Trading FAQs

Questions:

- What types of traders are there?
- Do I need to trade inside an entity such as an LLC?
- How can I make sure that I'm eligible for "trader tax status"?
- What is the best way to get access to my 401k for trading?
- What is a wash sale? Should I avoid wash sales and how?
- What are deductible expenses as a Trader?
- Are there any time deadlines for Traders?
- Are there any specific taxes to which Traders are subject?

Answers:

➢ **What types of traders are there?**

There are three types of traders and we can define them as follows:

- ▶ Investor – which by definition is not a "trader" at all, as the word implies. The goal of the Investor is the long-term appreciation of their respective security holdings, supplemented by dividend and/or interest income. The Investor does not perform security transactions on a daily, weekly or perhaps even a monthly basis.

- ▶ Trader – termed in the Internal Revenue Code ("IRC") as a "Trader in Securities". This is also called by some tax pundits as having attained "Trader Tax Status" which is a term nowhere found in the Internal Revenue Code, Regulations or Case law. A Trader in Securities ("TIS") is an active trader with multiple trades on potentially a daily and/or weekly basis. The primary goal of a TIS is to profit on short-term swings in the market, or even day-trading the market, either to the upside or the downside. Those swings may last a few days or a few weeks and may entail multiple securities during the "swing". A TIS is considered to be in the trade or business of trading securities.

- ▶ Mark-to-Market Trader – is an active trader that engages in trading as a trade or business, according to the IRC, and is essentially electing to be taxed as a dealer in securities except that the Mark-to-Market Trader ("MTM" or "MTMT") does not consider the securities owned as "inventory" for sale to other traders. The MTMT seeks to profit from short-term movements in the market whereas the dealer profits both from the holdings in its account but also on the bid-ask spread.

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Now to the question at hand, can you deduct the PowerX software from your taxes? The answer depends on what type of trader you are.

If you consider yourself an **Investor**, then any investment expenses are deductible only as Miscellaneous Itemized Deductions on Schedule A of your Form 1040. [IRC Sec 212] Unfortunately, Miscellaneous Itemized Deductions, at this point (as of Mar 2021), no longer exist. However, they are scheduled to re-appear in tax year 2026.

If you trade as a **Trader in Securities**, then the answer is "Yes you can". As a TIS you can deduct your trading expenses on Schedule C of Form 1040. Schedule C is the tax form for sole proprietors or single-member LLCs (more on the subject of LLCs later). [IRC Sec 162] It is important that you use the Business Code of 523110 and as a single-member LLC, you will also have a separate employer identification number ("EIN") obtained from IRS.

If you are a Trader in Securities who has made a **Mark-to-Market** election under IRC Sec 475, then you will report all trading expenses, on Schedule C of Form 1040 with the same Business Code and potentially a separate EIN from your social security number ("SSN"), but that is not necessary, unless you are trading inside an entity.

One important note would be that on Schedule C, *no items of income are reported*! Yes, that is correct. So where are they reported ...

As a TIS, you are still subject to the capital loss limit of $3000 and subject to wash sales and your gain or loss from trading is reported on Form 8949 which flows to Schedule D of Form 1040.

However, as a MTMT, you are no longer subject to either the capital loss limit noted above or the wash sale issue. Your reporting gains or losses are reported on Form 4797 Part II, thus, they are all taxed as short-term.

- **Do I need to set up an LLC? If not, what should I do?**

Essentially what this is asking is "Do I need an entity in which to trade?" and there are a number of issues with this determination that we will explore. I have heard it said by investors, with no actual knowledge of tax law, "just incorporate and deduct everything." Nothing could be further from the truth!

An LLC can be formed in any state and is, by default, a single-member LLC if only an individual owns and manages it and a partnership if owned and managed by two or more individuals. In fact, all LLCs are formed at the state level. An LLC can further elect to be taxed as either a C Corporation or an S Corporation. The principal difference between a C Corporation and an S Corporation is that a C Corporation pays its own income tax whereas an S Corporation flows its net income – or loss – through to

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its shareholder(s) and they pay the tax or receive the tax benefit, subject to several constraints, the discussion of which is outside the scope of this Q&A.

One of the big questions with forming an entity is whether there is *liability protection* with an entity. The answer to that is, for the most part, yes. The definition of LLC is "Limited Liability Company" — not "Limited Liability Corporation" as many people believe, even popular financial radio talk-show hosts.

