BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
HOMER E. GEIS)

Appearances:

For Appellant: Virgil V. Becker
Attorney at Law

For Respondent: Brian W. Toman
Counsel

O P I N I O N

This appeal is made pursuant to section 18594 of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protest of Homer E. Geis against a proposed assessment of additional personal income tax in the amount of $584.55 for the year 1971.

Appeal of Homer E. Geis

The sole issue for determination is whether the preference tax was properly applied to appellant's receipt of installment proceeds from the sale of land in a prior year.

In 1935, appellant purchased a parcel of farm land in Los Angeles County for $18,191. The parcel was sold for $323,000 in 1968, According to the terms of the sale $10,000 was payable at the time of sale, $100,000 was payable in one year, $100,000 was payable in two years, and $113,000 was payable in three years. In fact, $45,000 was paid in the year of sale, $52,000 in 1969, $52,000 in 1970, and $110,000 in 1971.

Appellant elected to report his income from the transaction on the installment basis, thereby reporting yearly income only to the extent of the gain included in the amount received from the sale in that year. (Rev. & Tax. Code, §§ 17577, 17578.2 The net long term. capital gain on the sale of the farm land was $304,809, or 94.37 percent of the selling price. Thus, the taxable gain for each year was 94.37 percent of the amount received during that year. Appellant's gain for 1971 was $103,804.

On December 8, 1971, the California Legislature enacted Chapter 2.1 (§§ 17062-17064.5) of the Revenue and Taxation Code entitled," "Tax on Preference Income." These provisions imposed a tax "equal to 2.5 percent of the amount (if any) by which the sum of the items of tax preference in excess of thirty thousand dollars ($30,000) is greater than the amount of net business loss for the taxable year." In the instant appeal the item of tax preference is "one-half of the amount by which net long-term capital gain exceeds the net short-term capital loss for the taxable year." (Rev. & Tax. Code, § 17063, subd. (f).)

In 1971, appellant realized a net long-term capital gain of $106,764 composed, primarily, of the proceeds of the 1968 installment sale received in 1971. Fifty percent of this amount is $53,382, which exceeds $30,000 by $23,382. This is the amount of appellant's preference income for 1971. Respondent determined the preference tax to be $584.56 and issued the proposed assessment which is the subject of this appeal.

Appellant challenges the assessment arguing that, since the preference tax was not enacted until December 8, 1971, it is retroactive when applied to proceeds received in 1971 from the sale of real property in 1968. Appellant concludes that, since the tax is retroactive in effect, it should be declared invalid.

It is respondent's position that the law existing at the time the installment payment was received controls, rather than the law which was in effect at the time of the installment sale.

In support of its position respondent relies, primarily, on Andrews v. Franchise Tax Board, 275 Cal. App. 2d 653 [80 Cal. Rptr. 403] (1969). In Andrews, supra, 275 Cal. App. 2d at 659, the court stated:

> . . .when proceeds of an installment sale are received by the taxpayer in a year during which a different revenue law is in effect than was in force the year of sale, the law existing at the time of such receipt determines whether those proceeds are capital gains or ordinary income. (See, Snell v. Commissioner (5th Cir. 1938) 97 F.2d 891; Weller v. Brownell (M.D. Pa. 1965) 240 F. Supp. 201, 209-210; Zola Klein (1964) 42 T.Ct. 1000, 1003-1005.) In substance, those authorities decide how much income is taxable income by applying the law which was in effect when the installment payment was received, not the law as it was at the time of the sale.

In Snell v. Commissioner, 97 F.2d 891 (5th Cir. 1938) the question was whether certain installment proceeds should be taxed under the Revenue Act of 1921 or the Revenue Act of 1924. If the former was applicable capital gains, rates would apply while ordinary income would result if the transaction was taxable under the 19.24 act. In resolving that question the court stated:

> As to the installment sales made in 1923, the taxpayer might have elected to take his. whole profit then and have had it taxed under the Revenue Act of 1921. He chose to defer realization of the profits on the deferred installments. These thereby were left to fall under such provisions of the law as might be of force at their maturity. That the law might be changed, not only in the tax rate but in any other of 'its provisions, was a risk the taxpayer took in deferring the realization of his gains. (97 F.2d at 893.1 (Emphasis added.)

Appellant attempts to distinguish these cases on the basis that the law changed was concerned with the determination of whether the proceeds of certain transactions were capital gains or ordinary income. We believe appellant's analysis of the authorities. is too narrow and restrictive. It is our opinion that the significance of the cited cases is that the law existing at the time the installment payment is received controls, not the law existing at the time of the original sale. The particular law that was changed is of no consequence in the instant determination.

The installment sales provisions of the Revenue and Taxation Code are elective. Appellant could have recognized his entire profit from the 1968 sale in that year. His failure to do so resulted in the application of the preference tax to the installment proceeds received in 1971; (See Snell v. Commissioner, supra,; Harry B. Golden, 47 B.T.A. 94 (1942).) Accordingly, we conclude that respondent's action in this matter must be sustained.

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, Appeal of Homer E. Geis

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 Homer E. Geis against a proposed assessment of additional personal income tax in the amount of $584.55 for the year 1971, be and the same is hereby sustained;

Done at Sacramento, California, this 15 day of December, 1976, by the State Board of Equalization.

William M. Bennett, Chairman

George R. Reilly, Member

Kenneth Cory, Member

Iris Sankey, Member

__________, Member

ATTEST: W. W. Dunlop, Executive Secretary