

## Capital Acquisitions Tax Consolidation Act 2003

### Section 36: Dispositions involving powers of appointment

This document should be read in conjunction with section 36 of the Capital Acquisitions Tax Consolidation Act (CATCA) 2003.

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## 1 Introduction

**Section 36** CATCA 2003 sets out special rules that apply for Capital Acquisitions Tax (CAT) purposes where a person receives a benefit as a result of the exercise of, the failure to exercise, or the release of a power of appointment. In such circumstances, section 36 CATCA 2003 defines who the disponent is in relation to the benefit received.

## 2 General Power of Appointment

A **general power of appointment** is defined in **section 2(1)** CATCA 2003 as including every power, right or authority which would enable the holder to appoint property to whomsoever the holder thinks fit or to obtain such power, right or authority. The holder can appoint the property directly in any manner the holder chooses, or the holder can appoint to a limited class of objects of which the holder is one. By appointing to themselves, the holder can obtain absolute ownership and then dispose of the property as they wish.

Section 2(1) CATCA 2003 defines an **absolute interest** in relation to property as including the interest of a person who holds a general power of appointment over the property. Accordingly, where a person is gifted or inherits an interest in property coupled with a general power of appointment over the property, they will be treated for CAT purposes as having taken an absolute interest in the property.

Section 36(1) CATCA 2003 provides that where a person, having a general power of appointment over property, **exercises** that power, the person is the disponent in relation to any appointments made under that power. The rule similarly applies where, as a result of the **failure to exercise** a general power of appointment or the **release of** a general power of appointment, a person becomes beneficially entitled in possession to a benefit. In such circumstances, the person who holds the general power of appointment is the disponent.

**Example 1**

Mary gifts Sheila a life interest in property, together with a power exercisable by deed or will to appoint the property to any person as Sheila should choose and in default of appointment by Sheila the property is to pass to Nora on Sheila's death.

The CAT Implications are as follows:

- As Sheila has been gifted a life interest in the property with a general power of appointment over it, she is treated as having taken from Mary an absolute interest in the property (section 2(1) CATCA 2003). CAT is payable on the full value of the property taken by Sheila from Mary (**not** on the value of the life interest).
- If Sheila subsequently appoints the property to James under her will, when Sheila dies, James will be liable to CAT on the basis of an inheritance taken by James from **Sheila** (section 36(1) CATCA 2003). CAT will be payable on the full value of the property taken by James from Sheila.
- If Sheila dies without exercising her power of appointment, the property passes to Nora and Nora will be liable to CAT on the basis of an inheritance taken from **Sheila** (section 36(1) CATCA 2003). CAT will be payable on the full value of the property taken by Nora from Sheila.

Section 112 of Finance Act 2012 amended section 36 CATCA 2003 to effectively disapply the rule in section 36(1) CATCA 2003 where the exercise, the failure to exercise, or the release, of a general power of appointment forms part of an arrangement the sole or main purpose of which is the avoidance of tax. In such circumstances, **section 36(1B)** CATCA 2003 provides that, notwithstanding the rule in section 36(1) CATCA 2003, the original settlor will be treated as the disponent and the disposition will be treated as the original settlement.

In addition, section 112 of Finance Act 2012 introduced **section 36(1C)** CATCA 2003 to address the granting of a general power of appointment that forms part of an arrangement the main purpose of which is the avoidance of [Discretionary Trust Tax](#). Section 36(1C) provides that the 6% and 1% charges imposed on certain discretionary trusts will not be prejudiced where the grant of a general power of appointment forms part of an arrangement the sole or main purpose of which is the avoidance of such charges to tax.

These subsections apply to gifts or inheritances taken on or after 8 February 2012.

### 3 Special Power of Appointment

Section 2(1) CATCA 2003 defines a **special power of appointment** as a power of appointment which is not a general power of appointment.

Where, as a result of the exercise of, the failure to exercise, or the release of a special power of appointment, a person becomes beneficially entitled in possession to a benefit, the person who created the power is the disponer in relation to that benefit. (**section 36(2)** CATCA 2003).

#### Example 2

Noel leaves property to his daughter Deirdre for her lifetime and after her death for such of his grandchildren as Deirdre by deed or will appoints and in default of such appointment for all his grandchildren equally.

The CAT Implications are as follows:

- As Deirdre only holds a special power of appointment over the property, she is **not** treated as having taken an absolute interest in the property for CAT purposes. CAT is payable on the taxable value of the [life interest](#) taken by Deirdre from Noel and **not** on the full value of the property.
- If Deirdre subsequently appoints the property under her will to Noel's granddaughter Anne, when Deirdre dies Anne will be liable to CAT on the basis of an inheritance taken from **Noel** (section 36(2) CATCA 2003). CAT will be payable by Anne on the full value of the property taken from Noel.
- If Deirdre fails to exercise the power of appointment, when Deirdre dies the property passes to Noel's grandchildren equally. Noel's grandchildren will be liable to CAT on the basis of an inheritance of an equal share of the property taken from **Noel** (section 36(2) CATCA 2003). CAT will be payable by each grandchild on the value of the portion of the property inherited from Noel.

### 4 Other Issues

In the past, the use of certain types of wording in wills has given rise to difficulties in this area.

For example, where a person by will leaves the residue of his or her estate to an executor "to be used by him or her as in his or her sole discretion he or she shall think fit". The intention may have been to create a discretionary trust under the will with the executor being trustee only. However, the use of this type of wording has been held to give the executor an absolute interest in the residue because of the definitions of "absolute interest" and "general power of appointment" in section 2(1) CATCA 2003. The executor would be taxed on the full value of the residue and, if he or she appoints the residue to, say, a brother of the deceased, that brother is also taxed on the full value of the residue taken by him from the executor.