NOTES ON LEGISLATION

Akta 126 . . . . Akta Cukai Spekulasi Tanah, 1974.
Land Speculation Tax Act, 1974.

The rapidly rising price of land over the past two years has prompted the Government to take action to stabilise the price of land, especially by curbing speculation in land. The Authorities claim that the price of land and houses was artificially inflated by speculators buying land in prime areas, both residential and industrial, and releasing it slowly on to the market and hence reaping large profits as demand outstripped supply. When it was found that monetary measures alone, eg. the tightening of credit, were not sufficient to stave off the rapidly rising prices, the taxing of gains from land dealings was introduced. Whether or not this measure has succeeded in stabilising price rises is a matter for the economists to consider and is entirely outside the scope of this comment. The object of this comment is merely to explain the scope of the land speculation tax, how it is to be administered, the effectiveness of the charge and its relationship with income tax.

It is of interest to observe that this is the first time that gains realised from speculative dealings have been subjected to tax in Malaysia. The tax is very much in the nature of a capital gains tax. The preamble to the Act states: "An Act to make provision for the imposition, assessment and collection of a tax on capital gains derived from land speculation. . . . ." This raises the question whether this is a prelude to a full scale system of capital gains taxation in this country. Hitherto any profits realised upon the disposal of any property have been subjected to tax only if they could be assessed as gains or profits from a business under s. 4(a) of the Income Tax Act, 1967 (Revised 1971). Profits from isolated transactions which are from any "manufacture, adventure or concern in the nature or trade"[1] have been subjected to Income Tax since 1967. Prior to this, the Income Tax Ordinance, 1947, contained no equivalent provision so that isolated transactions escaped tax altogether unless they could be shown to be part of a "business".[2] "Business", under the 1947 Ordinance was interpreted as requiring a repetition or series of acts; there must be a carrying on of a business.[3] Hence where a profit was a capital gain it was not subjected to tax. Although isolated transactions can be subject to tax after 1967, the

[1] See definition of "business" in s. 2 of the Income Tax Act, 1967.

[2] See s. 10(1)(a) of the Income Tax Ordinance, 1947.

[3] See *C.I.T. (Singapore)* v. *D.E.F.* (1961) M.L.J. 55; approved and adopted by the Federal Court in *E.* v. *Comptroller-General of Inland Revenue* [1970] 2 M.L.J. 117.

transaction must bear the *indicia* of trade: the transaction must bear the identity of a trading transaction. The application of the "badges of trade"[4] has always been most difficult in cases of transactions in land. The vast majority of cases decided by the Malaysian (and Singapore) Courts on the taxability of isolated transactions have concerned dealings in land. Now, where an isolated transaction in land falls within the Land Speculation Tax Act, 1974, there will be no need to explore the "badges of trade". If the transaction falls within the 1974 Act then even a capital profit, will nevertheless be chargeable to land speculation tax. However, the taxability of dealings in other subject-matters are still governed by the 1967 Act.

(I) THE IMPOSITION OF THE CHARGE

S.3(1) of the Land Speculation Tax Act, 1974, (the Act) provides that: "A tax, to be called land speculation tax, shall be charged in accordance with this Act in respect of chargeable gains, accruing on the disposal of chargeable assets." The tax is only payable by a "chargeable person" (s. 3(2)). Each one of the terms "chargeable gains", "chargeable assets" and "chargeable person" are ascribed special meanings which will have to be considered separately.

The rate of the tax is 50%. But all gains accruing upon the disposal of chargeable assets before December 6, 1973 (the date of the coming into force of the Act) are exempted by Sch. 4, para. 1. In the case of disposals after that date para. 2. exempts gains realised from the disposal of a chargeable asset more than 2 years after its acquisition or where the total consideration received on disposal within that period is less than $100,000.[5] However, the exemption is not available where a part of a larger asset, the market value of which exceeds $100,000 is disposed of. Where a person sub-divides a large estate into smaller plots and obtains separate titles for each of these the question arises whether the sale of each of these plots constitutes disposals of "a part of a larger chargeable asset"? It is arguable that each of the smaller plots, because they are sold under separate titles of their own are chargeable assets in their own right so that the gain will not be charged even if it comes within Sch. 4 para. 2. On the other hand it must be borne in mind that these assets come into existence by the sub-division of a larger asset, and hence it is submitted that they are in fact "part of a larger chargeable asset."

(a) *Chargeable Assets*

Firstly, the charge is restricted to chargeable gains arising from the disposal of "chargeable assets". This term is defined in s. 5(1) as being "lands

[4] See the Final Report of the 1954 Royal Commission on the Taxation of Profits and Income, Cmmd. 9474, para. 116.

[5] Reduced from $200,000 by the Finance Minister in his budget speech on 12/11/74.

situated in Malaysia and any interests, options and other rights in or over such lands." Dealings in interests, options and other rights in or over land are also included as being dealings in chargeable assets. (S.5(2)). Rights to purchase are also chargeable assets as being "rights in or over" land. (S.5 (3)). The definition of chargeable assets is therefore wide enough to cover every interest or right in or over land, legal or equitable. Thus options to purchase land, rights of way, grazing rights, leases and all easements and licences over land would fall to be treated as "chargeable assets." The matter is taken further by the definition of "land" in s.2 of the Act. "Land" is defined to include:

(a) buildings on land and anything attached to land or permanently fastened to anything attached to land;
(b) standing timber, trees, crops and other vegetation growing on land; and
(c) land covered by water.

It would appear that a licence granted to cut down standing timber, licence rights to farm land and advance contracts for the sale of standing crops on land would all be dealings in "chargeable assets". It is submitted that the scope of chargeable assets as defined in the Act is unduly wide. The definition brings into charge assets which it is most unlikely that the Government intended to subject to land speculation tax. For example, if a corn grower entered into a contract whereby the purchaser has a right to harvest all the fruit on the plants and remove the plants as well, this would be a disposal of chargeable assets. It should be noted that this consequence only arises in the context of ascertaining the scope of chargeable assets for the purposes of the Act. What may be a chargeable asset under the Act is not necessarily land as defined elsewhere, particularly in the National Land Code.

Although all rights and interests over land are termed "chargeable assets", express exemption from the tax is given to a gain received from the disposal of his private residence by an individual. (S.8). The exemption is available only to individuals and not companies, partnerships and other bodies of persons. This is only reasonable because the exemption is designed to provide relief only to persons who actually live in and occupy the premises. Companies, partnerships and other bodies of persons are not capable of living in premises as such. However, it is unfortunate that the exemption has not also been extended to private residencies held on trust and occupied by the beneficiary entitled to do so under the terms of the settlement. Further exemption should also have been extended to private residences privided by the taxpayer for dependent relatives. The class of dependent relatives could be restricted to cover only immediate relatives who are incapacitated by old age or infirmity from maintaining himself. The details of the operation of the exemption are contained in Sch. 3 of the Act.

A private residence granted the exemption is a building or part thereof owned and occupied by an individual immediately before its disposal as the individual's only place of residence in Malaysia. (para. 4). An individual is only regarded as owner of such building if he, is the registered proprietor of the land on which the building stands, or if he holds a lease of that land, or if he has entered into an agreement for the purchase and sale of that land. (para. 2) The land may be "owned" by the individual, his wife, or both of them jointly, and if the exemption is available to him, his wife too cannot be charged with the tax. (para. 3). The exemption is not available to an individual who owns and occupies two or more residences. (para. 5). However, a person who owns and occupies more than one private residence in Malaysia many nominate one of these residences as his only private residence for the purpose of the exemption. (para. 2). The nomination must be made in writing addressed to the Director-General within three months of the coming into force of the Act. (para. 11(1)(a)). When an individual owns more than one private residence or where he is in the habit of selling and buying houses which he occupies, the question arises whether he is able to obtain the exemption in respect of all his houses in the former case, or for each one one of the residences he buys and sells in the latter case, bearing in mind that to qualify for the exemption under para. 4 all that is needed is that the individual owned and occupied the house immediately before its disposal as his only place of residence in Malaysia. It would therefore appear that all that an individual need do is to live for a few days in a house he has just bought before selling it to qualify for the exemption. Paras. 8 and 9 have a bearing on the matter.

