The CPD Fest 2020

Trusts and High Net Worth Individuals

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Trusts and High Net Worth Individuals

03 December 2020

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Trusts & High Net Worth Individuals
What we will cover?

The objective is to identify:

- Types of trusts
- Taxation of trusts
- Use of trusts in tax/estate planning
- Onshore/offshore trust examples
- Trust reporting obligations
- Tips & Traps

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1. Types of Trusts

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1. Types of Trusts - Basic elements of a Trust

Before going further, important to explain important terms:

- **Settlement/Trust** – what is a settlement/Trust?
- **Settlor** – the creator of the trust
- **Trustee** – the person/entity who holds the trust
- **Beneficiary** – the person(s) who can benefit from the trust
- **Protector** – trust/trustee oversight

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1. Types of Trusts - Basic elements of a Trust

Settlement – what is a settlement?

- "Settlement" defined in section 10 TCA 1997 as:

  Includes any disposition, trust, covenant, agreement or arrangement, and any transfer of money or other property or of any right to money or other property"

- No separate definition for CAT. But reference in CAT Act to the "trustees of a settlement"
- No separate definition of "Trust" in CAT Act other than "discretionary trust" as set out in section 2 CATCA 2003 (defined later).

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1. Types of Trusts - Basic elements of a Trust

Settlement vs trust?

- Term "trust" not synonymous with term "settlement"
- Term "trust" however very relevant for CAT when considering settlements
- "Trust" definition often regularly quoted* as:

A trust is an equitable obligation, binding a person (who is called a <u>trustee</u>) to deal with property over which he has control (which is called trust property), for the benefit of persons (who are called <u>beneficiaries</u> or cestuis que trust), of whom he may himself be one and anyone of whom may enforce the obligation"

** Law of Trusts and Trustees, Underhill and Hayton (15th edition, 1995)*

- A trust or a settlement can take may forms.

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1. Types of Trusts – non tax considerations

When forming a trust, a role of **trustee** is often considered.

Trustee

- The trustees look after the trust assets for the beneficiaries
- Trustees typically legal owners of the trust assets
- Settlor can often be a trustee
- Fiduciary duty of care to manage trust assets for beneficiaries
- Can be individuals or corporate trustees (often offshore).

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1. Types of Trusts – non tax considerations

When forming a trust, a role of **Protector** often considered.

Protector

- As the name suggests, the appointment of the trustees often requires the consent of another person, referred to as the protector
- In some cases, the protector may be the settlor/settlor's spouse
- Not common in Irish trusts
- More common in trusts in offshore jurisdictions.

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1. Types of Trusts – non tax considerations

When forming a trust, important considerations can arise:

- **Settlor** – who is the settlor?
- **Trustee(s)** – selection of trustees – a question of trust!
- **Beneficiaries** – select (to include the settlor)?
- **Protector** – needed?
- **Law** – jurisdiction?

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1. Types of Trusts?

The objective is to identify:

- The various types of trusts that exist
- For tax purposes, to understand what is a:
  - Bare Trust
  - Fixed Trust
  - Life Interest/Limited Interest Trust
  - Discretionary Trust

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1. Type of Trusts - Bare Trust

A Bare Trust is where the trustee(s) are:

- Merely nominee owners
- Referred to as the "legal owner"
- Holding property for the "beneficial owner") is kept off title
- The beneficial owner can call on trustees to transfer property at any time

Typical example – nominee account (stockbroking firm).

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1. Type of Trusts - Bare Trust created by law

A Bare Trust is created by law where assets are:

- Transferred to a minor under a settlement
- "Settlement" is defined in section 794 TCA 1997 for tax purposes as including *"any disposition, trust, covenant, agreement or arrangement, and any transfer of money or other property or any rights to money or other property".*

Income settled on children (section 795 TCA 1997)

- Treats income from assets settled on minor children as income of the settlor

Typical example – parent transferring property to a minor child.

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1. Type of Trusts - Bare Trust example

A Bare Trust is created where:

- Mrs S (a successful businesswoman) own a rented commercial property
- Mr S has two minor children and decides to transfer ownership of the property to the two children
- A bare trust arises from above scenario (as children are minors)
- Section 795 TCA 1997 treats income from assets settled on minor children as income of the settlor.

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1. Types of Trust - Fixed Trust

A Fixed Trust is typically where:

- Beneficiaries receive the trust property under terms of trust
- Terms as set out by settlor
- Trustees have no discretion
- Property remains in trust until beneficiary reaches age set out in trust deed

Typical example – client creates fixed trust for children in their Wills so that assets vest at age of 25 (Will example).

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1. Types of Trust - Fixed Trust - Example

Clients with two young children and significant assets.

Their Wills create:

- Fixed trusts so vesting delayed until children reach age of 25
- Trustee power to accumulate income/appoint capital.

Treated as a discretionary trust (6% DTT when youngest child reaches 21 and annual 1% DTT until trust assets appointed at age of 25).

CAT on appointments (with applicable CAT tax free threshold applying).

CAT position can vary depending if power to accumulate not included (Table B Schedule 1 CATCA 2003 can apply in that event) and potential **second** CAT charge on 25th birthday (on receiving absolute interest).

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1. Types of Trust - Life Interest Trust

A Life Interest Trust is typically where:

- Beneficiary has a right to income of the trust
- Right to income given to life tenant for either:
    - A period certain (i.e. limited interest) or
    - For their lifetime (i.e. life interest).
- Interest in the trust does not extend to the capital
- After death of life tenant, the capital vests in the remainderman (who would typically be specified in the trust).

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1. Types of Trusts - Discretionary Trust

A Discretionary Trust is typically where:

- The trustee(s) have absolute discretion on
    - when to appoint and
    - who to appoint to
    - how much a beneficiary receives.
- A settlor normally provides a letter of wishes (non-binding).
- Often requires careful selection of trustees (given the discretionary powers provided to the trustees).

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1. Types of Trusts - Discretionary Trust

A Discretionary Trust used frequently in estate planning.

Two types of discretionary trust:

1. A discretionary trust created in lifetime by settlor.
2. A discretionary trust created under a Will.

As a practitioner, in general, the discretionary trust is most typical trust encountered with private clients.

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1. Types of Trusts – Trusts created by Wills

Trusts frequently (inadvertently) also arise under Wills.

1. A bequest as follows in a Will:

"I leave a cash sum of EUR10,000 to my godchild Mark"

If Mark is a minor, this creates a **bare trust**.

2. A settlement under the Settled Land Act (settlement for CGT).

"I leave my house to my wife Anna for life and then to my two children Kate and Eva."

In above cases, the person may not have realised that they have created a trust under their Will.

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2. Taxation of Trusts

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2. Taxation of Trusts

The objective is to identify tax charges that can arise on:

- Trust creation
- During life of a Trust
- On a death
- Wind up of a Trust

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2. Taxation of Trusts – Tax Monitor

The tax charges to monitor typically are:

- Discretionary Trust Tax ("DTT")
- Income Tax ("IT")
- Capital Gains Tax ("CGT")
- Capital Acquisitions Tax ("CAT")
- Stamp Duty ("SD")
- Local Property Tax ("LPT")

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2. Taxation of Trusts – Creation of Settlement

The tax charges that can arise on trust creation typically are:

- Capital gains tax ("CGT")
  - No CGT arises on assets passing to a Will Discretionary Trust
  - CGT can arise on lifetime disposals passing assets to trustees
- Stamp duty ("SD")
  - No SD arises on assets passing to a Will Discretionary Trust
  - SD can arise on lifetime transfers to trustees
- Income tax ("IT")
  - Requires monitoring of income settled on children provisions

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2. Taxation of Trusts – Creation of Settlement (2)

In addition, tax charges that can arise on trust creation typically are:

- Capital acquisitions tax ("CAT")
  - No CAT arises on assets passing to a Will Discretionary Trust
  - No CAT arises on assets passing to a lifetime Discretionary Trust but CAT charges can arise on other trusts if created
- Discretionary Trust tax ("DTT")
  - DTT arises on assets passing to a Will Discretionary Trust

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2. Taxation of Trusts – Taxes during lifetime of Trust

The tax charges that can arise annually during the life of a trust typically are:

- Income Tax ("IT")
  - IT at standard rate 20% on income
  - No personal credits/allowances/exemptions/reliefs
  - Surcharge on accumulated income at 20% rate (section 805 TCA 1997)
- Capital gains tax ("CGT")
  - CGT arises at 33% rate on assets sold by Trustees
  - Can arise on actual (and deemed) disposals

Taking in above example a standard discretionary trust scenario.

