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Minister Paschal Donohoe T.D.
Department of Finance
Government Buildings
Upper Merrion Street
Dublin 2

1 July 2021

Pre-Finance Bill 2021 Submission

Dear Minister

We set out in the body of this submission a number of legislative changes for consideration in the drafting of Finance Bill 2021. Our recommendations are broadly grouped into the following four key areas:

1. Measures to alleviate the impact of the COVID-19 restrictions on business
2. Measures to support Irish SMEs in the recovery of the economy
3. Measures to restore equity to our tax dispute resolution procedures
4. Tax technical measures required to mitigate certain 'unintended consequences' arising from recent legislative changes

This submission does not address the changes required to implement the new Anti-Tax Avoidance Directive[1] Article 4 Interest Limitation Rule (ATAD ILR) into Irish law. The Department of Finance Feedback Statement on the implementation of an ATAD ILR confirmed that policymakers, in the context of Finance Act 2021, intend to largely overlay the new ATAD ILR provision on top of existing comprehensive rules that restrict the deductibility of interest expenses.

The Institute's response[2] to the Feedback Statement included several recommendations on modifications to existing tax legislation which should be made in Finance Bill 2021, to help to integrate the ATAD ILR into domestic legislation, without imposing significant additional complex rules on businesses, while maintaining the necessary protections for the corporate

[1] Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market.
[2] Irish Tax Institute Response to Feedback Statement on ATAD implementation of Article 4 Interest Limitation Rules

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tax base. We welcome the ongoing engagement with officials in the Department of Finance and Revenue on this significant development for Irish business and we look forward to the planned publication of a second Feedback Statement on the ATAD ILR shortly. We strongly believe this ongoing consultation and engagement with stakeholders is critical to securing a successful outcome that works for both business and the Exchequer.

The Institute welcomes your commitment in the January 2021 Update to Ireland's Corporation Tax Roadmap to develop a new framework for domestic stakeholder engagement and your recognition that such engagement is an essential component of policy development. We acknowledge the increased stakeholder engagement in recent months by your officials as part of the review of submissions received in response to various public consultations and also the establishment of dedicated working groups to consider tax technical matters, such as the ATAD ILR. We firmly believe it is important that such stakeholder engagement is now placed on a more formal footing to ensure it can become embedded in the annual Finance Bill process.

We would welcome the opportunity to discuss the matters raised in this submission with you or your officials.

Yours sincerely

Sandra Clarke
Institute President

Institute Recommendations for Finance Bill 2021

Our recommendations for Finance Bill 2021 are grouped into four broad areas below. We have provided further detailed analysis of each technical matter in the Appendix to this submission.

Measures to alleviate the impact of the COVID-19 restrictions on business

1. Given the severe impact the Government public health restrictions have had on businesses in 2020 and 2021, we recommend allowing corporation tax that was due for payment in 2020, which remains unpaid due to cashflow pressures on the business, to be included in the Debt Warehousing Scheme to avail of a 3% interest rate to support these businesses to return to profitable trading.

2. We recommend that the provisions of section 997A TCA 1997 be urgently reviewed to ensure a credit for PAYE withheld from the remuneration of an individual within the remit of section 997A TCA 1997, which has been warehoused by the employer company under the Debt Warehousing Scheme, can be permitted.

3. In view of the extent of the significant changes proposed by Dividend Withholding Tax (DWT) Real-time Reporting and to enable businesses focus their current efforts on recovering from the impact of the pandemic, we believe that the implementation date for this initiative should not be any earlier than 1 January 2023.

4. Amend the Residential Development Stamp Duty Refund Scheme (SDRS) to further extend the completion period for qualifying projects given the impact the public health restrictions continued to have on the construction industry in 2021, including the limitations as a result of the ongoing social distancing requirements. In addition, we believe that the 75% test for the scheme should be applied after green areas, footpaths, roads, and other common areas on the site have been excluded given these communal areas are for the purposes of the housing units being built.

Measures to support Irish SMEs in the recovery of the economy

5. In the Institute's response to the public consultation on the Employment Investment Incentive (EII) scheme in February 2021[3], we set out 15 tax policy and administration recommendations to improve the overall effectiveness of scheme. We urge that the legislative recommendations to enhance the operation of the EII scheme be implemented as part of Finance Bill 2021 to encourage private sector investment in

[3] https://taxinstitute.ie/wp-content/uploads/2021/02/2021-02-12-ITI-Response-to-the-Public-Concultation-on-EII.pdf

supporting the recovery of businesses following the COVID-19 pandemic and to boost the creation of new jobs.

6. In our view, legislative clarification is needed to confirm that rent can be treated as qualifying expenditure for the purpose of the R&D tax credit to ensure this important incentive can continue to fulfil its policy objective of encouraging investment in R&D and innovation by Irish business. Given 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.

7. In our view, the policy intention of the Key Employee Engagement Programme (KEEP) to help SMEs attract and retain key employees, can only be achieved if the following amendments are made to the scheme:

    - Further amend the definition of a 'qualifying holding company'.
    - Develop an agreed 'safe harbour' approach to share valuation and impose an appropriate sanction where there is an undervalue.
    - Amend the conditions regarding remuneration, in particular for 2020 and 2021, to take account of situations where employees' hours may have been reduced or temporarily laid off because of the COVID-19 public health restrictions.
    - Create liquidity in KEEP shares by allowing a company to buy-back KEEP shares.
    - Amend the employment conditions for a 'qualifying individual', in particular for 2020 and 2021, to take account of situations where employee hours may have been reduced or temporarily laid off because of the COVID -19 restrictions.
    - Allow the continuing availability of the relief should the SME (e.g., holding company and its subsidiaries) undergo a corporate reorganisation during the period in which the KEEP share option rights are outstanding.
    - Provide 'roll over relief' of KEEP share options, similar to that provided in section 128(8)(a) TCA 1997.

8. The scaling up and passing on of businesses in the SME sector continues to be hindered by the anti-avoidance provision contained in section 135 (3A) TCA 1997. Unlike other anti-avoidance provisions in Irish tax legislation, section 135 TCA 1997 does not include a bona fide test. In many cases, the uncertainty regarding the tax consequences means a business owner will be unwilling to proceed with a proposed sale of their business. In our view, inserting an exclusion for bona fide commercial transactions into section 135 TCA 1997 is essential, 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.

Measures to restore equity to our tax dispute resolution procedures

9. We strongly urge that the rates of statutory interest on underpaid tax are reviewed to ensure the rate imposed is more commensurate with the cost of borrowing. We firmly believe that the reduced 3% rate that will be imposed in Period 3 of the Debt Warehousing Scheme represents a fair and reasonable rate of interest which should apply to all underpayments of tax. This rate recompenses the Exchequer and acts as a disincentive to late payment and it could be tracked to prevailing ECB market rates, to ensure it reflects the actual cost to the Exchequer. It is noteworthy that a recent decision of the Supreme Tax Court in Germany suspended the effect of Germany's annual statutory rate of interest of 6% on late payment of taxes on the basis that it was disproportionate given the long-established prevailing low rate of interest.

