions were in relation to a dwelling where the disponer and the beneficiary all lived in the dwelling and the beneficiary did not have an interest in any other dwelling. The whole or a share in the dwelling could be gifted ("*inter vivos*") or devised or bequeathed ("by will") to the beneficiary free from CAT provided certain conditions were met. The significant change introduced in 2000 was that the pre-existing relationship requirement was removed.

For cohabitants, this meant that the member of a cohabiting couple, either same sex or opposite sex who owned the dwelling the couple lived in could provide, either *inter vivos* or by will for the surviving cohabitant. The need of the surviving cohabitant for housing security could be met by the owning cohabitant either transferring the property into joint names or making provision by will, without incurring a liability to CAT. This was prior to any legislative provision for same sex couples and for opposite sex cohabiting couples.

In 2007, because of a perceived abuse of the exemption, the section was repealed and replaced in its entirety by s.116 Finance Act, 2007. S.116 provided that for *inter vivos* transfers, the relief would not be available where the disponer and the beneficiary resided in the dwelling at the same time.

Cohabitants however, could not transfer the property or a share in the property *inter vivos*. This of course, was prior to the Civil Partnership and Certain Rights and Obligations of Cohabitants Act, 2010 ("the Civil Partnership Act, 2010") and Finance (No. 3) Act of 2011 which regularised the legal and tax position for same sex couples who could now enter

into Civil Partnership and acquire the tax status of a married couple, including an exemption from CAT. Since then, we have had the Same Sex Marriage Referendum and the Marriage Act, 2015 which effectively replaces Civil Partnership with Same Sex Marriage. Existing Civil Partners can marry each other relatively easily and since February 2016 no new Civil Partnerships may be registered.

For cohabiting couples however, while the Civil Partnership Act, 2010 and the Finance (No. 3) Act of 2011 did introduce the concept of the “qualified cohabitant” and provide some measure of protection and tax relief for a qualified cohabitant (as defined), a corresponding recognition of the status of a qualified cohabitant has not been provided for CAT generally. In particular, it did not provide a similar exemption from CAT in relation to a shared dwelling. As noted, cohabiting couples, who satisfy the requirements of the Civil Partnership Act, 2010 to be considered qualified cohabitants cannot transfer the property *inter vivos* from the sole name of one cohabitant into the joint names of both without incurring a very significant liability to CAT.

Tax free transfers of the shared (but not co-owned) home can be only effected on death.

Section 52 of the Finance Act 2016 restructured the exemption significantly, confining it for the most part to inheritances where the beneficiary has been residing in the property. However no degree of recognition of the plight of qualified cohabitants can be discerned from the proposed legislation.

The Society’s practitioners regularly see in practical difficulties caused by this omission. The Society calls upon the Department to consider the needs of qualified cohabitants when reviewing Dwelling Exemption.

#### **1.4 ANOMALIES AROUND SUPPORT AND MAINTENANCE EXEMPTION FOR CHILDREN OF DECEASED PARENT**

1.4.1 Section 82 (2) CATCA 2003 as amended by Section 81 Finance Act 2014 provides an exemption for certain payments of money or monies worth to, inter alia, a child of a disponent for the support, maintenance or education of such child up to the age of 25 if in full time education or where the child is permanently incapacitated as defined. Section 82 (4) extends this exemption to money or monies worth received by a minor child of the disponent or a child in full time education up to the age of 25 at a time when both the disponent and the other parent of the minor child are dead.

1.4.2 This gives rise to an inequitable anomaly which has become more pronounced as a result of the reduction in threshold amounts and societal changes in recent years. This anomaly is caused by the requirement that the other parent of the minor child be dead.

##### **Example:**

Parents of a two year old child die simultaneously and leave their entire estate in order to provide for the care, maintenance and education of that child. This provision will be exempt from CAT for so long as that child is a minor or in full time education up to the age of 25.

However the relief would not be available where (for example) a lone parent was raising the child and the other parent has no role in the child’s life, on the death of that lone parent.



In this case, the exemption is denied solely on the basis that the other parent is still living even in circumstances where there may have been no relationship between the parents or the child and the surviving parent and that the surviving parent may never have contributed to the support and maintenance of the child.

#### **Law Society Recommendation**

It is proposed that Section 82(2) CATCA 2003 be extended to apply in the case of benefits taken from deceased parents for support, maintenance or education without the restrictions contained in Section 82(4).

### **1.5 DISCRETIONARY TRUST TAX**

- 1.5.1 Under s.111 Finance Act 2012, which took effect in relation to deaths arising since 8 February 2012, where a discretionary trust is created under a will (or codicil) of a deceased person, the property is deemed to become subject to the trust at the date of death of the deceased.
- 1.5.2 The legislation as drafted appears to capture discretionary trusts that are created under wills but which are not intended to come into effect until after a prior interest in possession has expired.
- 1.5.3 Revenue has confirmed by revision of the Revenue Manual (April 2012) that this was not the intention of the legislation, which revision confirmed that the taxation of such future trusts is not changed by the Finance Act 2012. However, this clarification is not legislated for and therefore the current legislation is unsatisfactory.

