LAW SOCIETY SUBMISSION

Finance Bill 2021 Submission

Department of Finance
Department of Public Expenditure & Reform
Department of Social Protection
Department of Enterprise, Trade & Employment

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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

Solicitors represent our citizens in many of their day to day dealings with the State and its agencies. In our **Finance Bill 2021 Submission** we draw on this experience to highlight issues that not only are relevant to tax policy and tax administration for taxpayers in the State, but also as a tool for economic generation.

The economic context of Budget 2022 (and ultimately the Finance Bill 2021) is one of the most complex and challenging in many years. The economy is contending with the challenges of emerging from a global pandemic, the forgotten but very much continuing challenges of Brexit and the rapidly changing international tax landscape. As a representative body, we support the work of the Department of Finance and we welcome continued interaction with the Department of Finance and Revenue on implementation of tax measures required at OECD and EU level.

Equally, there is the importance of examining how tax revenues can be used to address the difficulties and inequalities facing our society, in particular in housing, equality issues and health, and actually giving effect to achieving this through tax policy. This submission touches on some of those issues and renews our recommendations in the areas of the tax treatment of cohabitants, tax treatment of medical expenses of permanently disabled individuals, tax anomalies around support and maintenance exemptions for children of a deceased parent and pension funds and divorce. We also identify some considerations that might be considered in relation to offering a more secure housing picture in the rental sector.

In our submission, we are, as in former years, highlighting the weakness of a budgetary and legislative process that does not sufficiently incorporate proper consultation with stakeholders and representative bodies, resulting in some unintended effects in practice. Whilst lack of consultation is understanding in relation to measures seeking to counteract avoidance of tax or to counter tax revenue risk, proper consultation gives confidence in, and better outcomes from, the legislative process.

Five Key Areas

This **Finance Bill 2021 Submission** will focus on the following key areas:

1. **The sub-optimal means by which legislation has been introduced in recent years;**
2. **Wide ranging recommendations to deal with inequalities and hardship;**
3. **Housing Initiatives;**
4. **Keeping Ireland competitive through simple and pragmatic legislative amendments; and**
5. **Other technical issues impacting on enterprise and cross border economy.**

2 INTRODUCTION OF LEGISLATION

FINANCE BILL

The Law Society has repeatedly highlighted the need for input from the representative bodies for lawyers in the introduction of tax legislation, and particularly the Finance Bill. Providing adequate time for tax legislation to be considered by practitioners ensures certainty in our tax system and avoids unintended consequences (as was the case with the Finance Bill 2020).

The Finance Bill 2020, without any warning, incorporated legislation that would have had the effect of applying transfer pricing rules between related Irish resident companies irrespective of size. The measures would have created a requirement to apply arm's length pricing between such Irish companies save in very limited circumstances. These measures were included with ostensibly no benefit for the Exchequer as adjustments between Irish resident companies would generally not increase or decrease the tax revenues but would have added a layer of administration to the SME sector that they were not prepared for or, indeed, equipped for. Whilst the initial response from Revenue was that the measures only reflected the understanding of the application of existing rules, this was clearly not the case and would have had a significant impact on the SME sector (the multinational sector is already attuned to such measures).

Following the publication of Finance Bill 2020, consultations with representative bodies took place which highlighted the concerns of the SME sector. Submissions from representative bodies were made at the time and the result was a late change in the legislative process to make the measures subject to a commencement order. This could have been avoided by proper consultation in advance of publication of the legislation.

We would again emphasise the need for a formal technical consultation period in advance of publication of the Finance Bill to allow practitioners an opportunity to assist the Oireachtas in achieving its legislative aims.

3 RECOMMENDATIONS TO DEAL WITH INEQUALITIES AND HARDSHIP

AMENDMENTS TO CATCA 2003

Section 1 of the Appendix includes a list of specific recommendations some of which have been included in previous submissions and which we are again recommending should be legislated for, in particular amendments to the Capital Acquisitions Tax Consolidation Act 2003 (CATCA).

Qualifying Medical Expenses

Where a person is permanently disabled and received an inheritance either on intestacy or where the will does not specifically refer to the bequest being used to pay qualifying medical and related expenses of that person, that inheritance is not treated as exempt, even if it is subsequently used to pay qualifying expenses of that permanently disabled individual [Para 1.1].

Co-Habitants – Addressing Hardship in Death Situations

The tax treatment of qualifying cohabitants is an ongoing source of contention. Issues arising include the tax treatment of a bequest to a qualifying cohabitant as opposed to provision made by Court order [See Appendix 1 para 1.2] and the tax treatment of the

dwelling cohabitants live in if owned by one and placed in joint names [Para 1.3]. This represents a significant disadvantage for surviving co-habitants.

PENSION FUNDS AND DIVORCE

In family law, couples who separate or divorce have their matrimonial assets split by way of a court order. For example, ownership of the family home may be granted to a spouse under a Property Adjustment Order once the Court is satisfied that the conditions for divorce/separation are satisfied. The court order then provides for the transfer of an interest from one spouse to the other.