10. We believe that section 960GA TCA 1997 is unfair and has tipped the balance in the appeals process to the detriment of the taxpayer. If a taxpayer disputes an assessment, they must pay the tax liability in full or face a potential interest liability at annualised rates of 8% or 10% per annum while their appeal is pending. Meanwhile, there is no obligation on Revenue to pay interest in the event of a successful appeal by the taxpayer. In our view, in the interest of fairness in the tax system, section 960GA should be repealed as it penalises taxpayers who appeal Revenue assessments and therefore undermines the effectiveness of the appeals process.

11. An Appeal Commissioner can dismiss a tax appeal where there has been a failure to comply with a direction to file a Statement of Case or an Outline of Arguments. These provisions impose a sanction on the appellant (who is the taxpayer) if they fail to abide by the directions of the Appeal Commissioner, resulting in their case being dismissed but there is no corresponding sanction on the respondent should they not abide by a direction from an Appeal Commissioner. We consider it appropriate to have some form of legislative sanction for instances where the respondent does not fully comply with a direction and a means of achieving this would be to stop the "interest clock" from a date to be appointed by the Commissioner where the respondent has not complied with a direction. This would ensure that the appellant is not penalised through additional interest charges for the action or inaction of the respondent.

12. We believe in the interest of justice, taxpayers should have a clear understanding of the basis for Revenue's assessment at an early stage to help inform their decision on whether to proceed with appealing the assessment. In our view, this could be achieved by amending section 949Q TCA 1997 to ensure the onus is on Revenue to provide a Statement of Case first, before one is provided by the taxpayer (if it is required at all from the taxpayer).

13. To assist with alleviating congestion in the tax appeals system, consideration could be given to introducing an Alternative Dispute Resolution (ADR) mechanism. Sections 949H and 949W TCA 1997 permits the Appeal Commissioners to invite parties in dispute to consider a negotiated settlement and to stay proceedings if agreement is possible. This could facilitate the use of an ADR process which in turn could help to reduce the waiting times for appeal and the associated costs and

anxiety for taxpayers that can be experienced when taking an appeal case at present.

14. We recommend that section 959AA TCA1997 is amended to ensure, in giving effect to a Mutual Agreement Procedure (MAP) that any relevant time limits may be disregarded to ensure a taxpayer can be put in the same position they would have been, had the original filed return reflected the outcome of the agreement reached.

Tax technical measures required to mitigate certain 'unintended consequences' arising from recent legislative changes

15. The application of the transfer pricing provisions to non-trading transactions between Irish entities with the resultant problems in the ability to utilise cash within the group, continues to be a considerable practical issue for Irish groups and is a source of serious concern, at a time when access to cash is vitally important. While section 15 of Finance Act 2020, which proposes to amend the transfer pricing legislation governing transactions between domestic entities is subject to a Ministerial commencement order, it is imperative, in our view, that constructive engagement with stakeholders takes place now on this issue to ensure the policy objective of applying transfer pricing rules to transactions between domestic entities can be achieved without disadvantaging Irish business.

16. The tax treatment of non-resident landlords needs to be modernised in line with the ongoing moves to digitalisation in tax collection and administration. Where a non-resident landlord is in receipt of Irish rental income they must appoint a "collection agent" (such as a property management company, letting agent or family friend) and the non-resident landlord is chargeable to income tax in the name of that collection agent under section 1034 TCA 1997. This presents a range of practical issues, including difficulties in completing the return by the collection agent as they do not have the necessary information on the landlord's other income and the submission of multiple returns and duplicate claims in respect of a single taxpayer if there are multiple collection agents. We believe that the current process underpinned by the legislation is cumbersome and adds cost and unnecessary complexity to the tax compliance process. In our view, a more streamlined approach to collecting information and tax relating to non-resident landlords should be adopted.

17. It would appear that the increased rate of stamp duty of 10% imposed on the multiple purchase of 10 or more residential houses may also apply to independent living units which form part of the property of a nursing home business, since such units are not commercially rated and are subject to Local Property Tax. We believe this does not align with the stated policy intention of section 31E SDCA 1997 which is to provide a "*significant disincentive to the practice of multiple purchase by institutional investors of large parts of, or indeed whole, housing estates before they reach the market, thus denying first-time buyers an opportunity to purchase a home."* While a nursing home may be operated as a business, its residents are amongst the most vulnerable in society and are reliant on the care services and accommodation provided by the nursing home. In our view, an exemption from the increased stamp duty charge should apply in respect of the independent living units which form part of the property of a

nursing home business, similar to the exemption provided for multiple purchases by local authorities, approved housing bodies and the Housing Agency.

18. Associated Companies Relief provides for an exemption from stamp duty arising on property transferred between two companies within a group where certain conditions are met. For example, one of the companies must hold at least 90% of the ordinary share capital of the other company to avail of the relief. In our view, the relief should be available on any transfers within a group, regardless of whether they involve partnerships that are legally look-through or bodies corporate that have separate legal personality but do not have a share capital structure. We recommend that section 79 SDCA 1999 be amended to allow Associated Companies Relief to apply irrespective of the nature of the various entities within the group, provided the 90% ownership requirement can be met.

19. The differing tax treatment that applies to proceeds arising from the disposal of patents and patent rights continues to create uncertainty for business. Under existing legislation, any gain arising on the disposal of a patent is treated as a disposal of a capital asset and is subject to CGT, while any gain arising on the disposal of patent rights is treated as Case IV income under section 757 TCA 1997 and, as such, is subject to corporation tax of 25%. As patent rights are not within the charge to CGT, this means that there is no group relief mechanism on the transfer of patent rights within a group. In our view section 757 should be repealed and patent rights should be treated akin to any other chargeable asset, subject to CGT.

20. Gains or losses arising from the disposal of foreign currency held in an Irish bank, by certain holding companies are chargeable to corporation tax as Schedule D Case IV income, rather than capital gains tax, in accordance with section 79C TCA 1997. Such gains also fall within the scope of "investment income" for close company surcharge purposes. We believe that this is an unintended consequence of the legislation. We recommend that a new subsection be inserted into section 79C as follows: “*Any income chargeable under Case IV of Schedule D by virtue of this section shall not be taken into account in computing ‘investment income’ for the purposes of Section 434”.*

21. For commercial reasons, groups of companies may seek to restructure by means of a merger by absorption. The concept of mergers by absorption did not exist in Irish law before the enactment of the Companies Act 2014. Section 633D TCA 1997 sought to transpose into Irish law the requirements of the Mergers Directive (Council Directive 2009/133/EC), which provides that cross border mergers by absorption should be tax neutral. As this provision pre-dated the introduction of domestic mergers by absorption, legislative confirmation is required to ensure that the tax treatment available under section 633D for cross border mergers by absorption applies equally to mergers by absorption under Irish law.