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2. Taxation of Trusts – Income Tax for Trust Example

Income Tax

Assume the following income is received by a discretionary trust in 2019:

- Gross rent EUR70,000 (residential property)
- Rental expenses (deductible) EUR10,000
- Net taxable rent EUR60,000
- Income tax @ 20% = EUR12,000

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2. Taxation of Trusts – Income Tax for Trust - Example

Income Tax Surcharge (section 805 TCA 1997)

Assume the 2019 trust income accumulates (is not distributed within 18 months). Assume 2019 trustee expenses of EUR12,000.

Section 805 surcharge calculated as follows and payable in 2021:

Gross 2019 income of trust	EUR70,000
Less 2019 trustee expenses	
EUR12k x 100/80	(EUR15,000)
Surchargeable income	EUR55,000
Surcharge @ 20%	EUR11,000

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2. Taxation of Trusts – Income Tax

Other points to note (pitfalls/pointers):

- IT at standard rate 20% but can suffer higher DIRT on deposits
- Preliminary Tax applies to trusts/trustees (no different to individuals)
- Trustees can make qualifying disclosures (if income tax filing/payment obligations not previously met)
- 20% Surcharge on accumulated income
  - DTT allowed as deduction (by Revenue concession only)*

** Revenue Tax Briefing Issue 33*

- Income appointments – can also be a benefit subject to CAT!

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2. Taxation of Trusts – CGT on a death

Discretionary Trust – large farm/estate (death of Life Tenant)

- Mr M is a life tenant of a 200 acre farm estate held in an Irish discretionary trust
- Trust created by Mr M's late father in 2005
- On Mr M's death, the life interest ceases but the terms of the trust provide for the farm to remain in trust
- Farm assets worth EUR4m on date of Mr M's death and trust bank account has EUR150k cash
- Farm base cost for CGT is EUR3.2m in 2005 (when farm passed to trustees)
- On Mr M's death, trustees liable to CGT of EUR264K (EUR4m – EUR3.2m @ 33%).
- Trustees have responsibility to organise payment of CGT (but often in such cases, due to illiquid assets in trust, can be funding shortfall).

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2. Taxation of Trusts - Limited Interest Trust - Double Tax!

A Limited Interest Trust can create a double CAT charge where:

- Parents wish to leave estate to trustees until their child reaches a certain age (say 25) but child needs to be maintained from that income up to the age of 25.
- The above scenario can result in two CAT charges for the child:
  - CAT charge 1 – creation of limited interest.
  - CAT charge 2 – child becomes beneficially entitled to capital.
- No credit for CAT charge 1 against CAT charge 2 (resulting in double taxation on receipt of largely the same assets).

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2. Taxation of Trusts - Limited Interest Trust

Example – Will Trust – Limited Interest – Double CAT charge

Mr T is a widower. His Will provides that if he dies before his daughter Amy turns 25, the estate will be held on trust for Amy on following terms:

- Income to Amy until age of 25
- At age 25, Amy will become absolutely entitled to estate

Mr T passes away when Amy is aged 16. CAT charges for Amy:

- 1 – Interest in period certain for 9 years (16-25).
- 2 – On age 25, CAT on entire capital/estate.

No credit for CAT charge 1 against CAT charge 2 (not arising on same event).

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2. Taxation of Trusts – DTT arising on a death

Discretionary Trust definition (section 2 CATCA 2003)

"Discretionary trust" means any trust whereby, or by virtue or in consequence of which -

(a) Property is held on trust to accumulate the income or part of the income of the property, or

(b) Property (other than property to which for the time being a person is beneficially entitled for an interest in possession) is held on trust to apply, or with a power to apply, the income or capital or part of the income or capital of the property for the benefit of any person or persons or of a class of persons whether at the discretion of trustees or any other person and notwithstanding that there may be a power to accumulate all or part of the income."

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2. Taxation of Trusts – DTT arising on a death

Questions typically arising for practitioners/trustees are:

1. Are you dealing with a discretionary trust as defined?
2. What is the discretionary trust tax status for the trust (if it is a discretionary trust)?

Discretionary Trust Tax ("DTT")

A discretionary trust is liable to:

(a) 6% DTT once off charge on value of trust assets (section 15 CATCA 2003) on later of:

(i) Date property becomes subject to the discretionary trust.

(ii) **Death** of the disponer (i.e the settlor).

(iii) The date youngest "principal object" reaches 21 years of age.

(b) 1% Annual DTT charge on value of trust assets (section 20 CATCA 2003).

"Principal object" (s14 CATCA 2003) – spouse/civil partner/children

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2. Taxation of Trusts – DTT Example

Example – Will Trust – DTT charge

Mr W is a widower. He dies on 30 July 2019.

- The estate will be held on discretionary trust for his three children (all aged over 25):
- Probate issues to trustees on 1 January 2021

Relevant dates for DTT are:

- 1 – 30 July 2019 – 6% levy.
- 2 – 31 December 2020 – 1% levy.

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2. Taxation of Trusts – Exemptions from DTT

Exemptions from DTT (section 17 CATCA 2003) for trusts:

- Charitable trusts (public/charitable)
- Superannuation benefits (pension funds)
- Unit trust schemes
- For individual's incapable of managing their affairs because of:
  - (i) age/improvidence or
  - (ii) physical/mental or legal incapacity.

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2. Taxation of Trusts – Wind up of Settlement

The tax charges that can arise on a wind up of a discretionary trust typically are:

- Capital gains tax (“CGT”)
  - CGT arises on disposal of assets by Trustees
  - Credit for CGT paid by trustees against CAT may apply
- Stamp duty (“SD”)
  - Consider is SD exemption applies on appointments to beneficiaries
- Capital acquisitions tax (“CAT”)/Income Tax (“IT”)
  - CAT will arises on appointments (complex CAT rules on trust break-ups)
  - In some cases, distributions may result in IT and CAT
- Discretionary Trust tax (“DTT”)
  - DTT refund may arise (depending on timing of trust wind up)

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3. Use of Trusts in Estate Planning & Tax Planning

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3. Use of Trusts in Estate/Tax Planning

The objective is to identify:

- Areas where Trusts form part of estate planning
- Use of a Will Trust
- Trusts for disabilities
- Generation skipping trusts

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3. Estate Planning

Estate Planning is:

- The orderly/tax efficient transfer of assets between individuals
- Transferring wealth/assets to the next generation.

Why are Trusts used in Estate Planning?