#### **Law Society Recommendation**

That the Revenue Commissioners amend S. 15 (1A) CATCA 2003 (as inserted by S. 111 of the Finance Act, 2012) by inserting the following sentence:

*“save where an intervening interest or interests in possession arise. In such case, the discretionary trust will come into effect on the termination of the last such interest in possession.”*

### **1.6 GOVERNMENT SECURITIES**

#### **Exemption of Government securities under Section 81 CATCA 2003**

- 1.6.1 Government securities and units in certain authorised unit trust schemes are exempt from both Gift and Inheritance Tax (“CAT”) if a beneficiary who is neither domiciled nor ordinarily resident in Ireland takes them. The conditions attaching to the relief were amended in 2001 and 2003. It is submitted that in the current climate the conditions have become inappropriate and unworkable and are in need of urgent reform in order to attract investment into such Government securities. The current rules can also cause unintended anomalies and hardship for those who have invested in Government securities in the expectation of qualifying for the exemption.
- 1.6.2 Under Section 81 CATCA 2003, where Government bonds are gifted by an Irish resident donor to a beneficiary who is neither resident nor ordinarily resident in Ireland, those bonds are exempt from CAT but only if they had been held by the donor for a

continuous period of 15 years immediately before the date of the gift. The holding period in respect of Government bonds acquired before 15 February 2001 had been 3 years. With effect from 15 February 2001 that holding period was doubled to 6 years, before the increase in the holding period from 6 to 15 years in 2003.

- 1.6.3 It is clear that the introduction of a 15-year holding period had the effect of removing many individual investors from the marketplace as this holding period is simply too long for individuals or trustees of family trusts to contemplate. Many of them would be unable to commit to such a lengthy holding period as 15 years. It is submitted that the holding period should be revised to 3 years, to encourage investment by individuals and trustees in Government bonds again. There are in any event - insofar as can be established - currently very few Government bonds that are issued with a 15-year maturity date that would be capable of satisfying the terms of the exemption.
- 1.6.4 The current rules can also cause hardship, uncertainty and unintended anomalies for those who have invested in Government securities in good faith, in the expectation of qualifying for the exemption.
- 1.6.5 It is submitted that the section should be amended to provide that, where a person has invested in Government bonds which have matured, if the proceeds are re-invested in a new issue of Government bonds, rollover relief should apply so that the person is treated as holding the bonds from the date the investment in Government stock was first made.
- 1.6.6 There are known to be cases where trustees of family trusts with beneficiaries who are neither domiciled nor ordinarily resident in Ireland have invested consistently in Irish Government stock since the 1980s when there was a 3-year holding period. The trust would typically hold these bonds for the benefit of an Irish-resident life tenant, who would receive the interest income, and on the death of the life tenant the bonds would pass absolutely to the person entitled to the capital of the trust fund (the "remainderman"). Clearly, the trustees have no way of predicting when the life tenant will die and the remainderman will become absolutely entitled to the bonds. Even though these trustees have consistently held Government stock since the 1980s, the exemption could be denied if the life tenant died 14 years after the trustees had re-invested in a bond replacing earlier ones that had matured. This is clearly unjust and inequitable.

#### **Law Society Recommendations**

Section 81 CATCA 2003 should be amended to –

- allow a person to roll-over the proceeds of matured or redeemed Government stock into other qualifying Government stock, with the periods during which the old and new stock were held being aggregated in evaluating if the holding period is satisfied;
- provide that the holding period to be applied is the one that was applicable at the date of the initial purchase of Government stock by that person if more favourable than that applicable when replacement stock was purchased;
- reduce the holding period to 3 years.

## **1.7 CAT AND INCOME TAX**

- 1.7.1 The term “benefit” for CAT purposes is defined in Section 2 CATCA 2003 as including “any income”. Thus a sum of money that constitutes income is subject to a double charge to tax. It is treated as income and subject to income tax in the hands of a tax payer (potentially at the top rate of up to 55%) but the same sum is also regarded as a benefit for CAT purposes so that a CAT charge of an additional 33% can arise. This is the only circumstance in the tax code where the same sum can be subjected to two separate taxes in the hands of the same taxpayer.
- 1.7.2 The current position is perceived as inequitable and imposes an unduly harsh burden in cases where the problem occurs. It undermines the integrity of the tax system and discourages compliance as often taxpayers simply cannot fund both tax charges from the same sum.

### **Law Society Recommendation**

It is proposed to stipulate in the CAT code (as is the case in Section 551 TCA to eliminate the same sum being subject to CGT and income tax) that income tax is the primary tax and that if a sum of money is liable to income tax then it is to be excluded from the charge to CAT.

