# COMPULSORY PURCHASE AND ROLLOVER RELIEF

## by Barrie Akin

CGT<sup>1</sup> rollover relief under the convoluted provisions of ss.152 to 159 TCGA 1992<sup>2</sup> does not distinguish between voluntary and involuntary disposals by the taxpayer. So if a taxpayer is forced to dispose of land under a compulsory purchase order ("CPO") and is able to satisfy the requirements of the legislation, rollover is available. However, as is well known, s.152 applies in principle to assets used only for the purposes of a trade throughout the period of ownership, and does not assist property investors, even if they have no choice as to when (and to whom) they dispose of their property. Nor does it assist a trader who reinvests the sale proceeds in land which is held as an investment: see s.152(1). And if the land has been used for the purposes of the taxpayer's trade for only part of the period of ownership, the relief will be restricted under s.152(6) and (7).

The 1982 Finance Act introduced provisions which remedied these apparent shortcomings in s.152 where there is an element of compulsion in the disposal. The relevant provisions are now in ss.247, 247A and 248. Before that time, the only CGT rollover relief specifically targeted at compulsory purchase was the small part disposal provisions, now contained in s.243. Those provisions are not discussed further in this article, except where they are relevant to relief under s.247.

Section 247 relief generally attracts far less attention than s.152 relief, and its full implications are frequently overlooked, probably because the side note to s.247 is misleading. It says: *roll-over relief on compulsory acquisition*. But that does not tell the full story. The relief is available in many cases where the disposal is not the result of a CPO.

## The Basics

The basic thrust of s.247 is to permit rollover relief in the same basic manner as relief under s.152, but on disposals of land the proceeds of which are reinvested into further land and where the sale is a result of the exercise of compulsory powers or is to a body which has or may acquire such powers, as to which see below.

The timing criteria for reinvestment are the same as those in s.152(3)<sup>3</sup> and the same theoretical issue arises as to how the disposal consideration can be "applied" by taxpayer up to one year before the disposal: see *Watton v. Tippett.*<sup>4</sup> The provisions concerning partial rollover are essentially the same as those in s.153, and there are also rules dealing with rollovers into wasting assets.

There is also, as with s.152, the right to make provisional claims to relief before reinvestment takes place (see s.247A), a right to rollover where another group company makes the acquisition and a prohibition on "roll around relief" where assets are acquired intra group: see s.247(5A). The remainder of this article deals with the elements of s.247 relief that differ from s.152 relief.

## **Opening Words**

As for the language of the statute, s.247(1) requires that:-

- "(a) land ("the old land") is disposed of by any person ("the landowner") to an authority exercising or having compulsory powers; and
- (b) the landowner did not take any steps, by advertising or otherwise, to dispose of the land or to make his willingness to dispose of it known to the authority or others; and
- (c) the consideration for the disposal is applied by the landowner in acquiring other land .."

# Restriction of the Relief to "Land"

An obvious point which emerges from the section is that the relief relates to disposals and acquisitions of land only. The greater flexibility of s.152, which covers a wide range of assets in respect of which rollover is permitted, is simply absent from s.247. Compulsory purchase powers are generally directed towards the acquisition of land<sup>5</sup>, so it is not surprising that the draftsman restricted the relief to disposals and acquisitions of land. No doubt a policy case could be made for extending s.247 so as to permit rollover where the new asset is not land, but an asset which would satisfy s.152.

#### What is "Land"?

Section 247(8) TCGA says that "land" includes any interest in or right over land, so (subject to wasting asset issues) a freehold disposal can be rolled over into a leasehold acquisition. But this partial definition says nothing about buildings – it merely addresses rights and interests in and over land, but says nothing about its physical nature. Does "land" therefore include buildings? If it does not, then the relief will not operate effectively where the bulk of the value of the asset disposed of related to buildings. The bulk of the value of the disposal would not be attributable to "land" and could not be the subject of a s.247 rollover.