Para. 8 provides that an individual who either owned and occupied only one private residence on the coming into force of the Act, or nominated a private residence then he "shall not be entitled to treat any other residence as his private residence for the purposes of the exemption". However relief is given where the residence was the matrimonial home but owned by the wife and as a consequence of the dissolution of marriage or separation, he no longer occupies it. In such a case any new house that he occupies will be covered by the exemption. It appears from this provision that an individual is entitled to an exemption only once. This is rather harsh as it could prevent a person from moving to a better residence as he achieves greater success in life or vice-versa. A possible solution would be to prescribe a minimum period of occupation in order to qualify for the exemption. This would enable a person to obtain the exemption more than once during his lifetime while at the same time ensuring that the exemption is not used by speculators. A person who genuinely wishes to sell his house and buy a new one would not be hindered in this way.

In the case of a person who has to move from one place to another because of being transferred in his employment, para. 9(a)(i) provides a

relaxation to para. 8. Para. 9 also extends the exemption where an employee disposes of his residence to acquire a new residence elsewhere after his retirement from *further gainful employment* (para. 9 (a)(ii)); but in the case of a person retiring from business, he must have been *compelled* to dispose of his house in order to acquire another house elsewhere, (para. 9(b)). The exemption under this paragraph is very restricted, especially in the case of retirement. In the case of an employee, there must be a complete retirement, and not just a retirement from one job whereafter the employee takes up fresh employment.[6] Under para. 9(b) the individual must be compelled to sell his house and acquire a new one. The problem that arises here is how to establish compulsion. Presumably, a radical change in financial circumstances or by reason of health could be taken to be compulsion. But does this mean that an individual upon retirement from business cannot sell his house in the city and buy another by the beach and yet qualify for the exemption?

The exemption in Sch. 4 takes away most of the sting of para. 8, and at the same time leaves the way open for individual speculators to take advantage of it. A period of ownership of two years is very short and easily satisfied. Furthermore, the exemption where the purchase price is less than $100,000 leaves outside the scope of the charge most sales of houses. The net result of this is that the exemption granted by Sch. 3 is of real benefit only to the rich, as the value of the house sold must exceed $100,000, in addition to which the house must have been sold within two years of purchase. The exemption under Sch. 3 is of little importance to ordinary house-buyers and house-sellers and thanks to the blanket exemption given by Sch. 4, the restrictions and qualifications imposed on the exemption under Sch. 3 are of no significance in preventing speculation in the vast majority of residential property.

Paras. 11 to 13 of Sch. 3 provide the machinery for obtaining the exemption under the Schedule. Para. 11 provides the manner and the time within which nomination of a house as the sole private residence of the taxpayer is to be made. Para. 12 deals with the manner of calculating the amount of the exemption where only part of a building has been used as a private residence by the disposer, and para. 13 provides for the manner of calculating the gain where land which forms part of the grounds of the residence is sold without the residence.

(b) *Chargeable Persons.*

S. 6 of the Act provides that every person is chargeable with the tax irrespective of whether he is resident in Malaysia or not. This may be compared with income tax where residence is of the first importance.

[6] c/f position under Income Tax Act, 1967, Sch. 6, para. 25. See *Comptroller-General of Inland Revenue* v. *T* [1972] 2 M.L.J. 73 at p. 75.

Bearing in mind that the Act is meant to clamp down on land speculation and that a great deal of the speculation was at one time prompted by the flow of "hot" money into the country from abroad, it is only logical that residence be irrelevant in making a person subject to tax under the Act. Furthermore, the asset from which the gain is derived — land, is itself situate in Malaysia.

The definition of person in s.2 "includes a company, partnership, a body of persons and a corporation sole." Sch. 1 spells out the persons who will be held responsible for the payment of the tax by the chargeable person and for all ancilliary matters arising under the Act in making the return and assessing the tax payable.

(c) *Chargeable Gains or Allowable Losses:*

The terms "chargeable gains" and "allowable losses" are explained in s.7 of the Act. There is a chargeable gain where the disposal price exceeds the acquisition price; and an allowable loss where the disposal price is less than the acquisition price. "Allowable loss" is further explained as meaning "a loss suffered on the disposal of a chargeable asset which, if it had been a gain, would have been chargeable with the tax." (S. 7(2)). This definition is typical of statutory language. The sub-section gives the definition of one term which in turn depends on the meaning given to another term. It is therefore necessary to ascertain the meaning of a gain which would be chargeable to tax under the Act. The detailed provisions for calculating chargeable gains and allowable losses, and the application of the Act to different types of transactions are contained in Sch. 2.

Liability to tax under the Act only arises upon the disposal of a chargeable asset: in order to make a disposal there must first be an acquisition. Hence Sch. 2 para. 2 provides that "every method, scheme or arrangement by which the ownership of an asset is transferred from one person to another . . . . . shall constitute an acquisition of the asset by the transferee and a disposal of the asset by the transferor." The Schedule then goes on to deal with the different types of acquisitions and disposals that can arise eg. exchanges, part disposals, grants of leases etc. Also dealt with are acquisitions and disposals where the consideration for the transaction might not reflect the true value of the asset, eg. transactions between relatives, within a group of companies, trustees and beneficiaries, in partnerships, gifts *inter vivos* and on death. The Schedule also deals with the time when a transaction is to be deemed to have been carried out. All these matters are of great importance in arriving at the chargeable gain or allowable loss of a particular dealing in land.

(i) *Disposal price equal to acquisition price:*

There are certain transactions where the disposal price is regarded as being equal to the acquisition price, hence not giving rise to any liability to tax

under the Act. Transactions thus covered are:

(a) Devolution of the assets of a deceased person upon his executor or legatee under a will or intestacy or on the trustees of a trust created under his will.

The situation covered here is the passing of the deceased's estate into the hands of his personal representatives. This provision does not apply where, in the course of administration of the estate the deceased's personal representatives transfer the land to the beneficiaries under the will or upon intestacy. This transfer constitutes a disposal of the asset under Sch. 2, para. 2 of the Act. Para. 19(1) provides that the beneficiary's acquisition price is to be taken as being equal to the value of the asset for estate duty purposes (ie. market value at time of death). Hence the difference between the price paid by the deceased (or deemed to have been paid by him) and the market value of the asset at the time of the deceased's death shall be either a chargeable gain or an allowable loss, as the case may be, if the exemptions under Sch. 4 are not available. Hence if the deceased dies within six months of acquiring a piece of land, and that land is transferred to the beneficiary under the will within eighteen months, if the market value on death is more than $100,000 there will be liability to tax under the Act. This could work a severe hardship as the same asset will also be taken into account in assessing estate duty of the deceased.

The beneficiary's acquisition price for a subsequent disposal is provided for in Sch. 2 para. 19. Where the beneficiary receives the asset bequeathed to him under the will, his acquisition price is taken to be the value of the asset for estate duty purposes. If he is entitled to a legacy but accepts an asset in its place, the acquisition price of the asset is taken as being the amount of the legacy or the value of the asset for estate duty purposes, whichever is lower. When the personal representatives of the deceased themselves dispose of an asset, their acquisition price is taken as being the value of the asset for estate duty purposes. It will be noted that para. 3 (a) above has no application to any of these situations. Except where the personal representatives themselves sell the asset,there is a double liability to tax under the Act if the beneficiary himself makes a subsequent disposal: once when the asset is transferred to him and again when he disposes of the asset himself. For the second disposal his acquisition price is as provided for in para. 19. Where the personal representatives themselves dispose of the asset, upon the devolution of the asset to their hands, para 3(a) will apply and the acquisition price is regarded as being the same as the disposal price. Upon the subsequent sale of the asset the difference between the disposal price and the value of the asset for estate duty purposes will be either a chargeable gain or an allowable loss.

