86-SBE-078

-BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
) No. 84A-695-AJ
DAVID AND GOLDIE KRECHMAN)

Appearances:

For Appellants: Gordon Suber
Attorney at Law

For Respondent: a. S. (Bill) Heir
Counsel

O P I N I O N

This appeal is made pursuant to section 18593[1/] of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protest of David and Goldie Krechman against a proposed assessment of additional personal income tax in the amount of' $6,645 for the year 1980.

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

The issue presented is whether appellants have established that they are entitled to a greater theft loss deduction than allowed by the Franchise Tax Board.

On April 16, 1980, two knife-wielding assailants entered and ransacked appellants' home, fleeing with appellants* money and uninsured jewelry. Some of the jewelry had been acquired through inheritance and the rest had been purchased during appellants' 47 years of marriage. Before retiring, Mr. Krechman was a successful businessman who had to travel extensively. He testified that, during these travels, he purchased a great deal of jewelry but did not maintain records of the purchases.

On their 1980 joint California personal income tax return, appellants claimed a theft loss deduction of $100,900. Upon audit, the Franchise Tax Board determined that due to lack of substantiation, appellants were entitled to a deduction of only $18,950. It issued a proposed assessment reflecting that determination and, after considering appellants' protest, affirmed the proposed assessment. This timely appeal followed.

Section 17206 allowed a deduction for losses by theft of property not connected with a trade or business (after a $100 exclusion), if not compensated for by insurance or otherwise. The above statute was similar to its federal counterpart, section 165 of the Internal Revenue Code. Therefore, cases interpreting section 165 are highly persuasive as to the proper application of section 17206. (Meanley v. McColgan, 49 Cal.App.2d 203 [121 P.2d 45] (1942).) The theft loss deduction is limited to the lesser of either an amount equal to the fair market value of the property or the adjusted basis for determining loss from the sale or other disposition of the property involved. (Treas. Reg. § 1.165-7(b)(1).)

Respondent does not question the fact that the theft occurred. Therefore, the sole issue is a factual question of substantiation of the amounts involved. Appellants produced two written appraisals which had been prepared for insurance purposes. The first, dated 1963, appraised 13 pieces of jewelry at $16,350. The second, dated 1971, appraised one piece of jewelry at $2,600. Respondent allowed appellants a deduction for the appraised value of these 14 items; but allowed no deduction for any other items.

Appellants have presented this board with a list and description of various pieces of jewelry they allege were stolen and have testified that to the best of their recollection the cost of these items was over $101,000. They explained that they did not obtain appraisals of, or insurance covering, all their jewelry because the cost was prohibitive. Despite the weakness of appellants' evidence as to the value of the jewelry, this board finds appellants to be credible witnesses and is convinced that appellants owned and lost more jewelry than the items listed on the two appraisals. In cases where the taxpayer has established that a theft loss occurred but has not established the amount of the loss, courts have frequently applied the Cohan rule and estimated the amount of the loss. (See, e.g., Willis v. Commissioner, ¶ 80,304 T.C.M. (P-H) (1980); Wallach v. Commissioner, ¶ 51,129 T.C.M. (P-H) (1951).) We believe that application of the Cohan rule is appropriate in this case. However, in the absence of supporting records, we will "bear heavily" against appellants "whose inexactitude is of [their] own making." (Cohan v. Commissioner, 39 F.2d 540, 544 (2d Cir. 1930).) Using our best judgment, we find that appellants are entitled to an additional theft loss deduction in.the amount of $20,000.

For the above reasons, respondent's action must be modified.

Appeal of David and Goldie Krechman

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 18595 of the Revenue and Taxation Code, that the action of the Franchise Tax Board on the protest of David and Goldie Krechman against a proposed assessment of additional personal income tax in the amount of $6,645 for the year 1980, be and the same is hereby modified in accordance with this opinion.

Done at Sacramento, California, this 9th day Of April, 1986, by the State Board of Equalization, with Board Members Mr. Nevins, Mr. Collis, Mr. Bennett and Mr. Harvey present.

Richard Nevins, Chairman

Conway H. Collis, Member

William M. Bennett, Member

Walter Harvey*, Member

_____, Member

*For Kenneth Cory, per Government Code section 7.9