

Appeal of Frederick A. and Jean C. Giese

The issue presented on appeal is whether appellants have adequately substantiated their claimed cost basis in stock they sold in 1976.

Appellants, husband and wife, were the sole shareholders of M.T.I. Business Schools of Concord. In 1976, they sold all of their stock in M.T.I. for \$40,000, less certain claimed liabilities. On their joint tax return for that year, appellants claimed an adjusted basis in the stock of \$53,874. After subtracting that figure from the final sales price, appellants claimed a capital loss of \$29,924. Appellants used the claimed capital loss to offset capital gains that they realized that year.

On audit, respondent requested substantiation of the stock's claimed cost basis. Appellants failed to reply to that request. Consequently, respondent allowed enough cost basis so that appellants had no gain or loss from the sale of their business and issued the appropriate assessments. Appellants eventually paid the additional tax which resulted from respondent's determination and filed a claim for refund. As the basis of the claimed refund, appellants reiterated the belief that they sustained a loss of \$29,924 even though they acknowledged that "all the documents needed to verify the amount . . . were lost, misplaced, or not available." (App. Br. at 1.) Respondent denied the claim and this appeal followed.

The question of a taxpayer's cost basis is an issue of fact. (Vaira v. Commissioner, 444 F.2d 770 (3d Cir. 1971).) **The determination** of the Franchise Tax Board is prima facie correct, and the taxpayer bears the burden of establishing a different cost basis. (Moore v. Commissioner, 425 F.2d 713 (9th Cir. 1970); Appeal of Charlotte Lewis, Cal. St. Bd. of Equal., Sept. 12, 1984.) Unsupported assertions are insufficient to satisfy appellants' burden of proof (Appeal of James C. and Monablance A. Walshe, Cal. St. Bd. of Equal., Oct. 20, 1975), and a claimed loss of supporting records does not relieve them of that burden. (Appeal of Peter F. and Betty H. Eastman, Cal. St. Bd. of Equal., May 4, 1978.) Moreover, the fact that it may 'be difficult, if not impossible, for the taxpayer to substantiate any claimed deductions does not relieve him of his burden. (Appeal of Harold R. Jacobus, Cal. St. Bd. of Equal., Jan. 8, 1985; Appeal of Arthur, Jr. and Daisy M. Bedford, Cal. St. Bd. of Equal., June 29, 1982.)

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On appeal, appellants assert that they can only verify **\$15,801.85** of the loss. Appellants arrived at that figure by considering the capital stock cost, cash advances, payroll and sales taxes paid, a bank loan, and professional fees. Appellants make this claim even though they admit that they lost all of the records of the transactions which could be used to substantiate that lower figure. Instead of providing proof, appellants have simply listed a few items, from a source they claim to be the general ledger of the corporation, which they attribute to the basis. Yet, appellants have failed to provide that ledger for our consideration. The only documents submitted to support appellants' position are billings purported to be from a law firm and an accounting firm regarding the sale of their business, only one of which makes any reference to the sale of stock. No other proof has been provided, not even a record of the initial capitalization of the corporation. As nothing else has been presented to support their position, it is clear that appellants have failed to carry their burden of proving that the basis in the corporate stock was other than that determined by respondent. (Moore v. Commissioner, supra; Appeal of Charlotte Lewis, supra.)

While admittedly the method used by respondent does not conclusively establish appellant's cost basis, such a determination is not possible in this case where appellant has presented so little evidence of cost. (See Appeal of Charlotte Lewis, supra.) We note that if respondent had determined that the little evidence produced had no relation to the claimed basis, respondent could properly have made a determination that the basis was zero. (Spurgeon v. Commissioner, ¶ 77,326 T.C.M. (P-H) (1977); Calderazzo v. Commissioner, ¶ 75,001 T.C.M. (P-H) (1975).) Instead, respondent determined that appellants' basis was equal to the selling price. In light of the limited evidence available, we believe that determination was extremely reasonable. Accordingly, respondent's action in this matter 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 19060 of the Revenue and Taxation Code, that the action of the Franchise Tax Board in denying the claim of Frederick A. and Jean C. Giese for refund of personal income tax in the amount of \$993 for the year 1976, be and the same is hereby sustained.

Done at Sacramento, California, this 4th day of February, 1986, by the State Board of Equalization, with Board Members Mr. Nevins, Mr. Collis, Mr. Bennett, Mr. Dronenburg, and Mr. Harvey present.

Richard Nevins, Chairman
Conway H. Collis, Member
William M. Bennett, Member
Ernest J. Dronenburg, Jr., Member
Walter Harvey*, Member

*For Kenneth Cory, per Government Code section 7.9