



## **TALC Sub-committee on Simplification and Modernisation of Business Reliefs**

### **Feedback on the Tax Reliefs to Support the Lifecycle of a SME**

#### **Introduction**

The Institute has been an active participant in the work of the TALC Subcommittee on Simplification and Modernisation of Business Reliefs to date. We welcome the opportunity to provide a summary of the issues we have raised at the sub-committee meetings on the various business reliefs under consideration. We have summarised in the sections below the Institute's administrative and legislative recommendations which we believe would make the various business reliefs more accessible to SMEs.

In addition to identifying opportunities to simplify and modernise the administration of business reliefs, the TALC Sub-committee has been tasked by the Minister for Finance to consider ways to raise awareness of such reliefs among SMEs. In this regard, we welcome the work that Revenue has begun to ensure it is easier for SMEs to source information on the various reliefs on the Revenue website.

We would strongly encourage the development of a centralised webpage for SMEs on the Revenue website which categorises the business reliefs by the relevant phases of the business i.e. start-up, growth and maturity including sale and succession. This would simplify the process for SMEs to obtain the relevant information on the reliefs from the outset.

#### **1. Employment Investment Incentive (EII)**

##### **Administrative Recommendations**

##### **i. Commit appropriate and adequate resourcing to the administration of EII applications**

To ensure consistency in dealing with applications in a timely manner, it is important that there are dedicated full-time Revenue staff who understand the complicated rules of the scheme, together with Revenue officials who have commercial knowledge and experience in dealing with such businesses.

**ii. Provide enhanced support for small and micro companies**

A streamlined administrative process needs to be introduced for small and micro companies to help them avail of EII finance. This could be achieved by adopting non-mandatory template forms (i.e. for business plans, cash flows etc.) and/ Revenue accepting already completed Enterprise Ireland or Local Enterprise Office forms, where relevant, as supporting documentation for EII claims. Such steps would ease the extensive administrative burden for small and micro companies.

**iii. Reduce duplication of administration**

Companies claiming EII are required to file Form RICT, Form 21R and to tick a box on the Form CT1. The Form RICT is macro enabled and can be prone to technological errors. Feedback from members has highlighted that information that has already been submitted on the aforementioned forms to Revenue, is often requested subsequently by Revenue when conducting a Level 1 compliance intervention.

It is reasonable for Revenue officials to request copies of business plans, bank account statements to support EII applications but all Revenue officials dealing with a particular taxpayer should have access to the relevant information contained on their submitted EII forms when undertaking a compliance intervention without having to request the taxpayer to submit the information again.

Furthermore, Revenue officials should be able to download the relevant share information that has been submitted by a company on its Form B5 to the CRO, instead of requesting it again from the taxpayer when conducting an EII compliance intervention.

**iv. Separate Tax and Duty Manual (TDM) for each relief in Part 16 TCA 1997**

The TDM on Part 16 TCA 1997 currently runs to 108 pages and covers the three schemes contained in Part 16 i.e. EII, Start-up Capital Incentive (SCI) and Start-up Relief for Entrepreneurs (SURE). Consideration should be given to separating the Manual into three separate TDMs to cover each relief.

With regard to the TDM on EII, this should be streamlined to contain guidance on the current rules that apply with historical material archived into separate Manuals for reference.

**Legislative Recommendations**

**v. Permit holding company structures**

The exclusion of holding company structures is causing genuine businesses to be precluded from EII finance. Typically, founder holding companies are established before raising EII finance is even a consideration. These structures are inadvertently borne out of genuine commercial arrangements, sometimes as a result of partnerships or Joint Ventures (JVs) arising from incubator programmes or due to the understanding of founders as to market norms and investor expectations on certain structures. In some cases, the structure can be a legacy from a previous failed venture.

The exclusion of structures which include founder holding companies from the EII is in stark contrast to other funding sources (including Enterprise Ireland and other Government funding) where founder holding company structures are permitted and in fact, are encouraged in certain sectors.

It is our understanding that the General Block Exemption Regulations (GBER) which sets out the conditions which the EII, as a State aid, must satisfy, does not prohibit holding companies. The restriction appears to stem from rules that pertained to the former Business Expansion Scheme (BES).

**vi. Amend the employment conditions**

Section 26(b) Finance Act 2021 reintroduced a condition in section 502(5) TCA 1997 regarding increases in employment or expenditure on R&D. The condition must be satisfied three years after the year in which the eligible shares are issued. Failure to satisfy the condition will result in a partial withdrawal of the tax under the scheme.

This condition was removed in 2019 following the removal of second stage relief for shares issued after 8 October 2019. The removal of the condition was in line with the stated objective at that time, to increase the efficiency and effectiveness of the scheme. The reintroduction of the condition further adds to the administrative burden and does not take account of the fact that businesses may pivot and change their business models during the interim period.

Section 502(5) TCA 1997 requires an increase in (a) both the number of employees and the total remuneration of employees, or (b) the expenditure on R&D. The requirement to increase both the number of employees and the total remuneration of employees can be problematic and would appear to be contrary to section

496(2)(a) TCA 1997, which states that EII is for the creation or maintenance of employment.

In our view, it would be more appropriate for a company to be deemed to have fulfilled the employment condition if they satisfy either of the tests i.e., an increase in the number of employees under Section 502(5)(a) or an increase in total remuneration under Section 502(5)(b)) TCA 1997.

**vii. Impact of non-compliance**

Under the existing rules, administrative errors or delays in the certification and reporting process can result in a full clawback of the relief on the fundraising company which is disproportionate to the error in our view.

For example, where eligible shares are held by a nominee, a failure to file a nominee return (Form 21R) may result in such shares ceasing to be eligible shares and consequently, there will no longer be a qualifying investment for the purposes of the relief (see section 494(2) and section 496 TCA 1997). This means that there is a clawback of the relief on the company under section 508U TCA 1997. Equally, filing a Form RICT without an Eircode number could trigger a full claw back of the relief.

These penal sanctions can act as a disincentive for companies considering using the EII. We believe it would be more proportionate for a monetary fixed penalty to be imposed, rather than a clawback of the entire EII relief, as a sanction for an administrative error or the late filing of a return.

**viii. Amend the connected party rules**

We welcomed the amendment to the connected party rules in Finance Act 2022 where the EII investment in a company is made via an investment fund. However, we believe a further amendment to the connected party rules is necessary where the EII investment is made directly in the qualifying company.

The connected party rule limits the ability of early-stage companies to attract strong board membership because shares and share options granted to non-executive directors or other key employees to incentivise them to join the board, are curtailed. Investment by such individuals can be key to developing a business as it means they are committed to its future.

In our view, there should be a carve-out from the connected party rule linked with a control test, so that shares and share options granted to non-executive directors or

other key employees will not automatically result in ineligibility as a qualifying investor.

**ix. Recognising additional exit strategies for EII investors**

Normal commercial investment decisions are always made with exit strategies being provided to investors. Investors will always ask about what the company will do with their money and how and when they will receive a return on their investment.

