BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
WILLIAM L. AND MARILYN L. BIRD)

For Appellants: William L. Bird,
in pro. per.

For Respondent: Lazaro L. Bobiles
Counsel

O P I N I O N

This appeal is made pursuant to section 18593 1/ of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protest of William L. and Marilyn L. Bird against proposed assessments of additional personal income tax in the amounts of $130.64 and $907.95 for the years 1977 and 1978, respectively.

1/ Unless otherwise specified, all section references are to sections of the Revenue and Taxation Code as in effect for the years in issue.

The issues presented by this appeal are whether appellants are entitled to certain casualty loss and depreciation deductions claimed on their 1977 and 1978 personal income tax returns.

In 1977, a tree located in the yard of appellants' house was damaged by insecticide spray. On their 1977 return, appellants claimed a $500 casualty loss resulting from the loss of the tree. Respondent disallowed the deduction because damage from insecticide spray does not occur with sufficient suddenness to constitute a casualty loss and because there was no appraisal. The second casualty loss claimed in 1977 was for an $83 loss resulting from a car accident involving appellants' daughter. Respondent disallowed the deduction because it was under $100 and no evidence as to the circumstances of the accident was provided by appellants.

On appellants' 1978 return, a casualty loss of $100 was claimed because of the loss of ten koi located in a fish pond in appellants' yard which were killed by racoons. No further evidence was provided and respondent disallowed the deductions.

In 1977, appellants and a partner purchased a citrus packing plant for $811,700 under a partnership known as Ray Bird & Associates. The assets purchased included a packing plant, packing equipment, supplies, and an amount allocated to the trade brand,

In December 1977 and in January, February, and March, 1978, the packing plant was damaged by a tornado and heavy rains.[2/] The partners had no insurance., As a result, Ray Bird & Associates applied for and received a Small Business Administration (SBA) disaster loan for $206,000. The amount of the loan was later increased to $225,000. In order to qualify for the loan the partnership was required to purchase the 3.7 acres of land where the packing plant was situated. The purchase of the land occurred in October 1978. Because of the destruction caused by the tornado, business operations in the packing house did not begin until August 1979. Respondent disallowed depreciation deductions taken for the plant on appellants' 1977 and 1978 returns.

2/ Casualty losses claimed in 1977 and 1978 with respect to tornado damage were allowed by respondent and are not in issue in this appeal.

Appellants contend that the casualty losses reported represent real losses and therefore should be allowed as claimed. They also contend that the packing plant was an asset which was held for income production and should qualify for depreciation.

Casualty Losses

Section 17206, in effect during the appeal years provided, in pertinent part, as follows.:

> (a) There shall be allowed as a deduction any loss sustained during the taxable year and not compensated for by insurance or otherwise.
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> (c) In the case of an individual, the deduction under subdivision (a) shall be limited to--
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> (3) Losses of property not connected with a trade or business, if such losses arise from fire, storm, shipwreck, or other casualty, or from theft. A loss described in this paragraph shall be allowed only to the extent that the amount of loss to such individual arising from each casualty, or from each theft, exceeds one hundred dollars ($100).
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> * * *

Respondent correctly disallowed all of the claimed casualty loss deductions in issue. In the case of the tree, it was not shown that the loss occurred with sufficient suddenness so as to constitute a deductible casualty loss. (See Appeal of Lewis B. and Marian A. Reynolds, Cal. St. Bd. of Equal., Oct. 3, 1967.) The $83 casualty deduction for damage to appellants' daughter's automobile was correctly disallowed because a deduction under section 17206 is permitted only to the extent losses exceed $100. The deductions for the loss of the tree and the koi were also properly disallowed because appellants presented no evidence of the pre-casualty and post-casualty fair market value of either item. Such proof is necessary to fix the amount of any casualty

loss. (Appeal of Jack Caplan, Cal. St. Bd. of Equal., June 28, 1977.)

Depreciation

Respondent contends that the packing plant was not used in a trade, or business during the appeal years because operations did not begin until August 1979. Appellants contend that the packing plant was used from the time of its purchase in trade or business and therefore subject to an allowance for depreciation.

Section 17208, subdivision (a), in effect during the appeal years, allowed as a depreciation deduction a reasonable allowance for the exhaustion and wear and tear, of property used in a trade or business or property held for the production of income, This section is derived from and is substantially similar to Internal Revenue Code section 167. Federal precedent, therefore, is persuasive of the proper interpretation of section 17208, subdivision (a). (Meanley v. McColgan, 49 Cal.App.2d 203 [121 P.2d 45] (1942).) It is clear from our review of the federal precedents that the term "used in trade or business" means devoted to trade or business. (Kittredge v. Commissioner, 88 F.2d 632 (2nd Cir. 1937).) While property once used in trade or business, but idled, remains in such use unless withdrawn from business purposes or abandoned (Kittredge v. Commissioner, supra), depreciation may only be taken when depreciable property is available for use should the occasion arise, even if the property is not in fact in use. (Sears Oil Co. v. Commissioner, 359 F.2d 191 (2nd Cir. 1966).) Here, appellants were notengaged in the packing plant business when the purchase was made. Before they were able to put the plant in operation, the storm damage occurred. As such, appellants were not in business until the packing plant began operations in August 1979, and we must sustain respondent's disallowance of depreciation deductions taken for the plant during the appeal years.

For the reasons stated above, all of respondent's actions in this matter must be sustained.

Appeal of William L. and Marilyn L. Bird

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 William L. and Marilyn L. Bird against proposed assessments of additional personal income tax in the amounts of $130.64 and $907.95 for the years 1977 and 1978, respectively, be and the same is hereby sustained.

Done at Sacramento, California, this 25th day of June, 1985, by the State Board of Equalization, with Board Members Mr. Dronenburg, Mr. Collis, Mr. Bennett and Mr. Nevins present.

Ernest J. Dronenburs, Jr., Chairman

Conway H. Collis, Member

William M. Bennett, Member

Richard Nevins, Member

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