# Part 12 – Business Relief

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# Capital Acquisitions Tax

## 12 Part 12 - Business Relief - Sections 90- 102A CATCA 2003

### 12.1 General

A relief from capital acquisitions tax for all gifts and inheritances taken on or after 11 April, 1994 of relevant business property (see paragraph 4.2.2.2) was introduced in the Finance Act, 1994. The relief only applies to mainstream gift and inheritance tax. It does not apply to discretionary trust tax. Subsequent Finance Acts have amended the original provisions.

The relief was introduced for a variety of reasons viz.

(i) to encourage and reward enterprise, thereby countering the perception that CAT is a punitive tax which penalises successful entrepreneurs and discourages expansion of businesses;

(ii) to prevent the sale or break-up of businesses in order to pay the CAT liability;

(iii) to answer the demands of the business sector who wanted a relief similar to agricultural relief to be made available to it and who were pointing to the existence of business relief in the UK.

The relief amounts to a flat 90% reduction in respect of the taxable value of relevant business property.

**Example**

Michael inherited the family business on the death of his father on 1 May, 2004. The taxable value of the business was £400,000. Business relief is calculated as follows:

**£**

Taxable value prior to relief
400,0
00
Reduction of 90%
360,0
00
Revised taxable value after relief
40,000

### 12.2 Claim Form/Information Booklet

The relief should be claimed on Form I.T.5.

The main features of the relief (which are also incorporated in these instructions) are set out in booklet CAT 4.

## 12.3 Operation of the Relief

The relief operates as follows:

(i) the taxable value of the gift or inheritance is ascertained using the normal CAT rules;

(ii) the taxable value of the gift or inheritance attributable to the relevant business property is then ascertained[*];

(iii) then the portion of that value on which relief can be granted is ascertained[#];

(iv) the relief is calculated by reducing the figure at (iii) by 90%

(v) finally the figure at (i) is reduced by the amount of the relief at (iv).

More details on how the relief is calculated are contained in paragraph 12.6.

## 12.4 Conditions for Granting the Relief

**Summary.**
Before the relief can be granted **all** of the following questions must be answered in the affirmative:

(i) Was the gift or inheritance taken on or after 11 April, 1994?

(ii) Does the gift or inheritance consist of relevant business property?

(iii) Was the relevant business property comprised in the disposition (or owned by the disponer or his/her spouse) for the specified period immediately prior to the gift or inheritance?

Though all the above questions may be answered in the affirmative the value of the relevant business property may still have to be restricted – see for example paragraph 12.5(v) - Exclusion of Value of Certain Assets

Each one of these matters is considered in detail in paragraph 12.5.

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[*] In calculating this taxable value special regard must be had to the treatment of liabilities (see paragraph 5).

[#] In determining the value of relevant business property on which relief can be granted certain assets may have to be left out of the account. In addition, the replacement property and the successive benefits rules may operate to restrict the value on which relief can be granted (see paragraph 4.2.4).

## 12.5 Conditions Step-by-Step

### (i) Was the Gift or Inheritance taken on or after 11 April, 1994

This is a question of fact. Gifts or inheritances taken before 11 April, 1994 do not qualify for business relief.

### (ii) Does the Gift or Inheritance consist of Relevant Business Property - General

It is crucial to an understanding of how the relief works to realise that what is being granted is a relief on the transfer of a business, or a share in a business, or the shares or securities of a company carrying on a business. The relief is not available on the transfer of individual assets even if those assets were used in the business.

> **For Example**
>
> Anne started a crafts business in her own premises twenty years ago. The crafts are purchased by local shops for sale to the public. She works in the business with her nephew, Vincent, as her employee. She wishes to give a gift of the premises to Vincent but the business will continue to be hers. The premises will not qualify as relevant business property.

**NB:** If she had transferred the premises with the business the premises would have formed part of the relevant business property.

### - Definition of "Relevant Business Property

In the words of section 93 (1) CATCA 2003 relief is available on gifts or inheritances of **"relevant business property"**. However, as we will see in subsequent paragraphs the fact that the property is relevant business property does **not** mean that the relief will automatically apply: the conditions laid down in those paragraphs must also be met.

"Relevant business property" is defined as:

(a) a business i.e. the business of a sole trader (e.g. corner shop, pub); *or*

(b) an interest (i.e. share) in a business. Typical situations where an interest in a business might pass would include a sole trader going into partnership with a family member or a partner wishing to retire and transferring his or her interest in the partnership to another person who will then become a partner (subject, of course, to the agreement of the other partners).

(c) **unquoted** shares or securities* of a company carrying on a business provided that:

- the beneficiary will, on the valuation date and **after**# taking the gift or inheritance, either;

(i) control the powers of voting relating to all questions affecting the company as a whole which if exercised would yield more than 25% of the votes capable of being exercised thereon.

> **For Example**
>
> ABC Ltd., a private company, was incorporated in Ireland on 1 January, 2000. The shares are held as follows:
>
> | | |
> |---|---|
> | Mary Murphy | 33 1/3% |
> | John Walshe | 33 1/3% |
> | Michael Reid | 33 1/3% |
>
> Mary now wishes to gift her holding to her son, Maurice. Following the gift Maurice will have a 331/3% holding. The shares will qualify as relevant business property.

If the company had issued a class of share or security which only carried voting rights limited to the winding-up of the company and/or to questions primarily affecting that class then that class is to be ignored when deciding whether the beneficiary meets the above conditions (section 93(2)); *or*

(ii) own any percentage of the aggregate nominal value of all the issued shares and securities of the company and be in control of the company within the meaning of section 27 of the CATCA 2003 *or*

(iii) own 10% or more of the aggregate nominal value of all the issued shares and securities of the company and have worked as a full-time working officer or employee in the company (or in the case of a group, for any company or companies in the group) throughout the period of 5 years ending on the date of the gift or inheritance.

A "full-time working officer or employee" is defined as someone who devoted substantially the whole of his or her time to the service of that company (or in the case of a group to companies within the group) in a managerial or technical capacity (section 90(1)).

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* All of these terms are explained in the Appendix to this Part.

# The wording of section 93(1)(b), (c) and (d) is: "either by themselves alone or together with other shares or securities in that company in the absolute beneficial ownership of the donee or successor on [the valuation date]".

**For Example**

GHI Ltd., a private company was incorporated in Ireland on 1 November, 2000. It has issued only one class of share. These shares are held as follows:

| | |
|---|---|
| John Buckley (parent) | 40% |
| Mary Buckley (parent) | 40% |
| Michael Buckley (son) | 20% |

Catherine, who is not related to the Buckleys, has worked full-time (as accounts manager) in the company since it was incorporated. John has decided to gift Catherine sufficient shares to give her a 10% shareholding. The shares will qualify as relevant business property provided Catherine continues to work full-time in the company until the date of the gift.

(d) **quoted**[*] shares or securities of a company carrying on a business but only if all of the following conditions are met:

(i) the disponer owned the shares or securities[#] immediately prior to the disposition (gift/inheritance/settlement);

(ii) the shares or securities were unquoted at—

– the time they were acquired by the disponer, or at

– 23 May, 1994,

whichever is the later date; and

(iii) all of the other (i.e. other than being "unquoted") conditions laid down under (c) above are satisfied.

(e) Land, buildings, plant and machinery[*] (referred to hereinafter as "land, etc.") which are *used* in a business carried on by a company or a partnership but which are *owned* by the disponer rather than by the company or the partnership, will qualify for business relief provided that:

(i) – in the case of a company, the company was controlled by the disponer immediately before the gift or inheritance ("control" being defined as controlling the powers of voting on all

---

[*] This exception to the general rule that relief be available only on unquoted shares or securities is made so that the very availability of the relief does not deter expanding family businesses from seeking a quotation on the Stock Exchange.

[#] or other shares or securities of the same company which are represented by these shares or securities.

[*] If there is a doubt about whether a particular asset is plant or machinery the income tax rules are to be applied. In general terms "plant" encompasses whatever apparatus is used in the business for the purposes of the business. It includes all goods and chattels, whether fixed or movable, which are permanently employed in the business. It does not include stock-in-trade bought or made for sale.

questions affecting the company as a whole which if exercised would have yielded a majority (i.e. over 50%) of the votes capable of being exercised thereon: however, votes attaching to a particular class of share which are limited to questions involving the winding-up of the company and/or to questions primarily affecting shares or securities of that class will be ignored for the purposes of deciding whether or not the disponer controlled the company), and

– in the case of a partnership, the disponer was a partner immediately before the gift or inheritance (Section 93(2));

(ii) • The land, etc., was used[#] wholly or mainly for the purposes of the business concerned for a continuous period of 2 years immediately prior to the date of the inheritance in the case of an inheritance taken on the death of the disponer and in all other cases for a continuous period of 5 years prior to the date of the gift or inheritance (Section 100 (4)(a)).

If at any time during the required period of use, the land, etc., was used for the personal benefit of the disponer or his or her relatives then it cannot be treated as if it were used **wholly or mainly** for the purposes of the business concerned (Section 100(7)).

In the case of land or buildings only, if part of any land or a building was used exclusively for the purposes of the business concerned throughout the required period but the land or building does not satisfy the "wholly or mainly" test, then that part shall be treated as a separate asset (Section 100(5)).

