

BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
JOSEPH FRANCIS MITCHELL)

Appearances:

For Appellant :Joseph Francis Mitchell

For Respondent :W.M. Walsh, Acting Franchise
Tax Commissioner

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 Joseph Francis Mitchell to a proposed assessment of additional tax in the amount of \$513.44 for the taxable year ended December 31, 1940.

On October 3, 1940, the Appellant and his wife sold their jointly owned business, the property sold including certain machinery, machine tools and shop equipment. Almost all these items had been fully depreciated on records of the business before the time of the sale. In filing his personal income tax return for the year 1940, Appellant reported his portion of the gain from the sale of the fully depreciated property as gain from the sale of capital assets and took into account only 30% thereof pursuant to Section 9.4(a) of the Personal Income Tax Act. He contends that under Section 9.4(b) of the Act depreciable property used in trade or business is excluded from the statutory definition of "capital assets" only when such property remains subject to a depreciation allowance. The pertinent provisions of this Section, as in effect during 1940, are as follows:

"The term 'capital assets' means property held by the taxpayer (whether or not connected with his trade or business), but does not include . . . property used in the trade or business of a character which is subject to the allowance for depreciation provided in Section 8(i)."

The contention of the Appellant that such property is not of a character subject to depreciation when it is no longer subject to such depreciation does not accord with the normal meaning of the terms "...character subject to the allowance for depreciation ..." (Underscoring added.) The United States Tax Court rejected a similar argument with reference to the identical language in Section 117 (a)(1) of the Internal Revenue Code, holding that the fact that the property "has been fully depreciated is immaterial as long as the property is of a character subject to depreciation." 512 West 56th Street Corporation, T. C. Memo Op., Dkt. 2949

Appeal of Joseph Francis Mitchell

(January 17, 1945) aff'd. 512 West Fifty-Sixth Street Corporation
v. Commissioner, 151 F. 2d 942.

It should be noted that the liability here in question arose prior to the enactment of Sections 17721 and 17722 of the Revenue and Taxation Code, which provided that gains and losses from sales of Certain property used in a trade or business and of a character which is subject to an allowance for depreciation may be treated as capital gains and losses.

O R D E R

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

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the action of Chas. J. McColgan, Franchise Tax Commissioner, in overruling the protest of Joseph Francis Mitchell to a proposed assessment of additional tax in the amount of \$513.44 for the taxable year ended December 31, 1940, pursuant to Chapter 329, Statutes of 1935, as amended, be and the same is hereby sustained,

Done at Sacramento, California, this 11th day of December, 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 I. Pierce, Secretary