The other partial definition of "land" in the TCGA is to be found in s.288(1) TCGA. The subsection says:-

"In this Act, unless the context otherwise requires –

... "land" includes messuages, tenements, and hereditaments, houses and buildings of any tenure."

So both of these definitions expand the natural meaning of "land", but in largely different ways — one is concerned entirely with the legal nature of land: the other is largely concerned with its physical nature. Crucially, there is nothing in the context of s.247 that *requires* the definition in s.288(1) to be disapplied. Each can apply to land which is the subject of a s.247 claim, with virtually no overlap and certainly with no direct conflict. In addition, the provisions in s.248 dealing with rollover

into wasting assets and dwellinghouses reinforces the view that "land" must here also include buildings.

That also appears to be HMRC's view, as SP 13/93 accepts that s.247 relief can apply to shelter gains on the disposal of buildings and can apply where the rollover is into buildings rather than bare land. It should be remembered however that both HMRC and the Court have taken a different view of the meaning of "land" in other statutory contexts: see *Starke v. IRC* [1995] STC as to whether the definition of "agricultural property" in s.115(2) IHTA 1984 evinced sufficient contrary intention for the definition of "land" in the Interpretation Act 1978 to be disapplied. Consider also the position for s.152 rollovers, where the asset categories set out in s.155 make it tolerably clear that land and buildings are separate classes of assets for the purposes of that relief.

#### **Build Your Own?**

A second issue as regards buildings is: given that "land" should include buildings for the purpose of s.247 relief, can expenditure incurred on the *construction* of a new building on land already owned by the taxpayer constitute the application of disposal proceeds "in acquiring other land" for the purposes of s.247?

As a simple matter of language, it is by no means clear that the amounts paid to a builder for the construction of such a building will satisfy this requirement. Can placing brick upon brick amount to the acquisition of a building? In addition, if "land" here includes buildings, expenditure incurred on construction

is arguably incurred on the enhancement of the existing asset, namely the existing land, rather than on the acquisition of new "land", as defined. Unlike the position under s.152, where HMRC have made it clear that such expenditure is capable of qualifying for rollover, taxpayers should tread with extreme caution here

## **Excluded Land**

Understandably, the relief is denied when the land acquired by the taxpayer qualifies for private residence relief or does so within six years of its acquisition: see s.248. Interestingly however, s.247 has no equivalent to s.159. That section prevents non residents such from rolling over gains on the disposal of United Kingdom assets by reinvesting the proceeds into foreign assets used for the purposes of the same trade. Accordingly, a UK-resident but non-domiciled individual who disposes of land in a transaction to which s.247 potentially applies can reinvest the proceeds in new land situated outside the United Kingdom and still be eligible for relief. There is nothing in the legislation to refuse the relief where the land is outside the United Kingdom, but any disposal of the overseas land by a non domiciled but United Kingdom resident individual would of course fall outside the charge to CGT, unless the proceeds are remitted to the United Kingdom: see s.12.

# Is a CPO Necessary?

Whatever the side note to s.247 says (see above) the actual text of the section makes no direct mention of

CPOs and does not does at first sight require the disposal to have been made as a result of the exercise of compulsory purchase powers. It merely says that the disposal must be to "an authority exercising or having compulsory powers".

Section 247(8) says that this phrase is to be construed in accordance with s.243(5), which says:-

"In this section "authority exercising or having compulsory powers" means, in relation to the land transferred, a person or body of persons acquiring it compulsorily or who has or have been, or could be, authorised to acquire it compulsorily for the purposes for which it is acquired, or for whom another person or body of persons has or have been, or could be, authorised so to acquire it."

Long-winded as it undoubtedly is, this definition makes it clear that actual compulsory acquisition via a CPO is only one possible way of satisfying this part of the legislation. Even without the exercise of compulsory powers, the relief can apply if the person making the acquisition has compulsory powers ("who has ... been or could be authorised to acquire it compulsorily") and the purpose of those powers is also the purpose for which the acquisition is actually made. So if the only power possessed by the person or body is a power to acquire for the purposes of building a railway from A to B, a sale of an office building to that body for its own occupation is most unlikely to be capable of attracting relief – the power of compulsory acquisition is unlikely to permit

the acquisition of an office building for occupation by the railway company.

