BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
ROBERT ABRAHAM RUBIN)

Appearances:

For Appellant: Robert Abraham Rubin, in pro. per.

For Respondent: Kathleen M. Morris 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 Robert Abraham Rubin for reassessment of a jeopardy assessment of personal income tax and penalty in the total amount of $11,608.00 for the year 1976.

The following issues are presented by this appeal: (i) whether appellant received unreported. income from "fencing" stolen property; (ii), if so, whether respondent properly concluded'that appellant had $105,522.00 in taxable income from this illegal activity during the period, in issue; (iii) whether this board may consider hearsay evidence in this proceeding; and (iv) whether respondent was precluded from issuing the subject jeopardy assessment because of an agreement by and between the Los Angeles District Attorney and appellant granting the latter immunity from criminal prosecution. In order to properly consider these issues, the relevant facts concerning the issuance of the subject jeopardy assessment are set forth below. The following is a compilation of data derived from police reports, recorded conversations conducted by law enforcement authorities with appellant and one of his associates, court testimony from the criminal proceeding arising out of the robbery discussed below, and the factual summary contained in the brief of the Los Angeles District.Attorney in a proceeding against appellant.

The burglary which forms the subject matter of this appeal took place on February 25, 1976, at the home of Mr. and Mrs. Henry Salvatori. A review of the police report taken soon after the robbery reveals that the stolen property included $950 in currency and $462,150 in property, including $250,000 in silverware and $200,000 in jewelry. Immediately after committing the robbery, one J. E. Bowell and one Ray Knaeble went to appellant's residence with the stolen property. Appellant, in a recorded conversation conducted on March 23, 1976, acknowledged to officials of the Los Angeles Police Department (LAPD) that he had been fencing property stolen by Bowell for six to eight months prior to the Salvatori robbery. The two men examined the Salvatori property and agreed that Bowell would receive $10,000 after appellant had disposed of the goods. From newspaper accounts published the following day, Bowell learned that the Salvatori property was worth from $450,000 to $500,000, 'and thereafter demanded that he be paid more than $10,000. Bowell later testified that he requested $30,000; appellant, in the aforementioned recorded conversation, stated that Bowell demanded $75,000.

The record of this appeal reveals that appellant later gave two conflicting stories to law enforcement authorities with respect to the next episode concerning the stolen property. First, appellant stated

that he contacted an individual knowri to him as "Larry" regarding the purchase o.f the property. Appellant, Bowell, and "Larry" were to take the merchandise to a location in Beverly Hills and then proceed to the Malibu area where they would meet 'Larry's" father. During this trip, "Larry," allegedly to appellant's surprise, struck, Bowell with a pipe. Bowell escaped, but appellant was forced at gunpoint to drive "Larry" to the Hollywood area, where 'Larry' departed with the jewelry and the vehicle.

Allegedly cooperating with the police, appellant directed them on a search for "Larry" and the jewelry for a period of three days before admitting that "Larry was really one Martin Kenneth Bak. After admitting to the officers that the above version of the events was untruthful, appellant stated that he and Bak, a "fence" from Chicago, had agreed to represent to Bowell that Bak's father was a potential purchaser of the silverware. Appellant and Bak planned to render Bowell unconscious on the way to see Bak's father and then murder him and dispose of his body. Their plot failed, however, and Bowell escaped.

After the unsuccessful murder plot, appellant went into hiding in fear of retaliation from Bowell. According to appellant, Jack and Chris Connell, both known burglars and acquaintances of appellant and Bak, then transported the Salvatori property to Chicago where Bak was supposed to make arrangements for its sale. The police investigation of the subject episode casts doubt upon this story in light of the fact that fences normally do not entrust others to dispose of property in the hope of later sharing in the proceeds unless they are well acquainted; extensive investigation revealed no previous connection between appellant and Bak.

On March 9, 1976, police investigators met with an informant who related to them that he had recently conversed with a friend, a burglar specializing in jewelry, who stated that the Salvatori property had been given to appellant for disposal. This was the first indication that appellant was involved in the Salvatori affair, and the investigators began an inquiry into appellant's background and his current activities. This inquiry revealed, inter alia, that appellant had reported a burglary at his residence on March 1, 1976; further investigation disclosed that Bowell was the perpetrator of this burglary.

As noted above, appellant went into hiding after the unsuccessful attempt on Bowell's life; appellant permitted Frank and Susan Georgianni to move into his residence. On March 17, 1976, Bowell and Knaeble, both armed, broke into appellant's home looking for him. Upon finding that he had left, they kidnapped the Georgianni couple with the expectation that they would lead them to appellant. Before releasing the Georgiannis, Bowell and his partner related to them.that appellant had absconded with the Salvatori property and had failed to pay them for the merchandise.

