

BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
STEPHEN L. AND)
BEVERLY J. KOSTKA)

For Appellants: Stephen L. Kostka, in pro. per.

For Respondent: James W. Hamilton
Acting Chief Counsel

Steven S. Bronson
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 Stephen L. and Beverly J. Kostka against a proposed assessment of additional personal income tax in the amount of \$1,255.00 and penalty in the amount of \$313.75 for the year 1971.

Appeal of Stephen L. and Beverly J. Kostka

The primary question presented is whether respondent properly disallowed a casualty loss deduction claimed by appellants.

In June 1966, appellants purchased a three-story house in Playa del Rey, California, at a price of \$75,000.00. On June 25, 1971, they moved from California to Hawaii and listed their Playa del Rey home for sale for \$85,000.00. Appellants allege that at some time after their move to Hawaii, and while the house remained unoccupied, it was damaged by leaking water. Appellants further allege that after they received notice of the damage from their real estate broker they agreed to lower their asking price to \$70,000.00, since the distance between California and Hawaii made any attempt at effecting repairs impractical. Thereafter, on September 21, 1971, the house was sold for \$70,000.00.

On their 1971 California part-year resident tax return appellants claimed a casualty loss of \$14,900.00 with respect to the alleged water damage. On that return appellants indicated that the source of the water flow which caused the damage claimed was a broken water line. Respondent requested that appellants furnish additional information regarding the casualty loss. When no reply was received after more than three months, a follow-up copy of the information request, was mailed to appellants. After two additional months elapsed without a reply, on September 11, 1973, respondent **issued** a notice of proposed assessment based on its disallowance of the entire amount of appellants' claimed loss. In addition a 25 percent penalty was imposed for failure to furnish information.

Appellants responded to the notice of proposed assessment by letter, claiming that the probable cause of the water damage was a faucet left open by unknown persons while the house was vacant. In another letter, appellants stated: "Sometime during the unoccupancy plumbing burst in the upper level. " Subsequently, appellants produced a letter from a former neighbor in Playa del Rey, wherein the neighbor suggests that the cause of the water damage was a "gopher flood". These conflicting explanations are the only evidence before us as to the cause of the alleged loss.

Appeal of Stephen L. and Beverly J. Kostka

Under section 17206, subdivision (c)(3), of the Revenue and Taxation Code, a taxpayer is entitled to a deduction for losses of property not connected with a trade or business, if such losses arise from fire, storm, shipwreck, or other casualty, or from theft. This provision is substantially similar to and was patterned after section 165(c) of the Internal Revenue Code, Federal case law is therefore entitled to great weight in' **interpreting** the similar California statute. (Meanley v. McColgan, 49 Cal. App. 2d 203 [121 P. 2d 45].)

Since appellants have not alleged that any of the specific events listed in section 17206 caused the harm, it must be established that the water damage was the result of some "other casualty". The term "other casualty" has been construed to mean an identifiable event which is sudden, unexpected or unusual and similar in nature to fire, storm, shipwreck or theft. (Richard C. Purdy, T. C. Memo. , Aug. 9, 1966.) In order to establish that damage to property is due to an "other casualty", the taxpayer has the burden of proving by competent evidence the proximate cause of the 'damage. (Raymond Tank, 29 T. C. 677.)

Proof of water damage, standing by itself, is insufficient to establish a casualty loss. (Rupert and Elise Stuart, T.C. Memo., June 22, 1961.) While appellants have alleged that water damage occurred, they have not introduced any evidence by a competent, independent, and disinterested person to establish the probable cause of the water flow. There is nothing in the record other than appellants' three conflicting explanations from which one could conceivably identify the source of the water flow which caused the damage. Without such evidence we are unable to make a factual determination concerning the suddenness or unexpected nature of the event which caused the damage. We must therefore hold that appellants have failed to prove that the alleged loss was the result of an "other casualty" within the meaning of section 17206 of the Revenue and Taxation Code. In addition, appellants have failed to prove the amount of the loss which allegedly occurred.

Appeal of Stephen L. and Beverly J. Kostka

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 Stephen L. and Beverly J. Kostka against a proposed assessment of additional **personal** income tax in the amount of \$1,255.00 and a penalty in the amount of \$313.75 for the year 1971, be and the same is hereby sustained.

Done at Sacramento, California, this 19th day of November 1975, by the State Board of Equalization.

John W. Lynch, Chairman
Halley B. Bennett, Member
Paul J. Hearn, Member
Scott K. Perry, Member
_____, Member

ATTEST: W. W. Dendrop, Executive Secretary