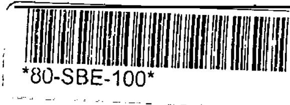
80-SBE-100

BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
VILLASENOR CORPORATION, TAXPAYER, AND)
SALVADOR VILLASENOR AND GUADALUPE)
VILLASENOR, ASSUMERS AND/OR TRANSFEREES)

For Appellant: Clifford H. Asay, Jr.
Certified Public Accountant

For Respondent: Jacqueline W. Martins
Counsel

O P I N I O N

This appeal is made pursuant to section 25666 of the Revenue and Taxation Code[1] from the action of the Franchise Tax Board on the protest of Villasenor Corporation, Taxpayer, and Salvador Villasenor and Guadalupe Villasenor, Assumers and/or Transferees, against a proposed assessment of additional franchise tax in the amount of $3,263.00 for the income year ended October 31, 1973.

1/ All statutory references are to the Revenue and Taxation Code unless otherwise indicated.

The issues presented are: (1) whether, appellant has shown that'it is entitled. to a particular capital loss deduction for the income year under appeal and, if not, (2) whether it may use the installment method and income averaging method in computing tax liability..

Appellant, a California corporation, was engaged in the business of renting residential properties. It was incorporated in February of 1959 and dissolved in May of 1977. Salvador and Guadalupe Villasenor, husband and wife, were its sole stockholders.

On its return for the income year ended October 31, 1972, appellant reported a capital loss of $141,856.00 resulting from an unsuccessful investment, which is described more fully below.. Appellant incurred a net loss for that year, even without taking that specific capital loss into account. Thus, while the $141,856.00 capital loss was, reported as having been sustained that year, it afforded appellant no tax benefit for that period.

On its return for the income year ended October 31, 1973, the year under appeal, appellant reported that it realized a net capital gain of $48,794.00 as a consequence of the sale of realty located in Vista, California. On that return, appellant offset $48,794.00 of the aforementioned $141,856.00 loss against the net capital gain reported for that year. Because appellant also suffered a net loss from rental operations for the appeal year, appellant reported a net loss for that period.

Respondent disallowed the offset on the ground that the Bank and Corporation Tax Law does not provide for the carryover of an unused capital loss sustained in prior years.- Therefore, respondent added the reported net gain of $48,794.00 to appellant's income in computing the proposed assessment in question. At the hearing with respondent at the protest level, appellant revised its position concerning the $141,856.00 loss. It urged that the loss actually was sustained during the appeal year rather than the prior year.. Respondent concluded, however, that appellant did not produce satisfactory evidence to support this-contention, and denied the. protest.

In this appeal, appellant has 'not-provided us with substantial factual information relating to the $141,856.00 loss. Consequently, the record before us

is sparse concerning the issue of when the loss was sustained. Based upon available information in the record, it does appear, however, that in 1964 appellant invested land and improvements in a mobile home park construction project. It further appears that in 1966 appellant sold a one-half interest therein to a third party, and also made an investment in Cavalier Mobile Estates, Inc. by transferring its other half interest to that entity.

The mobile home construction project was not a success. The contractor on the project ceased construction in 1972 when adverse geological factors caused impractical and expensive changes to the construction plan. Appellant brought suit against the contractor and its surety, and was unsuccessful both in the trial court and on appeal. The California Court of Appeal rendered a decision adverse to the appellant in September of 1972.

On its returns for both the income years ended October 31, 1972, and October 31, 1973, appellant indicated that the filing of the adverse decision by the appellate court in September of 1972 was the identifying event fixing the loss as occurring in the income year ended October 31, 1972.

Appellant concedes that if the loss was actually sustained in the income year ended October 31, 1972, there is no provision in the California Bank and Corporation Tax Law authorizing any carryover of, unused capital loss to offset the capital gain of the subsequent appeal year. It contends, however, as it did at the-protest level before respondent, that the loss of the investment was actually sustained in the appeal year. Appellant asserts that the capital loss of $141,856.00 was erroneously reported on the return for the income year ended in 1972. It now urges that the loss was involved in a court case on which there was litigation and correspondence as late as December 28, 1972. Thus, it contends that the event fixing the loss occurred in the income year ended October 31, 1973, i.e., in the appeal year, and, consequently, resulted in appellant incurring a net loss for that later period.