• Land, etc., which has replaced other land, etc. will qualify as relevant business property if:

  – in the case of an inheritance taken on the death of the disponer, the replaced land, etc. and the replacement land, etc. taken together were used wholly or mainly for the purposes of the business concerned for at least 2 years out of the 3 year period immediately prior to the date of the inheritance, or

[#] Whether they were *"used"* or not is a question of fact.

- in all other cases for at least 5 years out of the 6 year period immediately prior to the date of the gift or inheritance (Section 100(4)(b)).

- There is no requirement that the replacement land, etc. be of a similar nature to the land, etc. it replaced e.g. new plant could be bought with the proceeds from the sale of land.

- Land, etc. may be replaced any number of times and the replacement land, etc. will qualify as relevant business property provided that, taken together, the 2 out of 3 years or 5 out of 6 years "period of use" conditions is met (Section 100(4)(b)).

- The successive benefits rule (see paragraph 12.5(iv) – *Successive Benefits*) also applies. In such cases the land, etc. or any land, etc. it replaced must have been used wholly or mainly for the purposes of the business concerned throughout:
  - the period between the time the disponer or his or her spouse acquired the land, etc. (the earlier benefit) and the death of the disponer (the subsequent benefit), or
  - the part of that period during which the land, etc. and any land, etc. it replaced were owned by the disponer or his or her spouse (section 100(4)).

(iv) the land, etc., is transferred at the same time as the partnership interest or the shares or securities (section 93(5));

(v) the interest in the business or the shares or securities also qualified as relevant business property immediately before the gift or inheritance (section 93(5)); and

(vii) of course, the conditions laid down in paragraph 12.2.4 relating to period of ownership must also be satisfied in relation to both the land, etc., and the business/shares or securities.

**For Example**

Liam became a partner in a firm of solicitors in 1998. He bought the building in which the business is carried on in 2002. He has decided to retire. His share in the business including the building will be transferred to his daughter. As both the interest in the business and the building are being transferred at the same time the building will qualify as relevant business property.

(Sections 93(1)(e), 93(5), 100(4).)

**- Definition of "Business**

A "business" **includes** a business carried on in the exercise of a profession or vocation but it does not include a business carried on otherwise than for gain (section 90(1)). In other words all the usual types of business carried on for profit are included as are the various professions (e.g. law, medicine, accountancy) and vocations.

To qualify for the relief, therefore, two tests have to be satisfied i.e.

(i) a business must be carried on; and

(ii) the business must be carried on for gain.

The term "business" involves a wider concept than trade. The courts have defined it, for example, in the following terms:

"it denotes the carrying on of a serious occupation" (Lord Diplock in Town Investments v DOE [1977] 1 All ER at page 835)

"anything which occupies the time and attention and labour of a man for the purpose of profit" (Jessel MR in Smith v Anderson [1880] 15 Ch D page 258)

"a serious undertaking earnestly pursued" (Widgery J in Rael Brook Ltd v Minister of Housing and Local Government [1967] 1 All ER at page 266)

"any occupation or function actively pursued with reasonable or recognisable continuity" (Lord Cameron in Morrison's Academy [1978] STC at page 8).

In relation to rented property, the term was analysed in some detail by Diplock J in the Privy Council case of American Leaf Co. v Director-General [1979] AC 676 at age 684:

> "In the case of a private individual it may well be that the mere receipt of rents from property that he owns raises no presumption that he is carrying on a business. In contrast, in their Lordship's view, in the case of a company incorporated for the purpose of making profits for its shareholders any gainful use to which it puts any of its assets prima facie amounts to the carrying on of a business. Where the gainful use to which a company's property is put is letting it out for rent, their Lordships do not find it easy to envisage circumstances that are likely to arise in practice which would displace the prima facie inference that in doing so it was carrying on a business.
>
> The carrying on of a business, no doubt, usually calls for some activity on the part of whoever carries it on, though, depending on the nature of the business, the activity may be intermittent with long intervals of quiescence in between".

Although businesses not carried on for gain will be fairly rare, they are considered to include, inter alia:

– certain clubs e.g. golf clubs, tennis clubs, etc.

– the management and provision of leisure activities for the benefit of the shareholders and their friends, e.g. fishing or shooting not run on a genuine commercial basis (alternatively it may be argued that these are not business activities - see Customs and Excise Commissioners v Lord Fisher [1981] 2 All ER 147).

Where, exceptionally, a company does not have a business, or a business carried on for gain, and the parties decline to accept that such a business is necessary to, enable the shares or securities to constitute "relevant business property", it may be pointed out that even if they were correct (which is not accepted) relief would still not be available. As there would then be no "business concerned" for the purpose of satisfying section 100(2), all the assets of the company would constitute "excepted assets" and so be disqualified from any relief.

**- Excluded Businesses**

***General***

The following types of business (so called "excluded businesses") are specifically excluded from the relief (section 93(3)):

(a) businesses which consist wholly or mainly of dealing in currencies, securities, stocks or shares, land or buildings; and

(b) businesses which consist wholly or mainly of making or holding investments;

If the **wholly or mainly** test is satisfied and the business is an excluded business then **no** part of the business, or the shares or securities (in the case of a company) will qualify as relevant business property.

If, however, the wholly or mainly test is not satisfied then the business, etc., will qualify as relevant business property but, as will be seen in paragraph 12.5(iv) below, certain assets must still be ignored when valuing the relevant business property for the purposes of the relief.

***"Wholly or Mainly" Test***

**(a) General**

"Mainly" should be treated as meaning over 50%.

In applying the wholly or mainly test the position should normally be looked at over a reasonable period prior to the gift or inheritance, to allow for temporary fluctuations in activity and performance. (See FPH Finance Trust Ltd v CIR 26 TC 131.) Where, however, there has been a clear and definite change in direction, only the position after that change should be taken into account.

The wholly or mainly test is not an easy test to apply. As section 93(3) does not refer to the income or the capital or the activities of the business it is reasonable to assume that all aspects of the business must be considered. The official position, therefore, is that each case has to be decided on its own merits, having regard to the preponderant activities, assets and sources of income or gains of the business in question. It is not possible to lay down any precise ground rules. Each business has to be looked at in the round. It may, however, be readily accepted that, where the majority of ***both*** the asset value ***and*** profit of the business is attributable to trading activities, relief is available. Similarly it would generally be difficult to deny relief where the majority of the asset value ***or*** profit was attributable to trading.

The trading turnover will normally exceed the investment income but relief should normally be denied where the majority of the asset value and income is attributable to investment and the trading turnover is fairly modest. Some support for this may be obtained from:

– Foster's Capital Taxes Encyclopaedia G1.12:

"There is no guidance in the legislation as to the interpretation of "wholly or mainly" but it is considered that the ratio of trading profit

to investment income should be the prime consideration, and asset value of secondary importance", and

– McCutcheon's Capital Transfer Tax, 2nd edn, 14-14A:

  "Presumably regard will be had primarily to (i) the ratio of trading profit to investment income and (ii) the assets of the business, the former normally being the factor to be given the greater weight."

These extracts should, however, be used with care and should not be relied upon where, although the majority of asset value and income is attributable to investment, there is a large trading turnover. It is in this area that the greatest difficulty arises and in such cases all the factors must be assessed, including:

(i) the ratios of asset value and profit attributable to trading and investment respectively;

(ii) the ratio of turnover to investment income;

(iii) the degree of activity involved on the trading as opposed to the investment side measured for example by size of the labour force (sub-contracting work will count for less), directors' time, etc.'

(iv) any particular reasons for low trading profits, for example, the fact that the company was engaged in a low profit-making sector or was subject to heavy competition;

(v) whether the investments or their income were being used to subsidise trading losses, especially to carry it through a short term difficulty; and even

(vi) how the company was described in the Director's Report to the annual accounts (though this is a fairly weak point).

It is emphasised that the above factors are not intended to be exhaustive but merely illustrative of the considerations to be taken into account. Where there appears to be a case for treating a company as having a mainly investment business, because inter alia more than half its net income is derived from investments, a useful check may be to ask the Inspector of Taxes whether "management expenses" are being deducted under section 15 of the Corporation Tax Act, 1976. Section 15 provides that "management expenses" may be deducted from the profits of resident investment companies and an "investment company" is defined as "any company whose business consists wholly or mainly in the making of investments and the principal part of whose income is derived therefrom...". If deductions are being made, this may be cited in support of the mainly investment argument. The absence of a deduction, however, should not be regarded as in any way precluding a mainly investment argument, where the facts otherwise support it.

**(b) Holding Companies and their subsidiaries**

Where a company holds shares in subsidiaries, those shares constitute investments. However, section 93(4) preserves relief where a company is wholly or mainly engaged in being a holding company of one or more subsidiaries whose business(es) is/are not wholly or mainly excluded business(es) or where the value of the shares or securities is wholly or mainly attributable, directly or indirectly, to non-excluded businesses. For this purpose "holding company" and "subsidiary" have the same meanings as in section 155 of the Companies Act, 1963 – see Appendix to this Part.

In practice, where the company is being valued on a group basis by reference to the consolidated accounts, it will generally be acceptable to apply the wholly or mainly test in section 93(3) to the total group activities without detailed examination of each subsidiary.

Should, however, the answer on the group basis be uncertain, or the parties require it, the test should be applied strictly viz. giving separate consideration to the holding company and its individual subsidiaries. For this purpose regard should generally be had to the value of the individual subsidiaries rather than the level of any dividends paid to the holding company, as the latter may be somewhat arbitrary and subject to manipulation.

