LAW SOCIETY SUBMISSION

LAW SOCIETY OF IRELAND

PRE-BUDGET SUBMISSION ON ISSUES OF PROBATE AND TAXATION

DEPARTMENT OF FINANCE
DEPARTMENT OF PUBLIC EXPENDITURE & REFORM
DEPARTMENT OF SOCIAL PROTECTION

APRIL 2016

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.

Contents

1. STAMP DUTY

1.1. eSTAMPING: PPS NUMBERS FOR NON-RESIDENT INDIVIDUALS

1.1.1. The eStamping regime was introduced with effect from 30 December 2009 and, since that date, every person, individual or corporate, has required an Irish tax reference number in order to buy or sell property that is liable to stamp duty. This includes sales and purchases of shares in Irish companies and land transactions. This tax reference number is required for stamp duty purposes.

1.1.2. For foreign incorporated companies the procedure for obtaining a tax reference number is normally fast and efficient. The Revenue Stamp Duty branch allocates these numbers following the application, via email, for a tax reference number and numbers can be issued within 24 hours of application. The information required in order to apply consists of the name and address of the company and the jurisdiction of incorporation.

1.1.3. However, the situation for non-resident individuals is very different. It is necessary for the non-resident individual to apply to the Department of Social Protection for a Personal Public Service Number (PPSN). The application form (Reg 1) requires the submission of a considerable amount of personal information and copy documentation. Similar delays arise where a non-resident individual is the beneficiary of an Irish estate. The Inland Revenue Affidavit cannot be completed until the PPSN for the non-resident individual is obtained.

1.1.4. Practitioners are continuing to experience delays in obtaining PPS numbers. It takes a number of weeks to obtain a number (which from recent experience can extend to 6-8 weeks). This has led to situations where a share purchaser, being a willing taxpayer, cannot file on ROS and pay the stamp duty due to unilateral delay on the vendor side in obtaining a tax reference number (‘TRN’). This is totally outside the buyer’s control yet leads to the buyer’s liability for interest and penalties. This is clearly unfair.

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Law Society recommendation:

The Society urges the Department to permit Revenue to issue tax reference numbers to non-resident individuals for stamp duty purposes <u>only</u>. This is already done for foreign companies and the procedure could be extended to non-resident individuals.

1.2. ABOLITION OF STAMPING REQUIREMENT IN NON OR LOW VALUE SALES/LEASES

1.2.1. One of the objectives of the Revenue Commissioners is to avoid imposing unnecessary expense and obligations on taxpayers, in particular, business taxpayers. The reductions in stamp duty rates on conveyances on sales and leases contained in the Finance Act 2011 and the Finance Act 2012 were very welcome to taxpayers. Notwithstanding these reductions, 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).

1.2.2. 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.

1.2.3. 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 €1000 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.

1.3. SECTION 80 Stamp Duties Consolidation Act 1999 ("SDCA")

1.3.1. Currently, the term "acquiring company" pursuant to Section 80 SDCA is limited to companies incorporated in the EU/EEA. 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".

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

1.3.3. 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.

1.4. CHANGES TO SECTION 79 SDCA

1.4.1 The opportunity should be taken to amend section 79 SDCA so that relief granted is not subsequently clawed back if, following the transfer, either the transferor company or the transferee company is wound-up or dissolved or subject to the merger. A similar carve-out is available under section 623(1)(d) TCA where an entity that has acquired an asset from a group company is subsequently wound-up or dissolved and no claw back applies in respect of group relief previously claimed under section 617 TCA. In practice, Revenue are willing on a concessionary basis to confirm that the stamp duty relief granted under section 79 SDCA will not be clawed back where the winding-up is effected for bona fide reasons and the transferred asset remains within the group. It would be helpful to taxpayers and tax practitioners if this practice was enacted into legislation.

Law Society recommendation:

That sections 79(5)(c) and 79(7)(b) SDCA be amended in this regard.

2. REVENUE POWERS

2.1. SECTION 127 FINANCE ACT 2012 – Issues relating to legal professional privilege

2.1.1. Section 127 FA 2012 introduced a new Section 908E to the Taxes Consolidation Act 1997 (as amended) ("TCA") 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.

2.1.2. 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 and in matters arising in the context of the Companies Acts, they are dealt with in the High Court (s.2 Companies Act, 1963).

