

Notice of Proposed Rulemaking

Capital Gains, Installment Sales, Unrecaptured Section 1250 Gain

REG-110524-98

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document contains proposed amendments to the regulations relating to the taxation of capital gains on installment sales of depreciable real property. The proposed regulations interpret changes made by the Taxpayer Relief Act of 1997, as amended by the Internal Revenue Service Restructuring and Reform Act of 1998 and the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999. The proposed regulations affect persons required to report capital gain from an installment sale where a portion of the capital gain is unrecaptured section 1250 gain and a portion is adjusted net capital gain.

DATES: Written comments or requests for a public hearing must be received by April 22, 1999.

ADDRESSES: Send submissions to CC:DOM:CORP:R (REG-110524-98), room 5226, Internal Revenue Service, POB 7604, Ben Franklin Station, Washington, DC 20044. In the alternative, submissions may be hand delivered Monday through Friday between the hours of 8 a.m. and 5 p.m. to: CC:DOM:CORP:R (REG-110524-98), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, DC. Alternatively, taxpayers may submit comments electronically via the Internet by selecting the "Tax Regs" option on the IRS Home Page, or by submitting comments directly to the IRS Internet site at http://www.irs.ustreas.gov/prod/tax_regsg/comments.html.

FOR FURTHER INFORMATION CON-

TACT: Concerning the regulations, Susan Kassell, (202) 622-4930; concerning submissions, LaNita VanDyke, (202) 622-7190 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

This document contains proposed amendments to the Income Tax Regulations (26 CFR Part 1) relating to the taxation of capital gains on installment sales of depreciable real property.

Prior to 1997, the maximum rate on net capital gain for individuals was 28 percent. In the Taxpayer Relief Act of 1997, Public Law 105-34 (111 Stat. 788, 831) (1997 Act), Congress amended section 1(h) generally to reduce the maximum capital gain tax rates for individuals. Certain substantive changes and technical corrections to section 1(h) were enacted as part of the Internal Revenue Service Restructuring and Reform Act of 1998, Public Law 105-206 (112 Stat. 685), including the repeal of an 18-month holding period requirement for amounts properly taken into account after December 31, 1997, and by the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Public Law 105-277 (112 Stat. 2681).

As amended, section 1(h) generally divides net capital gain into three rate groups based on the nature of the property, the nature of the gain, and the holding period of the property.

A maximum marginal rate of 28 percent applies to 28-percent rate gain (28-percent gain), the combination of (1) capital gains and losses from the sale or exchange of collectibles held for more than one year; (2) an amount equal to gain excluded from income on the sale or exchange of certain small business stock under section 1202; (3) capital gains and losses determined under special transition rules in section 1(h)(13) for certain amounts taken into account in 1997; (4) net short-term capital loss for the tax year; and (5) any long-term capital loss carry-over to the tax year under section 1212.

A maximum marginal rate of 25 percent applies to unrecaptured section 1250 gain (25-percent gain), which is defined in section 1(h)(7)(A) as the amount of long-term capital gain (not otherwise

treated as ordinary income) that would be treated as ordinary income if section 1250(b)(1) included all depreciation and the applicable percentage under section 1250(a) were 100 percent, reduced by any net loss in the 28-percent rate category. Effectively, the amount of gain taxed at 25 percent is the amount of straight-line depreciation allowed for the property. Thus, the 25-percent rate category partially recaptures such depreciation, but the recapture is limited, inter alia, in that the recapture rate may be less than the marginal rates that applied to the depreciation deductions. Section 1(h)(7)(B) limits the unrecaptured section 1250 gain from section 1231 assets for any tax year to the net section 1231 gain for that year.

A maximum marginal rate of 20 percent generally applies to adjusted net capital gain (20/10-percent gain), defined in section 1(h)(4) as the portion of net capital gain that is not taxed at the 28-percent or 25-percent rates. Under section 1(h)(1)(B), a 10-percent rate applies to any portion of adjusted net capital gain that would otherwise be taxed at a 15-percent rate if capital gains were taxed as ordinary income.

For amounts properly taken into account after July 28, 1997, and before January 1, 1998, an 18-month holding period is required to obtain the maximum 25-percent, 20-percent, or 10-percent rates.

Section 453 provides that, unless taxpayers elect out, gain from an installment sale is recognized as payments on the installment obligation are received. Before the 1997 Act, reporting capital gain under the installment method was relatively straightforward: the capital gain portion of each payment was taxed at the maximum capital gain rate of 28 percent. Section 1(h) provides for multiple rates, but does not address how to treat an installment sale of depreciable real property when the gain to be reported consists of both 25-percent gain and 20/10-percent gain.

