CAPITAL GAINS TAX

The Revenue Commissioners have recently confirmed to the Society that the guidelines published in the November 1979 Gazette, which are re-published below are still applicable.

Capital Gains Tax

There have been a number of queries to the Conveyancing Committee about the position of a Purchaser where the Vendor argued that a particular property was not liable for Capital Gains Tax by reason of being the Vendor's only or main residence, and declined to furnish a Capital Gains Tax Clearance Certificate.

The legal position is quite clear. The question of whether a particular transaction is or is not liable to Capital Gains Tax is not relevant. A Purchaser is not required to make any enquiries about the Vendor's tax liability nor obliged to consider any information about it that may be given to him. All that is relevant is the amount of the consideration. If it is over £50,000[1] the Solicitor for the Purchaser must insist on a Capital Gains Tax Certificate or make the deduction prescribed by the Act from the amount of purchase money paid by him.

A Solicitor should not offer or accept an undertaking to furnish Capital Gains Tax Clearance Certificates. Solicitors are reminded of the severe sanctions available against them personally if they fail to fulfil the duties imposed upon them by the Statute.

Published in Law Society Gazette, November 1979

1. Check with Revenue for current figure.

CAPITAL GAINS TAX

NEW HOUSES

Members will have noted the increasing number of new houses where the total price being paid by Purchasers exceeds £50,000 (£100,000 since. 24th May 1989)[1].

Doubts have arisen as to the need for C.G.T. Clearance Certificates in such cases. The following appears to be the position:

(1) Where there is an agreement for the purchase of a site and that agreement is separate from and unconnected with another agreement to erect a building on the site, a CGT Clearance Certificate is not required for the protection of the Purchaser unless the price of the site itself exceeds £50,000 (£100,000 since 24th May 1989)[1].

(2) An Agreement for Sale and Building Agreement which are considered sufficiently unconnected by the Revenue Commissioners to enable the Revenue Commissioners to assess Stamp Duty on the Site Value only, should also satisfy the criteria of CGT purposes.

(3) If the Contracts comprise a combined Building Agreement and Agreement for Lease or if separate contracts are interconnected, then, if the total consideration exceeds £50,000 (£100,000 since 24th May 1989)[1] the Solicitors for the purchaser must insist on getting a CGT Clearance Certificate, or make the deduction prescribed by the CGT Act 1975.

Published in Law Society Gazette, November 1979

1. Check with Revenue for current figure.

DEALING IN LAND

A NEW RISK FOR PURCHASER'S SOLICITORS

Since 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[1] and contain a power in the amended section 21(2)[2] 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[3] is not resident in the State, to order the deduction of tax at the standard rate from such consideration (by applying Section 434[4] 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 parallelling 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)[5] 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[6] 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[7] of the Income Tax Act should apply.

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

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

to the provisions of Section 25[8] 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.

Published in Law Society Gazette, January/February 1982

8. Now S.604, TCA 1997

The Revenue have given some indication of their attitude to the Provisions of Section 20, 21 and 22 of the Finance (Miscellaneous Provisions) Act 1968, as amended by Section 29 of the Finance Act, 1981, which have caused concern over the past number of years. These Sections are based almost entirely on Sections 488 and 489 of the U.K. Taxes Act 1970 but without the relieving Provisions.

Section 20[1] applies to any Gain of a Capital nature realised on or after the 6th day of April, 1981 and obtained from the disposal of land. The Section is concerned mainly with Developing or Trading in land by a Developer.

If a gain is realised in these circumstances, it is treated as Income which arises at the time the gain is realised and chargeable under Case IV of Schedule D for the period in which the gain was realised. It is regarded as being Income of the person by whom the gain was realised.

The Section should be read in detail as it defines what land is, what dealing in land is, etc.

