LAW SOCIETY SUBMISSION

PRE-BUDGET SUBMISSION ON ISSUES OF PROBATE AND TAXATION

DEPARTMENT OF FINANCE
DEPARTMENT OF PUBLIC EXPENDITURE & REFORM
DEPARTMENT OF SOCIAL PROTECTION
DEPARTMENT OF JOBS, ENTERPRISE & INNOVATION

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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

1.1 CONTEXT

The background to Budget 2017 is the continued but tenuous recovery of the Irish economy set against uncertain economic and political changes in Europe and abroad.

The exit of the UK from the EU represents one of the most significant political and economic challenges since the foundation of the State. The Department of Finance's strategy paper "Getting Ireland Brexit Ready" emphasises the need for Ireland to respond and to continue to review our tax regime in light of the change of circumstances post Brexit. The only certainty from Brexit is that the future position is uncertain and in light of this we need to be both proactive and reactive as the likely future shape of the relationship of the UK with the EU and particularly Ireland unfolds.

In addition to the challenges, and opportunities, faced by Brexit there is ongoing international focus at OECD level regarding BEPS and, at a EU level, the implementation of the EU Anti-Tax Avoidance Directive (ATAD) and ATAD 2. There is a clear focus by national tax authorities on ensuring transparency and re-shaping the administration of the tax system for the rapidly changing global economy where re-location of people and companies is a daily occurrence.

At a domestic level, the recent changes in Irish social and business environments compel policy makers to ensure that our tax regime keeps apace with legislative changes. The Society has identified a number of tax treatment anomalies arising from the Marriage Act 2015, as well as the failure in our tax code to reflect the transformative effect of the Companies Acts 2014.

The Law Society's submission is made in the context of the above. Within this submission, we suggest changes which are proactive; that are focused at an international level on increasing our competitiveness while acknowledging the current environment. In addition, at a domestic level, we make specific proposals centered on equity and fairness in the treatment of the marginal or under-represented in Irish society.

Furthermore the Society has highlighted a number of issues which are not about changing tax rates or providing tax breaks or incentives but regime and administrative changes to ensure that Ireland is competitive not just in relation to our corporate tax rate but in the administration of the tax system. These are changes that cannot be introduced by Revenue but require a legislative framework.

Finally, it is our view that changes to tax should been introduced through legislation as opposed to the issue of Revenue practice notes or e-briefings. The Society is very supportive of the interaction with Revenue and their officials particularly through Tax and Audit Liaison Committee ("TALC") but are strongly of the view that it is important tax legislation, which imposes the liability to tax and provides reliefs is clear from the legislation and not by virtue of other briefings.

Practitioners note that when advising clients, particularly investors into Ireland the fact that issues which could potentially be easily legislated are instead dealt with by virtue of Revenue practice can often create concern and uncertainty in light of the possibility that these practices could be withdrawn at any time. Specific examples are included below

1.2 AREAS OF THE SUBMISSION

We have focused on three key areas in making this submission, these are:-

- Recommendations for changes to deal with inequalities or inequities which exist in the Tax Code;
- Changes which are focused on keeping Ireland competitive and encouraging international investment; and
- Administrative or technical issues.

2. RECOMMENDATIONS TO DEAL WITH INEQUALITIES AND THE CHANGED DOMESTIC SOCIETY

Section 1 of the Appendix includes a list of specific recommendations which have been included in previous submissions and which for the reasons set out above we are again recommending now need to be legislated for.

However, there are a number of issues we would like highlight.

2.1 QUALIFYING BENEFITS OF PERMANENTLY DISABLED INDIVIDUALS

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 were being applied for such purposes, the benefits were then treated as exempt.

As noted in further detail at section 1.1 of the attached Appendix, the Revenue position regarding section 84 of CATCA 2003 changed in 2013/2014 as a result of unreported Appeal Commissioners' decisions. As the legislation only applies to the beneficiary who is exposed to medical expenses which could be alleviated by a gift or inheritance, the ongoing uncertainty and tax treatment of such expenses is causing undue hardship.

The Law Society continues to recommend that there is no requirement to restrict the exemption. Also, in the normal course, any benefit would always be subject to the Revenue's power to audit where deemed appropriate. In the current environment of high medical expenses and the inability of certain dependants to get medical treatment, the proposed amendment would relieve hardship on those parties.

