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Taxation--A Discussion of the 1954 Capital Gains Provision Pertaining to Subdivision of Realty

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COMMENTS

TAXATION – A DISCUSSION OF THE 1954 CAPITAL GAINS PROVISION PERTAINING TO SUB-DIVISION OF REALTY

By VARTKES MIROYAN

This comment deals with the tax law regarding subdivision of realty as interpreted prior to the 1954 code, and the possible effect and interpretation of the wholly new section 1237, regarding subdivision of realty

Under the tax law prior to 1954 an individual who made an occasional sale of realty was certain to receive capital gains treatment.[1] However, the frequent seller was never sure whether his profit would be given capital gains or ordinary income treatment.[2]

Even though they appeared nowhere in the statutes the courts used the words "dealers" and "investors." They held that a "dealer" fell outside of the capital gains provisions, and his gains were treated as ordinary If the taxpayer were treated as an investor rather than a dealer and his gain were treated as a capital gain, the more favorable tax consequences would follow

The language in section 117(a)(1) provided that realty is a capital asset, and is to be given capital gains treatment, unless the taxpayer holds the property primarily for sale to customers in the ordinary course of his trade or business. The question of whether realty can be held as inventory in a trade or business will not be discussed in this article, as the essence of this comment is to consider subdivision of realty and how the old law, *i.e.*, pre-1953 law, has been modified.

The basic purpose of section 117 was to alleviate the tax burden on long term gains. That is, where due to holding the property for a considerable period there had been an increase in market value, a heavy burden would be imposed if the property were sold and taxed as ordinary income.[3] The problem was to know before the sale whether one was going to be classified as a dealer or an investor. It was counsel's job to advise on this point.

Some factors, listed below, are used by the courts in determining whether one is a dealer or an investor: (1) Purpose or reason of taxpayer's acquisition and sale; (2) occupation of the taxpayer; (3) the number, frequency and continuity of sales; (4) extent to which taxpayer or his agents may engage in sales activities, by developing or improving the property or soliciting customers and advertising

It was held in the *Thrift* case[4] that: "No one of these tests can be regarded as determinative, but, the question must be viewed in the light of all pertinent factors, and particularly the facts of the individual case."

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[1] Thomas E. Wood v Commissioner, 16 T.C. 213 (1951).

[2] C. E. Mauldin v. Commissioner, 16 T.C. 698 (1951).

[3] *Hearings before Ways and Means Committee on H.R. 350,* 67th Cong., 1st Sess. 10 (1921).

[4] W T. Thrift v. Commissioner, 15 T.C. 366 (1951).

It is obvious that with this as the court's approach, it will be difficult to reconcile many of the cases, and beyond that, to be able to forecast with reasonable certainty the result of a particular case on which counsel is asked to advise. Let us consider these factors.

(1) *Purpose or reason of taxpayer's acquisition and sale*

A mere general hope of sometime selling at a profit, with no specific plan for doing so, indicates an investor. The taxpayer's intent must be a general intent to hold the property, and to sell sometime in the future for a profit. In *Phipps v. Commissioner*,[5] the taxpayer purchased a tract of Florida land and divided it into lots and made extensive improvements, such as roads and utilities. Sales were made through local brokers. Aside from the above the taxpayer was completely passive and had turned the matter over to an employee, who spent the greater part of his time in New York receiving isolated offers through brokers. Persons with large incomes often invest surplus funds in land with the intent to sell it when a good price is offered. It was held that a such an intent or expectation of gain does not convert sales of land into a "trade or business."

There should be a greater continuity and larger absorbtion of the taxpayer's time in such transactions to indicate that the taxpayer is more than an investor.[6]

In *Carol Marks and Company v. Commissioner*,[7] it was held that the original status of the property and intent of the taxpayer is not determinative of the question of whether it was, at the time of its sale, held for investment purposes or for sale to customers. The crucial factor to consider in determining the character of the property in question is the purpose for which it was held during the period in question, *i.e.*, in the taxable year or years under consideration.