Section 21[2] provides that where a person is assessed to tax under these provisions and the assessment arises in consequence of or in respect of consideration received by another person, the assessed person is entitled to recover from that other person any part of the tax which he has paid. If any part of the tax remains unpaid after six months from the date on which it becomes due and payable, the Revenue Commissioners may recover it from that other person as if he was the person assessed but without prejudice to their right to recover from the assessed person.

In this instance, the person who pays the tax is entitled to a Certificate specifying the amount of Income in respect of which the tax has been paid and the amount of tax paid and this Certificate is evidence in any proceedings.

The Indemnity given by the Section is of no use if the person for whom the gain is realised is a non-resident, as an Irish Revenue Debt cannot be enforced abroad. Sub-section 2 concerns the "direction" and provides that if it appears to the Revenue Commissioners that any person, entitled to any consideration or other amount and is chargeable with tax under Section 20[3] is not resident in the State, they may direct that Section 434[4] of the Income Tax Act 1967, (which provides that Income payable to a non-resident is to be paid after deduction of tax) shall apply to any such payment as if the payment were an annual payment charged with tax under Schedule D. This means that the person paying the proceeds must deduct tax at 35% before paying the proceeds over to the vendor or his Solicitor.

1. Now S.643 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

The Act gives no clear indication as to whether the Revenue Commissioners can make such a direction in retrospect. It has never been accepted by the Law Society that such retrospective direction could be made and Counsel's Opinion was obtained. The matter was then discussed fully with the Revenue Commissioners and by letter dated 19th March, 1985, they are prepared to accept that directions under the relevant provisions cannot be made retrospectively.

This means that if a Purchaser's Solicitor is satisfied that on the day of the completion of a sale, no such direction has issued, it is safe for the Solicitor to complete that transaction on receipt of a certification to that effect from the Vendor's Solicitors.

Published in Law Society Gazette, October 1985

FARM TAX

The Farm Tax Act of 1985 provided for the introduction of a new Tax on agricultural land called the "Farm Tax"; the Tax was to be an annual one, payable to the Local Authority in the whole functional area in which the land is located. The occupier of land was to be liable for the Tax calculated at a fixed sum per adjusted acre of his holding ("a taxable farm"). It was envisaged that an appropriate rate of Tax per adjusted acre would be assessed each year by the Government.

It was originally envisaged that the Tax would be fully operative from 5th April, 1986, but classification of holdings had not gone as expeditiously as the Government has hoped. The Farm Tax Commissioner and his staff initially focused on classifying farms of over 150 adjusted acres. Statutory Instrument No. 321 of 1986 provided that holdings of 150 adjusted acres and over would be liable for Farm Tax at £10 per adjusted acre. Farm Tax paid before 30th June 1989 could be set as credit against the Income Tax due for the years 1985/86, 1986/87 to 1987/88.

The Minister for Finance in his 1987 budget speech announced the abolition of Farm Tax, and enabling legislation is due to be introduced. Accordingly, Tax was payable for only the year (1986) and then only in respect of farms of 150 adjusted acres or more which were included in the 1986 Farm Classification List. The Local Authority maintains a Farm Tax Record of all farms within its functional area which are liable to the Tax. The time for appealing the classification of an occupiers farm for 1986 has expired.

Section 21 of the Act provides that Farm Tax is a charge on the lands and is to be treated as one of the burdens referred to in Section 72 of the Registration of Title Act 1964 (attaching to the land even though not registered as a burden on the Folio). The Charge is similar to that for Capital Acquisitions Tax, in that the lands do not remain charged as against a bona fide purchaser or mortgagee after the expiration of twelve years from the date on which the Tax became due.

There is an additional provision that if there is a bona fide sale or mortgage for a consideration of less than £20,000 then, if the total consideration between the parties for sale or mortgage within the previous two years do not exceed £20,000, the land should be treated as free of charge.

