



BEFORE THE STATE BOARD OF EQUALIZATION  
OF THE STATE OF CALIFORNIA

In **the** Matter of the Appeals of )  
BEN F. AND EMILY MOORE )

Appearances:

For Appellants: Ben F. Moore, in **pro. per.**  
For Respondent: Tom Muraki  
Associate Tax Counsel

O P I N I O N

These appeals are made pursuant to section 18594 of the Revenue and Taxation Code **from the** action of the Franchise Tax Board on the protests of Ben F. and Emily Moore against proposed assessments of additional personal income tax against Ben F. Moore, individually, in the amounts of \$14.26, \$38.47 and \$552.30 for the years 1957, 1958 and 1959, respectively, and against Ben F. and Emily Moore, jointly, in the amount of \$114.13 for the year 1960.

In 1951 Ben F. Moore (hereafter "appellant") and seven other individuals entered into an agreement to purchase delinquent tax and water deeds on some 2,000 lots in a sub- . . division located in San Diego County. Appellant issued his check to the title company in payment for his share of the property in February 1952; Title to some of the individual lots still remained to be cleared at that time.

Shortly thereafter appellant established a temporary office on the subdivision site, and advertised the lots for sale in local newspapers. Appellant, a real estate broker by profession, was one of two exclusive agents for the sale of these properties. About one-third of the lots in the subdivision were sold prior to 1957. During the years involved in these appeals' lot sales were as follows:

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<u>Year</u>	<u>Number of Lots Sold</u>
1957	150
1958	16
<b>1959</b>	<b>102</b>
1960	(not specified)

The majority of these sales were to individuals, Some of the encumbered lots were sold as their titles were cleared,

At the date of hearing, appellant and his seven associates still held title to about one-half of the lots in the subdivision. Appellant contends that this fact tends to prove that they purchased the property as an investment. He argues that the sales of the lots were occasional and sporadic,, and constituted the liquidation of investment property resulting in capital gains. The proposed additional assessments which gave rise to these appeals are based upon respondent's determination that appellant's share of the profit on these lot sales constituted ordinary income rather than capital gain, as reported by appellant.

Appellant's gain is taxable as ordinary income if the lots were held primarily for sale to customers in the ordinary course of his trade or business. (Rev. & Tax. Code, § 18161, subd. (a).) A similar provision is contained in section 1221 of the Internal Revenue Code of 1954.

Whether at the time of sale property constituted a capital asset held for investment purposes, or was property held primarily for sale in the ordinary course of a trade or business, is a question of fact, (W. T. Thrift, Sr., 15 T.C. 366.) The taxpayer's own characterization of the property as an investment is not determinative of the issue. (Harlan O. Carlson, T.C. Memo., Dkt. Nos. 65856, 65857, Dec. 24, 1959, aff'd, 288 F.2d 228.) Factors to be considered are: the purpose or reason for the taxpayer's acquisition of the property and his disposal of it; the continuity of sales or sales-related activity over a period of time; the number, frequency and substantiality of sales; and the extent to which the owner or his agents engaged in sales activities such as developing or improving the property, soliciting customers, and advertising. (Boomhower v. United States, 74 F. Supp. 997; Thomas E. Wood, 16 T.C. 213; W. T. Thrift, Sr., supra.)

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Where a person has been active in the real estate business the **burden is plainly on him to establish** that property purchased and sold by him, **particularly non-income producing** property, was held for investment and not primarily for sale. (B. B. Margolis, T. C. Memo,, Dkt. Nos. 85706, 88082, April 19, 1962, aff'd on this point, rev'd and remanded on other grounds, 337 F.2d 1001.)

Appellant was one of two exclusive agents for the sale of the lots in the subdivision. He commenced sales activities very shortly after he and his associates acquired the property., He advertised the lots for sale and placed a temporary office on the property, thus enabling himself conveniently to show the lots to prospective buyers, These sales efforts were apparently quite successful, since by 1957 approximately one-third of the original 2,000 lots had been sold, The record indicates that 150, 16 and 102 lots were then sold in the years 1957, 1958 and 1959, respectively, We view these real estate transactions as frequent and substantial, rather than as isolated and casual sales of real property.

In addition, though the record indicates that appellant made no physical improvements upon the lots prior to their sale, he and his associates were apparently instrumental in initiating action to clear the title, of encumbered lots. Such activity has been viewed as being as important as improvements of the land itself, . since it also increases the marketability of the property. (Joseph M. Philbin, 26 T.C. 1159; J. Roland Brady, 25 T.C. 682; William H. Miller, T.C. Memo,, Dkt, No, 81398, Aug. 17, 1962.)

We are of the opinion that appellant's sales activities with regard to this property and the volume of lot sales made during the years in question are all indicative of a continuous business activity rather than the passive liquidation of an investment, The fact, that appellant and his associates still held title to approximately 50 percent of the lots at the time of the hearing does not alter our characterization of the lot sales which occurred during the years on appeal, Respondent therefore properly denied capital gain treatment of the profits realized by appellant on sales of those subdivision lots,

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**O R D E R**

Pursuant to the views expressed in the opinion of the board on file in this proceeding, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to section 18595 of the Revenue and Taxation Code, that the action of the Franchise Tax Board on the protests of Ben F. and Emily Moore against proposed assessments of additional personal income tax against Ben F. Moore, individually, in the amounts of \$14.26, \$38.47 and \$552.30 for the years 1957, 1958 and 1959, respectively, and against Ben F. and Emily Moore, jointly, in the amount of \$114.13 for the year 1960, be and the same is hereby sustained.

'Done at Sacramento, California, this 4th day of January, 1966, by the State Board of Equalization.

Geo. F. Kelley, Chairman

John W. Hinkel, Member

Paul R. Hain, Member

Paul W. Kern, Member.

\_\_\_\_\_, Member:

ATTEST: [Signature], Secretary