The EII scheme only allows investors to exit by way of share redemption or a trade sale. The former attracts income tax treatment and requires the company to have accumulated distributable reserves, and the latter only materialises for a small number of companies. Investee companies also need to be able to tidy up their share capital tables in advance of a potential exit or for other commercial reasons without the fear of contravening the EII rules.

The EII scheme imposes a clawback of relief for investors still within their relevant period if other EII investors are taken out. In the event a company raises several rounds of EII funds, it is not reasonable to expect the investors in Round 1, who took on the highest levels of risk, to have to wait until the 4-year period of the final round has expired to receive a return on their investment. The redemption windows set out in section 508R (9) TCA 1997 are not sufficient.

We believe the EII scheme should recognise exit strategies for investors beyond what is provided by way of a share redemption under section 508R(9) TCA 1997 or trade sale, given the high commercial risks investors assume.

**x. Allowing the offset of capital losses**

Capital losses, net of the tax relief already received, incurred on EII investments should be allowable, in line with the recommendation made by Indecon in their 2018 evaluation of the scheme, provided the loss relief does not impact the income tax relief available under the revised GBER. We believe limiting the loss to the actual cash loss to the investor is fair and reasonable and there is a precedent for such under section 552(1A) TCA 1997.

## 2. Start-up Capital Incentive (SCI)

### Administrative Recommendations

#### i. Raise awareness of the scheme

Feedback from our members indicates that awareness of the SCI scheme is low. Therefore, we would recommend Revenue to enhance the information on the Revenue website to ensure the SCI scheme is easily accessible to small and micro companies and start-ups.

#### ii. Separate TDM on SCI

As outlined above, we recommend that Revenue guidance on SCI is contained in a separate TDM for ease of reading rather than as part of a TDM on all reliefs contained in Part 16 of the TCA 1997.

### Legislative Recommendation

#### iii. Review the criteria of the scheme

Feedback from our members suggests the narrow criteria set out in the SCI scheme has impacted its take up. The limit of €500,000, which is considered quite low and the fact the company must not have any linked enterprises are barriers to claiming the relief.

Furthermore, as follow on investment under Part 16 only qualifies for 20% tax relief in line with the revised GBER, we understand that members advise their clients to undertake a larger round of investment first, which can qualify for 40% or 50% under the EII provisions before obtaining finance from family/friends which qualify for relief under the SCI scheme.

### 3. Start-up Relief for Entrepreneurs (SURE)

#### Administrative Recommendation

##### i. Separate TDM on SURE

As outlined above, we recommend that Revenue guidance on SURE is contained in a separate TDM for ease of reading rather than as part of a TDM on all reliefs contained in Part 16 of the TCA 1997.

#### Legislative Recommendation

##### ii. Extend SURE to the self-employed

Under the SURE scheme, an individual needs to have paid sufficient income tax through the PAYE system in the previous four years. This means that a previously self-employed person, who has paid equivalent levels of income tax through the self-assessment system, does not qualify for relief. Apart from discriminating against self-employed workers, this restriction acts as a significant barrier to the effectiveness and applicability of SURE. The SURE scheme should be extended to self-employed workers who set up a new business.

### 4. Tax relief for new start-up companies (Section 486C TCA 1997)

#### Administrative Recommendation

##### i. Raise awareness of the scheme

Section 486C provides relief from corporation tax for start-up companies in their first three years of trading. The relief was introduced to provide support to new business ventures in their critical early years of trading and thereby, supporting the creation of additional employment and economic activity in the State. Feedback from our members indicates that awareness of the relief available under section 486C TCA 1997 up to now has been low and has therefore been rarely claimed by companies.

It was highlighted during discussions of the sub-committee that it was even difficult to locate content on the tax relief for new start-up companies on the Revenue website. We welcome the ongoing work by Revenue to improve the accessibility of

this content on the Revenue website to ensure the relief can be more easily accessed by small and micro companies and start-ups.

### Legislative Recommendation

#### ii. **Remove the link to Employers' PRSI**

Finance Act 2011 modified the relief to link the quantum of corporation tax relief to the amount of Employers' PRSI paid by a company in an accounting period, subject to a maximum of €5,000 per employee and an overall limit of €40,000. Finance Act 2013 enhanced the relief to allow a carry-forward of any unused relief arising in the first three years of trading, due to losses or insufficient profits, for use in subsequent years.

Feedback from our members indicates that linking the quantum of relief to Employers' PRSI has acted as a significant barrier to availing of the relief under section 486C. This is because often in start-ups companies, salaries are often paid at reduced levels due to salary caps imposed by funders until certain milestones are reached by the business.

Furthermore, employees in start-ups are often given a mix of a lower salary and share-based remuneration. All of this results in lower levels of Employers' PRSI being paid by start-ups to support claims for relief under section 486C.

## 5. R&D Tax Credit

### Administrative Recommendations

#### i. **Increase limit for Revenue's streamlined R&D validation process for small and micro companies**

In an effort to reduce the administrative burden, Revenue does not seek to challenge the 'science test' as part of any validation checks on a R&D Tax Credit claim made by a small or micro company that has already been approved for an Enterprise Ireland, IDA or EU grant for the R&D project, provided the credit claim is no more than €50,000 for any accounting year and the R&D project is undertaken in a qualifying field of science or technology.

While this is a welcome simplification measure for small/micro companies, consideration should be given to increasing the amount that can be claimed from

€50,000 to make the credit more accessible for small/micro companies and start-ups. For example, the €50,000 limit could apply per project rather than per claim or it could be increased by a multiple of what it is now, say to €100,000.

**ii. A Revenue pre-approval process for first-time R&D Tax Credit claims by small and micro companies**

We believe a pre-approval process for first time R&D Tax Credit claims by small/micro companies would help to alleviate the uncertainty over Revenue subsequently challenging the claim on the ‘accounting test’ (i.e., the record-keeping requirements).

Notably, the OECD has recommended the introduction of such a pre-approval process to help reduce uncertainty for SMEs. In the UK, SMEs making their first R&D claim can qualify for ‘Advance Assurance.’ If ‘Advance Assurance’ is granted, HMRC will accept any R&D claims in the first three accounting periods without the need for HMRC to carry out further checks on the claim.

**iii. Simplified documentation requirements for R&D Tax Credit claims by SMEs**

The ‘accounting test’ must be passed by small and micro companies. The time and resources required to prepare this documentation can deter some taxpayers, and particularly SMEs, from claiming the credit. For them, the compliance cost for the business is greater than the potential benefit of the tax credit.

Having a ‘one size fits all’ approach, regardless of the size of the company is not fit for purpose and does not encourage engagement from the SME sector. Simplified documentation requirements for claims by SMEs would help improve the uptake of the R&D Tax Credit among start-up and SMEs.

Revenue should consider leveraging financial documentation prepared by SMEs for other government agencies, for example, Enterprise Ireland grants, to support R&D Tax Credit claims. Currently, Revenue provide a “Suggested File Layout” which is based on 24 questions, in addition to sub-questions, as a basic guide to the contemporaneous documentation that it expects a company to maintain. This includes a caveat that *“further supplementary/clarifying information may be requested.”*

Typically, grant agencies require supporting information in a different format to support a grant funding drawdown, including a “Claims Checklist” and associated documentation (e.g. Independent Accountant’s Report, Directors’ Statement,

Revenue Grant Claim Form, Progress Report) and further documentation to be available upon inspection (e.g. payslips, timesheets, and invoices).