**(c) Companies which are Members of a Group**

Section 99 provides two important restrictions to the relief. The first concerns the case where a company is a member of a group (see Appendix to this Part) and the business being carried on by any other company in the group is an excluded business. In such cases, unless the excluded business consists wholly or mainly of holding land or buildings wholly or mainly occupied by another member (or other members) of the group the value of the shares or securities in the company must be reduced, for the purposes of business relief (but not for the purposes of CAT), to what it would be if the subsidiary(ies) and/or associated companies carrying on the excluded businesses were not member(s) of the group.

This exclusion may possibly have a substantial effect on the value eligible for business relief. For example, where a group was worth £1m with 30% of its value attributable to property investment conducted by a subsidiary, 30% of the value transferred might be excluded from relief. Also, where there is a dispute as to whether the wholly or mainly test in section 93(3) is satisfied, and the value of the group is largely attributable to subsidiaries/associated companies carrying on excluded businesses, this exclusion may render that dispute of marginal importance.

Where the shares or securities qualify for relief but the group business includes an excluded business, officers should (except so far as already ascertained) ask for the name of each subsidiary/associated company, details of its activities and a copy of the last year's accounts prior to the valuation date. Where it then appears that any of the subsidiaries/associated companies is engaged wholly or mainly in carrying on an excluded business, the parties should be advised of the need to agree a further value for the shares or securities for business relief, excluding from the group each subsidiary/ associated company which is carrying on an excluded business.
Secondly, section 99(2) provides that the value of (unquoted) shares or securities must be reduced if the shares or securities of another company in the group are quoted on the valuation date unless:

(i) the disponer owned the unquoted shares or securities* immediately prior to the disposition; and

(ii) the quoted shares or securities* were unquoted at:

– some time prior to the gift or inheritance when they were in the beneficial ownership of the disponer (or a member of the group while being a member of that group), or

– 24 May, 1994,

whichever is the later date.

- ***Meaning of "Dealing"***

"Dealing" means dealing as a principal and not as an agent. Thus the normal activities of, for example, **estate agents**, **merchant bankers**, **investment advisers** and **stockbrokers** are not excluded businesses.

The reference to dealing in land and buildings in section 93(3) does not include a genuine **building** and **construction company** holding a number of completed properties for sale or a normal land bank. Similarly it does not apply to a property development company provided:

(i) the land is acquired with a view to the development and disposal of the completed development; and

(ii) most of the profit is derived from the enhanced value of the property resulting from the development (as opposed to increases in the value of the land from the obtaining of planning permission or a general rise in land values).

Care should, however, be taken to identify a building or development company which retains and lets its completed property, as this may, over time, convert the business into one of mainly investment holding.

* or other shares or securities of the same company which are represented by those shares or securities.

"Dealing" is restricted to the 6 categories specified in section 93(3) viz. currencies, securities, stocks or shares, land or buildings. It does not, therefore, relate to, for example, **commodities** or **money lending** (and provided this involved regular transactions it could not be regarded as "investment holding" either – *"meaning of investment"*.

- ***Meaning of "Investment"***

The word "investment" is considered to extend wider than the 6 categories specified in Section 93(3).

In the CTO Scotland case of Gardiner the Special Commissioners stated:

> "The case of Commissioners of Inland Revenue v. Broadway Car Co. (Wimbledon) Ltd. 29 TC 214 [also 1946 2 All ER 609] is indeed authority for the proposition that investments are not limited to Stock Exchange investments; but it is also authority for the proposition that the word is not a term of art and has to be construed according to the common understanding of businessmen applying ordinary common sense principles."

The Gardiner case concerned **commodities** and, following the Commissioners' decision and the advice of the solicitor in the subsequent case of the Ann B. Wilson Settlement (BP 301/86), regular dealing in commodities may be accepted as trading and not investment. Where, however, dealings are only infrequent, the case should be referred to the Assistant Principal.

"Investment" is not considered to include **office equipment rental** or **plant and vehicle hire**. On the other hand it clearly includes **unfurnished lettings**, without the provision of significant services.

Previously the position was not entirely clear regarding **furnished and holiday lettings**. However, in the light of the decisions in Gittos v. Barclay (Inspector of Taxes) [1982] STC 390 and Griffiths (Inspector of Taxes) v. Jackson/Pearman [1983] STC 184 the letting of furnished accommodation, whether on a long or short-term basis, and whether for holiday or other purposes, should generally be treated as "investment".

These cases reaffirmed and restated the principle that the "exploitation of property rights" cannot be treated as trading. In Griffiths, Vinelott J. stated at pages 191/2:

> "The principle that income derived from the exploitation of the owner's proprietary interest in the land is not taxable as the profits of a trade remains unaffected. Thus the income derived by the owner of property from letting the property furnished, whether for a short or a long term and whether in small or large units and whether in self-contained units or to tenants who

> share a bathroom or kitchen or the like, is not income derived from carrying on a trade but is still taxable under [Sch A] or, in the case of [para 4, under Case VI of Sch D]. Of course if the owner provides services and the services are separately charged or the receipts can be otherwise apportioned in part to the provision of the services any profit derived from the provision of the services will be taxable as the profits of a trade."

Vinelott J. also dealt with the point of the business occupying a large amount of management time at page 194:

> "The business may, as in this case, occupy much of the taxpayer's time or even be one which requires his whole time and attention. The taxpayer may put as much or more work into his business as, for instance, someone whose business consists in arranging licences to fix vending machines on the property of others and who daily or at less frequent intervals collects the proceeds and replenishes the machines. It is not too easy to see why in the modern world a business consisting of the exploitation of the right of property in land should be treated differently from a business consisting of the exploitation of other assets. However the principle is now too deeply embedded in the law to be altered except by legislation."

The same point was made by Warner J. in the further case of Webb (Inspector of Taxes) v. Conelee Properties Ltd. [1982] STC 913 when he stated at page 920:

> "It seems to me, however, that Counsel for the Crown was right when he said that mere management activity was not an activity that was capable of giving rise to the existence of a trade, and that the degree or amount of that activity made no difference so long as it was only management."

According to the report, management in this context includes such matters as advertising, taking bookings, collecting rents, inspecting the property, preparing it for visitors and carrying out repairs.

In Griffiths, Vinelott J. also drew a distinction at page 193 between situations where the landlord parts with the right of occupation of the rooms, as in the case of tenancies, and situations where he retains a continued right of access as in the case of **hoteliers** or **lodging housekeepers**. However, this view was not adopted by Goulding J. in Gittos and he approached the comparison between letting furnished flats and running a hotel at page 395, as follows:

> "So the real question that was before the General Commissioners in the present case ... was whether the activities of the taxpayer's wife over and above the mere exploitation of her landed property were significant enough to make her a trader and not a mere landowner who derived an income by

> exploiting her property. It is not of course possible to give an answer to such a question in general terms. It is a question of fact and degree. I can quite see that there are forcible arguments on both sides. The taxpayer, in his address in reply, took the case of an hotelier, who is undoubtedly carrying on a trade, and pointed out how similar, so far as they extend, are his wife's activities in respect of Millendreath to those of an hotelier. But, of course, they do not go nearly so far or require so much activity on the owner's part."

Consequently, while exclusive occupation may be a factor, the essential points appear to be as follows:

(i) the rental earning aspect of a business remains an investment activity even though it is accompanied by the provision of services;

(ii) although the provision of services as such may be regarded as a trading activity, the level of such services would have to be exceptional to supplant the rental aspect as the major activity for the purposes of the "wholly or mainly" test.

As regards (ii) the provision of, for example, cleaning, fresh linen and laundry services would not approach the exceptional mark. It is in fact difficult to envisage any level of service outweighing the rental contribution where **self-catering** is involved and only very exceptionally, therefore, will business relief be properly due for holiday and other furnished lettings.

Reference may usefully be made to the Special Commissioners decision in Salter (BP 310/88), though each case must be decided on its own merits.

Any case where the parties dispute the relevance of the above tax cases, or otherwise persist in maintaining that relief is due in respect of a furnished or holiday letting business, should be referred to the Assistant Principal.

The position regarding **caravan sites** was essentially unaffected by the Gittos and Griffiths decisions. The letting of furnished caravans, as opposed to furnished houses and flats, does not constitute the exploitation of property rights and hence investment. On the other hand the letting of pitch sites only would. However, most sites offer a range of letting options and usually also provide some facilities. In some cases this may be confined to purely basic facilities such as water and electricity. At the other extreme, the site may provide a full holiday package including shops, a swimming pool, club bar and entertainment. The availability of relief in each case must therefore depend on the particular facts.

It is preferable to approach a case by reference to the type of letting activity viz. how much of the letting relates to furnished caravans owned by the business and how much to pitch sites. As a general guideline, where a business's own furnished caravans account for at least half the total number of lettings it may be appropriate to accept the business as primarily trading, irrespective of the

facilities provided (assuming there are no other “investment” activities). Conversely, where most of the lettings relate to pitch sites and facilities are restricted to the provision of electricity, water, toilets and a shop (and there are no other activities) relief should be denied on the grounds that the business was mainly engaged in the exploitation of its property rights (as discussed, for example, in the Griffiths case).

The position concerning **chalets** is uncertain. Where, therefore, the number of chalets is such that the availability of relief depends on their treatment, the case should also be referred to the Assistant Principal.

In other cases involving the admission of people onto land it will be necessary to consider whether the income received amounted to nothing more than payments for the use of the site or whether it related, to a material extent, to the payment for facilities and services provided on the site: for an illustration of this distinction see the judgment of Lord Greene MR in Croft v. Sywell Aerodromes Ltd. 24 TC 126.