2.2 TAXATION OF SURVIVING QUALIFYING CO-HABITANT

The tax treatment of surviving qualifying cohabitants is as relevant now as when we first raised by the Law Society in its Budget Submission of 2014. There is an anomaly regarding the taxation of financial dependant cohabitants where provision is made either by agreement or by a court order. Effectively, the current legislation encourages parties to litigate as the tax treatment is less onerous on those who proceed to court, rather than through agreement. We see no policy rationale for the distinction and set out the issue in more detail at section 1.2 of the attached Appendix.

The adoption of the Society's recommendation would encourage cohabitants to resolve matters without the need for court intervention and ensure they are assessable to tax on the same basis as if they had not made such a court application.

2.3 FAIR DEAL – DIFFERING TAX TREATMENT OF CAPITAL SUM

Perhaps the most significant issue facing Irish society is the shortage of housing stock. Reports confirm that Ireland has a significantly greater proportion of unoccupied units, even excluding holiday homes, than most other EU jurisdictions. It is the view of the Society, in light of the practical exposure that Solicitors have to dealing with lifetime family planning issues and probate, that one factor which is potentially hampering the release of housing stock are the terms of the "Fair Deal" scheme.

In calculating the assets of a person applying under the Fair Deal scheme, a percentage of the capital value of their house is taken into account for the first three years. If however they sell the house and hold onto the sale proceeds, the full capital value is assessed which could potentially penalise an applicant who otherwise would qualify under Fair Deal. In addition, any income from the rent of the house is not paid to the applicant.

We would recommend that, where a house which would qualify as a principal private residence is sold, then where the sales proceeds are retained the Fair Deal applicant should be assessed on the same basis as if the house had not been sold. This in our view could potentially release some housing stock without any cost to the Exchequer.

2.4 DWELLINGHOUSE EXEMPTION - NO RECOGNITION OF QUALIFIED COHABITANTS IN CAT IN RELATION TO SHARED DWELLING

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 of the CAT Consolidation Act, 2003.

All these reliefs and exemptions were in relation to a dwelling where the disponer and the beneficiary all lived in the dwelling and the beneficiary did not have an interest in any other dwelling. The whole or a share in the dwelling could be gifted ("*inter vivos*") or devised or bequeathed ("by will") to the beneficiary free from CAT provided certain conditions were met. The significant change introduced in 2000 was that the pre-existing relationship requirement was removed. For cohabitants, this meant that the member of a cohabiting couple, either same sex or opposite sex, who owned the dwelling in which the couple lived 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 i*nter vivos* transfers, the relief would not be available where the disponer and the beneficiary resided in the dwelling at the same time. Where the disponer did not reside in the property, it could be purchased by the disponer, lived in by the beneficiary (usually a child of the disponer) and transferred free from CAT after three years.

Cohabitants, however, could not transfer the property or a share in the property *inter vivos*. This of course, was prior to the Civil Partnership and Certain Rights and Obligations of Cohabitants Act, 2010 (“the Civil Partnership Act, 2010”) and Finance (No. 3) Act of 2011 which regularised the legal and tax position for same sex couples who could now enter into Civil Partnership and acquire the tax status of a married couple, including an exemption from CAT. Since then, we have had the Same Sex Marriage Referendum and the Marriage Act, 2015 which effectively replaces Civil Partnership with Same Sex Marriage. Existing Civil Partners can marry each other relatively easily and since February 2016 no new Civil Partnerships may be registered.

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

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

Section 51 of the Finance Bill 2017 restructures 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 practical difficulties caused by this omission. The Society calls upon the Department to consider the needs of qualified cohabitants when reviewing the proposed changes to Dwelling Exemption provided for in Section 51 of the Finance Bill, 2016.

2.5 CAT THRESHOLD FOR QUALIFIED COHABITANT

Also, where a qualified cohabitant makes provision by will for a surviving qualified cohabitant, any such provision is taxed at the Group C threshold for CAT but should a qualified cohabitant fail utterly to provide for a surviving qualified cohabitant, any application by the qualified cohabitant for provision under s. 194 of the Civil Partnership Act, 2010 will pass free from CAT.

This has the outcome of encouraging a qualified cohabitant to fail to make proper, or indeed any, provision for a surviving qualified cohabitant by will or otherwise in the knowledge that litigation will result in the surviving qualified cohabitant receiving proper provision free from CAT.

