

BEFORE THE STATE BOARD OF EQUALIZATION  
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of )  
ADOLPH AND BERTHA KIRSCHENMANN )

For Appellants: Merle H. Jenkins, Attorney at Law

For Respondent: Burl D. Lack, Chief Counsel  
Crawford H. Thomas, Associate Tax Counsel

O R I N B O N

This appeal is made pursuant to Section 18594 of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protests of Adolph and Bertha Kirschenmann to proposed assessments of additional personal income tax in the amounts of \$16.95 and \$885.84 assessed against each Appellant for the years 1950 and 1951, respectively.

The issue is whether proceeds from the sale of certain land should be treated as capital gain or ordinary income.

The Appellants, husband and wife, purchased an eighty acre farm near Shafter, California, in 1930. Twenty acres of the farm were sold in 1936. By 1945, a lack of water rendered much of the remaining land valueless for farming and efforts to sell it all in one parcel proved fruitless. Since the city of Shafter had expanded toward their farm, Appellants determined that they could sell the land at its full value only by subdividing it.

Over a period of nine years Appellants' land was divided into five tracts containing a total of 228 lots. Appellants improved the tracts by installing streets, curbs, and water. From 1950 through 1955, Appellants sold an average of 24 lots per year. They sold four lots in 1950 and forty-nine lots in 1951. They engaged in no other real estate selling activities.

Neither of the Appellants was a licensed real estate broker and the great majority of their lots were sold for them by realtors on a commission basis. Appellants did not advertise or maintain a place of business to aid in the sale of these lots.

After 1945, Appellants' income was derived principally from the rental of farm lands. That portion of their income which was attributable to the sale of lots they reported as capital gain.

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The Franchise Tax Board's contention is that Appellants held their lots "primarily for sale to customers in the ordinary course of ... trade or **business**" within the meaning of Section 17711 (now **18161**) of the Revenue and Taxation Code; therefore, the gain from lot sales would be ordinary income.

Section 117(a)(1) of the Internal Revenue Code of 1939 is, in substance, identical to Section 17711. The factors considered by federal courts in determining whether property is held for sale in the ordinary course of business are: the purpose for which property was acquired, the extent of improvements made to the property, the activities of the taxpayer or his agents in conducting a sales campaign, the frequency and continuity of sales and any other facts showing whether the transactions were in furtherance of liquidation or in the course of the **taxpayer's** business. (Cudgel v. Commissioner, 273 F. 2d 206; W. T. Thrift, Sr., 15 T. C. 366.)

There is no single decisive test that can be applied. Our opinion must rest upon a consideration of all the pertinent facts. While no conclusion can be entirely free of doubt, we are greatly aided by a series of recent federal decisions dealing with facts similar to the case before us wherein the courts permitted capital gains treatment. (See Lazarus v. United States, 172 F. Supp. 421; Gudgel v. Commissioner, supra; Barrios' Estate v. Commissioner, 265 F. 2d 517. See also, Cebrian v. United States, 181 F. Supp. 412.)

In light of the above opinions, a careful scrutiny of the particular circumstances of Appellants' case leads us to conclude that the Appellants are entitled to treat profits resulting from the sale of their lots as capital gain. When Appellants' land, which they had farmed for fifteen years, became unsuitable for that purpose they tried to liquidate their holdings advantageously in an orderly fashion. They acquired no additional land for sub--division. Appellants accomplished their purpose with a minimum of activity and did not thereby place themselves in the real estate business.

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, pursuant to Section 18595 of the Revenue and Taxation Code, that the action

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of the Franchise Tax Board on the protests of Adolph and Bertha Kirschenmann to proposed assessments of additional personal income tax in the amounts of \$16.95 and \$885.84 assessed against each Appellant for the years 1950 and 1951, respectively, be and the same is hereby reversed.

Done at Sacramento, California, this 6th day of June, 1961,  
by the State Board of Equalization.

John W. Lynch, Chairman

Geo. R. Reilly, Member

Paul R. Leake, Member

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ATTEST: Dixwell L. Pierce, Secretary