APPENDIX

1. Measures to alleviate the impact of the COVID-19 restrictions on business

The Institute welcomes the introduction of new measures in the Government's Economic Recovery Plan, to support businesses as they recover from the pandemic, as well as the extension of existing valuable supports, including the Employment Wage Subsidy Scheme (EWSS), the Covid Restrictions Support Scheme (CRSS) and the Debt Warehousing Scheme.

The Debt Warehousing Scheme has been an invaluable support to businesses experiencing cashflow and trading difficulties arising from the COVID-19 pandemic. The further extensions of the scheme since then and the recent announcement that the period of restricted trading for which debt can be warehoused will be extended to the end of 2021 provides businesses with the breathing space that they will need to reopen and try to recover from the impact of the pandemic.

However, some issues have arisen in relation to the application of the rules of the Debt Warehousing Scheme which need to be addressed to support affected businesses as they attempt to return to profitability.

1.1 Amend the Debt Warehousing Scheme to include corporation tax balances due for payment in 2020

A company must file its corporation tax return and pay any balance of tax due nine months after the end of its accounting period. Balancing payments of corporation tax due in respect of accounting periods ending in 2019 and the first three months of 2020 crystallised during 2020. For many companies, this corporation tax liability was addressed through the availability of accelerated loss relief provisions introduced as part of the July Jobs Stimulus 2020.[4] Accelerated loss relief could be claimed by previously profitable companies that incurred trading losses in accounting periods affected by the COVID-19 pandemic.

However, for struggling businesses that managed to break even and did not incur an overall tax loss in 2020, the option to make a claim to carry-back trading losses against the taxable profits of the preceding accounting period i.e., 2019, was not available. Many of these businesses impacted by the COVID-19 restrictions do not have the necessary cashflow to discharge this corporation tax liability because any available funds were used to keep the business going in 2020 and as corporation tax does not qualify for the Debt Warehousing Scheme, interest is accruing at a rate of 8% on these unpaid balances.

Given the severe impact the Government public health restrictions have had on businesses in 2020 and 2021, we recommend allowing corporation tax that was due for payment in 2020, which remains unpaid due to cashflow pressures on the business, to be included in the Debt Warehousing Scheme to avail of a 3% interest rate to support these businesses to return to profitable trading.

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[4] July Jobs Stimulus 2020

1.2 Allow a credit for warehoused PAYE withheld from the remuneration of an individual within the remit of section 997A TCA 1997

An issue has arisen due to the interaction of warehousing Employer PAYE debts under the Debt Warehousing Scheme with section 997A Taxes Consolidation Act (TCA) 1997 (Credit in respect of tax deducted from emoluments of certain directors) which we believe merits examination due to its unintended consequences for some directors (and employees) who are working in family businesses.

Section 997A denies a credit for PAYE deducted from emoluments paid to directors or employees who have a "material interest" in the company until such time as that PAYE is fully remitted to the Collector–General. The scope of the section is very wide. For example, it applies to remuneration paid to any employee or director who controls more than 15% of the ordinary share capital of the company paying emoluments either on their own or taking into account the holdings of all persons connected with them[5].

It also applies to emoluments paid to a connected person even if that director or employee does not have any shareholding in the company but is deemed to have a material interest through the connected person rules. In essence, it applies equally to emoluments paid to an owner-manager who holds 100% of their company's shares and controls and directs the company activities; where a number of family members holding small shareholdings in a family business and may be directors of the company but have other employments; a family member who works as an employee in a family-run company but does not hold any shares and has no control over the company's affairs.

The denial of a credit for PAYE deducted for those within the scope of section 997A applies regardless of the circumstances which led to the PAYE not being remitted to Revenue. Revenue has advised that the legislation is clear on the position and that this treatment applies similarly where the employer company has availed of the Debt Warehousing Scheme for PAYE arising during the pandemic, as the PAYE has not been paid to Revenue.

Therefore, those directors and employees subject to section 997A cannot obtain credit for PAYE deducted during 2020 which has been warehoused by their employer when they file their income tax return for 2020. This means that they will, in effect, be assessable to tax on their gross remuneration when they submit their tax returns this autumn notwithstanding that they have only received remuneration net of the tax deducted at source by their employer (and warehoused by the employer).
Some of these individuals will be able to warehouse their income tax liability for 2020 and preliminary tax for 2021 (including the income tax liability arising from their employment income). However, this option is only available if they meet the specific

[5] Section 10 TCA 1997 (Connected person). As an example of the scope of section 10, under section 10(3) TCA 1997, a connected individual is "A person shall be connected with an individual if that person is the individual's husband, wife or civil partner, or is a relative, or the husband, wife or civil partner of a relative, of the individual or of the individual's husband, wife or civil partner."

conditions outlined in section 1080B TCA 1997. The income tax debt warehousing scheme is not available automatically to those within the scope of section 997A. Those directors or employees who do not meet the specific conditions applying to income tax debt warehousing, for example, if their total income for 2020 is not less than 75% of their total income for 2019, will be assessable to tax on money that they have not received and as a direct result of their employer's need to warehouse tax debt to enable the business to survive the pandemic.

Even if a company wants to assist an employee or director in these difficult circumstances and has some financial capacity to do so by making payments to reduce the PAYE outstanding on their remuneration, they are not permitted to specify how the payments of PAYE are allocated for individuals affected by section 997A. The legislation specifically outlines the order in which PAYE paid over to Revenue will be allocated.

Namely, payments will be allocated first to those employees/directors who do not hold a material interest in the company, notwithstanding that it is those subject to 997A who can be personally pursued by Revenue for their employer's PAYE liability in respect of their remuneration.

In practical terms, to clear such a director/employee's PAYE liability before the filing date for the income tax return for 2020 a company would have to divert much needed financial resources, if they have any, to accelerate the clearing of their full PAYE debt warehoused even though the Debt Warehousing Scheme legislation would otherwise allow them to park this liability, interest-free, until the end of 2022.

The Debt Warehousing Scheme was intended to provide an important source of liquidity to businesses trying to survive and emerge from the pandemic. No one could have foreseen the impact of the COVID-19 pandemic on businesses and the amount of tax debt that has now been warehoused with Revenue. We do not believe the legislation in section 997A was intended to operate in such a punitive manner for the unique situation we now face and arising from circumstances entirely outside the control of those affected by section 997A.

In fact, many of those affected may not even be aware of their situation until they file their return this October/November and credit for PAYE deducted from their remuneration is denied when assessing their tax liability. Some of these individuals may not even be aware that their employer's PAYE has been warehoused as they will not be privy to this information.

The Institute has been engaging with Revenue at the Tax Administration Liaison Committee (TALC) to seek some flexibility if these individuals need to enter into a Phased Payment Arrangement (PPA) for their income tax liability due this autumn, while PAYE may be paid in instalments by their employer and to obtain clarity on practical aspects of the arrangement.