## **2 KEEPING IRELAND COMPETITIVE**

### **2.1 WITHHOLDING TAX ON QUOTED EUROBONDS**

- 2.1.1 Section 64 TCA provides that no withholding tax shall be deducted from interest paid on “quoted Eurobonds”. This is a useful provision in the context of the Irish financial services industry. One of the conditions for the exemption is that the bonds are held in a “recognised clearing system”. Recognised clearing systems are used where the paying agent in respect of the bonds is “not in the State”. As the interpretation of “not in the State” could potentially require paying agents to have no presence in Ireland, this can cause difficulties in satisfying this condition.
- 2.1.2 Furthermore, the list of “recognised clearing systems” in section 246A(2)(a) TCA inevitably cannot keep up with a fast moving industry. The combination of this means that some uncertainty can exist in some cases as to the application of the quoted Eurobond exemption.

### **Law Society Recommendation**

The position regarding recognised clearing systems should be amended to read “clearing system” by the deletion of “recognised” and the corresponding definition in section 246A(2)(a) TCA.

In addition, the reference to a paying agent “not in the State” should be clarified so that it is clear that the test is satisfied where the *role* of paying agent is performed outside the State, irrespective of whether the paying agent has other operations in the State. This latter amendment should help remove a potential disadvantage for paying agents with operations in Ireland.

The current lack of clarity around this term could have the absurd effect of deterring international financial services providers from establishing branch operations in Ireland.

## 2.2 TREATMENT OF DISPOSAL OF PATENT RIGHTS

2.2.1 Irish tax law distinguishes between the disposal of patents themselves and the disposal of “patent rights” in the following manner:

- the disposal of patents is regarded as a capital disposal and any gain arising is subject to the capital gains tax rate of 33%; whereas
- the disposal of “patent rights” (e.g. a licence granted to use a patent) is not subject to capital gains tax, but instead is chargeable to tax under Schedule D, Case IV pursuant to section 757 TCA and is subject to corporation tax at 25%.

2.2.2 Issues arising under section 757 TCA

Section 757 TCA was introduced in Ireland in 1967 (prior to the introduction of capital gains tax) as an anti-avoidance measure to prevent certain receipts from being earned tax free. Once capital gains tax was introduced, the reason for this anti-avoidance measure fell away. In practice, the continuing existence of this provision gives rise to anomalies in the tax treatment of reorganisations.

2.2.3 Irish tax legislation permits companies to restructure their operations in a tax-free manner where no actual gains are realised (for example, where assets are transferred intra-group under section 617 TCA or on a restructuring under section 615 TCA). However, a charge to corporation tax at 25% can arise on the disposal of patent rights as part of the same reorganisation with no available reliefs. This requires businesses seeking to restructure to perform a costly and burdensome valuation exercise to try to identify the value of the patent rights element of the business. In some cases, it can even result in the proposed reorganisation being abandoned or being restructured, thereby increasing cost.

### **Law Society Recommendation**

That section 757 TCA should be repealed and patent rights should be treated as any other chargeable asset (as is clearly envisaged by section 533(h) TCA).

If this is not possible, at the very least, changes should be made to facilitate reorganisations of businesses in a tax efficient manner where existing reliefs and exemptions are available for the disposal of capital assets. This could be achieved by providing that section 757 TCA will not apply to disposals of patent rights, where, the transaction qualifies for relief or exemption from Irish tax on chargeable gains pursuant to the various reorganisation reliefs available.

## 2.3 WITHHOLDING TAX TREATMENT OF ROYALTY PAYMENTS MADE TO IRISH COMPANIES

2.3.1 It is generally possible for Irish companies to pay royalties to companies in EU Member States and double tax treaty partner jurisdictions free from Irish withholding tax. That is not the case where similar payments are made to Irish companies and generally exemption from withholding tax is only available if the payer and recipient companies are related through 51% commonality of ownership. Given Ireland’s success in attracting IP-intensive businesses to Ireland, the increasing commercial dealings between these Irish-based businesses and the desire to promote Ireland as the location of choice for exploiting IP, withholding tax on royalty payments made to Irish companies should be abolished.

- 2.3.2 It is difficult to justify the disparity of treatment between payments made to Irish resident recipients and non-Irish resident recipients, particularly as Irish residents will be required to include the income in their own tax returns. Further, the obligation to withhold imposes an additional and unnecessary administrative burden on both the payer and recipient.

#### **Law Society Recommendation**

That section 242A TCA should be extended to provide an exemption from withholding tax in respect of royalties paid to Irish resident companies where:

- the payment is made in the course of a trade or business carried on by the payer; and
- the payment is made for bona fide commercial reasons and does not form part of an arrangement the main purpose of which is tax avoidance.

