BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
) No. 86R-0167-SW
PHILIP R. BARRY INSURANCE)
SERVICES, INC.)

For Appellant: Philip R. Barry
President

For Respondent: Karen D. Smith
Counsel

O P I N I O N

This appeal is made pursuant to section 26075, subdivision (a),1/ of the Revenue and Taxation Code from the action of the Franchise Tax Board in denying the claims of Philip R. Barry Insurance Services, Inc., for refund of franchise tax in the amounts of $264, $1,055, and $1,055 for the income years 1981, 1982, and 1983, respectively.

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

The issue presented in this appeal is whether appellant is entitled to amortize the purchase price of renewal commissions associated with the acquisition of an insurance agency partnership interest.

Appellant is a California corporation wholly owned by Philip R. Bury. Prior to incorporating, Philip Barry was part of a partnership engaged in the insurance business. On November 27, 1979, Philip Barry, as an individual, agreed to buy a one-quarter partnership interest in the partnership of Bruntz, Fenchel and Smart with a payment of $39,852 to each partner. Mr. Barry continued doing business in the partnership as an individual until October 1, 1981, when he incorporated his share of the partnership.

Appellant filed timely California corporate franchise tax returns for the income years in issue. On November 13, 1984, appellant filed amended returns for all past years which contained the following statement:

> The amortization of the purchase price of renewed commissions, which was part of the buy-in of an insurance agency business, was erroneously omitted from the original return. The amortization represents the write-off of lost commissions over a ten-year period.
>
> Renewal Commissions Purchased / Useful Life of Commissions = $709,914 / 10 = $70,991 per year

(Resp. Br. at 1.)

The return for 1981 further indicated that "this return represents 25 percent of the year or a write-off of $2,748."

Respondent considered the amended returns to be claims for refund. The claims were subsequently disallowed and appellant filed this timely appeal.

Appellant contends that it may amortize certain renewal commissions over a 10-year period because 10 years is the useful life of such a list of customers. Appellant further contends that because the Internal Revenue Service allowed the amortization, respondent should likewise allow the amortization. Even if this board were to assume, without deciding, that appellant was a party to the sales agreement and was entitled to a

deduction, we must conclude that it has not shown that the deductions are valid.

Section 17208 and subsequent sections deal with the allowance of depreciation for exhaustion, wear, and tear of property used in a trade or business. The provisions of those sections are substantially similar to the provisions of section 167 of the Internal Revenue Code of 1954. Under these circumstances, interpretations placed on section 167 by the federal courts and administrative bodies are persuasive as to the proper interpretation and application of the parallel California code sections. (Andrews v. Franchise Tax Board, 275 Cal.App.2d 653 [80 Cal.Rptr. 403] (1969).

The question of whether customer renewal lists or subscription lists constitute an asset which can be amortized has been raised in many courts. A history of these cases has been well summarized by thfs board in the Appeal of Raymond and Rosemarie J. Pryke decided on September 15, 1983. It has now been established that these lists are assets which may be depreciated. The Internal Revenue Service has issued Revenue Ruling 74-456 which incorporates this concept and distinguishes these assets from goodwill. 2/ While this rule recognizes that purchased assets such as subscription lists may be depreciated, the court cases to which the recognition of that principle is credited all involved the purchase of customer or subscription lists from businesses that immediately thereafter ceased existing. With the cessation of the business from which the list was purchased the courts concluded that the purchased lists were more readily distinguishable from the goodwill of such discontinued businesses.

2/ This ruling states, in part, at 1974-2 C.B. 65, 66, that:

> The depreciability of assets of this nature is a factual question, the determination of which rests on whether the taxpayer establishes that the assets (1) have an ascertainable value separate and distinct from goodwill, and (2) have a limited useful life, the duration of which can be ascertained with reasonable accuracy.

The above-stated rationale will not apply in the present case, however, because in this case appellant purchased a business which continued to operate. It was the cessation of the business which the courts used to distinguish the purchased lists from the goodwill. With an ongoing business, this board would need other evidence that the lists had the value claimed by appellant. The agreement to sell did not specify that the amounts paid to each partner constituted the value of the customer renewal lists or make any reference to the appraised value of such lists. It is appellant's responsibility to present evidence that will support the deduction. We have long held that respondent's determinations that deductions should be disallowed are presumptively correct and that the taxpayer has the burden of proving them erroneous. (Appeal of Kee Dee, Inc., Cal, St. Bd. of Equal., Sept. 12, 1984.) Based on the record before us, we find that appellant has failed to present evidence that the lists had an ascertainable value or a limited useful life. Mere conclusionary statements, without supporting evidence, are unpersuasive.

We note that appellant appears to base a portion of its argument on the fact that the Internal Revenue Service (IRS) allowed the deduction. There is no indication that the IRS audited appellant's records, and no evidence has been presented which can aid this board in ascertaining how the IRS reached its conclusion. In any event, respondent and this board are not bound to adopt the conclusion reached by the IRS. (See Appeal of Der Wienerschnitzel International, Inc., Cal. St. Bd. of Equal., April 10, 1979.) We therefore uphold respondent's disallowance of appellant's claimed amortization deduction.

Appeal of Philip R. Barry Insurance Services, Inc.

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 26077 of the Revenue and Taxation Code, that the action of the Franchise Tax Board in denying the claims of Philip R. Barry Insurance Services, Inc., for refund of franchise tax in the amounts of $264, $1,055, and $1,055 for the income years 1981, 1982, and 1983, respectively, be and the same is hereby sustained.

Done at Sacramento, California, this 7th day of May , 1987, by the State Board of Equalization, with Board Members Mr. Collis, Mr. Dronenburg, Mr. Bennett, Mr. Carpenter and Ms. Baker present.

Conway H. Collis , Chairman

Ernest J. Dronenburo. Jr. , Member

William M. Bennett , Member

Paul Carpentsr , Member

Anne Baker* , Member

*For Gray Davis, per Government Code section 7.9