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detached bond is not covered by the provisions discussed above. Special provision is made for such obligations in section 1232(c) which provides that gain realized shall be considered as not from the sale or exchange of a capital asset "to the extent that the fair market value (determined as of the time of the purchase) of the evidence of indebtedness with coupons attached exceeds the purchase price."⁵⁸ For example, if Mr. A purchased bonds with coupons detached for 90 and if like bonds would sell for 100 with all coupons, Mr. A on a later sale at 100 will have 10 of ordinary income.

XV

CAPITAL GAIN PROBLEMS IN PARTICULAR AREAS (cont'd)

DISPOSITIONS OF REAL ESTATE

Harlan Pomeroy

Few topics in tax law have been the subject of more controversy and litigation than the capital gain status of profit realized from the disposition of real estate. There are literally hundreds of cases in this field and they have created a maze through which the courts and tax counsellors alike have made their way with great difficulty.

No paper of such modest length as this could hope to consider all the cases or analyze in depth the more important authorities. Rather, it is the purpose here to highlight the more important considerations and to indicate where problems may be expected to arise.

AS A MATTER OF STATUTORY CONSTRUCTION

The starting point is the statutory definition of a capital asset which *excludes* "property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business."¹ This statutory test seems to have evolved into the inquiry of whether the taxpayer is a "dealer in real estate."² If, under the particular facts, he is a dealer in the real estate in question, gain from its sale will be ordinary income. If, on the other hand, the property is held as an investment, gain should be eligible

1. INT. REV. CODE OF 1954, § 1221. (Hereinafter cited as §).

2. Treas. Reg. § 1.1221-1(b). (Hereinafter cited as Reg.).

for treatment as capital gain. It should be noted that the question is one of fact³ and that there is no single decisive test.⁴

AS AFFECTED BY MANNER AND PURPOSE OF ACQUISITION

The manner and purpose of acquisition of the property, although the first item in a chronological listing of considerations, is relatively unimportant. It is, however, entitled to some weight.⁵

Thus, if it can be shown that the property was *involuntarily* acquired, as by gift or inheritance⁶ or in satisfaction of a debt or claim,⁷ this is a factor helpful in establishing that the taxpayer is not *dealing* in real estate. The same is true where the taxpayer expected at the time of acquisition to sustain a loss from the eventual sale of the property.⁸ The fact that the property is acquired by way of exchange rather than purchase would seem by itself to be immaterial.⁹

Property may be *acquired* for reasons other than resale and yet be *held* during the tax years for sale to customers in the ordinary course of the taxpayer's trade or business. For example, gain from the sale of land acquired to prevent the erection of low-cost housing was held to be ordinary income where the taxpayer's activities with respect to the land were such as to cause him to be considered a dealer.¹⁰ On the other hand, where property is acquired and continues to be held for purposes other than resale, *e.g.*, for the production of rental income, this is a fact indicating that gain from the eventual sale of the property may be capital gain.¹¹

3. *Shepherd v. United States*, 231 F.2d 445 (6th Cir. 1956).

4. *Boomhower v. United States*, 74 F. Supp. 997 (N.D. Iowa 1947).

5. *Bauschard v. Commissioner*, 279 F.2d 115 (6th Cir. 1960).

6. *Yunker v. Commissioner*, 256 F.2d 130 (6th Cir. 1958) (capital gain on orderly liquidation of inherited property despite subdividing, improving and sales activity).

7. *Austin v. Commissioner*, 263 F.2d 460 (9th Cir. 1959) (capital gain from sale of lots acquired in payment for legal services); *Alabama Mineral Land Co. v. Commissioner*, 250 F.2d 870 (5th Cir. 1957) (capital gain on sale of real estate acquired by mortgage foreclosure); G.C.M. 26690, 1951-1 CUM. BULL. 28. Compare Rev. Rul. 57-468, 1957-2 CUM. BULL. 543 (ordinary income from prompt sales of non-income producing property acquired, and sometimes subdivided and improved, by bank pursuant to foreclosure) and *White v. Commissioner*, 172 F.2d 629 (5th Cir. 1949) (ordinary income from sale of lots acquired by foreclosure of paving liens).

8. *Boomhower v. United States*, 74 F. Supp. 997 (N.D. Iowa 1947) (capital gain where acquired by lawyer-trustee to avoid loss to trust. It is significant that when the land was acquired, he expected to sustain a loss).

9. Compare *Gruver v. Commissioner*, 142 F.2d 363 (4th Cir. 1944) (ordinary income from sale of property acquired by trade), with *Trapp v. United States*, 79 F. Supp. 320 (W.D. Okla. 1948), *aff'd*, 177 F.2d 1 (10th Cir. 1949), *cert. denied*, 339 U.S. 913 (1950) (capital gain from sale of lots acquired in corporate liquidations).

10. *Bauschard v. Commissioner*, 279 F.2d 115 (6th Cir. 1960). See also *Fowler v. United States*, 154 F. Supp. 859 (N.D. Ohio 1957) (ordinary income although acquired to keep employees of owner's corporation, engaged in excavating business, busy during slack periods).

