

BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
ANTHONY J. CALCIANO)

For Appellant: Gary H. **Delanois**
Certified Public Accountant

For Respondent: Karl F. Munz
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 Anthony J. Calcianno against a proposed assessment of additional personal income tax in the amount of **\$10,240.90** for the year 1977.

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The issue presented is whether appellant correctly calculated the depreciation deduction allowable for literary rights he purchased during the taxable year ended December 31, 1977.

On December 30, 1977, appellant purchased from OGM Corporation all its rights, title and interest to a book entitled Dead Weight. OGM Corporation had purchased the book from its author on October 31, 1977. The total purchase price paid by appellant was \$164,000, payable as follows: (a) \$17,000 cash down payment; (b) \$17,000 cash payable on or before February 10, 1978; and (c) assumption of the seller's nonrecourse note payable to the author in the amount of \$130,000 and due January 1, 1988. The note was payable only from the profits of the book., and the author was given a security interest in the book.

At the time of the purchase, appellant was given a copy of an appraisal of the book done for OGM Corporation by Jack Letheren and Associates, publishing consultants. This appraisal is not dated; however, we assume it was written sometime during the latter portion of 1977, since that was when appellant purchased the book and since appellant has not claimed otherwise. In this appraisal, the potential income of the book was estimated to be \$308,000, and the fair market value of the book was determined to be in excess of \$164,000.

After his purchase, appellant arranged for another publishing consultant to review the appraisal done by Jack Letheren and Associates. By letter dated **February** 14, 1972, this second consultant, Julien Yoseloff, stated that he had reviewed the first appraisal, including the estimate of potential income, and agreed with it. On April 15, 1978, appellant obtained from Jack Letheren another **estimate of the** potential income. At this time, Jack Letheren stated that as of December 31, 1977, the estimated potential income of Dead Weight was \$14,200.

Prior to purchasing the book, appellant also obtained a legal opinion as to the income tax consequences of the purchase. By letter dated December 30, 1977, the attorney consulted by appellant informed him that, in his opinion, the nonrecourse note was a bona fide debt and, therefore, the entire amount of the debt could be included in appellant's basis in the book. This opinion was based upon the first appraisal of Dead

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Weight, which estimated its potential income to be \$308,000.

Appellant employed the accrual method of accounting for the income and expenses connected with Dead Weight, although, for all other purposes, he was a cash basis taxpayer. In 1977, appellant reported income accrued from Dead Weight in the amount of \$6,977 and claimed a deduction for depreciation of the book in the amount of \$79,625. After an audit, respondent reduced the depreciation deduction to **\$3,715** and issued a proposed assessment of additional personal income tax of **\$10,240.90**. Respondent made several other adjustments which are not at issue here. Appellant protested the assessment, and **after** a hearing, respondent affirmed the assessment. This appeal followed.

Appellant used the income forecast method to calculate the depreciation deduction he claimed for Dead Weight. According to the income forecast method, depreciation for one year is calculated by multiplying the basis of the property less salvage value by a fraction, the numerator of which is the income produced by the property during the taxable year, and the denominator of which is the potential total income of the property as estimated as of the end of the taxable year. (**Rev. Rul. 60-358, 1960-2 Cum. Bull. 68.**)

Appellant and respondent agree that the income forecast method was the proper method to use to depreciate appellant's book. However, they disagree as to what figure should have been used as the estimate of potential income. Appellant used \$14,200, the estimate provided on April 15, 1978, which was supposedly based on conditions existing on December **31, 1977**. Respondent contends that \$308,000, the original estimate, should have been used.

The allowance of deductions is a matter of legislative grace. (New Colonial Ice Co. v. Helvering, 292 U.S. 435 [78 L.Ed. 13481 (1934)].) The taxpayer has the burden of proving that he is entitled to the deduction. (New Colonial Ice Co. v. Helvering, *supra*; Appeal of Robert V. Erilane, Cal. St. Bd. of Equal., Nov. 12, **1974.**) The only evidence submitted by appellant is the April 15th letter from Jack Letheren and Associates. This evidence does not persuade us that \$14,200 was the correct estimate to use in determining the allowable depreciation. Appellant's evidence is refuted by two letters from publishing consultants which estimate Dead

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Weight's potential income to be \$308,000. One of these consultants is from the same firm which produced the April 15th estimate. One of the appraisals was written in February, 1978, and the other was written sometime near the end of 1977. Appellant has produced no **evidence** which would explain how the book's potential income could be \$308,000 shortly before and shortly after December 31, 1977, yet be only \$14,200 on December 31, 1977.

In addition, appellant relies upon the first appraisal (which estimated the potential income to be **\$308,000**), when determining that his basis in the book includes the entire amount of the nonrecourse financing. Since appellant purchased the book on December 30, 1977, we find that his reliance upon the first appraisal on that date to compute his basis greatly reduces the persuasiveness of his claim that that appraisal was incorrect as of December 31, 1977, the very next day.

In **light of** the foregoing, we find that appellant has failed to prove that Dead Weight's potential income as of December 31, 1977, was \$14,200.

Therefore, the action of respondent is sustained.

