

BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
PATRICK E. IRVINE AND MILDRED IRVINE)

Appearances:

For Appellant: Morris Lavine, Attorney at Law
For Respondent: Burl D. Lack, Chief Counsel;
John S. Warren, Associate Tax Counsel

O P I N I O N

This appeal is made pursuant to Section 18593 of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protest of Patrick E. Irvine and Mildred Irvine to a proposed assessment of additional personal income tax in the amount of \$2,078.97 for the year 1951.

Appellants are husband and wife. During 1951 Patrick E. Irvine was engaged in the business of bookmaking (taking bets on horseraces). Appellants filed a delinquent joint return for 1951 in October, 1954. In this return there was reported the sum of \$9,317.57 as "commissions received." Patrick E. Irvine acquired a Federal gambling tax stamp pursuant to a Federal law, which was effective November 1, 1951. On his Federal gambling tax return he reported gross bets of \$10,078.00 for November, 1951, and \$7,661.00 for December, 1951.

The Franchise Tax Board, by letter of December 29, 1954, requested Appellants to complete a questionnaire regarding gambling income. When there was no reply to this request, nor to a repeated request, Respondent issued a notice of proposed assessment.

Respondent estimated the amount of bets paid out for 1951 on the basis of the percentage paid out of pari-mutuel pools at California race tracks, This was 86%. The sum of \$9,317.57 reported by Appellants as "commissions received" was considered to be 14% of all bets placed with Patrick E. Irvine in 1951. On this basis his payouts for the year were computed to be \$57,223.14. Respondent estimated that 8/12 of this figure, or \$38,148.76, represented payouts after the effective date (May 3, 1951) of Section 17359 of the Revenue and Taxation Code. This section, now numbered as Section 17297, is as follows:

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"In computing net income, no deductions shall be allowed to any taxpayer on any of his gross income derived from illegal activities as defined in Chapters 9, 10 or 10.5 of Title 9 of Part 1 of the Penal Code of California; nor shall any deductions be **allowed** to any taxpayer on any of his gross income derived from any other activities which tend to promote or to further, or are connected or associated with such illegal **activities.**"

To determine Appellants' taxable income from bookmaking, Respondent added the estimated payouts made subsequent to May 3, 1951 (\$38,148.76) to the \$9,317.57 returned as "commissions received."

Section 17359 (supra) prohibits the deduction of wagering losses incurred in bookmaking (Hetzel v. Franchise Tax Board, 161 Cal. App. 2d 224). Appellants advance a number of constitutional objections to that section. Some of these are answered by Hetzel v. Franchise Tax Board (supra), wherein it was held that the statute did not violate the equal protection provisions of the State and Federal Constitutions and was not a penalty for violation of State law rather than a true tax. In any event, we will not pass upon the constitutionality of a statute in an appeal involving an unpaid assessment, since a **finding** of unconstitutionality could not be reviewed by the courts (see Appeal of Tide Water Associated Oil Co., decided June 3, 1948).

A further objection made by Appellants to the proposed assessment is that it is arbitrary and capricious, without factual basis. This calls into question the formula method used by the Franchise Tax Board to estimate taxable income. Appellants offered no evidence whatsoever, either before the Franchise Tax Board or before this Board as to the extent of the gambling payouts made. They are attempting to shift the burden to Respondent to justify its **determination**. This they cannot do. It is well established that the taxpayer has the burden of proving a **proposed assessment** to be **erroneous** (Avery v. Commissioner, 22 Fed. 2d 6; Greengard v. Commissioner, 29 Fed. 2d 502). A taxpayer may not shift the **burden** to the tax administrator by merely asserting the incorrectness of his determination (Todd v. McColgan, 89 Cal. App. 2d 509; Anthony Delsanter, 28 T. C. 845).

There are limits to the presumption of correctness, where a determination was shown to be arbitrary and excessive, the United States Supreme Court has said that a

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taxpayer does not have the burden of showing the exact amount of tax due (Helvering v. Taylor, 293 U.S. 507). But the taxpayer must produce evidence to indicate that his income is different from that calculated by the taxing authority (Union Packing Co., T.C. Memo., Dkt. Nos. 29579, 29099-29105, ~~29580-29587~~, 32709-32714, 45707, entered November 22, 1955. See also Morris Wexler, T.C. Memo., Dkt. No. 49769, entered May 16, 1955, aff'd. 241 Fed. 2d 304, cert. den. 354 U.S. 938).

There have been cases before the Tax Court of the United States in which that court on the record before it, refused to sustain a pari-mutuel percentage figure as against other evidence in determining a bookmaker's payouts (Morris Nemmo, 24 T.C. 583; H. T. Rainwater, 23 T.C. 450; Sam Mesi, 25 T.C. 513, rev'd. in part on other grounds, 242 Fed. 2d 558; Charles v. Doyle, T.C. Memo., Dkt. No. 43868, entered December 27, 1954, aff'd. 231 Fed. 2d 635). In these cases there was evidence present which discredited the comparisons between pari-mutuel and bookmaker betting, In contrast. Appellants here have failed to present any evidence to show that the proposed assessment of the Franchise Tax Board would result in Appellants paying more than they should, The uncontroverted estimate will not fall as being per se arbitrary and capricious. (Albert D. McGrath, 27 T.C. 117; United Dressed Beef Company, et al., 23 T.C. 879. See also Appeals of Raymond H. Osbrink, et al., decided November 7, 1958.)

The record before us gives some positive assurance that the Franchise Tax Board did not overstate the assessment. Patrick E. Irvine reported bets of \$17,739.00 in his Federal gambling tax returns as a total for November and December, 1951. He reported \$9,317.57 as what we take to be the excess of his bookmaking "ins" and "outs" for the whole year of 1951. If the amount of the bets for November and December (the "ins") is projected back for the whole year, the amount of payouts is indicated to be approximately 91% of the total bets. This is to be compared to the figure of 86% used by the Franchise Tax Board. Taking into consideration the effective date of Section 17359, Appellants' taxable income for 1951 can be estimated at over \$70,000. This is considerably more than the amount used by the Franchise Tax Board in making the proposed assessment.

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,

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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 Patrick E. Irvine and Mildred Irvine to a proposed assessment of additional personal income tax in the amount of \$2,078.97 for the year 1951, be and the same is hereby sustained,

Done at Sacramento, California, this 21st day of April, 1959, by the State Board of Equalization,

John W. Lynch, Chairman

George R. Reilly, Member

Richard Nevins, Member

_____, Member

_____, Member

ATTEST: Dixwell L. Pierce, Secretary