11. *Nelson A. Farry*, 13 T.C. 8 (1949), *acq.*, 1950-1 CUM. BULL. 2. See also *McGah v. Commissioner*, 210 F.2d 769 (9th Cir. 1954) (capital gain on sale of rental housing held for investment where sales were compelled by bank to reduce taxpayer's indebtedness to it).

The classical capital gain situation is one in which property is acquired and passively held as an investment with a view to ultimate sale after it has appreciated in value.¹² Where the taxpayer acquires land with the purpose of passively holding it and selling it when anticipated nearby public or private improvements cause it to appreciate in value, this has been considered as a factor showing that the property is being held for investment so as to qualify for capital gain treatment.¹³

Sometimes a taxpayer in acquiring land for use in his business finds that he must acquire more land than he needs, either because the seller will only sell the entire tract or because the price is more advantageous if the unneeded land is acquired with the needed land. In this situation, it has been held that proceeds from the sale of the unneeded land, even though the taxpayer subdivides it, may qualify for capital gain.¹⁴

Where property has been acquired for a purpose which either has become impossible to carry out or has been abandoned, and the sale is forced by various circumstances, these are facts which may give rise to capital gain treatment. Thus, where a farm near an expanding city became uneconomical to operate because of the encroachment of urban activities, the farmer was entitled to capital gain treatment on the proceeds from sales of lots subdivided from his farm.¹⁵

AS AFFECTED BY MANNER AND PURPOSE OF HOLDING

The manner and purpose of holding the property during the tax years is a factor entitled to great weight in determining whether the taxpayer is a dealer in that property.¹⁶ A long holding period will often suggest a holding for investment whereas a short holding period will suggest a holding for sale.¹⁷ However, the fact that property is held for sale

12. Rev. Rul. 57-565, 1957-2 CUM. BULL. 546. This is recognized elsewhere in the Code, as in the case of non-taxable exchanges of property held for investment: "Unproductive 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." Reg. § 1.1031(a)-1(b). The purpose of the capital gain provisions of the Internal Revenue Code is to compensate for "the pyramiding of income in the year of realization" where property has appreciated in value over a period of years. *Fackler v. Commissioner*, 133 F.2d 509, 510 (6th Cir. 1943); *Boomhower v. United States*, 74 F. Supp. 997, 1001 (N.D. Iowa 1947).

13. *Eline Realty Co.*, 35 T.C. No. 1 (Oct. 7, 1960).

14. *R. H. Hutchinson*, 8 CCH Tax Ct. Mem. 597, 601 (1949). *Accord*, *Burgher v. Campbell*, 51 Am. Fed. Tax R. 1094 (N.D. Tex.), *aff'd*, 244 F.2d 863 (5th Cir. 1957) (capital gain to dealer on sale of undesirable lots subdivided from tracts acquired for apartment construction).

15. *Gudgel v. Commissioner*, 273 F.2d 206 (6th Cir. 1959). Compare *R. H. Hutchinson*, 8 CCH Tax Ct. Mem. 597 (1949) (ordinary income from tract acquired for factory site, plan abandoned, land subdivided and improved; capital gain from portion of different tract not needed for factory, subdivided and improved). See Note 21 *infra* and accompanying text, relating to capital gain from sale of property used in the trade or business.

16. *Harry Slatkin Builders, Inc.*, 14 CCH Tax Ct. Mem. 7 (1955), *aff'd per curiam*, 235 F.2d 189 (6th Cir.), *cert denied*, 352 U.S. 928 (1956).

17. See *Palos Verdes Corp. v. United States*, 201 F.2d 256, 258 (9th Cir. 1952).

or trade after it has increased in value does not prevent gain from being taxed as ordinary income.¹⁸

An important evidentiary fact tending to show that the owner is holding property for investment rather than sale is the repeated refusal of the owner to sell the property over a substantial period of time.¹⁹ However, a refusal to sell an entire tract followed by sale of individual lots from the tract may be evidence of a purpose to deal in the lots.²⁰

A special situation arises where property is used in the trade or business. In that event, net gains from sales of such property are capital gains, and net losses are ordinary losses.²¹ However, temporary use of property in the trade or business will not prevent it from being held for sale to customers in the ordinary course of the taxpayer's trade or business.²² Indeed, even though property is used in the taxpayer's trade or business, it can still be considered held *primarily* for sale to customers "in the ordinary course of the taxpayer's trade or business"²³ so as to result in ordinary income treatment.²⁴

Property held for the production of income, such as rental real estate, is not necessarily property used in the trade or business, and a difficult factual question may arise as to whether the taxpayer's rental activities constitute a business.²⁵ The Tax Court has held that the rental of a single piece of inherited residential real estate constituted the operation of a trade or business.²⁶ However, other courts have held that the renting of a private residence is not a trade or business.²⁷

Once it has been determined that the taxpayer is engaged in a trade or business to which the use of the property may be related, it must be

18. *Gruver v. Commissioner*, 142 F.2d 363 (4th Cir. 1944). Compare Rev. Rul. 57-565, 1957-2 CUM. BULL. 546.

