**BEFORE THE STATE BOARD OF EQUALIZATION**

**OF THE STATE OF CALIFORNIA**

In the Hatter of the Appeal of )
)
WILLIAM J. **AND ESTHER L. S-I-ROBE?** )

**For Appellants:** **William J. Strobel, in pro. per.**

**For Respondent:** **Allen R. Wildermuth Counsel**

OPINION

**This appeal is made pursuant to section 19057, subdivision (a), of the Revenue and Taxation Code from the action of the Franchise Tax Board in denying the claim of William J. and Esther L. Strobel for refund of personal income tax in the amount of $194.48 for the year 1976.**

The core issue presented here is whether appellants, California residents, are required to pay income tax on gain from the sale of Texas real property.

Appellants moved to California from Texas in January of 1976, leaving behind their unsold personal residence in Dallas. In July of 1976, after residing in California for six months, appellants finally sold the Dallas residence. Appellants filed a timely California tax return for 1976 in which they reported the sale of their personal residence and showed a deferral of the $12,272 gain pursuant to the nonrecognition provisions of Revenue and Taxation Code section 1809'1. However, during their occupancy, appellants had utilized 12.5 percent of the Dallas residence for business purposes and had, therefore, taken business deductions for such use. Nevertheless, in their 1976 federal and state tax returns, appellants failed to allocate any part; of the, gain of their personal residence to the business portion as is required. Respondent received notice that the Internal Revenue Service had determined that $1,399 of the gain from the subject' sale was not eligible for such nonrecognition treatment since it was attributable to the business use rather than to the personal residence use. In addition, the Internal Revenue Service's report indicated a decrease in real estate taxes allowable as a deduction in the amount of $821. Based on the information above, respondent issued a notice of proposed assessment totaling $194.48, which appellants promptly paid. However, appellants thereafter submitted an amended return for 1976 in which they requested a refund of the $194.48 on the basis that the original return was correct. Responaent denied appellants' claim for refund and this timely appeal followed.

Appellants' only contention on appeal is that since they had been residents of Texas during the nine and one-half years they had occupied the Dallas residence, some, if not all, of the taxable gain attributable to the sale of that residence in 1976 should be taxed by Texas and not by California. No arguments or evidence was Presented by appellants with respect to the propriety of the federal action involv-i-ng either the recognition of gain or the decrease in the amount of real estate taxes allowed.

Section 18451 of the Revenue and Taxation Code provides, in relevant part, that a taxpayer shall either concede the accuracy of an Internal Revenue Service determination or, state wherein it is erroneous. Moreover, we have previously held that it "is axiomatic that a deficiency assessment based on a federal audit report is presumptively correct and that the burden lies on the taxpayer to establish that the respondent's determination is erroneous."" (Appeal of Joseph B. and Cora Morris, Cal. St. Bd. of Equal., Dec. 13, 1371. See also, Todd v. McColgan, 89 Cal.App.2d 509 [201 P.2d 414] (1949); Appeal of Nicholas H. Obritsch, Cal. St. Bd. of Equal., Feb. 17, 1959.) In the instant

matter, appellants have made no attempt to establish that the Internal Revenue Service's determination is erroneous. We must, therefore, conclude that appellants concede (at least tacitly) the accuracy of that underlying determination.

Returning to appellants' basic contention that the taxable gain of the Dallas residence has been improperly attributed to California, we note that in July of 1976, at the date of the subject sale, appellants were clearly California residents within the meaning of Revenue and Taxation Code section 17014. Indeed, appellants have not contested this fact at any point in this proceeding. It is well settled that gain is realized entirely at the time of sale. (Helvering v. San Joaquin Fruit & Invest. Co., 297 U.S. 496 [80 L.Ed. 824] (1936).) Accordingly, since appellants were residents of California at the time the subject gain was realized, they are subject to tax here on the amount of gain attributable to the business use of the residence. (Rev. & Tax. Code, § 17041; Appeal of Jess D. and Marguerite M. Tush, Cal. St. Bd. of Equal., March 19, 1963.) We, therefore, conclude that respondent's action in this matter must be sustained.

**Appeal of William J. and Esther L. Strobel**

## 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 19060 of the Revenue and Taxation Code, that the action of the Franchise Tax Board in denying the claim of William J. and Esther L. Strobel for refund of personal income tax in the amount of $194.48 for the year 1976, be and the same is hereby sustained.**

**Done at Sacramento, California, this** 17th **day of** November, 1982, **by the State Board of Equalization,** with Board Members Mr. Bennett, Mr. Collis, Mr,, Dronenburg and Mr. Nevins present.

William M. Bennett, **Chairman**

Conway H. **Collis**, **Member**

Ernest J. **Dronenburg, Jr.**, **Member**

Richard Nevins, **Member**

_____, **Member**