



Appeal of John A. and Elizabeth J. Moore

The issue presented is whether respondent properly disallowed a casualty loss deduction.

In 1965 appellants purchased real estate consisting of 25 acres of land and a home near Santa Ynez, California, for \$110,000.00. Approximately two-thirds of the acreage consisted of farm land. Appellants resided there until some time in 1973. They acquired the farm land primarily as an investment, intending to resell it at a profit. Appellants were not, however, engaged in the business of farming. They were retired and derived income in the form of dividends, interest and capital gains from the sale of securities and real estate.

Appellants placed at least 11 acres of the farm property for sale in 1968 through a real estate broker. Prior to 1969, at least one offer to buy the 11 acres for \$3,200.00 per acre was rejected.

In January 1969, a prolonged and heavy rainstorm caused severe flood damage to property in the Santa Ynez Valley. As a result of alleged damage to their property, appellants claimed a \$3,900.00 casualty loss on their 1968 state income tax return. Specifically, they claimed \$1,200.00 for loss of "trees" and \$2,800.00 for loss of "1.6 acres - top soil." <sup>1/</sup> Respondent's denial of the deduction on the basis that the casualty loss had not been substantiated gave rise to this appeal.

Appellants contend that all 1.6 acres of the farm land were damaged by the storm. However, they principally rely upon a claim of severe damage to the above mentioned 11 acres. Appellants explain that because this latter acreage slopes, the heavy rains and flooding washed off all the top soil, leaving only a rocky surface unsuitable for farming. After the storm they listed the 11 acres

<sup>1/</sup> A casualty loss is deductible to the extent that it exceeds \$100.00. (Rev. & Tax. Code, § 17206, subd. (c).) If a casualty loss was incurred it was deductible in 1968 because of the statutory provision relating to a "disaster area." (Rev. & Tax. Code, § 17206.5.)

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for sale at \$3,000.00 per acre but no offers were received at this price over a period of several years. The broker expressed the opinion that the acreage lost value because of the storm, and stated that the top soil loss had a direct bearing on appellants' decision to list the 11 acres at \$3,000.00 per acre.

Appellants point out that each year after the storm the land was cultivated in an effort to better the condition of the soil. They verified that, notwithstanding such efforts, after the storm their farm land never produced a good crop. Appellants also explain that the storm caused large erosion ditches on the 11 acres. A photograph of the largest ditch has been submitted. This ditch is 4 1/2 feet deep, 2 1/2 feet wide, and 40 feet long. The absence of any suitable soil nearby precluded any inexpensive method of filling these ditches.

A company in the business of providing soil quoted the following as estimates to repair the damage: (1) a minimum charge of over \$700.00 per acre to cover the 11 acres with a two inch layer of top soil, and (2) a charge of \$800.00 to fill the main erosion ditch. The company emphasized that it would only do the job on a time and material basis inasmuch as costs could greatly exceed the estimates.

For the foregoing reasons, appellants urge that the damage to the farm land greatly exceeded the \$2,800.00 claimed. They also contend that the fair market value of the rest of the property was lessened by as much as \$2,000.00 because the storm destroyed two 80- 100 year old oak trees. A photograph has been submitted showing the remains of the larger tree. Appellants state that this tree was next to their home and, because of its size and value, could not be replaced "at any price". They claim that nurseries did not want to submit bids for replacements by smaller trees, "as it was too big a job for them." Appellants maintain that minimum replacement costs would be in excess of \$1,800.00. It is their understanding that land in the Santa Ynez Valley with large oak trees has a value of at least \$1,000.00 per acre more than land not having such trees. The real estate broker has also expressed his opinion that the loss of the large oak trees had a substantial effect upon the property value of the residential land.

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Appellants maintain that the damage to their entire property **was** actually in excess of \$4,900.00, rather than the \$4,000.00 claimed. Appellants explain that they did not obtain a timely appraisal of the total damage because there were no certified real estate appraisers in the area in early 1969.

