BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of )
)
JACK E. AND CORINNE PHILLIPS )

Appearances:

For Appellants: Jack E. Phillips, in pro. per,

For Respondent: Paul J. Petrozzi
Counsel

## OPINION

This appeal is made pursuant to section 18594 of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protest of Jack E. and Corinne Phillips against a proposed assessment of additional personal income tax in the amount of $1.14.86 for the year 1968.

The question presented is the propriety of respondent's partial disallowance of a claimed casualty loss in conformity with action taken in a federal audit.

On May 23, 1968, appellants incurred fire damage to their home and its contents. They attached a fire loss schedule to their 1968 state tax return explaining a $5,348.34 casualty loss deduction for damaged contents. The schedule contained columns listing "loss report" page numbers, cost amounts, insurance adjuster's allowances, percentages (apparently of estimates of depreciation incurred before the fire), and notes. The household contents were not identified (except partly in the n tes) because the loss report was not attached to the return. The notes merely indicated that included were firearms "of high resale value", appliances and household items "fairly new", and repair items. The cost of the damaged goods totaled $19,047. 19, while the total of the insurance adjuster's allowance column was $12,540.89. Sales tax in an amount of $627.45 was added to the latter figure for a total allowance of $13,168.34. Maximum insurance coverage for damage to contents was $8,750.00, and a net loss of $4,418.34 to the household contents (the difference between $13,168.34 and $8,750.00) was claimed on the schedule.

At the hearing, appellant Jack E. Phillips described some of the destroyed contents, in general terms, as clothing, and books and playroom supplies (such as toys) for a nursery school business his wife was in the process of starting. Except for certain repairs, appellant maintained that the adjuster's allowances were based on initial cost of all the items less any depreciation over the period used. Appellant has also claimed that the adjuster allowed $200.00 for the loss of food in a freezer. Despite requests to do so, appellant has presented no evidence specifically identifying the damaged or destroyed items, nor has he offered any evidence of the fair market value of specific contents either before or after the fire.

Expenses of $2,279.86 for rent, utilities, moving and traveling while living away from home, and baby-sitting costs incurred as a result of the fire were also listed on the schedule. The insurance company paid $1,249.86 of the living expenses and appellants added the $1,030.00 difference to the claimed casualty loss. Consequently, the total casualty loss claimed on the return was $5,348.34, i.e., $5,448.34, less the $100.00 expressly precluded by section 17206 of the Revenue and taxation Code. Appellants also did not include the $1,249.86 reimbursement received from the insurance company as income.

The Internal Revenue Service audited appellants' similar federal return. The federal auditors estimated the loss by determining the fair market value of the various damaged items before the fire and deducting any fair market value of such items after the fire. According to appellant, the auditors did not attribute any value to the food in the freezer before the fire. They concluded that the net loss was $2,209. 40, rather than $4, 418; 34. They further increased income by including the $1, 249. 86 living expense reimbursement, but allowed $925.32 of the $1, 030. 00 additional unreimbursed expenses claimed as a "rental loss". The net result was to increase income by $3, 463. 48, after deducting, the $100.00 statutory exclusion already taken into account by appellants. Appellant protested the federal action and conferred with federal representatives, but because of alleged illness at the, time, ultimately paid that assessment.

Respondent issued its proposed assessment based upon the federal audit. Its denial of appellants' protest gave rise to this appeal.

Appellant contends that the insurer's method of determining the amount of damage to the household contents was correct. He further claims that because of a subsequent change in the law appellants should be entitled to treat the disallowed living expenses as part of the loss.

A deduction is allowed for casualty (including fire) losses of property not connected with a trade or business (after a $100.00 exclusion), if not compensated for by insurance or otherwise. (Rev. & Tax. Code, § 17206, subds. (a) & (c)(3). ) The basis for determining the amount of the deduction is the adjusted basis for determining the loss from the sale or other disposition of property. (Rev. & Tax. Code, § 17206, subd. (b).) By regulation, the loss is limited to the lesser of either an amount equal to the fair market value of the property immediately before the casualty reduced by any fair market value immediately after the casualty, or the adjusted basis for determining loss from the sale or other disposition of the property involved. (Cal. Admin. Code, tit. 18, reg. 17206(g), subd. (2)(A). ) The applicable federal statute and regulation are similar. (Int. Rev. Code of 1954, § 165; Treas. Reg. 1.165-7(b)(1). )

In interpreting the statutory language, the prevailing view has also developed in the courts that the measure of a casualty loss to nonbusiness property is the difference between the fair market value of the property immediately before the casualty and its value immediately thereafter, not to exceed the adjusted basis of the property, (Helvering v. Owens, 305 U. S. 468 [83 L. Ed. 292]; I. Hal Millsap, Jr., 46 T. C. 7-d on other grounds, 387 F. 2d 420; Samuel Abrams, T. C. Memo., Sept. 29, 1964; Gilbert J. Kraus, T. C. Memo. , Oct. 31, 1951. )

As already indicated, appellant, although requested to do so, has, offered little, other than self-serving statements, in the way of evidence tending to show that the Internal Revenue Service's determination was erroneous on the factual question concerning damage to household contents. Since he has the burden to show where the federal determination was erroneous (Rev. & Tax. Code, § 18451; Appeal of Albion W. and Virginia B. Spear, Cal, St. Bd. of Equal. , April 20, 1964) and has not carried that burden, we believe that $2,208.94 of the claimed amount of the casualty loss was properly disallowed. We note that appellant was reimbursed by the insurance company for at least part of what he claims was the food loss..

Respondent also properly disallowed the unreimbursed expenses for rent, utilities, moving, traveling, and baby-sitting caused by the fire. There is no law, or change in the law as alleged by appellant, allowing these incidental expenses. Such expenses simply do not constitute loss_ of property. They are considered as nondeductible personal expenses. (Rev, Rul. 59-398, 1959-2 Cum. Bull. 76. ) We note that a $925.32 deduction was allowed for "rental loss". The propriety of this deduction is not a matter under consideration by this board,

Appellants were reimbursed by the insurer in the amount of $1,249.86 for certain additional living expenses occasioned by the fire which they did not include as income. In connection with disallowed incidental expenses, appellant erroneously referred to a change in the law. Prior to the enactment of section 123 of the Internal Revenue Code of 1954 reimbursement for such living expenses constituted gross income. (Millsap v. Commissioner, 387 F. 2d 420; Edmund W. Cornelius, 56 T. C. 976; Rev. Rul. 59-360, 1959-2 Cum. Bull. 75. ) Section 123 of that code now provides, for the

exclusion from gross income of such reimbursed living expenses (within certain limits) but is expressly applicable only with respect to amounts received after December 31, 1908. Section 17158 of the California Revenue and Taxation Code is a similar statutory provision but applies only to amounts received after December 31, 1970. These provisions relating to reimbursement were undoubtedly the ones appellant had in mind. Inasmuch as these provisions were not applicable in 1968, we hold that respondent properly treated the $1,249.86 as includible in gross income.

In view of the foregoing considerations, we sustain respondent's action in making adjustments in conformity with the federal audit.

## 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 Jack E. and Corinne Phillips against a proposed assessment of additional personal income tax in the amount of $114.86 for the year 1968, be and the same is hereby sustained.

Done at Sacramento, California, this 7th day of, January, 1975 by the State Board of Equalization.

John W. Lynch, Chairman

_____, Member

Richard Nevins, Member

Geo. R. Reilly, Member

_____, Member

ATTEST: Gordon Winton Secretary