



**S**ince the coming into operation of the 1981 Finance Act, many transactions which would previously have been regarded as capital transactions may now be regarded as “Dealing in or Developing” land, attracting Income Tax rather than Capital Gains Tax. Unfortunately, because of the wide ranging nature of the legislation, there is a hazard for the purchasers of land or buildings which they should guard against.

The new provisions apply to disposals on or after 6th April, 1981, particularly of land or any property deriving its value from land (e.g. shares in a property holding company) which was acquired for the sole or main object of realising a gain and provided that the “gain” is to be regarded as income for tax purposes.

The provisions are contained in Sections 28 and 29 of the Finance act 1981, amending Sections 17, 18, 20, 21 and 22 of the Finance (Miscellaneous Provisions) Act 1968<sup>1</sup> and contain a power in the amended section 21(2)<sup>2</sup> enabling the Revenue Commissioners, if it appears to them that any person entitled to any consideration or other amount chargeable to tax under Section 20<sup>3</sup> is not resident in the State, to order the deduction of tax at the standard rate from such consideration (by applying Section 434<sup>4</sup> of the Income Tax Act 1967). Such an order could be directed at the purchaser or purchaser’s solicitor.

Apart from a purchaser’s basic difficulty in knowing whether his Vendor is a “person chargeable to tax” (as there are circumstances in which some person other than the apparent Vendor could be the person chargeable to tax), the draughtsman, in adapting Section 488 and 489 of the U.K. Taxes Act 1970, which would appear to be the source of the new provisions, has created a further difficulty by omitting any provision paralleling Sub Section 11 of Section 488 of the U.K. Act, which enables a person who is about to dispose of land to obtain a determination from an Inspector of Taxes within 30 days as to whether the gain is to be chargeable to tax as income.

It has been suggested that on an application being made for a Clearance Certificate under paragraph 11 (6)<sup>5</sup> of the Fourth Schedule to the Capital Gains Tax Act 1975, the Inspector of Taxes is being put on notice of the transaction and that if he does not then issue a direction that Section 434<sup>6</sup> is to apply to the payment, he would not subsequently be entitled to issue such a direction. However, until such a situation has come before the Courts and the matter has been determined by them, it cannot automatically be assumed that no subsequent direction could be made. Moreover, there would appear to be nothing to prevent the Inspector from issuing the Capital Gains Tax Clearance Certificate without prejudice to his right to treat the gain as income subsequently and issue a direction that Section 434<sup>7</sup> of the Income Tax Act should apply.

While the legislation provides an exemption for a private residence, it does so by reference

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1. Now Sections 640-645 of the Taxes Consolidation Act 1997 (TCA 1997)
2. Now S.644, TCA 1997
3. Now S.643, TCA 1997
4. Now S.238, TCA 1997
5. Now S.980, TCA 1997
6. Now S.238, TCA 1997
7. Now S.238, TCA 1997



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(Contd.)

to the provisions of Section 25<sup>8</sup> of the Capital Gains Tax Act. Because of this, it may not be possible for a purchaser to accept a statement by the Vendor that the premises in sale are exempt by reason of their being a private residence.

It would appear therefore that at pre-contract stage it would seem essential for a purchaser's solicitor to make enquiries as to whether the Vendor in the proposed transaction may be a person "chargeable to tax". (This matter has been highlighted by the letter from John F. Condon, published elsewhere in this issue.)

The Law Society is pressing for the introduction of a statutory provision for clearance along the lines of Section 488 Sub-Section 11 of the U.K. Act and, in the meantime, asking that Inspectors of Taxes should, as a matter of practice, on receipt of an application for a Capital Gains Tax Clearance Certificate indicate whether they propose to order the deduction of Income Tax from the consideration.