(b) The transfer of assets owned by an individual, by his wife or jointly by the individual with his wife or with a connected person to a company controlled by the individual, by his wife, or by the

individual or jointly with his wife or with a connected person.

It is of interest to note that where the asset is owned jointly with connected persons, the joint owner must be the individual himself and not his wife; and in the case of control of the company, the control must be by the individual and the connected person, not the connected person and the individual's wife. Where the company itself subsequently disposes of the property so transferred to it, the company's acquisition price is equal to the transferor's acquisition price plus permitted expenses. (Sch. 2 para. 19(5)). However, if after the transfer of the asset to the company, the company takes it as forming part of its trading stock at a value which exceeds the transferor's acquisition price plus permitted expenses there is deemed to be a disposal, the disposal price being the amount entered in the company's books as being the value of the property as trading stock. The difference will then be a chargeable gain. (Sch. 2 para. 19(6)). This consequence can very easily be avoided if the property is treated as stock-in-trade two years after it is transferred to the company.

Sch. 2 para. 17(1) makes a provision similar to Sch. 2 para. 3(b) where the transfer of an asset is made between different companies in the same group, but with stricter requirements to be fulfilled. Firstly, the prior approval of the Director-General must be obtained; and secondly the transfer must have been made to bring about greater efficiency in the operation of the group. It is only then that the disposal price of the transferor company will be taken as being equal to its acquisition price plus permitted expenses. By para. 17(3) the Director-General can withdraw approval within three years if (a) the transfer was made for some purpose other than that specified in sub-para. (1); or (b) the transferee company is no longer in the same group; or (c) the transferee company ceases to be resident. Where approval is withdrawn the Director-General can make such assessment on the transferor or transferee company as he thinks proper.

In most cases it would be very difficult for the Director-General to refuse consent on the basis that the transfer was not made to increase the efficiency of the group. That is a subjective requirement the best judge of which is the company. However, the threat of withdrawal of consent if there is some other purpose would ensure that transfers within groups are not made for other reasons. The withdrawal of consent upon the company ceasing to be resident is also justified as a non-resident company does not pay Malaysian income tax.

Where the asset is subsequently taken to form part of the trading stock of the transferee company, there is then deemed to be a disposal and the difference between the transferor company's cost of acquisition plus permitted expenses and the value at which the asset is brought in as a trading asset of the transferee company, will be a chargeable gain. (Sch. 2 para. 17(2)).

(c) Where an individual or his wife or both acquire property to which

they are absolutely entitled from trustees or nominees resident in Malaysia, or dispose of such property to such nominees or trustees.

The requirement that the trustees or nominees must be resident in Malaysia is rather curious. Unlike Income Tax, tax under the Act is not dependent on the resident status or otherwise of the taxpayer (s.6(1)): the asset disposed of must be situated in Malaysia (s.5). If the property were not situated in Malaysia the Act would not apply at all. Furthermore, (c) above applies to disposals to trustees or nominees where the individual and/or his wife are absolutely entitled to the asset against the trustees or nominees; this is even more strange because where the individual and/or his wife are absolutely entitled to the property *as against* the trustee or nominee it does not make sense to have a transfer from the beneficiary to the trustee. In the case of acquisition from trustees, it is to be noted that the provision only applies if two conditions are satisfied: (i) the beneficiary must be absolutely entitled to the property, and (ii) the beneficiaries must be an individual or his wife or jointly. Hence the provision will not apply where the beneficiaries are entitled to anything short of absolute entitlement; and neither will it apply where the persons jointly entitled are not husband and wife. Therefore, apart from transfers falling within this provision all other transfers between trustees and beneficiaries will give rise to liability to tax under the Act.

(d) The conveyance or transfer of an asset by way of security, or the transfer of a subsisting interest or right by way of security in or over an asset (including re-transfer on the redemption of the security).

This provision is of limited application in Malaysia. The Act deals with transactions in land. Where land is used as security in Malaysia there is no transfer or conveyance of the asset to the chargee. Under the National Land Code, a charge is entered against the title of that land. The title to the land remains in the chargor. However, by virtue of the definition of land in s.2 a charge over land is an interest in or over land, and is itself a chargeable asset. Any transfer of the charge itself to a third person might well attract tax under the Act if the exemptions in Sch. 4 do not apply. Paragraph (d) above does not apply to such transactions. It only applies where the asset itself is being used as security. If the chargee disposes of the asset to realise the security, this disposal will give rise to liability to tax under the Act. In such a case, the chargee will be regarded as being the nominee of the chargor, and the tax will therefore be borne by the chargor (Sch. 2 para. 29). However, it would appear that there is no disposal from the chargor to the chargee when the charge is created as there is no transfer of ownership in the land to the chargee (Sch. 2 para 2). Therefore, the acquisition date will be taken to be the date when the chargor bought the asset, and if the chargee sells the land more than two

years after the chargor acquired it, the exemption under Sch. 4 will apply.

(e) Gifts made to the Government, a State Government. a local authority or a charity exempt from income tax.

The Income Tax Act, 1967, Sch. 6 para. 13 provides that the income of a charitable institution or trust is exempt from income tax where the institution or trust is set up for charitable purposes only. It may be noted that s. 44(6) of the Income Tax Act, 1967 has no application here as that section only deals with the deduction of gifts to approved institutions or organisations in computing the donor's income tax liability.

(ii) *Ascertainment of acquisition price and disposal price.*
The acquisition price of an asset is stated by Sch. 2 para. 4 as being "the amount or value of the consideration in money or money's worth given by or on behalf of the owner wholly and exclusively, for the acquisition of the asset plus incidental costs." Para. 20(1) regards as part of the acquisition price any sum paid on account of any subsisting charge or incumbrance. Para. 4 then goes on to provide that the acquisition price shall be reduced by any sums received by way of compensation or insurance recovery received for any damages or injury, destruction or dissipation, or for any depreciation or risk of depreciation to the asset, and any sum forfeited as a deposit made in connection with an intended transfer of the asset. Where such sums received exceed the amount paid for the acquisition of the asset, the difference constitutes a chargeable gain. The acquisition price for any subsequent disposal, in such a case is to be taken as nil. Furthermore, by virtue of Sch. 2 para. 8, where the owner of an asset receives a capital sum which does not fall within para. 4(1)(a), (b) or (c) and this sum relates to (a) the forfeiture or surrender of rights or far refraining from exercising rights, or (b) for the exploitation or use of assets, then the owner is regarded as having made a disposal even though the payer of the sum does not acquire any asset. The disposal is regarded as having been made when the capital sum is received, such sum constituting a chargeable gain accruing at that time.

It will be recalled that chargeable assets include all "interests, options and other rights" in or over land (s.5(2)). Para. 8 covers those dealings where the owner of the asset carries out a transaction whereby he surrenders or grants a right or interest in the asset while continuing to remain the owner of the asset. In such a case the whole of the consideration received is regarded as being his disposal price constituting a chargeable gain. Thus, for example, a capital sum received upon the grant of a licence or right to work a mine or cut down timber or a right of way would all fall within para. 8. Equally where A has a right of access to his land through B's land, and A agrees to surrender his right in consideration of B paying him a capital sum, that sum would be a chargeable gain under para. 8 even though A has not disposed of any tangible asset. Similarly, if

B grants A a right of access in exchange for a capital sum, B has disposed of a chargeable asset to which para. 8 will apply.