Turning to the applicable statute, we find that it allows a deduction for an uncompensated loss arising from storm, or other casualty. (Rev. & Tax. Code, § 17206, subs. (a) and (c).) Respondent's regulations provide for determining the amount of loss generally by ascertaining by a competent appraisal the fair market value of the property immediately before and after the casualty. General market decline also affecting undamaged property occurring simultaneously with the casualty is not to be considered, as the deduction is limited to actual loss resulting from damage to the property. The cost of repairs is acceptable as evidence if the repairs are necessary to restore the property to its condition immediately before the casualty; the cost is not excessive; the repairs do not care for more than the damage suffered; and the value of the property does not thereby exceed its value immediately before the casualty. (Cal. Admin. Code, tit. 18, reg. 17206(g), subd. (1)(B).)

Moreover, pursuant to the regulations, the amount of loss to be taken into account is the lesser of either the pre-casualty fair market value reduced by the post-casualty fair market value, or the adjusted basis for determining loss from sale. (Cal. Admin. Code, tit. 18, reg. 17206(g), subd. (2)(A).) A casualty loss to business property or property held in a transaction entered into for profit is determined by reference to the single, identifiable property damaged, but in determining a loss involving realty and improvements not used in a trade or business or in any transaction entered into for profit, the improvements to the property damaged are considered an integral part of the property. (Cal. Admin. Code, tit. 18, reg. 17206(g), subd. (2)(B).)

**The** above statute and regulatory provisions are similar to their federal counterparts. (Int. Rev. Code of 1954, § 165(a) and (c); Treas. Reg. §§ 1.165-7(a)(2), 1.165-7(b).)

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With this background, we first consider the \$2,800.00 casualty loss claimed with respect to the farm land. It is settled that deductions are a matter of legislative grace and the burden of proof is upon the taxpayer to show that he is entitled to the deduction. (New Colonial Ice Cd. v. Helvering, 292 U. S. 435 [78 L. Ed, 1348]; Joe B. Thornton, 47 T.C. 1; Appeal of Felix and Annabelle Chappellet, Cal. St. Bd. of Equal., June 2, 1969. ) When the storm occurred the farm land was held for the production of income since it was purchased primarily for ultimate sale at a profit, although not at that time producing income. (See George W. Mitchell, 47 T. C. 120. ) Thus, any damage to that land occurred in a transaction entered into for profit, and the amount of the casualty loss consequently must be determined by reference to the changed condition of that separate identifiable property.

Appellants' rejection of a pre-storm offer of \$35,200.00 for the 11 acres, along with the fact that no offers were made at a post-storm list price of \$33,000.00, obviously does not constitute an appraisal. These circumstances form a partial basis of their opinion, however, that the decrease in fair market value was far in excess of \$2,200.00. An owner's opinion as to the fair market value of his property is entitled to some weight. (Biddle v. United States, 175 F. Supp. 203; United States v. 3969.5-s of Land, 56 F. Supp. 831.; W. F. Harmon, 13 T. C. 373. ) It is also true that the loss of fair market value must be the result of actual physical damage; a deductible loss is not incurred to the extent that property decreases in value merely because it is apparent that a casualty has occurred, or to the extent that it is due to fear of prospective buyers that future casualty damage might occur. (Harvey Pulvers, 48 T. C. 245, aff'd, 407 F. 2d 838; Joe B. Thornton, supra; Clarence A. Peterson, 30 T. C. 660; see Appeal of Felix and Annabelle Chappellet, supra; see Cal. Admin. Code, tit. 18, reg. 17206(g), subd. (1)(B).)

