



# OHT Guide

## CAT Dwelling House Relief

### Dwelling House Relief (DHR)

A CAT exemption is available under s. 86 of the Capital Acquisitions Tax Consolidation Act 2003 (CATCA 03) for the receipt by a beneficiary of a family home, provided certain conditions are met. Since 2016 the relief is largely confined to inheritances, but gifts made to dependent relatives can also qualify for the relief.

### What is a Dwelling?

A dwelling is defined as *'any building or part ... of a building ... used or ... suitable for use as a dwelling'*, and includes grounds of up to 0.4047 hectares (circa one acre) occupied and enjoyed with the dwelling. A dwelling house can be a house or apartment.

Where the property is larger than one acre the part of the garden or grounds which is most suitable for occupation or enjoyment with the dwelling will qualify for relief.

### Conditions for Relief

The following conditions must be met:

- 1) The dwelling house must be occupied by the disponer as his only or main residence at the date of his death (except where it passes to a dependent relative).
- 2) The beneficiary cannot be beneficially entitled to an interest in any other dwelling at the date of the inheritance.
- 3) The beneficiary must have occupied the dwelling continuously as his or her only or main residence throughout the period of three years up to the date of the inheritance. If the dwelling is replaced during the three year period, the beneficiary must have occupied the original dwelling and the replacement property for at least three out of the four years up to the date of the inheritance.

### Key DHR issues at the start of 2019

1. The Deane case clarified the existing law, so a beneficiary who has paid CAT but was not liable post Deane can claim a refund. In practice Revenue are only likely to accept that a refund is due where the barrier to claiming DHR was the inheritance of other dwellings in the residue of an estate.
2. There is a 4 year statute of limitations in CAT refund cases which is strictly observed by Revenue and the Tax Appeals Commission so in older cases refunds will be statute barred. To secure a refund the valuation date (generally the date of death) will need to fall into the 2014/2015 CAT year or a later CAT year.
3. It is not clear how practitioners should approach the question of drafting Wills in DHR cases where there is a second property as the law is in a state of flux.
4. Revenue are keeping strictly to the facts of the Deane case (rather than applying the ratio decidendi). They draw a distinction between benefits passing through the residue, and benefits passing as specific devises, which is not in line with the legislation or the approach taken by Costello J. Revenue ignore a second dwelling taken in a residue, but not one taken as a specific devise. There does not appear to be a legal basis for the distinction, but the Manual has an example refusing relief where a second dwelling is taken by way of a specific devise.
5. The legislation currently requires that a DHR property is the only property that a beneficiary has a beneficial interest in at the date of death. If the beneficiary does not have a beneficial interest in the property at that date (per the Deane case) the "beneficial interest" test is not met. Going forward relief may only be available on inheritances through an estate if Revenue allow an "across the board" concession on the "beneficial interest" requirement.
6. If a taxpayer is relying on a Revenue concession to secure relief, he may be excluded from the appeals process. The TAC must apply the law strictly, rather than operating concessions. If an "across the board" concession is needed to bridge a gap in legislation, there may be no effective right of appeal in many (if not most) DHR cases.

- 4) The beneficiary must retain ownership of the property and continue to occupy it as his only or main residence for six years after the date of the inheritance, unless the beneficiary is over the age of 65 years at the date of the inheritance.

Where the beneficiary or donor has moved out of the house for a period of time (prior to the benefit) because of his mental or physical infirmity, the beneficiary (or donor) will be deemed to continue to occupy the property during that period.

### Gifts to Dependent Relatives

Dwelling house relief is available on gifts (and inheritances) of property passing to a dependent relative. A 'relative' is a lineal ancestor, lineal descendant, brother, sister, uncle, aunt, niece or nephew of the donor or his spouse or civil partner.

A dependent relative is defined as an individual aged 65 years or over, or permanently and totally incapacitated by reason of mental or physical infirmity from maintaining himself. The incapacity threshold is quite high given that there is a requirement for permanent and total incapacity.

A dependent relative who takes a gift of a dwelling house is deemed to take it as an inheritance and the condition that the house must be occupied by the donor does not apply.

Prior to Finance Act 2017 this relaxation of the conditions applied to gifts only so a dependent relative who qualified for DHR on a gift would not have qualified if the benefit passed as an inheritance instead and the donor was not living in the house on the date of his death.