Furthermore, we recommend that Revenue guidance relating to overhead costs should be simplified as it has become increasingly complex to navigate, particularly for SMEs. This could be achieved, for example, by providing for a set percentage of labour overheads in guidance to simplify R&D expense claims and provide more certainty to taxpayers.

**iv. Amend Revenue guidance on agency staff**

The use of agency staff is considered to be outsourcing for the purpose of computing the amount of qualifying R&D activity and related expenditure and is subject to the limitations on outsourcing. This rule relates to any individual not remunerated directly by the company for their services.

Revenue allows costs incurred which relate to individual consultants who are hired on a part time or short-term basis to undertake sub-contracted activity to be treated as part of the direct employee costs of the company and not as agency staff, provided that the following conditions are met:

- The individual works under the company's control and direction.
- The individual works on the company's premises.
- The individual must be able to contribute specialist knowledge, which cannot be supplied by the in-house research team, to a specific R&D project being undertaken by this in-house team.
- The engagement period does not exceed 6 months.

This is a welcome concession in Revenue's guidance but feedback from our members suggests that the conditions to satisfy the concession for agency staff often do not reflect the commercial reality of such projects, in particular the requirement for the individual to work on the company's premises and for the engagement period not to exceed 6 months. Requiring an individual to work on the company's premises does not reflect the hybrid nature of the new blended working environment and should be reconsidered.

We would contend that there should not be any restriction imposed on SMEs using agency staff or individual consultants, where those agency staff/individual consultants cannot make an R&D Tax Credit claim as there is risk of double-dipping

of the credit. Feedback from our members indicates that the removal of this restriction for agency staff/individual consultants would greatly benefit SMEs.

**v. Develop SME-friendly Revenue guidance on sector specific R&D issues**

The processes and documentation needed to support a R&D Tax Credit claim can be daunting. This is a particular challenge for business sectors such as food, software, and IT, which traditionally do not document their processes and costs to the extent done in highly regulated sectors, such as pharma and financial services. Providing SME-friendly guidance, with step-by-step instructions on the claims process and practical studies, together with tips on how to avoid common errors in claims is essential, similar to the approach adopted by HMRC in the UK.

Industry specific guidance, with detailed practical instances of what qualifies and what does not qualify would be welcome. For example, starting with sector-specific guidance for food production, software, and med-tech industries, all of which engage in very different R&D processes. Uncertainty surrounding what can qualify and how to document such processes, continues to persist in these sectors.

**vi. Ensure Revenue Compliance Interventions are proportionate and conducted in a timely and efficient manner**

There is a certain level of anxiety amongst companies over the potential for Revenue to subsequently challenge R&D Tax Credit claims. While verification of claims by taxpayers is an intrinsic part of a self-assessment system, it is important that Revenue Compliance Interventions are proportionate and conducted in a timely and efficient manner, in the interest of all parties. In addition, it is important that there is recognition of the appropriateness of ‘technical adjustment’ treatment for R&D Tax Credit claims, given the subjective nature of R&D.

**vii. Access to Revenue's R&D technical experts**

Providing access to Revenue’s R&D technical experts is a way in which R&D Tax Credit claims could be dealt with more smoothly. Taxpayers and their advisers should be given the opportunity to participate in briefings with R&D technical experts during the review process, which would reinforce the independence of the expert and increase the overall transparency of the review process.

It is also vital that the R&D technical experts tasked with opining on the science element of R&D Tax Credit claims have the experience of the application of science in a business environment. Feedback the Institute has received indicates that the

technical experts used by Revenue to opine on the 'science test' tend to be from academic backgrounds, which can often result in knowledge gaps, as the technical expert is applying science theory to commercial practices. Revenue should explore ways to expand the pool of experts undertaking this work to ensure it adequately reflects the necessary expertise.

The Institute was disappointed to learn that the May 2024 training session for R&D technical experts, which was being co-designed and co-developed by Revenue and members of the TALC R&D Discussion group from tax practice will no longer proceed due to concerns raised it might jeopardise the independence of the experts. Revenue needs to consider ways to address the serious concerns among taxpayers and their advisers in relation to the perceived lack of independence of R&D technical experts. These include:

- The level of consistency from the R&D technical experts varies widely on the science test.
- Delayed response times from the R&D technical experts, with some responses delayed up to six months.
- Some R&D technical experts do not appear to fully understand that they are independent given they are engaged by Revenue; provided with Revenue guidance at the start of the engagement; issue the draft report to Revenue (to ensure it meets certain technical standards per the legislation) and appear as a Revenue witness in appeal cases.
- Experts sharing draft reports on R&D Tax Credit claims with Revenue and not with the relevant taxpayer.
- Experts having pre-meetings with Revenue to discuss R&D Tax Credit claims and not with the relevant taxpayer.

The aim of the training was to ensure that the experts would remain independent in drafting their report, while at the same time, address the abovementioned concerns raised by practitioners over the past number of years in relation to the perceived lack of independence and access to R&D technical experts.

#### **viii. Stakeholder consultation in advance of updates to Revenue guidance**

Revenue guidance on the R&D Tax Credit has changed 18 times since the introduction of the credit. While many of the updates have provided more clarity on various aspects of the credit, the combination of the volume of iterations and the change in emphasis to the extent to which a company may rely on the guidance, has added to the uncertainty in particular where the legislation underpinning the guidance has not been amended but Revenue's interpretation of it has altered.

Consultation with stakeholders in advance of updates to Revenue’s guidance would help to provide more tax certainty for claimants. This should include consultation with corporation tax software providers to ensure R&D Tax Credit claims can be submitted to Revenue without processing difficulties.

### Legislative Recommendations

#### **ix. Condense the 3-year R&D Tax Credit payment schedule to one year for SMEs**

The changes introduced in Finance Act 2022 to align the R&D Tax Credit with new international definitions of refundable tax credits provides for a new three-year fixed payment schedule. We welcome the Finance (No.2) Act 2023 amendment to double the first year payment threshold to allow the first €50,000 of a R&D Tax Credit claim to be paid in full in the first year of the claim rather than having to be spread over the normal three-year period.

However, we believe condensing the 3-year R&D Tax Credit payment schedule to one year for SMEs would provide valuable assistance to smaller companies that tend to be cash constrained and accelerating the refund for them would be very beneficial, with only a timing cost for the Exchequer.

#### **x. Align the definition and criteria for R&D**

We believe consideration should be given to aligning the definition for R&D grants given by IDA Ireland and Enterprise Ireland which include innovation with the R&D Tax Credit.

Section 2.7.1. Interaction with IDA/Enterprise Ireland’s/Horizon 2020/Horizon Europe R&D grants in Revenue’s Guidelines refers to a concession for small or micro enterprises whereby Revenue would not, as a rule, seek to challenge the science test in relation to a project where: an Enterprise Ireland, Horizon 2020, Horizon Europe or IDA R&D grant has been approved in respect of the R&D project (where the total credit is €50,000 or less).