However, we do not believe that administrative practices are sufficient to address the difficulty for these individuals which is caused by the application of the legislation to

this unique situation. In addition, administrative practices will not address the potential consequences for these individuals personally, if their employer cannot ultimately survive the impact of the public health restrictions on their business and folds with unpaid PAYE debts in relation to their remuneration (for which the individual will be personally liable). We believe that the legislative provisions of section 997A TCA 1997 should be urgently reviewed to ensure the provision does not operate in an unintended manner because of the COVID-19 pandemic.

1.3 Postpone the implementation of Dividend Withholding Tax Real-Time Reporting Regime until at least 1 January 2023

In May 2020[6], Revenue postponed the introduction of a real-time reporting regime for Dividend Withholding Tax (DWT) that was planned for implementation from 1 January 2021 and suspended the related obligation in section 172BA TCA 1997 to obtain tax reference numbers in respect of relevant distributions made on or after 1 January 2021. This decision was very welcome in light of the significant pressures on businesses as a result of the COVID-19 pandemic.

As outlined in the Institute's response to the public consultation on DWT Real-Time Reporting in December 2019[7], if it can be demonstrated that a real-time regime for DWT is necessary, then it will be important to fully consider how such a regime could be implemented in a way which would minimise consequential additional administrative burdens for businesses and investors.

Revenue advised in May 2020[8] that it would engage with stakeholders in advance of the resumption of the change management programme and will ensure that adequate time is allocated to the delivery of any development work associated with DWT Real-Time Reporting. In view of the extent of the changes proposed and to enable businesses focus their current efforts on recovering from the impact of the pandemic, we believe that the implementation date for DWT real-time reporting should not be any earlier than 1 January 2023.

1.4 Amendments to the Residential Development Stamp Duty Refund Scheme

The Residential Development Stamp Duty Refund Scheme (SDRS) is an important relief which encourages the building of housing available for rental and reduces the cost of homes for buyers. Finance Act 2020 amended the SDRS to extend the expiry date for new applications to construction works commenced by 31 December 2022. The time allowed between commencement and completion of a qualifying project was also extended from two years to 30 months. In recognition of the impact the public health restrictions have had on the construction industry in 2021, including limitations as a result of the ongoing social distancing requirements, we believe the timeline for completion of ongoing developments should be further extended to take account of the restrictions during 2021.

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[6] Revenue eBrief No. 087/2019 May 2020
[7] Institute submission to Revenue consultation on DWT Real-Time Reporting – December 2019
[8] Ibid

In addition, certain legislative changes are necessary to ensure the policy intention of the SDRS of incentivising residential development can be achieved. One of the conditions to qualify for the SDRS is that housing units must account for at least 75% of the total surface area of the land. In less urbanised areas, often it is not possible to meet the 75% test due to the requirement to include green areas, footpaths, roads, and other common areas in the site area. In our view, the 75% test should be applied after such areas are excluded given that they are for the purposes of the housing units being built.

2. Measures to support Irish SMEs in the recovery of the economy

2.1 Improve the effectiveness of the Employment and Investment Incentive (EII)

The Employment and Investment Incentive (EII) scheme is a very important source of finance for early stage and small businesses that often have limited funding options available to them. Rather than having to rely solely on Government to inject cash into the economy, the EII could be used as a way for the private sector to support the return to business following the COVID-19 pandemic and to boost the creation of new jobs.

Whilst EII relief is very valuable for companies and investors, the inherent complexities of availing of the scheme can act as a significant barrier as the scheme rules in many cases do not reflect commercial investment norms in today's world.

The Institute welcomes the current review of the EII scheme being undertaken by the Department of Finance in the context of the legislative agenda. In responding to the public consultation on the EII last February, the Institute made 15 tax policy and administration recommendations which we believe are necessary enhancements to improve the overall effectiveness of the scheme. [9]

These are:

- A streamlined EII administrative process for small and micro companies.
- A carve-out from the connected party rule linked with a control test.
- Allow investors to access EII through a broader range of investment vehicles.
- Permit Designated Investment Funds (and other funds) to utilise capital redemption windows.
- Broaden the interpretation of financial intermediary.
- Amend the definition of a qualifying company for EII to include a Renewable Energy Community.
- Remove the exclusion of holding company structures.
- Introduce a carve out in "qualifying trading activities" for green/energy efficient specific projects.
- Commit appropriate and adequate resourcing to EII applications.

[9] https://taxinstitute.ie/wp-content/uploads/2021/02/2021-02-12-ITI-Response-to-the-Public-Concultation-on-EII.pdf

- Apply more proportionate monetary sanctions for administrative errors or the late filing of a return.
- Recognise additional exit strategies for investors.
- Provide a 4-year holding period for all EII investments.
- Enable the Statement of Qualification to issue once an investment has been made in a qualifying company.
- Allow the offset of capital losses.
- Extend SURE to include business founders who were previously self-employed.

2.2 Allow rental costs as qualifying expenditure for the Research and Development (R&D) tax credit

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*[10] identifies enhancements needed to the R&D tax credit to incentivise increased investment in innovation by our SMEs. However, Revenue's recently updated guidance[11] has 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 practitioners through the Tax Administration Liaison Committee (TALC)[12], Revenue recently 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[13].

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. 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

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[10] Report of the SME Taskforce: National SME and Entrepreneurship Growth Plan
[11] Research and Development (R&D) Tax Credit, Part 29-02-03,Tax and Duty Manual, April 2021
[12] https://taxinstitute.ie/wp-content/uploads/2021/06/2020-11-16-ITI-Submission-to-Revenue-on-treatment-of-rent-in-Research-and-Development-TDM.pdf
[13] Research and Development (R&D) Tax Credit, Part 29-02-03, Tax and Duty Manual, April 2021, Revenue Commissioners.

costs, subject to meeting specific conditions, qualifies for the R&D tax credit. However, based on Revenue's updated 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.

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. In our view, legislative clarification is now necessary to ensure rent is a qualifying cost for the purpose of the R&D tax credit so the credit can continue to encourage investment in innovation by Irish business.

2.3 Enhancements to the Key Employee Engagement Programme (KEEP)

KEEP provides for an exemption from income tax, USC and PRSI for any gain arising on the exercise of a share option by a qualifying individual in a qualifying company. Several amendments were made to KEEP in Finance Act 2019, however these changes continue to be subject to a Ministerial commencement order as State aid approval is required.