The Civil Partnership Act, 2010 recognised the enhanced status of the qualified cohabitant, but this is not reflected in the applicable CAT-free threshold. We would strongly suggest that, if a measure of CAT relief were provided for provision for a qualified cohabitant (for example, stipulating that a qualified cohabitant is entitled to a Group A threshold for benefits from their other qualified cohabitant), the number of court cases taken under s. 194 of the Civil Partnership Act, 2010 would reduce, leading to an easing of the strain on the parties concerned and the Court Service.

The Society urges the Department to amend legislation to ensure transfers between qualified cohabitants be amenable to Dwellinghouse Exemption under the revised structure, and for some measure of an increased CAT threshold generally for qualified cohabitants.

2.6 SPLIT A PENSION FUND

In family law, couples who separate or divorce have their matrimonial assets split by way of a court order; for example the ownership of the family home may be granted to a spouse under a Property Adjustment Order. Similarly pensions can be divided through a Pension Adjustment Order where the pension benefits of the parties may be split and a spouse can acquire rights to a pension which was built up by the other spouse during the marriage.

Upon the courts transferring the family home to one of the spouses, Revenue recognises that spouse as the rightful owner and the owner can avail of the various tax reliefs relating to the family home. However, Revenue does not recognise Pension Adjustment Orders.

Example 1

Michael is a member of a defined contribution pension established by his employer. He has been making regular pension contributions and his fund is worth the maximum benefit he is allowed under Revenue's funding rules, based on service and salary. He is divorced from Jane. Jane is living with the children. As part of the divorce settlement a Pension Adjustment Order granted 75% of the value of the fund to Jane. Michael subsequently remarries.

However, Revenue disregards the divorce and the new marriage for pension purposes and counts the pension which Jane received as still being part of Michael's assets. Accordingly, as Michael was at the maximum limit before the Order was granted he cannot make any further provision for his new family.

Example 2

Joe is a member of a defined benefit pension established by his employer. Joe has full service and on retirement at age 65 he can look forward to an annual pension of €60,000. Joe is recently divorced from his wife, Jane. The couple's 2 children live with Jane. As part of the divorce settlement a Pension Adjustment Order granted 75% of the value of the fund to Jane. Joe subsequently remarries.

Under Revenue rules, Joe's pension is at the maximum allowable threshold. This means that every cent Joe puts aside for his new family is taxed at 70%.

Both these examples are results of Revenue practice. There is no legislation to authorise Revenue's disregard for the court-ordered split of matrimonial pension assets when calculating tax. But that is the effect; for pension purposes the concept of divorce does not exist - you are eternally married to the first spouse.

In January 2015, in response to a Parliamentary Question, the Minister for Finance, Michael Noonan TD defended Revenue's position on the grounds of costs to the Exchequer of recognising the separation/divorce and that it was an anti-avoidance measure .

The reference to anti-avoidance rules in this context obviously implies that the courts facilitate divorce for tax planning purposes. In any event, the practice discriminates against the second family and runs contrary to the constitutional safeguards granted to divorce.

3. KEEPING IRELAND COMPETITIVE AND ENCOURAGING INTERNATIONAL INVESTMENT

The Law Society strongly supports the objective of making Ireland's tax regime competitive and attractive to job creation. In that regard, the Society welcomes the opportunity to engage with the relevant Departments and State Agencies in furtherance of these objectives.

It is vital that Ireland is seen as a "best in class" jurisdiction for incorporating a trading company or holding company. This is not just by reference to the corporate tax rate but as regards the regime that exists including transparency and reputation.

In order to achieve these goals, it is the Society's view that certain anomalies in different areas of tax legislation are amended and many of these have been included in prior submissions by the Society.

The failure to implement any tax changes to reflect the company law changes made in the Companies Act 2014 is a cause of serious concern to practitioners and their clients. While there is ongoing engagement between practitioners and Revenue through TALC, no changes to tax law have been made despite it being the largest piece of legislation in the history of the State. This has resulted in taxpayers being required to write to Revenue on a case by case basis to agree the applicable tax treatment of transactions. The failure to legislate for the tax treatment of the transactions made possible under the Companies Act 2014 has undermined the progress made in company law. This failure to legislate also undermines Ireland's claim to maintaining a competitive tax regime and we recommend the necessary legislation in relation to all changes resulting from Companies Act 2014 should be included in the Finance Bill.

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 now need to be legislated in respect of. Again many of the changes should not give rise to any cost to the Exchequer but will be helpful from a competitiveness agenda and encourage inward investment.