19. *But see* Hugh F. Little, 13 CCH Tax Ct. Mem. 115 (1954) (ordinary income where rejection of some offers to buy was not inconsistent with carrying on real estate business).

20. *Shepherd v. United States*, 139 F. Supp. 508, 511 (E.D. Tenn. 1954), *aff'd per curiam*, 231 F.2d 445 (6th Cir. 1956).

21. § 1231.

22. *Sovereign v. Commissioner*, 281 F.2d 830 (7th Cir. 1960).

23. § 1221.

24. *Nelson A. Farry*, 13 T.C. 8 (1949), *acq.*, 1950-1 CUM. BULL. 2. *See and compare* *Harry Slatkin Builders, Inc.*, 14 CCH Tax Ct. Mem. 7 (1955), *aff'd per curiam*, 235 F.2d 189 (6th Cir.), *cert. denied*, 352 U.S. 928 (1956) (where property held both for rental income and for sale, ordinary income; short-term leases may indicate holding for sale), *with Kanawha Valley Bank*, 4 T.C. 252 (1944), *acq.*, 1946-1 CUM. BULL. 3 (capital gain treatment on sale of three unimproved tracts acquired by bank by foreclosure).

25. See Reg. § 1.1221-1(b); *Fackler v. Commissioner*, 133 F.2d 509 (6th Cir. 1943) (lawyer who managed leasehold was not merely holding it as an investment from which he collected rents but was engaged in business of operating building). See also G.C.M. 26690, 1951-1 CUM. BULL. 28 (land acquired by financial institution by deed in lieu of foreclosure and held for production of income and to minimize loss, ruled to be used in trade or business).

26. *Anders I. Lagreide*, 23 T.C. 508 (1954).

27. *Grier v. United States*, 120 F. Supp. 395 (D. Conn. 1954), *aff'd per curiam*, 218 F.2d 603 (2d Cir. 1955). See *Bauer v. United States*, 168 F. Supp. 539, 541 (Ct. Cl. 1958).

determined whether the particular property is *used* in the trade or business. It is not necessary that property be physically employed in the operation of the business for it to be considered as used in the business. Thus, property purchased for use in the business but never so used, and sold when found unsuited to the business has been ruled to be property used in the business within the meaning of the statute.²⁸ Property is considered to be used in the trade or business if it is "devoted to the trade or business" and includes property purchased with a view to its future use in the business even though this purpose is later thwarted by circumstances beyond the taxpayer's control.²⁹

Where property is held for the production of income, this may indicate a holding for investment so that gain from its sale is capital gain.³⁰ However, even when property is held prior to the time of sale as an investment, the activities in connection with its sale may be such as to cause it to be held *primarily* for sale to customers.³¹

The fact that property is held subject to restrictions on its sale may indicate that it is not held for sale to customers in the ordinary course of a business.³² However, where the restrictions on the sale of property are entirely removed and the sale follows, the gain may be treated as ordinary income if the other facts indicate a holding at that time for sale to customers.³³

An additional factor which may indicate a holding for sale rather than investment is the making of improvements while the property is being held. For example, where the taxpayer put in water lines, gutters, curbs and streets on raw land which he had acquired, a subsequent gain on the sale of the property was treated as ordinary income.³⁴

28. Rev. Rul. 58-133, 1958-1 CUM. BULL. 277; Carter-Colton Cigar Co., 9 T.C. 219 (1947), *acq.*, 1947-2 CUM. BULL. 1 (vacant lot acquired as site for taxpayer's business, but sold because of depression, held to be used in business, where plans and specifications had been drawn for building but construction had not begun).

29. Alamo Broadcasting Co., 15 T.C. 534, 541 (1950), *acq.*, 1951-1 CUM. BULL. 1.

30. Nelson A. Farry, 13 T.C. 8 (1949), *acq.*, 1950-1 CUM. BULL. 2 (capital gain on sale of rental housing by real estate dealer; financing of construction under long-term blanket loan indicated investment purpose); Rylander v. United States, 51 Am. Fed. Tax R. 1658 (S.D. Cal. 1956) (capital gain from sale of rental housing on land contract; investment in housing converted into investment in land contracts).

31. Rev. Rul. 59-91, 1959-1 CUM. BULL. 15 (ordinary income on sale of nonproductive land held as investment, where owner subdivided and installed streets, drainage and utilities).

32. Fahs v. Taylor, 239 F.2d 224, 226 (5th Cir. 1956), *cert. denied*, 353 U.S. 936 (1957) (capital loss on sale of property held as security for and subject to restrictions of alimony trust).

33. Dougherty v. Commissioner, 216 F.2d 110 (6th Cir. 1954) (ordinary income on sale of homes by builder after removal of Government restrictions).

34. See, *e.g.*, George W. Longfellow, 31 T.C. 11 (1958) (ordinary income from sale of property acquired as raw land, where taxpayer put in water, streets, curbs and gutters and graded land).