#### **2.4 APPLICATION OF SECTION 29 TCA TO COMPANIES MIGRATING TO IRELAND**

- 2.4.1 The current language in section 29 TCA gives rise to ambiguity in the context of the taxation of companies that are not resident in Ireland for the entirety of a calendar year. While we understand that confirmations have been provided on this point in the past, we would be grateful if consideration could be given to now legislating for those confirmations.
- 2.4.2 Section 29(2) TCA provides that a company shall be chargeable to CGT in respect of chargeable gains accruing to such company “*in a year of assessment for which such [company] is resident ...in the State.*” However, companies are subject to corporation tax on capital gains by reference to accounting periods, and not years of assessment.
- 2.4.3 There is no case law or published Revenue guidance on whether a company that is resident for part only of a year of assessment is considered to be resident “for” the year of assessment for CGT purposes or whether such company should only be considered resident for CGT purposes from the date of commencement of its accounting period.
- 2.4.4 It seems unreasonable that Ireland should have the right to subject a company to Irish taxation as if it were resident at the time of a disposal, when it clearly was not so resident at that point. With this in mind, we understand that it has previously been confirmed that:
- 2.4.4.1 the reference to “year of assessment” in section 29(2) TCA should be read as “accounting period” in so far as it relates to a company and that on this basis, a company is chargeable to CGT (or in accordance with section 21(3) TCA corporation tax on chargeable gains) in respect of chargeable gains accruing to it in an “accounting period” for which the company is resident in Ireland; and
- 2.4.4.2 that a company which is resident for part only of a year of assessment (i.e. the calendar year) is not considered to be resident “for” the year of assessment but rather only for the period after the start of its accounting period or before the end of its accounting period.

### **Law Society Recommendation**

That an additional line be included in section 29(1) TCA to state:

*“references in this section to “year of assessment” shall be construed as referring only to an “accounting period” in the context of a company.”*

## **2.5 WITHHOLDING TAXES ON INTEREST PAID TO IRISH COMPANIES**

2.5.1 While it is generally possible for Irish companies to pay interest to companies in EU Member States and double tax treaty partner jurisdictions free from Irish withholding tax, that is not the case where interest is paid to Irish companies. Under existing Irish law, exemptions from withholding tax are available in respect of interest payments made to non-Irish resident companies if:

- interest is paid to persons resident in an EU Member State or a double tax treaty partner jurisdiction and that jurisdiction imposes tax on interest received from sources outside that jurisdiction (section 246(3)(h) TCA);
- interest is paid to persons resident in a double tax treaty partner jurisdiction and the interest is exempt from income tax under the terms of the treaty (section 246(3)(h) TCA); or
- interest is paid to an associated company that is resident in an EU Member State other than Ireland (section 267I TCA).

2.5.2 The exemptions available from withholding tax on interest paid to Irish companies are more restrictive. Exemptions are only available in a group context, or to particular types of companies, such as banks, funds and registered non-bank lenders. The disparity of treatment between interest payments made to Irish resident lenders and non-Irish resident lenders is difficult to justify.

2.5.3 The equivalent UK legislation provides a full exemption from withholding tax on interest where the borrower reasonably believes that the company is resident in the UK for UK tax purposes or the interest is within the charge to corporation tax by virtue of the lender having a permanent establishment in the UK.

### **Law Society Recommendation**

That the Irish legislation be amended to provide a similar exemption for interest payments made to Irish resident companies.

## **2.6 SHARE BASED AWARDS – EXCHANGE OF RESTRICTED SHARES**

2.6.1 Currently, section 128D(4) TCA provides a relief in respect of restricted shares. The maximum relief is available where the period of restriction lasts for 5 years or more. If the relevant director or employee disposes of the shares before the period of restriction has elapsed, the relief is clawed back. This claw back also arises in circumstances where restricted shares are exchanged for shares with equivalent restrictions. This result is anomalous.

### **Law Society Recommendation**

That section 128D(5) TCA be amended to include the additional underlined text set out below:

*“Where [an amount chargeable to income tax] under Schedule E or Schedule D on the acquisition of shares by a director or employee is reduced in accordance with subsection (4), and—*

*(a) the restriction on the freedom of the director or employee to assign, charge, pledge as security for a loan or other debt, transfer, or otherwise dispose of the shares acquired by him or her is subsequently removed or varied, or*

*(b) the shares are disposed of in any of the circumstances mentioned in subparagraphs (i) and (ii) of subsection (3)(c) before the specified period expires, except where the new shares acquired under sub-paragraph (I) or (II) of subsection 3(c)(ii) are subject to the same restrictions for the unelapsed specified period as the shares which have been disposed of ...”*

