

BEFORE THE STATE BOARD OF EQUALIZATION  
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of )  
EMIL BAUMGARTEN )

Appearances:

For Appellant: Henry W. Howard, Attorney at Law  
For Respondent: A. Ben Jacobson, Associate Tax 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 Emil Baumgarten to proposed assessments of additional personal income tax in the amounts of \$2,412.68, \$2,004.62, \$1,583.72 and \$1,298.12 for the years 1952, 1953, 1954 and 1955, respectively.

Appellant owned and operated an establishment in San Francisco where tobacco products and packaged liquor were sold and where dice games, pinball machines and claw machines were played. The dice games were called "Twenty-Six" and "Selection" and the player played against the house. Winning players received cash., The pinball and claw machines were owned by someone other than Appellant and as to these machines, Appellant received 50% of the net proceeds.

The excess of amounts Appellant won on dice games over amounts Appellant lost, Appellant's share of the proceeds of pinball and claw machines, and the gross profit from merchandise sales for each of the years in question were as follows:

<u>Year</u>	<u>Dice</u>	<u>Pinball</u>	<u>Claw</u>	<u>Merchandise</u>
1952	\$27,555.10	\$2,176.00	\$5,472.25	\$23,674.97
1953	23,951.20	2,079.70	3,145.75	20,283.61
1954	14,545.05	2,425.85	2,871.50	22,161.75
1955	6,362.33	2,793.50	2,410.00	24,441.48

Respondent disallowed all expenses pursuant to Section 17359 (now 17297) of the Revenue and Taxation Code which read:

In computing net income, no deductions shall be allowed to any taxpayer on any of his gross income

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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.

The operation of the dice games was a violation of Section 330 of the Penal Code. We have previously held the operation of a claw machine to be a violation of Section 330a of the Penal Code whether or not a successful player is permitted to redeem the merchandise for cash. (Appeal of Perinati, Cal. St. Bd. of Equal., Apr. 6, 1961, 3 CCH Cal. Tax Cas. Par. 201-733, 3 P-H State and Local Tax Serv. Cal. Par. 58191; Appeal of Seeman, Cal. St. Bd. of Equal., July 19, 1961, 3 CCH Cal. Tax Cas. Par. 201-825, 3 P-H State and Local Tax Serv. Cal. Par. 58208.) Accordingly, Respondent was correct in applying Section 17359.

From the volume of business done in merchandising and in gaming, it is obvious that merchandising was largely a front for gaming. Therefore, the merchandising was associated or connected with the illegal activities and it was proper to disallow the expenses of the entire business.

Q 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 Emil Baumgarten to proposed assessments of additional personal income tax in the amounts of \$2,412.68, \$2,004.62, \$1,583.72 and \$1,298.12 for the years 1952, 1953, 1954 and 1955, respectively, be and the same is hereby sustained.

Done at Sacramento, California, this 22nd day of March, 1962, by the State Board of Equalization.

George R. Reilly Chairman  
John W. Lynch, Member  
Paul R. Leake, Member  
Richard Nevins, Member  
Member

ATTEST: Dixwell L. Pierce, Secretary