We believe further legislative amendments are needed to improve the feasibility of the KEEP scheme. In our view, the policy intention of KEEP, to help SMEs attract and retain key employees, can only be achieved if these limitations are addressed. In our pre-Finance Bill 2020 submission[14], we outlined the limitations of the scheme in detail together with our recommendations for reforms to the existing legislation. In summary, we recommended the following legislative amendments:

- Further amend the definition of a 'qualifying holding company'.
- Develop an agreed 'safe harbour' approach to share valuation and impose an appropriate sanction where there is an undervalue.
- Amend the conditions regarding remuneration, in particular for 2020 and 2021, to take account of situations where employees' hours may have been reduced or temporarily laid off because of the COVID-19 restrictions.
- Create liquidity in KEEP shares by allowing a company to buy-back KEEP shares.
- Amend the employment conditions for a 'qualifying individual', in particular for 2020 and 2021, to take account of situations where employee hours may have been reduced or temporarily laid off because of the COVID-19 restrictions.
- Allow the continuing availability of the relief should the SME (e.g., holding company and its subsidiaries) undergo a corporate reorganisation during the period in which the KEEP share option rights are outstanding.

In addition, we believe that 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)

[14] https://taxinstitute.ie/wp-content/uploads/2020/07/2020-07-02-ITI-Pre-Finance-Bill-2020-Submission.pdf

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 is taken over in respect of a future exercise of the new right.

A similar relief is not included in KEEP legislation. For example:

- Company A grants share options that meet the conditions of 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.

In our view, 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, we believe that 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.

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

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) TCA 1997, which was inserted by Finance Act 2017. 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 capital gains tax (CGT) treatment on the selling shareholders. Unlike other anti-avoidance provisions in Irish tax legislation, section 135 TCA 1997 does not include a *bona fide* test. 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 provisions, 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.[15]

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

In many cases, the uncertainty regarding the tax consequences means a business owner will be unwilling to proceed with a proposed sale of their business. The tax consequences can be very significant being the difference between paying tax at the marginal rate of 55% (income tax, USC and PRSI) on a deemed distribution as opposed to no tax where the conditions for retirement relief from capital gains tax under section 598 TCA 1997 are met. For a retiring business owner, certainty regarding the net proceeds available following any sale will be a key deciding factor on whether they can afford to exit their business.

In our view, inserting an exclusion for bona fide commercial transactions into section 135 TCA 1997 is essential, 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.

3. Measures to restore equity to our tax dispute resolution procedures

Several aspects of the existing legislation underpinning the tax appeals system impose inequitable treatment between the parties to an appeal and this was exacerbated by a number of measures contained in Finance Act 2020. We would suggest that these legislative provisions be reconsidered in order to restore equity to the tax appeals process and strengthen our dispute resolution procedures.

3.1 Rate of interest charged on underpaid taxes

We strongly urge that the rates of statutory interest on underpaid tax are reviewed to ensure the rate imposed is more commensurate with the cost of borrowing. In the UK, the interest rate for late payment of tax is 2.6%[16], tracked at 2.5% above the current Bank of England base rate. The current European Central Bank (ECB) rates are minus 0.50% for deposits and 0.25% for marginal lending. In the last ten years the highest ECB deposit rate was 0.75% (in 2011) and the highest lending rate was 2.25% (again, in 2011). This clearly shows, in our view, that statutory interest rates of between 8% and 10% per annum cannot be justified by reference to the time value of money.

[15] Tax Appeals Commission Determination 20TACD2018
[16] From 7 April 2020.

We firmly believe that the reduced 3% rate that will be imposed in Period 3 of the Debt Warehousing Scheme[17] represents a fair and reasonable rate of interest which should apply to all underpayments of tax. This rate recompenses the Exchequer and acts as a disincentive to late payment and it could be tracked to prevailing ECB market rates, to ensure it reflects the actual cost to the Exchequer.

It is noteworthy that in a recent case in Germany, the Supreme Tax Court suspended the effect of Germany's annual statutory rate of interest of 6% on late payment of taxes, which had been in force for some 50 years, on constitutional grounds, on the basis that it was, in effect, disproportionate, given the long-established prevailing low rate of interest.[18]

3.2 Restore interest payable on tax refunded to a taxpayer following a successful appeal

Section 960GA TCA 1997, which was introduced by Finance Act 2020, provides that where a taxpayer appeals an assessment issued by Revenue and discharges the disputed tax liability but subsequently wins the appeal, no interest shall be paid on the tax refunded. This treatment discriminates against a taxpayer who is not entitled to interest when successful at appeal, notwithstanding the time value of the funds provided to the State which are ultimately not due.

In contrast, if tax is found to have been underpaid, the taxpayer is charged interest at annualised rates of 8% or 10% per annum from the date the tax liability falls due. Institute members who are very experienced in dealing with tax appeals have estimated that the average waiting time from filing a Notice of Appeal to the appeal hearing can be up to three years. This equates to a 24%/30% increase in the taxpayer's liability due to interest alone which is accruing over that period.

The rationale for adopting denying interest in appeal cases is unclear. As it is, interest at a reduced annualised rate of 4% arises on a repayment of tax only in circumstances where the overpayment is as a result of a *"mistaken assumption made by the Revenue Commissioners in the application of any provision of the Acts"*.[19] Prior to the introduction of section 960GA, it was quite common for no interest to be paid on repayments of tax arising on foot of statutory appeals, on the basis that the dispute centred on the facts of a case rather than the law.

We believe that section 960GA is unfair and has tipped the balance in the appeals process to the detriment of the taxpayer. If a taxpayer disputes an assessment, they must pay the tax liability in full or face a potential interest liability at a rate of 8% or 10% per annum while their appeal is pending. Meanwhile, there is no obligation on Revenue to pay interest in the event of a successful appeal by the taxpayer.

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[17] Period 3 ("the reduced interest phase") of the Debt Warehousing Scheme will run from 1 January 2023 until the relevant tax is repaid to Revenue. During Period 3, interest will be charged at 3% per annum on warehoused relevant tax from Period 1.

[18] Supreme Tax Court, resolution IX B 21/18 of 25 April 2018, published on 14 May 2018

[19] Section 865A Taxes Consolidation Act 1997

In our view, in the interest of fairness in the tax system, section 960GA should be repealed as it penalises taxpayers who appeal Revenue assessments and therefore undermines the effectiveness of the appeals process.

3.3 The absence of sanctions on the respondent for non-compliance with a direction by the Commission

Finance Act 2020 amended section 949AV TCA 1997 to extend the grounds on which the Appeal Commissioner can dismiss an appeal, to include instances where there has been a failure to comply with a direction to file a Statement of Case in accordance with section 949Q(1) TCA 1997 and where there has been a failure to comply with a direction to file an Outline of Arguments in accordance with section 949S(1) TCA 1997. These provisions impose a sanction on the appellant (who is the taxpayer) if they fail to abide by the directions of the Appeal Commissioner, resulting in their case being dismissed. In contrast, there is no corresponding sanction on the respondent should they not abide by a direction from an Appeal Commissioner.

In fact, conceivably a failure by the respondent to perform a certain action could result in the appellant's case being dismissed, even though we understand it is not envisaged that the legislation would be applied in such a manner in practice. In the interest of promoting fair and equal treatment of both the appellant and the respondent, neither party should be allowed to frustrate the progress of a tax appeal.