In *Richards v. Commissioner*[8] the taxpayer, through an agent, was engaged in subdividing and selling lots for profit. The court found a business, although the taxpayer had never personally taken part in the sales, and although the original purpose of the acquisition had been for truck farming. The later formed intent to subdivide and sell for profit was sufficient to make the profit from these sales ordinary income, and not gain from the liquidation of a capital asset. A close observation of the facts of the *Phipps* and *Richards* cases will show insufficient differentiation for the courts to reach opposite results. The *Richards* case is a 9th Circuit case, and said circuit has usually "accommodated" the Commissioner's requests.

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[5] 54 F.2d 469 (2d Cir. 1931).

[6] *Accord*. Pope v. Commissioner, 77 F.2d 599 (6th Cir. 1935), Corker v. Helvering, 91 F.2d 299 (2d Cir. 1937).

[7] 12 T.C. 1196, 1202 (1949).

[8] 81 F.2d 369, 106 A.L.R. 249 (9th Cir. 1936).

(2) *Occupation of the taxpayer*

In *Hay v Commissioner,*[9] the taxpayer was in more than one business, including buying and selling real estate. He was held to be a dealer, as his property was held primarily for sale purposes, and therefore his gains were held to be ordinary income.

In *Gruver v Commissioner,*[10] the court held that while the circumstance that the taxpayer is in the real estate business is not determinative of the question whether he held the property primarily for sale to customers, an intent on the part of the taxpayer to attract customers may be *inferred.* The gain was treated as ordinary because of the intent, activity, and occupation of the taxpayer.

In *Burman v. Commissioner*[11] and *Welch v. Commissioner,*[12] where the taxpayers were either real estate brokers, or associated with brokerage firms regularly, their sales and gains were held to be ordinary income.

Thus, gain may be held to be ordinary income, even though the taxpayer was engaged in two or more businesses, and the business of selling real estate was not his principal occupation.[13] It is evident that the occupation of the taxpayer is an important factor. The commissioner must balance the factor of investment with an intent to sell in the future, against investments by individuals with an intent to buy and sell property at a profit continuously Any connection with real estate activities passive or active seems cause enough to warrant the denial of capital gain treatment.

(3) *The number, frequency and continuity of sales*

In the *Wood* case,[14] the taxpayer did not attempt to develop the property, nor did he put for sale signs on the property It was not advertised, nor was the taxpayer personally active as an agent or licensed as a real estate broken. After holding the property for four years he sold eleven lots. The court found that the property was not held primarily for sale to customers under section 117 and that the gains should be treated as gain from the sale of a capital asset. Where the sale of lots is in the nature of a gradual and passive liquidation of an asset, it is not considered "doing business" within section 117[15] From an analysis of the cases it appears this is a rather poor test, although it is often emphasized. Cases where a considerable number of lots were sold have been given capital gain treatment, along with cases where a few lots were sold.

In *Brown v. Commissioner,*[16] the taxpayer acquired 500 acres of land

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[9] 25 B.T.A. 96 (1932).

[10] 42 F.2d 363 (4th Cir. 1944).

[11] 23 B.T.A. 639 (1931).

[12] 19 B.T.A. 394 (1930).

[13] Snyder v. Commissioner, 295 U.S. 134 (1930).

[14] See note 1 *supra.*

[15] Thompson Lumber Co. v. Commissioner, 43 B.T.A. 726 (1941), Frieda E. J. Farley v Commissioner, 7 T.C. 198 (1946).

[16] 142 F.2d 468 (5th Cir. 1944), *accord.* Spanish Trail Land Co., 10 T.C. 430 (1948).

from her husband by devise. In order to sell the land, the taxpayer was commercially compelled to sub-divide the acreage. Because of her lack of knowledge and business ability, she put the details in the hands of a real estate broker. Streets, sewers and utilities were made as improvements. Eighty lots were sold. While the taxpayer did not personally conduct the business of selling lots, she did conduct it through another. She sold to all comers, subdividing and developing to attract purchasers. Sales were not isolated, but were continuous. Gains were held to be ordinary rather than capital gains.

