BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
KAREN TOMKA)

For Appellant: Karen Tomka, in pro. per.

For Respondent: Mark **McEvilly**
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 Karen Tomka for a reassessment of a jeopardy assessment of personal income tax in the amount of $960.00 for the period January 1, 1978, through November 28, 1978.

Appeal of Karen Tomka

The propriety of respondent's determination of appellant's income from the sale of narcotics is the sole issue raised by this appeal.

On September 26, 1978, a confidential informant told a Costa Mesa Police Investigator that appellant Karen Tomka had been selling heroin since her release from jail in August, 1978, and that she normally possessed between 30 and 40 balloons of heroin. The following day, at Costa Mesa police direction, the informant went to appellant's residence and made a purchase of two balloons of heroin from appellant for $50 in state recorded funds. Appellant made the sale from a bag containing about 30 to 40 balloons carried in her brassiere. On September 29, 1978, the informant went to appellant's residence and made another purchase of two balloons of heroin from appellant for $50 in state recorded funds. Appellant made the sale from a bag containing about 30 to 40 balloons which were then stored under a bedroom mattress.

On October 16, 1978, the informant went to appellant's residence and in the presence of several other visitors, made a purchase of two balloons of heroin from appellant for $50 in state recorded funds. Appellant made the sale from a bag containing about 12 balloons which was stored in a pillowcase cover on a living room sofa.

On November 22, 1978, in the course of an entirely independent investigation, the Riverside Police Department made a purchase of four balloons of heroin from appellant for $100. Appellant secured the balloons for this sale from a supplying dealer at a residence a few minutes by automobile away from her own residence. The Costa Mesa Police Department was unaware of the Riverside Police Department investigation. On November 28, 1978, appellant was arrested at her residence by Costa Mesa Police. At that time appellant was carrying six balloons of heroin and $193 in her brassiere and $475 in her wallet. On November.29, 1978, the Costa Mesa Police notified respondent of the above facts, and also that the police estimated appellant had a $100 a day habit cost and sales of $2,100 per week.

Respondent's estimate of appellant's liability for the period August 1, 1978, to November 28, 1978, was reached by calculating appellant's heroin sales at two $25 balloons for each of six daily customers during the 120 day subject period. This resulted in $36,000 in

gross receipts. Respondent estimated a 50 percent cost of goods sold allowance, which resulted in an estimated taxable income for appellant of $18,000 for the period. Respondent also determined that the collection of tax would be jeopardized in whole or in part by delay and on November 29, 1978, issued a $960 jeopardy tax assessment, which is the subject of this appeal.

On December 20, 1978, appellant filed a petition for reassessment of the tax, She stated that she had not made $18,000, that the money taken from her by the police was part of a loan from her sisters, and that she had been in jail until August 15, 1978. In a financial statement appellant later filed with respondent, appellant claimed to have had no income or expenses for the period January 1, 1978, to November 28, 1978.

The California Personal Income Tax Law requires a taxpayer to state specifically the items and amount of his gross income during the taxable year. Gross income includes all income from whatever source derived unless otherwise provided in the law. (Rev. & Tax. Code, § 17071.) Gross income includes gains derived from illegal activities, including the illegal sale of narcotics, which must be reported on the taxpayer's return. (United States v. Sullivan, 274 U.S. 259 [71 L.Ed. 10371 (1927); Farina v. McMahon, 2 Am.Fed.Tax. R.2d 5918 (1958).)

Every taxpayer is required to maintain accounting records that will enable the taxpayer to file an accurate return. (Cal. Admin. Code, tit. 18, reg. 17561, subd. (a)(4).) In the absence of such records, the Franchise Tax Board is authorized to compute income by whatever method will, in its opinion, clearly reflect the income. (Rev. & Tax. Code, § 17561, subd. (b); Breland v. United States, 323 F.2d 492 (5th Cir. 1963); Harold E. Harbin, 40 T.C. 373 (1963); Appeal of John and Codelle Perez, Cal. St. Bd. of Equal., Feb. 16, 1971.)