Explanation of Provisions

Front-Loaded Allocation of Unrecaptured Section 1250 Gain

Under the proposed regulations, if a portion of the capital gain from an installment sale is 25-percent gain and a portion

is 20/10-percent gain, the taxpayer is required to take the 25-percent gain into account before the 20/10-percent gain, as payments are received. (Because sales that result in 28-percent gain cannot also yield 25-percent gain or 20/10-percent gain, an allocation rule for 28-percent gain is unnecessary.)

A front-loaded allocation method for 25-percent gain is generally consistent with the statute, under which 20/10-percent gain (that is, adjusted net capital gain) is defined as the residual category of capital gain not taxed at maximum rates of 28 percent or 25 percent. The front-loaded method precludes taxpayers from recognizing some 20/10-percent gain from an installment sale even when the amount ultimately recognized proves to be less than the amount subject to recapture at the 25-percent rate. Absent a front-loaded allocation method this inappropriate result could arise, for example, when a taxpayer later disposes of an installment obligation at a discounted price or when the amount to be received is contingent.

The IRS and Treasury Department have previously adopted analogous front-loaded allocation methods with respect to installment sales. For example, before 1984—when Congress enacted section 453(i), which requires immediate recognition of recapture gain at ordinary rates under sections 1245 and 1250—taxpayers were permitted to defer recognition of this ordinary-rate recapture gain under the installment method. Thus, an installment payment could contain both capital gain and gain taxed at ordinary rates. By regulation, a front-loaded allocation of the ordinary-rate recapture gain was required. §§1.1245-6(d); 1.1250-1(c)(6). See *Dunn Construction v. United States*, 323 F. Supp. 440 (N.D. Ala. 1971) (upholding §1.1245-6(d) as “reasonable and consistent with the underlying statute” and a valid exercise of the regulatory authority under section 453). See also §§1.1251-1(e)(6), 1.1252-1(d)(3), 1.1254-1(d), and 16A.1255-1(c)(3).

Interaction with Section 1231

Section 1(h) also does not address the interaction of the capital gain rates, the installment method, and the rules in section 1231. Section 1231(a) generally provides that, when gains from the sale or exchange of property used in a trade or busi-

ness exceed losses from such property, the gains and losses are treated as long-term capital gains and losses. Conversely, when section 1231 losses exceed section 1231 gains, the gains and losses are treated as ordinary. The capital nature of net section 1231 gain is subject to an exception: under section 1231(c), net section 1231 gain is treated as ordinary income to the extent of the taxpayer’s non-recaptured net section 1231 losses for the preceding five years.

With respect to the interaction of section 1231(c) and the capital gain rates, the IRS and Treasury Department have already provided that section 1231 gain that is recharacterized as ordinary gain under section 1231(c) is deemed to consist first of 28-percent gain, then 25-percent gain, and finally 20/10-percent gain. See Notice 97-59 (1997-45 IRB 7, 8). An example in the proposed regulations illustrates the application of this principle in the installment sale context. Consistent with this treatment and with the general rule that 25-percent gain is front-loaded, another example in the proposed regulations illustrates that—in a year in which installment gain is characterized as ordinary gain under section 1231(a) because there is a net section 1231 loss for the year—the gain is treated as consisting of 25-percent gain first, before 20/10-percent gain, for purposes of determining how much 25-percent gain remains to be taken into account in later payments.

The examples in the proposed regulations—regarding the interaction of sections 1(h), 453, and 1231—are specific applications of the general rule that, for any given installment payment, gain from all previous payments is treated as consisting first of 25-percent gain, rather than 20/10-percent gain, in determining how much of each category of gain remains to be reported with respect to current and subsequent payments. Under the regulations, in making this determination it is generally irrelevant how such prior gain was actually reported and taxed. For example, an installment payment that is taxed at 15 percent because the taxpayer is in a low tax bracket may be treated as consisting of 25-percent gain (that is, unrecaptured section 1250 gain) for allocation purposes, even though the gain is not actually taxed at 25 percent. The proposed regulations focus on examples in-

volving section 1231 since they are the most common.