2.1.3. 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 of the 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.

2.2. PENALTIES FOR FAILURE TO MAKE A RETURN

2.2.1. 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. CAPITAL ACQUISITIONS TAX

3.1. QUALIFYING BENEFITS OF PERMANENTLY DISABLED INDIVIDUALS

3.1.1. Section 84 of the Capital Acquisitions Tax Consolidation Act, 2003 ("CATCA2003") 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.

3.1.2. 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 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.

3.1.3. 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.

3.1.4. 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.

3.1.5. 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.

3.1.6 Section 84 (2) of the Capital Acquisitions Tax Act 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 recommendation:

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.

3.2. TAXATION OF SURVIVING QUALIFYING COHABITANT

3.2.1. 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.

3.2.2. Where a cohabitant feels it just that he or she should make financial provision for a financially dependant 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 dependant 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.

3.3. ANOMALIES AROUND SUPPORT AND MAINTENANCE EXEMPTION FOR CHILDREN OF DECEASED PARENT

3.3.1. Section 82 (2) CATCA 2003 provides an exemption for lifetime payments of money or monies worth to, inter alia, a child of a disponer for the support, maintenance or education of such child provided that provision of such support, maintenance or education is such as would be part of the normal expenditure of a person in the circumstances of the disponer and is reasonable having regard to the financial circumstances of the disponer. Section 83 (4) extends this exemption to money or monies worth received by a minor child of the disponer at a time when both the disponer and the other parent of the minor child are dead.

3.3.2. 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.

However the relief would not be available to a similar child of the deceased parent 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).

3.4. DISCRETIONARY TRUST TAX

3.4.1. 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.

3.4.2. 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.

3.4.3. 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 all or any such interest in possession.*"

3.5. GOVERNMENT SECURITIES

Exemption of Government securities under Section 81 CATCA 2003

3.5.1. 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.

3.5.2. 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.

3.5.3. 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.

3.5.4. 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.

3.5.5. 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.

3.5.6. 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 –

- 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.

3.6. CAT AND INCOME TAX

3.6.1. 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 40% + USC + PRSI) 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.

3.6.2. 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.

3.7. AGGREGATION

3.7.1 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 5th December, 1991 particularly where banks generally will only provide records dating back seven years.

Law Society recommendation

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

4. OTHER MISCELLANEOUS ISSUES

4.1. REITS

4.1.1. The REIT legislation is a welcome addition to Irish tax law. To mirror the interest of investors in property assets, it would benefit from being extended to cover not just property, but also both debt portfolios which are secured on property and shares in property holding companies/"SPVs". This would reflect the manner in which some investors are acquiring exposure to property, especially from banks, and would further assist banks in the disposal of property loan portfolios, which is carried out both as a direct property disposal and the sale of mortgage loan portfolios.

Law Society recommendation:

Part 25A of the TCA should be amended to include the receipt of income from debts secured on property and dividends from companies solely owning property within the ambit of a "property rental business".

4.2. WITHHOLDING TAX ON QUOTED EUROBONDS

4.2.1. 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.

4.2.2. 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.

4.3. CAPITAL GAINS TAX EXEMPTION FOR FOREIGN CHARITIES

4.3.1. 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.

4.4. R&D EXPENDITURE AND CLAWBACKS

4.4.1. Section 291A TCA provides relief in the form of capital allowances against trading income for companies that have incurred capital expenditure on the provision of certain “specified intangible assets” for the purposes of a trade. Specified intangible assets are treated as machinery or plant for the purposes of capital allowances so that the normal rules in regard to wear and tear allowances, balancing allowances and balancing charges for capital expenditure on machinery or plant also apply for capital expenditure on specified intangible assets, subject to the specific provisions of Section 291A.

4.4.2. Under current legislation, a claw-back of capital allowances occurs where the specified intangible asset is disposed of within a specified period of time. One particular anomaly that has been identified with this regime is the arbitrary way in which a company might suffer a claw-back of capital allowances under Section 288(3C) TCA, depending on when that company acquired the specified intangible assets.

