



BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
KERNAN and GERALDINE C. ROBSON)

Appearances:

For Appellant: Kernan Robson

For Respondent: Burl D. Lack, Acting Assistant Franchise
Tax Commissioner; James J. Arditto,
Franchise Tax Counsel

O P I N I O N

This appeal is made pursuant to Section 18593 of the Revenue and Taxation Code (formerly Section 19 of the Personal Income Tax Act) from the action of the Franchise Tax Commissioner in overruling the protest of Kernan and Geraldine C. Robson to a proposed assessment of additional tax in the amount of \$1,027.32 for the taxable year ended December 31, 1937.

For several years prior to 1936 Kernan Robson was a real estate dealer engaged in the purchase and sale of improved and unimproved property. He maintained an office in connection with that business and employed a staff of employees. During 1936 he gradually shifted the major portion of his capital from real estate to stocks and bonds. In 1937, the taxable year in question, he continued to maintain an office and retained the designation "Real Estate and Investments" on his letterheads. On the income tax return for 1937, his occupation was stated to be "stocks and bonds, banking and real estate." Mr. Robson did not cease to buy and sell real estate. In 1936 he had made 58 separate sales of real property and three purchases; in 1937 there were 37 sales and two purchases. His stock and bond transactions numbered 76 sales and 108 purchases in 1936 and 140 sales and 138 purchases in 1937.

In filing their return for 1937, Appellants listed the gains from real property sales as gains from sales of capital assets taken into account at the appropriate percentage. The Commissioner proposed an additional assessment of \$1,027.32, based in part on the treatment of these gains as ordinary income, taken into account at 100%. This appeal involves only the correctness of this action as the Appellants have not questioned the other adjustments made by the Commissioner and have made a payment of \$599.08 on the assessment.

The definition of "capital assets" of Section 117(b) of the Federal Revenue Act of 1936, incorporated by reference by Section 7(e) of the Personal Income Tax Act, is as follows:

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"For the purposes of this title 'capital assets' means property held by the taxpayer (whether or not connected with his trade or business), but does not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business."

The question presented herein is whether the real property sold in 1937 was held by Appellants primarily for sale to customers in the ordinary course of business within the meaning of this provision. The Appellants contend (1) that although Robson was engaged in the real estate business in prior years, the nature of his activities had changed by 1937 to the point where real estate was not his main trade or occupation, and that (2) even though he was a dealer in real estate during the taxable year, the property sold was held for investment and not primarily for sale to his customers.

Assuming the first proposition to be true, the nature of the gain would not be changed so long as Robson was still engaged in the real estate business. It has been clearly held that the words trade or business, as used in Section 117 of the Federal revenue laws, are not limited in their application to the taxpayer's sole or principal occupation. Fackler v. Commissioner, 133 Fed. 2d 509; Oliver v. Commissioner, 138 Fed. 2d 910; Lizzie May Jackson v. Commissioner, Tax Court Memo. Op., Dkt. 3114 (April 9, 1946).

It is not essential, as contended by Appellants, that an individual hold a license to sell real estate before he can be regarded as engaged in the trade or business of selling property. Oliver v. Commissioner, supra. The Appellants have failed to present evidence sufficient to controvert the determination of the Commissioner that Mr. Robson was engaged in the business of selling real estate, the fact that this business may not have been his sole or principal occupation not establishing that the Commissioner's conclusion was erroneous. The question whether a seller is engaged in the trade or business of selling property depends primarily on whether his sales are frequent, substantial and show a continuity of purpose or are merely isolated and casual transactions. Commissioner v. Boeing, 106 Fed. 2d 305; Ehrman v. Commissioner, 120 Fed. 2d 607; Brown v. Commissioner, 143 Fed. 2d 462. Even the liquidation of holdings not acquired for purposes of resale may constitute such a trade or business. Richards v. Commissioner, 81 Fed. 2d 369. The sales here involved clearly meet the test of frequency and continuity and, coupled with the manner in which Mr. Robson's activities were conducted, establish that he was engaged in the trade or business of selling real property within the meaning of the statute.

The second principal contention of the Appellants is that even though Mr. Robson was engaged in the real estate business: the property sold was held for investment and not for sale to his customers. Property held by real estate dealers ordinarily

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does not fall within the definition of "capital assets" inasmuch as generally it is held for sale.

It is possible, however, that a dealer may hold certain property for investment rather than resale, the gain or loss on the sale of which would constitute a gain or loss' from the sale of capital assets. Mertens, Law of Federal Income Taxation, Section 22.23. But it does not necessarily follow that property not originally acquired for resale is not so held at the time of sale, Richards v. Commissioner, supra. The determination by the Commissioner that these properties were held for sale to customers places the burden upon Appellants of establishing that they were held otherwise. Gruver v. Commissioner, 142 Fed. 2d 363; Greene v. Commissioner, 141 Fed. 2d 645. It is not enough to claim or even show that some of the properties may have been held for investment without showing what property, if any, was so held. The Appellants have not made such a showing. It follows, therefore, that the Commissioner must be sustained in his determination that the gains from the sale of real property by the Appellants in 1937 were taxable as ordinary income not subject to the capital assets limitations.

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 Chas. J. McColgan, Franchise Tax Commissioner, in overruling the protest of Kernan and Geraldine C. Robson to a proposed assessment of additional tax in the sum of \$1,027.32 for the taxable year ended December 31; 1937, be and the same is hereby affirmed. The Commissioner is directed to deduct from the proposed assessment the amount subsequently paid thereon, collecting interest on that portion of the assessment so paid only to the date of such payment, and otherwise to proceed in conformity with this order.

Done at Sacramento California, this 24th day of July, 1947, by the State Board of Equalization.

Wm. G. Bonelli, Chairman
Geo. R. Reilly, Member
J. H. Quinn, Member
Jerrold L. Seawell, Member

ATTEST: Dixwell L. Pierce, Secretary