**Conacre Lettings**

The Circuit Court, in May 2008, gave a decision on Business Relief in a case where an inheritance of lands was taken and where the deceased person had, for the nine years prior to his death, let out the lands for grazing on **conacre** for nine months of each year. The Revenue Commissioners had sought to disallow business relief on the grounds that the lands were not relevant business property as the deceased’s activities constituted a business wholly or mainly of making or holding investments. Accordingly, Revenue submitted, the deceased’s business was excluded from being “relevant business property” by the words of section 93(3). Section 93(3) disallows business relief to a business, which consists wholly or mainly of making or holding investments.

The Judge decided that the lettings were a business and that the business did not fall within the exclusion of “making or holding investments” in section 93(3).

The Judge, in his judgement, indicated that he paid close attention to the 1935 Irish Supreme Court decision in Howth Estates v Davis, an income tax case concerning management expenses where it was held that a landowning company was not making investments.

The Judge also took into account in his decision that there was evidence of supervision or management by the landowner sufficient to amount to a business.

**(iii) Does the business need to be carried on wholly or mainly in the State on the date of the Gift or Inheritance in order to qualify for business relief?**

The Finance Act 2001 removed the condition that the business must be carried on wholly or mainly in the State to qualify for relief.

The Finance Act 2001 also removed the condition that the company must be incorporated, and the assets situated, in the State.

The changes apply to gifts/inheritances taken on or after 15 February 2001.

**(iv) Was the Relevant Business Property comprised in the Disposition for the specified period ?**

**- General**

To safeguard to some extent against businesses or shares or securities being acquired merely for the purposes of getting business relief, relevant business property will not qualify for the relief unless it was comprised in the disposition for a minimum period prior to the date of the gift or inheritance i.e. relevant business property must have been owned either by:

(i) the disponer* alone, or by the disponer and his or her spouse; or

(ii) by the trustees (in the case of settlements) alone, or by the trustees, the disponer and/or the disponer's spouse,

for a continuous period of:

– 2 years immediately prior to the date of inheritance in the case of an inheritance taken on the death of the disponer, or

– 5 years in all other cases (section 94).

The 2 year or 5 year rule is referred to as the **minimum ownership period**.

The minimum ownership period is relaxed for:

(a) replacement property, and for
(b) successive benefits.

**- Replacement Property (Section 95)**

- Property which has replaced other property will qualify as relevant business property if:

*Where the disponer became entitled to the relevant business property on a death s/he is deemed to have owned it from the date of death (section 130).

– the replaced property would have qualified as relevant business property but for the minimum ownership period had the gift or inheritance been taken immediately prior to the replacement, and

– in the case of an inheritance taken on the death of the disponer, the replacement property and the replaced property taken together were comprised in the disposition for at least 2 years out of the 3 year period immediately preceding the date of the inheritance, or

– in all other cases, for at least 5 years out of the 6 year period immediately preceding the date of the gift or inheritance.

- There is no requirement that the replacement property be of a similar nature to the property it replaced. For instance, the replacement property rules enable a business carried on by a sole trader or by a partnership to be transferred to a company in exchange for shares or securities in that company and still qualify for the relief.

**For Example**

Brendan commenced a drapery business in 1996. He sold the business in 2003 and within 6 months he had bought a newsagents with the proceeds. He decided to give a gift of the new business to his daughter with effect from 1 June, 2004. Business relief will apply to the new business because, taken together, Brendan's period of ownership of the drapery and the newsagents amounted to over 5 years in the 6 year period immediately prior to the date of the gift.

- If the value of the replacement property exceeds the value of the property it replaced the relief will be restricted to what it would have been had the replacement not been made. If, in the above example, the drapery business had been sold for £100,000 and the newsagents though bought for £150,000 was worth £180,000 on the valuation date the value eligible for relief would be restricted to £120,000 as follows:

$$£180,000 \times \frac{£100,000}{£150,000} = £120,000.$$

In deciding whether the relief should be restricted any changes resulting from the formation, alteration or dissolution of a partnership or from the acquisition of a business by a company controlled (within the meaning of section 27 CATCA 2003) by the former owner of the business should be disregarded.

- There is no limit to the number of times that relevant business property can be replaced by other relevant business property within the 3 or 6 year period.

**- Successive Benefits (Section 97)**

- If the disponer or his or her spouse had taken a gift or inheritance of property (the earlier benefit) and the disponer had died before either he or

she and his or her spouse, had owned the property for the required period (i.e. for 2 years (or for 2 years out of the previous 3 years in cases where the property was replaced – see paragraph 12.5(iv) *"Replacement Property"* above) - the benefit now taken from the disponer (the subsequent benefit) may still qualify for the relief notwithstanding the minimum ownership period provided that the earlier benefit qualified for business relief (on the assumption that such relief existed at that time).

**For Example**

Nuala decided to retire from the family business on 1 June, 2004. She gifted her 100 shares (the entire share capital) in PQR Ltd. to her brother, Tom. The gift of the shares qualified for business relief. Tom died suddenly on 1 July, 2004 and left what were previously Nuala's shares to his son, John. Business relief will apply notwithstanding the fact that Tom had only owned Nuala's shares for 1 month.

- The relief will be limited to the same proportion of the relevant business property in the subsequent gift or inheritance as the taxable value attributable to the relevant business property in the earlier gift or inheritance bore to its market value. If, in the previous example, Nuala had gifted her 100 shares (valued @ £10,000 on 1 June, 2004) to Tom in consideration of Tom giving her £1,000 then the relief available to John in respect of the benefit taken on 1 July, 2004, when the shares were valued @ £11,000, will be limited to £9,900 as follows:

Market value of earlier benefit
£10,000

Taxable value of earlier benefit (£10,000 – £1,000)
£9,000

Fraction of subsequent benefit which will qualify for relief

$$\frac{(£10,000 - £1,000)}{£10,000} \quad 9/10$$

Amount of subsequent benefit which will qualify for relief

$$£11,000 \times \frac{9}{10} \quad £9,900$$

- If the value of the replacement property exceeds the value of the relevant business property it replaced the relief will be restricted to what it would have been had the replacement not been made. Again in deciding whether the relief should be restricted any changes resulting from the formation, alteration or dissolution of a partnership or from the acquisition by a

company controlled (within the meaning of section 27 of the CATCA Act 2003) by the former owner of the business should be disregarded.

**For Example**

Mary decided to retire from the family business on 1 June, 2004. She gifted her 100 shares (the entire share capital) in ABC Ltd. to her brother, Peter, on condition that Peter paid her £1,000. The gift of the shares qualified for business relief. Peter sold the shares and bought a newsagency. Peter died suddenly on 1 September, 2004 and left the newsagency to his son, Damian. On 1 June, 1994 the shares were valued @ £10,000. They were sold for £11,000. The newsagency cost £12,000 but was worth £15,000 on the valuation date of Damian's inheritance.

Value of subsequent benefit relief restricted to
(£15,000 x £11,000)
£12,000
£13,750

Value of earlier benefit
£10,000
Taxable value of earlier benefit
(£10,000 – £1,000)
£ 9,000

Fraction of subsequent benefit which
will qualify for relief

£10,000 – £1,000
9/10
£10,000

Value of subsequent benefit (restricted
as above)
£13,750

Amount qualifying for relief
£13,750 x 9/10
£12,375

Part of current benefit not eligible for relief
£15,000 – £12,375
£ 2,625

There is no limit to the number of times that relevant business property can be replaced by other relevant business property.

**(v) Exclusion of Value of Certain Assets**

**- General**

In view of the substantial nature of the relief business people will have a strong incentive to disguise private assets as business assets if they can. To prevent this section 100 seeks to exclude certain assets from the relief. We have already seen that the relevant business property (business/interest/ shares or securities) must have been **owned** for a minimum period prior to the gift or inheritance [paragraph 12.5(iv)]. It is also necessary (under section 100) to look through the business being carried on to the underlying assets to ensure that each asset has been used for business purposes for a minimum period prior to the gift or inheritance. The value attributable to any asset not so used must be left out of the account when determining what part of the taxable value attributable the relevant business property qualifies for the relief. A full list of all the assets, the value attributable to which must be left out of the account, is set out in *"Excepted Assets", "Excluded Property" & "Agricultural Property",* below.

In practice there are many cases – particularly involving minority shareholdings – where the exclusion of an asset would make little or no difference to the value attributable to the relevant business property.
For example, the value of a 10% shareholding is unlikely to be much affected by the exclusion of a private boat (see *"Excepted Assets*", below). A similar situation may also occur with a control shareholding where a company is being valued on a capitalisation as opposed to an assets basis. Where it appears, therefore, that the effect of the exclusion of a particular asset on the value attributable to the relevant business property will be small, the matter should not be pursued.

Where, however, shares are being valued by reference to the capitalisation value of a company, it should be remembered that the value of any substantial non-business asset ought to be added to the capitalisation value of the company and the added value on the non-business asset will clearly have to be excluded from relief.

**- "Excepted Assets"**

Section 100(1), (2) and (5) provides that the value attributable to the following assets (known as "excepted assets") must be left out of the account in determining what part of the taxable value of the relevant business property will qualify for business relief viz.

(i) any non-business assets i.e. investment assets (section 100(2)).