## **2.7 SECTION 626B (EXEMPTION FROM TAX IN THE CASE OF GAINS ON CERTAIN DISPOSALS OF SHARES) TCA 1997**

- 2.7.1 Section 626B TCA provides for an exemption from Irish capital gains tax in respect of disposals by companies of substantial shareholdings in trading subsidiaries where the trading subsidiary whose shares are disposed of is tax resident in an EU member state (including Ireland) or a country with which Ireland has a double tax treaty. This exemption was introduced in order to strengthen Ireland's holding company regime and maintain Ireland's competitiveness as a jurisdiction for the establishment of holding companies. To further enhance Ireland's attractiveness as a holding company location and facilitate investments by Irish companies in countries which have ratified the OECD Convention on Mutual Administrative Assistance in Tax Matters (the "**Convention**"), Section 626B TCA should be extended to include disposals of substantial shareholdings in trading subsidiaries which are tax resident in a territory which has ratified the Convention.
- 2.7.2 The scope of section 626B TCA can be contrasted with Section 21B TCA which contains another favourable feature of Ireland's holding company regime. Section 21B TCA extends the 12.5% rate of corporation tax to certain dividends received by Irish companies where they are paid out of the trading profits of certain non-Irish resident companies. Section 21B TCA was extended in Finance Act 2012 to facilitate investments by Irish companies in countries which have ratified the Convention. In order to ensure that section 626B does not negate the benefit of the amendments that were made to section 21B TCA, the definition of "relevant territory" for the purposes of section 626B should be extended to include a territory the government of which has ratified the Convention.
- 2.7.3 The recommended amendment to section 626B TCA would also broaden the exclusions from the definition of "investment income" for the purposes of the close company surcharge in section 440 TCA. Section 440 TCA imposes a surcharge of 20% on the undistributed investment and rental income of close companies. For the purposes of determining whether a surcharge may apply, "investment income" is defined in section 434(1) TCA and essentially comprises interest and dividend income subject to certain exceptions. Dividends or other distributions received in respect of shares at a time when

any gain on a disposal of those shares would not have been a chargeable gain by virtue of section 626B TCA are specifically excluded from the definition of "investment income". Accordingly, extending the scope of the relief in section 626B TCA would also have the benefit of ensuring that the close company surcharge would not negate the benefit of the amendments that were made to section 21B TCA and, more generally, Ireland's favourable holding company regime.

#### **Law Society Recommendation**

All changes that are recommended to the existing text of the following provisions appear in *italics* for additions.

Section 626(B)(1) TCA should be amended as follows:

"relevant territory" means –

- (i) a Member State of the European Communities;
- (ii) not being such a Member State, a territory with the government of which arrangements having the force of law by virtue of section 826(1) have been made;
- (iii) not being a territory referred to in subparagraph (i) or (ii), a territory with the government of which arrangements have been made which on completion of the procedures set out in section 826(1) will have the force of law; *or*
- (iv) *not being a territory referred to in subparagraph (i), (ii) or (iii), a territory the government of which has ratified the Convention referred to in section 826(1)(C),"*

### **3 TECHNICAL ISSUES**

#### **3.1 ABOLITION OF STAMPING REQUIREMENT IN NON OR LOW VALUE SALES/LEASES**

- 3.1.1 One of the objectives of the Revenue Commissioners is to avoid imposing unnecessary expense and obligations on taxpayers, in particular, business taxpayers. Documents transferring Irish assets, other than stocks or marketable securities where the amount of stamp duty payable is nil or very small, still require to be stamped (See Schedule 1, paragraph 1(b)(ii) of the Stamp Duty (E-stamping of Instruments) Regulations 2009).
- 3.1.2 Where a stamp duty transaction results in a respectable return to the Exchequer, it is reasonable that the taxpayer should absorb the costs of making the return and the retention of the records. Where there is little or no return to the Exchequer, this burden is much harder to justify.
- 3.1.3 Examples of non or low stamp duty yielding transfers include certain surrenders of occupational leases, and other transfers of interests of little or no value e.g. the freehold interest being acquired by the owner of a property which is subject to a ground rent. Securing the tax numbers of the relevant parties, filing on-line and retaining records for a minimum of 6 years for these non or low yielding transfers can be a costly and time consuming exercise.



### Law Society Recommendation

Conveyances on sales and leases where the consideration is €1,000 or less should be free of stamp duty and should not be required to be submitted to the stamping process. This would bring this head of stamp duty into line with the stocks and marketable securities head.

## 3.2 SECTION 80 SDCA

3.2.1 Currently, the term “acquiring company” pursuant to Section 80 SDCA is limited to companies incorporated in the EU/EEA. This definition was extended under the provision Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2019 to ensure that the relief could still be availed of by “acquiring companies” incorporated in the United Kingdom post-Brexit. The definition of “acquiring company” should be extended to include companies incorporated in countries with which Ireland has a double tax treaty. Irish start-ups and small to medium sized enterprises commonly seek funding from sources outside the EEA, principally in the United States. Frequently, US funders or equity providers insist on the incorporation of a US holding company to facilitate the making of the investment.

### Law Society Recommendation

It is proposed that section 80 SDCA (*Reconstructions or amalgamation of companies*) be amended such that an “acquiring company” may be a company which is incorporated in a jurisdiction with which Ireland has a double taxation agreement in force. This could be achieved by replacing sub-section 10(a) with the following paragraph:

*“(a) that the acquiring company referred to in this section is incorporated in –*

- (i) another Member State of the European Union,*
- (ii) an EEA State within the meaning of section 80A,*
- (iii) the United Kingdom, or*
- (iv) **a territory with the government of which arrangements having the force of law by virtue of section 826(1) of the Taxes Consolidation Act 1997 have been made,***

*or”*

The above amendment would allow for a group to be restructured with a new holding company in a treaty partner jurisdiction.