AS AFFECTED BY CHARACTER OF OWNER

Since the ultimate question under the statute is whether the *taxpayer* is a dealer in the particular real estate,³⁵ the owner's business and other activities may have an important bearing in determining whether real estate is held for sale in the course of his business.

Where the taxpayer is admittedly a broker or dealer in real estate and seeks to have certain real estate treated as investment property, he generally has a greater burden in showing that the particular real estate was not held for sale in the ordinary course of his real estate business. Generally, he must show that the particular property has been treated differently or separately from the property which he holds for sale as a dealer.

It is, of course, possible for a dealer to hold a portion of a tract for sale in his business and the balance as an investment eligible for treatment as a capital asset.³⁶ But, it generally will not be enough to insulate the dealer from the property merely to have it held in trust,³⁷ in his wife's name³⁸ or in a wholly-owned corporation.³⁹

Dealers, builders and developers have been permitted capital gain treatment where the property was held for rental⁴⁰ or where it represented undesirable or buffer-zone property not suitable for use or sale in the dealer's business.⁴¹

In determining whether the taxpayer is a dealer, the fact that he does not hold a real-estate broker's license⁴² and does not list his occupation as "real estate" or the like, in his tax returns⁴³ and elsewhere, such as in the telephone book, may be important from an evidentiary point of view.

Another important evidentiary fact helpful in determining whether the owner is a dealer in real estate relates to the acquisition of other

35. Note 2, *supra*.

36. Rev. Rul. 57-565, 1957-2 CUM. BULL. 546 (portion of tract subdivided by taxpayer held as dealer, unsubdivided part is capital asset); *Eline Realty Co. v. Commissioner*, 35 T.C. No. 1 (Oct. 7, 1960).

37. *Bauschard v. Commissioner*, 279 F.2d 115 (6th Cir. 1960). However, see *Fahs v. Taylor*, 239 F.2d 224, 226 (5th Cir. 1956), *cert. denied*, 353 U.S. 936 (1957) (capital loss from sale of land from alimony trust), and *Allen Moore*, 30 T.C. 1306 (1958) (capital gain from sale of land acquired by gift and placed in trust by nine owners for liquidation, where no other property acquired and beneficiaries were not in real estate business).

38. *Sovereign v. Commissioner*, 281 F.2d 830 (7th Cir. 1960).

39. *Burgher v. Campbell*, 244 F.2d 863 (5th Cir. 1957) (ordinary income from sale of forty-one-acre tract of raw land to wholly-owned corporation). *But see Alabama Mineral Land Co. v. Commissioner*, 250 F.2d 870 (5th Cir. 1957) (capital gain from sale of property acquired by shareholders through foreclosure and transferred by them to taxpayer-corporation).

40. *Nelson A. Farry*, 13 T.C. 8 (1949), *acq.*, 1950-1 CUM. BULL. 2.

41. *Burgher v. Campbell*, 51 Am. Fed. Tax R. 1094 (N.D. Tex.), *aff'd*, 244 F.2d 863 (5th Cir. 1957); *Eline Realty Co.*, 35 T.C. No. 1 (Oct. 7, 1960).

42. *Fahs v. Crawford*, 161 F.2d 315 (5th Cir. 1947).

43. See *White v. Commissioner*, 172 F.2d 629 (5th Cir. 1949).

property. Where the owner has acquired no additional land for subdividing, this fact has been relied upon as supporting the conclusion that the owner is not a dealer.⁴⁴

A person may have more than one business and an owner of real estate who is engaged in an entirely unrelated business can also be engaged in the business of selling real estate.⁴⁵ However, the fact that he devotes his full time to his regular business or profession may indicate that he is not in the business of selling real estate.⁴⁶

From an evidentiary point of view the fact that the owner has no other occupation⁴⁷ or derives a substantial portion of his income from sales of real estate⁴⁸ may indicate that the owner is a dealer.

The fact that the owner is engaged in a related business may indicate that he is not a dealer but acquired and held the property for reasons pertinent to his regular business.⁴⁹ However, where the business is closely tied to the real estate business, this may indicate that the owner is a dealer.⁵⁰

Where ownership of real estate is divided, difficult problems may arise in determining whether activities of the individual owners should be attributed to the other owners. Generally, the activities of the other owners will be attributed to the taxpayer in the absence of unusual circumstances. Thus, where lots were acquired in joint venture by lawyers

44. *Gudgel v. Commissioner*, 273 F.2d 206 (6th Cir. 1959); see *Alabama Mineral Land Co. v. Commissioner*, 250 F.2d 870 (5th Cir. 1957) (capital gain where only acquisition was small tract to complete holdings). Compare *Hollis v. United States*, 121 F. Supp. 191 (N.D. Ohio 1954) (ordinary income; impossibility of acquiring additional property is immaterial). See also *Fowler v. United States*, 154 F. Supp. 859 (N.D. Ohio 1957) (ordinary income where owner acquired other property).