I however, appellants have furnished additional evidence of the deductible farm loss, including the estimates of replacement costs, Replacement costs are evidence of loss of value. (Clapp v. Commissioner, 321 F. 2d 12; see Appeal of Felix and Annabelle Chappellet, supra. ) Such estimates are acceptable as some evidence of loss of value even though the work is not done. (Andrew A. Maduza, T. C. Memo. , Aug. 31, 1961. ) Repair and replacement costs have

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been considered as better evidence of physical damage than appraisals in certain instances. One instance is where appraisals are likely to be influenced by the psychological facts mentioned above, rather than merely reflecting physical damage. (See Clarence A. Peterson, supra; Joe B. Thornton, supra. )

The federal courts allow a reasonable approximation where the evidence clearly establishes, as in this appeal, that a casualty loss has been sustained but the taxpayer has not proved the exact amount of that loss. (Oceanic Apartments, Inc., T. C. Memo., Oct. 11, 1954; John W. Scott, T. C. Memo., Dec. 12, 1956; Andrew A. Maduza, supra; Herbert H. Nelson, T. C. Memo., Feb. 27, 1968; cf. Cohan v. Commissioner, 39 F. 2d 540. )

It is true that the cost of restoring the farm land to its pre-storm condition could be less than the estimates submitted by the rock company. We conclude, however, that the cost estimates for top soil replacement and for filling the largest ditch, together with all the other evidence in the record, clearly substantiate that damage to the farm land amounted to at least \$2,200.00. Applying the well established rule that a reasonable approximation should be allowed, we find that appellants suffered a casualty loss of \$2,200.00 with respect to the farm property.

We next turn to the question of tree damage. The measure of a casualty loss to nonbusiness property and property not held for profit is also the difference between immediate pre-casualty and post-casualty fair market value, but not in excess of the adjusted basis of the property. (Heilvering v. Owens, 305 U. S. 468 [83 L. Ed. 292]; see Cal. Admin. Code, tit. 18, reg. 17206(g), subd. (2)(A). ) The land and improvements are treated as a unit with no separate basis apportioned to either in determining the amount of any deductible loss. (Harry Johnston Grant, 30 B. T. A. 1028. )

Consequently, where ornamental, shade, or fruit trees on residential property are involved, the casualty loss is measured by the decrease in fair market value of the entire property. (Mary Cheney Davis, 16 B. T. A. 65; John S. Hall, et al., Executors, 16 B. T. A. 71; Buttram v. Jones, 87 F. Supp. 322; G. C. M. 21013, 19.39-1 (Part I) Cum. Bull. 101; Rev. Rul. 66-303, 1966-2 Cum. Bull. 55;

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Rev. Rul. 68-29, 1968-1 Cum. Bull. 74; see Cal. Admin. Code, tit. 18, reg. 17206(g), subd. (2)(B).) The injury logically goes beyond mere tree destruction because the value of the trees is principally as standing trees; thus, the injury is to the realty as a unit since its value is usually diminished more than lost timber value. (Mary Cheney Davis, supra.)<sup>2/</sup> Therefore, the loss suffered is composed of an amount representing the permanent decrement in value of the property plus the cost of removing the debris and cleaning up the storm damage. (Ralph Walton, T. C. Memo., May 12, 1961.)

On the basis of the record before us, however, we are unable to conclude that the appellants have actually proved any significant loss in value to the residential property as a consequence of tree damage. The only evidence presented, other than the photograph and the broker's opinion, which was unsupported by any statement of the basis of his opinion, are the appellants' assertions. Other independent evidence tending to establish that there was any significant loss in value is lacking. (See Western Products Co., 28 T. C. 1196, 1218; Robert F. Casey, T. C. Memo., Jan. 18, 1971; John A. Little, T. C. Memo., Oct. 31, 1957; Harry M. Leet, T. C. Memo., Jan. 24, 1955, aff'd, 230 F. 2d 845.)

In accordance with the views expressed herein, we conclude that appellants are entitled to a casualty loss deduction in the amount of \$2,100.00, i. e., \$2,200.00 less the \$100.00 statutory exclusion.

<sup>2/</sup> Unlike trees on residential land, trees used in a trade or business or held in a transaction entered into for profit are not considered as integral parts of the realty for purposes of measuring casualty loss. (Bessie Knapp, 23 T. C. 716; Cal. Admin. Code, tit. 18, reg. 17206(g), subd. (2)(B).)

