

BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
THERESA M. NOLLENBERGER)

Appearances:

For Appellant: Paul G. Taylor, Certified Public
Accountant

For Respondent: Burl D. Lack, Chief Counsel;
Jack Rubin, Junior Counsel

O P I N I O N

This appeal is made pursuant to Section 19059 of the Revenue and Taxation Code from the action of the Franchise Tax Board in denying the claims of Theresa M. Nollenberger for refund of personal income tax in the amounts of \$1,739.22, \$2,058.16 and \$654.58 for the years 1950, 1951 and 1952, respectively.

Prior to 1913 Appellant and her husband acquired a 10-acre tract of land in the vicinity of Burbank, California. Appellant and her family resided there and, until the beginning of World War II, raised poultry on the land. After the war Appellant's son maintained a boat manufacturing business on a part of the premises. Meanwhile, new subdivisions encompassed the tract and the city zoned it for residential use, thus preventing its further development as a commercial site. Appellant's son removed his business from the tract because the zoning restrictions and power limitations hampered expansion.

Faced with high taxes on unproductive property, Appellant decided to dispose of the tract. However, no buyer could be found willing to take the whole tract at Appellant's asking price. Negotiations to sell the land for \$87,000 were begun in 1949 but the sale was not completed. Appellant then had the tract filled and leveled; she had a street installed throughout the length of the tract; and she had the entire property subdivided into 50 lots. A "For Sale" sign was erected on the property and Appellant received prospective buyers in her home. Several real estate brokers were paid commissions for assisting in making sales.

Appeal of Theresa M. Nollenberger

In 1950, 21 lots were sold in 12 transactions; in 1951, 18 lots were sold in 13 transactions; and in 1952, 6 lots were sold in 5 transactions. Thus, Appellant sold 45 of the 50 lots in 30 transactions during the years on appeal. She was not otherwise gainfully employed and received substantially all of her income from sales of the lots. Her gain from the sale of the lots was \$100,000. This was \$20,000 more than she would have realized if she had completed the sale of the entire tract in 1949 for \$87,000.

Appellant contends that she was not in the real estate business but was only liquidating a capital asset held for many years, that her subdivision and leveling of the tract was necessary in order to liquidate at a fair price and that, therefore, her gain from selling the lots was taxable as a capital gain (see Section 17712 (now 18151) of the Revenue and Taxation Code). The Franchise Tax Board's position is that the tract was held primarily for sale, that in subdividing the land and selling lots the Appellant was engaged in a trade or business and that, therefore, the profit derived from the sales was ordinary income.

Section 17711 (now 18161) of the Revenue and Taxation Code, which is substantially the same as Section 117(a)(1) of the Internal Revenue Code of 1939, provides that the term "capital asset" does not include property held by a taxpayer primarily for sale to customers in the ordinary course of his trade or business.

It is apparent that Appellant's activities with respect to the sale of the lots were for the purpose of obtaining a greater profit than she could have obtained by a sale of the land in bulk. With this end in view, she leveled the tract, constructed a street and subdivided the land. She advertised the lots for sale to the general public and took charge of negotiations and sales herself, assisted partially by real estate brokers. She had no other gainful occupation and her sales resulted in substantially all of her income for the years in question.

These facts serve to distinguish Appellant's situation from the cases which she has cited. Of the cases which she relies upon, those most nearly in point are marked by the absence of a profit motive (Camp v. Murrap, 226 Fed. 2d 931), a lack of subdivision and improvement by the taxpayers (Frieda E. J. Farley, 7 T. C. 198; Viggo Gruy, T. C. Memo., Dkt. Nos. 2 0938-20940, entered March 21, 1950; Minnie Stienau Loewenberg, T. C. Memo., Dkt. No. 14378, entered October 11, 1948), sales to an exclusive group (W.T. Thrift. Sr., 15 T.C. 366) or sales activity entirely by an independent contractor

