IN THE SUPREME COURT OF MISSISSIPPI

W. WARREN CALLICUTT	**PLAINTIFF/APPELLANT**
VS.	**CASE NO. 2006-CA-00706**
PROFESSIONAL SERVICES OF POTTS CAMP, INC., DIANE G. TAYLOR AND UNION PLANTERS BANK, N.A.	**DEFENDANTS/APPELLEES**

APPEAL FROM THE CIRCUIT COURT OF MARSHALL COUNTY, MISSISSIPPI

APPELLANT, W. WARREN CALLICUTT'S

MOTION FOR REHEARING

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MOTION FOR REHEARING

The Appellant is compelled – both for personal reasons, but more importantly for policy reasons – to move the Court to reconsider its opinion and decision in this appeal.

The policy reasons relate to what the Appellant respectfully suggests is the Court's misunderstanding of the meaning of "held for sale" versus "held for investment" under the relevant portions of the federal tax laws. Like much that pertains to the Tax Code, these terms are counter-intuitive. Regardless of the outcome in this particular case, the Court's opinion regarding the definition of these terms is a departure from federal precedent and could have a far-reaching and unintended impact on investment in the State of Mississippi.

In the context of determining whether property is "held for sale" in the context of qualifying for treatment under Section 1031 of the Internal Revenue Code, the focus is not on whether the taxpayer intends to sell the property – ultimately the property must be sold to realize the expected return on investment. Rather, the focus is on whether the ultimate return is the *result of investment* or the *result of the business of selling*. Accordingly, if the taxpayer realizes a gain from the inherent value of the property and surrounding circumstance, and not from any improvement wrought by the

taxpayer, then the property is viewed as being "held for investment". *Maddux Construction Company v. Commissioner*, 54 T.C. 1278, 1284 (Tax Ct. 1970). In the instant case, the sale by Callicutt to Hurdle did not result from anything he did to improve the property, nor did it result from any effort on his part; the sale solely resulted from the fortuitous circumstance that Mrs. Hurdle desired to purchase the property for a price that was substantially higher than what Callicutt had agreed to pay for it. As has been pointed out by both parties to this appeal on numerous occasions, this opportunity presented itself *prior* to Callicutt obtaining title to the property. Accordingly, even though Callicutt purchased the property with the intent to sell it, he did so with the intent to sell it unchanged – solely as an investment. As stated in *Klarkowski v. Commissioner,* T. C. Memo. 1965-328, 1965 WL 1278 (Tax Ct. 1965):

> "An 'investor' or speculator in real estate is usually anticipating a gradual appreciation in value of the real estate, **or a rather sudden increase in value in the event of fortuitous circumstances**, without his doing must to cause that increase in value; whereas the dealer in real estate is typically looking for a rapid increase in price over a relatively short time, most frequently as a **result of some efforts on his part to cause the increase**."

T.C. Memo. 1965-328, Page 16 (Emphasis Added).

The Appellant respectfully submits that the majority's opinion (as well as the dissenting opinion in this case) misperceives this important distinction in focusing on the "intent to sell" the property as opposed to the determinative factor, which is the "intent to hold the property for sale" as opposed to the "intent to hold the property for investment". In both cases, the purchaser of the property intends to sell the property – it is the manner in which the taxpayer *holds* the property prior to sale that is the deciding factor in the context of Section 1031.

If the Appellant were the only person affected by the Court's holding in this case, the policy implications would be unfortunate for him, but the Court's opinion will have far-reaching impact on

many other persons who speculate in real estate investment – an area that the federal government has determined should receive favorable treatment for tax purposes. Although the Court's opinion may appear to be logical, it departs from the logic employed by the federal Tax Court, thereby creating uncertainty and potential confusion for other investors and tax advisors.

For these reasons, the Appellant respectfully urges the Court to revisit its rational on this point and clarify its pronouncement on the law as it pertains to property held for investment as opposed to held for sale.

If the Court does so, then the Appellant submits that it is likely that a jury would determine that he held the subject property for investment. Although he first decided to purchase the property for development as a subdivision, he changed that intent by the time he actually purchased the property because of the fortuitous circumstance that Mrs. Hurdle desired to purchase the property for that purpose. As noted previously, the Appellant has been candid with regard to his intent: initially, he intended to purchase and develop the property, subdividing it and selling lots for a profit; at the time he acquired title to the property, however, and certainly at the time he sold it to Mrs. Hurdle, his intent was to realize gain solely based on the inherent value of the property itself. Under federal tax law, his initial intent is irrelevant – what matters is his intent at the time of sale. If the sale results from his efforts to market or improve the property it will not qualify for Section 1031 treatment. If, as here, the sale results from gradual appreciation in value or fortuitous circumstance alone, then it will qualify. See, *Maddux*, supra, at 1286, and *Bramblett v. Commissioner,* 960 F.2d 526 (5th Cir. 1992), at 530.

Finally, if Diane Taylor and Professional Services of Potts Camp, Inc., had simply prepared the Exchange Agreement so as to provide that the indebtedness owed by Callicutt was replaced with "like-kind" debt, the sale would have qualified under Section 1031, and Callicutt would have been

allowed to continue his investment for ultimate gains to be realized at some future date. Instead, by rendering services which were negligent (and which arguably constituted the unauthorized practice of law), the Appellees caused Callicutt to needlessly incur several hundred thousand dollars in taxes. For these reasons as well, the Appellant respectfully urges the Court to reconsider its opinion and remand this case for a trial on the merits.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I, the undersigned counsel of record for the Appellant, do hereby certify that I have this day delivered a true and correct copy of the above and foregoing Motion for Rehearing to the following by placing true and correct copies thereof in the sent via United States Mail, postage prepaid, addressed as follows:

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This, the 26th day of December, 2007.

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