However, no type of entity can protect one from personal negligence.

So, if you place your assets (securities) into an entity in which to trade, the issue becomes, can a potential litigant reach those assets in the entity, or can the owner of the entity, on behalf of the entity itself be sued and the assets lost? Those are questions for an attorney in your state.

So what can an entity do for my trading?

Well, first off, it adds some legitimacy to your trading *business* because it is indeed a separate entity from you as an individual. From a strictly "trading" perspective, the TIS or MTMT <u>will not trade any differently</u> than if they were trading without an entity. That is the key point, since we are in the business of trading and an entity neither enhances nor detracts from our trading style.

As discussed above with regard to the deductibility of expenses and income reporting, an entity simplifies this because it captures all the income and expense and "flows it through" to the individual for inclusion on their tax return, typically on Schedule E page 2 of Form 1040.

The downside of an entity is that it costs money to form and there is compliance associated with it. Unless it is a single-member LLC, there is another federal tax return to file and typically another state income, business or franchise tax return to file. Some states, such as California, have a minimum tax per year, even if the LLC is dormant. So a California LLC could cost as much as $2500 to $3000 per year in compliance and tax costs. And I know what you are thinking, incorporate (form the LLC) in a no minimum tax state and just file there ... good thinking, you are well on your way to becoming a CPA ... oh no!! Unfortunately there is a concept called "nexus" which basically means that you file where you cast a shadow, or in the state in which you are domiciled.

So now you know about the pros and cons of entities, do you even need one?

If you are a TIS or a MTMT, I think it is a great idea because it adds legitimacy to your trading business. Additionally, if you have some securities in your "trading" account that have sentimental value – left to you by a deceased relative – it provides the opportunity to segregate your accounts into an investing account, owned individually and the trading account owned by the entity. That can be done anyway, but it adds one level of separation in order to help you satisfy your TIS or MTM criteria.

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However, keep in mind one critical point – having an entity will NOT qualify you as a TIS or MTMT if you do not satisfy the other criteria of regular and consistent trading.

So if you decide not to form an entity and trade in a regular and consistent manner a satisfactory volume of trades based on transactions or dollar volume, you may still qualify as a TIS or MTMT whereas the person with an entity that trades irregularly and without the requisite volume will not.

- **How can I make sure that I'm eligible for "trader tax status"?**

As mentioned above, there is no such thing as "trader tax status". It is never mentioned in the Internal Revenue Code, Regulations or Tax Court decisions.

It is also a misnomer that somewhat implies there is a "status" which one can attain, conferred by IRS, for special tax consideration ... and that is simply not the case.

What is mentioned in the Code, Regs and court decisions is "Trader in Securities". And as a review, a Trader in Securities

> is an active trader with multiple trades on potentially a daily and/or weekly basis. The primary goal of a TIS is to profit on short-term swings in the market, or even day-trading the market, either to the upside or the downside.

Essentially, a TIS is a facts and circumstances determination based on court case decisions. Attached is a summary of the most prominent Trader vs Investor court cases. The main criteria, as you will note, is consistency of trading throughout the tax year and number of trades, measured in either actual number of trades, an open/close or buy/sell being two trades, or dollar volume.

With regard to the number of trades, as you will note, the absolute number decreases over the years but the consistency and regularity of trading seems to be the most deciding factor. So as the Poppe decision designates 60 trades per month, that translates into less than 3 trades per trading day, assuming 20-22 trading days per month.

- **What is the best way to get access to my 401(k) for trading?**

You can trade your 401(k) with the same activity as a TIS or MTMT but the expenses incident to the production of that income are only deductible as Miscellaneous Itemized Deductions on Schedule A of Form 1040 and those have been suspended through 2025. You cannot trade your qualified plan as a margin account but you can sell cash-secured puts in order to enter a position.

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The only other way to access 401(k) funds would be to take a distribution which is very tax inefficient, especially if you are younger than 59½.

Retirement plans are for retirement, not to be distributed currently in the hopes of making an exorbitant amount of money trading those previously tax-deferred funds in a currently taxable account. Just trade your retirement account in the same manner as you trade your taxable account.

Make sure you can actually make money as a trader *before* taking distributions from your 401(k) plan.

