University of Baltimore Law Review

Volume 16
Issue 3 *Spring 1987*

Article 7

1987

Casenotes: Federal Income Tax — Taxpayers Can Defer the Gain Recognized on the Sale of Their Primary Residence and Deduct Depreciation and Maintenance Expenses on the Rental of That Same Property. Bolaris v. Commissioner, 776 F.2d 1428 (9th Cir. 1985)

Kendel L. Sibiski
University of Baltimore School of Law

FEDERAL INCOME TAX — TAXPAYERS CAN DEFER THE GAIN RECOGNIZED ON THE SALE OF THEIR PRIMARY RESIDENCE AND DEDUCT DEPRECIATION AND MAINTENANCE EXPENSES ON THE RENTAL OF THAT SAME PROPERTY. *Bolaris v. Commissioner*, 776 F.2d 1428 (9th Cir. 1985).

Taxpayers purchased a house in 1975 that served as their principal residence for approximately two and one-half years.[1] In late 1977, they moved into a newly constructed home. After the taxpayers unsuccessfully tried to sell their first residence,[2] they rented it to a tenant at fair market value on a month-to-month basis.[3] Eight months later, the taxpayers asked the tenant to vacate the house in hope that the saleability of the house would improve if it were unoccupied.[4] Six weeks after the tenant vacated, the taxpayers received and accepted an offer to purchase the house.[5] On their tax return, the taxpayers deferred recognition of the gain from the sale of the house and took depreciation and other rental expense deductions from the income received during the eight month rental period of the house.[6] The Internal Revenue Service (IRS) disallowed the depreciation and expense deductions, and the taxpayers filed a pro se petition in the United States Tax Court.[7] The tax court found that the taxpayers' primary motive in renting the property was not for the production of income, but rather to sell the property. The court held that the taxpayers were not entitled to the depreciation and expense deductions. The taxpayers, however, were entitled to defer recognition of gain on the sale of the old residence.[8] The United States Court of Ap-

---

1. Bolaris v. Commissioner, 776 F.2d 1428, 1429 (9th Cir. 1985).
2. *Id.* The taxpayers tried to sell their first residence for 90 days. *Id.*
3. *Id.* The taxpayers rented the property to "lessen the burden of carrying the property." *Id.*
4. *Id.*
5. *Id.* The taxpayers agreed to rent the residence to the purchasers until financing was secured. The residence was rented for approximately one month until the sale became final. *Id.*
6. Bolaris v. Commissioner, 81 T.C. 840, 843 (1983). The taxpayers' 1978 tax return indicated a gain of $20,708.45 on the sale of their old home. The taxpayers received and recorded rental income of $1,271 for 1977 and $2,717 for 1978. Using a straight-line method, taxpayers claimed that the house had a twenty-seven year useful life and certain appliances left in the house had a ten year useful life. The depreciation deductions taken were $373.00 for 1977 and $1,120.16 for 1978. The taxpayers also claimed deductons for expenses attributable to the following:

Expense	1977	1978
Mortgage interest	$1,505.28	$4,911.68
Property taxes	252.27	720.32
Insurance	236.00	—
Miscellaneous expense	542.67	692.12
	$2,536.22	$6,324.12

Id.

7. *Bolaris*, 776 F.2d at 1430. On the day of trial, the IRS filed an amended answer stating that if the taxpayer was entitled to deferred gain on the sale of their first residence, any depreciation or rental expenses were precluded. *Id.*
8. *Bolaris*, 81 T.C. at 847-50. The court stated that the taxpayers's rentals were "necessitated by the exigencies of the real estate market, were ancillary to sales efforts

peals for the Ninth Circuit stated that the rental of the property for the eight month period proved that the taxpayers had a "predominant purpose and intention of making a profit" and reversed and remanded that portion of the tax court's decision that denied the depreciation and expense deductions.[9]

