

BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
HENRY J. AND FLORENCE BRADLEY) No. 87R-0808-MW

Appearances:

For Appellant: Roger A. Pott
Attorney at Law

For Respondent: Phillip Farley
Counsel

O P I N I O N

This appeal is made pursuant to section 19057, subdivision (a), 1/₂ of the Revenue and Taxation Code from the action of the Franchise Tax Board in denying the claim of Henry J. and Florence Bradley for refund of personal income tax in the amount of \$10,325 for the year 1983.

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

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The issue in this appeal is whether appellants are entitled to a refund of tax paid as a result of the capital gain arising from the sale in 1983 of small business stock purchased in 1979.

In 1979, appellants acquired shares of Gnyx International Memories Incorporated (IMI), a corporation whose stock would have qualified as "small business stock" as defined in Revenue and Taxation Code section 18162.5, subdivision (e).^{2/} When they sold the stock in 1983, appellants reported the gain and paid tax in the amount of \$10,325. They also reported the unrecognized portion of the gain as an item of tax preference, upon which they paid minimum tax of \$1,902. Appellants later filed an amended return, claiming refund of both the capital gains tax and preference tax amounts. The Franchise Tax Board (FTB) allowed the refund of the preference tax amount, \$1,902, but denied the remainder of the claimed refund, leaving \$10,325 as the amount in controversy.

Appellants contend that they are entitled to apply the special gain rules provided by sections 18162.5 and 17063.11 applicable to small business stock. Section 18162.5, subdivision (b), provided that no gain would be recognized on the sale of small business stock which had been held for more than three years. Subdivision (d) of that section provided that the special holding period rules for small business stock found in subdivision (b) of the section were only applicable to small business stock acquired after September 16, 1981. Section 17063.11 contained no such limiting language. Section 17063.11 excluded from tax preference items the unrecognized portion of the gain from the sale of small business stock.

Appellants appear to argue that this board's decision in the Appeal of Magnus F. and Denise Hagen, decided April 9, 1986, allows both the capital gains and tax preference provisions to be used for all small business stock even if it had been acquired prior to September 17, 1981. Therefore, they contend that they should have received the full refund that they claimed, rather than just the part attributable to the preference tax.

We must disagree with appellants. The Hagen appeal dealt specifically and exclusively with the operative date of

^{2/} Originally enacted as section 18161.5 by SB 690 (Stats. 1981, Ch. 534) operative for taxable years beginning on or after January 1, 1982. Reenacted as section 18162.5, subdivision (e), operative for taxable years beginning on or after January 1, 1983. (Stats. 1983, Ch. 488.)

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section 17063.11. As we pointed out in that opinion, while the legislature failed to restrict the application of section 17063.11 to stock acquired after September 16, 1981, it specifically did restrict the application of subdivision (b) of section 18162.5 to stock acquired after that date. We also specifically rejected any suggestion that the effect of section 18162.5 was before us in that appeal.

Appellant's stock was acquired before September 17, 1981, and, therefore, the amount of gain recognized on its sale must be determined under the non-small-business-stock provisions of section 18162.5, subdivision (a). Accordingly, the action of the Franchise Tax Board must be sustained.

