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: Lawrence C. Counts
Associate Tax Counsel

O P I N I O N

This appeal is made pursuant to section 19059 of the Revenue and Taxation Code from the deemed disallowance by the Franchise Tax Board of the claims of Bruce A. and Gylberta I. Thomas for refund of personal income tax totaling $1,710.96 for the year 1953. Pursuant to section 19058 the claims were deemed disallowed since the Franchise Tax Board did not act on them within six months after they were filed.

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.

On the state income tax return which appellant filed jointly with his wife, Gylberta, for the year 1953 their income was listed as $8,260 from "commissions." No other details were shown on the return relative to the source of their income, Respondent Franchise Tax Board determined that the reported amount was net income derived from illegal activities and that, pursuant to section 17359 (now 17297) of the Revenue and Taxation Code, the gross income was taxable.

Based on the experience of the California tracks, which return 86 percent of the pari-mutuel pools and retain 14 percent, respondent made an estimate of appellant's gross income. The income of $8,260 reported for 1953 was divided

by 14 and the quotient was multiplied by 100. From the resulting sum the $8,260 was subtracted and the balance was added to the reported income for the year as estimated losing bets to be disallowed as deductions.

Respondent's determination was based in part on a police report of an investigation of appellant's activities and appellant's plea of guilty to a charge resulting from the investigation. The report indicated that law enforcement officers in Orange County received information that appellant was conducting a bookmaking operation in his trailer at the Seal Beach Trailer Court. On October 29, 1953, the officers visited appellant at his trailer and reported that they found 26 packages of bet recording blanks, an adding machine and two telephones. Numerous telephone calls were reportedly received while the officers were there and about half of the callers attempted to place bets. The investigating officers arrested appellant and charged him with operating a lottery. On November 18, 1953, appellant pleaded guilty to the charge and was fined $400.

Appellant appeared before us and testified that in 1953 he engaged in no bookmaking, lottery activities or any other activities prohibited by the Penal Code; that the law officers' report was exaggerated; that he pleaded guilty to the lottery charge because it was less expensive than to fight it; that he derived his income from legal forms of gambling in California, Nevada and Mexico; and that his income was derived primarily from card playing. Appellant testified that he had spent some time deer hunting in Utah just prior to his arrest and he expressed the belief that his brother had used the trailer for bookmaking activities in his absence.

During the year in question section 17359 of the Revenue and Taxation Code provided:

> 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.

Section 319 of the Penal Code, under which appellant was convicted on a lottery charge, and section 337 which prohibits bookmaking are contained in the portion of the Penal Code

referred to in the above-quoted section. Based on the evidence before us it appears that appellant was engaged in bookmaking or operating, a lottery or both. In any event we are convinced that appellant was engaged in illegal activities of the type contemplated by section 17359.

We shall briefly consider the following additional points raised by appellant.

1. Appellant contends that section 17359 was unconstitutional, This point was settled against appellant's position in Hetzel v. Franchise Tax Board, 161 Cal, App. 2d 224 [326 P.2d 611], and more recently in Hall v. Franchise Tax Board, *244 Cal, App. 2d ___ [___ Cal. Rptr. ___].

2. Appellant contends that wagering losses of a professional gambler must be excluded to arrive at gross income. He relies on Winkler v. United States, 230 F.2d 766, a case which concerned the federal income tax law. The court there was influenced by limitations which it felt were imposed by the Sixteenth Amendment of the United States Constitution on the power of Congress to provide for taxes on income. That amendment does not apply to the California Legislature nor does the federal law contain a provision comparable to section 17359 of the Revenue and Taxation Code., Subsequent to the Winkler decision, it was held in Hetzel v. Franchise Tax Board, supra, that wagers lost by a professional gambler must be regarded as deductions rather than as exclusions from gross income. We believe the Hetzel case is controlling on this point.

3. Appellant challenges respondent's estimate of taxable income and urges that certain expenditures for rent and similar items are deductible. This calls into question the formula method used by respondent to estimate taxable income, Appellant has the burden of proof to show that he is entitled to his claim and he cannot assert error and thus shift to the state the burden to justify the tax. (Hall v. Franchise Tax Board, supra.) Even though appellant must have an intimate knowledge of his business affairs he has offered no evidence to establish the amount of his gross income nor has he shown that he has incurred any expenses that are unrelated to income from illegal activities. Accordingly, we see no reason to disturb respondent's computation of taxable income.

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*Advance Report Citation: 244 A.C.A. 968

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,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to section 19060 of the Revenue and Taxation Code, that the deemed disallowance by the Franchise Tax Board of the claims of Bruce A. and Gylberta I. Thomas for refund of personal income tax totaling $1,710.96 for the year 1953 be and the same is hereby sustained,

Done at Sacramento, California, this 10th day of May, 1967, by the State Board of Equalization.

_____, Chairman

_____, Member

_____, Member

_____, Member

_____, Member

ATTEST: _____, Secretary