Under section 1034 of the Internal Revenue Code, a taxpayer can defer recognition of gain on the sale of his "old residence"[10] provided that a "new residence"[11] is purchased either two years before such sale or two years after such sale.[12] The intent of section 1034 is to remove the hardship associated with residential investment.[13] If an amount equal to

---

and [arose] from [their] use of the [old residence] as their principal residence." *Id.* at 847 (citing Clapham v. Commissioner, 63 T.C. 505 (1975)). The tax court concluded that the term "residence," as used in section 1034, was in contradistinction to property held for the production of income, as used in sections 167 and 212. The court also allowed interest and real estate tax deductions permitted under sections 163 and 164 of the Internal Revenue Code. *Id.* at 850.

9. *Bolaris*, 776 F.2d at 1434. The Ninth Circuit affirmed the portion of the tax court decision that permitted the deferred recognition of gain.
10. Treas. Reg. § 1.1034-1(b)(1) (" 'Old residence' means property used by the taxpayer as his principal residence which is the subject of a sale by him . . . .").
11. *Id.* § 1.1034-1(b)(2) (" 'New residence' means property used by the taxpayer as his principal residence which is the subject of a purchase by him . . . .").
12. Recognition of gain is deferred pursuant to section 1034 of the Code, which states in part:

> (a) Nonrecognition of gain. —
> If property (in this section called "old residence") used by the taxpayer as his principal residence is sold by him and, within a period beginning 2 years before the date of such sale and ending two years after such date, property (in this section called "new residence") is purchased and used by the taxpayer as his principal residence, gain (if any) from such sale shall be recognized only to the extent that the taxpayer's adjusted sales price (as defined in subsection (b)) of the old residence exceeds the taxpayer's cost of purchasing the new residence.
> (b) Adjusted sales price defined. —
> (1) In general. —
> For purposes of this section, the term "adjusted sales price" means the amount realized, reduced by the aggregate of the expenses for work performed on the old residence in order to assist in its sale.
> (2) Limitations. —
> The reduction provided in paragraph (1) applies only to expenses —
> (A) for work performed during the 90-day period ending on the day on which the contract to sell the old residence is entered into;
> (B) which are paid on or before the 30th day after the date of the sale of the old residence; and
> (C) which are —
> (i) not allowable as deductions in computing taxable income under section 63(a) (defining taxable income), and
> (ii) not taken into account in computing the amount realized from the sale of the old residence.

I.R.C. § 1034 (1985) (Section 1034 has remained unchanged since the Tax Reform Act of 1986.).

13. Section 1034 was added to the Code by section 318 of the Revenue Act of 1951.

or greater than the adjusted sales price of an old residence is invested in a new residence, no gain on the sale of the old residence is recognized.[14]

Section 1034 applies only if the property sold is considered a "principal residence."[15] Property is a principal residence if the taxpayer has not abandoned it.[16] For purposes of section 1034, property is abandoned if the taxpayer either vacates the residence and shows no intent to return or permanently converts the residence into property held for the production of income.[17] Property is not considered abandoned if the taxpayer vacates the residence and shows an intent either to return to the residence or to sell it within a reasonable amount of time.[18] The legislative history of section 1034 supports this analysis:

> The term "residence" is used in contradistinction to property used in trade or business and property held for the production of income. Nevertheless, the mere fact that the taxpayer temporarily rents out either the old or the new residence may not, in light of all the facts and circumstances in the case, prevent the gain from being recognized. For example, if the taxpayer purchases his new residence before he sells his old residence, the fact that he rents out the new residence during the period before he vacates the old residence will not prevent

---

The rationale was explained in the report of the House Ways and Means Committee as follows:

> This bill amends the present provisions relating to a gain on the sale of a taxpayer's principal residence so as to eliminate a hardship under existing law which provides that when a personal residence is sold at a gain the difference between its adjusted basis and the sale price is taxed as a capital gain. The hardship is accentuated when the transactions are necessitated by such facts as an increase in the size of the family or a change in the place of the taxpayer's employment. In these situations the transaction partakes of the nature of an involuntary conversion.