We consider it appropriate to have some form of legislative sanction for instances where the respondent does not fully comply with a direction. One means of achieving this would be to stop the "interest clock" from a date to be appointed by the Commissioner where the respondent has not complied with a direction. This would ensure that the appellant is not penalised through additional interest charges for the action or inaction of the respondent.

There is legislative precedent for stopping interest accruing on a tax liability, for example, with the "Expression of Doubt" facility when filing a tax return. Under section 959P TCA 1997, a genuine Expression of Doubt affords protection from interest charges for the taxpayer until the doubt is resolved.

3.4 Preparation of the Statement of Case

A taxpayer must outline in their Notice of Appeal all of the grounds for appeal which they intend to rely on in their appeal. Indeed, a taxpayer is prevented from introducing a new ground for appeal at a later stage unless the Appeal Commissioners are satisfied that the ground could not have been reasonably stated in the Notice of Appeal.[20]

Based on the feedback we received from members, often a taxpayer may not have full information on Revenue's basis for the assessment when filing their Notice of Appeal. For example, an assessment may be based on estimated figures without a

[20] Section 949I TCA 1997

full explanation from Revenue as to how these figures were derived. Notwithstanding that the taxpayer will have set out all of the grounds for appeal in the Notice of Appeal, they may then be required to produce a Statement of Case without being provided with any additional information which would assist them in understanding the rationale for Revenue's assessment. This can make it difficult for a taxpayer to decide how or even if, they should proceed with the appeal. Often the basis for the assessment may only become apparent after Revenue has provided their Statement of Case or Outline of Arguments.

As outlined in the Tax Appeal Commission's Annual Report[21], of the 1,392 appeals closed in 2020, 607 appeals (44% of the total number closed) were withdrawn by the appellant. A further, 509 of the closed appeals were closed by way of an agreed settlement. These figures include appellants who lodged an appeal but based on further information made available by Revenue during the appeals process decided that the appeal was no longer worth pursuing to a full hearing.

In the UK Tax Tribunal regime, the taxpayer must submit a Notice of Appeal but the onus to prepare a Statement of Case falls on HMRC. HMRC has 60 days[22] to provide the taxpayer or their adviser with a statement of their case once an appeal is lodged. HMRC must outline their technical arguments and the points they intend to make to prove their case. The taxpayer then has 42 days to respond, outlining the facts as they see them and their counter arguments. These statements are then provided to the Tax Tribunal Judge. This means that all parties to the dispute have a better understanding of the matters in dispute at an early stage in the process.

In our submission to the Department of Finance on the Heads of Finance (Tax Appeals Commission) Bill 2015[23], the Institute had recommended that the Irish tax appeals regime should adopt the UK Tax Tribunal procedures on the Statement of Case, given the taxpayer would already have set out their grounds for appeal in the Notice of Appeal. However, section 949Q(1) TCA 1997 provides for the preparation of a Statement of Case by one or both parties to the appeal without recognising the taxpayer would have already outlined their grounds of appeal in the Notice of Appeal.

Our members have highlighted the challenges for small businesses that are dealing with myriad business issues, in addition to tax, to deduce the basis for Revenue's position with limited information. In contrast, Revenue would have conducted a thorough review of its position in order to support its rationale for disagreeing with a taxpayer's self-assessment.

Feedback from our members suggests that a requirement that Revenue produce a Statement of Case first would; improve the overall fairness of the appeal process for taxpayers as they would understand the basis for Revenue's assessment; it could reduce the cost of the appeal by focusing on the exact matter in dispute and would

[21] Tax Appeals Commission, Annual Report 2020
[22] For standard or complex cases see Chapter 2, No. 25 (Respondent's statement of case) of the First-tier Tribunal (Tax Chamber) Rules, Consolidated version – as in effect from 21 July 2020.
[23] https://taxinstitute.ie/wp-content/uploads/2018/01/ITI-submission-on-Heads-of-Finance-Tax-Appeals-Commission-Bill-2015-12-March-2015-pdf.pdf

allow taxpayers to make an informed decision at an earlier stage on whether to proceed with an appeal, based on the likelihood of success.

The Institute believes in the interests of justice, taxpayers should have a clear understanding of the basis for Revenue's assessment at an early stage to help inform their decision on whether to proceed with their appeal. In our view, this could be achieved by amending section 949Q TCA 1997 to ensure the onus is on Revenue to provide a Statement of Case first, before one is provided by the taxpayer (if it is required at all from the taxpayer).

3.5 Alternative Dispute Resolution (ADR)

To assist with alleviating congestion in the tax appeals system, consideration could be given to introducing an Alternative Dispute Resolution (ADR) mechanism. There is widespread international recognition of the benefits brought by alternative approaches to resolving disputes such as independent mediation.

With mediation-based ADR, an independent and suitably qualified mediator works with the parties in dispute to assist them to reach agreement. The UK is one example of a country with a well-developed ADR regime, whose role in assisting with tax disputes is recognised by the UK Tax Tribunals. The Tribunal Procedures require the Tribunal to bring to the attention of the parties the availability of any appropriate alternative procedure for resolving their dispute, and if the parties wish, and provided that it is compatible with the overriding objective, to facilitate the use of alternative procedures such as ADR procedure[24].

Sections 949H and 949W TCA 1997 permits the Appeal Commissioners to invite parties in dispute to consider a negotiated settlement and to stay proceedings if agreement is possible. This could facilitate the use of an ADR process in an Irish context, which in turn could help to reduce the waiting times for appeal and the associated costs and anxiety for taxpayers that can be experienced when taking an appeal case at present.

3.6 Implementation of agreements reached under MAP

Section 959AA (2A) TCA 1997 permits a Revenue officer to amend an assessment to give effect to an agreement reached between the Irish competent authority and the competent authority of another jurisdiction under the Mutual Agreement Procedure (MAP). However, the section does not accommodate the claiming of reliefs that would have been available at the time the return was originally filed where the deadline for claiming the relief has expired (for example, loss carry back or group relief). In our view, this does not align with the policy intention that section 959AA seeks to achieve.

In the UK, section 124(4) Taxation (International and Other Provisions) Act 2010 (the 2010 Act) provides that a claim for relief under the UK's taxes acts may be made in pursuance of a MAP at any time within 12 months of notification of the MAP to the

[24] Part 1 of the First-tier Tribunal (Tax Chamber) Rules, Consolidated version – as in effect from 21 July 2020.

person affected, even if that involves making the claim after a deadline imposed by another enactment. A similar provision is contained in section 127(5) of the 2010 Act regarding agreements reached under the EU Arbitration Convention.

We recommend that section 959AA is amended to ensure, in giving effect to a MAP, that any relevant time limits may be disregarded so that a taxpayer can be put in the same position as they would have been, had the original filed return reflected the outcome of the agreement reached.

