BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
PAUL JOSEPH KELNER)

For Appellant: Kenneth R. Thomas
Attorney at Law

For Respondent: Jon Jensen
Counsel

O P I N I O N

This appeal is made pursuant to section 18646 of the Revenue and Taxation Code from the action of the Franchise Tax Board in denying the petition of Paul Joseph Kolner for redetermination of a jeopardy assessment of additional personal income tax in the amount of $12,892.00 for the period January 1, 1978, through March 1, 1978.

The sole issue of this appeal is whether respondent's jeopardy assessment was reasonble.

The facts forming the basis of the jeopardy assessment are as follows. On March 1, 1978, the Los Angeles County Sheriff's Department received information that appellant Paul Joseph Kelner was involved in the trafficking of narcotics between Miami and Los Angeles. The Sheriff's Department determined that appellant was due to arrive later that day in Los Angeles from Miami on a commercial flight at about 8:00 p.m. Appellant was observed arriving on said flight and, after his suitcase had been identified as one containing drugs by a police dog trained to locate drugs by smell, he was detained. Appellant was carrying $60,000 in cash on his person, $30,000 or so hidden in each of his socks, and had an additional $66,300 in his suitcase. The suitcase also contained a diminimus amount of marijuana. Appellant was asked to explain the large amount of cash, and the arrest report shows that he denied knowing about the money.

Respondent Franchise Tax Board was notified of appellant's arrest and the circumstances involved. On the basis of the above circumstances, respondent computed appellant's income at $128,300 for the first two months of 1978 ($126,300 [1] plus $1,000 per month living expense for two months), terminated his tax year, and issued a jeopardy assessment in the amount of $13,213.

Respondent's records disclosed that appellant had neither filed California tax returns in any of the six years immediately preceding 1978 nor paid tax in any of those years. Additionally, reference to other government records disclosed that appellant had been arrested on charges of possessing cocaine for sale and lesser charges on October 25, 1975. Although those charges were eventually dropped, the record shows that appellant was, at the time of that arrest, in possession of cocaine and hashish, as well as $2,405 in cash.

1/ The police report indicates that appellant was arrested with $126,305. However, respondent has at all times used the $126,300 amount. For purposes of this appeal, the correct amount will be considered to be $126,300.

Charges resulting from the March 1, 1978, arrest were also eventually dropped, and in April 1978, appellant filed a petition for reassessment of respondent's assessment. Along with the petition for reassessment, appellant submitted a 1978 income tax return. The return stated that appellant's January 1-March 1, 1978, income was $2,000 and that his occupation was "service." The return contained no other information. Respondent applied the standard deduction and exemption credit provisions and modified its assessment from $13,213 to $12,892. Appellant appealed.

California law, which is substantially similar to comparable federal law, provides that if respondent Franchise Tax Board finds that either the assessment or the collection of tax may be jeopardized by delay, it may mail or issue notice of the finding to the taxpayer with a demand that the tax or deficiency declared to be in jeopardy be paid immediately. (Rev. & Tax. Code, § 18641.) Respondent may also declare the taxable period of the taxpayer immediately terminated and demand the tax due for that period. (Rev. & Tax. Code, § 18642.)

Both the federal and state income tax regulations require each taxpayer to maintain such accounting records as will enable him to file a correct return. (Treas. Reg. § 1.446-1(a)(4); Cal. Admin. Code, tit. 18, reg. 17561, subd. (a)(4).) If the taxpayer does not maintain such records, the taxing agency is authorized to compute his income by whatever method will, in its opinion, clearly reflect income. (Int. Rev. Code of 1954, § 446, subd. (b); Rev. & Tax. Code, § 17561, subd. (b).) The existence of unreported income may be demonstrated by any practical method of proof that is available. (Davis v. United States, 226 F.2d 331 (6th Cir. 1955); Appeal of John and Codelle Perez, Cal. St. Bd. of Equal., Feb. 16, 1971.) Mathematical exactness is not required. (Harold E. Harbin, 40 T.C. 373, 377.) Furthermore, a reasonable computation, or reconstruction, of income is presumed correct, and the taxpayer bears the burden of proving it erroneous. (Breland v. United States, 323 F.2d 492, 496 (5th Cir. 1963); Appeal of Marcel C. Robles, Cal. St. Bd. of Equal., June 28, 1979.) -The presumption is rebutted, however, where the computation, or reconstruction, is shown to be arbitrary and excessive or based on assumptions which are not supported by the evidence. (Shades Ridge Holding Co., Inc., ¶ 64,275 P-H Memo. T.C., affd. sub nom. Fiorella v. Commissioner, 361 F.2d 326 (5th Cir. 1966).)