- Protection of Individuals
- Protection of Capital
- Flexibility
- Generation skipping
- Tax deferral

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3. Estate Planning – Protect Individuals

Protection of Individuals – typically individuals:

- That are minors/immature
- With incapacity
- With addictions/improvidence
- Experiencing marital difficulty
- Exposed to creditors/debt difficulties

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3. Estate Planning – Protect Individuals

Discretionary Trusts often considered for estate planning where:

- Parents have significant assets/young children
- Beneficiaries unable to manage their affairs (i.e. incapacity)
- Beneficiaries with marital difficulty
- Beneficiaries with financial difficulties

A discretionary trust provides the following benefits:

- Timing of benefits/timing of tax payments

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3. Estate Planning – Protect Individuals

Discretionary Trusts for child with special needs:

- Ensure funding of medical/care needs after parents' deaths
- Maintain child's quality of life
- Child may not be able to manage own financial affairs

Certain discretionary trust also provides the following benefits:

- IT/CGT exemption (i.e. section 189A TCA 1997)
- DTT exemption (i.e. where in case of incapacity)

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3. Estate Planning – Asset Protection example 1

Asset Protection Trust – Farm (Use of Will Discretionary Trust)

- Mr A is a farmer (widower) and owns a substantial farm worth EUR2m
- Mr A has 2 children but neither of them are farmers
- The children have already used their tax-free thresholds for house transfers
- Both children are married but one has marital difficulties
- Under Mr A's Will, the farm passes to a Will Discretionary Trust with the 2 sons as beneficiaries
- The trustees have discretion to appoint the farm at the time:
  - Likely when sons are "farmers" & qualify for CAT agricultural relief
  - Likely when neither son has marital difficulty

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3. Estate Planning – Asset Protection example 1

Asset Protection Trust – Farm (Will Discretionary Trust)

Tax position?

- Trust taxed on farm income while in existence
- Discretionary Trust Tax cost (6% initial/1% annual)
- CAT saving significant if agricultural relief conditions met

Asset Protection – risk of losing farm asset reduced through marital breakdown/reduced risk of selling farm to fund tax costs.

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3. Estate Planning – Asset Protection example 2

Asset Protection Trust – Farm (Alternative - use of Life Interest Trust)

- Mrs B is a farmer (widow) and owns a substantial farm worth EUR1m
- She wishes to leave farm to only daughter (currently aged 25) under her Will
- Mrs B has concern over daughter's partner
- Possible concerns over co-habitant rights
- Under Mrs B's Will, farm passes to trustees to be held for the daughter for her life
- Trust could also provide power to appoint capital to daughter (at trustee discretion)
- Remainderman could be grandchildren/other family members.

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3. Estate Planning – Bare Trust example

Bare Trust example of Estate Planning

- A grandparent (Mrs X) wishes to help fund three grandchildren's education
- Mrs X sets up a bare trust with grandchildren's parents as trustees
- Mrs X settles EUR32,500 per grandchild (total fund EUR97,500).
- The annual small gift exemption amount of EUR3,000 per child is added

Tax position?

- No CAT once tax-free thresholds not already utilised
- IT on trust income – taxed on settlor until grandchildren reach maturity
- Grandchildren entitled to funds at age of 18

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3. Estate Planning – Generation Skipping Trust example

Generation Skipping Trust example of Estate Planning – typical scenario

- Mr C (widower) aged 85 has 4 adult children (aged between 45 - 55) and 10 minor grandchildren
- Mr C's children have all fully used CAT tax thresholds from death of Mrs C/prior taxable gifts
- Mr C has property portfolio worth EUR5m. Four children all wealthy/financially independent
- Mr C's Will provides for property portfolio to pass into Will Discretionary Trust with 10 grandchildren names as potential beneficiaries

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3. Estate Planning – Generation Skipping Trust example

Generation Skipping Trust example of Estate Planning – tax position

Tax position?

- No CAT charge for Mr C's children (as they don't benefit) – saving 33% of EUR5m
- Disc Trust Tax initial charge 6%/1% thereafter (but 50% rebate if appointments < 5 years)
- IT on trust income – taxed on trustees
- CAT charge for grandchildren when assets appointed

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3. Estate Planning – Tax Deferral Trust example

Tax Deferral Trust example of Estate Planning

- Mr D (divorced) has 3 minor children (currently aged between 5 - 11)
- Mr D's diagnosed with a terminal illness with the unlikelihood of full recovery
- Mr D has investment portfolio (stocks/shares) worth EUR3m
- Mr D does not wish to leave EUR3m direct to minor children
- Mr D's Will provides for investment portfolio to pass into Will Discretionary Trust with 3 children named as potential beneficiaries.

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3. Estate Planning – Tax Deferral Trust example

Tax Deferral Trust example of Estate Planning – Tax Position

- No CAT charge for Mr D's children (on assets passing into trust)
  - 33% CAT deferral on amounts in excess of CAT tax free thresholds
- DTT - no 6%/1% charges as children are "principal objects" under age of 21
  - DTT deferral until principal object reaches 21
- IT on trust income – taxed on trustees
- CAT charge arises on making of appointments (at point in future).

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3. Estate Planning – Trust resulting in additional tax costs

Discretionary Will Trust – extra tax costs

- In certain cases a discretionary trust forming part of a Will can lead to:
  - CAT at 33% plus
  - DTT at 6% plus annual 1% charges.
- Example, parent with estate valued at EUR2m & one child.

Option 1 – Parent leaves estate to child (aged 21 at date of parent's death).

Option 2 – Parent leaves estate to Will discretionary trust. Trustees appoint to child when child aged 30.

Assume minimal growth of say 2% pa (compounded).

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3. Estate Planning – Trust resulting in additional tax costs

Discretionary Will Trust

Example – estate valued EUR2m

	Tax EUR '000
Option 1 – No Will Discretionary Trust	698
Option 2 – With Will Discretionary Trust	914

(workings provided)

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4. The Offshore Discretionary Trust

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4. The Offshore Discretionary Trust - objective

The objective is to identify:

- The Offshore Discretionary Trusts that we see today
- The Complex tax rules that can apply
- The CAT rules for pre/post 1 Dec 1999 trusts
- The Anti-avoidance rules difficult to avoid

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4. The Offshore Discretionary Trust – why go offshore?

Individuals might choose offshore trusts for following reasons:

- **Privacy** – historically but privacy level changing – trust register
- **Taxation** – generally tax neutral in jurisdiction where trust set up/trustees' resident
- **Asset Protection** – enhanced asset protection legislation offshore
- **Estate Planning** – flexibility if location of beneficiaries' mobile
- **Professional Trustees** – history of trustee business offshore.

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4. The Offshore Discretionary Trust – typical scenario

The scenario that often arises is as follows:

- Trust was set up outside Ireland a long time ago
- Settlor was not Irish tax resident when trust was set up
- Trust has Irish tax resident beneficiaries
- In some cases, the settlor now also Irish tax resident
- Various changes in tax laws since trust inception.

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4. The Offshore Discretionary Trust – trustee residence (CGT)

The tax residence position of the trustees is important to establish as for **CGT** purposes (s574 TCA 97):

- Trustees treated as resident/ordinary resident unless general administration carried on outside Ireland and
- Trustees/majority of them not Irish tax resident/not ordinarily resident.

Professional trustees – treated as non resident if property consists of property provided by a non domiciled/non resident/non ordinary resident individual.

Irish **specified assets** still within charge to Irish CGT.

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4. The Offshore Discretionary Trust – trustee residence (IT)

The tax residence position of the trustees is also important to establish for **IT** purposes (but the legislation is less clear).

- If all the trustees treated as tax resident in Ireland, trustees liable to IT on worldwide income
- If the trustee/majority of them are not Irish tax resident, trustees liable to IT on Irish source income only.

Case law – Dawson v IRC (UK case).

Revenue practice – treat trust as Irish tax resident for IT purposes if there are Irish tax resident trustee(s) even if trust administration carried on outside Ireland.

To avoid Irish IT, none of trustees should be Irish tax resident.

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4. The Offshore Discretionary Trust – territoriality (CAT)

Trust created PRE 1 December 1999 (rule applies to both onshore/offshore trusts)

- The **"domicile"** rules apply in terms of the charge to Irish CAT
- If the settlor/disponer was Irish **domiciled** when trust created **before 1 December 1999**, a gift/inheritance taken from the trust is taxable in Ireland if:

(a) The disponer was **domiciled** in Ireland at:

(i) the date of the disposition (generally the date of the settlement) or

(ii) the date of the gift, or

(iii) the date of his/her death if the gift if taken after the death of the disponer

or

(b) The property is situated in the State (i.e. Ireland).