4 Tax technical measures to mitigate certain 'unintended consequences' arising from existing legislative provisions

4.1 Transfer Pricing rules in the case of Ireland-to-Ireland transactions and SMEs

Ireland to Ireland transactions

Section 15 of Finance Act 2020 amends section 835E TCA 1997 which provides the legislative framework underlying the transfer pricing rules in the case of 'Ireland to Ireland' transactions. At Report Stage of Finance Bill 2020, section 15 was made subject to a Ministerial Commencement Order to allow sufficient time to consider further the scope and application of the section, prior to commencing the legislation.[25]

The Institute wrote to the Department of Finance outlining our concerns regarding the proposed amendments to Section 835E following the publication of Finance Bill 2020 as initiated.[26] The Committee Stage amendments to the Bill addressed some issues which we raised, however we continue to have significant concerns regarding the section and these were outlined in our submission to the Department on18 November 2020.[27]

The application of the transfer pricing provisions to non-trading transactions between Irish entities with the resultant problems in the ability to utilise cash within the Irish group, is a significant practical issue for Irish groups and is a source of serious concern for them. The ability to utilise cash within Irish groups is needed now more than ever as Irish businesses seek to recover from the impact of the public health restrictions.

The existing approach is to apply transfer pricing to transactions between domestic entities while allowing for certain exclusions from the charge. We believe that an alternative approach which could be considered would be to apply transfer pricing but to provide for corresponding deductions. This would be in line with the approach adopted in other EU countries. This concept is already enshrined in section 835H, the purpose of which is to eliminate artificial increases in the domestic corporate tax

[25] https://www.oireachtas.ie/en/debates/debate/dail/2020-12-03/32/

[26] https://taxinstitute.ie/wp-content/uploads/2020/11/2020-11-02-Irish-Tax-Institute-submission-to-the-Minister-for-Finance-re-Finance-Bill-2020.pdf

[27] https://taxinstitute.ie/wp-content/uploads/2020/11/2020-11-18-Irish-Tax-Institute-submission-to-the-Minister-for-Finance-re-Finance-Bill-2020-Committee-Stage.pdf

base. Where an ‘Ireland to Ireland’ transaction is not undertaken for bona fide commercial reasons, then relief by way of a corresponding adjustment would not be afforded.

Whilst we welcomed the move to delay the commencement of section 15 to allow sufficient to time to consider this issue further this matter cannot be left in abeyance. In our view, it is imperative that there is constructive engagement with stakeholders regarding this issue to ensure the policy objective of applying transfer pricing rules to transactions between domestic entities can be achieved without disadvantaging our indigenous businesses.

Application of transfer pricing rules to SMEs

The provisions to bring SMEs within the scope of Irish transfer pricing rules are also subject to a Ministerial commencement order. In our view, imposing administratively burdensome transfer pricing rules on those businesses now as they seek to recover from the impact of the COVID-19 pandemic would inevitably put further strain on already scarce resources. Furthermore, if the provisions of section 835E as amended by section 15 Finance Act 2020 were to be commenced, many of those businesses are likely to incur tax liabilities on deemed income.

4.2 Streamlining the tax reporting and collection process for non-resident landlords

In our Pre Finance Bill 2020 submission last year, we highlighted the need to modernise the tax treatment of non-resident landlords in line with the ongoing digitalisation of tax collection and administration.

Under the current tax regime for non-resident landlords, unless a tenant is paying the rent directly to the non-resident landlord, withholding tax at 20% and paying this tax to Revenue[28], a non-resident landlord is required to appoint a “Collection Agent” and the non-resident landlord is chargeable to income tax in the name of this Collection Agent[29].

The current legislative requirements present a range of practical challenges, as tenants may not be aware of their obligations and the Collection Agent process imposed under section 1034 can give rise to issues, such as:

- Difficulties in completing an accurate and complete return. For example, the Collection Agent needs to have information on the landlord’s worldwide income and Irish income to determine to what extent personal tax credits may be claimed on the return and the Collection Agent may not be privy to such information.
- Potentially the submission of multiple returns and duplicate claims in respect of a single taxpayer if there are multiple collection agents. For example, where there are a number of properties in different locations in Ireland and each agent is

[28] Section 1041 TCA 1997
[29] Section 1034 TCA 1997

expected to prepare a return based on the rent they receive on behalf of the landlord[30].

- Risk of incorrect returns where a family member is appointed by the non-resident landlord to be the Collection Agent but does not have the requisite knowledge of the tax regime to correctly complete the tax return.
- Increased compliance costs for taxpayers and lack of clarity on the taxpayer's own obligations as regards filing a tax return in their own right as a "chargeable person" under section 959I TCA 1997.

The self-assessment regime recognises that the taxpayer is the person best placed to prepare their own tax return, with the assistance of their tax agent, as the taxpayer will have full information on their own income and entitlements. Yet, the requirement to appoint a Collection Agent who becomes the chargeable person and must file the return, pay income tax and preliminary income tax instead of the landlord in these circumstances seems to displace this basic principle.

The current process underpinned by the legislation is cumbersome and adds cost and unnecessary complexity to the tax compliance process. In our view, a more streamlined approach to collecting information and tax relating to non-resident landlords should be adopted. For example, the current Third-Party Return for letting agents/property managers (provided for under section 888 TCA 1997) could potentially be adapted to capture information relating to non-resident landlords, perhaps, through a non-resident landlord version of the form. The letting/property agent could submit a report to Revenue electronically at set intervals, providing details of the non-resident landlords for whom they have collected rents. The taxpayer should then be able to submit an income tax return after the end of each year, as part of the normal self-assessment regime.

If it is the case, that there is a concern that a non-resident may not comply with their tax obligations then tax at the standard rate of 20% could perhaps be withheld on the rent after expenses and paid over to Revenue with the Third-Party Return. Adopting such an approach would supply Revenue with information on the recipients of such rental income while also protecting the Exchequer through the collection of withholding tax, if necessary.

Amendments to the regime would need to take account of the fact that some of the individuals collecting the rent on behalf of non-resident landlords may be family members with limited knowledge of tax compliance and related obligations so simplifications to the regime would need to be easy to administer for this cohort and widely publicised to ensure the requirements are very clear.

4.3 Application of the 10% stamp duty charge to independent living units

Section 13 of the Finance (Covid-19 and Miscellaneous Provisions) Bill 2021 gives statutory effect to the Financial Resolution passed on 19 May 2021. It inserts a new

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[30] Minutes of TALC Sub-Committee on Collection issues, 28 November 2019 https://taxinstitute.ie/wp-content/uploads/2020/03/Minutes-of-TALC-Sub-Committee-on-Collections-28-November-2019.pdf

section 31E into the Stamp Duties Consolidation Act (SDCA) 1999 and imposes an increased stamp duty charge of 10% on the multiple purchase of 10 or more residential houses.

