BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
KERRY AND CHERYL JAMES)

For Appellants: Cheryl James,
in pro. per.

For Respondent: John A. Stilwell, Jr.
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 Kerry and Cheryl James against a proposed assessment of additional personal income tax and penalty in the total amount of $338.09 for the year 1978.

The primary question presented for decision is the propriety of respondent's disallowance of a claimed theft loss.

On February 19, 1978, appellant Cheryl James (hereinafter "appellant") and her husband were having a heated argument on a street corner. A passerby, pretending to be a good Samaritan, took appellant's side in the dispute and offered her a ride in his car which she accepted. However, after driving a short distance, the passerby stopped the car, took appellant's purse and ordered her from the car. Fearing for her life, appellant complied. Appellant notified the police immediately and the resulting police report indicated the following items had been stolen:

ITEM	VALUE
Columbian purse	$ 30
Coin purse	5
Wallet	5
Lucien Piccard watch	800
Gold Ring with 20 misc. stones	1,000
Silver ring	75
Miscellaneous credit cards	----
Total	$1,915

In a letter aated February 23, 1978, appellant listed the items stolen on February 19, 1978, as follows:

ITEM	VALUE
Hewlett Packard calculator	$ 80
Multistone Ring	800 - 1000
Lucien Piccara Watch	800
Diamond Ring (1 carat)	1000
Silver Ring	100
Wallet	50
Purse	65
Total	$2845 - $3045

No recovery of these items was made. Thereafter, appellant filed a claim for compensation of the theft loss with her insurance company. While her total insurance coverage on her personal property amounted to $30,000, appellant stated in the claim form that her "whole loss and damage" from the theft was $2,000 and that the amount claimed under the policy was $2,000 which, in due course, the insurance company paid to her.

Nevertheless, on her 1978 personal income tax return, appellant claimed a loss before insurance reimbursement of $5,525. Subtracting the insurance reimbursement of $2,000 and- the "floor" of $100, appellant claimed a casualty loss deduction of $3.,425. On August 2, 1979, respondent requested further information concerning the subject casualty loss. As a result of appellant's failure to reply to that -letter or to subsequent letters dated September 16, 1979, and October 4, 1979, respondent issued a notice of proposed assessment against appellants dated January 17, 1980, which disallowed the claimed casualty loss deduction and also a claimed solar energy. credit amounting to $105. Respondent also imposed a penalty for failure to furnish information requested, pursuant to Revenue and Taxation Code section 18683. Appellant filed a timely protest-dated March 14, 1980, in which she stated that she had requested a copy of the police report twice during the previous four months but she had not yet received it. In addition, she said she had requested a copy of the insurance claim and that copies of the police report, insurance claim and an appraisal of the stolen property would be forthcoming. Moreover, appellant indicated that the delay in responding to respondent's requests for information had been caused by the fact that she had had a heart problem and had been under a doctor's care. Thereafter, the protest was supplemented with the requested information including an appraisal dated April 10, 1980, signed by a person purporting to be a "diamond consultant" which placed the following values on the stolen items:

ITEM	VALUE
Lucien Piccard watch	$2,100
Silver ring	300
Gold ring	2,925
Diamond Ring	8,795
Total	$14,120

However, the appraisal is somewhat deficient in that the appraiser's qualifications and appraisal techniques are not listed and the date for which the items are appraised has not been ascertained.

Appellant alleges that the discrepancy between the list given to the police and the list in the April 10, 1980, appraisal (specifically the diamond ring) was due to the fact that the police report was taken within ten minutes from the occurrence of the theft when she had been extremely distraught. Moreover, she stated that a minor fire in 1968 destroyed the receipts of most of those items she had pwchased, while other items had been given to her. Appellant apparently concedes that she is unable to establish the adjusted basis of the stolen property except for the cost basis of a "multicolored ring" for $294 and of a watch for $874.50 for which receipts were

supplied. In addition, the protest and the supporting data make no mention of the facts needed to support the solar energy credit.