In a similar way, pension benefits can be divided by Court order. Such orders are provided for pursuant to Section 12 of the Family Law Act 1995 or Section 17 of the Family Law (Divorce) Act 1996. This manner of splitting benefits is known as a Pension Adjustment Order. Under such an order, a spouse acquires rights to a pension which was built up by the other spouse during the marriage.

However, where an Order is made, the legislation is deficient in failing to recognise the interests of a second family in that it continues the limit on pension funding and maximum fund values (for the purposes of applying punitive tax rates for funds in excess of such values) for the spouse from whom the pension value is transferred. The practical effect of this is that such a spouse may be unable to fund a pension arrangement for a new partner or other dependents notwithstanding the fact that a proportion of the pension fund built up has been applied to the partner of the first relationship.

Example 1

Marie is a member of a defined benefit pension established by her employer. Marie has full service and on retirement at age 65 she can look forward to an annual pension of €60,000. Marie has divorced from her husband, Michael, who had a lower level of income and no pension fund. The couple's children live with Marie. As part of the divorce settlement a Pension Adjustment Order granted 50% of the value of the fund to Michael. Marie subsequently remarries.

If Marie's pension entitlements are over the standard fund threshold (including the element the subject of the Pensions Adjustment Order), then any funding of her pension scheme further to provide a pension for herself and her new family will create a tax exposure of over 65% on the additional funding.

Even if there was a cost to the Exchequer of putting the second family on an equal footing of the first, the Law Society recommends that tax policy must always observe the Constitution.

4 Housing Initiatives

The Law Society strongly supports the objective of ensuring access to housing and a fair and equitable residential letting sector.

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 also encouraging new supply into the sector.

Whilst the Law Society is aware of increased State investment in funding housing bodies to take long-term leases of residential property and under the Housing Assistance Payment

scheme, which will assist with meeting the housing need, it is clear that the private rental sector will continue to be required to provide an important housing supply in the medium and long-term.

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

Whilst rent freezes and rent caps 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 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 entered into such arrangements. This could, for example, offer an element of exemption for the period of ownership when the properties are subject to such arrangements similar to Principal Private Residence Relief.

5. KEEPING IRELAND COMPETITIVE

Ireland has built a strong reputation globally as one as of the most attractive jurisdictions in which to establish holding companies and to headquarter companies. 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 time of change with the pandemic, proposed international tax reforms and post-Brexit. The Law Society strongly supports the objective of making Ireland's tax regime competitive and attractive to job creation. The Law Society also supports 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 Law Society submissions and which, for the reasons set out above, we are again recommending should be legislated for. Again, many of the changes should not give rise to any cost to the Exchequer but will be helpful from a competitiveness viewpoint and will encourage inward investment.

Issues we would like to highlight include:

Improving Ireland as a holding company location

As an EU Member State with a wide double tax treaty network, Ireland 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 both in, or missing from, the tax regime which put Ireland at a competitive disadvantage.

They include:

- A change to withholding tax of interest paid by Irish companies to Irish companies such that interest can be paid without withholding tax 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 are included at section 2.7 of the Appendix.

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 depending on 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 cumbersome. We note that the public consultation on a proposed moved to a territorial based tax system which was due to take place in 2019 was postponed until there was greater certainty on proposed international tax reforms. We understand (from Ireland's Corporation Tax Roadmap January 2021 Update) that this consultation is now planned for 2021. 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.

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.

Domestic mergers by absorption

In order to align with the provisions of the Companies Act 2014, where a group of companies seek to restructure for commercial reasons by way of merger by absorption, we recommend that section 633D TCA 1997 is amended to confirm that this provision applies to a merger by absorption under Irish domestic law and that the reference to "transfer" in this provision includes both trading and non-trading assets and liabilities.

Transfer pricing

Section 15 of Finance Act 2020 introduced amendments to the "Irish-to-Irish" exemption in section 835E TCA 1997 to specifically legislate for "qualifying loan arrangements" to benefit from the "Irish-to-Irish" exemption to make it clear that a taxpayer must have profits or gains or losses chargeable to tax under Schedule D, the computation of which directly takes account of the actual results of the arrangement. However, these amendments require a commencement order before coming into effect and this has not yet been passed.

While we support the decision to delay the commencement to address the issues raised in respect of this amendment, we would encourage constructive engagement with stakeholders remaining a priority to move this matter forward and to ensure the policy objective is achieved without resulting in a disadvantage

6. TECHNICAL ISSUES

We have detailed in the Appendix, a number of legislative changes many of which we have suggested in previous 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 more clarity and certainty for the taxpayer will result.

7. 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.

The Society again requests to be consulted at an early stage of the Finance Bill deliberations. It is desirable that the Government would engage and work with the Society in relation to matters relevant to members and the citizens that solicitors represent in the lead up to Budget 2022 and the Finance Bill 2021. The Society looks forward to discussing these recommendations with you in due course.

