

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Consolidated Appeals of:	)	OTA Case Nos.: 230713806, 230713807,
MOLLER CONTRA COSTA RE INVESTORS,	)	230713808, 230713809, 230713810, 230713811,
LLC;	)	230713812
J.S.L.L., INC.;	)	
J. LAWRENCE AND L. LAWRENCE;	)	
J.S.S.R., INC.;	)	
J. RAPHEL AND S. RAPHEL;	)	
TAHOMA, INC.;	)	
T. THOMPSON AND	)	
L. THOMPSON	)	

OPINION

Representing the Parties:

For Appellants:	Chantal C. Renta, Attorney Jack Praetzellis, Attorney
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For Respondent:	Blake Cunningham, Program Specialist Mira Coutinho, Attorney
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For Office of Tax Appeals:	William J. Stafford, Attorney
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J. LAMBERT, Administrative Law Judge: These consolidated appeals are made pursuant to section 19045 of the Revenue and Taxation Code (R&TC) from the actions of respondent Franchise Tax Board (FTB) on the following protests of proposed assessments, including applicable interest: (1) protest of appellant Moller Contra Costa RE Investors, LLC (Moller) of a limited liability company (LLC) fee of \$11,790 for the 2015 tax year; (2) protest of appellant J.S.L.L., Inc. (JSLL) of an additional tax of \$311,662 for the 2015 tax year; (3) protest of appellants J. Lawrence and L. Lawrence (Lawrences) of an additional tax of \$2,783,393 for the 2015 tax year, and an additional tax of \$44,905 for the 2017 tax year; (4) protest of appellant J.S.S.R., Inc. (JSSR) of an additional tax of \$318,503 for the 2015 tax year; (5) protest of appellants J. Raphael and S. Raphael (Raphels) of an additional tax of \$2,851,752 for the 2015 tax year; (6) protest of appellant Tahoma, Inc. (Tahoma) of an additional tax of \$317,948 for the 2015 tax year; (7) protest of appellants T. Thompson and L. Thompson (Thompsons) of an additional tax of \$2,839,888 for the 2015 tax year. The above-listed entities and individuals are

collectively referred to as appellants. FTB agrees to abate interest from December 4, 2019, through April 5, 2022.

Office of Tax Appeals (OTA) Panel Members Josh Lambert, Sheriene Anne Ridenour, and Keith T. Long held an oral hearing for this matter in Sacramento, California, on April 22, 2026. At the conclusion of the oral hearing, the record was closed and this matter was submitted for an opinion on the oral hearing record pursuant to California Code of Regulations, title 18, section 30209(b).

ISSUES

1. Whether Moller held property primarily for sale pursuant to Internal Revenue Code (IRC) section 1031(a)(2)(A).
2. Whether further interest should be abated.

FACTUAL FINDINGS

Activities of Braddock & Logan Services, Inc.

1. Since its formation in 1997, Braddock & Logan Services, Inc., a California corporation, (Services) has provided property management, construction, real estate brokerage, and/or general business services. Services is owned by the Lawrences (25 percent), the Raphels (50 percent), and the Thompsons (25 percent).
2. In November 2010, Services entered into an agreement for an option to purchase (Purchase Option) property located in Dublin, California (the Property).¹ The exercise price for the purchase option was \$25,000,000, plus an additional \$100,000 (later amended to \$25,000) for each single-family home built over 250 homes. Under the terms of the purchase option, Services had the right to develop the Property, but it was not required to do so.
3. In January 2011, Services submitted a planning pre-application form to the City of Dublin (Dublin) to develop the Property with approximately 350-365 single-family homes. Services also submitted a processing agreement, which Dublin accepted on February 3, 2011.
4. In December 2011, Services submitted a formal request for a general plan amendment to change the general plan for the Property from medium (6-14 dwelling units per acre) to low density residential (0-6 dwelling units per acre). The general plan amendment

¹ The Purchase Option was for three tracts of land, including the Property, from unrelated third parties.

emphasized that Services would like Dublin's staff to "expeditiously complete the entitlement and environmental review process prior to the conclusion of 2012."

5. In September 2012, Services, along with architecture and engineering firms, released a master plan for the Property. The master plan envisioned a "premier residential haven nestled within the hills of the City of Dublin." At the time, Moller had not yet come into existence.