From 25 December 2017 the donor does not need to live in the house for an inheritance by a dependent relative to qualify for the relief.

### Revenue Guidance

Revenue provide guidance on dwelling house relief in Part 24 of the Revenue CAT manual.

The current Revenue guidance states:

*"The word "residence" is not defined and therefore has its normal meaning. This is a dwelling in which a person habitually lives and is his or her home. It follows that actual physical occupation of a dwelling house is necessary before it can be accepted that it is or was the person's residence.*

*The words "only" and "main" also have their normal meaning. Where a person owns just one residence then this is where they will habitually live as an owner occupier. Where a person has multiple residences, the "main" residence will be the one in which the person habitually lives for the majority of his or her time. Only one residence can be the only*

*or main residence at any one time i.e. the principal private residence".*

Revenue are applying a "time test" in deciding which property should be considered a main residence and it could be argued that the test of whether a property is a main residence is more than a simple "time spent" test.



### Owning More Than One Dwelling

A beneficiary cannot have a beneficial interest in more than one dwelling house if he is to qualify for relief. A foreign residential property (such as a holiday home abroad), or a rented property (such as an investment apartment) will prevent relief applying. The beneficiary is not precluded from acquiring other dwellings after the benefit is received.

Care should be taken where a property is divided into separate parts (for example a house with a granny flat or a mews at the back) where the separate parts may not form part of a single dwelling.

The relief on the main property will be jeopardised if the two units are not occupied as a single dwelling.

Finance Act 2018 (FA18) introduced a new anti-avoidance provision which deems a successor who has transferred a dwelling house into a discretionary trust, of which he is a beneficiary, to have a beneficial interest in that house on a subsequent inheritance of a further dwelling house.

### Clawback of Relief

The legislation provides that a beneficiary must continue to own and occupy the dwelling-house as his only or main residence throughout the relevant period of 6 years following the date of the benefit, if he is to retain the relief. If the dwelling is sold within the 6 year period the exemption will be clawed back. However there is a reinvestment saver so the beneficiary can move house during the 6 year retention period without losing the exemption.

The sales proceeds of the original dwelling must be used to buy a replacement dwelling and the original

and replacement properties must be occupied as the beneficiary's only or main residence for at least six out of seven years commencing on the date of the gift or inheritance.

The clawback condition will not apply if:

- The beneficiary was over the age of 65 years (previously 55 years) at the date of the gift or inheritance,
- The sale, disposal or non-occupation of the house occurs because the beneficiary needs long-term medical care in a hospital or nursing home and this is certified by a registered medical practitioner, or
- The house is not occupied because an employer requires the beneficiary to live somewhere else or because he is working abroad.

A partial clawback arises where a house that qualified for DHR is sold and the beneficiary does not reinvest the entire proceeds in another dwelling.

The clawback will be based on the relief that was granted originally, and the tax that must be repaid to Revenue is in proportion to the amount of the sale proceeds that are not re-invested.

### **Deane v Revenue**

If the residue of an estate includes another dwelling inherited at the same time as the DHR property, Revenue have in the past taken the view that the beneficiary has a beneficial interest in two dwellings at the date of inheritance and relief was not available.

However, an appeal was made to the Tax Appeals Commission (TAC) on this point and the Appeal Commissioner found in favour of the taxpayer (10TACD2017). A case was stated to the High Court and the Commissioner's decision was upheld.

The case involved a claim for the dwelling house exemption under the "old" legislation which applied up to 25 December 2016. The taxpayer inherited her family



home together with an interest in four other properties. The "old" legislation provided (in s. 86(3)(b)CATCA 03) that at the date of the inheritance the taxpayer must not be, 'beneficially entitled ... to any interest in any other dwelling-house'. There was no requirement that the taxpayer had to be beneficially entitled to the family home on a particular date.

It was held that the inheritance of an interest in the other four properties did not mean that the appellant was, as of the date of the inheritance, 'beneficially entitled ... to any interest in any other dwelling-house' (within s. 86(3)(b) of the "old" legislation), because she did not become beneficially entitled to the properties until the net estate had been ascertained. The High Court upheld the Appeal Commissioner's decision that a beneficiary's interest in the due administration of an estate is not an interest in land and is not an "interest in any other dwelling house" for the purposes of s. 86 (3)(b) CATCA 03.