In *Snell v. Commissioner*,[17] the court found that the taxpayer was not reselling the land in the condition in which he bought it, but was subdividing and platting it, and sometimes improving it, so as to make wild lands into town lots. All of this was done with such purpose, system, and continuity as to support taxation of the proceeds at ordinary rates.

(4) *Extent to which taxpayer or his agent may engage in sales activities, by developing or improving the property or soliciting customers and advertising*

If the taxpayer has been active in promoting the sales of his properties, he will probably be held to be a dealer.[18]

In *C. E. Mauldin v. Commissioner*,[19] the taxpayer purchased 160 acres within one mile of a city for grazing purposes. Four years later he platted the land for sale in lots. He continuously held the lots for sale and did, in fact, sell lots for 21 years, while engaging in other business activities. From 1940 to 1945 he changed the plats, donated lots, and devoted only enough time to act on offers presented to him. During this time he was regularly engaged in the lumber business. The court found that the lots were held by the taxpayer primarily for sale to customers in the ordinary course of his business within the meaning of section 117, and therefore the gain was includible in full in the taxpayer's gross income.

As was seen in the case of *Richards v. Commissioner*,[20] the taxpayer through an agent, subdivided lots. The agent did all the normal things an active broker would do to dispose of the property. The court treated the taxpayer as a dealer and the gain was held to be taxable as income.

The *Thomas E. Wood* case[21] is an example of what the taxpayer should avoid. The taxpayer *should not,* develop the property, advertise, be active personally, put up "For Sale" signs, or be a real estate broker. The taxpayer should be as passive as possible and refrain from any active sales efforts and promotion.

Under the 1939 Code, each case turned on its own particular facts. Each case was virtually one of first impression, because it had facts which could be distinguished by the courts from past cases.

17 97 F.2d 891 (5th Cir. 1940).
18 Ehrmann v. Commissioner, 120 F.2d 607 (9th Cir. 1941).
19 See note 2 *supra*.
20 See note 8 *supra*.
21 See note 1 *supra*.

The 1954 I.R.C. enacts the rule found in section 1237 This section had no counterpart in the 1939 Internal Revenue Act. The section pertains to the subdivision of realty, and how capital gain treatment may be obtained.

The cases in the discussion above were mostly cases on subdivision. Unfortunately, under the old law it was almost an impossibility for an individual to subdivide land he had held for investment a number of years without being subject to having the gain treated as ordinary income. As a practical matter, for a subdivider to sell his raw lots, he must put in the utilities, roads, grade some of the lots, fill in others, put banners around the area, advertise the lots in the local papers, and employ salesmen or real estate brokers. In short he must use every possible advertising technique to sell his lots. It is conceded that there is the rare case where the subdivider merely has to have a plat made and then sit back and accept offers. Cases discussed carlier in this article bear that fact out.

Unfortunately, all of the above activity is active conduct and may bring the taxpayer within the "dealer" category What should you advise your client? Be as passive as a turtle out of water on a hot day What will this do for your client? He will probably have the property on his hands for his lifetime, if he wants capital gains treatment. If he does not mind having the gain taxable as ordinary income, he can sell immediately, even though this might be confiscatory

To be reasonably certain of being held an "investor" the taxpayer under the old law should.

(1) on purchase of the property, have a general intent to hold the property forever.
(2) have complete passivity in sales activities, individually or through agents acting on his behalf.
(3) not hold a license as a real estate broker, or engage in real estates activities in any way
(4) not advertise, solicit, etc.
(5) sell as few lots as possible in a given year.
(6) hold the land for a reasonable length of time.

From the above, it is obvious why various interests wanted to have this area of the law changed or at least clarified. Bills were presented, sections protecting real estate brokers on property held for investment were passed, hearings were had, and all culminated with the utterly dissatisfactory section 1237 This section will probably do more harm than good, because if one does not come specifically within the section, he will be faced with the problem of whether the court will construe the section strictly or broadly If the taxpayer is not within the section, then is he bound by the law in effect prior to the section?