Formation of Moller

6. Moller was formed on October 11, 2012, as a California LLC by three S corporations holding equal 33.33 percent membership interests: JSLL, JSSR, and Tahoma. JSLL is owned 100 percent by the Lawrences; JSSR is owned 100 percent by the Raphels; and Tahoma is owned 100 percent by the Thompsons.
7. Section 2.5(a) of Moller's Operating Agreement defines some of Moller's purposes as:

[T]he business of acquiring, holding for investment purposes and continued appreciation, managing and ultimately disposing of [the Property]² and such interests in other real property as the Manager may determine, either directly or indirectly by ownership or control of interests in other entities
8. Upon Moller's formation as a California LLC, Services and Moller entered into an assignment agreement dated October 11, 2012, wherein Services assigned the Purchase Option to Moller.

Planning Commission Review

9. On November 27, 2012, Dublin's Planning Commission held a meeting in which it reviewed Services' concept design for the Property. At that meeting, representatives of Services "spoke in favor of the project."
10. The following month, on December 18, 2012, Dublin approved the general plan amendment that Services had submitted in December 2011.

Development Agreement

11. On January 15, 2013, Moller and Dublin entered into a development agreement, giving Moller the right to develop the Property according to specific terms and conditions, including permitted land uses, density, and design parameters. The Development

² More specifically, the three tracts of land included in the Purchase Option.

Agreement states (among other things) that Moller “desires to develop” the Dublin Property as a “single-family residential project . . . [with] a maximum of 382 units”

12. The signature page of the development agreement provides that Services is the “Manager” of Moller.

Moller’s Acquisition of the Property

13. On February 15, 2013, Moller exercised the Purchase Option and acquired the Property for \$28,250,000.

Third-Party Purchase Inquiries

14. During 2013, Moller received numerous inquiries from homebuilders and/or developers to purchase the Property. For instance, in an email dated July 25, 2013, Moller told an unrelated party that “we purchased . . . [the Property] for a long-term investment anticipating further appreciation in the market . . . [i]t is not for sale.” And in response to offer of \$92 million from another unrelated third party, Moller responded in an email dated April 9, 2013, that “the [Property] is not for sale . . . [and] [o]ur intention is to hold the [Property]. . . .”³

Listing Agreement

15. On March 14, 2014, Moller signed an exclusive listing agreement with Cushman and Wakefield of California, Inc. (Cushman) for the Property.
16. The listing agreement was for a six-month period, effective from March 3, 2014, through August 31, 2014.
17. The listing agreement provided that Cushman “. . . shall advertise the [Property] . . . and do whatever else is reasonably necessary to promote the sale of the [Property].”

Costs Associated with the Property

18. Costs associated with the Property include engineering and consulting fees, maintenance, fence repair required by California law, and removal of hazardous

³ In an email dated March 6, 2013, Moller told a third party that “. . . the [Property] is not for sale . . . [w]e purchased the [Property] with the intent of holding it for appreciation. . . .” In that same email, Moller stated that “[g]iven the limited number of acres available . . . for development of single family detached housing, and the strong demand for such housing, we think the [Property] is an excellent long term investment opportunity for us.” In a letter dated May 17, 2013, Moller stated to a different third party that the Property “is not for sale . . . [w]e have purchased the [Property] with the intent of holding it for a long term investment.” In that same letter, Moller stated “[w]e believe that over time, the [Property] will increase in value.”

structures. For instance, between 2010 and 2015, costs included \$140,000 on consulting fees, \$641,217 on city planning fees, and \$1,209,869 on civil engineering.

19. PG&E had two easements on the Property and to avoid condemnation, Moller entered into agreements with PG&E to provide refundable deposits of approximately \$600,000 to fund PG&E's obligation to relocate utility lines on the Property. The record includes internal email exchanges dated October 8, 2013, where J. Lawrence stated that he believes the obligation "increases the value of the property more than the amount of the deposits" and J. Raphael replied that "we have no intentions of developing or building the project" and the "next few years will determine if the [a]greements with PG&E add any real value to the property."

Recording of Development Agreement

20. On March 20, 2014, the development agreement was recorded in the Alameda County Recorder's office.
21. There were three vested entitlements: the development agreement, the entitlement staging, and the approved tentative map. There were 63 other reports, drafts, applications, or non-vested items.