In the case of the grant of an option, Sch. 2 para. 27(1) provides that such a grant over a chargeable asset is itself the disposal of a chargeable asset. This provision is somewhat repetitious in that options are already made chargeable assets by s.5. However this provision does clarify that the first grant of an option by the owner constitutes a disposal. Assignments of the option from the grantee to others is a normal disposal of a chargeable asset. Where the option is subsequently exercised, the grant of the option and the purchase of the asset are considered to be one transaction, and the price paid for the option is deemed to be part of the consideration for the disposal of the asset. (para. 27(2)). Where the option, or the right thereunder is disposed of by the person entitled to exercise it for a loss, that loss is not an allowable loss unless the right is subsequently exercised by the person acquiring the right or his successors. (para. 27(3)). This provision is somewhat curious and ambiguous. It appears that if the grantee of an option assigns it for an amount less than he paid for it, he cannot treat the difference as an allowable loss. However, if the assignee then exercises the option, the grantee can then claim an allowable loss. It therefore appears that the availability of an allowable loss depends on the conduct of a third person. It is difficult to understand the reasoning behind this. What the provision might be intended to prevent is the situation where the grantee of an option obtains an option with no intention of exercising it and assigns it at a loss to someone else who also has no intention of exercising, simply in order to obtain an allowable loss to set off against chargeable gains.

The alternative interpretation of the provision leads to an absurd result. Under this interpretation the grantee of the option assigns it for a loss and subsequently obtains a re-assignment and exercises it. These two possible interpretations arise due to the use of the word "acquiring" in para. 27(3). It is submitted that "acquiring" here should be interpreted to cover only the assignees of the option from the original grantee, and not the original grantee himself. This interpretation would give the provision a more sensible reading, although it does not necessarily furnish a reason for the provision in itself. Finally, it is not clear from the provision whether it applies only to claims for allowable losses by the original grantee only or covers subsequent assignors as well.

As a result of the definition of chargeable assets in s.5 of the Act, it is clear that leases too are chargeable assets. Sch. 2 para. 25 clarifies this by expressly providing that the grant of a lease constitutes the disposal of a chargeable asset. The paragraph then goes on to provide the manner of ascertainment of acquisition price when the original lessee makes an assignment of a lease for which he paid a premium and where assignees of the lease paid premiums to their respective assignors.

It will be observed that the acquisition price need not be in money. When the consideration is other than money, then the consideration received must be duly valued. Sch. 2 para. 13 provides that where one asset is exchanged for another, the market value of the asset received by the disposer is the consideration for the disposal. If the asset received by the disposer has no market value, the Director-General may take the market value of the asset disposed of as the consideration for the disposal. The disposer's disposal price in the above case will therefore be equal to the buyer's acquisition price.

Sch. 2 para. 5 explains what 'disposal price' means. The disposal price of an asset is the amount or value of the consideration in money or money's worth for the disposal of the asset. Para. 20(2) adds to the disposal price the full amount of the liability assumed by the acquirer of any subsisting charges or incumbrances at the time of disposal. Hence if the property is subject to a charge not released before or at the time of disposal, the price received by the disposer is increased by the amount outstanding under the charge. Para. 5 provides for the deduction from disposal price of:

(a) expenditure wholly and exclusively incurred on the asset after acquisition to enhance or preserve the value of the asset at the time of disposal. Hence structural improvements, the cost of redecorating, adding an extension or improving the garden will all be deductible. Equally if the taxpayer buys a plot of land and erects a building thereon, the cost of the building works will also be deductible. The question arises whether the cost of services such as architect's fees and interior designor's fees will also be deductible under this provision. It is submitted that such expenses, though not for tangible things, are equally reflected in the state or nature of the asset at the time of disposal and if anything enhance the value of the asset. Accordingly, such expenses should also be deductible. Where the land disposed of is or was subject to a lease then expenditure incurred by the lessee in erecting buildings on or otherwise improving the land is not deductible. (Sch. 2 para. 25(5)).

(b) Expenditure wholly and exclusively incurred, after acquisition, in establishing, preserving, or defending his title to, or to a right over the asset. This would cover the cost of litigation in defending an action concerning the rightful ownership of the land, and equally in contesting a claimed right of way over the land by a third person, or in establishing a right of way over other land which provides access to the taxpayer's land. It is to be noted that only costs incurred after acquisition are deductible. Hence costs incurred in order to acquire the land, eg. the cost of litigation in order to establish title under the provision of a will, are not deductible. It is submitted that the disallowance of such expenses can cause a hardship to the taxpayer, particularly because such an expense does not form part of the acquisition price either.

(c) The incidental costs to the disposer of making the disposal. As in the case of incidental costs of acquisition, these are enumerated in Sch. 2 para. 6. (see *infra*).

An expression used in both the paragraphs dealing with acquisition price and disposal price, "wholly and exclusively" requires some comment. In both cases where a sum is paid "wholly and exclusively" for the specified purposes so that it is either added to the acquisition price or deducted from the disposal price, its effect is ultimately to reduce the chargeable gain. The same expression is used in the Income Tax Act, 1967, s.33. For purposes of Income Tax, "wholly" has been interpreted to refer to quantum and "exclusively" to purpose.[7] The purpose under the Income Tax Act is "the production of gross income". It is submitted that the interpretation of the expression under the Act should be the same as under the Income Tax Act. The problem under the Act is in establishing the purpose. In relation to the acquisition price the purpose must be the acquisition of the asset. What is consideration given "exclusively" in order to acquire the asset? It is submitted that the phrase "consideration ..... given" further cuts down the scope of the "wholly and exclusively" requirement. Even if a sum is expended "wholly and exclusively" if it is not "consideration" it does not form part of the acquisition price. Hence the cost of litigation in order to obtain a title will not form part of the acquisition price. Most outgoings in the process of acquiring land will in any event be regarded as incidental costs, and will be covered by Sch. 2 para. 5 (*infra*) in any event. Accordingly, the actual purchase price whether in money or money's worth only will usually constitute consideration given wholly and exclusively for the acquisition of the asset.

In relation to the disposal price the purpose specified is either the enhancement or preservation of the asset. Hence, an expense suffered in order to satisfy the whims of the taxpayer which does not add anything to the asset will not be deductible. Similarly, where the expense is suffered for a dual purpose, it will not have been incurred "exclusively". Where the expense incurred is larger than it ought to be then an apportionment will be made and only that part of the expense which is exclusively incurred for the specified purposes will be deductible from the disposal price. In the case of Sch. 2 para. 5(b) there is a further restriction in that the expenditure must be reflected in the asset at the time of disposal. Hence if the expense is mere routine maintenance or redecoration, then it will not qualify for deduction even though it is incurred wholly and exclusively to enhance or preserve the value of the asset.

In the case of both the acquisition price and expenses for deduction from disposal price, the outgoing must have already been suffered: the consideration must have been "given" and the expense "incurred".

[7] See *Bentley Stokes & Lowless* v. *Beeson* (1952) 33 T.C. 491.

Therefore, the liability must be a present liability or at least a future liability[8] but not contingent liability. The exclusion of contingent liabilities is reinforced by Sch. 2 para. 26. Para. 26 deals with liabilities that the disposer of an asset might suffer if the transferee of the asset breaches any obligations entered into by the transferor. However, should the disposer become liable to pay such sum after disposal, and such liability has become enforceable and is or has been enforced, then an adjustment by way of repayment of tax or otherwise is to be made. (Sch. 2 para. 26(2)).

Finally, it will be observed that the expenses deductible from the disposal price under Sch. 2 para. 5(a) and (b) both relate to expenses affecting the asset directly. It is submitted that it would be more convenient to treat such expenses as part of the acquisition price. The chargeable gain would remain the same, but it would facilitate the keeping of accounts and records by the taxpayer. It is usual for a person to regard the cost of making any additions or improvements or repairs to an asset he acquires as part of his purchase price and in fact he would also obtain credit facilities on the same footing. Furthermore, it is usual for such improvements or repairs to be carried out soon after purchase. In any event expenses on routine maintenance are not deductible. Furthermore, in treating the expenses under para. 5(b) as part of the cost of acquisition, the cost of litigation in order to acquire the property could also be taken into account in arriving at the chargeable gain.