Issues we would like to highlight include

- **Improving Ireland as a holding company location**

Where a company is looking to migrate or set up a new holding company, it looks at various factors including tax. In comparing Ireland to under EU competitors, including the UK, there are a number of provisions both in, or missing from, the tax regime which put Ireland at a competitive disadvantage. In particular, for companies looking to migrate to this jurisdiction, the current language in s.29 Taxes Consolidation Act 1997 ("TCA 1997") gives rise to an ambiguity in the context of companies that are not resident in Ireland for a calendar year. This

ambiguity could be easily amended with an amendment to s.29(1) TCA as noted at section 2.4 of the attached Appendix.

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 encourages the free-movement of capital within Ireland. Further details are included at section 2.5 of the Appendix.

A further change would be an amendment to section 626 (B) TCA 1997, to the definition of 'relevant territory', in order to encourage Ireland as a jurisdiction for incorporating holding companies. Further details are included at section 2.8 of the attached Appendix.

All of these proposed measures support the vision of Ireland as a jurisdiction to established international headquarters/operations and, ultimately, to attract capital and investment into Ireland.

- **Effective Entrepreneurs Relief**

The Finance Act 2016 amended the rules relating to "Entrepreneur's Relief" introducing a 10% capital gains tax ("CGT") rate where a number of conditions are satisfied. The Department of Finance acknowledges that Ireland is competing with the UK for entrepreneurs and the changes introduced were in response to a review of the UK legislation.

However, the conditions to be satisfied in Ireland and in particular the requirement to work over 50% of the time in the business for 3 out a 5 year period prior to the disposal, are very restrictive and, in the Society's view, is resulting in entrepreneurs leaving Ireland or not locating here with the resultant missed opportunity of job creation and gains for the Exchequer. We would recommend that the conditions of "Entrepreneur's Relief" are reviewed so as to ensure Ireland can compete with the UK post-Brexit and attract these important employment generators.

- **Review of Stamp Duty as a competitive tool.**

The publication "Getting Ireland Brexit Ready" notes at paragraph 3.8 that a review of the current rate of stamp duty on the transfer of stocks or Irish marketable securities is to be carried out. We would support this review and recommend that in order to ensure ongoing investment in Irish companies the stamp duty rate on such transfers is reduced to 0.5% in line with the stamp date in the UK.

4. ADMINISTRATIVE AND TECHNICAL ISSUES

The administration of the tax system should provide certainty for taxpayers. As referenced above the introduction of the Companies Act 2014 is an example where the introduction of an important new legislative framework for businesses has created uncertainty from a tax perspective. While this is clearly an unintended consequence of the legislation it is very unhelpful.

We have detailed in the Appendix a number of legislative changes which we have suggested in our last three Budget Submissions. Some of these include legislating for existing published Revenue extra-statutory concessions such as no claw back of relief under section 79 of the Stamp Duties Consolidation Act 1999 ("SDCA 1999") at section 3.3 of the Appendix, or the ability to include a non-resident company in a CGT group under section 617 TCA 1997. As the proposed recommendations are to legislate for existing practice then by definition there will be no loss to the Exchequer but increased clarity and certainty for the taxpayer.

Another point worth highlighting is the inequitable position where a party who suffers the VAT costs and wishes to challenge such a determination has no right under the VAT Act. The fact that the taxpayer has no *locus standi* whatever the merits of their argument is unhelpful to the argument that the Irish tax regime is open, transparent and equitable. There are further details on this issue on page 18 of the Appendix.

5. 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, and set out more comprehensively in the attached Appendix, represent pragmatic and largely cost neutral changes that are based on the practical experience of our practitioners and their clients.

The Society welcomes the opportunity to outline in greater detail its views to the Departments and is available to clarify any queries that might arise regarding the proposals contained herein.

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APPENDIX:

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1 RECOMMENDATIONS TO DEAL WITH INEQUALITIES AND CHANGED DOMESTIC SOCIETY

1.1. QUALIFYING BENEFITS OF PERMANENTLY DISABLED INDIVIDUALS

1.1.1. 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.

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 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.

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) 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.

1.2. TAXATION OF SURVIVING QUALIFYING COHABITANT

1.2.1. Item 27 of the Third Schedule to the Finance (No. 3) Act, 2011 inserted Section 88A CATCA 2003. Section 88A provides that any gift or inheritance received by a qualified cohabitant under a Court Order under s. 175 of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act, 2010 shall pass free from CAT. There is no other provision in the Finance (No. 3) Act, 2011 for any tax relief for cohabitants.