It would appear that the increased rate of stamp duty may also apply to independent living units which form part of the property of a nursing home business because such units are not commercially rated[31] and are subject to Local Property Tax. In our view, this does not align with the stated policy intention of section 31E SDCA 1999 which is to provide a "*significant disincentive to the practice of multiple purchase by institutional investors of large parts of, or indeed whole, housing estates before they reach the market, thus denying first-time buyers an opportunity to purchase a home."*[32]

Independent living units operated by nursing homes, form an intrinsic part of the essential services offered by nursing homes to their residents and to the broader community in which they are based. These structures are located within retirement villages and provide a living space for the elderly, who do not require significant levels of home care or assisted living, in a safe and secure environment with access to many of the amenities and services offered by the nursing home. These units are not utilised and not intended for utilisation as living accommodation for the general population.[33]

In recognition of the issues inherent in the Irish housing market, the Government has exempted *"multiple purchases by local authorities, approved housing bodies and the Housing Agency"* from the scope of the provision. We would consider independent living units, in particular when operated as part of a nursing home business, serve a similar function to those residential units that have been specifically exempted from the scope of section 31E. We believe the application of this *"disincentive"*, which adds 8%/9% to the cost of acquiring independent living units, could result in a significant reduction in the development of new units and indeed the reduction of availability of existing units for nursing home businesses.

We believe careful consideration must be given to the negative impact of such a reduction in the future supply of available suitable residential accommodation for our aging demographic. According to the 2016 Census, the population of those aged 65 and over increased 19% from 2011.[34] The population of those aged 65 and over is *"projected to increase very significantly from its 2016 level of 629,800 persons to nearly 1.6 million by 2051*".[35]

While a nursing home may be operated as a business, its residents are amongst the most vulnerable in society and are reliant on the care services and accommodation

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[31] Section 1 SDCA 1999 provides that a property will not be considered a residential property if it is a rateable property.
[32] Department of Finance Press Release, 18 May 2021.
[33] The vast majority of Independent Living Units have planning conditions which state that only persons 55+ can rent/purchase the properties (other than nursing home businesses).
[34] Census of Population 2016 - Profile 3 An Age Profile of Ireland
[35] CSO Population Projections Results - CSO - Central Statistics Office

provided by the nursing home. In our view, an exemption from the increased stamp duty charge should apply in respect of the independent living units which form part of the property of nursing home businesses.

4.4 Amend Associated Companies Relief

Associated Companies Relief is a stamp duty exemption which applies where property is transferred between two companies within a group where certain conditions are met. To avail of the relief, one of the companies must hold at least 90% of the ordinary share capital of the other company. The relief does not apply to an Irish general or limited partnerships as they are not considered a body corporate for the purposes of section 79 SDCA 1999 because they do not have a separate legal personality distinct from the partners.

Foreign bodies corporates may claim the relief if they 'correspond to' a body corporate that has ordinary share capital. In practice, this requirement presents difficulties for foreign bodies corporates that do not have a share capital such as US LLCs, UK LLP's, Scottish limited partnerships, companies limited by guarantee.

We believe that these limitations are contrary to the intended purpose of the relief. Revenue's guidance states that the relief is to apply where property is transferred between two companies "whose association is so close that the transfer is effectively little more than a change in the nominal ownership of the property, with the underlying control remaining the same."

In our view, the relief should be available on any transfers within a group, regardless of whether they involve partnerships that are legally look-through or bodies corporate that have separate legal personality but do not have a share capital structure. We recommend that section 79 SDCA be amended to allow Associated Companies Relief to apply irrespective of the nature of the various entities within the group provided the 90% ownership requirement can be met.

4.5 Repeal of section 757 TCA 1997: Charges on capital sums received for sale of patent rights

The Institute's Pre-Budget 2017 submission[36] raised the issue of the differing tax treatment that applies to proceeds arising from the disposal of patents and patent rights. This is an issue which continues to create uncertainty for business and we welcome the recent engagement with the Department of Finance on this matter.

Under existing legislation, any gain arising on the disposal of a patent is treated as a disposal of a capital asset and is subject to capital gains tax (CGT). While any gain arising on the disposal of patent rights is treated as Case IV income under section 757 TCA 1997 and, as such, is subject to corporation tax of 25%. As patent rights are

[36] https://taxinstitute.ie/wp-content/uploads/2019/06/FINAL-SUBMISSION.pdf

not within the charge to CGT, this means that there is no group relief mechanism on the transfer of patent rights within a group.

Section 757 was introduced in 1967 to ensure that receipts arising on the disposal of certain patent rights could be earned tax-free. CGT legislation was introduced in 1975, thus eliminating the necessity for the standalone provisions in section 757. In our view section 757 should be repealed and patent rights should be treated akin to any other chargeable asset, subject to CGT.

4.6 Interaction of the close company surcharge with Section 79C TCA 1997

Gains or losses arising from the disposal of foreign currency held in an Irish bank, by certain holding companies, are chargeable to corporation tax as Schedule D Case IV income, rather than CGT, in accordance with section 79C TCA 1997. However, section 79C provides that the amount of any currency gain brought into the charge to corporation tax is increased, so that the tax payable equates to the tax that would have been payable if CGT had applied. This is to ensure that there is no loss to the Exchequer.[37]

Foreign exchange gains taxable under section 79C fall within the scope of "investment income" for close company surcharge purposes. We believe that was an unintended consequence of the legislation. To address this unintended consequence, we recommend that a new subsection be inserted into section 79C as follows: "*Any income chargeable under Case IV of Schedule D by virtue of this section shall not be taken into account in computing 'investment income' for the purposes of Section 434".*

4.7 Domestic mergers by absorption

For commercial reasons, groups of companies may seek to restructure by means of a merger by absorption. The concept of mergers by absorption did not exist in Irish law before the enactment of the Companies Act 2014. Section 633D TCA 1997 sought to transpose into Irish law the requirements of the Mergers Directive (Council Directive 2009/133/EC), which provides that cross border mergers by absorption should be tax neutral. As this provision pre-dated the introduction of domestic mergers by absorption, legislative confirmation is required to ensure that the tax treatment available under section 633D for cross border mergers by absorption applies equally to mergers by absorption under Irish law.

A wholly owned subsidiary must transfer all of its assets and liabilities to its parent company in the course of the merger to meet the conditions of section 633D. However, "transfer" is defined in section 630 for the purposes of Part 21 Chapter 1 TCA 1997, (which incorporates section 633D) by reference to a transfer by a company of the whole or part of its trade. This requirement does not align with the Mergers Directive which refers to the transfer of a company's "assets and liabilities"

[37] See Notes for Guidance, Taxes Consolidation Act 1997 Finance Act 2020 edition, Part 4 Principal provisions relating to the Schedule D Charge, Revenue Commissioners, at page 56.

without distinguishing between trading and non-trading assets. A legislative amendment is required to clarify that a “transfer” for the purposes of section 633D includes both trading and non-trading assets and liabilities.

We recommend that section 633D TCA 1997 is amended to clarify that the provisions for cross border mergers by absorption apply equally to mergers by absorption under Irish law and that the meaning of “transfer” for the purposes of a merger under section 633D, includes both trading and non-trading assets and liabilities.