➢ **What is a wash sale? Should I avoid wash sales and how?**

The best way to define a wash sale is the definition used by the IRS in Publication 550 – Investment Income and Expenses:

> A wash sale occurs when you sell or trade stock or securities **at a loss** <u>and</u> **within 30 days before or after** the sale you:
>
> - Buy *substantially identical* stock or securities,
> - Acquire *substantially identical* stock or securities in a fully taxable trade,
> - Acquire a contract or option to buy *substantially identical* stock or securities,
> - Acquire *substantially identical* stock for your individual retirement arrangement (IRA) or Roth IRA, and
> - If you sell stock and your spouse or a corporation you control buys *substantially identical* stock, you also have a wash sale. [Emphasis mine]

Wash sales are the bane of a Trader's existence!

Essentially, if you have a loss on a trade – and only a loss – there is a 61-day window for which you are concerned that extends 30-days before the loss transaction and 30-days after the transaction, as follows:

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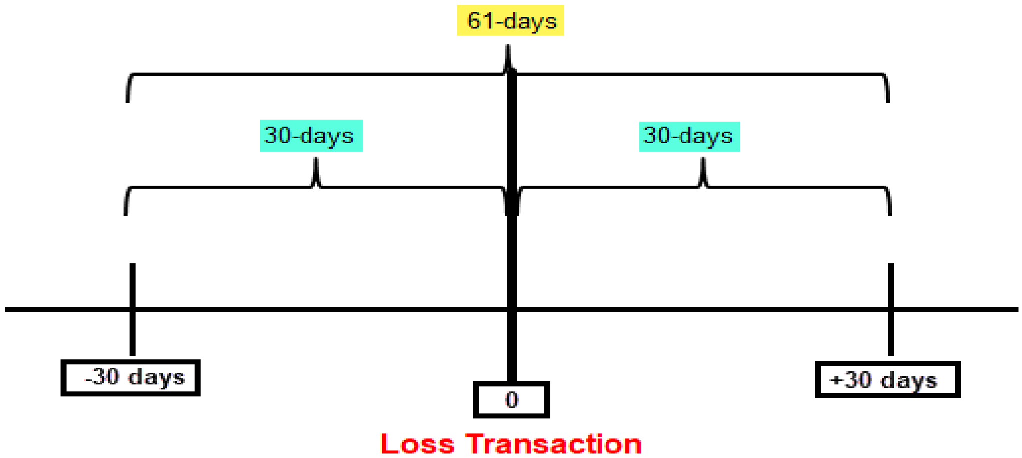

Option chain on SPY as of 3/1/2021

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SPY | SPDR S&P500 ETF TRUST UNITS SER 1 S&P ETF | 388.51 | +8.15 +2.14% | B: 388.51 A: 388.52 | ETB | NYSE | EXTO Eligible