Preliminarily, we note that several of appellant's arguments in this matter are based on constitutional objections. However, appellant admits being aware of this board's policy against deciding constitutional questions and of article III, section 3.5, of the California Constitution by which the board, and other administrative agencies, are generally prohibited from declaring state statutes unconstitutional or unenforceable for constitutional reasons. Appellant's purpose inincluding his constitutional arguments herein is to preclude it being said subsequently that he waived such grounds impliedly or in fact. Acknowledging the limited purpose for which appellant has included his constitutional arguments,. but refraining from considering them for the above stated reasons, we turn our attention to the remaining arguments posed by appellant.[2/]

The first of appellant's remaining arguments is that the jeopardy assessment was determined by reference to an amount of money obtained as the result of an illegal search 'and seizure. The argument is ill-founded. In the first instance, it has not been established that the search and seizure involved in this case was determined illegal. Secondly, even if such determination had been made, respondent is allowed to take cognizance of the fruits of an illegal search in order to-determine tax liability. (See Horack v. Franchise Tax Board, 18 Cal. App. 3d 363 [95 Cal. Rptr. 717] (1971); Appeal of Marcel C. Robles, supra.)

Appellant next argues that the finding of jeopardy should be reversed for lack of basis in fact. We disagree. First of all, it is not clear that a jeopardy assessment is subject to review. In Perez; supra, it was stated that the decision to issue a jeopardy assessment is a matter left within the broad discretion of the Franchise Tax Board. In any event, a finding of jeopardy is suppor'ted by the facts. Appellant's arrest occurred because of suspicions he was trafficking in narcotics. He was arrested in possession of a large amount of cash, $126,300, and'a small amount of marijuana. Moreover, he had been arrested in 1975 on charges of possession of drugs for sale, and in that

2/ In any event, jeopardy assessments are constitutionally permissible. (Dupuy v. Superior Court, 15 Cal. 3d 410 (124 Cal. Rptr. 900, 541 P.2d 540] (1975).)

earlier arrest, he was in possession of substantial amounts of narcotics and cash. At the time of the 1978 arrest, he denied knowing about the $126,300, even though he had transported it across the country and had concealed half of it immediately next to his skin. Appellant did not provide any explanation for his possession of the cash, nor any meaningful information about his financial affairs. Moreover, appellant did not file any tax returns, much less pay any tax, for any of the six years immediately preceding 1978. On the basis of these facts, it is apparent to us that the instant jeopardy assessment was "reasonable under the circumstances." (See Ericksen v. United States, 45 Am. Fed. Tax R.2d 80-1053; also see McAvoy v. Internal Revenue Service, 475 F. Supp. 297 (W.D. Mich. 1979).)

Appellant's last argument is that the amount of the assessment is arbitrary and excessive. The argument is without merit. It is an undeniable fact that appellant had $126,300 in cash with him when he was arrested. The suspicions which led to both of his arrests strongly indicate that he was engaged in activities which could generate $126,300 income. Moreover, there is a complete absence of other information suggesting any other income producing activity. In Hague Estate v. Commissioner, 132 F.2d 775 (2nd Cir. 1943), parallel circumstances were considered sufficient to support an assessment based on bank deposits. Since bank deposits and cash are equivalent, the assessment herein is amply supported. Furthermore, facts which would result in a more precise computation are completely,within the appellant's control and the burden is upon him to produce them. Since he has not done so, the assessment must be upheld. (Breland, supra.)

O R D E R

Pursuant to the views expressed in the opinioh of the board on File in this proceeding, and good cause appear inq there for,

I?' IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to section 18595 of the Revenue and Taxation Code, that the action of the Franchise Tax Board in denying the petition of Paul Joseph Kclner for redetermination of personal income tax in the amount of $12,892.00 for the period January 1, 1978, through March 2, 1978, be and the same is hereby sustained.

Done at Sacramento,, California, this 30th day of September, 1980, by the State Board of Equalization.

_____, Chairman

_____, Member

_____, Member

_____, Member

_____, Member