On the legislative aspect of section 1237, Mr E. Hienstand,[22] a Repre-

[22] Mr. E. Hienstand, Representative from California: *Hearings before the Committee on Ways and Means,* 83d Cong., 1st Sess. 1069 (1954).

sentative in Congress from California, presented among other bills H.R. 6256 providing:[23]

> "This is an amendment to Section 117, adding (q), the recognized gain or loss from the sale or exchange of any real estate which is described in Section 117(a)(1)(A) and which has been held for more than two years, shall be considered as a gain or loss (as the case may be) from the sale or exchange of a capital asset, held for more than 6 months."

This Bill never passed a reference to the Committee of Ways and Means, possibly because of its broad implications. It was Mr. Hienstand's opinion that such a provision would increase income to the Treasury because properties otherwise frozen, due to the fact that the profit on their sale would be classified as ordinary income, would now be sold. He felt that the real estate investor was being discriminated against, since investors in securities, who were also dealers, were able to keep separate investment accounts, and the dealers in real estate had no such statutory privilege.

In the same hearing E. J. Grassman,[24] engineer, related how he invested his savings in realty as investments. Two years prior a corporation had presented him an offer for property he had held for 30 years. Since the offer called for subdivision of the lands and the construction of roads, he declined the offer. Reason being, his basis was $40,000 and the price offered was near $500,000. The prospect of possibly paying a tax on $460,000 ordinary gain, would have been so confiscatory, that the offer was rejected.

With the intent to alleviate this type of problem and those already demonstrated in the earlier pages, Congress enacted section 1237 into the I.R.C., pertaining to individuals who subdivide realty into lots. By adhering to this section the gain will be treated as capital gain. It is the author's belief that the intention of Congress was not to open up the area so as to include dealers, as many advocates of the bill wanted, but the congressional intent was to restrict the new provision to a definite minority group who, because of activity, etc., might have been treated as "dealers" under the old law For this group this section was drafted. It is believed that the section was designed to aid those who held property as investment and where the only way to dispose of it at a fair price was to subdivide.

What special circumstances are necessary to bring an individual within the new section? The sale of a lot or parcel from a tract of real property by an individual (corporations are specifically excluded), shall not be ipso facto regarded as the sale of the taxpayer's stock in trade, simply because the sale was one of a subdivision, or of sales activity connected with the sale. It is suggested that "individual" does not include dealers, contractors, speculators, etc. However, it is arguable that the word is used in a restrictive sense, since corporations were specifically excluded and if dealers were also intended to be excluded from the benefits of this section the statute

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[23] H.R. REP. No. 6256, 83d Cong., 1st Sess. (1954).

[24] Edward J. Grassman, Consulting Engineer, New Jersey· *Hearings, supra* note 22.

might have so stated. Sales activity includes advertising, expenses of agents and the like.[25]

Notice the break away from the past law in that sales activity and sale of subdivided property will not by itself deny the taxpayer the beneficial rate. Sales outlays of a permanent nature such as cost of a real estate office, which would be usable for selling real property, are evidence that the property is, or was being held primarily for sale to customers, rather than for investment.[26] Sales activity with regard to other real property, such as subdividing other property, shall be taken into consideration in determining whether the specific property in question has ever been, or is being held for sale to customers in the ordinary course of trade or business.[27] Thus, if the taxpayer has engaged in several subdividing activities in one taxable year, he may, despite this section, be held to be a dealer in real estate on the basis of his activity as a whole.[28] He felt that the real estate investor was being discriminated against, since investors in securities, who were also dealers, were able to keep separate investment accounts, and the dealers in real estate had no such statutory privilege.