4.4.3. When Section 291A was first introduced in 2009, the specified intangible assets had to be used for the purposes of the trade for a period of 15 years in order to avoid a claw-back. Section 43 of Finance Act 2010 reduced this claw-back period from 15 years to 10 years, but only in respect of capital expenditure incurred by a company after 4 February 2010. Section 35 of Finance Act 2013 further reduced the claw-back period under Section 288(3C) from 10 years to 5 years, but only in respect of capital expenditure incurred by a company after 13 February 2013.

4.4.4. These changes have the anomalous effect of restricting the flexibility of the small number of companies that brought intellectual property assets into Ireland in the early days of the regime. To help illustrate this point, a company that acquired specified intangible assets on or before 4 February 2010 must hold these assets for three times as long as a company that acquires specified intangible assets today if it is to avoid a claw-back of capital allowances. In fact, a company that acquires intellectual property assets today will be entitled to dispose of these assets without suffering a claw-back more than 5 years before a company that acquired similar intellectual property assets back in 2009, shortly after the regime was introduced.

Law Society recommendation:

To ensure that there is a level playing field between all companies that are subject to the intangible asset regime contained in Section 291A TCA, we propose that the claw-back period in Section 288(3C) be amended such that no balancing charge arises in respect of expenditure incurred on specified intangible assets where there is a disposal of such assets (or where an event referred to in Section 288(1) takes place in respect of such assets) by a company more than 5 years after the beginning of the accounting period of the company in which the asset was first provided – regardless of when the relevant capital expenditure was incurred. This could be achieved by an amendment to Section 35(2) Finance Act 2013 as follows:

Chapter 5 of Part 1 of the Finance Act 2013 is amended in Section 35 (2) by substituting "7 May 2009" for "13 February 2013".

There would be no requirement to amend Sections 288 or 291A.

4.5. RIGHT OF APPEAL FOR A PERSON WHO SUFFERS THE COST OF VAT

4.5.1. 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.

4.6. CGT RETIREMENT RELIEF

4.6.1 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.

4.6.2 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.

4.7. TREATMENT OF DISPOSAL OF PATENT RIGHTS

4.7.1 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" (eg 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%.

4.7.2 *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.

4.7.3 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.

4.8. WITHHOLDING TAX TREATMENT OF ROYALTY PAYMENTS MADE TO IRISH COMPANIES

4.8.1 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.

4.8.2 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.

4.9. APPLICATION OF SECTION 29 TCA TO COMPANIES MIGRATING TO IRELAND

4.9.1 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.

4.9.2 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.

4.9.3 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.

4.9.4 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:

4.9.4.1.1 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

4.9.4.1.2 that a company which is resident for part only of a year of assessment (ie 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.”

4.10. WITHHOLDING TAXES ON INTEREST PAID TO IRISH COMPANIES

4.10.1 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).

4.10.2 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.

4.10.3 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.

4.11. SHARE-BASED AWARDS – TECHNICAL AMENDMENTS – EMPLOYER FILING OBLIGATIONS

4.11.1 Employers are required to notify Revenue of share-based awards made to employees under sections 128, 128C(15), 128D(8), 128E(9) and 897B TCA. Detail in relation to the awards was historically provided in the Form RSS1. However, the Form RSS1 was amended for the 2012 tax year and all subsequent years to only require detail in respect of share options and other rights granted under section 128 TCA.

4.11.2 We understand from correspondence with Revenue that as shares, restricted shares, forfeitable shares and convertible securities are within the scope of PAYE, they no longer require employers to provide details of such awards separately (and on that basis amended the Form RSS1). The various technical requirements to provide the relevant information to Revenue remain in the legislation.

Law Society recommendation:

That the following provisions be deleted: section 128C(15) TCA; section 128D(8) TCA; section 128E(9) TCA; and section 897B TCA (in full).

4.12. SHARE-BASED AWARDS - EXCHANGE OF RESTRICTED SHARES

4.12.1 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 the same restrictions for the unelapsed specified period as the shares which have been disposed of</u> …"

4.13. SECTION 626B (EXEMPTION FROM TAX IN THE CASE OF GAINS ON CERTAIN DISPOSALS OF SHARES) OF THE TAXES CONSOLIDATION ACT, 1997 (AS AMENDED) ("TCA")

4.14.1 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.

4.14.2 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.

4.14.3 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 ***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)."

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

4.15.1 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.

4.15.2 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).

4.15.3 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).

4.15.4 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.

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