**For Example**

Ciaran, who owns all of the shares in STU Ltd., wishes to gift his shares to his daughter, Liz. STU Ltd. has net assets of £950,000 including quoted shares worth £50,000. Relief is calculated as follows:

| | **£** |
|---|---|
| Taxable Value prior to relief | 950,000 |
| Value attributable to assets not used for the purposes of the business | (50,000) |
| Amount of taxable value which can benefit from the relief (950,000 – 50,000) | 900,000 |
| Reduction of 90% on £900,000 | (810,000) |
| Revised taxable value after relief (950,000 – 810,000) | 140,000 |

Where, however, the business concerned is being carried on by a company which is a member of a group any business assets (i.e. business assets other than investment assets) used wholly or mainly for the purposes of a business carried on by any other company in the group will be treated as if they were used for the purposes of the business concerned provided that that other company was a member of the group:

– at the time of the use, and
– immediately prior to the gift or inheritance.

However, business assets used by a company in the group which is wholly or mainly carrying on an excluded business will not be treated as if they were used for the purposes of the business concerned unless the excluded business consists wholly or mainly in the holding of land or buildings wholly or mainly occupied by companies in the group whose business is not wholly or mainly an excluded business.

(ii) any business assets which if owned for at least 2 years prior to the gift or inheritance were not being used wholly or mainly for the purposes of the business for a continuous period of 2 years prior to the gift or inheritance. However, business assets acquired within 2 years prior to the gift or inheritance need not be ignored provided that they were being used wholly or mainly for the purposes of the business for the whole of the period between the date they were acquired and the date of the gift or

inheritance. In other words there is no restriction on the acquisition of new assets by an existing business provided the business itself qualifies for business relief and that the assets satisfy the above test;

It should be borne in mind that a subsidiary which is wholly or mainly carrying on an excluded business will in any event be totally left out of account. In other words there is no need to consider the "excepted assets" test in relation to any assets of that subsidiary.

If an asset was used at any stage for the **personal benefit** of the disponer or for a relative (as defined in the CAT Act) of the disponer then it cannot be treated as if it was used wholly or mainly for the purposes of the business concerned (section 100(7)).

**For Example**

YZ Ltd. bought a house in Kerry in 2002 which is used intermittently for corporate entertaining. However, the shareholders use it on a number of occasions each year for family holidays. The house will not qualify for the relief.

This provision is aimed at conspicuous and substantial assets e.g. a mansion house, penthouse flat, private yacht or collection of expensive chattels which – although represented as a business asset – are simply held by (say) a company as a device for providing private benefit to the persons in question. The provision should not be deployed against the non-business use of non-luxury cars.

Where **land or buildings** are not used wholly or mainly for business purposes and prima facie constitute "excepted assets", section 100(5) gives a measure of relief in respect of the value of any part of the property which is used exclusively for the purposes of the business. In this context, exclusive use will embrace such use by another member of the group provided it satisfies the above conditions.

The land or building is to be treated as if it were two separate assets consisting of the part used exclusively for business purposes and the remainder not so used. If the part used exclusively is a viable severable entity for the purposes of valuation (possibly because it has a separate access) it will be valued as such. Otherwise, or if that gives a higher figure, the value should be "such proportion of the value of the whole as may be just".

The emphasis is on exclusive use for the purposes of the business so that mere casual or intermittent use of part of a building, e.g. as a temporary office, will not qualify under this provision. If, however, a room is equipped as a permanent store-room or is purpose-built for some business operation, and in either case is solely so used, the value attributable to that

part of the property will qualify for relief and the value of the remainder will be excluded as an excepted asset.

It is a question of evidence whether a particular asset was used wholly or mainly for business purposes during the relevant period. With the exception of assets which were used for the personal benefit of the disponer or his/her relative, (except non-luxury cars), the **requirement as to use should be interpreted reasonably** in the case of those businesses which appear to be pursuing normal business activities rather than serving as a repository for non-business assets.

Because of the diversity of circumstances of valuation, it is not practicable to lay down detailed rules as to the calculation of the part of the value transferred to be excluded in respect of excepted assets. The basic approach, however, is to exclude from relief that part of the value attributable to relevant business property which might fairly be attributed to the value of excepted assets. In essence, the answer lies in the difference between the value of the relevant business property calculated with the excepted asset included and excluded respectively.

**- "Excluded Property"**

Section 100(8) provides that any **new business or interest in a business** acquired by a company (or by a company within the same group) within the minimum ownership period must be left out of the account for the purposes of calculating the relief appropriate to the shares or securities of that company.

**For Example**

VWX Ltd., was incorporated in 1988 as a property holding company. In September, 1993 it sold off all its property and purchased a cheese manufacturing business with the proceeds. One of the shareholders wishes to gift her shares in the company to her son, the gift to take effect on 1 August, 1994. While the shares have been owned for more than 5 years they still will not qualify for the relief because their value is entirely attributable to the value of the new business.

If that new business replaces other business property the value of the new business will not be left out of account provided the combined periods of ownership of both businesses would satisfy the minimum ownership period. Where the value of the replacement business is higher than the value of the property replaced the relief is restricted to what it would have been had the replacement not been made.

**- Agricultural Property**

Gifts/Inheritances taken on or after 10 February 2000 of agricultural property can obtain the benefit of business relief. The relief will not be granted to agricultural property in respect of which a donee/successor has obtained

agricultural relief. A donee/successor cannot claim both business relief and agricultural relief in respect of the same property.

## 12.4 Calculating the Relief

**- General**

As already seen in paragraph 12.3 a number of steps have to be gone through before the relief can be calculated.

Remember:

- Businesses not being carried on for gain;
  and
- Excluded Businesses,

do not qualify as relevant business property.

**- Business or an interest in a business**

*Step (i)* Calculate the taxable value attributable to the value of the business or interest. For this purpose the value of the business or (interest) is the net value. The net value is arrived at by reducing the market value of the assets comprised in the gift or inheritance and which are used in the business (including goodwill) by the market value of any liabilities (to which the gift or inheritance is subject) incurred for the purposes of the business (e.g. borrowings). (Section 98(b)).

In the case of a partnership, only partnership assets and partnership liabilities are to be taken into account. (section 98(c)).

In deciding whether a particular asset was used in the business the accounts and information supplied should be examined to see how the assets shown (in particular, cash, bank accounts, building society accounts and similar assets) were used prior to the gift or inheritance. Any assets not used in the business are to be omitted when arriving at the net value.

In calculating the taxable value attributable to the value of the business (or interest) the following general rules should be applied to the treatment of liabilities/consideration where the acquisition consists of both relevant business property and other property e.g. an inheritance of residue consisting of a business, land, etc. and other non-business property:

| | | |
|---|---|---|
| deduct from the value of the business: | – | all liabilities payable out of residue which were incurred for the purposes of the business (section 98); and |
| | – | all liabilities payable out of residue which were an encumbrance on the business (section 28(11), CATCA 2003) whether or nor incurred for the purposes of the business; and |
| deduct from the value of the other property: | – | any other liabilities (or consideration) provided that where the value of the other liabilities exceeds the value of the other property then the excess should be deducted from the value of the business. |

*Step (ii)* It must be decided whether any part of the taxable value attributable to the value of the business (or interest) is attributable to the value of any of the items listed in paragraph 12.5(v) (these will generally have already been excluded in arriving at the net value). If it is then the value so attributable must be deducted to arrive at the value on which relief will be granted.

*Step (iii)* Having calculated the value attributable to non-excepted assets, etc., it is then necessary to restrict that value if:

(i) the replacement property rules apply and the value of the replacement property exceeds the value of the property it replaced – see paragraph 12. for an example of how to restrict the relief; or/and

(ii) if the successive benefits rule applies and the taxable value attributable to the earlier gift or inheritance was less than its full value (e.g. because some consideration was paid or because the relief was restricted in some other way) – see paragraph 12.5(iv) *"Successive Benefits"* for an example of how to limit the relief.

The resultant figure is the value on which relief can be granted.

*Step (iv)* Calculating the Relief:

– The taxable value of relevant business property is reduced by a flat 90% and the resulting figure equals the amount of the business relief applicable.

*Step (v)* The amount of relief should be deducted from the figure at step (i).

**- Shares or Securities of a Company carrying on a Business**

*Step (i)* Calculate the taxable value attributable to the shares or securities.

*Step (ii)* It must be decided whether any part of the taxable value attributable to the shares or securities is attributable to:

– the value of the shares or securities of any company in the group carrying on excluded businesses, and

– the value of any quoted shares or securities (paragraph 12.5(ii) "*Wholly or Mainly" Test* – subparagraph (c)).

If it is, then the value so attributable must be deducted to arrive at the value on which relief will be granted.

*Step (iii)* Follow steps (ii), (iii), (iv) and (v) in paragraph 12.6 "Business or an interest in a business (above).

Where an "excepted asset" is charged or encumbered at the valuation date, the net value of the asset should be looked at. However, it is not considered that an "excepted asset" should be reduced by a proportion of the uncharged debts. This is because we are essentially concerned with comparing the value of the shares if the excepted asset was removed from the company – in which case the other assets would have to bear all the debts.

This does not preclude taking into account the need for sufficient liquidity to cover the payment of liabilities in determining what constitutes an excepted asset in the first place – particularly as regards the amount to be treated as surplus cash. However, once the amount of cash and/or other assets to be treated as "excepted assets" have been determined, they should not be reduced further.

