

Appeal of William C. and Margaret M. Stewart

The sole issue presented in this appeal is whether appellants have shown their entitlement to a theft loss deduction for 1977.

On December 1, 1976, appellants invested \$10,000 in a gas well tax shelter called Barr Joint Venture. Appellants invested an additional \$10,000 in the same venture on March 22, 1977. On their 1977 state and federal tax returns, appellants claimed a loss on this venture. A federal audit report was subsequently received by respondent which disallowed the claimed losses from the Barr Joint Venture for the taxable year 1977.

Respondent, on January 24, 1980, likewise issued a notice of proposed assessment which reflected the adjustments made in the federal audit. Appellants paid respondent the full amount of the assessment in February of 1980.

On September 9, 1981, appellants filed an amended state return claiming an adjustment to gross income for 1977 of \$15,421. In support of their claimed refund, appellants provided a copy of their amended federal return and a statement from the Internal Revenue Service showing a credit of **\$7,847.56** for the taxable year 1979. Appellants subsequently provided respondent with a letter from another investor in the **Barr Joint Venture** which asserts 'that they became aware of the fraudulent nature of the venture in 1977.

Respondent denied appellants claim for refund because appellants had not shown that the loss occurred in 1977 rather than in 1979, which is the taxable year in which the Internal Revenue Service allowed the deduction. The loss could not be claimed for California tax purposes for the taxable year 1979 as appellants became residents of New York in 1978 and paid personal income tax only in that state in 1979.

Appellants contend that the claim for refund was properly made for taxable year 1977 because the fraud was perpetrated in 1976 and 1977 and because the investors became aware of the fraud at the end of 1977.

A nonbusiness theft loss in excess of \$100 is deductible if not compensated for by insurance or otherwise and if sustained during the taxable year. (Rev. & Tax. Code, § 17206, subds. (a) and (c)(3).) Subdivision (e) of Revenue and Taxation Code section 17206 further provides that for the purposes of subdivision (a), any

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loss arising from theft shall be treated as sustained during the taxable year in which the taxpayer discovers the loss. Section 17206 is virtually identical to section 165 of the Internal Revenue Code. It is well established that federal precedents are entitled to great weight when construing state law that is based upon or comparable to federal law. (Meanley v. McColgan, 49 Cal.App.2d 203 [121 P.2d 45] (1942).)

The Internal Revenue Service, using the federal statute and regulation referenced above, concluded that a fraud did exist and that the loss was properly deductible for taxable year 1979. Respondent, relying on the Internal Revenue Service's determination, concluded that any claim for refund relating to this loss must be made in 1979, not 1977. Appellants must either concede that the federal determination is correct or bear the burden of proving that it is incorrect. (Rev. & Tax. Code, § 18451.) In this case, appellants must prove not only that the loss was discovered in 1977, but that they had no reasonable prospect of recovery of this loss in 1977. (Ramsay Scarlett & co., 61 T.C. 795 (1974); Milton B. Florman, ¶ 79,254 P-H Memo. T.C. (1979); Russell v. United States, 592 F.2d 1069 (9th Cir. 1979).)

No evidence has been presented which will support either. The letter from another investor in the gas venture is evidence only that someone else suspected a fraud. It is not evidence that appellants knew of the fraud in 1977. Furthermore, no evidence has been submitted at all which indicates that appellants had no hope of recovery of their loss in 1977. We must conclude that appellants have not met their burden of proof and that respondent's actions were proper.

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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 19060 of the Revenue and Taxation Code, that the action of the Franchise Tax Board in denying the claim of William C. and Margaret M. Stewart for refund of personal income tax in the amount of \$1,696 for the year 1977, be and the same is hereby sustained.

Done at Sacramento, California, this 1st day of August, 1984, by the State Board of Equalization, with Board Members Mr. Nevins, Mr. Dronenburg, Mr. Collis, Mr. Bennett and Mr. Harvey present.

<u>Richard Nevins</u>	, Chairman
<u>Ernest J. Dronenburg, Jr.</u>	, Member
<u>Conway H. Collis</u>	, Member
<u>William M. Bennett</u>	, Member
<u>Walter Harvey*</u>	, Member

*For Kenneth Cory, per Government Code section 7.9