Additionally, the amendment will facilitate investment from outside the EEA without triggering a charge to Irish stamp duty on any re-organisation implemented to facilitate the investment.

3.2.2 Finance Act 2017 made a number of amendments to section 80 SDCA 1999, including introducing subsection 80(2)(b) SDCA 1999, which specifically excludes the use of a newly incorporated LTD. This stems from the fact that 80(2)(a)(ii) SDCA 1999 requires that a company has been “established... with a view to the acquisition...” and; as a DAC is the only form of private limited company that can expressly state the purpose of its establishment, it is the only form of new company that can be used to meet this condition.

- 3.2.3 It seems an unnecessary restriction on the use of an LTD particularly in circumstances where the powers of the LTD are sufficient for the purposes of s 80 SDCA 1999 and that an LTD is the preferred model of private company.
- 3.2.4 The Society's recommendations would enhance the overall compatibility of s 80 SDCA with the provisions of Council Directive 2008/7/EC. In this context, we would also recommend a broader review of s 80 SDCA in light of the provisions of Council Directive 2008/7/EC.

#### **Law Society Recommendation**

Section 80(2)(b) SDCA is either removed or is amended to clearly state that its application is to companies newly formed for the purposes of the relief.

### **3.3 CHANGES TO SECTION 79 SDCA**

- 3.3.1 The Finance Act 2017 made a number of changes to the clawback provisions under Section 79 SDCA to accommodate mergers and the previous concessionary practice in relation to liquidations. The exception in section 79(7A) SDCA 1999 is specific to mergers by absorption.
- 3.3.2 Finance Act 2017 amended associated companies relief (section 79 SDCA) to provide relief for a 'merger by absorption'. The revised section essentially provides that there will not be a clawback of relief where the transferor is liquidated or automatically dissolved as a result of a merger by absorption. It does not deal with the situation where the transferor is dissolved in a merger by acquisition or voluntarily struck off. Revenue guidance provides that the treatment applying to a liquidation is extended to a situation where the transferor is wound up, dissolved or struck off the CRO register. Similarly, Revenue Guidance provides that the subsection also applies where the transferor is dissolved upon a merger by acquisition. We suggest that section 79(7A) is amended to place the Revenue Guidance on a statutory footing.
- 3.3.3 The Finance Act 2017 changes do not cover circumstances where the transferee company is liquidated, struck off or automatically dissolved as a result of a merger following a prior transfer of assets between group companies in respect of which the relief was claimed in the preceding two year period. Revenue Guidance confirms that a clawback of relief will not arise where the transferee is liquidated or dissolved provided that the transferred property is retained within the corporate group for a period of 2 years after transfer (with certain exceptions). To ensure equivalence of treatment between transferors and transferees, we suggest that section 79(7A) SDCA is amended in line with the Guidance.
- 3.3.4 Somewhat surprisingly, section 79(7A) SDCA requires that there is no change in the beneficial ownership of the ordinary share capital of the transferee company for two years from the date of the relieved transfer. While we understand that the provision should contain a requirement that the transferee remain within the same associated company group, the requirement that the shareholding in the transferee should not change at all (even within the associated company group) goes significantly further than warranted. The Revenue Guidance confirms that Revenue is prepared to disapply the clawback where these two post-transfer conditions are not satisfied, but an alternative condition (i.e. that the transferred property is retained within the corporate group for the two year

period following the transfer but not necessarily held by the transferee) is satisfied instead. We suggest that section 79(7A) SDCA is amended in line with the Guidance.

- 3.3.5 Finally on this issue, we would recommend a minor technical adjustment to address the challenge that arises in practice in meeting the no-clawback conditions in circumstances where the assets transferred are realised naturally (e.g. debts) or that where they no longer exist within a period of two years from the date of the conveyance/transfer. While the Revenue Guidance provides for the disapplication of the clawback in such circumstances, we suggest that section 79(7A)(i) be amended to clarify the treatment and to place same on a statutory footing.

#### **Law Society Recommendation**

The suggested changes to Section 79 SDCA referred to above be implemented.