City of Dublin - Annual Report

22. On March 3, 2015, the Dublin's annual report was submitted to its city council. The annual report states that the Property was designed to have 370 single family detached homes on 80 acres, with an additional 137 acres being designated as rural residential/agricultural.
23. The annual report further states that "[t]he next step in the development process is for [Moller] to submit a Site Development Review application for the architecture of the homes."
24. The annual report also states that "Construction is scheduled to commence on backbone infrastructure and the culvert under Tassajara Road in Spring of 2015."

Exchange of the Property

25. On April 10, 2015, Moller entered into an option agreement for sale of the Property to Toll Bros., Inc. (Toll Brothers) for \$99,500,000.
26. The terms of the Toll Brothers option provide that Moller will assign the development agreement (along with all other agreements related to the Property) to Toll Brothers.

Cushman did not facilitate discussions between Moller and Toll Brothers in relation to the Toll Brothers option.

27. On August 4, 2015, Toll Brothers (or its affiliate) exercised the Toll Brothers option and Moller transferred the Property to an affiliate of Toll Brothers as part of a transaction reported as a tax deferred like-kind exchange. The purchase price was \$99,500,000. Moller timely identified and acquired qualified replacement properties.
28. On its 2015 California income tax return, Moller reported the transaction as a tax deferred like-kind exchange. On its tax returns, Moller described the Property as "Land Held for Investment."⁴

FTB Audit and Protest

29. FTB audited appellants. FTB determined that the exchange of the Property did not qualify for deferral of gain because it had been held primarily for sale. Therefore, FTB concluded that Moller had to recognize a capital gain of \$63,706,830, which would flow through to Moller's S corporation members and, ultimately, to the members' shareholders.
30. FTB issued Notices of Proposed Assessment (NPAs) to appellants, proposing additional taxes and/or fees, plus applicable interest, as set forth above.
31. In response, appellants filed timely protests, and FTB affirmed the NPAs in separate Notices of Actions.
32. Appellants filed timely appeals, which were consolidated.

DISCUSSION

Issue 1: Whether Moller Contra Costa RE Investors, LLC held property primarily for sale pursuant to IRC section 1031(a)(2)(A).

Applicable Law

California law conforms to IRC section 1031 at R&TC section 18031. For an exchange of property to qualify for nonrecognition of gain treatment under IRC section 1031, three general requirements must be satisfied: (1) the transaction must be an exchange; (2) the exchange must involve like-kind properties; and (3) both the property transferred (i.e., the relinquished property) and the property received (i.e., the replacement property) must be held for a productive use in a trade or business or held for investment. (IRC, § 1031(a)(1).) As relevant

⁴ This is noted by appellants and is not disputed by FTB.

here, however, the nonrecognition treatment of IRC section 1031(a) does not apply to any exchange of property “held primarily for sale.” (IRC, § 1031(a)(2)(A); *Black v. Commissioner* (1960) 35 T.C. 90, 96; *Neal T. Baker Enterprises, Inc. v. Commissioner*, T.C. Memo. 1998-302 (*Baker*).)

The test of whether property is held for investment (thus qualifying for nonrecognition treatment) or held primarily for sale (thus not qualifying for nonrecognition treatment) is applied at the time of the exchange. (*Bolker v. Commissioner* (1983) 81 T.C. 782, 804, *affd.* (9th Cir. 1985) 760 F.2d 1039.) A taxpayer’s conduct before and after an exchange can help a court determine the taxpayer’s intent at the time of the exchange. (*Adams v. Commissioner*, T.C. Memo. 2013-7.) A taxpayer has the burden of proving that it had the requisite intent. (*Click v. Commissioner* (1982) 78 T.C. 225, 231.) Unsupported assertions cannot satisfy a taxpayer’s burden of proof. (*Appeal of Wright Capital Holdings LLC*, 2019-OTA-219P.)

For purposes of IRC section 1031, neither the IRC nor Treasury Regulations specifically define held “for investment.” (*Baker, supra.*) The Treasury Regulations provide, however, that “[u]nproductive real estate held by one other than a dealer for future use or future realization of the increment in value is held for investment and not primarily for sale.” (Treas. Reg. § 1.1031(a)-1(b).)

Similarly, for purposes of IRC section 1031, neither the IRC nor Treasury Regulations define “held primarily for sale.” (*Baker, supra.*) Whether property is “held primarily for sale” is a question of fact. (*Ibid.*) In the context of IRC section 1221,⁵ the United States Supreme Court has held that the term “primarily” means “of first importance” or “principally.” (*Malat v. Riddell* (1966) 383 U.S. 569, 572.)