45. *William E. Starke*, 35 T.C. No. 4 (Oct. 7, 1960) (lawyer held to be a dealer); *Bauschard v. Commissioner*, 279 F.2d 115 (6th Cir. 1960) (Catholic priest held to be dealer); *Shepherd v. United States*, 231 F.2d 445 (6th Cir. 1956) (housewife held to be dealer).

46. *Boomhower v. United States*, 74 F. Supp. 997 (N.D. Iowa 1947) (lawyer held not to be dealer).

47. *Kelley v. Commissioner*, 281 F.2d 527 (9th Cir. 1960) (no other occupation during period is significant factor in holding owner to be dealer).

48. *William E. Starke*, 35 T.C. No. 4 (Oct. 7, 1960). Compare *Gudgel v. Commissioner*, 273 F.2d 206 (6th Cir. 1959) (capital gain despite fact that income from sales greatly exceeded taxpayer's farm income).

49. *Trapp v. United States*, 79 F. Supp. 320, 327 (W.D. Okla. 1948), *aff'd*, 177 F.2d 1 (10th Cir. 1949), *cert. denied*, 339 U.S. 913 (1950) (capital gain on sale of land acquired to obtain scattered mineral interests for taxpayer's oil business); *Kanawha Valley Bank*, 4 T.C. 252 (1944), *acq.*, 1946-1 CUM. BULL. 3 (capital gain from sale of real estate acquired by foreclosure where local law forbade taxpayer-bank from dealing in real estate). Compare *White v. Commissioner*, 172 F.2d 629 (5th Cir. 1949) (ordinary income from sale of lots acquired by foreclosure of paving liens acquired in paving business).

50. *Heebner v. Commissioner*, 280 F.2d 228 (3d Cir. 1960) (ordinary income on sale of land upon which architect-owner's corporation built commercial and industrial buildings); *Sovereign v. Commissioner*, 281 F.2d 830 (7th Cir. 1960) (ordinary income where lots sold to wife as means of advertising, aiding annexation of land and preventing sales for inferior homes, all a part of taxpayer's brokerage business).

who cleared the titles, and by realtors who sold the lots, the lawyers were held to be dealers.⁵¹

AS AFFECTED BY NATURE OF PROPERTY SOLD

Generally, the nature of the property, *i.e.*, whether it is unimproved or improved, city or rural, industrial, commercial or residential, raw acreage or subdivided land, has little bearing by itself on whether gain from its sale is ordinary income or capital gain. Of course, if the property is deemed to be used in the taxpayer's trade or business,⁵² this fact may be important in classifying gain from the sale of such property.

Probably one of the strongest factors suggesting that the taxpayer is a dealer is the fact that the property is subdivided while he holds it. This is evidence of a purpose to hold for sale to customers.⁵³ However, it is not conclusive and an owner may subdivide property without becoming a dealer.⁵⁴ On the other hand, an owner may acquire land which has already been subdivided by another and still be considered a dealer.⁵⁵

Of some importance in this area is a special statutory provision, Internal Revenue Code section 1237, relating to the effect of subdividing and sales activity under certain conditions. Owners who qualify under this section are not considered as dealers merely because of subdividing and sales activity.⁵⁶ The principal requirements for the special treatment accorded by this section are:⁵⁷

- (1) No part of the tract from which lots or parcels are sold can have been held at any time by the owner as a dealer;
- (2) No other real estate can be so held in the year of sale;
- (3) The owner cannot make substantial improvements on the tract substantially increasing the value of the lot sold;⁵⁸

51. *Rossiter v. United States*, 282 F.2d 892 (7th Cir. 1960); *William E. Starke*, 35 T.C. No. 4 (Oct. 7, 1960). Compare *Pope v. Commissioner*, 77 F.2d 599 (6th Cir. 1935) (capital gain from sale of lots from land owned by syndicate, subdivided by corporation to which land was conveyed in trust by syndicate).

52. See Note 21 *supra* and accompanying text.

53. *Gruver v. Commissioner*, 142 F.2d 363 (4th Cir. 1944) (ordinary income, subdivision of unimproved land is evidence of purpose to hold for sale to customers).

54. *Gudgel v. Commissioner*, 273 F.2d 206 (6th Cir. 1959) (capital gain from liquidation of farm by way of subdividing); *Boomhower v. United States*, 74 F. Supp. 997 (N.D. Iowa 1947) (capital gain where property involuntarily acquired and subdivided by taxpayer-lawyer, who advertised it for sale).

55. *Ehrman v. Commissioner*, 120 F.2d 607 (9th Cir.), *cert. denied*, 314 U.S. 668 (1941) (ordinary income although subdivided by taxpayer's vendee from whom property was acquired by foreclosure).

56. Reg. § 1.1237-1(a)(1).

57. Reg. § 1.1237-1(a)(5).

58. For attribution of improvement activity, see Reg. § 1.1237-1(c)(2); *Hvidsten v. Commissioner*, 185 F. Supp. 856 (D.N.D. 1960). Substantial improvements may be made under certain conditions. Reg. § 1.1237-1(c)(5).

(4) The owner must have owned the property at least five years, unless he inherited it.