But many compulsory purchase powers are extremely wide. This can in theory extend the relief considerably. Consider the freely negotiated sale of an building by an investor to a Regional Development Authority, which will occupy the building for its own use. The purposes for which such an authority can compulsorily acquire property incredibly wide - certainly wide enough to encompass the acquisition of the building for its own use: see the Regional Development Agencies Act 1989, ss.4, 5 and 20. Accordingly, a chargeable gain on such a sale could be the subject of a rollover under s.247, provided of course the other requirements of the section were met. There are practical difficulties in making use of the apparent width of the relief in such circumstances namely the provisions of s.247(1)(b) – see below.

## Who can be an "Authority"?

Many "official" bodies, including central government and public and local authorities, have powers of compulsory purchase for a host of purposes<sup>7</sup>. But the possession of such powers is not confined to "official" bodies – commercial organisations frequently possess compulsory purchase powers. Utility companies and railway companies are obvious examples. Their powers are usually granted by private Acts of Parliament –see, for example, the Channel Tunnel Rail Link Act 1996. HMRC accept that a tenant exercising a right to buy a freehold reversion under the Leasehold Reform

Act 1967 can be an "authority" for the purposes of s.247: see SP 13/93.

# **Inchoate Compulsory Powers**

It is tempting to argue that sale to a person who does not currently possess compulsory powers could nevertheless fall within the ambit of s.247 because s.243(5) refers to "a person or body of persons ... who has or have been, or could be, authorised to acquire [the land] compulsorily ..." This could, taken literally apply to anybody at all, as it is conceivable that parliament might confer powers of compulsory purchase on anybody. Any such argument is, of course, wholly unrealistic and ignores the messy structure and history of compulsory purchase. The more realistic explanation of the draftsman's use of "could be" is that it is intended to cover bodies whose powers of compulsory purchase are subject to the authorisation or confirmation of a third party, such as a Secretary of State. For example, the Acquisition of Land Act 1981 which follows a two stage procedure under which a body intending to make a compulsory purchase must usually have its CPO confirmed by the Secretary of State. Arguably, such a body only possesses compulsory purchase powers once it has its authorisation for that particular CPO. Until then it only falls within s.247 because it "could be authorised" to acquire the land compulsorily.

## **Purchasers without Compulsory Powers**

The definition in s.243(5) has a further feature: it also treats as "an authority exercising or having compulsory powers" a person or body of persons

"for whom another person or body of persons has or have been or could be authorised ... to acquire ... [the land compulsorily for the purpose for which it is acquired]."

So a purchaser with no CPO powers of its own can nevertheless be regarded as "an authority exercising or having compulsory powers". What if a property investor (who is clearly never able to benefit from s.152) sells land to a developer and the land lies within the area of a Regional Development Agency, which has extensive CPO powers within its area? The Agencies' areas, taken together, cover the whole of England (see Schedule 1 to the 1989 Regional Development Agencies Act) and an RDA can acquire property compulsorily and dispose of it at an undervalue, if that would further the economic development and regeneration of its area and the Secretary of State consents: see sections 4 and 5 to that Act. So, can the investor sneak within s.247 rollover provisions simply because an RDA could be authorised to acquire the land for the developer, even if the developer and the RDA have never spoken? At a less extreme level, what if the RDA says that it would consider going through the CPO process if an investor does not act promptly to develop its own land and, in the event of a CPO being made, it would then consider selling to a developer? Could that assist the investor who then sells to a developer to forestall a CPO?

