

BEFORE THE STATE **BOARD** OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the **Appeal of)**
JOHN C. AND ELIZABETH R. FULTON)

For Appellants: John C. Fulton,
in pro. per.

For Respondent: Jon Jensen
Counsel

O P I N I O N

This appeal is made pursuant to section 18593 of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protest of John C. and Elizabeth R. Fulton against proposed assessments of additional personal income tax and penalties in the total amounts of \$640.35 and **\$1,543.33** for the years 1976 and 1977, respectively.

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As respondent is now prepared to withdraw the penalty assessments amounting to \$213.45 and \$514.44 for the years **1976** and 1977, respectively, the sole issue to be decided here is whether respondent's reconstruction of appellants' income was **reasonable**.

In April of 1976, appellant John C. Fulton (hereinafter "appellant") and Vincent Carrano purchased Bullion Metals International, Ltd. (hereinafter "BMI") and Swiss Vaults, Inc. (hereinafter "Swiss Vaults"). BMI was engaged in the business of selling precious metals, while Swiss Vaults was engaged in the business of storing such precious metals. In July of 1977, it was revealed that appellant and Carrano had been systematically embezzling funds and precious metals from these two corporations. As a consequence, each individual was tried for and convicted of embezzlement. In the course of the criminal proceedings, it was discovered that appellants' 1976 and 1977 California income tax returns did not include the embezzled funds as income. However, based on the books, records and financial statements of BMI, as well as appellant's and Carrano's bank records, the district attorney's office prosecuting the cases reported to respondent that appellant and Carrano had misappropriated approximately one million dollars. Relying upon detailed accounting records and testimony developed at the trial, respondent's examination of appellant's activities resulted in the following computations:

	<u>1976</u>	1977
Unexplained bank deposits	\$ 9,815.90	\$ 7,508.58
BMI checks payable to appellant	--	1,236.80
BMI checks payable to cash	1,500.00	10,675.00
Personal expenses of appellant paid by BMI	946.35	2,240.81
Total unreported income	\$12,262.25	\$21,661.19

Respondent issued proposed assessments based upon these figures. Appellants protested the assessments and respondent's denial of that protest led to this appeal.

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Respondent's authority to reconstruct a taxpayer's income is found in section 17561, subdivision (b), of the Revenue and Taxation Code, which states:

If no method of accounting has been regularly used by the taxpayer, or if the method used does not clearly reflect income, the computation of taxable income shall be made under such method as, in the opinion of the Franchise Tax Board, does clearly reflect income.'

It is not-necessary that mathematical exactness be achieved (Harold E. Harbin, 40 T.C. 373 (1963)), but the reconstruction will be presumed correct only if it is reasonable and is based on assumptions which are supported by the evidence. (Shades Ridge Holding Co., Inc., ¶ 64,275 P-H Memo. T.C. (1964), affd. sub nom., Fiorella v. Commissioner, 361 F.2d 326 (5th Cir. 1966); Appeal of David Leon Rose, Cal. St. Bd. of Equal., March 8, 1976.) Appellant has the burden of proving that respondent's computation was incorrect (Breland v. United States, 323 F.2d 492 (5th Cir. 1963)), and that the correct income is an amount less than that on which the deficiency assessment was based; (Kenney v. Commissioner, 111 F.2d 374 (5th Cir. 1940); Appeal of Marcel C. Robles, Cal. St. Bd. of Equal., June 28, 1979; Appeal of John and Codelle Perez, Cal. St. Bd. of Equal., Feb. 16, 1971.)

Here, the district attorney's investigation indicated that appellant had received substantial amounts in corporate funds and that he had diverted those funds to his own use. The record indicates that, based on this investigation, appellant was convicted of embezzlement. In our opinion, this conviction creates at least prima facie evidence that appellant received taxable income in the amounts indicated. (See Appeal of Eli A. and Virginia W. Allec, Cal. St. Bd. of Equal., Jan. 7, 1975.) As no rebutting evidence has been offered here, the conviction is proof that appellant did receive such income. (Appeal of Robert C. Sherwood, Deceased, and Irene Sherwood, Cal. St. Bd. of Equal., Nov. 30, 1965.)

Appellant asserts that he is entitled to unspecified business deductions which allegedly exceed the amount of unreported income. However, the only evidence presented by appellant is a vague declaration by his associate in crime, Vincent Carrano, whose credibility is questionable at best.. Since appellant bears the burden of proving that he is entitled to the deductions claimed, we must hold for respondent.

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For the above reasons, . respndent's action
with respect to the proposed assessments of **additional**
tax will be sustained.

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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 18.595 of the Revenue and Taxation Code, that the action of the Franchise Tax Board on the protest of John C. and Elizabeth R. Fulton against proposed assessments of additional personal income tax and penalties in the total amounts of \$640.35 and **\$1,543.33** for the years 1976 and 1977, respectively, be and the same is hereby modified in accordance with the concessions made by the Franchise Tax Board. In all other respects, the action of the Franchise Tax Board is sustained.

Done at Sacramento, California, this 5th day of April, 1983, by the State Board of Equalization, with Board Members Mr. Bennett, Mr. Collis, Mr. Dronenburg, Mr. Nevins and Mr. Tiarvey present.

William M. Eennett, Chairman
Conway Li. Collis, Member
Ernest J. Dronenburg, Jr., Member
Richard Nevins, Member
Walter Harvey*, Member

*For Kenneth Cory, per Government Code Section 7.9