The special tax treatment which follows, if the terms of section 1237 are met, is that:

(1) If the owner has sold less than six lots or parcels from the same tract by the end of the tax year, the entire gain is capital gain.

(2) If the owner sells the sixth lot or parcel from same tract, the amount by which five per cent of the selling price of each lot sold that year (which may include the first five lots) exceeds the expenses of the sale or exchange, to the extent that it represents gain, is ordinary income and the balance of the gain is capital gain.⁵⁹

Another important factor in determining whether the owner has become a dealer is the nature and extent of the improvements made while he holds the property. Extensive improvements may indicate a purpose of holding for sale.⁶⁰ However, while important, such improvements are far from conclusive; a showing that improvements were minimal⁶¹ or were made by another⁶² may be enough to qualify the sale for capital gain treatment.

Where the taxpayer buys and sells land contracts instead of the underlying real estate itself, the question for decision is whether he is a

59. Reg. § 1.1237-1(e). The section is inapplicable to losses.

60. *Kelley v. Commissioner*, 281 F.2d 527 (9th Cir. 1960) (ordinary income where improvements cost twelve times original cost of acreage); *Shepherd v. United States*, 139 F. Supp. 508, 511, 513 (E.D. Tenn.), *aff'd per curiam*, 231 F.2d 445 (6th Cir. 1956) (ordinary income from sale of land improved by taxpayer and from sale of vacant lots where improvements were not needed to make lots saleable); Rev. Rul. 59-91, 1959-1 CUM. BULL. 15 (ordinary income where nonproductive land platted, streets, drainage and utilities installed); *George W. Longfellow*, 31 T.C. 11 (1958) (ordinary income where owner spent seven times cost of raw land for improvements; profit from owner's services and funds devoted to improvements far exceeded gain from appreciation of raw land). See also *Heebner v. Commissioner*, 280 F.2d 228 (3d Cir. 1960) (ordinary income where owner and his corporation were "package builders," *i.e.*, bought land, designed and constructed building, arranged financing and delivered completed industrial project to customers). If the taxpayer makes improvements some of which are completed six months or less prior to sale, capital gain attributable to improvements completed within six months of sale will be short-term. *Paul v. Commissioner*, 206 F.2d 763 (3d Cir. 1953) (where building under construction is sold more than six months after construction begins but less than six months after construction completed, long term capital gain treatment accorded to that portion of building completed six months and one day prior to sale). Followed in *Fred Draper*, 32 T.C. 545 (1959), *acq.*, 1960 INT. REV. BULL. NO. 10 at 8.

61. *Lazarus v. United States*, 142 F. Supp. 897 (Ct. Cl. 1956) (capital gain where improvements limited to those required by ordinance for subdivision); *Gudgel v. Commissioner*, 273 F.2d 206 (6th Cir. 1959).

62. *Yunker v. Commissioner*, 256 F.2d 130 (6th Cir. 1958) (capital gain where access road built by agent who was reimbursed from sale proceeds).

dealer in land contracts. Generally, the same tests apply as are used in determining whether the owner is a dealer in real estate.⁶³

Where the property which is the subject of the transaction is an option to purchase rather than the real estate itself, there may be special problems. Whether gain from the sale or exchange of an option is capital gain depends upon whether gain from the sale of the option property by the taxpayer would be capital gain.⁶⁴ A question may arise as to whether the taxpayer has sold the option itself rather than the property which is subject to the option. The answer to this question may be important in determining whether the gain is long term or short term. In one case, the court held that the gain was short term, although the option had been held for more than six months, where the option property was transferred directly from the optioner to the optionee's buyer.⁶⁵ Although the option had never been formally exercised, the transfer of the property was treated, under the particular facts, as a sale of the property rather than a sale of the option by the optionee.

AS AFFECTED BY MANNER AND PURPOSE OF DISPOSITION BY OWNER

The taxpayer's manner and purpose of disposing of the property are the critical considerations in determining whether the taxpayer is a dealer in that property.⁶⁶ A number of factors have evolved in this area which are helpful in answering the question whether the manner in which the property is prepared for sale and sold amounts to a business.

The first of these factors is whether the sales and sales-related activity, by or on behalf of the owner, have been frequent and continuous. If so, this indicates that the taxpayer may be a dealer.⁶⁷ Conversely, absence of activity designed to attract customers suggests that the taxpayer is not in the business of selling real estate.⁶⁸ While this is a most im-

63. Thomas McHugh, 16 CCH Tax Ct. Mem. 14 (1957) (ordinary income to real estate dealer from selling land contracts which he had purchased).

64. § 1234.

65. Herman J. Miller, 19 CCH Tax Ct. Mem. 475 (1960).

66. Fowler v. United States, 154 F. Supp. 859 (N.D. Ohio 1957); Boomhower v. United States, 74 F. Supp. 997 (N.D. Iowa 1947) (leading case citing numerous authorities).