### **3.4 SECTION 127 FINANCE ACT 2012 – Issues relating to legal professional privilege**

- 3.4.1 Section 127 FA 2012 introduced a new Section 908E TCA 1997 to provide that an authorised officer of the Revenue Commissioners may (for the purpose of investigating certain offences) apply to a Judge of the District Court for an order in relation to the making available of particular documents or the provision of particular information. Section 908E(8) provides an exception from the operation of the section in the case of documents subject to legal professional privilege. A further new section, Section 908F, provides that, where a person refuses to produce a document on the grounds of legal professional privilege (LPP), an application may be made to the District Court for a determination as to whether or not LPP attaches to the document. Section 908F(5) provides that a District Court judge may make interim or interlocutory orders including, in appropriate cases, the appointment of a person with suitable legal qualifications to examine the documents and prepare a report for the judge.
- 3.4.2 In light of the fact that the offences targeted by Section 127 are offences that can be prosecuted on indictment (and not summarily), the Society is of the view that, from a legal professional privilege standpoint, it is inappropriate for the District Court to decide upon a matter such as the status of a document, when the offence that the Revenue is pursuing is triable on indictment i.e. only in a higher court. By way of analogy, in the context of *inter partes* discovery, disputes relating to legal professional privilege that arise in Circuit Court matters are dealt with by the Circuit Court; in the case of matters before the High Court, they are dealt with by the Master of the High Court.
- 3.4.3 The Society also believes that the powers conferred on the District Court to appoint another person to examine the documents under review and prepare a report for the court, run contrary to the very concept of legal professional privilege. The rationale for the doctrine of legal professional privilege would be seriously undermined if a District Court could provide sensitive documents to, for example, another firm of solicitors, in order to prepare a report on them. Section 908F(5) also gives rise to practical difficulties in that its description of the person to examine the documents as being a “person with suitable legal qualifications” is too broad and could encompass a wide range of people – it is entirely unclear as to whether such persons would be required to be a member of the legal profession. It is also unclear as to how the court can satisfy itself that the person has “independence from any interest falling to be determined”.

#### **Law Society Recommendation**

Section 908F TCA (as inserted by s.127 Finance Act 2012) should be amended to provide clarification that the application to the court envisaged by that section is to be made to the High Court.

### **3.5 PENALTIES FOR FAILURE TO MAKE A RETURN**

- 3.5.1 Section 1052 TCA provides for a penalty of €3,000 for failure to make certain returns etc., which have been requested by Revenue notice. The penalty may be increased to €4,000 where the failure continues after the end of the tax year in which the notice was served. Where a company fails to make a return, the court has a discretion as to the level of fine to be imposed and can reduce the fine to a zero sum. However, in the case of an individual, the court may only mitigate the fine down to €1,250.00. This appears to discriminate against the individual taxpayer.

#### **Law Society Recommendation**

The relevant legislation should be amended to provide that the discretion of the court to impose a zero sum fine be extended to individual taxpayers.

### **3.6 CAPITAL GAINS TAX EXEMPTION FOR FOREIGN CHARITIES**

- 3.6.1 While there is an exemption from capital gains tax for charities under Section 609 TCA, which in the context of defining charity cross-refers to the income tax exemption contained in Section 208 TCA, this may not strictly extend to foreign or "overseas" charities. Overseas charities do have the benefit of an income tax exemption, or can obtain an income tax exemption, under Section 208A. It is suggested that - certainly in relation to charities established in EU member states - the current position is potentially discriminatory.

#### **Law Society Recommendation**

It is proposed that specific legislative provision is made for an exemption from capital gains tax for overseas charities. It is suggested that the definition of charities under Section 609 TCA be extended to include foreign charities qualifying under Section 208A.

### **3.7 RIGHT OF APPEAL FOR A PERSON WHO SUFFERS THE COST OF VAT**

- 3.7.1 The Value Added Tax Consolidation Act 2010 (VATCA) is drafted on the basis that all interaction with the Revenue relating to a VAT charge will be between the Revenue and the accountable person. It is the accountable person who will receive the notice of assessment and accordingly the accountable person will be the party with the right of appeal. VATCA does not give the person who suffers the cost of VAT any direct right of appeal.

#### ***Example***

X contracts to sell goods or services to Y. If VAT applies, X is the accountable person in relation to the sale/supply. The contract provides that the price includes such VAT as

applies under VATCA. Revenue confirm in an assessment given to X that VAT applies on the sale/supply. Y is advised that there are reasonable arguments to indicate that the Revenue is not correct in the assessment and that VAT should not apply. In order to complete the contract, Y must pay the purchase price plus VAT to X. However, as Y is not the accountable person in relation to the sale/supply, there is serious doubt whether Y can appeal the assessment of Revenue under VATCA. If X agrees to conduct the appeal in the name of X, an appeal would be possible but this is not a satisfactory position for either X or Y.

#### **Law Society Recommendation**

It is suggested that VATCA should be amended to allow a person who bears a VAT charge to appeal against that charge. It is understood that in the UK a more flexible system of appeal applies for persons who are not regarded as the accountable persons in the sale/supply.

