

MILLER v. COMMISSIONER
29 T.C.M. 741; P-H T.C. Memo ¶ 70,167 (1970)
Editor's Summary

Key Topics

CASUALTY LOSS

- Suffocation
- Suddenness

Facts

The petitioners, husband and wife, purchased a house on a wooded lot. Wooded lots in the area cost approximately \$2,500 more than similar unwooded lots. The lot was graded and leveled on December 2, 1965. By the spring of 1967 some of the trees had to be removed because it was apparent they were dead, by the fall of 1967 it was evident that other trees also were dead and would have to be removed. A landscape gardener and tree surgeon believed that the trees were doomed from the date of the grading because the grading of fill dirt of the root system prevented osmotic action of absorption and seration, thereby suffocating the trees. The fair market value of the lot dropped \$1,500 because of the loss of the trees. The taxpayers claimed a \$1,400 casualty loss under Section 165(c)(3) which allows a deduction to individuals for "losses of property not connected with a trade or business, if such losses arise from fire, storm, shipwreck, or other casualty, or from theft ..." The Commissioner assessed a deficiency contending the loss was not within Section 165(c)(3).

Tax Court

HELD: FOR THE GOVERNMENT. The taxpayers are not entitled to the deduction under Section 165(c)(3) since the loss caused by improper grading arose through progressive deterioration rather than a sudden occurrence. "Other casualty" as used in Section 165(c)(3) means an event due to some sudden, unexpected or unusual cause since under the principle of *ejusdem generis* "other casualty" must have some of the same characteristics as a fire, storm, or shipwreck. The facts in this case lead to the inescapable conclusion that the loss of the trees was the result of progressive deterioration. Therefore the deduction must be denied under Section 165(c)(3) since the requisite suddenness is absent.*

Case Text

IRWIN, Judge: The Commissioner determined a deficiency of \$324.64 in petitioners' Federal income tax for the calendar year 1967. Due to a concession made by petitioners in their petition, the sole issue for decision is whether petitioners are entitled to a casualty loss deduction under section 165(c)(3) of the Internal Revenue Code of 1954.¹

Findings of Fact

William R. (hereinafter petitioner) and Nancy C. Miller are husband and wife, who filed a joint Federal income tax return for the calendar year 1967 with the district director of internal revenue, Indianapolis, Indiana. At the time of the filing of the petition herein, they resided in Indianapolis.

On November 30, 1965, petitioners purchased a house located on Lot No, 236, Avalon Hills, Section 9, commonly known as 6815 Alnwick Court, Indianapolis, Indiana. The desirability of this lot was enhanced by the large Beech and Maple trees located thereon. In fact, wooded lots situated in the Avalon Hills area cost approximately \$2,500 more than similarly situated unwooded lots.

On December 2, 1965, the property in question was graded and leveled. In the opinion of a landscape gardener and tree surgeon, the grading of fill dirt of the root system of the trees located on the lot in question caused them to die because the fill dirt prevented osmotic action of absorption and aeration, thereby suffocating the trees. As of the date on which the grading occurred, the trees were, in the gardener's opinion, doomed.

An appraisal of the property in question was made in February 1968. At that time the fair market value of the property prior to the loss of the trees was \$42,500, whereas the value thereof after the loss in question was \$41,000. According to a real estate appraiser, the loss would be in the same amount had the appraisal been made in February 1966.

Some of the trees were removed in the, spring of 1967, at which time it was apparent that they were dead. Other trees which still manifested some signs of life were not removed until the fall of 1967, at which time there was no doubt that these trees were also dead.

Petitioners claimed a \$1,400² casualty loss deduction on their 1967 income tax return which respondent disallowed in its entirety.

Opinion

As a result of improper grading, certain trees situated on petitioners' property suffocated and died. Petitioners chimed a casualty loss deduction therefor, which respondent disallowed.

The issue presented for our decision is whether the damage to the trees caused by improper grading is a casualty loss within the meaning of section 165(c)(3) which provides in pertinent part as follows;

SEC. 165. LOSSES.

(a) General Rule.-There shall be allowed as a deduction any loss sustained during the taxable year and not compensated for by insurance or otherwise.

* * *

(c) Limitation on Losses of Individuals. In the case of an individual, the deduction under subsection (a) shall be limited to-

* * *

(3) losses of property not connected with a trade or business, if such losses arise from fire, storm, shipwreck, or other casualty, or from theft. * * *

The phrase "other casualty" has been defined as "an event due to some sudden, unexpected, or unusual cause." *Matheson v. Commissioner* [2 USTC ¶ 830], 54 F.2d 537, 539 (C.A. 2; 1931). Under the rules of *ejusdem generis*, "other casualty" must have the same characteristics as fire, storm, or shipwreck. *Appleman v. United States* [64-2 USTC ¶ 9860], 338 F.2d 729 (C.A. 7, 1964); *Shearer v. Anderson* [1 USTC ¶210], 16 F.2d 995 (C.A. 2, 1927); *Keenan v. Bowers* [50-2 USTC ¶9444], 91 F. Supp. 771 (E.D.S.C., 1950).

We have recognized that the "term 'suddenness' is comparative, and gives rise to an issue of fact,". *Rudolf Lewis Hoppe* [Dec. 26, 902], 42 T.C. 820,823 (1964), *affd.* [66-1 USTC ¶9163]: 354 F.2d 988 (C.A. 9, 1965); *E. G. Kilroe* [Dec. 23, 771], 32 T.C. 1304, 1306 (1959). Therefore, a careful examination of the facts in the case before us is warranted in order to determine whether the requisite "suddenness" was present so as to justify a casualty loss deduction under section 165(c)(3).

The grading took place on December 2, 1965. Photographs introduced into evidence by petitioner show that some of the trees in question had died as of the spring of 1967, whereas others appeared healthy at that time and did not die until the fall of the same year. The process by which the trees died was described as suffocation of the roots. In the words of a tree surgeon, the fill dirt prevented osmotic action of absorption and aeration, thereby suffocating the trees. The very nature of the cause of death indicates that the loss caused by improper grading arose through a progressive deterioration rather than a sudden occurrence.

While it may be true, as petitioner contends, that the grading close to the trees and their root systems was unexpected, the death of the trees is the result of progressive deterioration, here a minimum of 16 months.

While we sympathize with petitioner's situation, we are unable to find that requisite degree of "suddenness" or "unexpectedness" which would warrant a deductible casualty loss. The damage to the trees, according to the evidence, was due to the gradual suffocation of the root systems. Accordingly, we are constrained to deny the deduction claimed therefor. *Fay v. Helvering* [41-2 USTC ¶ 9494], 120 F.2d 253 (C.A. 2, 1941), *affirming* [Dec. 11,231] 42 T.A. 206 (1940); *Matheson v. Commissioner*, *supra*.

Decision will be entered for the respondent.

* Since the damaged trees surrounded the residence of the petitioners, apparently it was not argued that the loss was deductible under Section 165(a) and did not depend on Section 165(c)(3). It has been argued that an individual can deduct a timber loss under Section 165(a) if the timber is held as a trade or business or transaction entered into for profit, An individual holding timber who fits into one of the above two categories would not be subject to the requisite elements of Section 1651(C)(3) such as suddenness and unexpectedness. See Whitaker, *Timber Casualties*, 1 Timber Tax Journal 26 (1965).

1 All statutory references axe to the Internal Revenue Code of 1954, as amended, unless otherwise indicated.

2 Although the actual loss was \$1,500, section 165(c)(3) limits the deduction for a casualty loss to the amount of the loss in excess of \$100.