

BEFORE THE STATE BOARD OF EQUALIZATION  
OF THE STATE OF CALIFORNIA

'In the Matter of the Appeal of )  
LUCILLE F. ATHEARN )

For Appellant: Lucille F. Athearn,  
in pro. per.

For Respondent: Crawford H. Thomas  
Chief Counsel

Marvin J. Halpern  
Counsel

O P I N I O N

This appeal is made pursuant to section 19059 of the Revenue and Taxation Code from the action of the Franchise Tax Board in denying the claim of Lucille F. Athearn for refund of personal income tax, penalty, and interest in the total amount of \$322.88 for the year 1967.

The issue presented is whether a loss on small business stock may, under sections 18206-18210 of the Revenue and Taxation Code, form the basis for ordinary loss deductions in years other than the year in which the loss was sustained.

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In 1966 appellant sustained a loss of \$80,000 when some "small business stock" she owned became worthless. On her California income tax return for that year she deducted \$25,000 as an ordinary loss and \$1,000 as a capital loss. These deductions were allowed.

In 1967 appellant again claimed \$25,000 as an ordinary loss deduction arising from the same \$80,000 loss in 1966. Respondent disallowed this deduction. That disallowance, together with minor adjustments not here in issue, resulted in assessment of additional tax, penalty, and interest totaling \$322.88. Appellant paid the assessment under protest and respondent treated the protest as -a claim for refund. (Rev. & Tax. Code, § 19061.1.) Denial of that refund claim resulted in this appeal.

In support of her position appellant relies primarily on an alleged conflict between section 1244(d)(3) of the Internal Revenue Code of 1954 and Treasury Regulation § 1.1244(b)(1). This conflict, says appellant,, "should be resolved in favor of the code and the taxpayer." We are unable to agree. Assuming without conceding that such a conflict in the federal law does exist, the resolution of that conflict is not relevant to the issue of this appeal. **Federal law, with possible exceptions not pertinent here,** does not establish the liability of California residents for California income tax. Federal revenue provisions which have not been enacted by the California Legislature cannot be used by California taxpayers in computing their state income tax liability. (Appeal of Arthur G. and Euaenia Lovering, Cal. St. Bd. of Equal., April 21, 1966.). In the instant case California has no provision comparable to section 1244(d)(3) of the Internal Revenue Code, nor to section 172 of that code to which section 1244(d)(3) refers. Hence, appellant's reliance on federal law is misplaced, and California law must be applied.

The Revenue and Taxation Code provides that an individual may, in the year when the loss is sustained, treat a loss on section 18208 (small business) stock as a loss from the sale or exchange of an asset which is not a capital asset, such treatment being limited to an aggregate amount not to exceed \$25,000 for any taxable year. Respondent's regulations contained in the California

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Administrative Code, title 18, state repeatedly that losses are deductible only in the year when sustained and expressly say that any loss on small business stock in excess of the \$25,000 limit shall be treated as a loss from the sale or exchange .of a capital asset.

The Franchise Tax Board and this board are charged with implementing the law as written. The above mentioned provisions of law, and implementing regulations, are clear and explicit. The reiteration of the requirement that, to be deductible, losses must be sustained in the taxable year when claimed is of particular note. In view of these provisions this board finds no merit in appellant's secondary contention that "the California Revenue and Taxation Code does not state that any loss in excess of the limitation is to be treated as a capital loss.". The statement may not be explicit in the code, but certainly seems to be a necessary inference therefrom. The statement is explicit in the implementing regulations.

Our analysis-of the facts and the law in this case reveals no error on the part of respondent in denying appellant's claim for refund.

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,

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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 Lucille F. Athearn for refund of personal income tax, penalty, and interest in the total amount of \$322.88 for the year 1967, be and the same is hereby sustained.

Done at Sacramento, California, this 8th day of May, 1973, by the State Board of Equalization.

Shelton G. Benson, Chairman  
John F. Gentry, Member  
John W. Lynch, Member  
Richard G. ..., Member  
..., Member

ATTEST: W. W. ..., Secretary