It seems to me that these arguments (which have, perhaps understandably, been put forward to investors by developers) misunderstand the draftsman's intention, which appears to have been to allow rollover relief for

CPO disposals and for disposals entered into to avoid having to go through the CPO process. So where an acquiring authority had power to acquire on behalf of another, it would be sensible to relieve direct sales to that other person. Compulsory powers of this kind do exist. One can be found in the Military Lands Act 1892 – see s.1(3), where the acquiring authority (a county council) has power to acquire land on behalf of others (certain volunteer organisations, which themselves are capable of holding property in their own name). The existence of such a specific CPO power suggests (albeit not conclusively) that the Court is likely to regard the use of "for whom" in s.243(5) as requiring a narrow interpretation - applying it only to situations in which there is a clear statutory authority under which one body has power to acquire on behalf of another. Since the contrary argument could make s.247 available to virtually all sales of investment land in the United Kingdom, it would be surprising if the Courts did not take a narrow view here

# Marketing

It must be remembered that s.247(1)(b) will prevent rollover if the owner has taken active steps to sell the land. Its requirements are:-

"the landowner did not take any steps, by advertising or otherwise, to dispose of the old land or to make his willingness to dispose of it known to the authority or others."

This does not mean that the landowner must not intend to sell. That would be illogical, as s.247(1)(a) clearly allows relief where the sale is not under a CPO. It is active marketing and the communication of an intention to sell that creates difficulty here. This does however raise practical difficulties. What can landowner say when approached by an authority that is minded to exercise its statutory powers? Must be initially put on a show of unwillingness? Must he continue to do so and if so for how long? If, when approached, he says that he is perfectly willing to sell, has he fallen foul of s.247(1)(b)? It seems to me that the answer is in the negative. A response to an approach cannot, in the context of this legislation be the "taking of steps, by advertising or otherwise ... to make his willingness to dispose of [the land] known ..."

A further issue here is communication to one's own advisers such as solicitors or chartered surveyors. Even if no marketing of the land is undertaken, is the communication to one's own advisers of a willingness to sell sufficient to contravene s.247(1)(b) even when those advisers have not passed the information to third parties? The answer here must be that communication to one's own advisers is not communication to "others" in the context of this legislation.

And what if the landowner has marketed the land previously but then decided not to sell? The paragraph has no time limit, so arguably any earlier marketing of the land causes difficulties. Fortunately, HMRC have a practical solution to this – CG 72202 says that any

activity that falls foul of s.247(1)(b) is to be disregarded if it took place more than three years "before the compulsory acquisition in question". Presumably this is also intended to apply to sales to authorities having compulsory powers, rather than just to disposals under a CPO, but it does not say that.

#### Miscellaneous

It should not be forgotten that the amount received by the landowner may not strictly relate solely to the land. Some may relate to goodwill or trade disturbance or to the reduction in value of land that is not disposed of. Section 245 deals with these issues and potentially reduces the amount on which s.247 relief can be claimed.

#### Conclusion

This rather obscure corner of the capital gains tax legislation may be coming to life shortly. A host of CPOs have been served on investors in preparation for the development required for the 2012 London Olympics. There is also considerable non-CPO activity in adjacent areas and the author is aware of at least one developer that has suggested that the relief is readily available where the sale to the developer might forestall a CPO by a Recognised Development Agency. It will be interesting to see what resulting disputes emerge.

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<sup>&</sup>lt;sup>1</sup> Throughout this article, I use "CGT" to denote both capital gains tax and corporation tax on chargeable gains

<sup>&</sup>lt;sup>2</sup> All statutory references are to TCGA 1992 unless otherwise stated.

<sup>&</sup>lt;sup>3</sup> See s. 247(5)(b) TCGA 1992; see also s. 246 on the timing of disposals and acquisitions.

<sup>&</sup>lt;sup>4</sup> [1997] STC 893. The point is, rightly, ignored in practice by HMRC.

<sup>&</sup>lt;sup>5</sup> That general statement is not completely accurate – there is statutory power to authorise the acquisition of any kind of property in an emergency: Civil Contingencies Act 2004, s. 22(3).

<sup>&</sup>lt;sup>6</sup> See, for example ESC D25

<sup>&</sup>lt;sup>7</sup> See for example, the powers of the Secretary of State for Defence under the Military Lands Act 1892 and of Regional Development Agencies under the Regional Development Agencies Act 1989.