PUTS

Strike	Bid X	Ask X	Impl Vol	Prob.ITM	Delta	Theta	Volume
							23.42% (±16.
375	3.39 P	3.40 I	24.17%	27.45%	-.26	-.19	13,028
376	3.56 P	3.57 Z	23.79%	28.75%	-.27	-.19	2,116
377	3.74 Z	3.76 D	23.42%	30.13%	-.28	-.19	3,015
378	3.93 N	3.95 D	23.03%	31.56%	-.30	-.19	927
379	4.14 P	4.15 P	22.64%	33.08%	-.31	-.19	775
380	4.35 Q	4.37 D	22.26%	34.67%	-.33	-.19	7,436
381	4.58 E	4.60 Z	21.87%	36.33%	-.34	-.20	833
382	4.83 N	4.85 W	21.50%	38.09%	-.36	-.20	1,049
383	5.09 P	5.11 W	21.11%	39.93%	-.38	-.20	935
384	5.37 P	5.39 W	20.73%	41.86%	-.40	-.20	451
385	5.67 P	5.69 W	20.35%	43.87%	-.42	-.20	3,738
386	5.99 P	6.01 P	19.98%	45.98%	-.44	-.19	1,219
387	6.34 P	6.36 W	19.64%	48.17%	-.46	-.19	992
388	6.71 P	6.73 P	19.29%	50.45%	-.49	-.19	1,287
389	7.11 P	7.13 P	18.96%	52.80%	-.51	-.19	779
390	7.54 P	7.57 Q	18.66%	55.21%	-.53	-.18	1,540
391	8.01 P	8.04 P	18.39%	57.66%	-.56	-.18	109
392	8.51 Q	8.54 I	18.14%	60.15%	-.58	-.18	132
393	9.04 Q	9.09 Q	17.92%	62.63%	-.61	-.17	83
394	9.62 Q	9.67 I	17.75%	65.09%	-.64	-.17	3
395	10.24 Q	10.29 I	17.62%	67.48%	-.66	-.16	117
396	10.90 Q	10.95 I	17.53%	69.79%	-.68	-.16	6
397	11.60 Q	11.66 Q	17.52%	71.97%	-.71	-.15	9
398	12.32 Q	12.39 Q	17.50%	74.07%	-.73	-.15	87
399	13.09 Q	13.15 I	17.56%	76.00%	-.75	-.14	1
400	13.87 P	13.96 Q	17.65%	77.79%	-.77	-.14	135
401	14.70 Q	14.77 Q	17.78%	79.43%	-.78	-.14	0
402	15.51 P	15.62 Q	17.89%	81.00%	-.80	-.13	15
403	16.40 Q	16.49 Q	18.15%	82.27%	-.81	-.13	3
404	17.29 Q	17.36 I	18.36%	83.51%	-.82	-.12	0
405	18.19 Q	18.27 Q	18.65%	84.57%	-.83	-.12	24
406	19.11 Q	19.19 P	18.98%	85.51%	-.84	-.12	0
407	20.01 Q	20.11 Q	19.22%	86.48%	-.85	-.12	0
408	20.97 Q	21.04 I	19.60%	87.20%	-.86	-.12	0
409	21.88 P	21.98 P	19.86%	88.02%	-.87	-.11	0
410	22.86 Q	22.95 P	20.36%	88.50%	-.88	-.11	11
411	23.82 Q	23.93 P	20.82%	89.00%	-.88	-.11	0
412	24.79 Q	24.90 P	21.27%	89.47%	-.88	-.11	24
413	25.77 Q	25.87 I	21.73%	89.88%	-.89	-.11	24
414	26.76 Q	26.84 P	22.22%	90.25%	-.89	-.11	0
415	27.71 P	27.83 P	22.62%	90.67%	-.90	-.11	24
416	28.74 Q	28.81 P	23.24%	90.86%	-.90	-.11	0
417	29.72 Q	29.81 P	23.76%	91.12%	-.90	-.11	25
418	30.71 Q	30.79 I	24.24%	91.41%	-.90	-.11	0
419	31.70 Q	31.78 I	24.75%	91.65%	-.91	-.11	0
420	32.68 Q	32.77 I	25.21%	91.91%	-.91	-.11	25
421	33.68 Q	33.77 I	25.77%	92.08%	-.91	-.11	0
422	34.68 Q	34.77 P	26.33%	92.24%	-.91	-.11	0
423	35.67 Q	35.76 I	26.81%	92.44%	-.91	-.11	0
424	36.68 Q	36.76 I	27.39%	92.56%	-.92	-.11	0
425	37.66 P	37.75 I	27.83%	92.78%	-.92	-.11	0
426	38.22 Q	38.32 I	28.14%	92.83%	-.92	-.11	0
427	39.13 Q	39.44 Q	28.79%	92.88%	-.92	-.11	0
428	40.08 Q	40.55 Q	29.55%	92.86%	-.92	-.12	0
429	41.24 Q	41.53 Q	30.61%	92.66%	-.92	-.12	0
430	42.01 Q	42.47 Q	30.03%	93.47%	-.92	-.11	16
435	46.95 Q	47.61 Q	32.94%	93.80%	-.93	-.12	0
440	52.00 Q	52.38 Q	34.66%	94.63%	-.94	-.11	0
445	56.99 Q	57.46 Q	37.41%	94.85%	-.94	-.12	0
450	61.96 Q	62.61 Q	40.36%	94.94%	-.94	-.13	5
455	66.96 Q	67.60 Q	42.65%	95.25%	-.94	-.13	0
460	71.96 Q	72.59 Q	44.89%	95.53%	-.94	-.13	0
465	76.95 Q	77.59 Q	47.07%	95.77%	-.95	-.13	0
470	81.95 Q	82.59 Q	49.26%	95.98%	-.95	-.13	0
475	86.95 Q	87.58 Q	51.36%	96.18%	-.95	-.13	0
480	91.91 Q	92.62 Q	53.45%	96.35%	-.95	-.14	0
485	96.91 Q	97.62 Q	55.53%	96.51%	-.95	-.14	0
490	101.94 Q	102.59 Q	57.55%	96.65%	-.95	-.14	0
495	106.91 Q	107.62 Q	59.54%	96.78%	-.96	-.14	0
500	111.94 Q	112.59 Q	61.50%	96.90%	-.96	-.14	0
505	116.94 Q	117.57 Q	63.31%	97.04%	-.96	-.14	0
510	121.93 Q	122.59 Q	65.26%	97.13%	-.96	-.14	0
515	126.89 Q	127.61 Q	67.00%	97.25%	-.96	-.14	0