A deduction is allowed for losses by theft of property not connected with a trade or business (after a $100 exclusion), if not compensated for by insurance or otherwise. (Rev. & Tax. Code, § 17206, subds. (a) & (c)(3).) The above statute is similar to its federal counterpart. (Int. Rev. Code of 1954, § 165.) As there are now no regulations of the Franchise Tax Board interpreting section 77206, pursuant to the authority of section 19253 of the Revenue and Taxation Code, regulations under the Internal Revenue Code would govern the interpretation of the conforming state statute (Cal. Admin. Code, Lit. 18, reg. 19253.) Moreover, cases interpreting section 165 are highly persuasive as to the proper application of section 17206. (Heanley v. McColgan, 49 Cal.App.2d 203 [121 P.2d 45] (1942); Holmes v. McColgan, 17 Cal.2d 426 [110 P.2d 428] (1941); Union Oil Associates v. Johnson, 2 Cal.2d 727 [43 P.2d 291) (1935).) We further note that deductions are a matter of legislative grace and the burden is upon the taxpayer to show that he is entitled to the deduction. (New Colonial Ice Co. v. Helvering, 292 U.S. 435 [78 L.Ed. 13483 (1934); Jot B. Thornton, 47 T.C. 1 (1966); Appeal of Felix and Annabelle Chappellet, Cal. St. Bd. of Equal., June 2, 1969.)

With these facts in mind, we note that the loss by theft is limited to the lesser of either an amount equal to the fair market value of the property immediately before the theft reduced by any fair market value immediately after theft, or the adjusted basis for determining loss from the sale or other disposition of the property involved. (Treas. Reg. §1.165-7(b)(1).) Accordingly, appellant bears the burden of establishing the lesser of the fair market value of the property at the time of its theft or its adjusted basis. Thus, in order to determine whether the appellant is entitled to a theft loss, her basis in the stolen property must be established. "Where petitioners fail to prove that basis, we are unable to determine the amount of the deductible loss." (Otto V. Niehues, ¶ 80,329 P-H Memo. T.C. (1980).) In this situation, where appellant admits that she cannot establish the adjusted basis of the stolen property (amounting to a claim of $5,525 on her return) except for receipts of $1,168.50, we must find that she has failed to carry her burden of proof and sustain respondent's determination. Moreover, notwithstanding the inconsistencies and insufficiencies of the April 10, 1980, appraisal, noted above, we note that in spite of insurance coverage of $30,000, appellant stated in her insurance claim that her "whole loss and damage" from the theft was $2,000 for which she was completely compensated. No reasons, business or nonbusiness, were given for not claiming more than a $2,000 loss. (See Henry L. Hills, 76 T.C. 484 (1981), app. pending.) Accordingly, even assuming the factual accuracy of appellant's latest allegations, we would hold in this case that appellant's voluntary assumption of part of the cost of the theft would

not constitute a deductible theft loss. (See e.g., Kentucky Utilities Co. v. Glenn, 394 F.2d 631 (6th Cir. 1968).)

As indicated above, appellant has provided no evidence to support her claimed solar energy credit. We must therefore hold that appellant has not borne her burden of showing that respondent's determination is erroneous. (Appeal of Harold G. Jindrich, Cal. St. Bd. of Equal., April 6, 1977.)

Lastly, we must also sustain respondent's application of a penalty for failure to furnish information requested, pursuant to the authority of Revenue and Taxation Code section 18683. This section provides for a penalty of 25 percent of the tax due, unless it is shown that such failure is due to reasonable cause. The propriety of this penalty presents issues of fact as to which the burden of proof is on the taxpayer. (Appeal of Thomas T. Crittenden, St. Bd. of Equal., Oct. 7, 1974.) As indicated above, appellant appears to allege that her failure to furnish information was due to her heart condition. While illness may constitute "reasonable cause" if it can be shown that the taxpayer was prevented from complying with Franchise Tax Board requirements, appellant has offered no evidence to show that the circumstances of her heart problem were such as to prevent compliance with the Franchise Tax Board's requests. (Appeal of Allen L. and Jacqueline M. Seaman, Cal. St. Bd. of Equal., Dec. 16, 1975.) Moreover, it would appear appellant could have replied to respondent's requests even if she had a heart problem requiring a doctor's care.

Again, respondent's determination must be sustained in this matter.

Appeal of Kerry and Cheryl James

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 18595 of the Revenue and Taxation Code, that the action of the Franchise Tax Board on the protest of Kerry and Cheryl James against a proposed assessment of additional personal income tax and penalty in the total amount of $338.09 for the year 1978, be and the same is hereby sustained.

Done at Sacramento, California, this 3rd day of January, 1983, by the State Board of Equalization, with Board Members Mr. Bennett, Mr. Dronenburg and Mr. Nevins present.

William M. Bennett, Chairman

Ernest J. Dronenburg, Jr., Member

Richard Nevins, Member

_____, Member

_____, Member