



Appeal of Melburn E. and Judy McKell

The question presented is whether appellant-wife is entitled to utilize the nonrecognition provisions of Revenue and Taxation Code section 18091 so that the gain realized from the sale of her principal residence need not be recognized in the year at issue.

On April 6, 1977, Melburn E. McKell, a recent widower, and Judy Gregory, a recent divorcee, were married. Both Dr. McKell and the new Mrs. McKell, appellants herein, had separate principal residences prior to their marriage. It was decided that Judy would sell her principal residence (Belford) and that the newly wed couple would reside in Melburn's principal residence (Dole Place). On June 11, 1978, Judy sold her home for \$81,500 and after the appropriate adjustments, realized a gain of \$48,075.

Thereafter, in an apparent attempt to defer that gain, Melburn executed a grant deed to himself and Judy, as joint tenants in the Dole Place residence. That deed, dated July 13, 1978, indicated that no consideration was given by Judy for the transfer to her of Dole Place. On their 1978 joint income tax return, appellants reported the gain on the sale of the Belford residence, but treated the above-described transfer into joint tenancy as a reinvestment of Judy's gain thereby deferring the recognition of the entire gain. Upon audit, respondent concluded that the gain must be recognized in whole pursuant to Revenue and Taxation Code section 18162.5.<sup>1/</sup>

Revenue and Taxation Code section 18091, as in effect during the year at issue, provided in relevant part that if property used by a taxpayer as his principal residence is sold and

"within a period beginning 18 months prior to date of sale and ending 18 months after the date, property . . . is purchased and used by the taxpayer as his principal residence, gain . . . shall be recognized only to the extent that the taxpayer's adjusted sales price . . . of the old residence exceeds the taxpayer's

<sup>1/</sup> Since the Belford residence had been held for over Five years, pursuant to Revenue and Taxation Code section 18162.5, subd. (a)(3), fifty percent of the gain was included in taxable income in the year at issue.

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cost of purchasing the new residence ...."  
(Emphasis added.)

As indicated above, . Judy paid no consideration to **Melburn** for the transfer of Dole Place to her. Accordingly, Judy did not purchase an interest in Dole Place, but was gifted such interest. As such, Judy clearly did not meet the repurchase requirement of **section 18091** and denial of nonrecognition treatment is proper.<sup>2/</sup>

Therefore, respondent's action in this matter must be upheld.

<sup>2/</sup> It is interesting to note that if the transfer from **Melburn** to Judy of the Dole Place residence **were** found to be a "purchase" by her, a sale of that interest by **Melburn** would necessarily follow, requiring recognition of gain by him. Moreover, we note that the consent provisions of Revenue and Taxation Code section 18097 have no application to the instant situation because the Belford property had not been the principal residence of **Melburn** prior to sale.

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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 1'8595 of the Revenue and 'Taxation Code, that the action of the Franchise Tax Board on the protest of Melburn E. and Judy McKell against a proposed assessment of additional personal income tax in the amount of \$2,644.47 for the year 1978, be and the same is hereby sustained.

Done at Sacramento, California, this 10th day of October, 1984, by the State Board of Equalization, with Board Members Mr. Nevins, Mr. Dronenburg, Mr. Collis, Mr. Bennett and Mr. Harvey present.

Richard Nevins \_\_\_\_\_, Chairman

Ernest J. Dronenburg, Jr. \_\_\_\_\_, Member

- Conway H. Collis \_\_\_\_\_ - \_\_\_\_\_, Member

William M. Bennett \_\_\_\_\_, Member

- Walter Harvey\* \_\_\_\_\_, Member

\*For Kenneth Cory, per Government Code section 7.9