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4. The Offshore Discretionary Trust – territoriality (CAT)

Trust created AFTER 1 December 1999 (rule applies to both onshore/offshore trusts)

- The **"residence"** basis of charge to CAT applies (instead of "domicile" rules)
- Gift/inheritance taken from offshore trust after 1/12/1999 is taxable in Ireland if:

(a) The disponer is **tax res/ord res** in Ireland for the tax year in which:

(i) the date of the disposition giving rise to the gift/inheritance falls, or

(ii) the date of the gift falls or

(iii) the date of his/her death falls (in the case of a gift taken after that date), or

(b) The beneficiary is **tax res/ord res** in Ireland in the tax year in which the date of the gift falls, or in the case of an inheritance the beneficiary is tax res/ord res in Ireland at the date of the inheritance, or

(c) The property is situated in the State (i.e. Ireland).

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4. The Offshore Discretionary Trust – practical issues (settlor)

Settlor domicile

Issues that often arises are as follows:

- If trust was set up outside Ireland pre 1 Dec 1999
- Settlor is no longer alive
- Was settlor Irish domiciled when trust was set up?

Identifying Settlor for CAT

Issues that often arises are as follows:

- If trust had more than one settlor (it happens)
- What is CAT position for trust based on each settlor?

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4. The Offshore Discretionary Trust – other practical issues

Tracking beneficiaries

- If trust has multiple beneficiaries
- Beneficiaries can be based in different jurisdictions (with different tax rules)
- Some beneficiaries may be liable to CAT/others may not.

Trust legacy issues for CAT

Issues that often arises are as follows:

- Has the trust previously made appointments to beneficiaries
- What is CAT position for previous trust appointments?
- Is there any concern regarding **offshore matters** (from 1/5/2017)

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4. The Offshore Discretionary Trust – Anti avoidance rules

Income Tax ("IT")

- ***Section 806 – 807A TCA 1997***

Capital Gains Tax ("CGT")

- Section 579 - 579A TCA 1997

General Anti-avoidance

- Section 811 – 811D TCA 1997

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4. The Offshore Discretionary Trust – Anti avoidance rules

Income Tax ("IT") – "Transfer of Assets Abroad" (section 806)

Section 806 TCA 1997 seeks to prevent a scenario whereby:

- Irish tax res/ord res individuals **avoid IT** by means of a **transfer of assets**
- As a result of a transfer of assets, income becomes payable to a non resident/non domiciled person
- Irish tax res/ord res individuals have the **power to enjoy** the income/capital sum associated with the transfer

The remit of section 806 is wide-ranging as can be seen by the definitions of the various elements forming part of this charging section.

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4. The Offshore Discretionary Trust – Anti avoidance rules

IT – "Transfer of Assets Abroad" (section 806) – Transfer of Assets

A transfer of assets can apply to a scenario:

- Even where there is not a **transfer of assets** out of the Irish State to a foreign country
- Where there has been some transfer of assets (any asset(s)) and that the transfer, whether with or without any **associated operations**, should have the result that income becomes payable to a foreign person (i.e. to any person who is either not resident or not domiciled in the State).

The remit of section 806 is wide-ranging as can be seen by the definitions of the various elements forming part of this charging section.

A typical example, however, would be where a taxpayer sells an asset to a non-resident company (i.e. a transfer of assets abroad).

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4. The Offshore Discretionary Trust – Anti avoidance rules

IT "Transfer of Assets Abroad" (section 806) – Associated Operations

Section 806 (1) TCA 1997, s 806(1) defines an "associated operation", in relation to **any transfer of assets**, as being:

- an **operation of any kind** effected by **any person**, and
- in relation to any of the assets transferred, or any assets representing, whether directly or indirectly any of the assets transferred, or the income arising from any such assets, or to any assets representing, whether directly or indirectly the accumulations of income arising from any such assets.

For example, if a taxpayer sells an asset to a non-resident company, leaving the sale price outstanding, any subsequent dealing in the shares of that company would be an "associated operation" in relation to the **relevant transfer** (e.g. the original sale).

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4. The Offshore Discretionary Trust – Anti avoidance rules

IT "Transfer of Assets Abroad" (section 806) – Power to Enjoy

Power to enjoy arises where in any of the following scenarios are met:

- Income accrues **to enure for the benefit** of the individual
- The accrual of income **increases the value** of assets held for the benefit of the individual
- The individual is **entitled to receive** the income or benefit at any time
- The individual has power to benefit through **power of appointment or revocation**
- For individual has ability to **control** the application of the income.

Section 806 can apply where an individual (typically the settlor) has the power to enjoy the income/assets of the trust.

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4. The Offshore Discretionary Trust – Anti avoidance rules

IT "Transfer of Assets Abroad" (section 806) – Capital Sum

Even if income not enjoyed, the charge under section 806 can apply where a **capital sum** is received by an individual.

A **capital sum** is defined as:

- Any sum paid or payable by way of a **loan** or repayment of a loan
- Any **other sum paid**/payable otherwise than as income
- Any **sum received by a third party** by virtue of assignment by the individual (or under their direction).

Section 806 capital sum example overleaf.

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4. The Offshore Discretionary Trust – Anti avoidance rules

IT "Transfer of Assets Abroad" (section 806) – Capital Sum Example

Background

- Mr O is Irish tax resident/ordinary resident. He sets up a discretionary trust with non resident trustees. Mr O and his family are discretionary beneficiaries of the trust.
- Mr O settles cash on the trust. The trustees invest in shares.
- Trustees receive dividends from the shares and accrue the income in the trust
- Mr O receives benefit from the trust in form of a capital sum.

Result of section 806 "**capital sum**" rules are:

- Mr O is assessed on the income of the trust under section 806 as he received a capital sum.

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4. The Offshore Discretionary Trust – Anti avoidance rules

The effect of "Transfer of Assets Abroad" (section 806) rules

What does the above all mean (in simpler terms)?

Where the rules of section 806 apply:

- Income of the foreign discretionary trust deemed to be income of the **settlor**
- Income not assessed on the trustees

Exceptions to section 806 applying

- Where individual can satisfy Revenue purpose of transfers not to avoid tax
- Bona fide commercial transactions.

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4. The Offshore Discretionary Trust – Anti avoidance rules

IT – "Transfer of Assets Abroad" (section 807A) – Income taxed on Non-Transferor

Section 807A TCA 1997 seeks to apply where:

- Irish tax res/ord res & domiciled individual(s) receive a benefit arising from a **transfer of assets**
- Typically, the settlor is not Irish tax res/ord resident (and is **not liable** under **section 806**)
- The amount **received** will be treated as income of the individual in the year of assessment in which it is received.

Section 807A example overleaf.

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4. The Offshore Discretionary Trust – Anti avoidance rules

IT "Transfer of Assets Abroad" (section 807A) – Example

Background

- Mr U is UK domiciled and UK tax resident. He sets up a discretionary trust with non resident trustees for the potential benefit of his two UK tax resident children (Child A and Child B).
- Mr U settles cash on the trust. The trustees invest in shares.
- Trustees receive dividends from the shares and accrue the income in the trust
- In 2020, Child B takes up tax residence in Ireland and receives a benefit from the trust in 2020 in form of a capital sum.

Result of section 807A rules are:

- Child B is assessed on the income payment received under section 807A as he received a capital sum (once the sum in not liable to CGT under section 579).

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4. The Offshore Discretionary Trust – Anti avoidance rules

Income Tax ("IT")

- Section 806 – 807A TCA 1997

Capital Gains Tax ("CGT")

- ***Section 579 - 579A TCA 1997***

General Anti-avoidance

- Section 811 – 811A TCA 1997

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4. The Offshore Discretionary Trust – Anti avoidance rules

Capital Gains Tax ("CGT") – section 579 TCA 1997

Section 579 TCA 1997 seeks to prevent avoidance of CGT through use of a trust. Under section 579, where chargeable gains are realised in a trust and where:

- Trustees are non-Irish tax resident
- Settlor is Irish res/ord res (or was when settlement made)
- Settlor has an interest in the settlement (i.e. he/she can benefit)
- A beneficiary is domiciled in Ireland and res or ord res in Ireland in the tax year

the capital gains are treated as accruing to the settlor (if tax resident) and if not attributed to all beneficiaries on just/reasonable basis.