Subsection (a)(1) makes the general rule in section 1237 inapplicable in two situations: first, a taxpayer cannot take advantage of this section if he previously held the property for sale to customers in the ordinary course of trade or business. However, this provision will not operate against the taxpayer, if in the prior year in which he was deemed to have held the property for sale to customers in the ordinary course of business, he would have been entitled to make use of the provisions of this section. Second, if the taxpayer in the year in which he sells subdivided lots holds other real property for sale to customers in the ordinary course of trade or business, he is denied the benefits of this section as to the tract of land he is presently subdividing [29] This provision automatically takes real estate dealers, etc., out of this section, and shows an intent to have the statute operate on what were the borderline cases under the old law

Subsection (a)(2) denies the benefits of section 1237 to the proceeds from the sale of lots on the original tract of real property, if

(a) the particular lots sold were substantially enhanced in value, as a result of a substantial improvement (anywhere *on* the tract)

(b) or if such substantial improvement was made by the taxpayer, or deemed to be made by the taxpayer.[30]

An improvement is deemed to be made by the taxpayer, if it is made by a member of his family, by a corporation controlled by the taxpayer, or by

25 P-H., INT. REV. CODE ¶ 1237 (1954).

26 *House Committee Report on the Internal Revenue Code of 1954*, 5 U.S. CODE CONGRESSIONAL AND ADMINISTRATIVE NEWS 964 (1954). House Bill Section 1238, finally enacted as INT. REV. CODE § 1237

27 See note 25 *supra*.

28 See note 26 *supra*.

29 See note 25 *supra*.

30 *Ibid.*

a partnership in which the taxpayer is a partner. If an improvement is made by a lessee under such circumstances that it is income to the taxpayer, then the improvements are taxable as ordinary income in an amount equal to the fair market value, as they are deemed to be made in lieu of rent.[31] If an improvement is made by the federal government, or a state or local government, and such improvement increases the taxpayer's basis, as in the case where the taxpayer capitalized a special assessment which is used to pave a street, the improvement is considered and deemed to have been made by the taxpayer.[32]

Under this subsection two questions must be considered:
(1) did the taxpayer make or is he deemed to have made the improvement?
(2) if there is an improvement, is it substantial?

The first question may have an obvious answer. Where a sham is shown, the tax court will look through the form to the substance. However, the second question presents the most complex problem of this new section. What is a substantial improvement? A particular improvement could easily increase the value of some lots, and not others. Only the lots substantially increased in value would be disqualified from the benefits of this section, and not the remaining lots on which no improvement was made directly or indirectly.[33]

Suppose the tract of real property had previously been a farm. If the taxpayer erected a barn on the property it would probably not increase the value of any lot not improved by the barn.[34] Therefore, all lots will not be disfavored. This is substantiated by the Conference Committee Amendment, which specified that to disqualify a lot or parcel, the improvement must substantially enhance the value of the particular lot sold.[35]

We know from the language of the code that sales of subdivided lots will not qualify for capital gains benefits under section 1237, if such lots were substantially enhanced in value as a result of a substantial improvement made anywhere on the tract. Examples are a shopping center, paved roads, sidewalks and public utilities, made as improvements by the taxpayer.

However, this section does not deny its benefits to a taxpayer if improvements are made on adjacent property, although such improvements would indirectly enhance the value of the taxpayer's property and enable him to subdivide his property and sell at a greater profit.

The following permissible improvements set out in the reports of the House and Senate, previously referred to, indicate that if the improvement is minor in character, or results in a slight enhancement in value of the lots sold, the commissioner will probably not disallow capital gain treatment.

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31 I.T. 4009.

32 16 CCH Fed. Tax Rep. (1954).

33 See note 25 *supra*.

34 See note 26 *supra*.

35 *Conference Committee Report on the Internal Revenue Code of 1954*, 14 U.S. Code Cong. and Admin. News (1954).

Permissible improvements include. (1) clearing operations, and (2) construction of minimum all-weather "access" roads to each lot sold. Such road may be made of gravel, if weather conditions require it in the particular area. This does not include a paved road.[36]

Although the above improvements are not substantial in and of themselves, they do result in substantial increase in the value of the lots so improved. Nevertheless, they are permissible.[37]

Subsection (a)(3) requires that the taxpayer, to avail himself of the benefits of section 1237, the particular lot or parcel sold must have been held for a period of five years. However, if the lot or parcel was acquired by inheritance or devise, no holding period is imposed, other than the provision that applies to all capital assets, namely, the capital asset must be held for more than six months in order to get the benefit of having the gain treated as a long-term capital gain.