67. Shepherd v. United States, 139 F. Supp. 508 (E.D. Tenn.), *aff'd per curiam*, 231 F.2d 445 (6th Cir. 1956) (ordinary income from sale of four lots in one year where taxpayer and her realtor-husband had made forty purchases and seventy sales during twenty-one years). Compare Gudgel v. Commissioner, 273 F.2d 206 (6th Cir. 1959) (capital gain although farmer-taxpayer subdivided, advertised and sold forty-eight lots in three years). Activities by or on behalf of the owner in later years may show continuing sales and sales-related activity. Harry Slatkin Builders, Inc., 14 CCH Tax Ct. Mem. 7 (1955), *aff'd per curiam*, 235 F.2d 189 (6th Cir.), *cert. denied*, 352 U.S. 928 (1956).

68. Austin v. Commissioner, 263 F.2d 460 (9th Cir. 1959) (capital gain where lawyer-owner engaged in no activity to attract customers).

portant test, frequent and continuous sales alone should not cause the gain to be taxed as ordinary income.⁶⁹ A closely related factor is whether the transactions have been extensive and substantial. If so, this also indicates that the taxpayer may be a dealer.⁷⁰

If advertising is conducted by or on behalf of the owner, this may indicate a holding for sale as a dealer.⁷¹ Again, the existence of advertising is far from conclusive,⁷² and the absence of advertising has been explained away by the courts where a sellers' market made advertising unimportant.⁷³

One of the most important factors, if not the most important single factor, which has helped owners to obtain capital gain treatment is a showing that the sales occurred as part of an orderly *liquidation* of their holdings. This factor has often been buttressed by a showing that the property has been involuntarily acquired, as by inheritance,⁷⁴ has been held a long time⁷⁵ and sales have been forced by circumstances beyond the owner's control.⁷⁶ This argument has also been supported by a showing that the proceeds from the sale were not invested in similar property.⁷⁷

The fact that sales are restricted to a limited class of buyers does little to establish that the owner is not a dealer.⁷⁸ Similarly, sale of the entire tract to one buyer is not a particularly important factor.⁷⁹

69. *Alabama Mineral Land Co. v. Commissioner*, 250 F.2d 870 (5th Cir. 1957) (capital gain although sales were frequent and continuous, where liquidation without subdivision, improvements or sales activity); *Goldberg v. Commissioner*, 223 F.2d 709 (5th Cir. 1955) (capital gain, although court found sales to be frequent and continuous, on liquidation of rental property).

70. *White v. Commissioner*, 172 F.2d 629 (5th Cir. 1949) (ordinary income from sale in three years of 340 lots in 56 transactions).

71. *Sovereign v. Commissioner*, 281 F.2d 830 (7th Cir. 1960) (ordinary income where broker deducted cost of signs as business expense).

72. *Boomhower v. United States*, 74 F. Supp. 997 (N.D. Iowa 1947) (capital gain although taxpayer-lawyer advertised and placed "for sale" signs on property).

73. *Shepherd v. United States*, 139 F. Supp. 508 (E.D. Tenn.), *aff'd per curiam*, 231 F.2d 445 (6th Cir. 1956) (ordinary income where advertising and soliciting of offers was unnecessary because of demand and existence of seller's market).

74. *Estate of W. D. Haden*, 12 CCH Tax Ct. Mem. 825 (1953) (capital gain although inherited from dealer).

75. See *Palos Verdes Corp. v. United States*, 201 F.2d 256, 258 (9th Cir. 1952).

76. *Gudgel v. Commissioner*, 273 F.2d 206 (6th Cir. 1959) (capital gain where encroaching city forced orderly liquidation of uneconomical farm). Compare *Harry Slatkin Builders, Inc.*, 14 CCH Tax Ct. Mem. 7 (1955), *aff'd per curiam*, 235 F.2d 189 (6th Cir.), *cert. denied*, 352 U.S. 928 (1956) (ordinary income on sale of rental housing even though liquidation of unprofitable investment); *Palos Verdes Corp. v. United States*, 201 F.2d 256 (9th Cir. 1952) (immaterial that owner did not desire to be in business of selling parcels but was forced to do so by circumstances).

77. *Curtis Co. v. Commissioner*, 232 F.2d 167 (3d Cir. 1956); see *Lazarus v. United States*, 142 F. Supp. 897 (Ct. Cl. 1956) (capital gain where sale made to raise funds needed in unrelated business).

78. *Gruver v. Commissioner*, 142 F.2d 363 (4th Cir. 1944) (ordinary income although exchanged or sold to real estate traders or persons from whom property originally acquired);

Generally, the owner cannot avoid the status of a dealer by selling through a real estate agent.⁸⁰ This is because the agent's activities are imputed to the owner either because they are carried out at the owner's direction or because the owner acquiesced in the realtor's activities.⁸¹

Where the sales and sales-related activities are conducted and improvements are made by an independent contractor on his own behalf, it may be possible for the owner to avoid having the activities and improvements imputed to him.⁸² However, in a recent decision, the Court of Appeals for the Sixth Circuit seems to have held that a developer's activities will be imputed to the owner as a matter of law so long as the owner continues to hold the land while the activities are being conducted.⁸³ Of course, activities of co-owners will be attributed to the taxpayer-owner in the absence of special circumstances.⁸⁴ But developmental and sales activities by prior owners generally will not be attributed to the taxpayer.⁸⁵ However, a purchaser's activity prior to sale by the owner has been attributed to the owner.⁸⁶

