8 April 2025

In our Pre-Finance Bill Submissions to the Minister for Finance over the last number of years, the Institute has made several legislative recommendations in respect of the SME enterprise tax measures including the reliefs contained in Part 16 of the Taxes Consolidation Act (TCA) 1997, the Key Employee Engagement Programme (KEEP) and Revised Entrepreneur Relief.

We welcome the Department of Finance's invitation to request feedback on the policy rationale for not proceeding with many of the legislative reforms sought by the Institute. We look forward to receiving clarification of the tax policy in respect of each of the listed recommendations outlined below, as this feedback will assist us in formulating future legislative recommendations on the various SME business tax reliefs.

Part 16 TCA 997 Reliefs

Employment Investment Incentive (EII)

1. *Permit holding company structures*

   We have highlighted how 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 because 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 Regulation (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) when only large group could have holding companies, and the relief was aimed at SMEs.

Our members would consider this restriction does not make sense in today's world. GBER has checks and balances around the relief being aimed at SMEs and has very detailed rules for the members of a RICT Group which both protects the Exchequer and implicitly permits group structures.

We welcome feedback from the Department of Finance on the policy rationale for not permitting holding company structures under the EII scheme.

2. *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. This sanction 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 as a sanction for an administrative error or the late filing of a return, rather than a clawback of the entire EII relief.

We welcome feedback from the Department of Finance on the policy rationale for not imposing a proportionate fixed penalty as a sanction for an administrative error or the late filing of a return under the EII scheme.

3. *Amend the connected party rules*

We welcomed the Finance Act 2022 amendment to the connected party rules 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. We would also recommend that the 30% control test is reinstated for non-founder investors. An investor not being able to have any capital in the company is highly restrictive and excludes several investors particularly if they want to follow their money if they invested at a time when the company did not qualify for the EII scheme.

We welcome feedback from the Department of Finance on the policy rationale for not amending the connected party rules as outlined above.

4. *Allow 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.

We welcome feedback from the Department of Finance on the policy rationale for not allowing the offset of capital losses, net of tax relief already received, incurred on EII investments.

Start-up Capital Incentive (SCI)

5. *Review the criteria of the scheme*

Feedback from our members suggests the fact a company must not have any linked enterprises prevents it from qualifying for SCI and has impacted the take-up of the scheme.

We welcome feedback from the Department of Finance on the policy rationale for this condition.

Start-Up Relief for Entrepreneurs (SURE)

6. *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. In our view, the SURE scheme should be extended to self-employed workers who set up a new business.

We welcome feedback from the Department of Finance on the policy rationale for not extending SURE to the self-employed.

KEEP

7. *Impose a proportionate sanction for undervaluing share options*

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).

We welcome feedback from the Department of Finance on the policy rationale for not imposing a proportionate sanction for undervaluing KEEP share options.

8. *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 will 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 like the approach taken for the CGT holding company exemption in section 626B TCA 1997.

We welcome feedback from the Department of Finance on the policy rationale for not amending the definition of a 'qualifying holding company' under KEEP as outlined above.

9. *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.

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.

We welcome feedback from the Department of Finance on the policy rationale for not removing the annual emoluments cap from the qualifying share option limit for KEEP.

10. *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.

We welcome feedback from the Department of Finance on the policy rationale for not allowing the continuation of the relief where a SME undergoes a reorganisation.

11. *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.

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.

We welcome feedback from the Department of Finance on the policy rationale for not providing 'roll over relief ' of the KEEP share options.

Revised Entrepreneur Relief

12. *Broaden the definition of a holding company*

Following enactment of Finance (No.2) Act 2023, a holding company for Revised Entrepreneur Relief purposes means a company that holds shares in other companies, all of which are its 51% 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 regarding their business assets in a prudent manner 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.

We welcome feedback from the Department of Finance on the policy rationale for not broadening the definition of a holding company as outlined above.

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

According to Revenue's guidance, 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. We recommend that the legislation should be amended to remove the restriction from Entrepreneur Relief, which is set out in Revenue guidance, in situations where a group holds a dormant company for *bona fide* commercial reasons.

We welcome feedback from the Department of Finance on the policy rationale for not removing the restriction where a group holds a dormant company for *bona fide* commercial reasons.