H. REP. NO. 586, Cong., 1st Sess. 17 (151).

14. Treas. Reg. § 1.1034-1 ("On the other hand, if the new residence costs the taxpayer less than the adjusted sales price of the old residence, gain is recognized to the extent of the difference . . . .").
15. *Id.* § 1.1034(c)(3).
16. *See* Stolk v. Commissioner, 40 T.C. 345, 353 (1963), *aff'd per curiam*, 326 F.2d 760 (2d Cir. 1964) (The taxpayer's use of his farm residence during weekends and holidays did not constitute use as a principal residence).
17. *See* Houlette v. Commissioner, 48 T.C. 350, 357-58 (1967) (Section 1034 was inapplicable because the taxpayers showed no intent to reoccupy their home during a six-year leave abroad.). *See also* Rogers v. Commissioner, 45 T.C.M. (CCH) 318 (1982). Unable to sell their home, the taxpayers entered into a series of one-year lease agreements. The court held that the taxpayers had abandoned the property because no evidence had been presented to show "that the dominant motive in leasing the premises was anything more than for the 'business' of producing income." *Id.* at 321.
18. *See Triskov*, 29 T.C. 515 (1957) (holding that the taxpayer's home maintained its status as a principal residence even though federal rent control regulations prevented the taxpayers from returning to the residence upon their return from military service; Clapham v. Commissioner, 63 T.C. 505 (1975) (holding that the taxpayer's home maintained its status as a principal residence because the rentals were necessitated by the exigencies of the real estate market).

the application of this subsection.[19]

Thus, proof that a residence was temporarily rented will not necessarily prove abandonment.

Several tax court decisions that determined whether a residence was abandoned for purposes of section 1034 focused upon whether the taxpayer intended to reoccupy the residence. For example, after an unsuccessful attempt to sell his home, the taxpayer in *Houlette v. Commissioner*[20] rented the home on five separate occasions over a six-year period.[21] Following the expiration of each lease period, the taxpayer made efforts to sell the home. The taxpayer eventually sold the residence and deferred recognition of the gain from that sale.[22] The court recognized that actual occupancy of the home at the time of sale was unnecessary to satisfy section 1034,[23] but held that the taxpayer was unable to defer recognition of gain on the sale of that home because the taxpayer's consistent rental and sales efforts combined with six years of non-occupancy gave rise to a presumption of abandonment.[24]

By contrast, the taxpayer in *Trisko v. Commissioner*[25] rented his home for approximately three years in order to maintain it during his absence abroad.[26] Although tenants made several offers to buy the property, the taxpayer refused to sell the property.[27] After returning to the United States, the taxpayer tried to reoccupy the premises, but was precluded from doing so because of federally imposed rent control restrictions.[28] The court held that, although the taxpayer rented the home for almost three years, he did not abandon the property; his inability to return to the home was caused by government regulation.[29]

Similarly, the taxpayer in *Barry v. Commissioner*[30] also rented his home in order to maintain it during his absence abroad.[31] The rental

19. H.R. REP. NO. 586, 82d Cong., 1st Sess. 109, *reprinted in* 1951 U.S. CODE CONG. & ADMIN. NEWS 1781, 1896.
20. 48 T.C. 350 (1967).
21. *Houlette*, 48 T.C. at 352.
22. *Id.* at 352-53.
23. *Id.* at 354.
24. *Id.* at 357. *See also* Stolk v. Commissioner, 40 T.C. 345 (1963), *aff'd per curiam*, 326 F.2d 760 (2d Cir. 1964). The taxpayer in *Stolk* had two residences: a leased apartment in New York City, where he stayed during the week, and a home in Chappaqua, New York. In 1953 the taxpayer vacated the home in Chappaqua and listed it for sale. In 1955, the home was sold and the taxpayer subsequently purchased a farm in Virginia. The tax court disallowed nonrecognition of gain on the sale of the home in Chappaqua because the court determined that the taxpayer's primary residence was the apartment in New York City and not the home in Chappaqua. *Id.* at 355.
25. 29 T.C. 515 (1957).
26. Trisko v. Commissioner, 29 T.C. 515, 516-17 (1957).
27. *Id.* at 516.
28. *Id.* at 517.
29. *Id.* at 519-20.
30. 30 T.C.M. (CCH) 757 (1971).
31. Barry v. Commissioner, 30 T.C.M. (CCH) 757 (1971).

