

BEFORE THE STATE BOARD OF. EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
SIDNEY AND **BERNICE** CURTIS)

Appearances:

For Appellants: Samuel **J.** Osheroff
Certified Public Accountant

For Respondent: Charlotte Meisel
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 Sidney and **Bernice** Curtis against a proposed assessment of additional personal income tax in the amount of \$836 for the year 1979, and from the action of the Franchise Tax Board on the protest of Sidney Curtis against a proposed assessment of additional personal income tax in the amount of \$1,356 for the year 1980.

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The sole issue presented in this appeal is whether **appellants** are entitled to a casualty loss **involving theft** during 1979.

Appellants filed a timely **personal** income tax return for 1979 claiming a \$50,000 ordinary **loss** on small business stock. Respondent denied the deduction, for taxable year 1979 and issued a Notice of Additional Tax Proposed to be Assessed **dated September 21, 1981-i** As appellants were not original investors in the corporation, they acquiesced in respondent's decision but subsequently filed an amended return claiming the loss was a casualty loss. Appellants assert that they invested in the California Center for Weight Control only because they were given **erroneous** information on the financial **condition** of the corporation. They further allege that the business became bankrupt because the company president withdrew funds from the corporation for personal use as well as for paying corporate liabilities of which **appellants** were not aware. Appellants did not file a criminal complaint or **bring** a civil action against anyone involved as their attorney allegedly dissuaded them from this action, advising them that there **was** no hope of collecting" Furthermore, appellants do not have any corporate records in their possession to substantiate their allegations.

Respondent denied appellants' 1979 claim of casualty loss caused by fraud for lack of substantiation. Respondent also, based on its finding concerning the casualty loss, revised Mr. Curtis' 1980 tax liability by eliminating a \$1,050 carryover loss deduction and by changing the 1979 base year income figure **used in** income averaging. Respondent's actions for both years are the basis of this appeal.

A nonbusiness theft loss in excess of \$100 is deductible if not compensated for by insurance or otherwise. (Rev. & Tax. Code, § 17206, subds. (a) & (c)(3).) However, it is well established that deductions are a matter of legislative grace and **that the** taxpayer has the burden of substantiating his entitlement **to each** claimed deduction. (New Colonial Ice Co. v. Helvering, 292 U.S. 435 [78 L.Ed. 1348] (1934); Appeal of Sol and Millie Erlich, Cal. St. Bd. of Equal., Aug. 16, 1979,)

In order to claim an ordinary **loss deduction**, appellants must, under the law of the jurisdiction where the loss was sustained, establish the elements of the alleged criminal appropriation of their money. (Edwards v. Bromberg, 232 F.2d 107 (5th Cir. 1956).) Appellants

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in this case have alleged that their money was taken by false pretenses. Although California law and the applicable federal law found in section 165 of the Internal Revenue Code speak of losses arising from "theft," this word is intended to cover any criminal appropriation of another's property, including theft by fraud or false pretenses. (Edwards v. Bromberg, supra.) Under California law, persons who knowingly and designedly, by any false or fraudulent representation or pretense, defraud any other person of money are guilty of theft. (Pen. Code, § 484.) Appellants, therefore, to **establish the** crime of theft by false pretenses, must show: (1) an intent to defraud, (2) the commission of actual fraud, (3) false pretenses, and **(4) reliance** on the false representation or causation. (See People v. Jordan, 66 Cal. 10 [4 P. 773] (1884); Appeal of Abe and Constance C. Cooperman, Cal. St. Bd. of Equal., March 30, 1981.) Investments may not be deducted as a theft loss where the taxpayer fails to establish that a crime under state law was committed. (George D. Ladas, ¶ 76,064 P-H Memo. **T.C. (1976).**)

We do not know from the facts given who sold appellants the stock. We, likewise, do not know who appellants are asserting committed the fraud. In any event, no evidence of an intent to defraud the appellants has been submitted with regard to anyone. Unsupported allegations which raise suspicions **about an** alleged theft are insufficient to sustain a finding of a theft loss. (Appeal of Milton and Helen Brucker, Cal. St. Bd. of Equal., July 26, 1982.) As the requirements necessary to establish a theft by false pretenses have not been met, we must sustain respondent's action.

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O R D E R

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 Sidney and Bernice Curtis against a proposed assessment of additional personal income tax in the amount of \$836 for the year 1979; and that the action of the Franchise Tax Board on the protest of Sidney Curtis against a proposed assessment of additional personal income tax in the amount of \$1,356 for the year 1980, be and the same are hereby sustained.

Done at Sacramento, California, this 5th day of April , 1984, by the State Board of Equalization, with Board Members Mr. Nevins, Mr. Dronenburg, Mr. Bennett and Mr. Harvey present.

Richard Nevins , Chairman
Ernest J. Dronenburg, Jr. , Member
William M. Bennett , Member
Walter Harvey* , Member
_____ , Member

*For Kenneth Cory, per Government Code section 7.9