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

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

1.3.1. 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.

1.3.2. 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).

1.4. DISCRETIONARY TRUST TAX

1.4.1. 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.

1.4.2. 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.

1.4.3. 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.*"

1.5. GOVERNMENT SECURITIES

Exemption of Government securities under Section 81 CATCA 2003

1.5.1. 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.

1.5.2. 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.

1.5.3. 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.

1.5.4. 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.

1.5.5. 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.

1.5.6. 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.

1.6. CAT AND INCOME TAX

1.6.1. 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.

1.6.2. 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.

2 KEEPING IRELAND COMPETITIVE AND ENCOURAGING INTERNATIONAL INVESTMENT

2.1. WITHHOLDING TAX ON QUOTED EUROBONDS

2.1.1. Section 64 TCA provides that no withholding tax shall be deducted from interest paid on "quoted Eurobonds". This is a useful provision in the context of the Irish financial services industry. One of the conditions for the exemption is that the bonds are held in a "recognised clearing system". Recognised clearing systems are used where the paying agent in respect of the bonds is "not in the State". As the interpretation of "not in the State" could potentially require paying agents to have no presence in Ireland, this can cause difficulties in satisfying this condition.

2.1.2. Furthermore, the list of "recognised clearing systems" in Section 246A (2) (a) TCA inevitably cannot keep up with a fast moving industry. The combination of this means that some uncertainty can exist in some cases as to the application of the quoted Eurobond exemption.

Law Society recommendation:

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

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

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

2.2. TREATMENT OF DISPOSAL OF PATENT RIGHTS

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

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

2.2.2. Issues arising under section 757 TCA

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

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

Law Society recommendation:

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

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

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

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

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

Law Society recommendation:

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

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

- the payment is made for bona fide commercial reasons and does not form part of an arrangement the main purpose of which is tax avoidance.

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

2.4.1. The current language in section 29 TCA gives rise to ambiguity in the context of the taxation of companies that are not resident in Ireland for the entirety of a calendar year. While we understand that confirmations have been provided on this point in the past, we would be grateful if consideration could be given to now legislating for those confirmations.

2.4.2. Section 29(2) TCA provides that a company shall be chargeable to CGT in respect of chargeable gains accruing to such company "*in a year of assessment for which such [company] is resident …in the State*." However, companies are subject to corporation tax on capital gains by reference to accounting periods, and not years of assessment.

2.4.3. There is no case law or published Revenue guidance on whether a company that is resident for part only of a year of assessment is considered to be resident "for" the year of assessment for CGT purposes or whether such company should only be considered resident for CGT purposes from the date of commencement of its accounting period.

2.4.4. It seems unreasonable that Ireland should have the right to subject a company to Irish taxation as if it were resident at the time of a disposal, when it clearly was not so resident at that point. With this in mind, we understand that it has previously been confirmed that:

2.4.4.1. the reference to "year of assessment" in section 29(2) TCA should be read as "accounting period" in so far as it relates to a company and that on this basis, a company is chargeable to CGT (or in accordance with section 21(3) TCA corporation tax on chargeable gains) in respect of chargeable gains accruing to it in an "accounting period" for which the company is resident in Ireland; and

2.4.4.2. that a company which is resident for part only of a year of assessment (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."*

2.5. WITHHOLDING TAXES ON INTEREST PAID TO IRISH COMPANIES

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

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

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

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

Law Society recommendation:

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

2.6. SHARE BASED AWARDS – TECHNICAL AMENDMENTS – EMPLOYER FILING OBLIGATIONS

2.6.1. 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.

2.6.2. 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).

2.7. SHARE BASED AWARDS – EXCHANGE OF RESTRICTED SHARES

2.7.1. 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> …"

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

2.8.1. 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.

2.8.2. The scope of Section 626B TCA can be contrasted with Section 21B TCA which contains another favourable feature of Ireland's holding company regime. Section 21B TCA extends the 12.5% rate of corporation tax to certain dividends received by Irish companies where they are paid out of the trading profits of certain non-Irish resident companies. Section 21B TCA was extended in Finance Act 2012 to facilitate investments by Irish companies in countries which have ratified the Convention. In order to ensure that Section 626B does not negate the benefit of the amendments that were made to Section 21B TCA, the definition of "relevant territory" for the purposes of Section 626B should be extended to include a territory the government of which has ratified the Convention.