Does this section mean that, unless acquired by inheritance or devise, all other holding periods must be for five years? What effect will be given an intervivos gift? If the statute is exclusive, the holding period would have to be five years. This is probably the case. Otherwise, members of a family would make completed gifts of property held less than five years to other members of the same family, and subdivision could take place before five years.

Assuming that the taxpayer does come within the general provisions of the section, how will the gain from the sale or sales be treated?

Subsection (b) provides the rules for computation of tax on the sale of lots which qualify under subsection (a) (1) If the taxpayer has not made more than five sales of lots from a single tract at the end of a taxable year, the entire proceeds from the sale will be treated as the amount realized upon the sale of a capital asset.[38] Thus, if the taxpayer sold two lots in 1954 the proceeds from the sales will be treated as the amount realized upon the sale of a capital asset. If three more lots were sold in 1955 the same rule would be applicable. (2) *All sales made during* or after the year in which the sixth lot from a single tract is sold or exchanged will come under a special 5 per cent rule.[39]

Assume that the taxpayer subdivids a tract of land in 1955 and sells three lots for $1,000 each. Each lot having an adjusted basis of $600, leaving the taxpayer with a long term capital gain of $400 on the sale of each lot. The $400 would be treated as amounts realized from the sale of a capital asset if section (a) and its subsections had been complied with.

Suppose further than in 1956, the taxpayer sells five more lots, making the same amount of gain. If more than five lots in the same tract of real property are sold or exchanged, gain which occurs in or after the taxable

[36] See note 25 *supra*.

[37] *Senate Committee Report on the Internal Revenue Code of 1954,* 12 U.S. CODE CONG. AND ADMIN. NEWS (1954)

[38] See notes 25 and 32 *supra*.

[39] See note 25 *supra*.

year in which the sixth lot is sold or exchanged, shall be deemed to be gain from the sale of property held primarily for sale to customers in the ordinary course of trade or business to the extent of 5% of the selling price.[40] The selling price is the full amount received, not reduced by selling expenses.[41] Thus, 5% of $1,000 or $50 of the gain on the sale of each lot is ordinary income. The balance or $350 is treated as long-term capital gain. Notice that 5% of all lots sold in the year the sixth lot was sold are subject to the 5% rule. It would be advantageous to sell five lots in one year and get the sixth lot in another year, rather than selling one lot in one year, and nine in another, because the latter nine would be subject to the 5% rule.

Subsectio (b)(2) provides for allocation of the expenditures of sale. To wit: (1) expenditures may be taken as a deduction from gross income in determining taxable income only to the extent that the gain was reported as ordinary income, and (2) the remainder of the expenditures will be offset against the selling price to determine the amount realized on the sale of a capital asset.

Thus, suppose in 1954 the taxpayer subdivides an unimproved tract of land and sells lots for $2,500 each. The basis allocable to each lot is $1,500. Selling expenses are $175 for each lot. Of the gain on each sale, 5% of $2,500 or $125 is ordinary income. Note—no such rule is applicable for the first five lots. The taxpayer will be allowed to deduct from gross income $125 of his expenses with regard to each lot on which the special 5% rule applied. The remaining $50 will be offset against the selling price and will reduce the capital gains. The gains on the sale of each lot would be $825. That is, $2,500 minus $50, minus $1,500 basis, minus $125 ordinary income.[42]

The statutory provisions extend capital gain benefits to those who are subdividers. There is no mention of losses. How are they to be taken? If the loss is one on the sale of a capital asset, it is allowed as a deduction only to the extent of the gains from such sales or exchanges, and against ordinary net income of the taxpayer or $1,000, whichever is smaller.[43] If the taxpayer seeks to take the loss as an ordinary loss, it would seem that he should have to prove that he is not within section 1237, and that he is a "dealer."

