



BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
JOHN C. MARTIN)

Appearances:

For Appellant: Thomas B. Irvine,
Attorney at Law

For Respondent: Burl I. Lack, Chief Counsel;
Mark Scholtz, Associate Tax
Counsel

O P I N I O N

This appeal is made pursuant to Section 18593 of the Revenue and Taxation Code from the action of the Franchise Tax Commissioner (now succeeded by the Franchise Tax Board) on the protests of John C. Martin to proposed assessments of additional personal income tax in the amounts of \$113.72 and \$113.71 for the years 1941 and 1942, respectively.

Appellant, a resident of Salem, Illinois, and President of the Salem National Bank, has for many years made periodic visits to California. After learning in 1935 in the course of one of these visits of the proposed expansion of a Long Beach cemetery owned by Pacific Builders, Inc., Appellant on May 8 of that year purchased 11.96 acres of land adjoining the property owned by that company. On May 17, 1935, he entered into an agreement with Pacific Builders, Inc., whereby he agreed to sell and that company agreed to buy this acreage. The agreement provided that the buyer was to plat and improve the property, maintain it as a cemetery, pay all taxes levied thereon and protect Appellant against all liens, claims or damages in respect to its operation as a cemetery. The buyer was to sell the property as cemetery lots in the course of its business and was to receive title to the lots at the end of the quarterly period in which sales were made. At the close of the quarter Appellant was to receive as consideration for the lots deeded by him to Pacific Builders, Inc., one-half of the amount charged by that company to its purchasers for the lots. Pacific Builders was not to purchase property within fifteen miles of its cemetery for sale as cemetery lots until the acreage purchased from Appellant was exhausted, at which time Appellant was to deed to it any interest still retained by him.

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While the agreement specified the minimum and maximum prices to be charged by the company for the lots, Appellant did not otherwise retain any control over its sales of the lots. He was entitled, however, to examine its books and accounts to ascertain the amounts due him by virtue of the sales. On March 14, 1941, Appellant purchased an additional twenty-two acres of land adjoining the property owned by Pacific Builders, Inc., and on March 21 he entered into an agreement to sell this acreage to that company. The provisions of the 1941 agreement were substantially the same as those of the one made in 1935, the new agreement also being made applicable to the original 11.96 acres and providing that it superseded that agreement.

In his returns for the years 1941 and 1942, Appellant proceeded on the theory that the two parcels of property were capital assets and he reported the profits received by him pursuant to those agreements as capital gain. The Commissioner determined, however, that the properties came within the exemption of Section 9.4(b) of the Personal Income Tax Act (now Section 17711 of the Revenue and Taxation Code), which excludes from the term "capital assets" all property "held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business," and, accordingly, treated the profits received under the agreements as ordinary income. It is this determination of the Commissioner which is the subject of the present controversy, his disallowance of certain deductions in the amount of \$669.23 for the year 1941 not being contested herein.

It is the contention of the Commissioner that the agreements created either an agency relationship or a joint venture between Appellant and Pacific Builders, Inc., and that the sales of portions of Appellant's property to cemetery lot purchasers by Pacific Builders, Inc., in the course of its business are imputable to Appellant. We are of the opinion, however, that the facts before us do not establish the existence of either an agency or a joint venture. The agreements, in our opinion, constitute merely the granting by Appellant to Pacific Builders, Inc., of an option to purchase the property. We find no language of agency or joint venture therein and the facts that Pacific Builders, Inc., not Appellant, was authorized to maintain and operate a cemetery and that Appellant was freed from all risks incident to such activity constitute strong evidence that the parties intended neither of such relationships.

It follows, then, that Appellant correctly reported the profits from the sales of lots to Pacific Builders, Inc., as a capital gain, unless his activities on his own behalf placed him in the business of selling realty. The activity of the Appellant, however, in entering into the two contracts with Pacific Builders, Inc., and then merely conveying title and receiving payment for lots pursuant to those agreements

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is not sufficient to constitute a business, and the property in question was not accordingly held by Appellant primarily for sale to customers in the ordinary course of his trade or business. Eahs v. Crawford, 161 Fed. 2d 315, Boomhower v. United States, 74 Fed. Supp. 997. Accordingly, the position of the Appellant that the income in question should be regarded as a capital gain rather than as ordinary income must be sustained.

O R D E R

Pursuant to the views expressed in the opinion of the Board or? 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 the Franchise Tax Commissioner (now succeeded by the Franchise Tax Board) on the protests of John C. Martin to proposed assessments of additional personal income tax in the amounts of \$113.72 and \$113.71 for the years 1941 and 1942, respectively, be and the same is hereby modified as follows: the action of the Commissioner in treating the profits from the sale of property pursuant to the agreements of May 8, 1935, and March 21, 1941, with Pacific Builders, Inc., as ordinary income and increasing Appellant's income for 1941 and 1942 in the amounts of \$6,588.90 and \$6,154.66, respectively, be and the same is hereby reversed; in all other respects the action of the Commissioner is hereby sustained.

Done at Sacramento, California, this 10th day of August, 1950.

J. H. Quinn , Chairman
J. L. Seawell , Member
Wm. G. Bonelli , Member

ATTEST: Dixwell L. Pierce, Secretary