There is a provision for obtaining a Certificate of Discharge from the Local Authority. The Act envisages that a fee may be charged for such a Certificate. On purchasing, leasing or taking a mortgage or charge on agricultural land where the consideration or the amount of the mortgage or charge exceeds £20,000 enquiries should be made as to whether the property formed part of a holding included in the 1986 Farm Classification List. If it did, evidence of payment of the Tax should be obtained. It should be noted that in assessing the

liability of a farm to Farm Tax, the Commissioner has regard to all the lands occupied by the farm, even though these might be registered on a number of different Folios or located many miles away from each other. This being the case, it would not be sufficient for a purchaser/lessee/mortgagee merely to check whether the lands acquired formed part of a Folio comprising less than 150 acres.

Enquiries must be directed to the totality of the vendor/lessor/mortgagor's lands.

When purchasing, leasing or taking a mortgage or charge of agricultural land where the consideration exceeds £20,000 it is suggested the following Requisition be raised:

Is the property part or all of a Taxable Farm within the meaning of Section 3 of the Farm Tax Act, 1985? If so, and the consideration/mortgage debt exceeds £20,000 either:

(i) in this sale/mortgage or

(ii) in the aggregate of this and previous sales/mortgages in the last 12 years between the parties furnish a certificate of Discharge from Farm Tax for 1986.

It is understood that proceedings challenging the constitutionality of the Farm Tax legislation have been instituted in the High Court. While it is understood that some District Justices have adjourned summonses brought under legislation, purchasers solicitors would of course still be advised to make the appropriate enquiries.

NOTE: Farm Tax was levied only for the Tax year 1986/87

Published in Law Society Gazette, November 1987

GIFTS AND INHERITANCES BETWEEN SPOUSES, TRANSFERS BETWEEN SPOUSES, EVIDENCE OF STATUS

Inheritances between Spouses have not been liable for Inheritance Tax since the 30th January 1985 (Section 59 Finance Act 1985) and Gifts between Spouses have not been liable to Gift Tax since the 31st January 1990 (Section 127 Finance Act 1990). The relevant provisions of both Finance Acts provide that not only are the Gifts and Inheritances exempt from C.A.T., but also that they will not be taken into account in computing liability for Tax on other Dispositions.

The Revenue Commissioners have taken the view that as the Gifts and Inheritances are exempt from Tax there is no necessity to obtain a Certificate of Discharge from Capital Acquisition Tax. The Conveyancing Committee have been asked for their Opinion on this practice and are in agreement with it subject to the Vendor producing evidence that the Parties to the Gift or Inheritance were in fact Spouses at the date of the disposition. It is considered that this evidence should consist of a Statutory Declaration, confirming that the parties were spouses at the date of the gift or date of the death. Such declaration should exhibit the Marriage Certificate of the Parties which Declaration in the case of a Gift should be made by both Parties to the Gift and in the case of an Inheritance by the surviving Spouse. This Declaration should be retained as part of the Title Documents.

Section 114 of the Finance Act 1990 provides that where the property is transferred between Spouses no Stamp Duty should be payable on the Instrument. The Adjudication Office of the Revenue Commissioners have adopted a practice of returning un-adjudicated Deeds of Conveyance and Transfer between Spouses on the basis that adjudication is not required. Having regard to the fact that the exemption from Duty only applies where the Parties are Spouses the Committee consider that such Conveyances and Transfers should be accompanied by a Statutory Declaration of the Parties exhibiting their Marriage Certificate and confirming that they were Spouses as at the date of the Disposition.

Published in Law Society, June 1991

GIFTS AND INHERITANCES BETWEEN SPOUSES

Since publication of the Practice Note in the June 1991 issue of the Gazette it has come to the attention of the Taxation and the Conveyancing Committees that the Revenue Commissioners take the view that notwithstanding the provisions of Section 127 of the Finance Act, 1990 there are circumstances where a charge to CAT may arise in a gift between spouses, or as a result of a prior gift between spouses.

Section 8 of the Capital Acquisitions Tax Act, 1976 provides where a donee takes a gift from a disponer and within three years a further disposal of the gift takes place the beneficiary of the second gift is deemed to take the gift from the original disponer.