Treatment of Installment Payments from Sales Prior to the Effective Date of the 1997 Act

The capital gains provisions of the 1997 Act were effective for taxable years ending after May 6, 1997. However, the maximum rate of 28 percent was not reduced for gains properly taken into account before May 7, 1997. Under settled authority, originating in *Snell v. Commissioner*, 97 F.2d 891 (5th Cir. 1938), the law in effect when an installment payment is received controls the tax treatment of the payment. Unless otherwise provided, installment payments received after a change in the law are taxed under the new law, whether favorable or unfavorable, looking back to the original transaction for the facts necessary to apply the changed law. In *Snell*, for example, installment payments from what was a capital asset in the sale year were taxed as ordinary income after Congress changed the definition of a *capital asset*. See also *Estate of Kearns v. Commissioner*, 73 T.C. 1223 (1980); *Klein v. Commissioner*, 42 T.C. 1000 (1964); Rev. Rul. 79-22 (1979-1 CB 275). Congress also implicitly has recognized the *Snell* principle by enacting grandfather exceptions when the application of *Snell* would be unfavorable. For example, when Congress extended the holding period requirement for capital gain in 1976, the legislation specifically excepted from the new, harsher requirements post-1976 installment gain from pre-1976 sales.

The legislative history of the 1997 Act reflects the *Snell* principle, providing that section 1(h) “generally applies to sales and exchanges (and installment payments received) after May 6, 1997.” Conf. Rep. 105-220, 105th Cong., 1st Sess. 382, 383 (1997). Thus, under these settled principles, gain on installment payments received after May 6, 1997, from sales on or before that date, is taxed at the new, lower maximum rates of 25 percent, 20 percent, or 10 percent if it qualifies as unrecaptured section 1250 gain or adjusted net capital gain. However, as in the case of gain from post-effective-date sales, section 1(h) does not specify how to allocate the two categories of gain.

The proposed regulations provide that the capital gain rates applicable to installment payments that are received on or after the effective date of the 1997 Act from sales prior to the effective date are determined as if, for all payments received after the date of sale but before the effective date, 25-percent gain had been taken into account before 20/10-percent gain. This approach is consistent with the Snell principle in that it provides for the same method of allocation, whether the sale occurred before or after the effective date of the 1997 Act. For taxpayers who sold property and received installment payments before the effective date of the 1997 Act, this provision is favorable, since it generally reduces or eliminates the amount of 25-percent gain to be reported on installment payments received after the effective date. The approach is also simple — because it is generally irrelevant how the prior gain was actually reported and taxed, in most cases taxpayers will simply calculate the total amount of 25-percent gain on the sale and subtract from that all gain previously reported, in order to arrive at the amount of 25-percent gain remaining to be reported.

Treatment of Installment Payments Received Between the Effective Date of the Statute and the Effective Date of the Final Regulations.

The proposed regulations also address the treatment of gain in installment payments that are received during the period between the effective date of section 1(h) and the effective date of the final regulations. The proposed regulations provide that, in the event the cumulative amount of 25-percent gain actually reported in installment payments received during this period was less than the amount that would have been reported using the front-loaded allocation method of the regulations, the amount of 25-percent gain actually reported, rather than an amount determined under a front-loaded allocation method, must be used in determining the amount of 25-percent gain that remains to be reported. This provision ensures that taxpayers cannot underreport the total amount of 25-percent gain by taking inconsistent positions with respect to payments received before and after the effective date of the regulations. By providing for this rule, no inference is in-

tended that any allocation method other than the method provided for by the regulations was a reasonable interpretation of section 1(h) in this context. However, the IRS will not challenge the use of a pro rata allocation method—that is, a method under which the amounts of 25-percent gain and 20/10-percent gain in each installment payment bear the same relationship as the total amounts of 25-percent and 20/10-percent gain to be reported on the sale—for installment payments received before the effective date of the final regulations, if the taxpayer used the same pro rata method for all installment payments during such period.

Proposed Effective Date

The regulations are proposed to be effective for payments properly taken into account after the date the regulations are published as final regulations in the *Federal Register*.

Special Analyses

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in EO 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations, and, because the regulations do not impose a requirement for the collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Internal Revenue Code, this notice of proposed rulemaking will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Comments and Requests for a Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written comments (a signed original and eight (8) copies) that are submitted timely to the IRS. The IRS and Treasury Department request comments on the clarity of the proposed rules and how they can be made easier to understand. All comments will be available for public inspection and

copying. A public hearing may be scheduled if requested in writing by a person that timely submits written comments. If a public hearing is scheduled, notice of the date, time, and place for the hearing will be published in the **Federal Register**.

Drafting Information

The principal authors of these regulations are Susan Kassell and Rob Lauderman, Office of the Assistant Chief Counsel (Income Tax & Accounting). However, other personnel from the IRS and Treasury Department participated in their development.