## 12.6 Clawing Back the Relief (Section 101)

If the business, or any business which replaced it, ceases to trade within a period of 6 years after the valuation date the relief will be clawed back unless the business is replaced within 1 year by other relevant business property. However, there will be no clawback of the relief where the business ceases to trade by reason of bankruptcy or as a result of a bona fide winding-up on the grounds of insolvency.

The relief will also be clawed back if, within that 6 year period the business or the shares or securities, are sold, redeemed or compulsorily acquired and are not

replaced within 1 year by other relevant business property. The relevant business property being sold, redeemed or compulsorily acquired may not be replaced by quoted shares or securities.

If there is a subsequent gift or inheritance of the same property within the said 6 year period (e.g. because the beneficiary died within 6 years of taking the gift or inheritance) a sale or other event happening after the date of the subsequent gift or inheritance will not trigger a clawback in relation to the earlier gift.

If only part of the relevant business property or of any replacement property ceases to qualify for the relief the clawback will relate only to that part.

The clawback provisions will not apply to any land, building, plant or machinery, or any replacement land, building, plant or machinery, for so long as they are used for the purposes of the business concerned.

## Appendix I - Definitions

**"Associated Company "** has the meaning assigned to it by section 16(1)(b) of the Companies (Amendment) Act, 1986 (section 90(1)) viz.

"16.—(1) Subject to the provisions of this section, where at the end of the financial year of a company, the company—

(b) holds a qualifying capital interest equal to 20 per cent. or more of all such interests in an undertaking that is not its subsidiary undertaking (in this section referred to as "an undertaking of substantial interest")."

A **"group "** consists of:

- a company,
- its subsidiaries,
- its associated companies,
- the associated companies of its subsidiaries, and
- the subsidiaries of its associated companies (Section 90(3)).

**"Holding Company "** has the meaning assigned to it by section 155 of the Companies Act, 1963 (Section 90(1)).

**"quoted v. unquoted "**: quoted means quoted on a recognised stock exchange and unquoted means not so quoted (Section 90(1)).

If relief is claimed for shares or securities quoted on the Unlisted Securities Market (USM) on the basis that such shares fall within the meaning of "unquoted" the relief can be allowed but Legislation Branch should be informed.

**"Securities "** may be treated as including any debt which is either charged on property or is evidenced by a document under seal. Debts such as debentures and loan notes, even if described as "unsecured" may, therefore, rank as securities.

**"Subsidiary "** is defined in Section 155 of the Companies Act, 1963 (Section 90(1)).

# Appendix II - Business Relief - Response to certain Business Relief Queries

Reproduced are business relief queries and Revenue's decisions regarding certain aspects of the operation of Business Relief.

## Query of 4 July, 1994.

4th July 1994.

The matter on which we have a further query relates to a case where a husband and wife between them own 100% of a private trading company, which has 100% ownership of a subsidiary (also a private trading company). If the parent company makes a gift of some of its shares in the subsidiary company to one or more of their children would "business relief" apply? It is assumed that the shareholding of the donee would comply with the 10% requirement and that the parent company's shareholding in the subsidiary and the shareholdings of husband and wife in the parent company have both been held for more than five years.

Yours sincerely,

## Reply to query of 4 July, 1994.

## Re: CAT Business Relief

I refer to your letter dated 4 July, 1994, concerning a proposed gift by a parent company of shares in its subsidiary company. Under Section 34 of the Capital Acquisitions Tax Act, 1976, the shareholders of the parent company would be the disponers in relation to the gift and the shares in the subsidiary company could not qualify for business relief because they would not have been in the beneficial ownership of the disponers throughout the 5 year period.

Yours sincerely,

## Query of 12 August, 1994.

12 August, 1994

We are examining the possible application to our clients of the provisions relating to business relief contained in Part VI of the Finance Act, 1994.

We would be grateful to have your views as to the correct interpretation of the legislation as it would apply in certain circumstances. These are outlined below:

1. **Inter-company loans**

   It is common in group situations to have dormant companies with no assets other than debts due from group companies. The inter-company loans are generally interest free.

   In relation to a dormant company whose net assets have been on-lent interest free to group companies, would you please confirm that the dormant company will not for the purposes of

Section 133 be regarded as carrying on a business within Section 127(4) on the basis that the making of an interest free loan would not constitute a business as defined in Section 124. The effect would be that the dormant company would not be regarded as a non-qualifying subsidiary for the purposes of calculating the relief applicable to shares or securities of the holding company.

On the basis that the assets of the dormant company have been lent on to the group and used for the purposes of the business of group companies, and on the basis that the group company concerned does not fall to be disregarded under Section 133, it would appear that the group company debtor should not be regarded as an excepted asset within the meaning of 134(2). Please confirm the position.

Section 134(7) provides that assets of group members shall be excluded properly unless they would be relevant business property if they were a subject matter of a gift or inheritance from the disponer. Again, based on the definition of business in Section 124, the inter-company loan of the dormant company is not property consisting
Accordingly, the group debtor balance would not be an excluded asset for the purposes of Section 134.

We would be grateful if you could confirm that you agree with this interpretation.

2. **Property owned by one company in Group and used by other companies in the Group**

It is common in groups of companies to have a company within the group owning property from which other companies in the group trade. Very often the property is occupied without any rent being charged. It would appear that such a company would fall within Section 127(4). Under Section 133 where the business of the company consists wholly or mainly in holding lands or buildings wholly or mainly occupied by members of the group which do not fall within Section 127(4), the property company will not be ignored for the purposes of calculating the relief applicable to shares in the holding company. Please confirm that the holding of property occupied rent free by other group companies is regarded as a business for the purposes of Section 133.

In order to determine whether the property company is to be excluded or otherwise in calculating the relief applicable to shares of a holding company, it is necessary to determine whether the business of the property company consists wholly or mainly in the holding of lands or buildings wholly or mainly occupied by members of the group whose business does not fall within Section 127(4). Typically, property companies will own assets as follows:

– Property which is occupied rent free by group companies not falling within Section 127(4);

– Debtor balances representing interest free loans to group companies;

– Other investments.

There is no guidance in the legislation in relation to the factors to be taken into account in determining in the circumstances outlined whether the business of the company consists wholly or mainly in the holding of land or buildings wholly or mainly occupied by members of the group. A number of points arise in this regard:

(i) in valuing the shares in the holding company for CAT purposes, the valuation may be done based on a combination of net assets and earning capacity. Should the test in Section 133(1) be applied based on the net value of the underlying assets of the property company?

(ii) In determining the wholly or mainly test, should interest free loans to group companies be ignored on the basis that the granting of interest free loans would not appear to be a business as defined within Section 124.

Section 134(7) provides that assets of group members shall be excluded property unless they would be relevant business property if they were the subject matter of a gift or

inheritance from the disponer. It would appear in relation to a property company, as described above, that the relevant business would fall within Section 127(4) and accordingly the tests laid down in Section 134(7) would not have to be applied.

Please confirm the position.

3. **Holding Company**

The shares in a holding company are relevant business property where the business of the company consists wholly or mainly in being a holding company for one or more companies whose business does not fall within Section 127(4). There is no guidance in the legislation as to the interpretation of "wholly or mainly". It is common for many companies to have strong asset backing in terms of property used for their trade with a poor earnings record. For capital acquisitions tax purposes, the shares in the company are likely to be valued taking into account the company's earning capacity and its asset backing. In circumstances where there has been a poor trading record, the shares in the company will be valued at an amount less than that which would apply based on an asset basis. This could give particular difficulties in interpreting the legislation, particularly in relation to companies where the property is held in one company and used by other trading companies in the group.

We would be grateful if you would confirm on behalf of the Revenue that in the case of genuine trading groups, the legislation will be applied so as to treat the shares in a holding company as qualifying business property notwithstanding that a substantial proportion of the underlying value of the company derived from land and buildings held by a company within the group but used wholly or mainly by trading companies within the group not falling within Section 127(4).

Yours faithfully,

## Reply to query of 12 August, 1994.

1. It is agreed that the dormant company will not, for the purpose of Section 133 of the Finance Act, 1994 be regarded as carrying on a business within Section 127(4) of the Act on the basis that the making of an interest-free loan would not constitute a business as defined in Section 124.

2. It is agreed that on the basis that the assets of the dormant company have been lent on to the group and used for the purposes of the trading business of group companies and on the basis that the group company does not fall to be disregarded under Section 133, the group company debtor should not be regarded as an excepted asset within the meaning of section 134(2) of the Act.

3. It is agreed that the group debtor balance would not, in the circumstances outlined in the letter, be an excluded asset for the purposes of Section 134 of the Act.

4. It is agreed that the holding of property occupied rent-free by other group companies is regarded as a business for the purposes of Section 133 of the Act.

5. All factors are taken into account in applying the test in Section 133(1) of the Act.

6. It is agreed that a case can be made that interest-free loans to group companies can be ignored in the circumstances outlined in the letter.

7. In the case of a property company, as outlined in the letter, the relevant business would fall within Section 127(4) of the Act. Accordingly, the tests laid down in Section 134(7) would not have to be applied.

8. Confirmed that, in the case of genuine trading groups, the legislation will be applied so as to treat the shares in a holding company as qualifying business property notwithstanding that a substantial proportion of the underlying value of the company is derived from land and buildings held by a company within the group but used wholly or mainly by trading companies within the group not falling within Section 127(4).

## Query of 22 November, 1994.

22 November, 1994

We are writing to you seeking clarification of Section 127, Finance Act 1994 in the circumstances set out below. In summary we are looking at a situation in which the premises from which the **A** group trades is owned by the holding company rather than the trading subsidiary.