period, however, lasted for six years. Following the lease period, the taxpayer constructed a new home because of a sudden change in employment.[32] The court held that, although the taxpayer rented the house for six years, he did not abandon the property; his failure to return to the home was caused by an unexpected change in employment.[33]

Although the taxpayer's intent to reoccupy the residence is relevant to a finding of abandonment, it is not determinative. In *Clapham v. Commissioner*,[34] the taxpayer unsuccessfully attempted to sell his home.[35] Unfavorable financial circumstances forced the taxpayer to rent the premises with an option to purchase the home.[36] The option was not exercised, and after the home was vacant for five months, the taxpayer again entered into a rental agreement.[37] The taxpayer eventually sold the property and deferred recognition of gain on that sale. In allowing the nonrecognition of gain, the tax court focused, not on the taxpayer's intent to reoccupy the house, but rather on the taxpayer's intent to sell the property.[38] The court held that, even though the taxpayer did not intend to reoccupy the premises, he did not abandon it. Notwithstanding, the primary motive in leasing the premises was to sell the property as soon as the market allowed.[39] Consequently, a temporary rental period will not deprive a home of its character as a principal residence if the taxpayer intends to sell the property.[40]

Sections 167[41] and 212[42] of the Code allow deductions for deprecia-

---

32. *Id.* at 758-59.
33. *Id.* at 760. The taxpayer also rejected several purchase offers and lived in government housing during his stay abroad. The court rejected respondent's claim that section 1034 was inapplicable because the taxpayer had deducted depreciation and maintenance expenses attributable to the rental of the Maryland house from 1960-66. The court stated, "[t]he fact that petitioner rented the house and claimed deductions for depreciation and maintenance is not determinative of a conversion to 'property held for the production of income.' " *Id.* at 759.
34. 63 T.C. 505 (1975).
35. Clapham v. Commissioner, 63 T.C. 505, 506 (1975). The taxpayers had no intention of returning to their home.
36. *Id.*
37. *Id.* at 507.
38. *Id.* at 510.
39. *Id.*
40. *Id.* at 512.
41. Section 167 of the Code governs depreciation deducton. I.R.C. § 167 (1985). It provides in part:

    > (a) General rule. — there shall be allowed as depreciation deduction a reasonable allowance for the exhaustion, wear and tear (including a reasonable allowance for absolescence) —
    > (1) of property used in the trade or business, or
    > (2) of property held for the production of income.

    Id.
42. Section 212 of the Code governs maintenance deductions. *Id.* § 212. It provides in part:

    > In the case of an individual, there shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year —

tion and maintenance expenses if the property is held for the production of income.[43] A personal residence converted to income producing property can qualify for these deductions.[44]

In *Robinson v. Commissioner*,[45] the taxpayer had made numerous attempts to sell her former residence, however, the premises remained unoccupied for three years.[46] The tax court identified three factors to determine whether a residence is held for the production of income.[47] Applying section 121, the predecessor to sections 167 and 212, the court held that a residence is held for the production of income if (1) the house is abandoned by the owner, (2) it is listed for rent or sale, and (3) diligent efforts are made to implement the rental or sale of the home.[48] The court allowed the deductions because these three factors were met.[49]

Attempts to rent an abandoned former residence are not conclusive proof that property is held for the production of income, they are merely factors considered by the court. For example, in *Newcombe v. Commissoner*,[50] the taxpayers abandoned their old residence and attempted to sell the home through a local realtor. The house remained on the market

---

(1) for the production or collection of income;
(2) for the management, conservation, or maintenance of property held for the production of income; . . .