However, Revenue’s Guidelines draw a distinction whereby projects may be “innovative” rather than qualifying R&D, while national grants often include reference to innovation e.g. Enterprise Ireland “RD&I Fund” or IDA “RD&I Grant.”

Enterprise Ireland’s, Horizon Europe and IDA’s R&D grants in respect of research and experimental development projects come within the meaning of the OECD’s Frascati Manual 2015, which states: “*Research and experimental development comprise*

*creative and systematic work undertaken in order to increase the stock of knowledge....and to devise new applications of available knowledge. [Innovation] has to do with putting new or significantly improved products on the market or finding better ways (through new or significantly improved processes and methods) of getting products to the market. R&D may or may not be part of the activity of innovation, but it is one among a number of innovation activities. These innovation activities may be carried out in-house or procured from third parties.”*

Ideally, the criteria for the R&D Tax Credit administered by Revenue should be aligned with other State agencies, the EU, and the OECD Frascati Manual for simplicity. However, at a minimum, it should be aligned with the criteria adopted by other State agencies. Given all R&D grants from IDA and Enterprise Ireland are subject to assessments on the science element by Technical Assessors, this should be relied upon by Revenue for the purposes of meeting the science test for R&D Tax Credit claims.

**xi. Increase the limits for outsourcing**

We believe the level of qualifying expenditure incurred by a company when R&D is sub-contracted or outsourced to a third-party or university or Institute of Higher Education should be increased, above the current limits of 15% of in-house R&D expenditure or €100,000 (whichever is greater). This would be in keeping with Government policy to foster collaboration between academia and private business.

**xii. Allow rent to qualify as R&D expenditure**

The R&D Tax Credit plays a critical role in supporting innovation in our indigenous businesses. *The Report of the SME Taskforce: National SME and Entrepreneurship Growth Plan* identifies enhancements needed to the R&D Tax Credit to incentivise increased investment in innovation by Irish SMEs. However, Revenue’s guidance, updated in July 2020, significantly impacted the attractiveness of the R&D Tax Credit for SMEs.

In July 2020, Revenue updated their guidance on Section 766(1) TCA 1997 on the circumstances in which rental costs can be considered qualifying expenditure for the purpose of the R&D Tax Credit. Notwithstanding representations from tax advisers through TALC, Revenue confirmed their view that in most cases rent does not qualify as R&D expenditure but there may be scenarios where rent can qualify where the expenditure is incurred wholly and exclusively in the carrying on of the R&D activities.

The guidance provides examples of rent incurred on a specialised laboratory or a clean room in order to advance R&D activities which it states may be qualifying expenditure but the rent of an office space in which R&D activities are carried on is not qualifying expenditure as the office is “the setting in which R&D happens and does not itself perform a key function in relation to the R&D process”. We believe that Revenue’s guidance significantly narrows the circumstances where rent may be included as qualifying expenditure on R&D and in our view, is contrary to the policy intention of the R&D Tax Credit.

We consider that Revenue’s interpretation also creates a clear inequity in favour of companies that have the available resources to incur expenditure on the construction or refurbishment of a building or structure for R&D purposes rather than incur a rental cost. It must be the purpose to which the building is used that is relevant as opposed to the occupancy type i.e. owned versus rented.

Section 766A TCA 1997 provides that where a company acquires a building and incurs expenditure on the refurbishment of the building for R&D purposes, these costs, subject to meeting specific conditions, qualify for the R&D Tax Credit. However, based on Revenue’s most recent guidance, renting the same refurbished R&D building may not qualify for the R&D Tax Credit even if the same R&D activity is being undertaken in the building. This measure clearly discriminates against SMEs who are, in many instances, unlikely to have the financial resources to purchase a building, but very often are the start-ups carrying out significant and innovative R&D.

Equally, as rental costs are a substantial cost for most small and micro sized companies, the disallowance of rent as qualifying expenditure on R&D significantly diminishes the attractiveness of the R&D Tax Credit for such companies.

Feedback the Institute has received directly from entrepreneurs confirms that legislative clarification is necessary to ensure rent is a qualifying cost for the purpose of the R&D Tax Credit so that the tax incentive can continue to encourage investment in R&D and innovation by Irish business.

### **xiii. Incentivise green or energy related R&D**

In our view, consideration should be given to new targeted measures for R&D in specific priority areas, such as green or energy related R&D and AI/innovation in general. The introduction of such targeted measures could help the Government to deliver its ambitious carbon emission targets.

## 6. Transfer of a business to a company

### Administrative Recommendation

#### i. **Update Revenue guidance on meaning of bona fide trade creditors for the relief**

Relief under section 600 TCA 1997 applies by deferring chargeable gains on the transfer of a business as a going concern to a company (by someone who is not a company). All assets of the business must transfer. The relief applies to the extent that the consideration for the business as a going concern is in the form of shares.

According to Revenue's interpretation of the relief, any liabilities of the business included in the transfer ranks as consideration for the transfer and therefore, that proportion of any gain on transferring chargeable assets is chargeable to CGT. However, Revenue guidance provides that "bona fide trade creditors" do not form part of consideration for the purposes of the calculation. Revenue's Tax & Duty Manual Part 19-06-04, states "the term 'bona fide trade creditors' means genuine creditors who supply goods or services to a business. An example of a trade creditor is a supplier of food to a restaurant. Liabilities of a business such as bank loans or tax liabilities taken over by the company are not trade creditors and, if taken over, are to be included as consideration for the transfer of a business."

It is important to note that section 600 does not contain any such definition of the meaning of "consideration paid". In practice, the value of a business as a going concern is calculated taking into consideration all assets and liabilities of the business including bank loans, finance lease, invoice discounting/factoring, tax liabilities etc. These factors must be taken into account to establish the market value of a business. In our view, it is counter intuitive to exclude these items when actually transferring the business.

Revenue's interpretation seems to apply the relief on an asset by asset basis whereas the relief is targeting the transfer of a business as a whole with a deferral of CGT. Revenue has adopted a narrow interpretation of the legislation which essentially precludes businesses with any degree of leverage with legitimate business liabilities, from availing of the relief in full. Of course, it is accepted that liabilities should reduce the base cost for any future disposal of the share but having to pay CGT up front makes this relief unworkable in practice for many taxpayers.

For example, common occurrences such as businesses owning a premises with bank debt; businesses with assets on finance lease or hire purchase; businesses with invoice discounting and businesses with overdrafts, are essentially prohibited from

availing of full relief under section 600. The main reason for this is the upfront CGT liability which creates a real cash cost without any corresponding cash income for the business owner.

If Revenue consider the liabilities of the business should remain as consideration/ deemed consideration, then the taxpayer should be entitled to choose how to allocate the liabilities to asset line items (i.e. allocate bank loan against non-chargeable assets first to maximise the amount which can qualify for relief under section 600).