**B** Limited is an investment holding company which, inter alia:

- holds the entire share capital in a wholly owned trading subsidiary, **C** Limited (“the Subsidiary”),
- holds a number of investment properties, including a property in Dublin from which the Subsidiary trades. The value of this property is some £1.3m.

Part VI Finance Act 1994 deals with the Business Property Relief for CAT purposes. Section 127 defines “relevant business property” in relation to a gift or inheritance.
Subsection 4 of Section 127 provides that shares in a company shall not be “relevant business property” if the business carried on by the company consists wholly or mainly of “making or holding investments”. Subsection 5 provides that Subsection 4 shall not apply if the business of the company consists wholly or mainly of holding shares in a trading company.

There is a concern that because the Subsidiary does not own the property in Dublin, out of which it trades, the provisions of Section 127 Finance Act, 1994 may not necessarily apply to the shares in **B** Limited. It is clear to us that the intention of the legislation would be that cases such as this should come within the new provisions. Our reason for this is that paragraph (e) of Subsection 1 of Section 127 provides that “relevant business property” shall include land or buildings in the State owned by a disponer and used wholly or mainly for the purposes of a business carried on by a company of which the disponer had control.

While the property in Dublin owned by **B** Limited would come within the spirit of the relief provided for in paragraph (e) of Subsection 1, we are not clear on whether it would come within the provisions of the legislation as currently drafted.

We would be grateful for your confirmation that:

> In the circumstances described above, the property in Dublin which is used for trading purposes by the Subsidiary would be regarded as a trading asset in determining under Subsections 4 and 5 whether or not the business of **B** Limited is one of making or holding investments.

Yours faithfully,

## Reply to query of 22 November, 1994.

18 January, 1995

In the circumstances described in your letter dated 22 November, 1994, it is confirmed that the property in Dublin which is used for trading purposes by the subsidiary would be regarded as a trading asset in determining under subsections (4) and (5) whether or not the business of **B** Limited is one of making or holding investments.

Yours sincerely,

## Query of 28 March, 1995.

28 March, 1995

A question has arisen here in connection with the business relief given in the Finance Act, 1994 in relation to capital acquisitions tax.

Section 125(5), FA 1994 makes it clear that the relief is available for shares in a holding company which has a trading company. What is not clear is whether the relief is available for a holding company (Company A) which owns (say) 100% of the shares of a second holding company (Company B) which in turn owns (say) 100% of the shares of a trading company (Company C).

In this example, the relief is prima-facie lost, under Section 127(4), FA 1994, if the business of Company A consists wholly or mainly of holding investments (as it does - Company A's assets consist entirely of shares in Company B). However, Section 127(5), FA 1994 provides that the relief is not lost if the business of Company A consists wholly or mainly of being a holding company of Company C, which is a trading company.

The question as to whether Company A is a holding company of Company C involves (Section 124(I), FA 1994) the definitions of "holding company" and "subsidiary" in Section 155, Companies Act, 1963. Section 155(4) of the Companies Act provides that Company A is a holding company of Company C if Company C is a subsidiary of Company A.

This in turn raises the question as to whether Company C is a subsidiary of Company A. Section 155(I)(b), of the Companies Act provides that Company C shall be a subsidiary of Company A if Company C is a subsidiary of Company B and Company B is a subsidiary of Company A. This is in fact the position.

Therefore it appears that, because Company C is a subsidiary of Company A, Company A is a holding company of Company C and so business relief is not lost under Section 127(5), FA 1994.

I would be obliged if you would confirm that the relief is available in these circumstances. If not, would you consider an appropriate amendment in this year's Finance Bill. There may be commercial reasons why there would be more than one holding company above the trading company, and it would seem inconsistent with the intention of the legislation if a claim for business relief was to be denied merely because business shares were held through two holding companies, rather than through one.

Yours sincerely,

## Reply to query of 28 March, 1995.

30 March, 1995

In the circumstances described in your letter, the Revenue Commissioners will accept that the shares in Company A will not be precluded from qualifying for business relief, where the wholly or mainly test is satisfied, on the grounds that Company A does not hold Company C directly.

Yours sincerely,

## Query of 21 April, 1995

21 April, 1995

A point has arisen in relation to business relief, and I would be grateful for your confirmation of the Revenue Commissioner's interpretation of the point. The issue concerns Section 127(4) Finance Act 1994. Subsection 4 states that business relief will not be available to any business or shares in a company where the business of that company,

> *"consists wholly or mainly of one or more of the following, that is to say, dealing in currencies, securities, stocks or shares, land or buildings, or making or holding investments".*

The question that arises is what constitutes a company whose business consists of dealing in land. For example, would property developers be regarded as "dealing in land". The property developer that I have in mind buys large areas of land, applies for planning permission and then constructs properties (mostly residential) on the land. The properties are then sold individually. A typical example would be where the company buys land, builds houses and then sells the houses (e.g. a housing development). These property development companies are liable to corporation tax on their profits. The companies, as is common in the building industry, tend to use subcontractors extensively.

It seems to me that this type of company is not a company that falls within Section 127(4) because it is not dealing in property, instead it is developing/carrying out construction on the land. It was interesting to see the comments made in "Fosters Inheritance Tax" at page 3417-3420, (copy attached), where the UK Secretary to the Treasury in 1976 (when business relief was introduced in the UK), stated that business relief applies on the transfer of a property dealing or property holding business providing the business includes property construction or land development (and also that housing stocks would qualify for the relief as normal trading stock). Accordingly, it seems clear that property development companies qualify for business relief for UK inheritance tax purposes.

Yours sincerely,

## Reply to query of 21 April, 1995

23 May, 1995

I refer to your letter dated 21 April, 1995 in which you asked for Revenue's views on the applicability of CAT business relief to property development companies.

Though it is not the practice to issue replies to hypothetical questions, the reference to dealing in land and buildings in Section 127(4) of the Finance Act, 1994 would not, in our view, include a genuine property development company where:

(a) the land is acquired with a view to development and subsequent disposal of the completed development; and

(b) most of the profit is derived from the enhanced value of the property resulting from the development (as opposed to increases in the value of the land from the obtaining of planning permission or a general rise in land values).

Yours sincerely,

## Query of 1 July, 1997.

1 July, 1997

I would appreciate if you would clarify the position regarding the availability or otherwise of business relief where a company holds land that is forested.

As you know an individual who is receiving a gift or inheritance of land that is forested can claim agricultural relief in relation to the trees essentially without qualifying conditions and in relation to the land if he qualifies as a "farmer". The availability of the relief does not depend in any way on whether the disponer rents the land to a third party, actively engages in managing the forest himself or uses the services of a contractor.

Where forested land is owned by a company, as far as business relief is concerned, the company has to qualify as a company not wholly or mainly holding investments for the relief to apply. However, it is not clear what would be required on behalf of the company in the form of active involvement in managing the forest in order to qualify for business relief. In most cases the company would not have any employees as ongoing management on a daily basis of the forested land would not be required. However, the company would have to plant the trees initially, keep the weeds under control in the early stages of the development of the forest and thin out the plantation. In most cases it will use the services of a contractor to carry out these activities. Clearly from a corporation tax point of view the company would be the occupier of the woodlands and would be entitled to the corporation tax exemption. To qualify as you know for the corporation tax exemption under Section 18, Finance Act, 1969 the woodlands have to be occupied and managed on a commercial basis with a view to the realisation of profits. This would clearly be the case in most instances. If this test can be satisfied would the shares in the company holding the forested land qualify for business relief?

Yours sincerely,

## Reply to query of 1 July, 1997.

25 September, 1997

I refer to your enquiry regarding the application of Business Relief to shares in a company owning forested land.

Your letter focuses on the provisions of Section 18 of the Finance Act, 1969 regarding exemption for Corporation Tax, and asks whether a company which qualifies for that exemption would also fulfil the requirements for Business Relief. At the outset I should say that this is not necessarily the case as qualification for Business Relief relies, inter alia, on certain tests which may not equate with the requirements for the Corporation Tax exemption to which you refer.

As you have pointed out in your letter, a company which consists wholly or mainly of making or holding investments is excluded from Business Relief – Section 127(4), Finance Act, 1994. In

deciding whether a business is wholly or mainly an investment business, the following factors, amongst others, are taken into account:

- The ratio of asset value and profit attributable to trading and investment respectively.
- The ratio of turnover to investment income.
- Whether the employees are engaged more on the trading side than on the investment side and vice versa.
- Whether there are any particular reasons for low trading profits.
- The use to which the investment or the income from the investments is put.
- How the company is described in the annual accounts.

Based on the general description you give in your letter of a company apparently entitled to the Corporation Tax exemption, the "active involvement" described would not bring such a company within the requirements for Business Relief. In essence, such a company appears to be a non-trading company with essentially no employees, and whose profits are in the main derived from investments. It is our view that such a company is wholly or mainly an investment company and would fall within the provisions of Section 127(4) of the Finance Act, 1994. Consequently it is excluded from the relief.

Yours sincerely,

## Query of 15 August, 1997

15 August 1997

**Background**

**A** died in 1991 leaving all of his assets to a discretionary trust, in accordance with the instructions in his Will. The main beneficiaries of the Trust comprise his wife and their children. The youngest child will be 21 in 1997. Most of the assets in the Trust comprise business property either within the **C** Group (which is a subsidiary of **D** – see below) or assets which are held outside the **C** Group but are used by the **C** Group. The trustees wish to make a distribution of the assets in the near future and have some points on which they would like your view.