2.8.3. 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).*"

3 ADMINISTRATIVE AND 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. 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).

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 €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.

3.2 SECTION 80 Stamp Duties Consolidation Act (“SDCA”)

3.2.1 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".

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.

3.3. CHANGES TO SECTION 79 SDCA

3.3.1. 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.

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 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.

3.4.2. In light of the fact that the offences targeted by Section 127 are offences that can be prosecuted on indictment (and not summarily), the Society is of the view that, from a legal professional privilege standpoint, it is inappropriate for the District Court to decide upon a matter such as the status of a document, when the offence that the Revenue is pursuing is triable on indictment i.e. only in a higher court. By way of analogy, in the context of inter partes discovery, disputes relating to legal professional privilege that arise in Circuit Court matters are dealt with by the Circuit Court; in the case of matters before the High Court, they are dealt with by the Master of the High Court and in matters arising in the context of the Companies Acts, they are dealt with in the High Court (s.2 Companies Act, 1963).

3.4.3. The Society also believes that the powers conferred on the District Court to appoint another person to examine the documents under review and prepare a report for the court, run contrary to the very concept of legal professional privilege. The rationale for the doctrine of legal professional privilege would be seriously undermined if a District Court could provide sensitive documents to, for example, another firm of solicitors, in order to prepare a report on them. Section 908F(5) also gives rise to practical difficulties in that its description of the person to examine the documents as being a "person with suitable legal qualifications" is too broad and could encompass a wide range of people – it is entirely unclear as to whether such persons would be required to be a member of the legal profession. It is also unclear as to how the court can satisfy itself that the person has "independence from any interest falling to be determined".

Law Society recommendation:

Section 908F 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.

3.5. PENALTIES FOR FAILURE TO MAKE A RETURN

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

Law Society recommendation:

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

3.6. CAPITAL GAINS TAX EXEMPTION FOR FOREIGN CHARITIES

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

Law Society recommendation:

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

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

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

Example

X contracts to sell goods or services to Y. If VAT applies, X is the accountable person in relation to the sale/supply. The contract provides that the price includes such VAT as applies under VATCA. Revenue confirm in an assessment given to X that VAT applies on the sale/supply. Y is advised that there are reasonable arguments to indicate that the Revenue is not correct in the assessment and that VAT should not

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

Law Society recommendation:

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

3.8. CGT RETIREMENT RELIEF

3.8.1. In order to claim CGT Retirement Relief, the persons transferring the farm i.e. generally parents, must be 55 years of age or over and have owned and farmed the land for 10 years prior to the transfer. The parents can lease out the farm for up to 25 years but have to have owned and farmed the land for 10 years prior to the first lease/letting. Many farming couples put land into joint names not realising that it could cause unintended CGT tax implications.

3.8.2. The question generally arises as to whether a female spouse is entitled to claim CGT Retirement Relief where she has been working off farm i.e. whether she can prove that she has farmed the land for 10 years prior to the transfer? While the tax rules provide that a spouse can step into the shoes of the other spouse in satisfying the 10 year ownership requirement, the spouse can only step into the shoes of the other spouse in satisfying the 10 year usage requirement in a death situation i.e. where the spouse farming the land has died.

Law Society recommendation:

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

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

3.9.1. Section 55 of Finance Act 2015 inserted a new Section 64(8A) VATCA which extends certain anti-avoidance rules to supplies of "uncompleted" properties between connected persons.

3.9.2. Section 64(8A) applies to sales of "uncompleted" properties between connected persons where the VAT charged on the sale of the property is less than the VAT deducted on acquisition and/or development of the property. Where Section 64(8A)

applies, there is a claw-back of the difference between the two amounts from the person making the supply (i.e. the vendor).

3.9.3. Section 64(8) is the corresponding provision which applies to supplies of "completed" properties between connected persons. A claw-back under Section 64(8) may be avoided under Section 64(9) if the vendor and the purchaser agree in writing that the purchaser will take on the capital goods scheme liabilities in relation to the property (i.e. the purchaser "steps into the shoes" of the vendor such that no VAT is chargeable on the supply and no new capital goods scheme life begins at the time of the supply).

3.9.4. Section 64(9), however, has not also been amended to avoid a claw-back under Section 64(8A) where the vendor and purchaser of an "uncompleted" property agree in writing that the purchaser will take on the capital goods scheme liabilities in relation to the property (as in the case of supplies of "completed" properties under Section 64(8) VAT Act).

Law Society Recommendation:

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