

BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the **Matter** of the Appeal of)
IRVING AND SONDRAL PLONE)

For Appellants: F. I. Stichman, Inc.
An Accountancy Corporation

For Respondent: Donald C. McKenzie
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 Irving and Sondra Plone against a proposed assessment of additional personal income tax in the amount of **\$3,912.63** for the year 1977.

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

Appeal of Irving and Sondra Plone

The issue presented on appeal is whether appellants are entitled to a deduction for the alleged payment of two loans appellant Irving Plone personally guaranteed. As Sondra Plone is involved with this appeal solely because she filed a joint income tax return with her husband, Irving Plone, hereinafter the latter will be referred to as "appellant."

Appellant was one of two general partners in a limited partnership named the Ten Three Hundred Company, Ltd. In 1972, the general partners personally guaranteed two bank loans made to the partnership. The partnership defaulted on the loans in 1974 and went bankrupt in 1975. In 1977, appellant apparently satisfied his personal guarantees on the notes with assets from his wholly owned corporation. Allegedly, the partnership's other general partner satisfied his obligations in a similar manner.

A "business loss" deduction of \$187,500, taken under "Miscellaneous Income," was claimed on appellant's 1977 personal income tax return. Appellant appears to argue that the payments were made in the ordinary course of his trade or business and, therefore, should be deductible in full during the appeal year. Originally, respondent denied the deduction as an ordinary business loss and recharacterized it as a nonbusiness bad debt deduction. On appeal, respondent seeks to recharacterize the payments as contributions to the partnership's capital. For the reasons expressed below, we agree with respondent's position on appeal.

We begin by noting that section 17915 controls the relationship between a partnership's liabilities and a general partner's capital account. We also note that section 17915 conforms with Internal Revenue Code section 752. In the absence of regulations by the **Franchise Tax Board**, regulations promulgated under the Internal Revenue Code "shall, insofar as possible, govern the interpretation of conforming state statutes, . . ." (Cal. Admin. Code, tit. 18, reg. 19253.) Under the federal regulations, third party loans to a partnership increase each general partner's capital account by the ratio of his partnership interest. (Treas. Reg. **§ 1.752-1(a)(1)**.) A limited partner's liability, however, is specifically limited to the amount he placed at risk in the original and any subsequent agreements. (**Treas. Reg. § 1.752-1(e)**.)

Appellant has made no showing that the limited partners made any other contributions to the partnership, or that they expressly agreed to incur any liability on

Appeal of Irving and Sondra Plone

the two loans in question. **Therefore**, the two loans only increased the general partners' liabilities and thereby became part of appellant's capital account in the Ten Three Hundred Co. on a pro-rata basis. The fact that the general partners guaranteed the two loans does not change our conclusion that the loans were a contribution to the partnership's capital because "[a]ny increase in a partner's individual liabilities because of the assumption by him of partnership liabilities shall also be considered as a contribution of money by him to the partnership," (Treas. Reg. **§ 1.752-1(a)(2).**)

A contribution to a partner's capital account may be used as a capital loss deduction **only** in the following circumstances: (1) upon a partner's retirement or death (Rev. & Tax. Code, §§ 17896 & 17897); (2) upon the sale or other distribution of a partnership interest (Rev. & Tax. Code, §§ 17901-17905); or (3) upon the termination of the partnership (Rev. & Tax. Code, § 17867). There is no claim by appellant that he retired or sold his interest in the partnership. Consequently, the only reason why appellant would be entitled to a capital loss deduction, assuming his capital account reflected a loss, would be if the partnership could be considered terminated in 1977. (Rev. & Tax. Code, § 17867.) Section 17867, subdivision (a), stated that, "an existing partnership shall be considered as continuing if it is not terminated." Further, as appellant is attempting to deduct his capital account, he has the burden of proving that the partnership was terminated. (Appeal of Ronald G. Doe, et al., Cal, St, Rd. of Equal., Apr. 5, 1965.)

Appellant has not provided us with any proof that the Ten Three Hundred Co. was terminated in 1977. There is no evidence of a sale or exchange of 50 percent of the total interest of the partnership's capital or profits or that the partnership was inactive in 1977 as required by section 17867. Since appellant has failed to prove the partnership was terminated during the appeal year, he has failed to prove he is entitled to a capital loss deduction of any amount for that year.

Finally, appellant argues that respondent's position is inconsistent with the treatment accorded appellant's partner for a similar deduction. Appellant alleges that respondent and the Internal Revenue Service audited the partner's 1977 tax return and granted the partner an ordinary loss deduction for the same series of transactions. Appellant has not, however, provided any proof of this allegation. Moreover, even if we assumed

Appeal of Irving and Sondra Plone

'the audit had occurred, it is unnecessary for us to speculate on whether a mistake was made in the allowance of the deduction or not. We are not bound by the administrative handling of another taxpayer's case. (Fischbach & Moore, Inc. v. State Bd. of Equalization, 117 **Cal.App.3d** 627 [172 Cal.Rptr. 9231 (1981).])

On the record before us, we must conclude that appellant has failed to carry his burden of proving he was entitled to the ordinary business loss deduction' claimed. Accordingly, respondent's action in this matter will be sustained.'