While the CAT legislation deems a beneficiary to be "entitled in possession" to an interest in an estate, it is noted that this phrase was not used in the old DHR legislation and similarly, it is not used in the current DHR legislation.

### **Impact on Current DHR Legislation**

This case affects the interpretation of the current dwelling house relief legislation. In Finance Act 2016 the section was revised and now there is a requirement that the family home is "the only dwelling to which the successor is beneficially entitled".

It follows that a beneficiary needs a beneficial interest in the DHR property at the date of the inheritance (generally the date of death) to claim relief.

The Deane case clarified that a beneficiary does not have an interest in a dwelling inherited through an estate at the date of death. At that stage a beneficiary only has an interest in the due administration of the estate. It follows that a beneficiary of an estate cannot meet the strict wording of the legislation.

This issue should not affect property gifted to a dependent relative as the beneficial interest passes on the date of gift. Similarly an asset which passes by operation of law outside the estate (e.g. an interest in a joint property is taken by survivorship) would not be affected as the beneficiary becomes a beneficial owner on the date of death.

If the current legislation is not changed, the only inheritances of family homes that can meet the strict statutory test are inheritances by operation of law (e.g. survivorship or on the death of a life tenant), and inheritances from estates of dwellings in which the beneficiary already has an interest (e.g. where the deceased and beneficiary were holding as tenants in common).

### **Revenue CAT Manual**

Revenue have updated the Revenue Manual to deal with

the Deane case. It appears that Revenue are interpreting the judgement as affecting benefits passing through the residue only, and taking the approach that a second property passing by way of specific devise under a Will should be treated as beneficially taken at the date of death.

The judgment in the case was based on the terms of S. 10 Succession Act 1965, which vests the assets of an estate in the personal representative for the period of administration. The section does not distinguish between specific benefits and the residue.

Judge Costello found that the beneficiary's interest in the due administration of an estate was not an interest in land and was not an *"interest in any other dwelling house"* for the purposes of S. 86 CATCA 03. The judge went on to apply this general rule to the facts of the case, concluding that the beneficiary did not have a beneficial interest in the residue at the date of the inheritance.

As the case law does not confine the principle to an interest in the residue, Revenue's approach (which treats an interest in a specific bequest as passing at the date of death but an interest in residue as passing on the date upon which the net estate is ascertained) diverges from the judgement.

The general rule that the expenses of administration are borne by the residue can be displaced by a provision in the Will. In addition a specific devise or bequest can be abated if the asset is required by the personal representative to pay expenses of the administration (i.e. if the residue is not sufficient). In the Deane case the judge also noted that property may need to be appropriated to satisfy claims, such as a child's claim under s. 117 Succession Act 1965 or the legal right share of a surviving spouse or civil partner. As a result, estate property may become unavailable to the beneficiaries named in the Will due to the obligation to discharge these costs and expenses and the requirement to meet claims. Specific devises and bequests may be affected as well as the residue.

The Revenue Manual states that a dwelling house forming part of the residue of an estate is not to be taken into account in determining whether a successor has an interest in another dwelling house at the date of an inheritance.

It appears from the Manual that Revenue are limiting the relaxation of their previous approach to the fact scenario set out in the Deane case (i.e. dwellings passing in the residue), even though the judgement in the Deane case was more wide-ranging and was not confined to the residue, and the legislation that the decision was based on (S.10 Succession Act 1965) does not distinguish a specific benefit from the residue.

### Other Scenarios

The CAT Manual states that following the Deane judgement a dwelling house contained in the residue

## Revenue CAT Manual Examples

### Example 4

*"John inherits the family home from his father. John had lived in the house with his father for six years prior to the date of the inheritance. At the date of the inheritance he co-owns a holiday home with his three brothers. John does not qualify for the dwelling house exemption as he had an interest in another dwelling house at the date of the inheritance."*

Note: The ownership of the holiday home means John cannot meet the conditions of the relief.