The "incidental costs' refered to in Sch. 2 para. 4 and 5 are expenses incurred wholly and exclusively by the taxpayer consisting of the usual types of expenses that are suffered upon the purchase or sale of property. The exact items are enumerated in para. 6(1). The one item that merits special mention is (c), interest paid on capital employed to acquire the asset. Para 6 (2) goes on to exclude the deductibility of interest where such interest is deductible for income tax purposes under para. 7. One is hard put to find a situation where interest is paid for a loan to purchase property and that interest is not deductible for income tax purposes. Under s.33(1)(a) of the Income Tax Act, 1967, any interest paid on capital employed to earn income is deductible from the income of that source. Hence if money is borrowed to buy a house which is then rented out, the interest paid on the loan would be deductible against the rental income received. Where a person occupies premises for a non-business purpose, which thus constitutes a source of income under s.11, s.37(1)(a) allows the deduction of interest paid for money borrowed to acquire the premises. Where the asset is acquired for the purposes of a business the

[8] The difference between a present or future liability ie. "incurred" expense and contingent liability can be seen in *Sun Insurance Office* v. *Clark* [1912] A.C. 443 and *Southern Railway of Peru* v. *Owen* [1957] A.C. 334.

interest on capital employed is deductible as a business expenses under s. 33(1) of the Income Tax Act, 1967.

Expenses not allowed to be deducted in computing the chargeable gain are contained in Sch. 2 para. 7. All of these are expenses which are deductible in computing adjusted income or adjusted loss for income tax purposes including such expenses as cannot be deducted due to the insufficiency of gross income. The same exclusion applies where the asset is used as fixed capital of a business and the expenses in relation to that asset are deductible in computing the adjusted income or adjusted loss of the business for income tax purposes.

Apart from expenses disallowed above, Sch. 2 para. 30 disallows the deduction of expenses from the disposal price under para. 5(a) or (b) where the disposer has been or is to be reimbursed the expense. By para. 32, no amount may be deducted more than once in computing the chargeable gain or allowable loss.

Where the taxpayer disposes of only a part of a larger asset than the acquisition price and expenses to be taken into account in ascertaining the chargeable gain are apportioned in accordance with the provisions of para. 21. Para 21 (1) provides that there is a part disposal where any description of property derived from the asset remains undisposed of. If the owner of one acre of land divides the land into lots A,B,C, and D and obtains the grant of separate titles for each one of these plots, the question arises whether there is a part disposal if he sells lots A and B and retains C and D. Plots A and B here form separate chargeable assets in themselves as they are the subject of separate title deeds. In such a case it is submitted that these would not constitute part disposals. But the problem then arises as regards fixing the acquisition price of the disposer for each of these plots and the deduction of expenses incurred in obtaining the sub-division. The logical approach would be to apportion the expenses four ways, and this course is in fact not prohibited by the Act. Para. 21 requires the apportionment of expenses for the purposes of para. 5(a) and (b) but not para 5(c). In the above example, if it is accepted that the disposal of each plot constitutes the disposal of a whole asset, there is then no part disposal to which para. 21 can apply. Para 21 is more apt to apply to the situation where part of a larger piece of land is sold without first obtaining a separate title for that part.

Para 21(2) provides that in order to ascertain the acquisition price and the amount of deductible expenses under para. 5(a) and (b) in fixing the disposal price an apportionment on whatever basis that is most appropriate is to be made. It is hoped that the Inland Revenue will apply this provision equitably in each case and not formulate general rules applicable to all cases. Apportionment on a *pro rata* basis should not be made in all cases as this would exclude the deduction of expenses that have been expended only on that portion of the land disposed. For example if the taxpayer

buys an acre of land for $100,000 and builds a house on half the land for $500,000, which he then sells, if a *pro rata* basis were to be applied he would be able to deduct only half the cost of acquisition of land and half the building costs. The more appropriate allowance would be half the acquisition price of the land and the whole of the building costs.

Para 21 (3) provides a special formula for ascertaining acquisition price and deduction of expenses where the asset consists of a lease, and a sub-lease is granted for a portion of the property leased.

(iii) *Transactions at market price.*

The Act deems certain transactions to have been carried out at market price in computing the tax liability. Much of the effect of the Act would be lost if all transactions were to be assessed on the basis of consideration agreed upon between the parties concerned.

Sch. 2 para. 9 provides that the acquisition or disposal of an asset shall be deemed to be for a consideration equal to market value where the transaction is not a bargain made at arm's length, particularly where the acquisition or disposal is by way of gift. However, where the disposal is by way of gift, and the donor and receipient are both of full age and are husband and wife, parent and child or grandparent and grandchild, then para. 12 permits the parties to jointly elect to treat the disposal as being one whereby the donor receives no gain and suffers no loss. The donee's acquisition price is then deemed to be equal to the donor's acquisition price plus permitted expenses. With regard to this election, it is submitted that the election will be available even if it is the wife who makes the gift to the husband, or the child to the parent or grandparent. The provision does not use the word "respectively" after enumerating the relationships. Furthermore, if this election is made, it may well be that the exemption under Sch. 4 will be available when the receipient makes a subsequent disposal more than two years after the asset was transferred to him. This is only fair because if the donor himself had retained the asset for that period his gain would have been exempted.

As regards transactions not being bargains at arm's length, Sch. 2 para. 23(1) provides that transactions between connected persons fall within such a category. The paragraph then goes on to enumerate the various relationships of "connected persons".

Para. 9(b) provides that a transaction shall be deemed to be at market value where the asset is acquired or disposed of:

(i) for a consideration that cannot be valued;

(ii) in connection with his own or another's loss of office or employment or diminution of emoluments; or

(iii) in consideration for or recognition of his or another's services or past services in any office or employment or of any other service rendered or to be rendered by him or another.

(ii) and (iii) above must be viewed in the light of s.13 of the Income Tax Act, 1967. S. 13(1) provides that gains or profits from an employment include

"(a) any wages, salary, remuneration, leave pay, fees, commission, bonus, gratuity, perquisite or allowance (whether in money or otherwise) in respect of having or exercising the employment."

"(e) any amount received by the employee, whether before or after his employment ceases, by way of compensation for loss of the employment . . . . "

Para. 9(b)(ii) and (iii) above would come within s. 13(1)(e) and (a) of the Income Tax Act, 1967 respectively. S. 13(1)(a) covers receipts in forms other than money as well, but that which is received must be convertible into money.[9] S. 13(1)(e), however covers only any "amount" received and hence would apply to receipts in money only. It must be understood that the Income Tax Act and para. 9(b) of the Act cover different grounds. Whereas s.13(1) of the Income Tax, 1967 regards as gross income of the employee such receipts as are contained therein, para. 9(b) of the Act deems the disposal of chargeable assets in such circumstances as having been made at market value in order to arrive at the chargeable gain on which tax will be charged on the disposer and not on the receipient. If however, the particular asset given in the circumstances stated in para. 9(b) can be shown to be a gain or profit from employment of the employee and subject to income tax on the employee by virtue of s. 13(1) of the Income Tax Act, 1967, then, *prima facia* the disposer can deduct the value of that asset in computing his own liability to income tax. But it is unlikely that the disposal of a chargeable asset in the circumstances stated in para 9(b) of the Act could constitute a gain or profit from employment, because the asset received is not an asset convertible to money or in money form for the purposes of s. 13(1) of the Income Tax Act, 1967. It may also be recalled that liability to tax under the Act will only arise if the disposal is made within two years of acquisition and the market value exceeds $100,000, at the time of disposal.