Courts have acknowledged that IRC section 1221 applies a different standard than IRC section 1031. (*Black v. Commissioner, supra*, 35 T.C. 90, 96; *Baker, supra.*) IRC section 1221 excludes from the term “capital asset” property “held by the taxpayer primarily for sale to customers in the ordinary course of [the taxpayer’s] trade or business.” (IRC, § 1221(a)(1).) Unlike IRC section 1221, IRC section 1031 omits the phrase “to customers in the ordinary course of [the taxpayer’s] trade or business.” Because IRC section 1031(a)(2)(A) deals only with property “held primarily for sale,” this is the only requirement for the applicability of the

⁵ IRC section 1221 (incorporated by R&TC section 18151) defines capital assets to include property held by the taxpayer, except those specifically listed in the statute.

exception to nonrecognition treatment provided by IRC section 1031. (*Baker, supra*; see also *Black v. Commissioner*, 35 T.C. 90, 96.)⁶

In analyzing the term “primarily for sale” in IRC section 1031 cases, courts have referenced the following factors established in IRC section 1221 cases: (1) the purpose for which the property was initially acquired; (2) the purpose for which the property was subsequently held; (3) the extent to which improvements, if any, were made to the property by the taxpayer; (4) the frequency, number, and continuity of sales; (5) the extent and nature of the transactions involved; (6) the ordinary business of the taxpayer; (7) the extent of advertising, promotion, or other active efforts used in soliciting buyers for the sale of the property; (8) the listing of property with brokers; and (9) the purpose for which the property was held at the time of sale. (*Baker, supra*, citing *Maddux Construction Co. v. Commissioner* (1970) 54 T.C. 1278, 1284; see also *Paullus v. Commissioner*, T.C. Memo. 1996-419.) None of the factors are conclusive standing alone; rather, all of the factors taken as a whole govern. (*Baker, supra*.)

In determining whether property is “held primarily for sale” under IRC section 1031, the factors presented in IRC section 1221 cases (as set forth above) provide guidance in making the applicable determination; however, for IRC section 1031 purposes, courts are not concerned with factors analyzing whether the property was sold “to customers in the ordinary course of business” or whether the property was held in the taxpayer’s “trade or business.” (*Baker, supra*.) In other words, the exclusion of “property held primarily for sale” from nonrecognition treatment in IRC section 1031(a)(1) is broader than the exception to capital gain treatment in IRC section 1221.

Contentions

FTB contends that Moller held the Property primarily for sale, as shown by development agreement, listing agreement, and expenditures to develop the Property. FTB contends that the Property was acquired by appellants with the intent to obtain land-use approvals and sell a development-ready property to a developer.

Appellants contend that Moller held the Property for investment purposes, not primarily for sale, as shown by its operating agreement, repeated rejections of unsolicited offers, and lack of physical development of the Property. Two witnesses appeared at the oral hearing on behalf of appellants, T. Thompson and J. Lawrence, owners of Services and indirect owners of Moller.

⁶ This Opinion may reference cases that discuss whether the taxpayer held property primarily for sale in the ordinary course of business. Such cases may be persuasive by analogy, while taking into account that this Opinion only considers whether the property was held primarily for sale.

Analysis

The only issue in dispute as to the claimed like-kind exchange is whether, at the time of the exchange, Moller was holding the Property primarily for sale, pursuant to IRC section 1031(a)(2)(A).⁷ To determine whether appellants held the Property primarily for sale, the *Baker* factors, as discussed above, will be addressed.

The purpose for which the property was initially acquired

The activities of Services prior to Moller's formation, such as submissions of the planning pre-application form, formal request for a general plan amendment, and master plan, which led to the development agreement, indicate an intent by Services to develop the Property for sale. FTB argues that the activities of Services indicate that Moller acquired the Property with the primary intent to sell.

Moller is a separate LLC than Services, and FTB does not assert a basis to disregard the separate entities, so without more, the actions of Services cannot be attributed to Moller. (See *Phelan v. Commissioner*, T.C. Memo. 2004-206 [refusing to attribute development activities to an LLC despite identical ownership interests, where the entities were separately formed for legitimate business purposes and formalities were observed]; *Bramblett v. Commissioner* (5th Cir. 1992) 960 F.2d 526, 533-534; *Sugar Land Ranch Development, LLC v. Commissioner*, T.C. Memo. 20180-21 (*Sugar Land*).) Nevertheless, given the pre-formation activities of Services, the overlapping ownership of Services and Moller, and the fact that Services was Moller's manager in executing the development agreement, an inference could be made that Moller's acquisition was completed with an intent to develop and sell the Property.