The gains are computed as if the trustees are res/domiciled in Ireland using normal CGT rules and allowing for losses.

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4. The Offshore Discretionary Trust – Anti avoidance rules

CGT – section 579A – Gains taxed on Non-Transferor

Section 579A TCA 1997 seeks to apply where:

- Trustees are not Irish tax resident
- Settlor has no "interest" in settlement or has "interest in settlement" but not res/ord res & domiciled at date trust created or now
- A beneficiary is Irish **domiciled** & tax res/ord resident
- The amount of capital **received** by such a tax resident beneficiary will trigger the attribution of gains arising in that tax year (or arising in a prior tax year since 11/02/1999) up to the limit of the capital payments received.

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4. The Offshore Discretionary Trust – Anti avoidance rules

Income Tax ("IT")

- Section 806 – 807A TCA 1997

Capital Gains Tax ("CGT")

- Section 579 - 579A TCA 1997

General Anti-avoidance

- ***Section 811 – 811D TCA 1997***

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4. The Offshore Discretionary Trust – Anti avoidance rules

General Anti-avoidance - Section 811 – 811D TCA 1997

***Section 811 TCA 1997* – consider if general anti-avoidance rules apply**

- Tax avoidance transaction – tax advantage and primary purpose
- Was section 811 relevant in context of creation of the offshore trust?

Section 811A TCA 1997 – protective notification

- May need to consider if protective notification should have been made

Section 811C TCA 1997 – consider if <u>new</u> anti-avoidance rules apply

- For transactions that commenced after 23 October 2014

Section 811D TCA 1997 – consider if <u>new</u> protective notifications apply

- For transactions that commenced after 23 October 2014

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5. Trust Tax Traps &
Tax Reporting

03 December 2020

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5. Trust Tax Traps & Tax Reporting

The objective is to identify:

- Tax Traps for Trustees/advisers to avoid
- Wide ranging reporting obligations
- Mandatory Reporting and Trusts
- CRS/FATCA

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5. Trust Tax Traps

Typical trust/trust tax traps that arise are:

- A negative change in tax rules (i.e. CAT dwelling house exemption)
- A negative change in timing of DTT charge (Will trusts)
- CGT exit charge (section 579B TCA 1997)
- DTT 6% charge – ensure 5 year rule for appointments not missed (section 18 CATCA 2003)
- LPT obligations (residential property in trust) – ensuring timely filings

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5. Trust Traps – Irish Discretionary Trust – CAT charges

Discretionary Trust owning residential property with CAT estate planning in mind

Section 86 CATCA 2003 Dwelling House Exemption ("DHE") negative changes

- FA 2007 (section 116) requirement for house to be owned by **disponer** for 3 years before gift
- As house owned by **trustees** (not disponer), CAT DHE relief no longer available
- FA 2007 changes made it impossible for houses held in trusts to avail of DHE
- Resulted in properties continuing to be held in discretionary trusts (in a number of cases).

Further trust anti-avoidance rules for CAT DHE (section 52 FA 2018)

- A successor treated as having an interest in another dwelling house at date of inheritance
- Where the successor transferred interest in a dwelling house to a discretionary trust of which he/she is a beneficiary before the date of the inheritance.

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5. Trust Traps – Irish Discretionary Trust – CAT charges

Discretionary Trust owning residential property - what options available to trustee's post FA 2007?

1. Appoint property back to disponer

- No CAT if original benefit created by disponer (section 83 CATCA 2003)
- CGT position – if property has fallen in value (due to economy) – may be no CGT
- Stamp duty – exemption on appointment from a trust?

2. Retain property in trust

- Merits if property is settlor's main residence (protection of family asset)
- DTT position needs monitoring long term in this event.
- CAT – requires monitoring of free use of property rules.

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5. Trust Traps – Will Trust – DTT charge on a death

Discretionary Trust under Will – what changed in s111 FA 2012)?

A new minefield for trustees of a Will discretionary trust

- Where a discretionary trust forms part of a Will, property treated as subject to a discretionary trust at the **date of disponer's death**
- Result: 6% Initial DTT charge on Will Trusts (applies from date of death instead of when assets transfer to trust, if at a later date)
- Valuation date for DTT: 4 months from date of death (gives trustees/advisers very little time)!
- "Discretionary trust" definition extended to cover similar entities (e.g. foundations). Revenue CAT manual also refers to:
  - anstalts/establissements (Liechtenstein)
  - similar structures in Switzerland.

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5. Trust Traps – Irish Trust – CGT exit charge

CGT exit charge – section 579B TCA 1997

- Can arise where Trustees become neither resident nor ordinarily resident in the State
- Care therefore needed when there is a change of Trustees!
- If exit charge arises, deemed disposal for CGT purposes of all assets of the trust by the trustees
- Tax trap – What if trustees have responsibility for payment of CGT (but funding shortfall due to illiquid assets)?
- Ability to pay tax in instalments.

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5. Trust Traps – Irish Discretionary Trust – DTT charges

6% Discretionary Trust Tax ("DTT") – how to minimise?

Initial 6% DTT charge (s18 CATCA 2003)

- If trustees are considering appointments/trust wind up
- Trustee(s) may be able to avail of rebate of **50%** of 6% initial charge
- Rebate if appointments made within **5 years** (section 18 CATCA 2003).

Trust for beneficiary with disabilities

- No DTT where trust created under section 17(1)(d) CATCA 2003 for individual who is:

"because of age or improvidence, or of physical, mental or legal incapacity, incapable of managing that individual's or those individual's affairs"

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5. Trust Traps – Irish Discretionary Trust – DTT charges

1% Annual Discretionary Trust Tax ("DTT") – how to minimise?

Annual 1% DTT charge (s 15 CATCA 2003)

- Appointments could be made before 31 December
- To avoid annual 1% DTT cost for that year.

Valuation of assets for 1% charge

- For real estate property/private company shares (held in trust)
- Value for one valuation – can be used for next 2 valuation dates
- Where property prices are rising, can be useful saving.

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5. Trust Traps – Discretionary Trust – property charges

Offshore/Onshore Discretionary Trust holding residential property

Annual LPT charge

- Large estates/properties – annual charge can be significant
- Ensuring trust has sufficient funds to pay the charge on time
- In case of shortfall, has settlor ability to put trust in funds?

In event of sale, where do trustees stand in terms of payment of:

(i) Household charge.

(ii) NPPR charges.

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5. Trust Tax Reporting – the minefield for advisers

Trusts – Tax Filing & Reporting Requirements

- CAT Reporting – section 46(15) CATCA 2003 (Form DT1)
  - Reporting by **settlor** within 4 months of assets settled on Trust
- Section 896A TCA 97 – Trust set up reporting for **advisers** (Form 8-S)
- Section 917A TCA 97 – Property transfers to non-resident trustees reporting for **settlors**
- Section 917B TCA 97 – Return by **settlor** in relation to creation of non-resident trust
- Section 917C TCA 97 – Reporting by **trustees** where trust falls out of Irish tax charge
- DTT 6% charge – Form IT4/DTT 1% charge – Form IT32
- Form TR1 – Tax registration/Annual Form 1 tax return & Form 11 (if section 806 applies)
- LPT Return (ROS)

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5. Trust Tax Reporting – Mandatory Reporting

Irish Mandatory Reporting – section 817D TCA 1997

- Mandatory Reporting – in place since FA 2010
- Who discloses?
  - Promoter
  - Settlor
- Tax Advantage
- Early warning system (for Revenue)

EU Mandatory reporting (since July 2020)

Mirrors many of same concepts & principles of domestic mandatory reporting regime.

