



BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
S. JOSEPH THEISEN and)
REGINA THEISEN)

Appearances:

For Appellant: S. Joseph Theisen, Attorney at Law

For Respondent: Burl D. Lack, Acting Assistant Franchise
Tax Commissioner; James J. Arditto,
Franchise Tax Counsel

O P I N I O N

This appeal is made pursuant to Section 18593 of the Revenue and Taxation Code (formerly Section 19 of the Personal Income Tax Act) from the action of the **Franchise** Tax Commissioner in overruling the protest of S. Joseph Theisen and Regina **Theisen** to a proposed assessment of additional tax in the amount of \$33.45 for the year 1941.

In their return of income for 1941 Appellants **reported** gains and losses from the sale or exchange of capital assets which, to the extent recognized under Section 9.4(a) of the Act, were in the following amounts:

Capital gains \$1,234.95
Capital losses 4,381.51

They claimed a loss from these transactions in the amount of \$3,146.56, that sum having been computed by adding \$2,000.00 to the amount of the recognized capital gains. This amount, they assert, was allowable by virtue of Section 9.4(d) of the Act, which read as follows:

"(d) Losses from sales or exchanges of capital assets shall be allowed only to the extent of \$2,000 plus the gains from such sales or exchanges."

The Commissioner construed this provision, however, as limiting Appellants' deduction for capital losses to \$2,000 and levied his proposed assessment accordingly. The proper construction of the provision is the only question presented for our consideration herein, the Appellants having conceded the correctness of the action of the Commissioner in disallowing their claim for credit for taxes paid on certain foreign securities.

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Section 9.4(d) was adopted by the California Legislature from Section 117(d) of the Federal Revenue Act of 1934, the two provisions being identical. The Senate Finance Committee's Report (73rd Cong. 2d. Sess., S. Rept. 558) clearly sets forth the object sought to be accomplished by the provision. So far as relevant, it reads as follows:

"... in the case of the general limitation provided in the House bill that capital losses should only be allowed to the extent of capital gains, your committee recommends that \$2,000 of such excess of losses may be charged off from ordinary income."

The Board of Tax Appeals, in Joseph R. Seeds, 37 B.T.A. 705, in replying to an argument similar to that made by the Appellants stated:

"In construing the meaning of Section 117(d) we think the entire section must be read, and when that is done it seems reasonably clear to us that it was the intent of Congress to allow to a taxpayer a deduction for capital losses computed in accordance with the percentages provided in the Act, equal to the amount of his capital gains computed also on the percentage basis. If a taxpayer should have capital losses figured in this manner greater than his capital gains figured on the same basis, then he is entitled to a deduction of such excess but not to exceed \$2000. That is the limitation which we think Congress intended to provide in Section 117(d)."

In the light of these authorities there is, in our opinion, no escape from the conclusion that Section 9.4(d) contemplates a deduction from gross income for losses from sales of capital assets in an amount not to exceed \$2000. The position of the Commissioner must, accordingly, be sustained.

O R D E R

Pursuant to the views expressed in the opinion of this Board on file in this proceeding, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to Section 18595 of the Revenue and Taxation Code, that the action of Chas. J. McColgan, Franchise Tax Commissioner, in overruling the protest of S. Joseph Theisen and Regina Theisen to a proposed assessment of additional tax in the amount of \$33.45 for the year 1941 be and the same is hereby sustained,

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Done at Sacramento, California, this 24th day of July,
1947, by the State Board of Equalization.

Wm. G. Bonelli, Chairman
Geo. R. Reilly, Member
J. H. Quinn, Member
Jerrold L. Seawell, Member

ATTEST: Dixwell L. Pierce, Secretary