Subsection (b)(3) was added by way of amendment by the Conference Committee,[44] and is an exception to the general rule found in 1237(a)(3) Only property held by the taxpayer for five years and on which the taxpayer makes no substantial improvement (a)(2) is within the scope of this section.

Under this amendment (1) if the lot or parcel is held by the *T* for a

40 *Ibid.*

41 See note 32 *supra.*

42 *Ibid.*

43 INT. REV. CODE § 117(d)(2) (1939), INT. REV. CODE § 1211(b) (1954), U.S. Treas. Reg. 118, § 39 (1943).

44 See note 35 *supra.*

period of 10 years, and (2) if the improvement made is the building or installation of water or sewer facilities or roads (which improvement would be a substantial improvement under (a)(2), and (3) if it is proved that the lot or parcel so improved would not have been marketable at the prevailing local price for similar lots without such improvement, and (4) if the *T* elects to make no adjustment to basis, the improvement shall not be deemed substantial, and the *T* will have the benefits of this section.

This is the "Necessary Improvements" section, *i.e.*, it is necessary to make such improvements to get top market value for the lots.

Assume lots of the type *T* has are marketable at the local price of $2,500. Adjusted basis is $500. Due to the lack of roads and utilities the *T* can only realize $1,000 per lot. Under this section *T* can improve each lot substantially with roads and utilities and avail himself of the local price and still have the gain treated as capital gain. However, he must make no adjustment to the basis of the property or other property for the cost of such improvement. Will the cost of the improvements be completely denied in computing the gain, or will they be handled as other expenditures of sale, outlined in (b)(1) and (2)?

This subsection affords the *T* who has held the property for 10 years or more, tremendous benefits, and in effect is the only part of the statute which gives taxpayers the necessary relief.

Subsection (c) defines a "tract." The general rule is that a "tract" consists of a single piece of real property[46] However, there are two exceptions: (1) two or more pieces of real property shall be considered a tract, if at any time in the previous five years they were contiguous in the hands of the taxpayer, and (2) two or more pieces of real property shall be considered a tract, if they would have been contiguous, except for the fact that they were separated by a road, street, railroad, stream or similar property

Also, within this section there is a provision for an "original tract" to become a new tract. It provides that if at any time following the sale or exchange of any lot or parcel the taxpayer makes no further sales for a period of five years, the remainder of the original tract will be considered a new tract of realty This permits the taxpayer to start counting the sales of the first five lots again, before the special 5% rule comes into operation.[47]

Subsection (d) should now be considered. The applicability of this section began after December 31, 1953. However, for the purposes of applying the definition of a tract of real property, and for determining how many sales have been made from that tract, sales during the period five years prior to December 31, 1953 will be considered. Some of these sales may be of no consequence due to the five-year rule provided in subsection (c) That is, if sales were made in 1949, they would not fall into the five-year period, if further sales were made in 1956.[48]

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[45] See note 25 *supra.*
[46] See note 32 *supra.*
[47] See note 25 *supra.*
[48] *Ibid.*

Conclusion

The law in effect prior to the 1954 amendment, and the legislative material behind the 1954 section have been discussed. It is obvious the precedents of pre-1954 are still in effect and the section 1237 has not preempted the area. Today counsel has a double-barreled job to do: (1) see if his client comes within section 1237; (2) if not, what is the position of the pre-1953 precedents regarding his client's case?

Counsel may have to argue that his client's deviation from section 1237 is slight and within the purview and spirit of the section and therefore his client should be given its benefits. If he is unable to do this, he must prove to the satisfaction of the court that the deviation was not so reprehensible that his client should be classified as a "dealer," but that as the law was interpreted prior to the 1954 I.R.C., his client should be termed an "investor."

The task of balancing section 1237 and the pre-1954 law to fit the particular cases of the future is a job for counsel to inform the court and will be an endless task now that this new legislation is on the shelf for counsel's use.