Subdivision (a) of section 24347 allows, as a deduction, "any loss sustained during the income year and not compensated for by insurance or otherwise." Subdivision (d) thereof provides that "[i]f any security becomes worthless during the income year, the loss resulting therefrom shall . . . be treated as a loss from

its sale or exchange, on the last day of the income year."

Respondent's pertinent regulation provides that "a loss must be evidenced by closed and completed transactions, fixed by identifiable events,'and actually sustained during the income year." (Cal. Admin. Code,. tit. 18, req. 24347(a), subd. (2).) It also again subsequently reiterates that "a loss shall be treated as sustained during the income year in which the loss occurs as evidenced by closed and completed transactions. and as fixed by identifiable events occurring in such income year. (Cal. Admin. Code; tit. 18, reg. 24347(a), subd. (4).)

The burden of proof to establish entitlement to a lossdeduction is imposed upon the taxpayer. (Mahler v. Commissioner, 119 F.2d 869 (2nd Cir. 1941), cert. den., 314 U.S. 660 [86 L. Ed. 529]; Appeal of William C. and Lois B. Hayward, Cal. St. Bd. of Equal., Oct. 3, 1967.) Notwithstanding appellant's assertions, the record in this appeal indicates that the identifiable event establishing worthlessness of the investment in Cavalier Mobile Estates, Inc. occurred when the decision was rendered by the California Court of Appeal in September of 1972. There is no evidence of any subsequent appeal, or of any other litigation or event which would establish that worthlessness occurred in the subsequent fiscal year. Therefore, appellant has failed to meet its burden of establishing that it is entitled to the loss deduction claimed for the appeal year.

Appellant urqes, in -the alternative, that it should be entitled to report the gain from the sale of the Vista realty by the installment method. The settled rule is that where a taxpayer elects to report the entire qain on the sale of. property in the year of sale . . . he cannot, after the expiration of the time allowed for filing a return, change his election to the installment method of reporting the gain. (Appeal of Glenn R. and Julia A. Stewart, Cal. St. Bd. of Equal., Oct. 18, 1977; Appeal of Carl H. and Ellen G. Bergman, Cal. St. Bd. of Equal., Feb. 19, 1974.) In those appeals, we relied on the decision of the United States Supreme Court in Pacific National Co. v. Welch, 304 U.S. 191 [82 L. Ed. 12821 (1938) which held that where-a taxpayer makes an election not to use the installment reporting method, that election is binding and may not be changed after the expiration of the time allowed for filing the return. In so holding the Court stated:

> Change from one method [of reporting income] to [another], as petitioner seeks, would require recomputation and readjustment of tax liability for subsequent years and impose'burdensome uncertainties upon the administration of the revenue laws. It would operate to enlarge the statutory period for filing returns . . . to include the period allowed for recovering overpayments. ... There is nothing to suggest that Congress intended to permit a taxpayer, after expiration of the time within which return is to be made, to have his tax liability computed and settled according to [another] method. By reporting income from the sales in question according to [one] method, petitioner made an-election that is binding upon it and the commissioner. (304 U.S. at 194-195.) (Footnote omitted.)

In the instant case, appellant reported the gain from the sale of the Vista realty on the completed sale method and offset the entire gain with a portion of the claimed Cavalier loss. Thus, appellant-elected to report the gain by a method inconsistent with the installment method. We conclude that it is thereby now precluded from electing the use of the installment method.

Lastly, appellant contends that since it sustained losses in each of the four income years previous to the year on appeal, it is entitled by statute to. determine its tax liability for the appeal year by the income averaging method.' However, while the Personal Income Tax Law provides for income averaging under certain conditions, the Bank and Corporation Tax Law does not. As appellant is governed by the latter, appellant clearly is not entitled to compute its tax liability by such method.

For the foregoing reasons, we must sustain respondent's action.

Appeal of Villasenor Corporation

ORDER

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 25667 of the Revenue and Taxation Code, that the action of the Franchise Tax Board on the protest of Villasenor Corporation, Taxpayer, and Salvador and Guadalupe Villasenor, Assumers and/or Transferees, against a proposed assessment of additional franchise tax in the amount of $3,263.00 for the income year ended October 31, 1973, be and the same is hereby sustained.

Done at Sacramento, California, this 18th day of August, 1980, by the State Board of Equalization.

______, Chairman

______, Member

______, Member

______, Member

______, Member