For example, if a parent gives property to his son who subsequently transfers the property into joint names of himself and his spouse within three years of the first gift, the Revenue Commissioners have made it clear that they may regard this latter transaction as a gift between parent-in-law and daughter-in-law, to the extent of half the property.

Furthermore, if a wife gives property to her husband, who subsequently transfers the property into the name of his parents within three years of the first gift this latter transaction would be deemed to be a gift between daughter-in-law and parents-in-law.

Section 8 only applies to gifts and is an anti-avoidance provision.

In the context of family settlements one must be wary of any inter vivos disposals within three years of the proposed disposal, as these may be caught by the provisions of Section 8 of the Capital Acquisitions Tax Act, 1976.

To avoid the provisions of Section 8 one must either await the elapse of the three year period or in the alternative dispose of the property by will.

This anti-avoidance provision also related to gifts made within three years before the date of the gift. It may be possible that the Revenue Commissioners may accept that the subsequent gift does not come within the provision when the subsequent gift was not connected with the first gift.

Taxation Committee

Published in Law Society Gazette, July/August 1992

CERTIFICATES OF DISCHARGE FROM CAT

A number of queries have been received by the Conveyancing Committee with regard to the acceptability of conditional Certificates of Discharge from Capital Acquisitions Tax (CAT) where the time limit has expired.

A conditional certificate provides that, in the event of any variation from the market value accepted for tax on any portion of the property covered by it, occurring as a result of a sale or compulsory acquisition within a period of (in the case of agricultural property) six years, and, (in the case of other property) three years, the taxable value of the gift/inheritance may be subject to adjustment.

The argument has been made that, where a vendor is disposing of property and holds a certificate of conditional discharge, there is no necessity for an absolute certificate if the disposition occurs outside the time limit specified in the conditional certificate on the basis that the condition has withered. The difficulty with this argument is that it does not take account of the possibility of a prior transfer of *part* of the property which may have taken place within the limitation period. If this occurs then, although the subsequent disposition may have taken place outside the limitation period, a liability for tax may attach to it as a result of the earlier disposition.

It is the view of the Conveyancing Committee that a purchaser should not be obliged to enquire into the existence of earlier dispositions and is entitled in all cases to an absolute Certificate of Discharge from CAT. The vendor's solicitor should experience no difficulty or delay in obtaining such a certificate provided, of course, that no tax is payable.

Purchasers' solicitors will keep in mind, however, that property comprised in a taxable gift or taxable inheritance shall not remain charged as against a bona fide purchaser or mortgagee for full consideration after the expiration of twelve years from the date of the gift or inheritance (section 47 Capital Acquisitions Tax Act, 1976).

Published in Law Society Gazette, September 1993

RESIDENTIAL PROPERTY TAX/ PROBATE TAX

REQUISITIONS ON TITLE

The Conveyancing Committee recommends that the following additional requisitions be raised.

(a) Residential Property Tax

Where the property in the sale consists in whole or in part of residential property as defined in Section 95 of the Finance Act, 1983 and the consideration exceeds the residential property tax threshold furnish:-

(i) Certificate of Clearance from residential property tax (form RP50A);

(ii) Certificate of Discharge from residential property tax where there has been a transfer between spouses after 17 June, 1993.

(b) Probate Tax

Where the property in the sale has passed under a will or intestacy after 17 June, 1993, furnish Certificate of Discharge from Probate Tax in respect of the property.

Published in Law Society Gazette, November 1993

RESIDENTIAL PROPERTY TAX

The Conveyancing Committee has been requested to publish to the profession the following practice note by the Revenue Commissioners

'Residential property tax: certificate of clearance

Practitioners are no doubt aware that residential property tax has been abolished with effect from 5 April 1997. However, the existing tax clearance arrangements in the case of sales of houses above a specified value threshold are being maintained.

The value threshold relating to the residential property tax certificate of clearance procedure is £115,000 in 1997.