Para. 9 (c) provides that the consideration is to be taken to be the market value of the asset where the person acquiring the asset does so as trustee for creditors in satisfaction of a debt, or when he transfers the asset as trustee for the creditors of another in satisfaction of a debt due to the creditors. Generally speaking this provision will apply to trustees in bankruptcy. There could however be a double charge to the tax; once when the trustee collects in the assets of the bankrupt, and again when the trustee transfers those assets to the creditors. On both occasions the tax

[9] See *Daly v. I.R.C.* (1934) 18 T.C. 641.

will be paid out of the assets of the bankrupt. Since the assets of the bankrupt are already insufficient to pay off the creditors, this will mean that the creditors will get even less. The transfer of assets to a trustee, whether in bankruptcy or otherwise, is a disposal of assets giving rise to a liability to the tax. Relief is only given where there is a devolution of the assets of a deceased person to his personal representatives, or on trustees of a trust created under a will, or when the beneficiary is absolutely entitled to the property in which case the disposal price is deemed to be equal to the acquisition price. (Sch. 2 para. 3(a)(c).)

The final situation where the consideration is deemed to be equal to market price is under para. 9(c) when the asset is acquired or disposed of in a transaction for the disposal of a business for a lump sum consideration. In such cases it is sometimes not possible to ascribe the consideration received to each asset of the business, and it is only fair that the chargeable asset be deemed to have been transferred at market value.

Sch. 2 para. 10 provides that where an asset is deemed to have been disposed at market value the acquirer's acquisition price is to be taken to be the same market value in computing any gain or loss suffered by him on a subsequent disposal.

Para. 11 defines market value as being the price which the asset would fetch in a transaction between independent persons dealing at arms length. However, if the parties cannot agree on the market value, or there is only one party to the disposal, or if the Director-General is of the opinion that the market value agreed upon by the parties is incorrect, then the Director-General is to determine the market value.

(iv) *Allowable losses*

It will be recalled that s. 7(2) of the Act defines allowable losses as being losses suffered on the disposal of an asset, which if they had been gains, would have be chargeable with tax. Having examined the manner of arriving at chargeable gains, it is now possible to look at the provisions governing allowable losses. Briefly, where the acquisition price exceeds the disposal price, then there is an allowable loss. All the provisions applicable for ascertaining the acquisition and disposal price when computing chargeable gains are equally applicable here. The special provisions governing losses relate to the right to set off losses and in disallowing deduction of certain losses. Sch. 2 para. 31 provides that allowable losses of one year of assessment cannot be set-off against chargeable gains of an earlier year of assessment. This means that allowable losses cannot be taken into account as against chargeable gains of a previous year which have already been subjected to tax. But, the question arises whether allowable losses can be set off against chargeable gains of future years. S. 3(2) provides that where allowable losses of a previous year have not been absorbed by the chargeable gains of that year then the loss may be carried

forward and be set-off against chargeable gains of the subsequent year. Sch. 2 para. 33 goes on to provide that losses suffered in the following cases are not allowable: (a) the disposal was made before the Act came into force; (b) the gain accruing is exempt from tax under the Act; (c) the gain (if any) from the disposal is not included in the return made under s. 13(1) or (2) of the Act.

(v) *Time of disposal and acquisition*

The fixing of the date of disposal and acquisition of chargeable assets is of utmost importance under the Act because of the exemption granted in Sch. 4 to disposals made two years after acquisition. Also certain transactions may overlap the period before the Act came into force and after.

Sch. 2 para. 14 provides that the chargeable gain or allowable loss arises at the time of disposal even though the consideration is paid in instalments. Para. 15(1) then goes on to provide that where there is an agreement for the disposal, the disposal is deemed to occur on the date of such agreement, failing which on the date of completion of the disposal. By sub-para. (3) the completion of disposal occurs when the ownership of the asset disposed of is transferred by the disposer or when the disposer receives the full consideration, whichever is the earlier. Transfer of ownership occurs when all that is necessary for the transfer of the ownership of the asset has been done. The date of disposal is the acquirer's date of acquisition.

From the above it is clear that the actual date of transfer of registration of title is not the crucial date for determining when the chargeable gain arises. In most sales of land there is usually an agreement to sell and to buy the land. Thus the execution of such agreement will in most cases result in the fixing of the time of a disposal for the purposes of the Act. The Act here presumes that if the agreement is not eventually performed by one party or the other, the innocent party will be able to claim specific performance, so that for the purposes of charging the tax there is in fact an effective disposal. When there is no such agreement, then the time of disposal is taken as being when the vendor has delivered to the purchaser all the necessary documents to obtain registration or when the purchaser pays the vendor the full consideration. Normally the vendor will only pay the full consideration upon being delivered the documents enabling him to obtain registration. Again these provisions take into cognisance the normal practice and course of dealings in land transactions. If the disposal was only taken to occur upon an actual transfer of title it might well be that most transactions would then fall outside the two year period under Sch. 4. so that the gain would be exempt from tax simply due to delay in registration, even though the purchaser has the use and enjoyment of the property well before that, and the vendor has already received the purchase price.

In the case of conditional contracts, where the contract for the disposal of an asset is conditional, and the condition is subsequently satisfied, the acquisition and disposal are regarded as occuring when the contract was made unless the consideration for the asset is to be determined when the condition is satisfied. (Para. 16). Thus, in an option which specifies the purchase price, upon the exercise of the option the disposal is deemed to have taken place when the option was granted. If the purchase price is to be fixed by valuation or otherwise after exercise of the option then the date of exercise of option is the time of disposal.

Sch. 2 para. 24 deals with transactions in land that span a period both before and after the coming into force of the Act. Para. 24(1) provides that where land was acquired before the Act came into force and construction of a building on the land was either commenced after that date or was completed after that date, then the land is deemed to have been acquired on or after that date at a price equal to the acquisition price of the land. This means that the date of acquisition of the land is taken to be when the construction of a building on the land is completed if that date falls after the Act came into force. The acquisition price of the land remains the same. This therefore brings into the ambit of the Act disposals of land and buildings when the construction of the building is completed after the Act came into force even though the land might have been purchased fifty years ago. If the property is sold within two years of completion for a consideration in excess of $100,000 the vendor will be liable to pay tax under the Act. His chargeable gain will be so much the larger the earlier he acquired the land as the price of acquisition remains the same. However Sch. 2 para. 5 will apply as regards making deductions for cost of building.

By para. 24(2), where an agreement is made for the disposal of an asset before the coming into force of the Act and the payment is to be made in instalments, the date of disposal is when the ownership of the asset is transferred to the purchaser. However, where all the instalments were paid before the Act came into force then the date of disposal is taken to be before the Act came into force even though transfer of ownership is effected only after that date. If the acquirer disposes of the property before the transfer of ownership to him before the Act came into force, then the acquisition by him is deemed to have taken place on the date of this subsequent disposal. It is unclear whether in this case too all the instalments must have been paid off before the Act came into force. Para. 24(2)(a) uses the conjunctive "or" which could be construed to mean that the second circumstance is entirely independent of the first. It is submitted that the payment of all the instalments is not the criteria where the property is sold before transfer of ownership. The original vendor, usually the developer, will only release the property upon receipt of the full consideration, and the vendor to the present purchaser will therefore

use the purchase price received to pay the developer in full. In such a case all the instalments would have been paid before the Act came into force. Alternatively the present purchaser will pay the vendor a lump sum and take-over his obligation to pay the instalments to the developer, in which case the date of disposal and acquisition will be when the transfer of ownership takes place. In either event, as far as the disposer is concerned, he has divested his interest in the property before the Act came into force. Where all the instalments are paid after the Act came into force the disposal and acquisition are treated as having been made after that date.

