



BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
ALBERT J. AND JANICE BERNARD)

For Appellant: Albert J. Lempert,
 Attorney at Law

For Respondent: James C. Stewart
 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 Board on the protest of Albert J. and Janice Bernard against a proposed assessment of additional personal income tax in the amount of \$448.07 for the year 1970.

Appeal of Albert J. and Janice Bernard

The sole issue is whether appellants have proved that stocks in "Subchapter S" corporations became worthless in 1969 and 1970.

On January 16, 1976, respondent issued a proposed assessment for 1970 based upon a federal adjustment which added \$4,350.40 to appellants' income as a result of capital gains on the sale of a Hawaii leasehold (disallowance of an amortization deduction). As the adjustment was also applicable for state purposes, respondent adopted the adjustment as reflected in the proposed assessment.

Appellants, in their protest against the proposed assessment, did not dispute the correctness of the adjustment. They, instead, contended that they were entitled to offset the adjustment with certain "Subchapter S" capital losses which appellants had previously claimed as ordinary losses and which respondent had disallowed.

In their returns for 1969 and 1970, appellants had claimed deductions of \$20,554.49 and \$26,273.23, respectively, as partnership losses. However, on audit, respondent determined that the deductions were not allowable as they represented losses of federal "Subchapter S" corporations. (The California Personal Income Tax Law does not contain provisions similar to the Internal Revenue Code with respect to "Subchapter S" corporations.) Appellants paid the assessments resulting from respondent's disallowances.

Appellants now contend that the stocks in the "Subchapter S" corporations became worthless in 1969 and 1970 and that a capital loss for 1969 is applicable with a carry-over to 1970. They claim that the carry-over more than offsets the proposed deficiency. Respondent, on the other hand, notes that when appellants originally claimed the "partnership losses," its examination of the corporate records indicated that all the corporations were operating in 1970 and one of them was operating in 1971.

It is further noted by respondent that at the protest hearing on the instant matter, both the Franchise Tax Board and appellants agreed that additional information was necessary in order to substantiate appellants' position regarding the worthlessness of the

Appeal of Albert J. and Janice Bernard

stock. Appellants were given the opportunity to come forward with such evidence but they did not do so. Therefore, respondent affirmed the proposed assessment and this appeal followed.

Section 17206 of the Revenue and Taxation Code provides for the deduction of a loss sustained as a result of a security's becoming wholly worthless during the taxable year. To be allowable as a deduction, the loss must be evidenced by closed and completed transactions, fixed by identifiable events, and actually sustained during the taxable year. (Cal. Admin. Code, tit. 18, reg. 17206(a), subd. (2).)^{1/} The burden is on the taxpayer to establish that the securities became totally worthless during the year for which the deduction is claimed. (Appeal of Harry E. and Mildred J. Aine, Cal. St. Bd. of Equal., April 22, 1975; Appeal of William C. and Lois B. Hayward, Cal. St. Bd. of Equal., Oct. 3, 1967.)

Appellants have presented no evidence to support their contention that they should be allowed offsetting losses for the capital stocks which they allege became worthless in 1969 and 1970. They have presented no evidence showing that the investments in the corporations were in fact worthless in 1969 or 1970. All that is known is that all these corporations were apparently operating in 1970 and one of them did not suspend operations until sometime in 1974. On the basis of this information we have no choice but to find that appellants have not proven their entitlement to the claimed deductions.

Subsequent to the filing of this appeal, respondent received a copy of a final federal audit which reversed the disallowance of the amortization of the Hawaii leasehold. This permits allowance of a credit to appellants of \$308.60 as of October 29, 1975 to the date of overpayment. This overpayment should be applied to the 1970 assessment. In all other respects respondent's proposed assessment is sustained.

^{1/} Repealer filed January 15, 1981; effective thirteenth day thereafter (Register 81, No. 3).