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APPENDIX:

1 RECOMMENDATIONS TO DEAL WITH INEQUALITIES AND HARDSHIP

1.1 QUALIFYING BENEFITS OF PERMANENTLY DISABLED INDIVIDUALS

1.1.1 Section 84 CATCA 2003 exempts benefits taken exclusively for the purposes of discharging the 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 disponer in order for the exemption to apply. In this way, Revenue requires evidence from the disponer 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:

1. Clarify in law 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.

2. 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 refers. 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 considers it just that s/he 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 The 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 related to a dwelling where the disponer and the beneficiary all lived 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 a 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 enter into Civil Partnership and acquire the tax status of a married couple (including an exemption from CAT) as a result. 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 introduced the concept of the "qualified cohabitant" and provided 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 the practical difficulties caused by this omission. As such, the Society calls on 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 disponer 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 disponer or a child in full time education up to the age of 25 at a time when both the disponer 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 or 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 to a will) 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 confirmed, in its April 2012 revision of the Revenue Manual, 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 Recommendation:

Section 81 CATCA 2003 should be amended to:

1. 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;

2. 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; and

3. 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 taxpayer (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 taxpayers often simply cannot fund both tax charges from the same sum.

Law Society Recommendation:

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 to make it 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 a minimum, 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:

i. the payment is made in the course of a trade or business carried on by the payer; and

ii. 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 legislating for those confirmations in order to provide clarity in the area.

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 which 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 would 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" insofar 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 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 provide that:

"*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 e.g. 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:

Amend the legislation to provide a similar exemption for interest payments 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, <u>except where the new shares acquired under sub-paragraph (I) or (II) of subsection 3(c)(ii) are subject to</u> <u>the same restrictions for the unelapsed specified period as the shares which have been disposed of</u> …"

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 the 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 such amendments, 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 (below) 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 *bold 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 another Member State of the European Union, in an EEA State within the meaning of Section 80A or in a territory with the government of which arrangements having the force of law by virtue of Section 826(1) Taxes Consolidation Act 1997 have been made".*

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 The Finance Act 2017 made a number of amendments to s 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.

Law Society Recommendation:

Remove/amend Section 80(2)(b) SDCA to make it clear 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 brought 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 s 79(7A) SDCA 1999 is specific to mergers by absorption.

3.3.2 The 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 voluntarily stuck off. It is long-standing Revenue practice not to enforce the clawback provision in circumstances where the transferor company is voluntarily struck off the companies register within the two year period following a transfer of assets on which section 79 relief was claimed. We suggest that section 79(7A) is amended to put Revenue's practice on a statutory footing.

3.3.3 The changes made in the Finance Act 2017 do not cover circumstances where the transferee company is liquidated or 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. To ensure equivalence of treatment to mergers involving group companies, we suggest that a technical amendment should be made to ensure that associated companies relief continues to apply irrespective of whether it is the transferor or transferee company that is dissolved or liquidated or stuck off, as the case may be. Such an amendment would also reflect the existing Revenue practice.

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 much further than is warranted. Accordingly, we suggest that section 79(7A) SDCA is amended so that no clawback would apply where there is a change in the beneficial ownership of the transferee company provided it remains within the 90% associated companies group within the two year clawback period.

3.3.5 We also suggest that a minor technical adjustment is made to address the challenge which arises in practice in meeting the no clawback conditions where the assets transferred might naturally be realised (e.g. debts) or where they no longer exist within a period of two years from the date of the conveyance or transfer. Revenue's practice on this point has been to confirm that the two year condition could be satisfied and the exemption preserved where such assets did not pass outside the ownership of the transferee company's wider 90% associated group - as distinct from the test currently contemplated by section 79(7A)(i) SDCA which requires that the transferred asset remain within the beneficial ownership of the transferee company for the two year period.

Law Society Recommendation:

Implement the above suggested changes to Section 79 SDCA.

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 making available 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 which are subject to legal professional privilege (LPP). A further new section, Section 908F, provides that where a person refuses to produce a document on the grounds of 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 (rather than summarily), the Society is of the view that, from a LPP 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 LPP which 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 LPP. The rationale for the doctrine of LPP 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. Section 908F(5) also gives rise to practical difficulties insofar as its description of the person to examine the documents (i.e. "person with suitable legal qualifications") is too broad and could encompass a wide range of people. It is entirely unclear whether such persons would be required to be members of the legal profession and how the court could satisfy itself that the person has "independence from any interest falling to be determined".

Law Society Recommendation:

Amend Section 908F TCA (as inserted by s.127 Finance Act 2012) to provide clarity 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:

Amend the legislation to extend the discretion of the court to impose a zero sum fine 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 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 Recommendations:

1. Make specific legislative provision for an exemption from CGT for overseas charities.

2. Extend the definition of charities under Section 609 TCA 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 confirms 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:

Amend VATCA 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 also 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:

Amend the provisions for claiming CGT Retirement Relief 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 However, Section 64(9) 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:

Amend Section 64(9) VATCA 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 5 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 5 December 1991 (i.e. almost 30 years old) particularly where banks generally only provide records for the previous seven years.

The issue with this level of retrospection has garnered 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 those 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 Statue 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 Statue of Limitations.

Law Society Recommendation

Amend the definition of 'relevant period' under Section 62(1) to reflect the requirements of the Statue 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…"