

BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
ROBERT N. AND CHARLOTTE GOLD)

Appearances:

For Appellants: Robert N. Gold, in pro. per.

For Respondent: Paul J. Petrozzi
 Counsel

OPINION

This appeal is made pursuant to section 18593 of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protest of Robert N. and Charlotte Gold against a proposed assessment of additional personal income tax in the amount of \$9,769.00 for the year 1972.

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The sole issue for determination is whether respondent properly denied a capital loss deduction in 1972 for a loss associated with a trustee's sale of real property which occurred in 1973.

Appellant Robert N. Gold is an attorney who was engaged in the development and sale of residential real estate. During the appeal year, appellant and certain associates owned a parcel of real property referred to as the "Rowland Property." The property, which was held for future development, was subject to a promissory note secured by a standard deed of trust. Appellant and his associates were unable to obtain sufficient financing to develop the Rowland Property. As a result, appellant and his associates **defaulted on** the payments on the promissory note.

In October 1972, the trustee filed a notice of default under the deed of trust. The notice was duly served upon appellant, who took no action to cure the default or to prevent the trustee's sale. The trustee's sale took place on **April 13, 1973.**

Appellant deducted the \$137,500 loss incurred on the trustee's sale as a long-term capital loss on his 1972 personal income tax return. Respondent denied the deduction on the basis that the only identifiable event tending to establish the time of the loss was the sale of the property which occurred in 1973. It is from this action that appellant appeals.

In this appeal respondent concedes that appellant incurred a long-term capital loss in the amount of \$137,500 as a result of the default on the note secured by the Rowland Property. The only issue concerns the year of the deduction.

Losses in connection with real estate are generally deductible only upon the sale of the property or the occurrence of some event terminating the taxpayer's interest in the property. The theory is that no loss is suffered until the property no longer belongs to the taxpayer since, as long as he retains the property, there is a possibility that the apparent loss will be recouped. Application of this theory means that, ordinarily, the taxpayer's loss is sustained upon the foreclosure sale when all of his rights in the property are extinguished. (See 5 Mertens, Law of Federal Income Taxation, § 30.85 (1980 Revision) and the cases cited therein.) The loss may be taken in a year preceding the foreclosure only if the taxpayer can show that he has abandoned the **property**

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before the occurrence of the sale. (Bickerstaff v. Commissioner, 128 F.2d 366 (5th Cir. 1942).)

Appellant argues that his intent was to abandon the property in 1972, the year the loss deduction was claimed. In this regard, appellant states that he informed the holder of the deed of trust of the intent not to develop the property, and offered to quit-claim his interest in the property. This offer was declined by the holder of the deed of trust. Based on this information, we cannot conclude that appellant has established the existence of an identifiable event indicating that he abandoned the property in 1972. We believe that the only identifiable event which finally extinguished appellant's rights in the Rowland Property was the trustee's sale which occurred in 1973. Since 1973 is the proper year for the deduction of the loss, respondent's action in this matter must be sustained.

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 of the Franchise Tax Board on the protest of Robert N. and Charlotte Gold against a proposed assessment of additional personal income tax in the amount of \$9,769.00 for the year 1972, be and the same is hereby sustained.

Done at Sacramento, California, this 21st day of **May**, 1980, by the State Board of Equalization.

[Signature], Chairman
[Signature], Member
[Signature], Member
[Signature], Member
[Signature], Member