Exhibit 1

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Essentially the wash sale rule is similar in spirit to the tax straddle rules in that it prevents the deductibility of a loss in the current tax year while allowing a TIS to *also* participate in the growth of the *same* security and pay tax on any gains in a subsequent year.

Active traders, without a MTM election in place, can fall into a wash sale situation in multiple ways. The most simple example is by purchasing a security on Monday for $100 and then selling it the following Monday for $90 – a $10 loss. If within 30 days that security is repurchased, say for $80, the $10 loss is added to the cost of the replacement shares and the new cost basis is $90 ($80 cost + $10 disallowed loss). If those shares are held over a year-end, there is no loss recognized for tax purposes that year on that transaction.

It is also important to note that the IRS also states if a trader acquires an option for the purchase of replacement shares after a loss, that will also trigger wash sale treatment. Further, wash sales can be created across brokerages and from a taxable account to an IRA account.

The wash sale rule can sneak up on you especially when dollar-cost averaging down (selling puts on a declining stock) and then implementing covered calls at a strike less than the cost of the first security purchase.

So how can one avoid wash sales? Again, a wash sale can only occur after a loss transaction. Keep in mind that by default, securities are reported on a first-in first-out (FIFO) basis, unless you specify otherwise as dictated by your broker.

- The easiest method is to wait 30 days after a loss transaction before entering a trade on the same security.
- The second easiest is to elect mark-to-market accounting method so wash sales do not apply.
- Another method of reporting cost basis is the "specific share identification" method. IRS states that specific shares of *mutual fund* shares will be adequately identified by identifying to your broker the shares sold and then receiving written confirmation. Written confirmation is somewhat antiquated. Therefore, theoretically if you can adequately identify the shares to which a covered call applied, you may be able to avoid the wash sale rule as a TIS.

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What are deductible expenses as a Trader?

As mentioned previously, as a TIS you are considered to be in a trade or business so any expense incident to the production of that income is deductible. Some examples of specific expenses for traders could be found in IRS Publication 535 – Business Expenses and the Instructions for Form 1040 Schedule C.

Here is a list of the type of expenses a TIS can expect to have. These expenses may be taken in full or partially based on their applicability to the trading business on a percentage basis. There is a tax adage that goes – *Pigs get fat while hogs get slaughtered*. That is a warning against deducting everything including the kitchen sink.

- Computers and software already loaded
- Multiple monitors for trading
- Specific software for your trading
- Mobile information device – cell phone or hot spot
- Trading research services – but not robo-trading, trade following automated trading or self-created trading systems (your time is not deductible)
- Office supplies
- Coaching and mentoring services
- Reference materials
- Seminars/webinars
- Travel to seminar – where the primary purpose is business not personal
- Continuing education – but not education that would qualify you for another business
- Interest – credit cards used to purchase trading items
- Interest – margin interest charged by a brokerage
- Office furniture conducive to trading
- Home office – if used *regularly and exclusively* for your trading business; this represents a pro-rata share of you home costs or a flat rate of $5 per square foot up to 300 sf; If qualified business use for a month is less than 15 days then that month is excluded. There are typically 22 trading days in a month.
- Entity formation fees – from your secretary of state and the third-party fees
- Brokerage data fees – typically for "professional" designated entities
- Accounting/legal fees – tax compliance and planning
- Franchise/business tax associated with the trading business
- Vehicle expense for business use – all trading business mileage must be substantiated with a mileage log or other method (not percentage estimates)

This does not represent an exhaustive list. However, as noted in the vehicle section, these expenses must be substantiated according to IRS rules and regulations and the home office must be used "regularly and exclusively" for the trading business. If two businesses are run out of the same area, each must be allocated up to a maximum of 300 square feet for the safe-harbor/simplified method.

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As a TIS and even a MTMT, all expenses are reported on Schedule C for the sole proprietor and on page 1 of the entity tax return.

