

Appeal of Stanley T. and Bettejan H. Counts

The sole issue presented in this appeal is whether appellants are entitled to a theft loss deduction for a loss connected with the failure of a building contractor employed by appellants to properly construct an addition to appellants' home and for a loss connected with money allegedly stolen from Mrs. Count's purse.

On their return for the taxable year 1980 appellants claimed a deduction for a casualty loss in the amount of \$18,255.31. In explanation of this deduction, appellants stated that in August of 1979 they had contracted with one John Kirkham to build an addition onto their home. Mr. Kirkham allegedly told appellants he was a licensed contractor and that he held a current performance bond. Appellants learned in February of 1980 that Mr. Kirkham was not a licensed contractor and that he had given them the contractor's license number of another contractor. Mr. Kirkham also had no performance bond. Appellants reported this situation to the California Contractors' State License Board. In this report appellants stated that Mr. Kirkham's work was never satisfactory, was messy and sloppy, and that he never finished completely anything he started. Appellants hired one Thomas J. McCune to do the rework-they felt was necessary after they terminated Mr. Kirkham's services in March of 1980.

Action on appellants' complaint was begun by the Contractors' State License Board but was never completed as Mr. Kirkham died on July 25, 1980.

On their return for taxable year 1980 appellants stated that their total loss was \$18,355.31. This amount included \$150 in cash which was allegedly stolen from Mrs. Counts' purse on April 7, 1980. Appellants have stated that the \$150 was stolen during the installation of a swimming pool at their-home and that they reported the theft to the police as well as to the swimming pool company. The remaining \$18,205.31 claimed was the damage relating to the construction of the addition to their home and was itemized as follows:

Necessary rework to correct major defects	\$7,759.55
Repair of damage caused by contractor,	2,118.02
Payment for work not completed	5,395.00
Contract material not delivered by contractor	2,932.74
Total	\$18,205.31

Respondent issued a notice of proposed assessment disallowing the claimed, theft loss deduction on the basis that appellants had not established that a theft

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had occurred which would qualify such losses for a deduction, Appellants filed a timely protest contending that the construction losses were the result of theft by false pretenses. Respondent affirmed its proposed assessment, which resulted in this appeal.

A nonbusiness theft loss in excess of \$100 is deductible if not compensated for by insurance or otherwise. (Rev. & Tax. Code, § 17206, subds. (a) & (c)(3).) However, it is well established that deductions are a matter of legislative grace and that the taxpayer has the burden of substantiating his entitlement to each claimed deduction. (New Colonial Ice Co. v. Helvering, 292 U.S. 435 [78 L.Ed. 1348] (1934); Appeal of Sol and Millie Erliech, Cal. St. Bd. of Equal., Aug. 16, 1979.)

In order to claim an ordinary loss deduction, appellant must, under the law of the jurisdiction where the loss was sustained, establish the elements of the alleged criminal appropriation of appellants' money. (Edwards v. Bromberg, 232 F.2d 107 (5th Cir. 1956).) Appellants in this case have alleged that Mr. Kirkham took their money by false pretenses. Although California law and the applicable federal law found in section 165 of the Internal Revenue Code speak of losses arising from "theft," this word is intended to cover any criminal appropriation of another's property, including theft by false pretenses; (Edwards v. Bromberg, supra.) Under California law; persons who knowingly and designedly, by any false or fraudulent representation or pretense, defraud any other person of money are guilty of theft. (Pen. Code, § 484.) Appellants, therefore, to prove their deduction, must show: (1) an intent to defraud, (2) the commission of actual fraud, (3) false pretenses, and (4) reliance on the false representation or causation. (See People v. Jordan, 66 Cal. -10 [4 P. 773] (1884); Appeal of Abe and Constance C. Cooperman, Cal. St. Bd. of Equal., March 30, 1981.)

The available facts in this case indicate that appellants did not bring a criminal action or any other legal proceeding against Mr. Kirkham. Appellants have stated that no actions were brought because of Mr. Kirkham's death and the fact that at the time of his death Kirkham was allegedly 'heavily in debt and had no tangible assets.

As we view the evidence, Kirkham may have lacked a contractor's license and was either negligent in his work or unqualified to perform the work necessary

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to complete the addition, but there is no clear evidence of fraud or false pretenses. Five months after signing the contract, appellants terminated Mr. Kirkham's services because they felt that he had failed both to make progress and to provide satisfactory workmanship, and because he did not hold a valid contractor's license with the state. While it is possible that some of the money advanced to Mr. Kirkham may have been used for his personal expenses, it was appellants' act of discharging him which actually prevented him from completing the construction. There is no evidence that appellants requested Mr. Kirkham to finish the work or to repay the money advanced. (Cf. Ewald Schneider, ¶ 81,603 P-H Memo. T.C. (1981).) Mere negligence in failing to perform or inability to perform is not conclusive evidence that the advances paid were taken by Mr. Kirkham under false pretenses. Furthermore, the fact that Mr. Kirkham wrongfully represented himself as a licensed contractor does not compel the conclusion that he accepted appellants' money without any intention of performing the contract or that he knew he was incapable of performing the work. Since he did, in fact, try to do the work, the most we can conclude on this record is that he contracted to perform a job which ultimately became more than he could handle satisfactorily. This is not sufficient evidence of a fraudulent intent.

Appellants also claim a \$150 theft loss deduction which resulted from an alleged theft from Mrs. Counts' purse. In this case appellants' only evidence of the loss was their uncorroborated assertion that the theft occurred and that they notified the police. This board has consistently held that such an unsupported assertion by a taxpayer is not sufficient to satisfy the required burden of proof. (See, e.g., Appeal of James C. and Monablanche, A. Walshe, Cal. St. Bd. of Equal., Oct. 20, 1975.)

Based upon the record before us, we must conclude that appellants have failed to meet their burden of substantiating the claimed theft loss deduction.