Fowler v. United States, 154 F. Supp. 859 (N.D. Ohio 1957) (ordinary income from sales to builders). Compare Goldberg v. Commissioner, 223 F.2d 709 (5th Cir. 1955) (capital gain where sales made to tenants of rental housing); Allen Moore, 30 T.C. 1306 (1958) (capital gain from sale of lots to relatives, friends and others to build desirable residential community); Burgher v. Campbell, 244 F.2d 863 (5th Cir. 1957) (ordinary income from sale of raw land to taxpayer's wholly-owned corporation).

79. Compare Collins v. United States, 57 F. Supp. 217 (N.D. Ohio 1944) (capital loss from exchange of tract which had been subdivided by taxpayer ten years earlier), with Charles Dorrance, 6 CCH Tax Ct. Mem. 675 (1947) (ordinary loss from sale in one transaction of entire tract which taxpayer had subdivided into five tracts which he could not sell individually). See note 20 *supra*.

80. George W. Longfellow, 31 T.C. 11 (1958) (ordinary income where owner paid real estate agent \$100 for each lot sold; agent's activities found to be on owner's behalf).

81. Wood v. Commissioner, 276 F.2d 586 (5th Cir. 1960).

82. Fahs v. Crawford, 161 F.2d 315 (5th Cir. 1947) (capital gain although taxpayer platted land where improvements and sales, executed by contractor and developer without taxpayer's supervision, were not imputed to taxpayer). Compare Shephard v. United States, 139 F. Supp. 508 (E.D. Tenn.), *aff'd per curiam*, 231 F.2d 445 (6th Cir. 1956) (ordinary income where activity of family corporation formed to build, finance and sell homes on shareholders' lots attributed to shareholders), with Pope v. Commissioner, 77 F.2d 599 (6th Cir. 1935) (capital gain from sale of lots subdivided and sold by corporation where land owned by members of syndicate who had substantial stock holdings in corporation but were not active in its affairs). See also Fowler v. United States, 154 F. Supp. 859 (N.D. Ohio 1957) (ordinary income from sales of lots through real estate agent despite claim that agent bought lots from taxpayer and was independent contractor). What appears to be an independent-contractor relationship may be found to be a joint venture or a principal-agent relationship. Bauschard v. Commissioner, 279 F.2d 115 (6th Cir. 1960).

83. Bauschard v. Commissioner, 279 F.2d 115 (6th Cir. 1960).

84. See note 51 *supra*.

85. Allen Moore, 30 T.C. 1306 (1958) (capital gain from sale of lots where prior owner had prepared subdivision plan and constructed road, although present owners completed subdivision and made minimum improvements).

86. Bauschard v. Commissioner, 279 F.2d 115 (6th Cir. 1960) (ordinary income where owner gave option to developer who subdivided and improved land and whose activities were attributed to owner).

CONCLUSION

In many common situations there is no ready or sure answer to the factual question of whether gain from the sale of real estate is capital gain rather than ordinary income. Where the relevant facts are such that the Commissioner may assert that the gain should be treated as ordinary income, attention to certain factors, both by way of advance planning and by way of marshalling helpful evidence when the Commissioner makes his challenge, may weight the balance in favor of capital gain treatment.

On the affirmative side, the following factors may be helpful in sustaining capital gain treatment:

(1) The owner should hold the property as long as possible and use long term borrowing where appropriate.

(2) Wherever possible, he should make the property productive of income; long term leases may indicate an investment purpose.

(3) He should, if the facts permit, justify acquisition and disposition of the property in terms of circumstances not entirely within his control.

(4) He should, again if the facts permit, treat the sales as part of the orderly liquidation of an investment.

(5) He should have a third party perform all sales and sales-related activity independent of his supervision and control.

(6) Where he is a dealer as to other property, he should clearly treat the property in question differently and hold it separately and apart from the property which he holds for sale as a dealer.

(7) He should hold the property as passively as possible unless it is held for the production of income or used in his trade or business.

(8) Where possible, he should seek to come within the terms of section 1237 of the Internal Revenue Code.

Certainly an investor in real estate should not list his occupation in his return, in the telephone book and elsewhere as "dealer in real estate" or the equivalent. If his principal occupation is investing in real estate, a more appropriate designation would be "Investor." He should not deduct the cost of selling his property (*e.g.*, cost of signs) as a business expense. He should not maintain a real estate office and should not hold a real estate license if this can be avoided. It would be well for him to keep advertising, subdivision, improvements and sales activities (in tax years and later years as well) to the barest minimum compatible with a sensible plan for disposing of his property. Acquisitions of other property, especially during the years of peak sales, should be avoided. And finally, proceeds from the sales should not be used to purchase similar property unless it is clearly investment property or the sale is forced by circumstances beyond the owner's control.