## 7. Revised Entrepreneur Relief

### Administrative Recommendations

#### i. **Liquidation of a holding company following sale of the trading subsidiary**

Section 597A TCA 1997 does not specify whether Entrepreneur Relief is available on a liquidation of a holding company following the sale of its trading subsidiary. Revenue's guidance on Entrepreneur Relief only refers to situations where the liquidated company is carrying on a qualifying business at the date the liquidator is appointed.

However, it is unclear whether Entrepreneur Relief can apply on the liquidation of a qualifying holding company. For example, where the trading company is sold because the purchaser did not want to acquire the entire group and the holding company is immediately liquidated following the sale. It would be helpful if Revenue guidance could clarify that relief is available in such circumstances.

#### ii. **Working time requirement – non-group companies**

It is not uncommon for a business owner to own two individual companies, which are not in a group and wants to sell one of those companies. Consider the example of Taxpayer A who owns two Centra shops each in a separate company. This structure was not created by design but occurred commercially, as Taxpayer A inherited one shop and acquired the second. Taxpayer A wants to sell one of the companies to reduce his hours and scale back. The question then must be considered regarding whether Taxpayer has met the full-time working requirement for Entrepreneur Relief particularly if the payroll is processed through the company which is not being sold.

The abovementioned example arises in practice frequently across a number of sectors including FMCG (Centra etc.), pharmacies and hospitality. Clearly, the business owner is spending his full-working time in the overall business but it would be helpful if clarification could be provided by Revenue to give certainty to such taxpayers.

**iii. Apportioning of relief where a company/group holds investments or leases trading premises**

When either the holding of investments or the leasing of trading premises takes place within a group company, this can exclude an entrepreneur from claiming Entrepreneur Relief. We believe consideration should be given to either apportioning the relief in circumstances where there is a mix of investments and qualifying activities (similar to the Retirement Relief provisions) or to allow the relief in full where non-trading activities are below a certain *de minimus* level.

This is the approach adopted in the UK, where Business Asset Disposal Relief (formerly known as Entrepreneurs' Relief) is available on the sale of shares in a holding company, provided non-trading activities in the group do not comprise of more than 20% of the group's overall activities.

A *de minimus* level could also be determined on a valuation basis, for example, less than 20% of the value of the company, where the valuation basis is defined.

### Legislative Recommendations

**iv. Broaden the definition of a holding company**

Following enactment of Finance No.2 Act 2023, a holding company for Entrepreneur Relief purposes means a company that holds shares in other companies, all of which are its 51 per cent subsidiaries, and whose business consists wholly or mainly of the holding of shares in those subsidiaries.

Whilst this is a legislative definition, there is one main issue which commonly occurs in practice, which can be illustrated by the following example: HoldCo has two subsidiaries, Sub1 which is trading and Sub2 which owns the property which is used wholly for the purposes of the trade of Sub1. Entrepreneur Relief is denied in such circumstances.

There is a myriad of scenarios where these types of structures are implemented for commercial reasons such as for banking requirements; insurance requirements

where there is a high risk asset within the business like a quarry or to de-risk the trade/business interests from property. This is particularly prevalent in the context of emergency accommodation provision at present. Business owners who manage their risk in a prudent manner regarding their business assets are disadvantaged against business owners who do not.

This could be addressed by amending the definition of a “qualifying group” in section 597AA TCA 1997 to include a company (which would include a holding company or another subsidiary company) that owns an asset that is used wholly or mainly for the purposes of a qualifying business carried on by another company within the qualifying group.

**v. Remove the restriction on relief where a group holds a dormant company**

According to Revenue’s Operational Manual, Entrepreneur Relief is not available in situations where a dormant company is present in the group. This is a very significant limitation to the relief because a subsidiary company can commonly become dormant over time. For example, this might happen where the company has ceased to trade or where the trade has been transferred to another group company and the company cannot be wound up or liquidated due to company law legislation for the protection of creditors.

A group company could have dozens of trading subsidiaries, out of which only one is dormant, yet the relief is completely denied to the entrepreneur in this situation. The legislation should be amended to remove the restriction from Entrepreneur Relief in situations where a group holds a dormant company for *bona fide* commercial reasons.

**vi. Remove the restriction on relief where a group has a shareholding in a joint venture company of less than 51%**

One of the conditions of Entrepreneur Relief is that all subsidiaries must be minimum 51% subsidiaries for the relief to apply. If a group is party to a joint venture and holds less than 51% of the joint venture company, this again can result in full denial of the relief. The legislation should be amended to remove restrictions to the relief in situations where a group has a shareholding in a joint venture company of less than 51%.

## vii. Allow claim for relief where EII funds are raised by a company

A founder of a company which was financed using shares issued under the EII scheme may be denied Entrepreneur Relief on disposal of their shares in certain circumstances. This issue arises because Entrepreneur Relief requires the vendor to own 5% of the ordinary share capital of a company.

Often, EII shares do not have voting rights and have limited dividend and winding up entitlements. However, such EII shares may be considered to be ordinary share capital for tax purposes, as section 2 TCA 1997 defines ordinary share capital as *“all the issued share capital (by whatever named called) of a company, other than capital the holders of which have a right to a dividend at a fixed rate, but have no other right to share in the profits of the company”*.

This means, for example, if a founder shareholder owned 100 €1 ordinary shares but the company also had 500,000 €1A ordinary shares in issue from a previous EII round, a disposal of the founder’s shares may not qualify for Entrepreneur Relief, as the legislation is silent on whether to consider the number of shares in issue or the nominal value of the shares in issue, when applying the 5% shareholding test.

The legislation should be amended to confirm that shares which qualified for relief under Part 16 TCA 1997, with the exception of shares qualifying for SURE, should be ignored for the purposes of meeting the 5% shareholding test for Entrepreneur Relief. Clarification would also be welcome on whether it is the number of shares or the nominal value of shares that is relevant when determining the 5% test.

## 8. Relief for Investment in Innovative Enterprises (Angel Investor Relief)

It is difficult to provide any meaningful feedback on the operation of this relief given it is newly introduced and the administrative measures have not yet been rolled-out. However, we would ask that the certification process is made as simple as possible for SMEs. Given this scheme operates under GBER, we would urge that lessons are learned from the complexities encountered in the administration of the EII scheme and are avoided where possible in the roll-out of this new scheme.

Furthermore, the investment made must be for a minimum amount of €20,000, or €10,000 where at least a 5% shareholding is acquired. We understand that there is concern that some investors may not be able to obtain the minimum 5% ordinary issued share capital of a company to qualify for the relief and that the overall limit of €20,000 is too low to encourage claimants.

## 9. CGT Share Buyback Relief

### Administrative Recommendation

#### i. Update Revenue guidance on the Trade Benefit Test

Where a company buys back its shares for a price above the subscription price for the share, any amount in excess of the subscription price, is treated as a distribution by the company subject to income tax at marginal rates in the hands of the shareholder, unless the shareholder meets the conditions of share buyback relief to avail of CGT treatment.

Appendix II of Revenue's Manual on the acquisition by a company of its own shares (TDM Part 06-09-01) provides guidance on the application of the Trade Benefit Test. It outlines situations where a vendor who is selling all the shares but retaining a connection with the company can meet the test.