- **Are there any time deadlines for Traders?**

There are no specific dates with which a TIS should be concerned.

With that said, should a TIS desire to elect that his trading business utilize the MTM method of accounting, there are several critical dates to remember.

The MTM election is due with the filing of the unextended tax return – that is, filed on or before the original due date – or attached to a timely-filed extension and preferably mailed certified.

A new entity may elect MTM accounting by preparing the MTM election by the 15th day of the third month after the formation of the new entity and placing the election with its books and records – probably with the entity formation documents. Then, with the first-year tax return for the MTM entity, attach the MTM election to the tax return.

If a TIS wanted to trade inside an entity there are no dates that are critical to that decision either. As stated under the LLC section, by default, an LLC with one member is a single-member LLC ("SMLLC") that files as a sole proprietor on Form 1040 Schedule C. There are more than likely state filing requirements as well. If the LLC has more than one member then by default it is a partnership and Files Form 1065. A SMLLC or multi-member LLC can elect to be taxed as a corporation – either a flow-through S Corporation, by filing Form 2553, or a C Corporation by filing Form 8832, although the latter is not suggested for traders. An S Corporation election must be filed within 2½ months after the beginning of the year to be in effect for the current year.

- **Are there any specific taxes to which Traders are subject?**

Actually, it is quite the opposite, Traders are subject to fewer taxes than regular sole proprietors.

An individual who files as a sole proprietor on Schedule C reports all income and expenses on that schedule. However, the TIS reports only expenses on Schedule C and all gains or losses on Schedule D and/or Form 6781 for those trading Sec 1256 contracts.

Therefore, the TIS is not subject to self-employment (SE) tax, which is the sole proprietor equivalent of social security and Medicare.

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The same is true for the MTMT who files as a sole proprietor. All expenses are reported on Schedule C but all gains or losses are reported of Form 4797 Part II in addition to Form 6781 for all Sec 1256 contracts.

Further, for the MTMT, the income reported on Form 4797 can be subject to the Qualified Business Income Deduction ("QBID") created by the Tax Cuts and Jobs Act in December 2017. The QBID creates up to a 20% deduction for income from flow-through entities depending on other items on the taxpayer's tax return.

Investor – Trader in Securities – Mark-to-Market Trader

Court Case Summaries

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Summary of Court Cases

This summary is based upon the criteria used by most of the courts in the cases presented.

Case	Intent	Nature of Income	Frequency and Regularity	Result
Higgins (1941)	Long-term	Sought "permanent" holdings and did not replace securities when sold	Extensively "managed" those who managed his real estate and security investments Court concluded that real estate activities rose to the level of a trade or business but investments did not	Investor
Levin (1979)	No mention is actually made of the intent or nature of income except that he "traded"		Substantial research Spent whole day working on stock transactions Conducted 332 transactions representing 112,400 shares with value of $3.45 million Court said "sheer quantity of transactions" supports the conclusion of a trade or busines	Trader
Moller (1983)	Long-term	Invested for long-term growth and dividends	Spent 40-42 hours/week researching stocks 83 buys and 41 sells one year 76 buys and 30 sells in next year	Investor
King (1987)	Commodities futures	Short-term gains from spot market trades and investment interest expense	A trader can be engaged in a trade or business that produce capital rather than ordinary income	Trader
Yaeger (1988)	Sought undervalued companies and waited for their value to be reflected in their stock price	No interest or dividend income but longer-term appreciation	Pursued investment activity full-time and worked 7 days/week; Contacted company management and attempted mergers & acquisitions 1,176 buys and 86 sells one year 1,088 buys and 39 sells next year Court concluded that although extensive time involved, Yaeger managed securities rather than traded	Investor
Laureys (1989)	Short-term losses as ordinary instead of capital	Option trading and losses from straddle transactions	Substatial trading as a CBOE market-maker entitled petitioner to ordinary loss treatment as a trader	Trader but Capital
Paoli (1991)	Short-term profit 1 day holding period for some stocks	Stocks not held long enough to earn dividends	326 sales; $9.8 million in gross proceeds with $10.8 million in cost Sch D was 22 pages 40% of transactions during one-month period Also employed as engineer	Investor
Mayer (1994)	Gave investment managers three years to make profits	Weighted average holding period was 317, 439 & 415 days over three year period	Averaged over 1,000 trades/year over three year period	Investor

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Summary of Court Cases

This summary is based upon the criteria used by most of the courts in the cases presented.