On the following day, appellant contacted the police to inquire about the status of the investigation into the March 1, 1976, burglary of his home. While inquiring about this matter, he learned about the Georgianni kidnapping. This incident intensified appellant's fear of Bowell, and he decided to make a deal with the police in exchange for protection. That evening a meeting was conducted at the LAPD West Los Angeles station; present were appellant, his attorney, and three LAPD officials. During the course of the ensuing conversation, an oral agreement was reached whereby appellant was to: (i) assist in the recovery of the Salvatori property; (ii) reveal his total involvement in the Salvatori case; and (iii) testify accordingly in fiuture criminal proceedings. In exchange, Rubin would be granted complete immunity from criminal prosecution for any violation of the law that he might have committed up to that time; he would also receive police protection. The grant of immunity from prosecution was contingent upon appellant's performance of his part of the agreement.

Upon arriving at the above agreement, appellant related to LAPD officers the two conflicting stories set forth above with respect to Bak and the attempt to eliminate Bowell. After it was discovered that appellant's first story regarding the disposition of the Salvatori property was false, and after he had disclosed his part in the scheme to murder Bowell, appellant was subjected to a polygraph examination on April 9, 1976. Appellant was apparently questioned with respect to information he had related to the LAPD, including the then current whereabouts of the Salvatori jewelry. When appellant responded, inter alia, by stating that the jewelry was in Chicago with Bak, he failed the polygraph examination. Confronted with this result, appellant stated that: he had failed the examination because he knew where one piece of jewelry was located. He then took the police to the backyard of his residence and uncovered one

diamond earring he had hidden; the earring was valued at $4,000. Since he had returned the piece of jewelry which he claimed had caused him to fail the polygraph examination, appellant was asked to repeat the test; he refused.

On March 19, 1976, Bak, now in Chicago, contacted a Mr. O'Donnell, a local attorney, and retained him with respect to the Salvatori case. The attorney thereafter contacted the Chicago office of the Federal Bureau of Investigation, advised that office that his client might be the focal suspect in a major Los Angeles area burglary, and requested the F.B.I. to inform him as to the status of the LAPD investigation. On or about March 24, 1976, LAPD officials contacted Mr. O'Donnell and advised him that they were investigating the Salvatori case and were very interested in seeing that the stolen property was returned; two LAPD officers thereafter left for Chicago. Upon their arrival, Mr. O'Donnell notified the officers that an agreement on their part not to prosecute was insufficient because of possible federal violations. Accordingly, a meeting .was conducted on March 26, 1976, between the LAPD investigators, three assistant United States Attorneys, two F.B.I. agents, the Chief of the Criminal Division of the U.S. Attorney General's office for the Northern District of Illinois, and Mr. O'Donnell. An agreement was ultimatsly reached betweenthese parties that there would be no prosecution of Bak arising out of his involvement in the Salvatori case if he: (i) returned the Salvatori property in his possession; and (ii) made a statement with respect to his involvement in the affair. The federal authorities added the proviso that Bak return all of the stolen property in his possession that very day. Later that day, Bak delivered eight or nine moving-carton-sized boxes of silverware to law enforcement authorities; he later returned a small bag containing a gold chain, three rosaries, and four watches. It has not been established that the latter items constituted part of the Salvatori jewelry. Bak also informed the LAPD investigators that his only involvement with the Salvatori case had been with the silverware, and that appellant had retained the jewelry.

Bowell and Knaeble were arrested on March 25, 1976, and admitted to having committed the Salvatori robbery. Bowell informed the investigators that he had been acquainted with appellant for several years, and that appellant had been his conduit for disposing of stolen property since 1975. This latter statement is

consistent with appellant's admission that he had been fencing goods stolen by Bowell for eight or nine months prior to the Salvatori burglary. Bowell and Knaeble cooperated in the recovery of some of the property taken in the Salvatori case. Bowell's statements about appellant's fencing activities also assisted the police in solving a number of other robberies committed during the period in issue.

On April 27, 28, and 29, 1976, appellant testified at the preliminary hearing against Bowell and Knaeble regarding the March 1, 1976, burglary of his house, but not with respect to the Salvatori or other burglaries. During this period, the police decided to encourage the District Attorney to prosecute appellant because of what they determined to be his failure to fully abide by the terms of the above described immunity agreement. On June 30, 1976, appellant went to Israel taking 25 pieces of luggage; he returned to Los Angeles approximately one month later after the police began to process a warrant for his arrest. On October 22, 1976, the Los Angeles District Attorney filed an information in Superior Court charging appellant with receiving stolen property and conspiracy to commit murder; appellant pled not guilty to these charges. Based upon the oral agreement with the LAPD, and in view of what the court concluded had been appellant's substantial compliance in accordance therewith, the court determined that appellant was immune from prosecution.

