



BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
BRUCE A. AND GYLBERTA I. THOMAS)

Appearances:

For Appellants: Robert M. Blakey, Attorney at Law
For Respondent: Burl D. Lack, Chief Counsel

O P I N I O N

This appeal is made pursuant to Section 19059 of the Revenue and Taxation Code from the action of the Franchise Tax Board in denying the claim of Bruce A. and Gylberta I. Thomas for refund of personal income tax in the amount of \$559.22 for the year 1954.

In the years 1951 and 1952, Bruce A. Thomas (hereafter referred to as Appellant) was engaged in bookmaking. For those years, he had a federal gambling tax stamp as required by Section 3293 of the Internal Revenue Code of 1939. In 1953, he pleaded guilty to a charge of operating a lottery.

On State income tax returns which Appellant filed jointly with his wife, Gylberta, for the years 1952, 1953 and 1954, their income was listed as from "commissions." The return for 1954 reported \$4,100 as adjusted gross income. Returns for the years 1955 through 1958 reported income from gambling in Nevada, in Mexico, and at California racetracks.

Respondent determined that Appellant's operations in 1954 were within the scope of Section 17297 (formerly 17359) of the Revenue and Taxation Code, which provides that:

In computing taxable 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.

Appeal of Bruce A. and Gylberta I. Thomas

Respondent made an estimate of Appellant's gross income. The income of \$4,100 reported for 1954 was divided by 14 and the dividend was multiplied by 100. From the resulting sum, the \$4,100 was subtracted and the balance was added to the reported income for the year as estimated losing bets to be disallowed as deductions.

Respondent contends that Appellant was engaged in bookmaking or operating a lottery in 1954 in violation of Sections 337 and 319, respectively, of the Penal Code, Respondent also contends that Appellant operated or participated in dice games in that year in violation of Section 330 of the Penal Code. Respondent states that pari-mutuel pools at California racetracks retain 14 percent of the betting pool and that it was appropriate to estimate that Appellant, as a bookmaker, retained only 14 percent of the bets placed with him.

As support for its position that Appellant was engaged in illegal gambling activities in 1954, Respondent relies on the fact that he was engaged in such activities in prior years and that his return for 1954 showed his income as from "commissions," the same as did his returns for the prior years. Respondent also relies on a report of its auditor which states that Appellant said he played dice games in 1954.

Appellant appeared before us and testified that in 1954 he engaged in no bookmaking, lottery activities or any other activities prohibited by the Penal Code; that he derived his income from legal forms of gambling in California, Nevada and Mexico; that he did not engage in any dice games in California in 1954; that 85 or **90 percent of** his income was from playing cards; that he was an expert gambler and seldom lost at cards; and that in 1954 he lived in part on \$3,000 from the sale of a **house-trailer**.

Upon the evidence before us, we would not be justified in finding that Appellant was engaged in any activities in 1954 that were prohibited by the enumerated chapters of the Penal Code. In particular, there is a lack of evidence to show that in 1954 he was engaged in bookmaking, the activity upon which Respondent's estimate of gross income is specifically based. Moreover, the fact that Appellant had a federal gambling tax stamp for 1951 and 1952, when he was **concededly** engaged in bookmaking, and that he did not have such a stamp thereafter, tends to show that he was not a bookmaker in 1954.