Id.

43. I.R.C §§ 167(a)(2) and 212(2) of the 1954 Code are almost identical to their predecessors, §§ 23(1)(2) and 23(a)(2), respectively, which were added to the 1939 Code as amended by section 121 of the Revenue Act of 1942. *See* Rev. Act of 1942, ch. 619, 56 Stat. 798, 819 (1942).
44. Treas. Reg. § 1.212(h).
45. 2 T.C. 305 (1943).
46. Robinson v. Commissioner, 2 T.C. 305, 307 (1943).
47. *Id.* The court distinguished pre-1942 decisions, in which deductions for depreciation and maintenance expenses with regard to a private residence were permitted only if the taxpayer converted the residence to business property. *See, e.g.*, Morgan v. Commissioner, 76 F.2d 390 (5th Cir. 1935). The court also noted a difference between a profit-inspired transaction and a transaction that involved the production of income. The court stated, "had Congress, in enacting Section 121 intended nothing more than to cover transactions 'entered into for profit' they would have used that expression [rather than 'production of income']." *Robinson*, at 308-09. *See also* Warner v. Commissioner, 6 T.C.M. (CCH) 582 (1947), *aff'd per curiam*, 167 F.2d 633 (2d Cir. 1948). The taxpayer abandoned the property and unsuccessfully attempted to rent or sell the property for four years. The court allowed depreciation expenses claiming that the property was held for the production of income, but disallowed loss deductions from the sale because the Code provisions requiring that the transaction be entered into for a profit were not satisfied. *Id.* at 583.
48. *Robinson*, 2 T.C. at 308.
49. The taxpayer, however, need not receive income to satisfy this three-factor test. In Horrman v. Commissioner, 17 T.C. 903 (1951), the taxpayer abandoned his old residence and made numerous efforts to rent and sell the property prior to its eventual sale. *Id.* at 907. After examining the taxpayer's use of the property prior to its discontinuance as a personal residence, and the taxpayer's intent regarding the disposition of that property, the court held that even though the taxpayer received no income from his efforts to rent or sell the property, it was held for the production of income. *Id.* at 907-08.
50. 54 T.C. 1298 1970).

for approximately one year, yet at no time did the taxpayers attempt to rent the property.[51] To determine whether the property was held for the production of income, the court implemented the following five-factor test: (1) whether the house was permanently abandoned, (2) whether the house was offered for rent, (3) whether the house was offered for sale, (4) whether the house was occupied before it was placed on the market for sale, and (5) whether the house was used for recreational purposes.[52] The court focused not upon the taxpayers' attempt to rent the property,[53] but on the taxpayers' intent to hold the property in order to realize anticipated appreciation in the value of the property.[54] The court held that the taxpayers did not satisfy that criterion because they did not seek an amount in excess of their investment.[55]

Since the addition of section 183[56] of the Code in 1969, some courts have used the factors promulgated in the Treasury regulations of section 183 to determine whether property is income producing.[57] Section 183(c) defines an activity not engaged in for profit as "any activity other than one with respect to which deductions are allowable for the taxable year under section 162 or section 212."[58] By implementing section 183, Congress intended to distinguish between taxpayers who enter into business for the purpose of realizing a profit and taxpayers who engage in hobbies to create losses that offset their income.[59] Nevertheless, the tax

