

BEFORE THE BOARD OF ZONING ADJUSTMENT
OF THE DISTRICT OF COLUMBIA

Appeal of Stephanie Wallace

BZA appeal No. 17747

ANC 3E

Public Hearing: July 15, 2008

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INTERVENOR'S STATEMENT ON 'CASUALTY'

Webster's New Universal Unabridged Dictionary, copyright 1983, states the first definition of 'casualty' as: accident, that which comes by chance or without design, or without being foreseen; contingency.

Courts have considered the concept of casualty and have determined that termite damage, being a progressive deterioration, cannot be considered casualty. In *The United States v. Rogers* 120 F.2d 244, 246 (9th Cir. 1941), the court resorted to Webster's New International Dictionary and found that "casualty" could be used in the sense of "accident", and that a common denominator of both was suddenness.

EXHIBIT B: Income Tax, Deduction of "termite damage" as "other casualty" Internal Revenue Code.

BOARD OF ZONING ADJUSTMENT
District of Columbia
CASE NO. 17747
EXHIBIT NO. 43

The perspective given in the Internal Revenue Code can be instructive in the case of this Appeal, since the concept of casualty is a well-developed in federal tax law.

A casualty loss can be claimed as a tax deduction. According to the Internal Revenue Service, Rev. Rul. 63-232 (July 1963), a loss resulting from damage to property caused by termites does not constitute a casualty loss within the meaning of section 165(c)(3) of

the Internal Revenue Code of 1954. According the IRS, "termite infestation and the resulting damage cannot be inflicted with the suddenness comparable to that caused by fire, storm or shipwreck."

EXHIBIT A: IRS publication 547

Casualty losses are those that generally arise from a sudden catastrophic event such as fire, storm, or earthquake, (or hurricane, as the Appellant cites in the Togas case). Progressive deterioration from steadily operating causes is generally not considered a casualty loss [Edward A. Saccone v. Commissioner, 39 T.C.M. 616 (1979)]. The loss from termite damage, for example, does not fall under this term, nor would progressive deterioration due to rot.

The Service goes on to state "it is the position of the Service, based on the scientific data available in this area, that damage caused by termites to property not connected with the trade or business does not constitute an allowable deduction as a casualty loss within the meaning of section 165(c)(3) of the Code. Such damage is the result of gradual deterioration through a steadily operating cause and is not the result of an identifiable event of a sudden, unusual or unexpected nature. Further, that time elapsed between the incurrence of damage and its ultimate discovery is not a proper measure to determine whether the damage resulted from a casualty. Time of discovery of the damage, in some situations, may affect the extent of the damage, but this does not change the form or the nature of the event, the mode of its operation, or the character of the result."

Furthermore, Home insurance Policies do not cover termite damage. According to the

American Insurance Association, home insurance policies will generally contain an exclusion clause for damage from insects, rot or other gradual, progressive damages which are foreseeable and can be controlled by proper maintenance.

CONCLUSION

For the forgoing reasons, the Appellant must not be able to claim the termite damage and rot, already existing in the original house when it was purchased, a "casualty". The Appellant could not make such a claim as a tax deduction. The Appellant could not make an insurance claim for such damage. Therefore, it must be concluded that the progressive, unmitigated deterioration of the property must not be considered a 'casualty' in the application of zoning regulations.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "John Lemoine". The signature is written in a cursive, slightly slanted style.

John Lemoine

EXHIBIT A

page 1

Internal Revenue Service
Publication 547

Casualty

A casualty is the damage, destruction, or loss of property resulting from an identifiable event that is sudden, unexpected, or unusual.

- A sudden event is one that is swift, not gradual or progressive.
- An unexpected event is one that is ordinarily unanticipated and unintended.
- An unusual event is one that is not a day-to-day occurrence and that is not typical of the activity in which you were engaged.

Deductible losses. Deductible casualty losses can result from a number of different causes, including the following.

- Car accidents (but see *Nondeductible losses*, next, for exceptions).
- Earthquakes.
- Fires (but see *Nondeductible losses*, next, for exceptions).
- Floods.
- Government-ordered demolition or relocation of a home that is unsafe to use because of a disaster as discussed under *Disaster Area Losses*, later.
- Mine cave-ins.
- Shipwrecks.
- Sonic booms.
- Storms, including hurricanes and tornadoes.
- Terrorist attacks.
- Vandalism.
- Volcanic eruptions.

Nondeductible losses. A casualty loss is not deductible if the damage or destruction is caused by the following.

- Accidentally breaking articles such as glassware or china under normal conditions.
- A family pet (explained below).

- A fire if you willfully set it, or pay someone else to set it.
- A car accident if your willful negligence or willful act caused it. The same is true if the willful act or willful negligence of someone acting for you caused the accident.
- Progressive deterioration (explained below).

Family pet. Loss of property due to damage by a family pet is not deductible as a casualty loss unless the requirements discussed earlier under *Casualty* are met.

Example.