(II) ASSESSMENTS, COLLECTION AND ADMINISTRATION

Generally speaking, the administrative machinery of the tax under the Act is the same as that for income tax. The Inland Revenue Department is charged with the administration of the tax. Many of the provisions governing the administration of the tax are identical to those found in the Income Tax Act, 1967, with the necessary modifications. Accordingly, only those provisions which are special to the Act and those also to be found in the Income Tax Act with special implications under the present Act will be considered. The provisions that are peculiar to the administration of the Act are contained in sections 10 to 13, sections 14(3), 16, 17 and 25(1). Otherwise, all the provisions in Parts III, IV and V of the Act are identical to those in the Income Tax Act, 1967, with the necessary modifications. (Appendix I of this note lists the various sections of this Act together with the equivalent sections of the Income Tax Act, 1967).

The provisions peculiar to the Act deal with assessments and returns. S. 10 provides that after 31st December 1974, the year of assessment is to be the calendar year. When this provision is taken in conjunction with s. 11, it appears that chargeable gains arising in a particular year are to be charged in that year of assessment. The amount to be charged is not computed by reference to transactions in the basis period for the year of assessment ie. the preceding year, as is the case for income tax, but on the actual gains from transactions in the current year.

S. 13(1) requires every chargeable person who disposes of a chargeable asset to submit a return of all disposals of chargeable assets made by him during the year of assessment, within three months after the end of that year. The return must specify the acquisition and disposal price of each asset, the gain or loss realised, and must provide the information necessary to determine the acquisition and disposal price. Any tax paid in advance of assessment under s. 12 must also be stated, and the receipt for the payment must be sent. The requirement that such particulars as are necessary to determine the acquisition and disposal price must also be sent indicates that if the Director-General is not satisfied with the taxpayer's computation of chargeable gain or allowable loss, he can make such

adjustments as are necessary. (See S. 14 (1) *infra.*) This provision will also apply where the transaction is deemed to have been carried out at market value, and the Director-General is not satisfied with the taxpayer's valuation. When the asset is held by a nominee, the nominee is required to submit a similar return, under S. 13(2), specifying the name and address of the nominator, the asset disposed of and the data when the nominee became vested with the asset. A nominee is a chargeable person and liable to pay the tax. S. 13(3) deals with the making of a return by a company where assets are transferred to the company by the person controlling the company, or his wife, or by them jointly; or inter-group transfers, and the asset is subsequently treated as the trading stock of the company to which the transfer is made.[10]

S. 13(5) provides that where a person is required to make an income tax return, then he shall make a declaration in that return whether or not he has made a disposal of chargeable assets in the year preceding the year of assessment for which this return is made. This declaration will facilitate the Inland Revenue Department in keeping a check of all disposals of chargeable assets, whether or not a chargeable gain has accured to the taxpayer, and comparing these declarations with the returns made by the taxpayer. The declaration, however, relates to disposals made in the year preceding the year of assessment whereas the return relates to the year of assessment itself.

Finally, it may be noted that the return under s. 13 is to be made where there is a disposal of chargeable assets, regardless of whether or not a chargeable gain or allowable loss has arisen. Hence even where the asset is sold more than two years after acquisition, or the disposal price is less than $100,000, the taxpayer must nevertheless make the return and the necessary declaration. Such returns and declarations could be used by the Department as circumstantial evidence in making out a case against the taxpayer as carrying on a business in land for income tax purposes even though the transaction is exempted from land speculation tax.

Once the return has been submitted the next step is the making of the assessment. S. 14(1) provides that the Director-General can either accept the return and make an assessment accordingly, or he may make such adjustments as are necessary before making the assessments. Where no return has been submitted, then s.14(2) provides that if the Director-General is of the opinion that that person is chargeable with the tax he may make an assessment accordingly. But such assessment does not affect that person's liability for failure to make a return. (These provisions are the equivalent of s.90 of the Income Tax Act, 1967). S.14(3) vests in the Director-General a blanket discretion to make an assessment which he considers appropriate on any person for any reason, and such assessment is

[10] See Sch. 2 para. 3(b), 17 and 19(5), (6), *supra.* p. 267–268.

to be adopted with such adjustments as are necessary as the assessment for that year of assessment once the period for making the return under s.13(1) has expired. The discretion conferred on the Director-General can be abused and used to persecute a taxpayer. Strict guidelines on the basis of which this discretion should be exercised ought to have been specified. It should be borne in mind that by virtue of s.21 of the Act upon service of the notice of assessment on the person assessed, the tax becomes due and payable. Such tax is to be paid notwithstanding any pending appeal on the matter. This could impose a serious financial strain on the taxpayer, even though payment by instalments may be permitted under s. 21(3). The granting of this sort of discretion is, however, typical of the entire tax structure in this country. It is to be hoped that in disputes arising under such provisions the Courts will invoke the principles of natural justice and require the Director-General to justify his course of conduct. S. 14(4) provides that the death of a chargeable person does not prevent the making of an assessment, so long as the assessment is made within three years of death. The notice of assessment is made on the deceased's executors and the liability is the same as if the assessment was made before his death. Under s. 17, every person assessed must be served a notice of assessment containing such particulars as are provided for in the subsection.

There are two provisions in the Act which are especially peculiar to this tax. These relate to payment of the tax in advance of assessment, (s. 12), and the assessment of the acquirer of the asset in certain circumstances. (S. 16). S. 12(1) provides that both the disposer and acquirer of a chargeable asset, are to send to the Director-General within thirty days, notification of the transaction, a written valuation by a valuer of the asset where the transaction is deemed to take place at market value, and if the transaction is carried out through a nominee, sufficient information to identify the nominator. Hence, this provision imposes the obligation on both the disposer and the acquirer. Should either one fail to do so, the Inland Revenue will nevertheless obtain the information from the other. Under sub-section (2), upon receipt of the notification, the Director-General is to determine the chargeable gain, compute the tax payable (without regard to any allowable losses available to the disposer) and serve upon the disposer a requisition to pay the amount of tax. By sub-section (3) the disposer is liable to pay such sum upon requisition. By sub-section (4) the Director-General is to send to both the disposer and acquirer a certificate of clearance upon receipt of payment or where there is in fact no chargeable gain arising. By sub-section (5) until such clearance is given, and the consideration consists wholly or partly of money, the acquirer must retain that money, up to a maximum of fifty percent of the consideration. The Director-General can require the amount retained or ought to have been retained by the acquirer, to be paid to him before the issue of the

certificate of clearance. Such sums due to the Director-General from the disposer or acquirer are treated as tax due by sub-section (6).

It appears that s.12 enables the ascertainment of tax liability before the transaction is completed so that adequate provision for the payment of the tax can be made. If the disposer is unable to pay the tax, the amount may be obtained from the acquirer out of the consideration which he is required to withold from the disposer until the clearance is given. There is however one major obscurity in the section. The opening words of s. 12(1) provide "In a case to which this section applies . . . .". The section, however, completely omits to state the circumstances in which it is to apply. Indeed the rest of the Act makes no mention of what circumstances are to give rise to the application of s. 12. Therefore, the section, as it stands is meaningless even though the machinery set up by the section is highly commendable in ensuring that tax due under the Act will be paid. It is submitted that sense could be restored to this section simply by amending the word "section" to read "Part". Then notification of every disposal of a chargeable asset would have to be given.

S. 16, which enables the acquirer to be assessed, is dependent on the operation of s. 12, as it only applies to cases to which that section applies. S. 16(1) provides that in such a situation, where (a) the consideration for the disposal consists of another asset, or (b) both the acquirer and disposer have failed to make the notification required by s. 12, or (c) the consideration is deemed to be market value under the Act, the Director-General may assess the acquirer for the tax payable by the disposer plus 10 per cent under s. 21(4). Sub-section (3), however, entitles the acquirer to recover the amount paid from the disposer. Where the acquirer has not retained the sum required to be retained by him from the consideration payable to the disposer under s.12(5)(b), and the Director-General has required him to pay to him the sum he ought to have retained, then that sum too is recoverable from the disposer, by virtue of s.12(2), under s.16(3).