However, even though a property may be originally held primarily for sale, that intent may change. (See *Sugar Land, supra*) [where development intent was abandoned and the property was thereafter held for investment rather than for sale]; see also *Baker, supra*.) T. Thompson testified that, because of an economic financial crisis affecting the real estate market, Moller was formed with the intent to hold the Property as an investment. This is consistent with the evidence in the record, as Moller was formed with an operating agreement stating its purpose was to hold the Property for investment and appreciation, and Moller rejected numerous purchase offers after the acquisition, as discussed further below. Therefore, the evidence shows that, even though Service's actions may have been development and

⁷ FTB does not assert any issues with the status/actions of the qualified intermediary and Moller's identifications of replacement properties. In addition, neither FTB nor appellants argue that Moller was holding the Property for use in a "trade or business."

sale-oriented, any such intent shifted to an investment purpose at the time the Property was acquired.

Purpose for which the Property was subsequently held

Operating Agreement

Moller's operating agreement states that its purpose in holding the Property is for investment purposes and continued appreciation. The operating agreement is contemporaneous evidence that the entity was formed to hold the property for investment and is consistent with Moller's subsequent rejections of purchase offers, as discussed below, which stated the Property was not for sale and was being held for long-term appreciation.

Development Filings

FTB argues that the development agreement with Dublin was part of a plan to ready the property for sale. T. Thompson testified that the development agreement was entered into to preserve entitlements on the Property for investment purposes, and that the recording of the agreement was automatic. J. Lawrence stated that Moller was minimally involved with actions taken by Dublin as to the development agreement.

Legal steps to enhance value do not necessarily mean a property is held primarily for sale. (See *Buono v. Commissioner* (1980) 74 T.C. 187, 201 (*Buono*) ["petitioners have merely enhanced the property by taking purely legal steps to make it more marketable"].) A development agreement is not necessarily inconsistent with investment intent, particularly where the property's highest and best use is development, and any future buyer likely would be a developer. (See *Sugar Land, supra*, at p.*6 ["[m]aintenance of the development agreement was therefore consistent with both development intent and investment intent"].)

The development agreement is indicative of an intent to increase the value of the property so that it may be sold, as well as to develop the property. However, after the development agreement was effective in January 2013, and its value presumably increased as a result, Moller rejected numerous purchase offers. In addition, the development agreement did not create an obligation to develop, and no actual physical development occurred to transform the Property into a residential project.⁸ Moller never implemented the subdivision described by the agreement; instead, Moller disposed of the Property in a single bulk exchange. The record also does not show that, after the development agreement was entered, Moller was the impetus

⁸ While the development agreement states that Moller "desires to develop" the Property as a "single-family residential project," such language indicates Moller had the right to develop the Property, but was not obligated to do so.

of further administrative actions as to the agreement, such as the issuance of Dublin's annual report and the recording of the agreement.

In *Baker*, where the court found the taxpayer had a primary intent to sell, the taxpayer had built and sold homes on a related portion of the same property, recorded the property as work-in-progress, described its business as real estate subdivision and development, and produced a final map. In *Jersey Land & Development Corp. v. U.S.* (3d Cir. 1976) 539 F.2d 311 (*Jersey Land*),⁹ where the court found the taxpayer had an intent primarily to sell in the ordinary course of business, the taxpayer physically filled and graded the property, converting it into usable commercial or industrial land, and then sold parts of the property in multiple transactions.

Here, Moller did not build homes, install roads or utilities, record final subdivision maps creating separate saleable lots, or sell lots or homes. Although the record identifies vested entitlements, including a tentative map, the record does not show that Moller took the next steps to turn the Property into developed property or lots ready to sell. Therefore, the development agreement and related activities are more indicative of enhancement of the Property through legal entitlement steps for the purpose of investment.