Based upon the above, respondent determined that appellant's fencing activities had resulted in unreported taxable income for the period January 1 through March 30, 1976, and that the circumstances indicated that collection of his personal income tax for the period in issue would be jeopardized by delay. Based upon the then known facts, a jeopardy assessment reflecting tax liability of $26,600 was issued on March 30, 1976.

Upon receipt of appellant's petition for reassessment of the jeopardy assessment, respondent requested that he furnish the information necessary to enable it to accurately compute his income, including income from fencing stolen property. In addition to completing respondent's financial questionnaire, appellant filed a timely 1976 California personal income tax return indicating adjusted gross income of $4,805.. On the financial questionnaire, appellant claimed that he had realized gross income of $4,805 in 1976 from rental

property and that his living expenses were in excess of $10,000. Appellant made no attempt to reconcile the fact that he was the owner of an expensive home, a new Cadillac convertible, and had approximately $20,000 in liabilities from revolving charge accounts, with his allegedly meager income. Appellant disclosed no income from fencing activities, despite his admission that he had been selling property stolen by Bowell during the appeal period. In the course of its review of the documentation submitted by appellant, respondent also received additional information from the LAPD regarding the burglaries in which appellant had acted as the fence. This documentation revealed that a total of $553,070 had been stolen, of which $211,045 was never recovered, including $163,100 from the Salvatori robbery. The $211,045 figure represents the cost or insured value of the stolen property, not its fair market value.

In order to compute the income a fence would receive from selling jewelry of the type stolen in the Salvatori burglary, respondent contacted Mr. Doug Haskin, a former gem wholesaler, and then a LAPD gem valuation expert. Mr. Haskin informed respondent that a fence would normally sell such jewelry for 25 percent of its fair market value. Merchandise sold directly to its ultimate purchaser could be sold for 100 percent of its fair market value. The record of this appeal indicates that appellant stated he disposed of stolen merchandise through the latter type of sale. Mr. Haskin also stated that the fair market value of the Salvatori jewelry would have doubled from 1970 to 1975. Information supplied by Henry Salvatori revealed that approximately 50 percent of the unrecovered jewelry had been purchased prior to 1971. Based upon the above, respondent computed that appellant had disposed of the unrecovered property for 25 percent of its current fair value, thereby arriving at unreported taxable income to appellant from the illegal sale of stolen property in the amount of $105,522. Respondent thereafter revised its jeopardy assessment in accordance with this computation, and added thereto a five percent negligence penalty for appellant's failure to properly report his income. This appeal followed.

Tne initial question with which we are presented is whether appellant received any income from fencing activities during the appeal period. The LAPD investigative report, which contains references to appellant's actions and activities, appellant's own admissions with respect to his fencing operation, the confessions of Bowell and Bak, the jewelry uncovered at

appe'llant's residence, and the corroborating statements of the reliable informant referred to above establish at least a prima facie case that appellant received unreported income from the illegal sale of stolen merchandise, including the Salvatori jewelry.

The second issue is whether respondent properly reconstructed the amount of appellant's taxable income from fencing. Under the California Personal Income Tax Law, taxpayers are required to specifically state the items of their gross income during the taxable year. (Rev. & Tax. Code, § 18401.) As in the federal income tax law, gross income is defined to include "all income from whatever source derived," unless otherwise provided in the law. (Rev. & Tax. Code, § 17071; Int. Rev. Code of 1954, § 61.) Specifically, gross income includes gains derived from illegal activities. (United States v. Sullivan, 274 U.S. 259 [71 L.Ed.. 1037) (1927); Farina v. McMahon, '2 Am.Fed.Tax R.2d 5918 (1958).)

Each taxpayer is required to maintain such accounting records as will enable him to file an accurate return. (Treas. Reg. 1.446-1(a)(4); Former Cal. Admin. Code, tit. 18, reg. 17561, subd. (a)(4), repealed July 25, 1981, Register 81, No. 26.) In the absence of such records, the taxing agency is authorized to compute a taxpayer's income by whatever method will, in its judgment, clearly reflect income. (Rev. & Tax. Code, § 17651, subd. (b); Int. Rev. Code'of 1954, § 446(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 (1963).) Furthermore, a reasonable 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.) Appellant also bears the burden of establishing as erroneous respondent's assessment of the negligence penalty. (Appeal of K. L. Durham, Cal. St. Bd. of Equal., March 4, 1980.)

In the instant appeal, respondent used the projection method of reconstructing appellant's income from illegal fencing. Like any method of reconstructing income, the projection method is somewhat speculative. For example, it may rest on a hypothesis that the amount of income during a base period is representative of the

level of income throughout the entire projection period. (Cf. Pizzarello v. United States, 408 F.2d 579 (2d Cir.), cert. den., 396 U.S. 986 [24 L.Ed.2d 450] (1969).)

