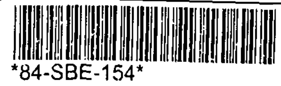

BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
ABNER E. AND LUPE CARRASCO)

For Appellants: Earl D. Williams
Nationwide Accounting Services, Inc.

For Respondent: Anna Jovanovich
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 Abner E. and Lupe Carrasco against proposed assessments of additional personal income tax in the amounts of **$4,717.64** and **$1,297.00** for the years 1977 and 1979, respectively.

Appeal of Abner E. and Lupe Carrasco

The sole issue in this appeal is whether appellants are entitled to deferral of the gain on the sale of their home.

Abner Carrasco is an engineer who was employed by Lockheed Corporation. In January of 1977 he received an offer to work in Iran for two years. He left for Iran on March 3, 1977; however, his wife, Lupe, remained in California. She sold the home in which appellants had lived since 1956 and purchased a second house in either April or May of 1977. Lupe sold some of their furniture and personal property and the rest was stored by Lockheed. In June of 1977 Lupe joined her husband in Iran,

While in Iran, appellants rented the California house Lupe had purchased in April or May of 1977. Appellants' adult son collected the rent and deposited the money in a California bank. Appellants rented a home during their stay in Iran.

On February 17, 1979, appellants returned from Iran and moved in with their son. As their house was still rented, appellants purchased a third house in July and moved into it on August 1, 1979. They sold their rented house on *November 11, 1974.*

Respondent found that appellants retained their domicile and residence in California for income tax purposes during the period- they were in Iran. Respondent further found that appellants sold the home they had lived in for over twenty years and purchased another in which they never lived but rather rented to others. More than two years later, appellants sold this rental property. Respondent found that appellants were not entitled to defer the recognition of their gain from the sale of their home. Respondent assessed deficiencies against appellants for the years in question and, subsequently, appellants filed this timely appeal objecting only to recognition of the gain.

Revenue and Taxation Code section 18091, before revision in 1982, provided:

> If property (hereinafter in this article called "old residence") used by the taxpayer as his principal residence is sold by him after December 31, 1952, and, within a period beginning 18 months prior to the date of such sale and ending 18 months after such date,

> property (hereinafter in this article called "new residence") is purchased and used by the taxpayer as his principal residence, gain (if any) from such sale shall be recognized only to the extent that the taxpayer's adjusted sales price (as defined in Section 18092) of the old residence exceeds the taxpayer's cost of purchasing the new home.

This statute provides an exception to the general rule that all income, including gain from the sale of property, is taxable in the year realized.

The language of section 18091 is essentially the same as Internal Revenue Code section 1034(a). Therefore, federal case law is highly persuasive as a proper interpretation of section 18091. (Rihn v. Franchise Tax Board, 131 Cal.App.2d 356, 360 [280 P.2d 893] (1955); Holmes v. McColgan, 17 Cal.2d 426 [110 P.2d 4281 (1941).) In order for -the proceeds from the sale of their home to qualify for the special tax benefit under this section, the taxpayers must show that they have satisfied the specified requirements.

Section 18091 has two requirements, the first being that the new property must be "purchased" within eighteen months after the sale of the old residence. It is known that appellants did purchase a house in April or May of 1977. The second requirement of section 18091, however, provides that they use the new house as their principal residence. It is well established that this statutory provision requires actual physical occupancy of the new property by the taxpayer within the prescribed time period. In other words, the taxpayer must live in the new house within that period. (United States v. Sheahan, 323 F.2d 383, 386 (5th Cir. 1963); John F. Bayley, 35 T.C. 288, 295 (1960); Appeal of Larry D. and Marjorie M. Crandall, Cal. St. Bd. of Equal., Aug. 1, 1980.)

When appellants sold the home they had lived in for twenty years in May of 1977, Abner Carrasco was already in Iran. They purchased their second house in either April or May of 1977 and Lupe Carrasco left for Iran shortly thereafter. There is no evidence that they ever lived in the second house. It was rented during appellants' stay in Iran and upon their return to California appellants moved in with their son. We must conclude that this second house was rental property and was never appellants' residence.

Appeal of Abner E. and Lupe Carrasco

Appellants purchased their third house in July of 1979 and moved in during August of that year. Although they- actually lived in this house,; appellants failed to move into it within the statutory period. In sum, we. conclude that the gain from the sale of appellants.' home does not meet the eligibility requirements for deferral because the house they purchased in April or May of 1977 was not used as. their residence and the home they purchased in, July of 1979 was not purchased within the statutory period.

Appeal of Abner E. and Lupe Carrasco

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 Abner E. and Lupe Carrasco against proposed assessments of additional personal income tax in the amounts of $4,717.64 and $1,297.00 for the years 1977 and 1979, respectively, be and the same is hereby sustained.

Done at Sacramento, California, this 14th day, of November, 1984, by the State Board of Equalization, with Board Members Mr. Nevins, Mr. Dronenburg, Mr. Collis and Mr. Bennett present.

Richard Nevins, Chairman

Ernest J. Dronenburg, Jr., Member

Conway H. Collis, Member

William M. Bennett, Member

_______________, Member