1. **D** (an unlimited company, part of the **A** estate) is the top company in the **C** Group and distributions of shares in that company to the **A** family will qualify for business relief from capital acquisitions tax under Part VI, Finance Act, 1994.

2. **E** Limited (also part of the **A** estate) is a land and shareholding company and is not part of the **D** Group. Even though it is outside the **D** Group, the lands owned by **E** Limited and its subsidiaries are used as an integral part of the operations of the **C** Group for more than five years.

3. The trustees of the **A** estate wish to distribute as much of the estate as possible to avoid a charge to discretionary trust tax which will apply in 1997, the date the youngest of the **A** children becomes 21. The trustees are however concerned that because of their youth and relative inexperience it would be better not to give over voting control to the **A** children at this stage even though one of the wishes of the late **A** was that his children would share his estate equally.

To deal with their concerns they propose to restructure **D** so that it will have voting shares and non-voting shares. The voting shares will confer voting rights but nothing more and the non-voting shares will have all other privileges including exclusive rights to dividends and exclusive rights to participate in any surplus on winding up.

It is further proposed that the children will get 100% of the non-voting shares divided equally between them in **D** whilst 49% of the voting shares will be distributed between the children with 51% of the voting shares being appointed to their mother. All of the shares in **E** Limited will be divided equally between the children. The table below sets out the scheme of the proposed distribution.

| *Beneficiary* | *Number of non-voting shares in D proposed to be distributed* | *Number of voting shares in D proposed to be distributed* |
|---|---|---|
| Widow | None | 51% |
| Children | 100% | 49% |

The shares in **E** Limited will be divided equally between the children.

The distributions to the **A** children of shares in **D** will qualify for business relief from capital acquisitions tax.

We believe that under FA 1974, Section 127(6), as amended and the other provisions of Part VI, Chapter I of that Act;

(a) the transfer of the shares in **E** Limited to the children; and

(b) the land held by **E** Limited and its subsidiaries used wholly by the **C** Group for over 5 years qualifies for business relief (even though such land is distributed in the form of the above mentioned shares in **E** Limited to the children) would qualify for business relief, but because of a lack of clarity which we perceive in that section, we feel it necessary to ask you to confirm our view.

As you know, the Group have recently made a successful bid for **F** in the amount of IR£X million, as well as for **G** Limited for which they will pay IR£Y million. Neither of these assets will have been held by the **C** Group for more than 2 years and, hence, will not qualify for the minimum period of ownership in accordance with Section 128, FA, 1994. Both of these acquisitions are wholly financed by bank borrowings which have a charge over the shares in **F** and the other company as well as over the assets of those companies. We understand in computing the value of those businesses in accordance with Section 132, Finance Act, 1994 that the related borrowings can be deducted.

Yours faithfully,

## Reply to query of 15 August, 1997

I refer to your letter (faxed) of 15 August, 1997 in the estate of **A**, regarding the application of business relief to the transfer of certain assets.

In response to the views you have expressed, I would reply as follows:

*View A. The transfer of shares in **E** to the children qualify for business relief.*

**Response.** Provided the shares in **E** are, at the valuation date, "relevant business property", that is, they are not excluded because the business carried on by **E** consists wholly or mainly of making or holding investments (Section 127(4) and reference to your statement that **E** is "a land and shareholding company" – page 1, point 2 of your letter), then they will not be excluded from business relief on those grounds.

In any event, as the land held by **E** is used wholly or mainly by **C**, (see View B below), the value of such land must be left out of account as an excepted asset (Section 134(2)) in computing the business relief on the transfer of the **E** shares.

*View B. The land held by **E** and its subsidiaries but used wholly by **C** qualifies for business relief on the transfer of the **D** shares.*

**Response.** The land owned by **E** and its subsidiaries but used wholly or mainly by **C** would not, on the distribution of the **D** shares, be an excluded asset for the purpose of calculating business relief for the shares in **D** (Section 134(2)).

*View C. Borrowings for the acquisition of **F** and **G** (excepted assets) are charged on the shares and assets of those companies – in valuing these companies for business relief purposes those borrowings may be deducted.*

**Response.** For the purpose of calculating the value of those excepted assets for business relief purposes, the Revenue Commissioners are prepared to accept that, as the borrowings are a charge on the shares and other assets of those companies, the deduction of the borrowings from the value of those excepted assets is acceptable in arriving at such value to the extent those borrowings are charged on those assets.

Yours faithfully,

21 August, 1997

## Summary of other Revenue opinions given on Business Relief in response to Queries

**Section 93 Relevant business property**

**Section 93(1) (b) (c) (d).**

- Unquoted shares in or securities of a company will qualify as relevant business property if they satisfy certain criteria. Shares are defined in CATCA 2003 s2 (1) as including any interest whatsoever in the company which is analogous to a share in the company. The term "securities" is not defined for CAT purposes. Revenue accepts that "securities" may be treated as including any debt, which is either charged on property or is evidenced by a document under seal. Debts, such as debentures and loan notes, even if described as unsecured may, therefore, rank as securities. Revenue therefore accepts that a debt, which is either charged on property or is evidenced by a document under seal, will be treated as a security that would qualify to be treated as "relevant business property".

**Section 93(1) (e) and section 93(5)**

- Land, buildings, machinery or plant which are used in a business carried on by a company of which the disponer had control or by a partnership of which the disponer was a partner but which were owned separately by the disponer rather than by the company or partnership will qualify for business relief provided that the land, buildings, machinery or plant are transferred at the same time as the partnership interest or the shares or securities. If the shares and land etc are not comprised in the one disposition but are transferred by different dispositions e.g. by will and by survivorship or by two separate transfers, once the dispositions/transfers are simultaneous the land etc will qualify for business relief.

- Land, buildings, machinery or plant will not qualify for business relief under section 93(1) (e) unless the disponer has control of the company. Control under this section is defined as control of powers of voting on all questions affecting the company. Therefore in order for the land, buildings, machinery or plant to qualify for relief the disponer must have more than 50% of the votes of the company.

- Revenue accepts that if a disponer has 50% of the votes in the relevant company and has a casting vote he/she would satisfy the control requirement of section 93(1)(e).

- The land, building, machinery or plant need only to be used for the purpose of the business of the company or the partnership immediately before the gift or inheritance in order to qualify for business relief. Therefore, if land etc is owned for a period of five years in advance of a gift but only used in the

business for a period of one year in advance of a gift the land etc can still qualify for relief.

- Where an individual owns 100% of the shares in a trading company and owns land which has been used by the trading company for the purposes of it's trade it is not necessary for the individual when transferring the land to also transfer all of his or her shareholding in the company in order for the land to qualify for business relief. It is necessary however, that the transfer of the shares also qualifies for business relief in order for the land to qualify for relief.

- In order that the land, buildings, plant or machinery may qualify for relief under section 93(1) (e) the property must be held personally by the disponer prior to the gift or inheritance. Relief will not therefore be available under this subsection if the property is held through a company.

- Section 93(1) (b) (c) and (d) sets out the unquoted shares that qualify as relevant business property. Revenue have confirmed that where a person receives a limited interest in unquoted shares e.g. a life interest or an interest for a period certain that such a limited interest in the unquoted shares will qualify for business relief provided that the necessary conditions of section 93 (b) (c) or (d) are satisfied.

**Section 94 Minimum period of ownership**

- Bonus shares are treated as having been acquired at the same time as the original shareholding was acquired for the minimum period of ownership test in section 94.

- Section 94 requires only that the business property has been owned for the relevant minimum period. It is not necessary that the other conditions that need to be complied with in order to qualify for business relief must have been satisfied throughout the period of ownership.

**Section 95 Replacements**

- There is no requirement that the replacement property must be of the same or a similar nature to the replaced property.

- The replacement provisions may apply where certain corporate reorganizations and reconstructions are undertaken.

## Section 100 Exclusion of excepted assets

- It has been accepted by Revenue that cash held by a company was not an accepted asset in a situation where the company specifically built up the cash to fund the construction of a new premises. The cash was accepted as being held wholly and exclusively for the purposes of the company's business/trade. The cash was generated by the profits of the company and had been set aside for the construction of the new premises.

- Cash representing the proceeds of the sale of land by a company which was sold in order to fund the construction of new showrooms and related facilities and credited to the current account of the company was allowed business relief provided the cash was used for the purpose of the business either in expanding the showroom premises or the purchase of new stock etc.

- Revenue have given an opinion that where shares in a company qualify for business relief, business relief will be restricted if the company had acquired a new business which had not been held for the relevant minimum ownership period. The acquisition of a new business is not the same as that of an existing business acquiring new assets.

## Section 101 Withdrawal of relief

- Changes in the nature of assets owned by a company will not result in a claw back of business relief once the company shares continue to qualify as relevant business property for the six year claw back period.

- After the transfer of a business which qualifies for business relief as relevant business property, the incorporation of the business by the beneficiary will not result in a claw back of the relief, irrespective of whether the property itself is incorporated, once the business continues to operate.

- A subsequent gift of a business by a beneficiary, who had previously obtained business relief on a transfer of the business to him/her, will not result in a claw back of business relief.

- In the case where a beneficiary rents the business within the six year claw back period, a claw back of the relief granted to the beneficiary would occur as the beneficiary has ceased to operate the business and instead, is in receipt of rental income.