Purchase Inquiries

Moller received numerous inquiries from homebuilders and/or developers during 2013 to purchase the Property. Moller responded that the property is not for sale and that it is being held as an investment and for appreciation. Moller's repeated rejection of unsolicited purchase inquiries in 2013 is objective, contemporaneous evidence of investment intent that was communicated to unrelated third parties. One rejected offer was for \$92 million shortly after acquisition, which is not significantly lower than the purchase price of \$99.5 million. The rejection of a near-market offer shortly after acquisition is inconsistent with a primary purpose to sell the Property. In addition, the rejections occurred after the development agreement was effective, indicating that, even after the Property gained any value due to the development agreement, Moller continued to hold for appreciation rather than sell.¹⁰

⁹ Abrogated on other grounds by *Pleasant Summit Land Corp. v. Commissioner* (3d Cir. 1988) 863 F.2d 263, 268.

¹⁰ FTB also cites *Land Dynamics v. Commissioner*, T.C. Memo. 1978-259, but in that case the taxpayer, who had the burden to prove an investment intent instead of that it held the property primarily for sale in the ordinary course of business, provided no evidence that it held the exchanged property as an investor. In this case, appellants provide evidence showing an investment intent.

The extent of advertising, promotion, or other active efforts used in soliciting buyers for the sale of the property / The listing of property with brokers

In March 2014, Moller entered a listing agreement with Cushman for 6 months, stating that Cushman shall advertise and promote the Property. The listing agreement also stated that there would be a \$250,000 fee if appellants rejected a cash offer above \$95 million. FTB concedes that, as indicated in *Baker*, the advertising, promotion, and solicitation along with enlisting an agent alone does not establish that the Property was held primarily for sale. However, FTB asserts that the listing agreement weighs in favor of the property being held primarily for sale, because entitlements were secured around the time appellants signed the listing agreement. Appellants contend that they entered the agreement to explore options for the Property in the international market and to determine whether to continue to hold the Property.

The listing agreement shows there was a broker listing, advertising, and promotion. However, the agreement lasted only six months, expired well before the final sale, and Cushman was not involved with the final sale and did not receive a commission. Appellants did not renew the listing agreement or enlist another broker, and the record does not show a continuous marketing program after the listing expired. And prior to the listing, Moller had already rejected numerous purchase offers. Therefore, the listing agreement is consistent with an investor temporarily evaluating whether the market would pay a higher price for an appreciated asset. An investor may decide to test the market or consider selling an investment without changing the primary intent. So, while the listing agreement is indicative of an intent to sell, when examined along with all the evidence in the record, it does not establish that Moller's primary intent shifted from investment.

Extent of improvements made to the Property

The costs associated with the property include engineering and consulting fees, maintenance, fence repair required by California law, removal of hazardous structures, and refundable PG&E deposits. Appellant asserts that the expenses were routine maintenance costs or required by law. J. Lawrence testified that Moller's actions, such as work performed in connection with zoning, entitlements, and maintenance were to preserve the property's value rather than to develop it for sale. FTB argues that the substantial costs were not just for routine maintenance and were more in line with developing the property to ready it for sale.

The property expenditures are not the type of physical construction or development costs that courts have treated as strong evidence that property was held primarily for sale. In

Jersey Land, supra, 539 F.2d at pp. 315-316, the taxpayer spent substantial amounts filling and grading the property and converting it into usable commercial or industrial land. The court emphasized that the gain resulted from the taxpayer's physical work on the property rather than market appreciation, and the taxpayer sold portions of the property in multiple transactions. (*Id.* at p. 317) Here, Moller did not fill, grade, construct roads, install sewer or water systems, build homes, or otherwise physically convert the Property into separate saleable lots. The Property remained undeveloped and was transferred as one asset.

In *Baker, supra*, the taxpayer's expenditures were part of a broad development pattern. The taxpayer had already built and sold 14 homes on a related portion of the same tract, recorded the property in work-in-progress accounts, described its business as real estate subdivision and development, and pursued final-map processing and construction-related approvals. (*Ibid.*) The exchange was also tied to house plans, building permits, sewer permits, and water connections. (*Ibid.*) The court concluded that "petitioner expended substantial time, energy, and money in its efforts to develop the Exchange Property. Whether petitioner was going to get its money back by subdividing and developing the property or by selling the raw land, it indicates an intent to liquidate the property." (*Id.* at p.*19.) Here, Moller did not sell homes or lots, did not report the Property as inventory or work in progress, and did not take the Property beyond entitlement and planning activity into physical development as described in the development agreement and annual report.