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Proposed Amendment to the Regulations

Accordingly, the IRS proposes to amend 26 CFR part 1 as follows:

PART 1—INCOME TAXES

Paragraph 1. The authority citation for part 1 continues to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

Par. 2. Section 1.453-12 is added to read as follows:

§1.453-12 Allocation of unrecaptured section 1250 gain reported on the installment method.

(a) *General rule.* Unrecaptured section 1250 gain, as defined in section 1(h)(7), is reported on the installment method if that method otherwise applies under section 453 or 453A and the corresponding regulations. If gain from an installment sale includes unrecaptured section 1250 gain and adjusted net capital gain (as defined in section 1(h)(4)), the unrecaptured section 1250 gain is taken into account before the adjusted net capital gain.

(b) *Installment payments from sales before May 7, 1997.* The amount of unrecaptured section 1250 gain in an installment payment that is properly taken into account after May 6, 1997, from a sale before May 7, 1997, is determined as if, for all payments properly taken into account after the date of sale but before May 7, 1997, unrecaptured section 1250 gain had been taken into account before adjusted net capital gain.

(c) *Installment payments received after May 6, 1997, and before the effective date of the final regulations.* If the amount of

unrecaptured section 1250 gain in an installment payment that is properly taken into account after May 6, 1997, and before the effective date of the final regulations, is less than the amount that would have been taken into account under this section, the lesser amount is used to determine the amount of unrecaptured section 1250 gain that remains to be taken into account.

(d) *Examples.* In each example, the taxpayer, an individual whose taxable year is the calendar year, does not elect out of the installment method. The installment obligation bears adequate stated

interest, and the property sold is real property held in a trade or business that qualifies as both section 1231 property and section 1250 property. In all taxable years, the taxpayer's marginal tax rate on ordinary income is 28 percent. The following examples illustrate the rules of this section:

Example 1. General rule. This example illustrates the rule of paragraph (a) of this section.

(i) In 1998, A sells property for \$10,000, to be paid in ten equal annual installments beginning on December 1, 1998. A originally purchased the property for \$5,000, held the property for several years, and took straight-line depreciation deductions in the

amount of \$3,000. In each of the years 1998-2007, A has no other capital or section 1231 gains or losses.

(ii) A's adjusted basis at the time of the sale is \$2,000. Of A's \$8,000 of section 1231 gain on the sale of the property, \$3,000 is attributable to prior straight-line depreciation deductions and is unrecaptured section 1250 gain. The gain on each installment payment is \$800.

(iii) As illustrated in the following table, A takes into account the unrecaptured section 1250 gain first. Therefore, the gain on A's first three payments, received in 1998, 1999, and 2000, is taxed at 25 percent. Of the \$800 of gain on the fourth payment, received in 2001, \$600 is taxed at 25 percent and the remaining \$200 is taxed at 20 percent. The gain on A's remaining six installment payments is taxed at 20 percent. The table is as follows:

	1998	1999	2000	2001	2002	2003-2007	Total gain
Installment gain	800	800	800	800	800	4000	8000
Taxed at 25%	800	800	800	600			3000
Taxed at 20%				200	800	4000	5000
Remaining to be taxed at 25%	2200	1400	600				

Example 2. Installment payments from sales prior to May 7, 1997. This example illustrates the rule of paragraph (b) of this section.

(i) The facts are the same as in *Example 1* except that A sold the property in 1994, received the first of the ten annual installment payments on December 1, 1994, and had no other capital or section 1231 gains or losses in the years 1994-2003.

(ii) As in *Example 1*, of A's \$8000 of gain on the

sale of the property, \$3000 was attributable to prior straight-line depreciation deductions and is unrecaptured section 1250 gain.

(iii) As illustrated in the following table, A's first three payments, in 1994, 1995, and 1996, were received before May 7, 1997, and taxed at 28 percent. Under the rule described in paragraph (b) of this section, A determines the allocation of unrecaptured section 1250 gain for each installment payment after

May 6, 1997, by taking unrecaptured section 1250 gain into account first, treating the general rule of paragraph (a) of this section as having applied since the time the property was sold, in 1994. Consequently, of the \$800 of gain on the fourth payment, received in 1997, \$600 is taxed at 25 percent and the remaining \$200 is taxed at 20 percent. The gain on A's remaining six installment payments is taxed at 20 percent. The table is as follows:

	1994	1995	1996	1997	1998	1999-2003	Total gain
Installment gain	800	800	800	800	800	4000	8000
Taxed at 28%	800	800	800				2400
Taxed at 25%				600			600
Taxed at 20%				200	800	4000	5000
Remaining to be taxed at 25%	2200	1400	600				

Example 3. Effect of section 1231(c) recapture. This example illustrates the rule of paragraph (a) of this section when there are non-recaptured net section 1231 losses, as defined in section 1231(c)(2), from prior years.