The guidance states: *"However, there may be situations where:*

- *For sentimental reasons, a retiring director of a company wishes to retain a small shareholding in the company. In this context, **Revenue would consider that a small shareholding would not exceed 5% of the share capital of the company.***
- *A controlling shareholder in a family company is selling his/her shares to allow control to pass to his/her children but remains on as a director for a specified period purely because his/her immediate departure from the company at that time would otherwise have a negative impact on the company's business. **Revenue would consider that the specified period that the director remains with the company should not exceed 6 months.***

*In such circumstances it may still be possible for the company to show that the main purpose is to benefit its trade."*

There is nothing in legislation which requires a disponent to dispose of all (or practically all) of his shares and retire from the business. The only requirement under section 178 TCA 1997 is that the vendor's shareholding is substantially reduced and that they are not otherwise connected with the company post buy-back. We believe Revenue's guidance goes beyond the legislative requirements on the basis of an interpretation of what generally benefits a trade.

In most cases the purpose of a buy-back is to allow control and decision-making to pass on to someone else (usually the next generation) allowing them to progress the business trade further. Usually, this would entail embracing new technology and introducing new practices and procedures to improve productivity within the business. Furthermore, in family business situations, the preference of parents in many instances is to pass the business on a gradual basis to children.

Remaining on as a director of the company post buy-back is generally a legitimate benefit to the trade of the company, retaining experience, networks, customer, supplier, staff relationships etc and successfully managing the transition. This can last for much longer than a six-month period. While exiting as a shareholder and ceding control is one aspect, being available as a resource and support for the new owners can be invaluable and a necessary requirement with key customers.

Of course, every case turns on its own facts but the guidance should be more clear that it is only Revenue's interpretation and it is not legislation, or at the very minimum, it should state that longer periods can be referred to Revenue Technical Service (RTS) to be considered on a case by case basis.

### Legislative Recommendation

#### ii. **Insert a bona fide test in section 135(3A) TCA 1997 to provide certainty for taxpayers when selling shares in closely held companies**

Finance Act 2017 inserted a new subsection 3A into section 135 TCA 1997. The policy intent at the time of its introduction was *"to deal with a number of specific tax avoidance schemes which have been uncovered by the Revenue Commissioners."* However, unlike other targeted anti-avoidance measures in Irish tax legislation, section 135 TCA 1997 does not include a *bona fide* test, which is normally used to prevent unintended consequences from arising.

The passing on of family businesses and management buy-outs (MBOs) involving close companies continue to be hindered by the anti-avoidance provision contained in section 135(3A). If Revenue take the view that a company has retained profits in excess of the company's commercial needs, subsection 3A imposes income tax treatment rather than CGT treatment on the selling shareholders. This prevents selling shareholders from claiming CGT treatment and retirement relief on an exit from the business.

In the absence of a statutory *bona fide* test, considerable concern continues to exist regarding the potential effect of section 135 on scaling up and passing on of

businesses in the SME sector. Although, Revenue guidance may assert that *bona fide* financing arrangements entered into by a purchaser relating to the acquisition of shares are outside the scope of the provision, this is not expressed in legislation. Therefore, it cannot be relied upon by taxpayers in the event of the matter being disputed and subject to an appeal.

Indeed, the Appeal Commissioners have expressly stated that their jurisdiction does not extend to supervising the administrative actions or any purported inequity in the application of the tax code by Revenue.

A number of examples are provided by Revenue in its guidance to demonstrate the application of the section. However, given the broad scope of the measure, the examples do not address the wide range of circumstances in which the provision can potentially apply. Furthermore, as it is an anti-avoidance section, Revenue do not provide an advance opinion as to the application or otherwise of section 135(3A) to any given transaction.

Take the following scenario which often arises in practice. There is a straight-forward sale of shares in a trading company. Increasingly, our members report that purchasers require vendors to leave certain levels of cash in the business to fund post-acquisition working capital for a period of time (usually 2-3 months). Cash levels can vary depending on the nature of the business. Ultimately that cash is repatriated back to the selling entity over time. Clearly, both parties are part of the agreement, as these terms are generally specified in the legal documents. Section 135(3A) catches such situations which are not specifically excluded in Revenue guidance.

Section 135(3A) is so broad ranging that it appears to catch all scenarios (*bona fide* or not) in respect of which assets are in some way linked to the disposal/acquisition of shares. To continually update guidance for the specific practical examples that arise in the commercial world necessitates a “whack a mole” approach, which ultimately, creates further uncertainty around commercial transactions.

Inserting an exclusion for *bona fide* commercial transactions into section 135(3A) TCA 1997 is critical, to provide the necessary level of certainty to taxpayers and their advisers, when implementing transactions involving the disposal of shares in a company with cash on its balance sheet. This matter has been continually highlighted by advisers since the introduction of this legislative provision and it frequently prevents the sale or transfer of family businesses.

It is worth noting that Revenue has other substantial anti-avoidance legislation to rely on, such as sections 817 and 811C TCA 1997 to address any concerns.

## 10. Accelerated Capital Allowances – Energy Efficient Equipment

### Administrative Recommendation

#### **i. Simplify the process to add new products to the approved list**

The cost incurred by a business in investing in energy efficient equipment (EEE) can be relieved for tax purposes through accelerated capital allowances (ACAs). ACAs provide a tax deduction equal to 100% of the costs incurred on qualifying EEE in the year the expenditure was incurred.

The ACA scheme is administratively difficult and is limited in scope. We would ask that the process for adding new products to the list is simplified to reduce the delay experienced when new products are added to the list.

This could be achieved by determining the eligibility of a product based on it meeting certain specified performance criteria for its particular product category. For example, the Sustainable Energy Authority of Ireland (SEAI) criteria could be used to determine qualification rather than being based on different individual product codes and registered with the SEAI.

### Legislative Recommendations

We would recommend the following enhancements to the ACA scheme:

- ii.** Widen the scope of the relief beyond EEE to whole buildings that receive a recognised accreditation for overall energy performance.
- iii.** Remove the condition that the equipment must not be leased, let, or hired, as this precludes landlords and lessors from availing of the relief.
- iv.** Introduce a tax credit for companies which can be monetised where the company is loss-making for the element of the loss generated by the ACA claim.
- v.** Introduce an enhanced rate of relief above the current 100% first-year allowance.

## 11. Key Employee Engagement Programme (KEEP)

### Administrative Recommendation

#### i. A Revenue agreed 'safe harbour' for share valuations

Share valuations in relation to KEEP are costly and difficult in practice because a company may be required to undertake multiple valuations within a 12-month period depending on when employees are recruited.

Currently, there is no clear guidance on how to determine what market value is for the purposes of the KEEP. If qualifying options are not granted for market value or the market value is subsequently determined by Revenue to be higher than originally projected, the options will not qualify as KEEP options under section 128F TCA 1997, resulting in no exemption from income tax, USC and PRSI on exercise.