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5. Trust Tax Reporting – Mandatory Reporting

Mandatory Reporting – section 817D TCA 1997

Definitions under S817D TCA 1997 of:

(i) Promoter.
(ii) Transaction.
(iii) Disclosable transaction.
(iv) Tax advantage.

Specified descriptions/hallmarks – **discretionary trusts** (section 817DA(10) TCA 1997)

"Targets schemes that seek to gain a tax advantage through the use of a discretionary trust, wherever located"

Revenue guidance notes on regime – guidance on application of reporting for Will trusts.

Essentially, regime is an early warning system (for Revenue).

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5. Trusts - Other Tax Reporting – FATCA/CRS

FATCA Reporting (US Foreign Account Tax Compliance Act "FATCA")

- Trust classification as Foreign Financial Institution ("FFI")
- Trust classification as Non-Financial Foreign Entity ("NFFE")

Annual reporting feeding to US authorities

CRS Reporting (Common Reporting Standards "CRS" – OECD nations)

- Trust classification as Financial Institution ("FI")
- Trust classification as Non-Financial Entity ("NFE")

Annual reporting feeding to relevant authorities

EU AML Beneficial Ownership of Trusts Regulations 2019

Applies to all trusts administered in Ireland or where trustees tax resident in Ireland.

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5. Trust Tax Reporting – Mandatory Reporting

Mandatory Reporting – application to practitioners

- Consider whether current client transactions are within regime
- Consider if potential transactions or tax planning within regime
- If concerned on role on particular tax planning, review the rules/obtain advice to ensure reporting obligations satisfied
- Record reasoning why:
  - (i) within mandatory reporting.
  - (ii) not within mandatory reporting.

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Trusts & High Net Worth Individuals - The Future?

The future use of trusts by high net worth individuals?

- Continued flexibility/longevity (& sometimes tax efficiency)
- Generation skipping attractive (& warehousing important assets)
- Mobile families with varied tax residence – continued use of onshore/offshore trusts in tax/estate planning
- Continued merits for asset protection/incapacity/charities
- The future – more administration and transparency..

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Questions & Answers

03 December 2020

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Joe Thompson | Principal of firm

Joe has over 20 years experience working extensively with high net worth individuals on a range of tax issues and private client tax matters.

Joe's expertise covers all personal taxes and he is passionate about providing a personal, tailored service on a variety of tax issues including:

- Day to day tax planning
- Tax compliance/tax returns & cashflow planning
- Succession & retirement planning for business owners
- Transition of family businesses/wealth/estate planning
- Representing clients on Revenue matters.

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Appendix
CATCA 2003 Sch 1 Tables A and B

PART 2

TABLE A

Years of age (1)	**Joint Factor** (2)	**Value of an interest in a capital of €1 for a male life aged as in column 1** (3)	**Value of an interest in a capital of €1 for a female life aged as in column 1** (4)
0	.99	.9519	.9624
1	.99	.9767	.9817
2	.99	.9767	.9819
3	.99	.9762	.9817
4	.99	.9753	.9811
5	.99	.9742	.9805
6	.99	.9730	.9797
7	.99	.9717	.9787
8	.99	.9703	.9777
9	.99	.9688	.9765
10	.99	.9671	.9753
11	.98	.9653	.9740
12	.98	.9634	.9726
13	.98	.9614	.9710
14	.98	.9592	.9693
15	.98	.9569	.9676
16	.98	.9546	.9657
17	.98	.9522	.9638
18	.98	.9497	.9617
19	.98	.9471	.9596
20	.97	.9444	.9572
21	.97	.9416	.9547
22	.97	.9387	.9521
23	.97	.9356	.9493
24	.97	.9323	.9464
25	.97	.9288	.9432
26	.97	.9250	.9399
27	.97	.9209	.9364
28	.97	.9165	.9328
29	.97	.9119	.9289
30	.96	.9068	.9248

31	.96	.9015	.9205
32	.96	.8958	.9159
33	.96	.8899	.9111
34	.96	.8836	.9059
35	.96	.8770	.9005
36	.96	.8699	.8947
37	.96	.8626	.8886
38	.95	.8549	.8821
39	.95	.8469	.8753
40	.95	.8384	.8683
41	.95	.8296	.8610
42	.95	.8204	.8534
43	.95	.8107	.8454
44	.94	.8005	.8370
45	.94	.7897	.8283
46	.94	.7783	.8192
47	.94	.7663	.8096
48	.93	.7541	.7997
49	.93	.7415	.7896
50	.92	.7287	.7791
51	.91	.7156	.7683
52	.90	.7024	.7572
53	.89	.6887	.7456
54	.89	.6745	.7335
55	.88	.6598	.7206
56	.88	.6445	.7069
57	.88	.6288	.6926
58	.87	.6129	.6778
59	.86	.5969	.6628
60	.86	.5809	.6475
61	.85	.5650	.6320
62	.85	.5492	.6162
63	.85	.5332	.6000
64	.85	.5171	.5830
65	.85	.5007	.5650
66	.85	.4841	.5462
67	.84	.4673	.5266
68	.84	.4506	.5070
69	.84	.4339	.4873
70	.83	.4173	.4679
71	.83	.4009	.4488
72	.82	.3846	.4301

73	.82	.3683	.4114
74	.81	.3519	.3928
75	.80	.3352	.3743
76	.79	.3181	.3559
77	.78	.3009	.3377
78	.76	.2838	.3198
79	.74	.2671	.3023
80	.72	.2509	.2855
81	.71	.2353	.2693
82	.70	.2203	.2538
83	.69	.2057	.2387
84	.68	.1916	.2242
85	.67	.1783	.2104
86	.66	.1657	.1973
87	.65	.1537	.1849
88	.64	.1423	.1730
89	.62	.1315	.1616
90	.60	.1212	.1509
91	.58	.1116	.1407
92	.56	.1025	.1310
93	.54	.0939	.1218
94	.52	.0858	.1132
95	.50	.0781	.1050
96	.49	.0710	.0972
97	.48	.0642	.0898
98	.47	.0578	.0828
99	.45	.0517	.0762
100 or over	.43	.0458	.0698

PART 3

TABLE B

(Column (2) shows the value of an interest in a capital of €1 for the number of years shown in **column (1)**)

Number of years (1)	**Value** (2)	**Number of years** (1)	**Value** (2)
1	.0654	26	.8263
2	.1265	27	.8375
3	.1836	28	.8480
4	.2370	29	.8578
5	.2869	30	.8669
6	.3335	31	.8754
7	.3770	32	.8834
8	.4177	33	.8908
9	.4557	34	.8978
10	.4913	35	.9043

11	.5245	36	.9100
12	.5555	37	.9165
13	.5845	38	.9230
14	.6116	39	.9295
15	.6369	40	.9360
16	.6605	41	.9425
17	.6826	42	.9490
18	.7032	43	.9555
19	.7225	44	.9620
20	.7405	45	.9685
21	.7574	46	.9750
22	.7731	47	.9815
23	.7878	48	.9880
24	.8015	49	.9945
25	.8144	50 and over	1.0000

Part 3 - Estate Planning

Will Discretionary Trust resulting in additional tax costs

Example

Background facts

Parent (widow) with estate valued at EUR2m.

One child will inherit entire estate. Child aged 21 at date of parent's death.

Scenario 1. **Parent leaves entire estate under Will direct to child.**

Scenario 2. **Parent leaves entire estate by Will to a Will discretionary trust.**
Child a discretionary beneficiary of Will trust.
Trustees appoint entire trust fund to child at age of 30.

Assume minimal growth in trust fund by 2% per annum.
Growth compounded.

Part 3 - Estate Planning - Will Discretionary Trust resulting in additional tax costs

Scenario 1 - No Discretionary Will Trust - instead straight inheritance.