(i) The facts are the same as in *Example 1*, except that in 1998 A has non-recaptured net section 1231 losses from the previous four years of \$1000.

(ii) As illustrated in the following table, in 1998, all of A's \$800 installment gain is recaptured as ordinary income under section 1231(c). Under the rule described in paragraph (a) of this section, for

purposes of determining the amount of unrecaptured section 1250 gain remaining to be taken into account, the \$800 recaptured as ordinary income under section 1231(c) is treated as reducing unrecaptured section 1250 gain, rather than adjusted net capital gain. Therefore, A has \$2200 of unrecaptured section 1250 gain remaining to be taken into account.

(iii) In 1999, A's installment gain is taxed at two rates. First, \$200 is recaptured as ordinary income under section 1231(c). Second, the remaining \$600 of gain on A's 1999 installment payment is taxed at

25 percent. Because the full \$800 of gain reduces unrecaptured section 1250 gain, A has \$1400 of unrecaptured section 1250 gain remaining to be taken into account.

(iv) The gain on A's installment payment received in 2000 is taxed at 25 percent. Of the \$800 of gain on the fourth payment, received in 2001, \$600 is taxed at 25 percent and the remaining \$200 is taxed at 20 percent. The gain on A's remaining six installment payments is taxed at 20 percent. The table is as follows:

	1998	1999	2000	2001	2002	2003-2007	Total gain
Installment gain	800	800	800	800	800	4000	8000
Taxed at ordinary rates under section 1231(c)	800	200					1000
Taxed at 25%		600	800	600			2000
Taxed at 20%				200	800	4000	5000
Remaining non-recaptured net section 1231 losses	200						
Remaining to be taxed at 25%	2200	1400	600				

Example 4. Effect of a net section 1231 loss. This example illustrates the application of paragraph (a) of this section when there is a net section 1231 loss.

(i) The facts are the same as in *Example 1* except that A has section 1231 losses of \$1000 in 1998.

(ii) In 1998, A's section 1231 installment gain of \$800 does not exceed A's section 1231 losses of \$1000. Therefore, A has a net section 1231 loss of \$200. As a result, under section 1231(a) all of A's section 1231 gains and losses are treated as ordinary gains and losses. As illustrated in the following table, A's entire \$800 of installment gain is ordinary gain. Under the rule described in paragraph (a) of

this section, for purposes of determining the amount of unrecaptured section 1250 gain remaining to be taken into account, A's \$800 of ordinary section 1231 installment gain in 1998 is treated as reducing unrecaptured section 1250 gain. Therefore, A has \$2200 of unrecaptured section 1250 gain remaining to be taken into account.

(iii) In 1999, A has \$800 of section 1231 installment gain, resulting in a net section 1231 gain of \$800. A also has \$200 of non-recaptured net section 1231 losses. The \$800 gain is taxed at two rates. First, \$200 is taxed at ordinary rates under section 1231(c), recapturing the \$200 net section 1231 loss sustained in 1998. Second, the remaining \$600 of

gain on A's 1999 installment payment is taxed at 25 percent. As in *Example 3*, the \$200 of section 1231(c) gain is treated as reducing unrecaptured section 1250 gain, rather than adjusted net capital gain. Therefore, A has \$1400 of unrecaptured section 1250 gain remaining to be taken into account.

(iv) The gain on A's installment payment received in 2000 is taxed at 25 percent, reducing the remaining unrecaptured section 1250 gain to \$600. Of the \$800 of gain on the fourth payment, received in 2001, \$600 is taxed at 25 percent and the remaining \$200 is taxed at 20 percent. The gain on A's remaining six installment payments is taxed at 20 percent. The table is as follows:

	1998	1999	2000	2001	2002	2003-2007	Total gain
Installment gain	800	800	800	800	800	4000	8000
Ordinary gain under section 1231(a)	800						800
Taxed at ordinary rates under section 1231(c)		200					200
Taxed at 25%		600	800	600			2000
Taxed at 20%				200	800	4000	5000
Net section 1231 loss	200						
Remaining to be taxed at 25%	2200	1400	600				

(e) *Effective date.* This section applies to installment payments properly taken into account after the date these regulations are published as final regulations in the **Federal Register**.

Robert E. Wenzel,
Deputy Commissioner of
Internal Revenue.

(Filed by the Office of the Federal Register on January 21, 1999, 8:45 a.m., and published in the issue of the Federal Register for January 22, 1999, 64 F.R. 3457)