Revenue's guidance on KEEP states that Revenue expects that in valuing the shares the company should use a valuation method which complies with relevant accounting standard and that Revenue will not provide an opinion regarding company specific share valuations. No guidance is provided by Revenue on what may be appropriate regarding acceptable discounting of shares in a private company.

Furthermore, it is unclear if Revenue's CAT Manual on the valuation of unquoted shares can be relied upon by taxpayers when valuing KEEP shares given the CAT guidance is directly linked to section 27 CATCA 2023 inheritance cases. It can often be difficult to apply general accounting principles, depending on the stage in the lifecycle of a business, especially if the company is not yet generating revenues.

Comprehensive Revenue guidance on share valuations is urgently required to support companies adopting the KEEP. This could be achieved by Revenue developing templates or safe harbour approaches for valuing shares in a SME. For example, if the taxpayer has undertaken 'best endeavours' to make a reasonable attempt to value 'potential' at a point in time and that valuation is accepted by Revenue to last for 12 months, provided no significant events are likely to take place which could impact the valuation.

This would mean that a taxpayer would have assurance from Revenue that the share valuation is not less than market value for tax purposes, where the taxpayer has adopted the safe harbour approach to valuing the KEEP shares.

It is noteworthy that it is possible to agree a valuation of a company with HMRC for the purposes of the Enterprise Management Incentive (EMI) which is a share scheme in the UK that is similar to the KEEP. An application request for a share valuation in connection with the EMI can be made online by the SME and is given priority by HMRC.

### Legislative Recommendations

#### ii. **A proportionate sanction for undervaluing share options**

As outlined above, obtaining certainty over the valuation of KEEP shares is a key concern for companies considering availing of the scheme. Where options are granted at an undervalue within say a certain percentage of the Revenue determined value (for example, 75%), we believe a more proportionate sanction would be for a charge to income tax to arise on the exercise of the options on the difference between the market value at the date of grant and the option price. This would allow the options to remain qualifying share options, but it would also enable Revenue to collect income tax on the portion of the gain attributable to the undervalue.

The income tax arising on exercise could be collected under the same mechanism as section 128 TCA 1997 (i.e., a charge to income tax under Schedule E is imposed on any gain realised by a director or employee from a right granted to him/her, by reason of his/her office or employment, to acquire shares or other assets in a company).

#### iii. **Amend the definition of a ‘qualifying holding company’**

A ‘qualifying holding company’ for KEEP purposes cannot be a trading company. If it is trading, it is not a ‘qualifying holding company,’ even if it is wholly or mainly holding shares in trading subsidiaries.

Company structures with an intermediate holding company may not be regarded as a qualifying company if there is no qualifying subsidiary held directly by the ultimate holding company. In contrast, Revenue guidance for Revised Entrepreneur Relief (Section 597AA TCA 1997) acknowledges that structures with a double holding company are not precluded from that relief.

A holding company can only hold shares in a qualifying subsidiary and a ‘relevant subsidiary’ and no other companies. A ‘relevant subsidiary’ is one in which the ‘qualifying holding company’ holds more than a 50% interest in the ordinary share

capital. Therefore, if the holding company had a 50% joint venture interest in another company it cannot be a 'qualifying holding company', even if it had a qualifying subsidiary that was a qualifying company.

The definition of 'qualifying holding company' in section 128F(1) TCA 1997 should be amended to permit the group as a whole to be considered, rather than simply considering the holding company in isolation. This could be achieved by amending the wording of the definition of 'qualifying holding company' at subsection (c) to state that it means a company where *"the business of the company, its qualifying subsidiary or subsidiaries, and as the case may be, its relevant subsidiary or subsidiaries, taken together consists wholly or mainly of the carrying on of a trade or trades."* This approach would be similar to the approach taken for the CGT holding company exemption in section 626B TCA 1997.

**iv. Remove the annual emoluments cap from the qualifying share option limit**

Currently, the total market value of all shares, in respect of which qualifying share options have been granted by the qualifying company to an employee or director, must not exceed €100,000 in any year of assessment, €300,000 in all years of assessment or 100% of the annual emoluments of the qualifying individual in the year of assessment in which the qualifying share option is granted.

Linking the amount of share options that can be awarded under the KEEP to the employee's annual emoluments restricts high growth companies in start-up mode availing of the scheme. Often in start-up businesses, employees and directors have lower salaries, compared with larger multinationals, which can prohibit such companies under the KEEP offering equity as an incentive for these individuals to stay in the business.

Rather than discriminating in practice against the remuneration strategies of these companies and the mix of cash-based and equity-based remuneration that they offer employees, the KEEP measures should simply set absolute values, such as those included in subparagraph (i) and (ii) of part (d) of the definition of a qualifying share option in section 128F(1) TCA 1997. It should be left to a company to determine the proportionate mix of cash and share-based remuneration as a commercial matter and to follow market driven pay awards.

An amendment to the qualifying limit of 100% of the annual emoluments of the qualifying individual would take account of situations where an employee's salary has reduced because of reduced working hours or a temporary layoff. It would also address situations where employees, who are temporarily absent from work due to

maternity or paternity leave, are limited in terms of the relief which may apply, as often their salary levels would be reduced during this time.

The lifetime limit of €300,000 can act also as a barrier to claiming relief under the scheme where shares have increased in value. Consideration should be given to applying the limit on a rolling basis. In the UK scheme, the cap is on the value of the share options as opposed to the value of the shares, which can be rolled over every three years.

**v. Allow for the continuation of the relief where a SME undergoes a reorganisation**

The current KEEP legislation does not provide for the continuing availability of the relief in the event of the SME (e.g., holding company and its subsidiaries) undergoing a corporate reorganisation during the period in which the KEEP share option rights are outstanding.

The KEEP legislation should be amended to include similar provisions to those contained within the Revised Entrepreneur Relief legislation, which seeks to address reorganisations that might affect the entitlement of a qualifying individual and a qualifying company to meet the scheme requirements.

**vi. Provide for 'roll over relief' of the KEEP share options**

Section 128F TCA 1997 should be amended to provide 'roll over relief' of KEEP share options, similar to that provided in section 128(8)(a) TCA 1997. Where share rights are exchanged between directors and employees or a company grants a new right in exchange for the surrender of an original right, the new right and the original right are looked at as one for the purpose of the charge to tax under section 128.

This 'roll over relief' effectively means that the tax charge arises at the point of exercise of the new right, with the history of the original share right taken over in respect of a future exercise of the new right. A similar relief is not included in the KEEP legislation.

For example, Company A grants share options that meet the conditions of the KEEP under section 128F TCA 1997 and would qualify for an exemption from income tax on exercise.

During the exercise period, a transaction is entered into which results in the share capital of Company A being acquired, and unexercised share options are exchanged or assigned for new options in the acquiring company.

Section 128F should be amended to provide 'roll over relief' in respect of KEEP share options. This would apply where during the exercise period, a transaction is

entered into which results in the share capital of a company being acquired, and unexercised KEEP share options are exchanged or assigned for new options in the acquiring company.

In such circumstances, if the acquiring company meets the qualifying company/group criteria set out in the legislation, the future exercise of the new replacement options should qualify for relief, with the history of the original share option being taken over for the purposes of determining the charge to tax.