51. Newcombe v. Commissioner, 54 T.C. 1298 (1970).
52. *Id.* at 1299-1300. The *Newcombe* factors expand on those announced in *Robinson* by adding factors (4) and (5). *See also* Sherlock v. Commissioner, 31 T.C.M. (CCH) 383 (1972) (The court held that, based upon the *Newcombe* factor test, the taxpayer converted the property for the production of income).
53. *Newcombe*, 54 T.C. at 1301.
54. *Id.* at 1303. The court determined that the taxpayer was not seeking to obtain an amount in excess of his investment. *Id.*
55. *Id.* Although the sale price of property was in excess of the market value, the court claimed that this was an offset against commissions and expenses rather than realization of profit. The taxpayers adjusted cost basis on the date of conversion was $70,887.39. The property was offered for sale for $70,000.00 and the fair market value of the property was $60,000.00.
56. I.R.C. § 183 (1982) states:
    > (a) General rule. — In the case of an activity engaged in by an individual or an S corporation, if such activity is not engaged in for profit, no deduction attributable to such activity shall be allowed under this chapter except as provided in this section.
57. *See, e.g.*, Allen v. Commissioner, 72 T.C. 28, 33 (1979); Jasionowski v. Commissioner, 66 T.C. 312, 321 (1976).
58. I.R.C. § 183(c) (1982).
59. *See Jasionowski*, 66 T.C. at 321. Congress provides additional guidance in applying section 183:
    > In making the determination of whether an activity is not engaged in for profit, the committee intends that an objective rather than a subjective approach is to be employed. Thus, although a reasonable expectation of profit is not required, the facts and circumstances (without regard to the taxpayer's subjective intent) would have to indicate that the taxpayer entered the activity, or continued the activity, with the objective of making a profit.

court in *Allen v. Commissioner*[60] looked to section 183 for guidance in determining whether property is income producing. In effect, the *Allen* court equated property used for the production of income with property used for the predominant purpose of making a profit.[61]

In *Bolaris v. Commissioner*,[62] the United States Court of Appeals for the Ninth Circuit held that taxpayers can defer gain recognized on the sale of their primary residence and deduct depreciation and maintenance expenses from the income produced on the rental of that same property.[63] Based upon the legislative history of section 1034, the court reasoned that the taxpayers could defer recognition of gain even if they temporarily rented their old home.[64] Furthermore, the property's status as a primary residence is consistent with the taxpayers' desire to convert the property temporarily into an income producing asset before its sale.[65] The court found that the taxpayers satisfied the *Newcombe* factors because they permanently abandoned their home and they made several offers to rent or sell the property for its actual fair market value.[66]

Bolaris is consistent with both prior case law and the legislative history of section 1034. To determine whether the property was abandoned, the *Bolaris* court did not focus on the taxpayers' intent to reoccupy the premises, but rather on the taxpayers' intent to sell the property.[67] Although the taxpayers' primary motive in renting the old residence was

---

S. REP. NO. 552, 91st Cong., 1st Sess. 104, *reprinted in* 1969 U.S. CODE CONG. & ADMIN. NEWS 2027, 2134.

60. 72 T.C. 28 (1979).

61. Allen v. Commissioner, 72 T.C. 28 (1979). The court held:

> [T]he standard for determining . . . whether an individual is engaged in activities for the production or collection of income or for the management, conservation, or maintenance of property held for the production of income so that his expenses are deductible under section 212, is: did the individual engage in the activity with the predominant purpose and intention of making a profit.

Id. at 33.

62. 776 F.2d 1428 (9th Cir. 1985).

63. Bolaris v. Commissioner, 776 F.2d 1428, 1434 (9th Cir. 1985).

64. *Id.* at 1432.

65. *Id.* at 1433.

66. *Id.* The court looked to the fact that the taxpayers actually rented their home at fair market value and that such a transaction would normally suggest that the taxpayer had the requisite profit motive. The court also noted that the property in question had no elements of recreational property, and that the desire to eventually sell the property was ancillary to the taxpayer's profit motive during the rental period. *Id. Contra Bolaris*, 776 F.2d at 1434 (Reinhardt, J., dissenting). The dissent asserted that section 1034 and sections 167 and 212 are mutually exclusive because a principal residence, by definition, cannot be held for the production of income. *See also* Sherlock v. Commissioner, 31 T.C.M. (CCH) 383, 385 (1972). ("It is completely understandable that petitioners desired to turn this potential expense 'eater' [the old residence] into an income-producing asset during this waiting period [prior to sale].").