### **3.8 CGT RETIREMENT RELIEF**

- 3.8.1 In order to claim CGT Retirement Relief, the persons transferring the farm i.e. generally parents, must be 55 years of age or over and have owned and farmed the land for 10 years prior to the transfer. The parents can lease out the farm for up to 25 years but have to have owned and farmed the land for 10 years prior to the first lease/letting. Many farming couples put land into joint names not realising that it could cause unintended CGT tax implications.
- 3.8.2 The question generally arises as to whether a female spouse is entitled to claim CGT Retirement Relief where she has been working off farm i.e. whether she can prove that she has farmed the land for 10 years prior to the transfer? While the tax rules provide that a spouse can step into the shoes of the other spouse in satisfying the 10 year ownership requirement, the spouse can only step into the shoes of the other spouse in satisfying the 10 year usage requirement in a death situation i.e. where the spouse farming the land has died.

#### **Law Society Recommendation**

The provisions for claiming CGT Retirement Relief should be amended to allow for a spouse/civil partner to step into the shoes of the farming spouse in terms of satisfying the 10 year ownership and usage requirement.

### **3.9 SECTION 64(8A) (CAPITAL GOODS SCHEME) OF THE VALUE-ADDED TAX CONSOLIDATION ACT, 2010 (AS AMENDED) ("VATCA")**

- 3.9.1 Section 55 of Finance Act 2015 inserted a new Section 64(8A) VATCA which extends certain anti-avoidance rules to supplies of "uncompleted" properties between connected persons.
- 3.9.2 Section 64(8A) applies to sales of "uncompleted" properties between connected persons where the VAT charged on the sale of the property is less than the VAT deducted on acquisition and/or development of the property. Where Section 64(8A) applies, there is a claw-back of the difference between the two amounts from the person making the supply (i.e. the vendor).

- 3.9.3 Section 64(8) is the corresponding provision which applies to supplies of "completed" properties between connected persons. A claw-back under Section 64(8) may be avoided under Section 64(9) if the vendor and the purchaser agree in writing that the purchaser will take on the capital goods scheme liabilities in relation to the property (i.e. the purchaser "steps into the shoes" of the vendor such that no VAT is chargeable on the supply and no new capital goods scheme life begins at the time of the supply).
- 3.9.4 Section 64(9), however, has not also been amended to avoid a claw-back under Section 64(8A) where the vendor and purchaser of an "uncompleted" property agree in writing that the purchaser will take on the capital goods scheme liabilities in relation to the property (as in the case of supplies of "completed" properties under Section 64(8) VAT Act).

**Law Society Recommendation:**

Section 64(9) VATCA should be amended to dis-apply Section 64(8A) (as well as Section 64(8)) where the vendor and the purchaser agree in writing that the purchaser will take on the capital goods scheme liabilities in relation to the sale of an "uncompleted" property between connected persons.

**3.10 AGGREGATION**

- 3.10.1 Aggregation rules provide that all benefits taken from the same Group Threshold since 5th December 1991 are added together to calculate the tax on the latest benefit. The Society is of the view that most recipients would be unable to produce records dating back to the 5<sup>th</sup> of December, 1991 (i.e. 30 years ago at the end of this year) particularly where banks generally will only provide records dating back seven years.

The issue with this level of retrospection has obtained increased focus in light of recent Revenue regulations introduced in connection with the new probate process. Under these new regulations, in order to apply for a grant of probate, details of all prior benefits (not just relevant to the benefit under the deceased's estate) from December 1991 must be provided. This presents a significant, and in many cases, unmanageable burden.

**Law Society Recommendation**

That the date from which aggregation applies be brought forward to a more recent date.

**3.11 Section 62 CATCA 2003**

3.11.1 Section 62 (2) of the Capital Acquisitions Tax Consolidation Act 2003 requires that a person applying to the Registrar of Titles for registration based on possession shall produce to the Registrar a certificate issued by the Revenue Commissioners to the effect that (i) that the property the subject of the application did not become charged with gift tax or inheritance tax during the 'relevant period' (as therein defined) or (ii) that any charge for gift tax or inheritance for which the property became subject during the relevant period has been discharged or will be discharged within a reasonable period. Section 62 (1) defines the 'relevant period' as being the period commencing on 28 February 1974 and ending on the date on which the registration was made.

3.11.2 Section 13 of the Statute of Limitations 1957 provides that no action shall be brought by a State authority to recover any land after the expiration of thirty years from the date on which the right of action accrued to the State authority. In the case of applications to recover lands by a person other than a State authority, same shall not be brought after the expiration of twelve years from the date of which the right of action accrued. Two other time limits of sixty years and forty years, relating to foreshore are also stipulated. Thus, in instances where the period stipulated by the Statute of Limitations is either twelve years or thirty years, the provisions of Section 62 (2) require the production of a certificate from the Revenue Commissioners relating to a period which is in excess of a period stipulated by the Statute of Limitations.

**Law Society Recommendation**

That the definition of 'relevant period', set out in section 62(1) be amended to reflect the requirements of the Statute of Limitations as follows: "relevant period", in relation to a person's application to be registered as owner of property, means the period ending on the date as of which the registration was made and commencing on a date which is, at a minimum, such number of years prior to the date as of which the registration was made as is stipulated by s13 of the Statute of Limitations, 1957..."