## **12. CGT Retirement Relief and CAT Business Relief**

CGT Retirement Relief promotes the timely transfer of businesses from one generation to the next and from one entrepreneur to the next, when the transferor is approaching retirement age. It is a critical relief, without which, the lifetime transfer or disposal of many family businesses would be uneconomic.

While CAT Business Relief is key to ensuring that CAT does not create a barrier to the transfer of business property by way of gift or inheritance which could otherwise result in businesses being wound up and assets having to be sold to pay a CAT liability.

However, there are a number of inconsistencies in the definitions; conditions and types of activities/assets which do not qualify between each of the reliefs which often cause difficulty, complexity, and uncertainty in practice. In Appendix I, we have prepared a comparison of CGT Retirement Relief and CAT Business Relief which outline these inconsistencies in detail. More alignment on the definitions, conditions etc of the two tax reliefs that can apply on the transfer of passing on a business to the next generation would enhance simplification for SMEs.

## APPENDIX I

### COMPARISON OF CGT RETIREMENT RELIEF AND CAT BUSINESS RELIEF

#### 1. Minimum Age Requirement

In the case of CGT Retirement Relief, there is a minimum age requirement of 55 for the individual disposing of assets. In addition, different age limits currently apply where the disposal is made by the individual aged between 55 and 66 or > 66 yrs. These limits will be further revised with effect from 1 January 2025, such that the age limits will change to disposals when the individual is aged between 55 and 70 or > 70 yrs.

There is no age requirement in respect of CAT Business Relief.

#### 2. Period of Ownership

In the case of CGT Retirement Relief, assets must have been owned for a minimum period of 10 years prior to a disposal.

In the case of CAT Business Relief, the minimum holding period is 2 years in the case of an inheritance and 5 years in the case of a gift.

These time frames apply also to transfers of land/buildings which are owned personally, and which are used by a company, and both the property and shares are transferred to the same person at the same time.

#### 3. Qualifying Assets

For the purpose of CGT Retirement Relief, a 'family company' is where:

- a. The individual exercises at least 25% of the voting rights or
- b. The individual exercises at least 10% of the voting rights and at least 75% of the voting rights are exercisable by his/her family (as defined).

A completely different test applies for CAT Business Relief for the purposes of 'relevant business property.' The test is not linked solely to voting rights.

Given the divergence it is not uncommon to have a situation where one relief applies but not the other.

#### 4. Basis of Valuation

For the purposes of CAT Business Relief, no account can be taken of minority discounts in arriving at the valuation of shares which are transferring in a 'private company' as defined in Section 27 CATCA 2003.

However, the restriction on a minority discount does not apply in the context of valuing shares for CGT Retirement Relief purposes. A transfer to family members is a 'connected party' transaction which is deemed to be for market value in accordance with the provisions of Section 547/548 TCA 1997. The CGT legislation defines market value as the '*price which those assets might reasonably be expected to fetch on a sale in the open market.*'

This results in a difference in valuation for CGT purposes and for CAT purposes in the context of share transfers between connected/family members. This results in:

- a. Different valuation methodologies being adopted for CGT and CAT in the context of the same transaction.
- b. The beneficiary having a lower CGT base cost (by reference to the lower CGT valuation incorporating a minority discount) in the event of a future disposal of the shares income when they will have potentially paid CAT by reference to a higher amount.
- c. It can impact the workings in relation to the CGT/CAT of said provisions.

#### 5. Trade versus Business

For CGT Retirement Relief the 'chargeable business assets' must be used for the purposes of 'farming, or a trade, profession, office or employment.' The meaning of these terms is in accordance with the income tax acts.

For CAT Business Relief, there must be a transfer of a 'business, an interest in a business or shares in a company carrying on a business.' In certain cases, a company could be regarded as trading not necessarily carrying on a business or vice versa.

Therefore, there is a lack of consistency in relation to the types of activity which can qualify for each relief.

#### 6. Non-Qualifying Assets

For CGT Retirement Relief, in the case of a transfer of shares in a 'family company' it is necessary to consider the underlying assets in the company/group to determine the level of

relief available. The relief applies to gain arising on 'chargeable business assets' as compared to chargeable assets. It is necessary therefore to consider the split of underlying assets in the company between:

- a. Chargeable business assets,
- b. Chargeable assets, and
- c. Non-chargeable assets.

As euro denominated cash is not a chargeable asset, the company can potentially have excess cash resources and still qualify in full for CGT Retirement Relief. This contrasts with CAT Business Relief where excess cash over and above normal working capital requirement can at worst, impact the availability of relief or at best dilute the level of relief available.

For the purposes of CAT Business Relief certain activities are regarded as 'excluded businesses' which includes investment activity or businesses which consist wholly or mainly of dealing in currencies, securities, stocks or shares, land, or buildings.

Overall, there is a lack of consistency in terms of the types of activity/assets which do not qualify for each relief.

## **7. Property not held within a company but used for the purposes of the company's trade/business**

Both CGT Retirement Relief and CAT Business Relief permit the transfer of land and buildings owned outside of the qualifying company to transfer to the same person and at the same time as the transfer of the shares to qualify for relief.

For CGT Retirement Relief permits such transfers in respect of land and buildings: *"which was owned by the individual for a period of not less than ten years ending with the disposal, and used throughout that period for the purposes of his family company, and which is disposed of at the same time, and to the same person as the shares or securities in his family company."*

The individual could have a shareholding as low as 10% in the family company and meet this requirement.

For CAT Business Relief, the relief applies to land and buildings: *"owned personally by the disponent which, immediately before the gift or inheritance was used wholly or mainly for the purposes of a business of a company controlled by the disponent..."*

Control is taken by reference to voting rights. Therefore, it is possible that a significant asset forming part of the transfer or succession of a business may qualify for one relief but not the other.

## **8. Availability of Reliefs following Share Reorganisation**

Section 598 TCA 1997 specifically sets out that CGT Retirement Relief can apply where there has been a share reorganisation in accordance with Section 586 and 587 TCA 1997. Section 95 TCA 2003 deals with replacement property, however, the section does not specifically address a situation where the shares being transferred have previously been the subject of the reorganisation provisions. Therefore, there is less clarity in this situation in relation to the availability of CAT Business Relief.

## **9. Definition of Holding Company/Subsidiary/Group**

For the purposes of CGT Retirement Relief, the definition of a holding company and a group are determined by reference to the definition of a 75% subsidiary in accordance with section 9 TCA 1997. Only 75% subsidiary companies can qualify.

For the purposes of CAT Business Relief, the definitions of holding company and subsidiary have the same meanings as in the Companies Acts.

The lack of consistency in terms of definitions means that often in a group situation CGT Retirement Relief may not apply and CAT Business Relief does and vice versa.

## **10. Clawback Provisions**

A 6-year clawback period applies for both CGT Retirement Relief and CAT Business Relief. The clawback period for CAT Business Relief is extended to 10 years in the case of a disposal of development land but this is not the case with CGT Retirement Relief.