67. *Bolaris*, 776 F.2d at 1431; *see also* Clapham v. Commissioner, 63 T.C. 505, 512 (1975).

to sell the property as soon as the market permitted,[68] the court held that the temporary rental did not destroy the home's character as a principal residence.[69] This analysis is in accord with the legislative history of section 1034: "[T]he mere fact that the taxpayer temporarily rents out either the old or the new residence may not . . . prevent the gain from being not recognized."[70] Although the example given to illustrate this point refers to the rental of a *new* residence, the language in the legislative history suggests that section 1034 should be equally applicable when an *old* residence is rented.[71] Furthermore, the purpose of section 1034 is to eliminate the hardship incurred by the taxpayer if the difference between the adjusted basis and the sale price of the house results in a gain.[72]

Although other courts have applied section 183 to determine whether taxpayers should be allowed deductions when renting property,[73] the *Bolaris* court held that section 183 was inapplicable.[74] Section 183 is more appropriately used when the taxpayer is involved in a sport, hobby, or similar form of recreation rather than when the taxpayer is renting property.[75] A taxpayer who rents property should be allowed deductions under section 212 if the property is held for the production of income.[76] The *Newcombe* factor test is an effective means of determining when a taxpayer intends to hold property for the production of income.[77] Therefore, the proper test for determining whether a taxpayer should be allowed deductions when renting property is not section 183, but rather the *Newcombe* factor test.[78]

The dissent in *Bolaris* asserted that section 1034, and sections 167 and 212, are mutually exclusive because a principal residence cannot be held for the production of income.[79] This conclusion, however, is not supported by precedent.[80] In fact, the legislative history of section 1034 anticipates similar situations and provides for temporary rentals of either

68. Bolaris v. Commissioner, 81 T.C. 840, 845 (1985).
69. *Bolaris*, 776 F.2d at 1432.
70. H.R. REP. NO. 586, 82d Cong., 1st Sess. 109, *reprinted in* 1951 U.S. CODE CONG. & ADMIN. NEWS 1781, 1896.
71. *Id.*
72. *Id. See supra* note 13 and accompanying text.
73. *See* Allen v. Commissioner, 72 T.C. 28 (1979); Jasionowski v. Commissioner, 66 T.C. 312 (1976).
74. *See Bolaris*, 776 F.2d at 1433 n.5.
75. *See id.*
76. *See supra* note 42 and accompanying text.
77. *See Bolaris*, 776 F.2d at 1433.
78. *See id.*
79. *Bolaris*, 776 F.2d at 1434.
80. *See* Newcombe v. Commissioner, 54 T.C. 1298, 1302 (1970) (To realize a profit, a taxpayer must seek post-conversion appreciation in the market value of the property.); Sherlock v. Commissioner, 31 T.C.M. (CCH) 383, 385-86 (1972) (it is reasonable that taxpayers want to turn an old residence into an income-producing asset during the waiting period).

the old or the new residence.[81] Moreover, Congress enacted section 1034 nine years after the statutory predecessors to sections 167 and 212 were enacted and eight years after the *Robinson* court had held that residential property that was abandoned and listed for rent or sale qualified as property held for the production of income.[82] If Congress wanted either to prevent the use of section 1034 when sections 167 and 212 are applicable, or to nullify the effects of *Robinson*, Congress could have drafted appropriate legislation.[83]

Bolaris is consistent with prior case law and with the legislative history of section 1034. The court recognized that the application of section 1034 will not automatically preclude application of sections 167 and 212, but rather, that the factors promulgated in *Newcombe* will provide an effective means to determine the taxpayer's intent when a taxpayer temporarily rents his old residence prior to its eventual sale.

Kendel L. Sibiski

81. *See supra* text accompanying note 19.
82. *Bolaris*, 776 F.2d at 1432.
83. *Id.*