Case	Intent	Nature of Income	Frequency and Regularity	Result
	Focused on long-term appreciation		Court concluded he met the substantial trading requirement	
Steffler (1995)	Setup a business with name, cards, separate bank account Wrote software to analyze commodity markets	Sought to profit from short-term swings in commodity prices Positions were covered within two months of opening	Traded 16, 18 & 47 contracts in each of three years on 7, 8 & 12 days of those years, respectively	Investor
Chen (2004)	Short-term profit	Trading profits from short-term trades and covering short positions	323 trades in one year with 303 occuring in three months, 20 in another three months and none in six month period Employed full-time as engineer Court concluded that Chen met criteria for three months but not entire year	Investor
Knish (2006)	Trader in Securities	Short-term trades Substanital losses (> $5M over two years)	Trading within an S Corp that had not made a proper MTM Election Filed Form 3115 but without the Sec 475 election, the Change in Accounting Method was moot	not MTM
Vines (2006)	Short-term day trader	Short-term swings in market	Although this case pertained to a late mark-to-market election, one must be a "trader" to make the election Court concluded that "volume and frequency" of trading substantiated trader status Vines was also allowed a late MTM election utilizing 9100 relief	Trader
Arberg (2007)	Value/position trader Traded as a mark-to-market trader	Attempted to profit from undervalued securities; holding period based on value recovery	Traded from Feb to Sep and Feb to Oct next year; Trading 17 securities with gross proceeds of $32.4 million Traded spouse's account in a non-community property state Spouse's account constituted all short-term trades	Investor
Cameron (2007)	Court recognized short-term profit motive	Short-term profits - holding periods of less than 61 days	Did not trade 5 days/week and only traded 10 days/month two times during two year period 2002 - 46 buys, 14 sells 2003 - 109 buys, 103 sells	Investor
Jamie (2007)	Short-term day trader	Short-term swings in market No attempt to earn dividends or interest from securities traded	This case pertained to reflecting MTM tax treatment without making a MTM election IRS (and Court) apparently concluded that dlollar volume of trading activity rose to the level of a trader	Trader

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Summary of Court Cases

This summary is based upon the criteria used by most of the courts in the cases presented.

Case	Intent	Nature of Income	Frequency and Regularity	Result
			Maximum trades in one year during 3 year period was 118 but dollar amount was $14.8 million	
Perkins (2007)	Day trader and Mark-to-market trader without election	Short-term losses without MTM election exceeded $3000 capital loss limit	Number of trades not stated but "day trader" losses at issue	Investor
Holsinger (2008)	To capture short-term market swings	Rarely held stocks LESS than 31 days and hardly bought and sold on the same day	Setup "trading" business but continued to use his name and social security number on brokerage accounts 289 trades one year 372 trades the next year Traded on 40% and 45% of trading days respectively	Investor
Kay (2011)	Short-term Made mark-to-market election	No day-trading activity but securities held short-term	313 transactions one year, followed by 72 the next year and 84 the next Traded on 73 days, 18 days and 21 days over three years	Investor
Van der Lee (2011)	Price appreciation	Capital appreciation from longer-term holdings No day trading	148 transactions in one brokerage account and 11 in another during year Traded on 7 of 252 trading days	Investor
	Note: Taxpayer's recordkeeping consisted primarily of credit card statements with expenses circled. This was found not to satisfy the substantiation threshold required by IRS.			
Endicott (2013)	Option premium hedged with stock + dividends	Short-term gains from option premium, some long-term gains plus dividends Significant margin interest	204 trades, 303 trades and 1,543 trades in subsequent years Trading not regular and continuous	Investor
Nelson (2013)	Short-term	Short-term gains	535 trades in 121 days; 235 trades in 66 days; Trade volume exceeded $32.5M and $24.2M	Investor
Poppe (2015)	Short-term Trader in Securities	Short-term gains 38.4% of Total Income from Trading Securities	Roughly 60 trades/month Traded 4-5 hours each trading day 10-12 hours per day when off "Sec 475 identifies being a trader in securities as a prerequisite to filing the mark-to-market election." Failed to file Form 3115	Trader not MTM
Spicko (2016)	MTM Trader	Interest Dividends	Did not submit MTM Election to IRS but provided to brokerage	not MTM

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