BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
GERALD H. AND DOROTHY S. BENSE)

MODIFICATION OF OPINION AND ORDER

This appeal, originally decided March 7, 1979, presented the following two issues for determination which concerned appellants' disposition of one-half of their partnership interest in 1969 and the remaining one-half interest in 1970:

1. Did respondent properly include in the amount realized on both sales the amount by which appellants' share of the partnership liabilities were reduced?

2. Did respondent properly attribute part of the amount realized on the 1970 sale to appellants' interest in the partnership's "unrealized receivables"?

With respect to the first question respondent's determination was upheld in its entirety.

The second issue concerned the recapture of appellants' share of the partnership's "potential depreciation recapture income" and its recharacterization as ordinary income. Initially, respondent recaptured all of appellants' share of the partnership's "potential depreciation recapture

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income" and recharacterized the entire amount as ordinary income in 1970. Respondent did not fragment the 1969 sale of part of appellants' partnership interest, thus recapturing part of the depreciation for that year as required by section 17911 of the Revenue and Taxation Code. During the course of the proceedings, respondent conceded that part of appellants' share of the partnership's "potential depreciation recapture income" should have been recaptured and characterized as ordinary income for 1969 as well as for 1970. The effect of this concession was to reduce the 1970 deficiency. Our initial review of respondent's concession and the supporting schedules indicated that respondent failed to consider an earlier sale of part of appellants' partnership interest in 1967. Based upon this analysis, we concluded that appellants' share of the partnership's "potential depreciation recapture income" must be considered with respect to the 1967 sale in order to properly determine the amount of "potential depreciation recapture income" to be characterized as ordinary income with respect to the 1970 sale. Accordingly, our order of March 7, 1979, directed that respondent's action be modified in this regard. Further analysis, however, has established that respondent's concession and the supporting schedules did, in fact, consider the 1967 sale and properly redetermined the amount of "potential depreciation recapture income" to be characterized as ordinary income with respect to the 1970 sale. Therefore, such modification was inappropriately reflected in the order of March 7, 1979. Accordingly, the order of March 7, 1979, must be revised as follows:

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Appeal of Gerald H. and Dorothy S. Bense

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 Gerald H. and Dorothy A. Bense against proposed assessments of additional personal income tax in the amounts of $2,292.66 and $4,668.79 for the years 1969 and 1970, respectively, be and the same is hereby modified in accordance with respondent's concession as clarified herein. In all other respects, the action of the Franchise Tax Board is sustained.

Done at Sacramento, California, this 28th day of March, 1979, by the State Board of Equalization.

_____, Chairman

_____, Member

_____, Member

_____, Member

_____, Member

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