In *Buono, supra*, 74 T.C. at p. 192, the taxpayer incurred expenses for engineering, subdivision approval, taxes, interest, and related matters to make a single tract more marketable. The court held that the taxpayer had "merely enhanced the property by taking purely legal steps to make it more marketable," and that the taxpayer did not hold the property primarily for sale in the ordinary course of business. (*Id.* at p. 201.) Similarly, Moller did not undertake physical residential development and the work remained at the planning and documentation stage. Moller's expenditures were primarily directed toward preserving or obtaining legal development rights and maintaining the Property, not physically developing the Property for sales of lots or homes.¹¹

There are also internal email exchanges in October 2013 between J. Lawrence and J. Raphel as to the PG&E agreements where they state the PG&E work will increase the value of the property, that they have no intention to develop or build the project, and the next few years will determine if the agreements add value to the property. The emails demonstrate a

¹¹ However, a lack of improvements does not alone require a conclusion a property was held for investment. (*Baker, supra.*)

contemporaneous investment intent with regard to any costs for physical work or maintenance performed on the Property. Therefore, the costs were primarily based on securing and maintaining legal entitlements to preserve the property's development potential and to protect its investment value rather than physical development of the property for sale.

Frequency, number, and continuity of sales/Ordinary business of the taxpayer

Although IRC section 1031 does not require appellants to prove that Moller was not engaged in a trade or business, the absence of continuous sales activity and Moller's disposition of the Property in a single bulk exchange is still relevant. Moller did not subdivide or sell lots or homes and was not a real estate dealer. It disposed of the Property as a single asset, which is inconsistent with numerous sales from an inventory of properties in the ordinary course of business of selling real estate.¹²

Extent and nature of the transactions involved/The purpose for which the property was held at the time of sale

Appellants assert that, based on the changing real estate market and an unsolicited offer from Toll Brothers, Moller decided to sell the Property. As noted above, Cushman was not involved in the eventual sale. Although Moller necessarily intended to sell when it accepted Toll Brothers' offer, that does not mean the Property was held primarily for sale for purposes of IRC section 1031(a)(2)(A). (See *Baker, supra*, at p. *16 ["a subsequent sale is not conclusive on the question of the primary purpose in acquiring and holding the real estate"].) The sale of the Property and assignment of the development agreement and related documents to Toll Brothers is consistent with the transfer of an appreciated entitled investment.

FTB asserts that the increase in value of the property from its purchase to sale of \$28 million to \$99.5 million can be attributed in part to appellants' expenditures which go beyond routine work. Appellant provides evidence that new home sale prices in Dublin increased materially from 2010 to 2015, with a price per square foot increase of approximately 70 percent, which supports that the increase in value was not just due to Moller's activity. While a material portion of the increased value may be attributable to entitlement work, as stated in *Buono, supra*, 74 T.C. at p. 201, legal steps to enhance value through entitlement work is consistent with an investment intent and does not necessarily mean a property is held primarily for sale. As previously noted, the expenditures were primarily based on securing and maintaining legal

¹² Nevertheless, a taxpayer in the real estate business may also acquire and hold real property for an investment purpose. (*Baker, supra*.)

entitlements to preserve the property's development potential. Therefore, the Property's value increase is consistent with activities related to holding an investment property.

Conclusion

Moller has shown that it did not hold the Property primarily for sale. While both parties provide compelling evidence, appellants provide stronger evidence in support, including Moller's operating agreement, repeated rejections of purchase offers, and contemporaneous statements to third parties or internally describing the Property as a long-term investment. The listing agreement and entitlement work persuasively supports FTB's position, but the listing lasted only six months, expired before the eventual sale, and did not lead to the sale. In addition, the entitlement work was not followed by physical subdivision or construction development to ready the Property for sale. Furthermore, Moller's entitlement work does not necessarily show that the Property was held for sale, because preserving or enhancing the Property's development potential is consistent with holding it as an investment. Accordingly, Moller did not hold the Property primarily for sale within the meaning of IRC section 1031(a)(2)(A).

Appellants also contend that additional interest should be abated. However, because OTA finds in favor of appellants in Issue 1, the issue of interest is moot.

HOLDING

Moller did not hold property primarily for sale pursuant to IRC section 1031(a)(2)(A). Because FTB's proposed assessments are reversed, no additional interest remains to be abated, and the interest-abatement issue is moot.

DISPOSITION

FTB's actions are reversed.

Signed by:



Josh Lambert
Administrative Law Judge

We concur:

DocuSigned by:



Sheriene Anne Ridenour
Administrative Law Judge

DocuSigned by:



Keith T. Long
Administrative Law Judge

Date Issued: 7/23/2026