	Estate '000	**Growth 2%**	**Value '000**	**Growth '000**	**Tax '000**	**Net '000**
	EUR		**EUR**	**EUR**	**EUR**	**EUR**
Estate	2,000	Yr 1	1,451	29	-16	13
Group A Threshold	-335	Yr 2	1,464	29	-16	13
	1,665	Yr 3	1,477	30	-16	13
CAT @ 33%	-549	Yr 4	1,490	30	-16	13
Net inheritance	1,451	Yr 5	1,503	30	-17	14
Growth over 9 years	271	Yr 6	1,517	30	-17	14
Tax on Growth (55%)	-149	Yr 7	1,531	31	-17	14
Inheritance value after 9 years	1,572	Yr 8	1,544	31	-17	14
		Yr 9	1,558	31	-17	14
Total Tax	**-698**		1,572	271	-149	122

Scenario 2 - Discretionary Will Trust	**EUR '000**	**Growth 2%**	**Value '000**	**Growth '000**	**Tax '000**	**Net '000**	**1% DTT '000**
			EUR	**EUR**	**EUR**	**EUR**	**EUR**
Assets passing into Disc Trust	2,000	Yr 1	1,880	38	-15	23	-19
6% DTT initial charge	-120	Yr 2	1,884	38	-15	23	-19
Net assets after 6% DTT charge	1,880	Yr 3	1,887	38	-15	23	-19
Trust funds invested for 8 yrs until child aged 30		Yr 4	1,891	38	-15	23	-19
(value before tax)	2,183	Yr 5	1,894	38	-15	23	-19
1% DTT charge for 8 yrs (and 40% tax on growth)	-274	Yr 6	1,898	38	-15	23	-19
Net value of trust at end of 9 years (after all DTT)	1,908	Yr 7	1,901	38	-15	23	-19
Group A Threshold	-335	Yr 8	1,905	38	-15	23	-19
	1,573	Yr 9	1,908	0	0	0	0
CAT @ 33%	-519			303	-121	182	-153
Net inheritance	1,481			Taxes	-274		
Total Tax	**-914**						

GUIDANCE NOTES

ON

MANDATORY DISCLOSURE REGIME

Updated September 2019

Revenue
Cáin agus Custaim na hÉireann
Irish Tax and Customs

The information in this document is provided as a guide only and is not professional advice, including legal advice. It should not be assumed that the guidance is comprehensive or that it provides a definitive answer in every case.

A scheme will come within the specified description if the following test is met:

- as a consequence of the scheme, a person who would otherwise incur, or be expected to incur, a liability to income tax chargeable in any tax year, will:
  - incur, or be expected to incur, a lesser or nil liability to income tax chargeable in that year, and
  - the person acquires an asset, the disposal of which would in principle give rise to a chargeable gain under the Taxes Consolidation Act 1997.

Section 817DA(8)(b) ensures that situations where the scheme creates a capital receipt but without creating a potential CGT liability, due to CGT reliefs or exemptions, also come within this specified description.

4.3.9 Income into Gift Schemes *(Section 817DA(9))*

This specified description targets schemes that seek to convert income into gifts with a view to avoiding the higher rate of income tax and the income levy and having the gain taxed at the lower gift tax rate or possibly relieved or exempted from tax altogether.

A scheme will come within the specified description if the following test is met:

- as a consequence of the scheme, a person who would otherwise incur, or be expected to incur, a liability to income tax chargeable in any tax year, will:
  - incur, or be expected to incur, a lesser or nil liability to income tax chargeable in that year, and
  - the person is instead deemed to take a gift under the provisions of the Capital Acquisitions Tax Consolidation Act 2003.

4.3.10 Discretionary Trusts *(Section 817DA(10))*

This specified description targets schemes that seek to gain a tax advantage through the use of a discretionary trust, wherever located.

Details of discretionary trusts are required to be reported to Revenue in accordance with ***section 46(15) Capital Acquisitions Tax Consolidation Act 2003***. However, the information provided in the return made under that section is insufficient to enable Revenue to determine whether or not any party expects to obtain a tax advantage from a transaction involving that trust. Therefore, the fact that a trust has been reported to Revenue in this manner is not a substitute for disclosing any scheme involving the trust in accordance with the Mandatory Disclosure regime.

Revenue recognises that some discretionary trusts are trusts created under a will. Many such trusts will not have obtaining, or seeking to obtain, a tax advantage as one of the main benefits (refer to ***paragraph 2.2.6***) of the will trust. Therefore, many of those trusts will not be disclosable.

Examples might include a business man who is unsure which of his children will be best placed to take over a family business. The will trust may provide that the business be held in trust until the trustees identify which child should succeed the businessman. Alternatively, an individual might have significant wealth and wish to ensure that his or her children do not have access to that wealth until they have first made their own way in the world. That individual's will might provide that the trustees have the discretion to provide a certain standard of living for the children until they have reached a certain age (for example 35) or a certain point in their life (for example becoming parents). It will be clear in these situations whether or not seeking to obtain a tax advantage is one of the main benefits of establishing the will trust.

However, where a promoter has given advice to an individual in relation to creating a will trust where obtaining, or seeking to obtain a tax advantage is one of the main benefits of the transactions to which the trustees of that trust are to be party, the advisor must disclose the scheme. As set out in ***paragraph 5.2*** the date on which a disclosure relating to bespoke advice must be made is linked to when that advice is implemented. Advice in relation to the creation of a will trust is implemented when the taxpayer enters into a will which follows that advice, notwithstanding that the taxpayer may amend the will at some point in the future or that the will trust may never actually come into being.

4.3.11 Exemption from certain specified descriptions

The nature of certain specified descriptions is such that they could result in a significant volume of unwanted disclosures of tax planning is routine in nature. Therefore, the ***Schedule*** to the Regulations lists certain types of schemes which will not be considered to fall into certain specified descriptions. The specified descriptions to which the Schedule applies are:

- Standardised tax products
- Employment products
- Income into capital
- Discretionary trusts

For the most part, these exclusions reflect schemes that rely on ordinary tax planning using standard exemptions and statutory reliefs provided for in the legislation where, in general, there is some Revenue oversight, certification or approval involved. Examples are approved Profit Sharing Schemes, approved Salary Sacrifice Arrangements and approved Retirement Benefit Schemes. Such schemes are not disclosable under certain specified descriptions when used in a routine fashion for *bona fide* purposes, notwithstanding that they would otherwise meet the criteria of that specified description.

However, it is also clear that the exclusion of such schemes and transactions from the specified description does not preclude the possibility that such schemes might be disclosable under the confidentiality and/or premium fee specified descriptions. This could happen, for example, if a promoter was to combine such reliefs with other reliefs, allowances or abatements provided for under the various taxation codes in such a way as would result in a tax outcome that was not intended by the legislature and which a promoter would wish to keep confidential or charge a premium fee for, such that the scheme would be disclosable in any event, under the generic specified descriptions.

Appendix 1
Examples

Examples of what Revenue would consider as routine day-to-day tax advice and the routine use of statutory exemptions and reliefs for bona fide purposes

Stamp Duty

- Advising a client in relation to the reliefs available under sections 79 SDCA 1999 (intra-group relief) and section 80 SDCA 1999 (scheme of reconstruction or amalgamation) in the case of a corporate group reorganisation.
- Advising a farmer of the conditions which need to be satisfied in order to avail of the relief for young trained farmers (section 81AA SDCA 1999) and for farm consolidation (section 81C SDCA 1999).
- Advising a client of the various rates of stamp duty and the requirement for certificates in deeds in order to attract the appropriate stamp duty charge.

Corporation Tax

- Advising on the impact of close company legislation (Part 13 of the TCA) on owner-managed or family-owned companies, including surcharges applicable in respect of retained profits and provisions dealing with loans to and expenses incurred for directors/ participators.
- Advising on the requirements that must be met for a share buy-back by a company not to treated as a distribution for tax purposes (Chapter 9 of Part 6 of the TCA).
- Advising on the tax consequences of a company reconstruction/ amalgamation undertaken for bona-fide commercial reasons.
- Advising on the requirements that must be met for a proposed acquisition of intangible assets by a company to qualify for capital allowances under section 291A of the TCA.