Your antique oriental rug was damaged by your new puppy before it was housebroken. Because the damage was not unexpected and unusual, the loss is not deductible as a casualty loss.

Progressive deterioration. Loss of property due to progressive deterioration is not deductible as a casualty loss. This is because the damage results from a steadily operating cause or a normal process, rather than from a sudden event. The following are examples of damage due to progressive deterioration.

- The steady weakening of a building due to normal wind and weather conditions.
- The deterioration and damage to a water heater that bursts. However, the rust and water damage to rugs and drapes caused by the bursting of a water heater does qualify as a casualty.
- Most losses of property caused by droughts. To be deductible, a drought-related loss generally must be incurred in a trade or business or in a transaction entered into for profit.
- Termite or moth damage.
- The damage or destruction of trees, shrubs, or other plants by a fungus, disease, insects, worms, or similar pests. However, a sudden destruction due to an unexpected or unusual infestation of beetles or other insects may result in a casualty loss.

Notes and Recent Decisions

INCOME TAX: DEDUCTION OF TERMITE DAMAGE AS "OTHER CASUALTY": INTERNAL REVENUE CODE SECTION 23(e)(3).

As a general rule, the Internal Revenue Code does not allow individual taxpayers deductions for personal losses. Certain specified losses expressly made deductible by the statute constitute exceptions to this rule. These include losses of property not connected with a trade or business which arise from fire, storm, shipwreck or other casualty.¹

To draw a line where nondeductible depreciation ends and deductible casualty begins is extremely difficult. The problem of what constitutes "other casualty" within the meaning of this and similar sections² has often been considered, and two different methods of determination have been laid down by the courts. Both, however, lead to the same result: to be a casualty the event causing the loss must be sudden. Some courts have attempted to devise a definition on the basis of common characteristics of events which are casualties. Thus in *United States v. Rogers* the court resorted to the dictionary, and found that "casualty" could be used in the sense of "accident," and that a common denominator of both was suddenness.³ Similarly in *Fay v. Helvering* it was held that "casualty" . . . "denotes an accident, a mishap, some sudden invasion by a hostile agency; it excludes the progressive deterioration of property through a steadily operating cause."⁴

The application of the *ejusdem generis* rule has also been used by the courts in interpreting the term. Under this rule, the general words "other casualty" are not construed in their widest meaning, but are limited to the same kind of events as the words which they follow—"fires, storms, and shipwrecks."⁵ Again it was concluded that a common characteristic of the three is the comparative suddenness of the loss.⁶

In ruling on allowing other casualty deductions where the damage was caused by physical force, the courts and the Bureau of Internal Revenue frequently do not follow theoretical lines, but decide case by case on a pragmatic basis. Accord-

¹ INT. REV. CODE § 23(e)(3).

² See, e.g., REV. STAT. § 3221 (1878), 26 U.S.C. § 151 (1926), abating tax on distilled spirits destroyed while in a bonded warehouse "by accidental fire or other casualty."

³ The court made use of WEBSTER'S NEW INT'L DICTIONARY 419 (2d ed., now 1950) which defines "casualty" in part as follows: "1. Chance; accident; contingency; also, that which comes without design or without being foreseen; an accident . . . 2. An unfortunate occurrence; a mischance; a mishap; a serious or fatal accident; a disaster . . ." The court stated: "It can be seen that 'casualty' may properly be used in the sense of 'accident.' The latter word is defined by the same source as 'An event that takes place without one's foresight or expectation; an undesigned, sudden, and unexpected event.'" *United States v. Rogers*, 120 F.2d 244, 246 (9th Cir. 1941).

⁴ *Fay v. Helvering*, 120 F.2d 253 (2d Cir. 1941). Cf. *Matheson v. Commissioner*, 54 F.2d 537, 539 (2d Cir. 1931). (A loss due to rapid deterioration of a residence caused by poor construction held not to be a casualty.) " . . . 'casualty' as used in section [23(e)(3)] is an event due to some sudden, unexpected, or unusual cause. Anything less than this renders it hardly distinguishable from depreciation from ordinary wear and tear which cannot be deducted by a taxpayer in the case of property that is not used in trade or business."

⁵ *United States v. Rogers*, 122 F.2d 485 (9th Cir. 1941); *Crystal Spring Distillery Co. v. Cox*, 49 Fed. 555 (6th Cir. 1892). The words "other casualty" have not been limited to natural causes, however, as one might expect under the *ejusdem generis* rule. *Shearer v. Anderson*, 16 F.2d 995, 996 (2d Cir. 1927) (deduction allowed to cover damages to a pleasure auto when it overturned on an icy road, the court saying that " . . . 'casualty' expresses rather the result than the cause of the damage . . .").

⁶ *Fay v. Helvering*, *supra* note 4; *United States v. Rogers*, *supra* note 3.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Intervener's response to the Appellant's Opposition to the Motion to Dismiss was served electronically and via first-class postage this 16th day of May, 2008, to the following:

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