### Example 5

*"Liam inherits a specific bequest of the family home from his mother, in which he lived with her for the five years preceding her death, together with an interest in additional dwelling houses in the residue of her estate. Liam did not have an interest in any other dwelling house prior to the death of his mother. He qualifies for the dwelling house exemption on the specific legacy as he does not have an interest in another dwelling house at the date of the inheritance."*

Note: The example is on all fours with the facts of the Deane case and in line with the judgement. However Liam does not have a beneficial interest in the family home at the date of death (the statutory test).

### Example 6

*"Carmel is specifically bequeathed a dwelling house from her aunt, in which she has already been living for four years. The house was her aunt's principal residence at the date of her death and at that time Carmel did not have an interest in any other house. As part of the same inheritance, her aunt also leaves a specific bequest to Carmel of a half share in a holiday cottage in Kerry. Carmel does not qualify for the dwelling house exemption as she has an interest in another dwelling house at the date of the inheritance."*

Note: Following the decision in the Deane case Carmel does not have an interest in the holiday cottage in Kerry at the date of her aunt's death so she is not precluded from relief because of the property in Kerry. She does not meet the statutory test of having a beneficial interest in the family home at the date of death, and therefore she would not be entitled to relief unless Revenue operate a concession.

will not be taken into account in determining if the beneficiary has a beneficial interest in another dwelling. It does not deal with the question of the beneficiary's interest in a family dwelling that forms part of the residue. The issue arises in the following scenarios:

- A family home which is the only dwelling inherited as part of the residue, and
- A family home and a holiday home which are both inherited as part of the residue.

The current legislation requires that the family home is the only dwelling to which the successor is beneficially entitled or in which the successor has a beneficial interest. As noted above this "beneficial interest" test cannot be met at the date of death, if the family home is inherited through an estate.

This issue would affect Example 5 in the Revenue CAT Manual, but Revenue indicate that relief would be available, so it appears that Revenue will not refuse relief solely on the basis that the statutory "beneficial interest" test is not met. Confirmation that Revenue have a concession on this point would be welcomed.

If a concession needs to be given across the board in order for the relief to operate, there would be merit in revisiting the statutory test in the legislation so that beneficiaries are entitled to the relief in law, rather than relying on Revenue concession.

#### Checklist for Refund Application In Line with Revenue Manual

- Inheritance of family home (whether by specific bequest, or devise, or survivorship), and
- Inheritance of an interest in one or more additional dwelling houses in the residue of the estate, and
- A CAT valuation date for the inheritance of the family home, that was on or after 01 September 2014 (the start of the 14/15 CAT year). As the beneficiary was in possession the valuation date for the inheritance of a DHR property would in general, be the date of death.

## Refunds

Following this judgement, it may be possible to claim refunds for cases in which a DHR claim was not made, or was refused, because another dwelling was inherited.

Refunds are only available subject to the four year limit which is set out in S.57(3) CATCA 03. This subsection restricts refund claims to 4 years from 31 October in the year in which that tax was due (essentially, 4 years from the pay & file date).

Therefore a refund may be available where the CAT valuation date (in most DHR cases, the date of death) was on or after 01 September 2014.

## Other Conditions of Relief

All of the other conditions of the relief need to be met and Revenue may seek evidence that the conditions have been met. It should be noted that the pre Finance Act 2016 version of DHR applied up to 25 December 2016.

## Timing of Refund Claim

A claim will be statute barred after 4 years from the relevant pay and file deadline. Any refund claim for valuation dates falling within the 14/15 CAT year will need to be made by 31 October 2019.

#### Checklist for Scenario in which a Protective Refund Claim may be Considered

- Inheritance of family home (whether by specific bequest, or devise, or survivorship), and
- Inheritance of an interest in one or more additional dwelling houses by specific devise, and
- A valuation date for the inheritance of family home, which is on or after 01 September 2014 (the start of the 14/15 CAT year). Again, as the beneficiary was in possession the valuation date for the inheritance of a DHR property would in general, be the date of death.

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**Caveat:** These notes are intended as a general guide to the dwelling house CAT exemption. OHT has endeavoured to provide an accurate commentary but the notes cannot cover all circumstances so OHT strongly recommends that formal tax advice be obtained before any steps are taken that may have a tax effect. It should also be noted that the Revenue approach may change over time and that the relevant legislation may be amended.