Tax clearance procedure

The new threshold, which relates exclusively to the tax clearance procedure, applies to house sale contracts executed on or after 5 April 1997. From that date, where the sale consideration for residential property exceeds £115,000, the vendor must provide the purchaser with a certificate from the Revenue Commissioners indicating that all residential property tax due for years for which the tax was in operation has been paid. Otherwise the purchaser must deduct an amount ('specified amount') from the purchase price and remit it to the Revenue Commissioners.

Applications

Practitioners are once again requested to make applications for residential property tax clearance certificates **immediately** a contract for sale is executed and **well in advance of the closing date**. Failure to submit an application until days before the closing of a sale will prejudice the timely issue of the clearance certificate.

It should be noted that where a certificate of clearance is not furnished by a vendor on the closing of a sale, and the sale consideration exceeds £115,000, the purchaser is obliged to deduct a 'specified amount' from the consideration and to pay it over to the Revenue Commissioners. The specified amount is 1.5% of the difference between the sale price and the market value exemption limit (as at the previous 5 April), multiplied by the number of years that the vendor has owned the property, up to a maximum of five years. It is **not** acceptable for a vendor to give an undertaking to a purchaser that a certificate of clearance from residential property tax will be provided **after** the sale has been closed.

A leaflet (RP5) relating to the operation of the certificate of clearance from residential property tax is available from tax offices or from the Capital Taxes Division in Dublin Castle. Assistance or information regarding the clearance certificate may be obtained by calling (01) 6792777, exts 4308, 4626 and 4628.'

Published in Law Society Gazette, December 1997

RESIDENTIAL PROPERTY TAX

The Conveyancing Committee has received the following notice from the Revenue Commissioners in relation to certificates of clearance in respect of residential property tax:-

"RESIDENTIAL PROPERTY TAX
CERTIFICATE OF CLEARANCE

While Residential Property Tax was abolished with effect from 5th April 1997, a Clearance Certificate procedure remains in place in relation to the sale of certain residential properties to assist the Revenue Commissioners to collect outstanding tax.

The value threshold relating to the Residential Property Tax Certificate of Clearance has been increased to €438,000 in accordance with the "indexation" provisions in the legislation.

The new threshold, which relates exclusively to the tax clearance procedure, applies to house sale contracts executed on or after 5th April 2002. From that date, where the sale consideration for residential property exceeds €438,000 the vendor must provide the purchaser with a Certificate from the Revenue Commissioners indicating that all Residential Property Tax due for years for which the tax was in operation has been paid."

Published in Law Society Gazette, May 2002

CAT CLEARANCE CERTIFICATES

The Conveyancing Committee recently made inquiries with the Revenue Commissioners' Capital Taxes Division regarding the CAT clearance certificate and the status of the letter attaching CAT to the proceeds of sale rather than to the property. The committee had asked if, having obtained such a letter attaching CAT to the proceeds of sale rather than to the property, a purchaser would still require production of the CAT clearance certificate at a later date. The Revenue Commissioners have replied along the following lines:-

"Section 60 (1) of the Capital Acquisitions Tax Consolidation Act, 2003 states that the tax due in respect of a taxable gift or inheritance shall be and remain a charge on the property of which the taxable gift or inheritance consists at the valuation date. If property is sold in the course of administration prior to the valuation date, Revenue will, on request, issue a letter discharging the property from the CAT charge and attaching the charge instead to whatever assets represent the proceeds of sale of the property at the valuation date.

The issue of this letter is confirmation from Revenue that there is no charge to CAT attaching to the property disposed of. Therefore any purchaser is fully protected and the production of a CAT clearance certificate is not required."

In relation to such letters attaching CAT to the proceeds of sale, it is up to both vendors' solicitors and purchasers' solicitors to ensure that this letter is used only in appropriate circumstances i.e. where a sale of the property takes place in the course of administration prior to the valuation date.

Published in Law Society Gazette, November 2003