The determination of a deficiency by the taxing authority is presumed correct, and the burden is on the taxpayer to prove that the correct income was an amount less than that on which the deficiency assessment was based. (Kenney v. Commissioner, 111 F.2d 374 (5th Cir. 1940); Appeal of John and Codelle Perez, supra.) No particular method of reconstructing income is re-

quired, since the circumstances will vary in individual cases. (Harold E. Harbin, supra.) The existence and amount of unreported income may be demonstrated by any practical method of proof that is available. (See, e.g., Davis v. United States, 226 F.2d 331 (6th Cir. 1955); Agnellino v. Commissioner, 302 F.2d 797 (3rd Cir. 1961); Isaac T. Mitchell, ¶68,137 P-H Memo. T.C. (1968), affd., 416 F.2d 101 (7th Cir. 1969); Appeal of John and Codelle Perez, supra; Appeal of Walter L. Johnson, Cal. St. Bd. of Equal., Sept 17, 1973.)

'The presumption of correctness is rebutted, however, where the reconstruction is shown to be arbitrary and excessive or based on assumptions which find no support in the records. (Shades Ridge Holding Co., Inc., 164,275 P-H Memo. T.C. (1964), affd. sub nom. Fiorella v. Commissioner, 361 F.2d 326 (5th Cir. 1966). In such a case the reviewing authority may revise the computation on the basis of all the available evidence without regard to the presumption of correctness. (Shades Ridge Holding Co., Inc., supra; Appeal of David Leon Rose, Cal. St. Bd. of Equal., March 8, 1976.)

In this case, the average rate of sales postulated by respondent is reasonable in the light of the facts in the record. The police authorities had instigated a number of heroin purchases from appellant without difficulty during and after the period. The transactions were handled by appellant with dispatch. Considering the closeness and apparent availability of "appellant's supplier, appellant appeared to have maintained possession of a sufficient stock of heroin bagged for sale to support respondent's projected rate of daily sales. The police investigators who had investigated appellant had estimated appellant's own daily drug use cost and had estimated appellant's weekly gross receipts from sales at amounts which support respondent's assessment. Appellant has not offered any evidence or rationale which would tend to demonstrate that respondent's conclusions were unreasonable. Appellant simply denied having any taxable income during the assessed period.

Respondent's estimated total sales amounts are the result of a projected rate of sales made from August 1, 1978, to November 28, 1978. Respondent now recognizes that appellant was in jail during the August 1 to August 15 period and so could make no sales during that time. Respondent has requested the Board to accept

the assessed tax as the properly determined amount due from appellant for the period August 15, 1978, through December 31, 1978, because on December 4, 1978, a Riverside police officer, operating without knowledge of appellant's recent arrest by the Costa Mesa police, purchased four balloons of heroin from appellant for $100. Appellant immediately secured the heroin for this sale from her supplier who lived near her residence. Then, on December 27, 1978, appellant was arrested by the City of Orange police in a shoplifting incident in a department store. At the time of the arrest, appellant possessed ten balloons of heroin.

Respondent's authority to issue the jeopardy assessment and to terminate the taxable period of appellant is conferred by Revenue and Taxation Code sections 18641 and 18642, respectively. Respondent terminated the period covered by the jeopardy assessment on November 28, 1978. Respondent's decision to issue the assessment for that period is not subject to review by this board. (Appeal of John and Codelle Perez, supra.) That leaves for our consideration only the question of the propriety of the deficiency actually determined by respondent for the period of the assessment. We must find that the assessment was excessive to the extent it attributed $300 a day in sales and $150 a day in income to appellant for the first 15 days of the period. Therefore, respondent's estimate of income for the August 1, 1978, to November 28, 1978, of $18,000 should be reduced by $2,250 to $15,750.

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 18595 of the Revenue and Taxation Code, that the action of the Franchise Tax Board in denying the petition of Karen Tomka for a reassessment of a jeopardy assessment of personal income tax in the amount of $960.00 for the period January 1, 1978, through November 28, 1978, be and the same is hereby modified in accordance with this opinion. In all other regards, the action of the Franchise Tax Board is sustained.

Done at Sacramento, California, this 19th day of May, 1981, by the State Board of Equalization, with all Board members present.

Ernest J. Dronenburg, Jr., Chairman

George R. Reilly, Member

William M. Bennett, Member

Richard Nevins, Member

Kenneth Cory, Member