CAT

- In anticipation of a gift/inheritance, advising the making of prior gifts so as to ensure the beneficiary meets the 'farmer' test of section 89 CATCA 2003.
- Advising on the arrangement of assets within a group of companies so as to ensure that excepted assets are not within companies whose shares are to be gifted or will form a bequest, thus maximising a later claim to business relief. (S93(3) CATCA).
- Advising employees who take up residence in the State in relation to avoiding a double charge to tax on gifts or inheritances on estates accumulated prior to their coming to Ireland.
- Advising on the creation of a will trust where that trust is established under the laws of a Member State of the European Communities and the trustees are resident in such a jurisdiction.
- Advising on the use of a trust to ensure that reliefs and exemptions that would have been available had the person lived, do not cease to be available on death due to time limits, for example using a trust to ensure availability of the dwelling house exemption under ***section 86 CATCA 2003.***.

CGT

- Advising on arranging a share buy-back for a parent or long-standing shareholder so as to avail of the CGT share buy-back provisions and CGT retirement relief simultaneously (Chapter 9 and section 598 TCA).

VAT

- Advice in relation to the operation of transfer of business relief (Section 20(2)(c) and Section 26(2) VAT Consolidation Act 2010).
- Advice on the VAT implications of property transactions including the option to tax and the Capital Goods Scheme.
- Advice on the VAT application to taxable persons who are closely bound by financial, economic and organisational links (VAT Grouping)
- Advice on the portion of VAT borne or paid that can be deducted in accordance with Section 59 VAT Consolidation Act 2010 including qualifying activities
- Advice in relation to the preparation for a Revenue audit and on-going advice in the course of the conduct of the audit

Employee Share Schemes etc.

Advising on the structure of share based schemes so as to benefit from:

- Profit sharing schemes under which employees are not chargeable to income tax on free shares received;
- Savings-related share option schemes, comprising a share option scheme element and a savings element where interest or bonuses arising on any savings used to acquire shares are not chargeable to income tax;
- Employee share ownership trusts which work in conjunction with approved profit sharing schemes and have the further tax advantage of not being taxable on any dividends received in respect of shares held by the trust where such dividend income is used for a qualifying purpose e.g. the repayment of borrowings and or interest, to purchase further shares, meeting of expenses etc.

Advising, in relation to employees who take up residence in the State, on variations to share schemes set up by international employers where to make a payment or award without such variation would result in a higher level of taxation on receipt of benefits under the scheme than those delivered to Irish based employees with equivalent awards, where the scheme is equivalent to a share scheme listed in the Schedule to Regulations or listed in this Appendix.

Income Tax

- Advising on the application of section 201 TCA 1997 on termination of employment.
- Advising on the use of EII schemes/ film relief and on the timing of the individual's contribution (so as to get the tax relief as soon as possible).
- Advising on the use of AVC for the purposes of maximizing tax relief and pension benefits.
- Advising on the implications of using joint or single assessment.

- Advising on the taxation implications of marriage breakdown and whether to claim relief for maintenance payments or make a continued claim for joint assessment (Sections 1025 and 1026 TCA 1997).

Advising that losses in a self-employment situation (Case I or II) can be set against any other income (Sections 381 to 390 TCA 1997).

Multiple taxes

- Advising on a transaction entered into by a trustee of a discretionary trust with a party that is not related to, or connected with (within the meaning of section 186 TCA 1997), the trustee, a settlor of the trust or any of the beneficiaries under the trust, where such transactions do not fall to be disclosed under any specified description other than the 'discretionary trust' description (contained in section 817DA(10) TCA 1997).
- Advising individuals on the tax consequences of the transfer of a business to a limited liability company in a way that relief under section 600 is available. This specifically does not apply to transfers to unlimited companies or hybrid entities such as Limited Liability Partnerships.
- Advising individuals on the tax consequences of setting up a new business to be conducted through a limited liability company post cessation of employment by the individual, in such a way that relief under section 493 is available.
- Advising individuals on the tax consequences of setting up a new trade or profession to be conducted by a limited liability company.

Appendix 2
Schedule to Regulations

Transactions to which certain sub-sections of 817DA do not apply

1. A Profit Sharing Scheme approved by the Revenue Commissioners under Part 2 of Schedule 11 to the Principal Act.

2. An Employee Share Ownership Trust approved by the Revenue Commissioners under paragraph 2 of Schedule 12 to the Principal Act.

3. A Savings Related Share Option Scheme approved by the Revenue Commissioners under paragraph 2 of Schedule 12A to the Principal Act.

4. A Contractual Savings Scheme certified by the Revenue Commissioners under Schedule 12B to the Principal Act.

5. A Share Option Scheme approved by the Revenue Commissioners under paragraph 2 of Schedule 12C to the Principal Act.

6. An approved salary sacrifice arrangement referred to in section 118B of the Principal Act.

7. A Retirement Benefits Scheme within the meaning of section 771 of the Principal Act, for the time being approved by the Revenue Commissioners for the purposes of Chapter 1 of Part 30 of that Act.

8. An Annuity Contract or a Trust Scheme, or part of a Trust Scheme, for the time being approved by the Revenue Commissioners under section 784 of the Principal Act.

9. A PRSA contract, within the meaning of section 787A of the Principal Act, in respect of a PRSA product, within the meaning of that section.

10. A Qualifying Overseas Pension Plan, within the meaning of Chapter 2B of Part 30 of the Principal Act.

11. A transaction qualifying for relief for investment in films under section 481 of the Principal Act.

12. A transaction qualifying for relief for investment in renewable energy generation under section 486B of the Principal Act.

13. A transaction qualifying for exemption for profits or gains arising from the occupation of certain woodlands under section 232 of the Principal Act.

14. A transaction qualifying for exemption from capital gains tax of certain proceeds of sale of woodlands under section 564 of the Principal Act.

15. A transaction qualifying for relief for investment in corporate trades under Part 16 of the Principal Act.

16. A transaction qualifying for the tax treatment of certain venture fund managers under section 541C of the Principal Act.

17. A transaction qualifying for repayment of tax for relevant employees where earnings are not remitted under section 825B of the Principal Act.

18. A transaction with trustees of a special trust for permanently incapacitated individuals, within the meaning of section 189A of the Principal Act.

19. A transaction with trustees of a trust where the trust is of a type specified in section 17 of the Capital Acquisitions Tax Consolidation Act 2003 (No.1 of 2003), or a trust which is established under the laws of another Member State which would be of a type specified in that section if the trust were established under the laws of the State.

20. A transaction with the trustees of a trust used to hold plant or machinery for finance and lease transactions where the beneficiary under the trust arrangement is treated as the beneficial owner of those assets for the purposes of corporation tax and where the transaction relates to the holding, disposing, financing, leasing of, or the dealing in, those assets.

21. A transaction with the trustees of a trust used to hold assets which are securitised by a company to which the provisions of section 110 of the Principal Act apply, where the beneficiary under the trust arrangement being that company, is treated as the beneficial owner of those assets for the purposes of corporation tax and where the transaction relates to the holding of those assets.

22. A transaction with the trustees of a trust used to hold debt issued by a company to which the provisions of section 110 of the Principal Act apply, where the beneficiary under the trust arrangement is treated as the beneficial owner of the debt for the purposes of the Principal Act or any other enactment relating to tax and where the transaction relates to the holding of that debt.

23 A transaction with the trustees of a trust used to hold the share capital of a company to which the provisions of section 110 of the Principal Act apply, where the trust is established for charitable purposes and where the transaction relates to the holding of that share capital.

24. A trust that is an investment undertaking within the meaning of section 739B or 731(5)(a)(i) of the Principal Act, or a special investment scheme within the meaning of section 737 of the Principal Act, or any similar investment undertaking which is regulated in another Member State or a territory with the government of which arrangements having the force of law by virtue of section 836(1) of the Principal Act have been made.

25. A transaction with trustees of a trust in respect of securities to which the provisions of section 128D of the Principal Act apply