It has been recognized that a dilemma confronts the taxpayer whose income has been reconstructed. Since he bears the burden of proving that the reconstruction is erroneous (Breland v. United States, supra), the taxpayer is put in the position of having to prove a negative, i.e., that he did not receive the income attributed to him. In order to ensure that such a reconstruction of income does not lead to injustice by forcing the taxpayer to pay tax on income he did not receive, the courts and this board require that each element of the reconstruction be based on fact rather than on conjecture. (Lucia v. United States, 474 F.2d 565 (5th Cir. 1973); Appeal of Burr McFarland Lyons, Cal. St. Bd. of Equal., Dec. 15, 1976.) Stated another way, there must be credible evidence in the record which, if accepted as true, would "induce a reasonable belief" that the amount of tax assessed against the taxpayer is due and owing. (United States v. Bonaguro, 294 F.Supp. 750, 753 (E.D.N.Y. 1968), affd. sub nom., United States v. Dono, 428 F.2d 204 (2d Cir. 1970).) If such evidence is not forthcoming, the assessment is arbitrary and must be reversed or modified. (Appeal of Burr McFarland Lyons, supra; Appeal of David Leon Rose, Cal. St. Bd. of Equal., March 8, 1976.)

Respondent utilized information obtained as a result of the exhaustive police investigation, together with the other sources referred to above, in reconstructing appellant's fencing-related income. Specifically, respondent determined that: (i) appeilant had fenced $211,045 in stolen merchandise; (ii) that the profit realized from the Salvatori jewelry (approximately 77.25 percent of the aforementioned $211,045) was representative of the profit earned from the sale of property stolen in other burglaries; (iii) appellant sold this merchandise at 25 percent of its current fair market value; and (iv) the property sold had doubled in value from the time it had been purchased by its owners until it was stolen.

We believe that the record of this appeal, as summarized above, supports the reasonableness of each of the four elements of respondent's reconstruction formula. The third and fourth elements are based upon reliable law enforcement information of the sort that this board has previously used in cases of this type and require no further discussion. (Appeal of Gduardo L. and Leticia

Raygoza, Cal. St. Bd. of Equal., July 29, 1981.). The second factor is reasonable in view of the fact that the Salvatori jewelry comprised the lion's share, over 77 percent, of the total stolen property upon which appellant's income was based. Finally, in view of appellant's admission that he had long been fencing property stolen by Bowell, the fact that some of the Salvatori jewelry was found at his residence, and because the record of this appeal discloses that appellant was the last person to have the Salvatori jewelry and that he negotiated with Bowell with respect to the latter's share of the proceeds from the Salvatori burglary, we conclude that respondent properly determined that appellant did sell the jewelry and other goods. Indeed, this is a conservative assumption; had appellant merely retained the stolen merchandise, he would have been liable for tax on 100 percent of its fair market value.

Again, we emphasize that when a taxpayer fails to comply with the law in supplying the required information needed to accurately compute his income, and respondent finds it necessary to reconstruct the taxpayer's income, some reasonable basis must be used. Respondent must resort to various sources of information to determine such income and the resulting tax liability. In such circumstances, a reasonable reconstruction of income will be presumed correct, and the taxpayer has the burden of proving it erroneous. (Breland v. United States, supra; Appeal of Marcel C. Robles, supra.) Mere assertions by the taxpayer are not enough to overcome that presumption. (Pinder v. United States, 330 F.2d 119 (5th Cir. 1964).) Given appellant's failure to provide any evidence challenging respondent's reconstruction of his income from fencing, we must conclude that respondent reasonably reconstructed the amount of such income, and that the negligence penalty was properly assessed.'

Appellant has argued that the jeopardy assessment should not be sustained since it was determined, in part, by hearsay evidence. The identical contention was addressed and rejected in the Appeal of Carl E. Adams, decided by this board on March 1, 1983. There is no reason to reach a different conclusion in this appeal. Appellant's position that the aforementioned agreement granting him immunity from criminal prosecution precluded respondent's issuance of the subject jeopardy assessment is equally without merit. Respondent was not a party to that agreement, and, in any event, the agreement merely granted appellant immunity from criminal prosecution;

appellant's income tax liability is a civil matter. (See 55 ops. Cal. Atty. Gen. 289.)

For the reasons set forth above, respondent's action in this matter will be sustained.

Appeal of Robert Abraham Kubin

ORDER

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 Robert Abraham Rubin for reassessment of a jeopardy assessment of personal income tax and penalty in the total amount of $11,608.00 for the year 1976, be and the same is hereby sustained.

Done at Sacramento, California, this 21st day of June, 1983, by the State Board of Equalization, with Board Members Mr. Bennett, Mr. Collis, Mr. Dronenburg and Mr. Nevins present.

William M. Bennett, Chairman

Conway H. Collis, Member

Ernest J. Dronenburg, Member

Richard Nevins, Member

_____, Member