This provision, therefore, covers the situation when no cash consideration changes hands out of which the disposer can pay the tax, or where the consideration received would not be sufficient to pay the tax. Since the liability to pay the tax falls on the acquirer it is in his interest to ensure that the disposer can pay the tax, failing which he ought to withhold at least half the consideration, if it be in money. On the other hand an unscrupulous disposer could leave innocent acquirers holding the baby as far as the tax liability is concerned, once they have received the price. The lesson from this is that acquirers of chargeable assets should first ensure that there will be no tax liability arising from the particular transaction, and if there is they should ensure that they are cleared from liability first before paying the full sum to the disposer.

The final provision peculiar to the Act deals with anti-avoidance where the transaction is between connected persons.[11] In effect s. 25(1) provides that if A disposes of an asset which he acquired for a consideration which was wholly or substantially provided by B, a connected person, then the disposal is deemed to have been made by B rather than A, except where B gave A a *bona fide* loan to acquire the asset in the course of carrying on business as a money-lender. However, if A aquired the asset from B, then in computing the chargeable gain where A disposes of the asset in the circumstances above, the acquisition price is to be taken to be the market value of the asset when A acquired it. This provision works in two ways. Firstly, it disallows the deduction of interest paid on the money provided by B if B did not give the sum as a loan in the course of his business as moneylender. Secondly, if it was B who sold his asset to A, then in computing the chargeable gain the consideration shall be taken to be the market value even though the price agreed between A and B might be considerably more so as to realise a smaller gain on subsequent disposal. It is to be noted that if A acquires the asset from an outsider, only the consideration being provided by B, then the price agreed between A and the outsider will be taken as the acquisition price. Market value is only imputed when the asset is acquired from B, a connected person. This means that if B is not a connected person, then even if he provided the consideration and the asset was acquired by A from him, s.25(1) will not apply. In order to show that B was not a connected person it must be established that the transaction was a bargain at arm's length.

The anti-avoidance provision contained in S. 25(2) is similar to that of S. 140 of the Income Tax Act, 1967.

(III) CONCLUSION

This piece of legislation appears to be a rushed effort. Apparently little thought went into the implications of many of the provisions and little effort was made to tailor the Act to the objectives sought to be achieved. The Act appears to have been modelled on similar legislation in New Zealand. In copying the New Zealand legislation wholesale our draftsmen have failed to take into account many of the special features of Malaysian law, especially the National Land Code, so that some of the provisions in the Act are either totally unworkable or meaningless.

A particularly major fault in the Act is the failure to take into account income tax liability. It would appear that transactions in land could be subject to land speculation tax and income tax. Although the preamble states that this is a tax on capital gains derived from land speculation, yet there is nothing in the body of the Act which provides that if the

[11] For meaning of "connected persons" see Sch. 2 para. 23.

transaction is subject to income tax, then it is not subject to land speculation tax. Furthermore the machinery of the tax is to be administered by the already overworked Inland Revenue Department. This means that there will be considerable delays in the making of final assessments. Also as a result of this the Department will have even more information about the activities of the taxpayers: this taken together with the vast discretions vested in the Director-General under both the Income Tax Act and under this Act could be used to encroach even more on the privacy of individuals and possibly subject them to unfair treatment and even persecution without showing cause.

It is felt that this Act will either be heavily amended in the near future, or repealed and be replaced by a better drafted and more thoughtful statute. As a humourous anecdote illustrating the overall shortcomings of the Act, s. 1 may be cited:

> "This Act may be cited as the Land Speculation Tax Act, *1974*, and shall be deemed to have come into force on 6th December, *1973*."

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APPENDIX I

Sections governing the administration (Parts III, IV and V) of the Land Speculation Tax Act, 1974 and their equivalents in the Income Tax Act, 1967.

Land Speculation Tax Act, 1974		*Income Tax Act, 1967*
s. 14(1), (2)	– Assessments	s. 90
s. 15	– Additional Assessments	s. 91
s. 18	– Right of Appeal	s. 99
s. 19	– Error or mistake	s. 131
s. 20	– Finality of assessment	s. 97
s. 22	– Recovery from persons leaving Malaysia	s. 104
s. 23	– Suit for the tax by the Director-General	s. 106
s. 24	– Refund of overpayments	s. 110
s. 25(2)	– Anti-avoidance	s. 140
s. 26	– Remission	s. 124
s. 27	– Power to call for information etc.	s. 81
s. 28	– Power of access to buildings and documents, etc.	s. 80
s. 29	– Failure to notify or make return of disposal	s. 112
s. 30	– Incorrect returns etc.	s. 113
s. 31	– Wilful Evasion	s. 114
s. 32	– Leaving Malaysia without payment of tax	s. 115
s. 33	– Obstruction of officers	s. 116
s. 34	– Breach of secrecy	s. 117
s. 35	– Offences by officials and unauthorised collection	ss. 118; 119
s. 36	– Other offences	s. 120
s. 37	– Additional provisions to offences under sections 30, 32, 33 or 36	s. 121
s. 38	– Tax payable notwithstanding prosecution	s. 122
s. 39	– Sanction for prosecution	s. 123

s. 40	– Compounding of offences and statement of penalties.	s. 124
s. 41	– Recovery of penalties	s. 125
s. 42	– Jurisdiction of subordinate court	s. 126
s. 43	– The Director General	s. 134
s. 44	– Power of Minister to give directions to Director-General	s. 135
s. 45	– Delegation of Director General's functions.	s. 136
s. 46	– Identification of officials	s. 137
s. 47	– Certain materials to be treated as confidential	s. 138
s. 48	– Evidential provisions	s. 142
s. 49	– Returns, etc. presumed to be made with due authority	s. 88
s. 50	– Persons by whom returns to be made	ss. 66; 67
s. 51	– Power to appoint agent	s. 68
s. 52	– Errors and defects in assessments etc.	s. 143
s. 53	– Service of notice and requisitions	s. 145
s. 54	– Power to direct where returns etc, are to be sent	s. 144
s. 55	– Authentication of notices and other documents.	s. 146
s. 56	– Free Postage	s. 147
s. 57	– Forms	s. 152
s. 58	– Power to make rules.	s. 154

LEGISLATION

The following is a list of Acts passed and revised in Malaysia in 1974:

FEDERAL ACTS PASSED

Bil. Akta/ Act No.	*Tajuk Ringkas/Short Title*
126	Akta Cukai Spekulasi Tanah, 1974. Land Speculation Tax Act, 1974.
127	Akta Kualiti Alam Sekeliling, 1974. Environmental Quality Act, 1974.
128	Akta Petroliam dan Letrik (Kawalan Bekalan), 1974. Petroleum and Electricity (Control of Supplies) Act, 1974.
129	Akta Penyiasatan Kajibumi, 1974. Geological Survey Act, 1974.
130	Akta Tisu Manusia, 1974. Human Tissues Act, 1974.
131	Akta Bishop-bishop Roman Catholic (Tukaran Nama dan Perbadanan), 1974. Roman Catholic Bishops (Change of name and Incorporation) Act, 1974.
132	Akta Cukai Pendapatan (Carum dan Pembayaran Balik Stok Penimbal Timah), 1974. Income Tax (Tin Buffer Stock Contributions and Repayments) Act, 1974.
133	Akta Jalan, Parit dan Bangunan, 1974. Street, Drainage and Building Act, 1974.
142	Akta Kumpulan Wang Kutu (Pengesahan), 1974. Kootu Funds (Validation) Act, 1974.
143	Akta Persekutuan Pengakap-pengakap Malaysia, 1974. Scouts Association of Malaysia Act, 1974.
144	Akta Kemajuan Petroliam, 1974. Petroleum Development Act, 1974.