

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

In the Matter of the Appeal of)
ELISR A. MORGAN)

Appearances:

For Appellant: **Elisa A. Morgan,**
in pro. per.

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 Elisa A, Morgan against a proposed assessment of additional personal income tax in the amount of \$393 ~~for~~ the year 1976.

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The major issue in this appeal is whether appellant is entitled to a theft loss **for** the alleged removal by her ex-husband of funds, including the proceeds from the sale of their residence, from their joint savings account.

When appellant and her husband sold their home in 1976, they realized a \$21,253 gain. The proceeds from this sale **were placed** into their joint savings account at Wells Fargo Bank. Three months after the sale of their home, appellant and her husband separated, Appellant filed a separate return for 1976; however-, she did not report any of the gain from the sale of the house.

Respondent issued a proposed assessment against appellant adding to her reported income a \$6,907 gain on the sale of the house. Appellant filed a timely protest asserting that her husband absconded with all the funds in their joint savings which included the gain on the sale of their home. Appellant contends that she is entitled to claim as a short-term capital loss the theft by her husband of \$18,500 from their joint savings account. In her **amended return**, appellant, in addition to claiming the loss, reported a \$10,626 gain from the sale of her residence as a middle-term capital asset. These two items were reported as resulting in an \$11,593 net capital loss, of which appellant claimed only \$1,000, as the statutory limit for 1976.

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 Erliech, Cal. St. Bd. of Equal., Aug. 16, 1979.)

In order to claim an ordinary loss deduction, appellant must, under the law of the jurisdiction where the loss was sustained, establish **the** elements of the alleged criminal appropriation of her money. (Bellis v. Commissioner, 540 F.2d 448 (9th Cir. 1976); Edwards v. Bromberg, 232 F.2d 107 (5th Cir. 1956).) In this case, appellant alleges that her money was stolen by her husband.

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California Penal Code section 484 defines the term "theft" as follows:

(a) Every person who shall feloniously steal, take, carry, lead, or drive away the personal property of another, or who shall fraudulently appropriate property which has been entrusted to him . . . is guilty of theft.

The crime of theft, therefore, is complete if a person takes property not his own with the intent to take it. (People v. Andary, 120 Cal.App.2d 675, 680 [261 P.2d 791] (1953).) Theft also requires a specific intent to permanently deprive the owner of his property, (People v. Jaso, 4 Cal.App.3d 767 [84 Cal.Rptr. 567] (1970).) Appellant, therefore, to **prove her** theft deduction, must show: (1) that the money was hers, (2) that her husband took the money, and (3) that he intended to permanently deprive **appellant** of her property.

The available facts in this case indicate that appellant did not bring a criminal action against her husband. Rather, the information presented consists only of allegations of a wrongful taking of appellant's funds. There is also no evidence that appellant's husband took money which was appellant's separate property. While we agree that a person may be convicted of stealing property from his spouse; there must be a showing that the property stolen was the person's separate property. (See People v. _____ 27 Cal.3d 1 [609 P.2d 468] (1980).) In **this case**, it has not been shown that the funds were **appellant's** separate property or ~~that~~ appellant had an exclusive right to the money. The funds were in a joint account to which appellant's spouse allegedly had access. There can be no theft of funds by appellant's husband if 1, he and appellant both had title to the funds. (See Appeals of Aaron F. Vance, Cal. St. Bd. of Equal., Dec. 11, 1963,) Appellant has failed to provide any evidence that the requisite elements of a theft existed.

Appellant also alleges that because the money from the sale of their residence was stolen by her husband, she should not be required to report it as income. We cannot agree. Appellant acknowledges that she and her husband sold their home and deposited the gain from this sale into their joint account. The home owned by appellant and her husband was purchased three years after they were **married** and was presumably community property. One-half of the property was appellant's

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property and, therefore, one-half of the gain from the sale ~~of~~ the house was appellant's income for which she is liable for income tax. (See United States v. Malcolm, 282 U.S. 792 [75 L.Ed. 714] (1931).) Appellant's share of this gain will be subject to tax under the provisions of Revenue and Taxation Code section 17073.

In sum, we conclude that appellant has not shown that she is entitled to a theft loss. We further conclude that appellant's one-half community property interest in the gain from the sale of the house is subject to tax. The action of the Franchise Tax Board in these matters, therefore, **will be** sustained.

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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 Elisa A. Morgan against a proposed assessment of additional personal income tax in the amount of \$393 for the year 1936, be and the same is hereby sustained.

Done- at Sacramento, California, **this 5th** day Of February , 1985, by the State Board of Equalization, with Board Members Mr. Dronenburg, Mr. Bennett, Mr. Nevins and Mr. Harvey present.

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

*For Kenneth Cory, per Government Code section 7.9