BEFORE THE STATE BOARD OF EQUALIZATION

OF TEE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
CARMINE T. PRENESTI)

Appearances:

For Appellant: John T. Trevino
Attorney at Law

For Respondent: Philip M. Farley
Counsel

O P I N I O N

This appeal is made pursuant to section 18646[1/] of the Revenue and Taxation Code from the action of the Franchise Tax Board in denying the petition of Carmine T. Prenesti for reassessment of a jeopardy assessment of personal income tax in the amount of $47,540 for the taxable period January 1, 1981, to December 21, 1981.

1/ Unless otherwise specified, all Section references are to sections of the Revenue and Taxation Code as in effect for the period in issue.

The issues presented for determination in this appeal are as follows: (1) did appellant receive unreported income from illegal bookmaking activities during the appeal period; (2) if he did, did respondent properly reconstruct the amount of that income; and (3) whether respondent is precluded from using evidence obtained in violation of appellant's constitutional rights as the basis for the jeopardy. assessment. In order to properly consider these issues, the relevant facts are set forth below.

Based on information received from a confidential reliable informant and a subsequent 'police surveillance of appellant's residence, the Riverside Sheriff's Department, suspecting appellant of engaging in illegal bookmaking activities, obtained a search warrant. On December 21, 1981, appellant's residence was searched and a tally sheet, several notebooks with listings of bettors, hand-out schedules for bettors which listed hours to call, blank 'playing sheets," and other address books, calendars, and notebooks were seized. As a result of this search, appellant and two other men who were in appellant's residence at the time of the search were arrested.

Upon being notified of appellant's arrest, respondent obtained copies of the materials seized during the search of appellant's home. Respondent determined that collection of appellant's personal income tax for the period January 1, 1981, through December 21, 1981, would be jeopardized by delay. Accordingly, respondent. issued a jeopardy assessment for $144,999.60 on December 25, 1981. The amount of the assessment was based upon the records seized during the search of appellant's home. An analysis of those records revealed that total losses by bettors from wagering between December 18 and December 21 were $94,990. Projection of this weekly income over the fourteen-week period appellant was known to be engaged in bookmaking resulted in respondent attributing $1,325,860 in income to appellant.

Subsequent to the issuance of the jeopardy assessment, the criminal charges against appellant were dismissed because the search was found to have been illegal..

Appellant filed a petition with respondent for reassessment of the jeopardy assessment contending that all civil charges should be dropped against appellant because, due to the illegal search, all criminal-charges

were dismissed. Appellant has reiterated this contention on appeal and, in the alternative, asserts that the total income attributed to bookmaking activities was improperly reconstructed by respondent.

The initial question presented by this appeal is whether appellant received any income from illegal bookmaking activities during the period in question. The affidavit for a warrant and the various reports by Investigator Gary L. Jensen of the Riverside County Sheriff's Department provide that Mr. Jensen was advised by an informant that appellant had-taken a bet on a football game. Appellant's residence was placed under surveillance and men, who were later identified as making a living by gambling, were observed visiting appellant's residence. The subsequent search of 'appellant's home also revealed various items of gambling paraphernalia. We are satisfied, upon reviewing evidence in the record, that respondent has provided at least a prima facie case that appellant received unreported income from illegal bookmaking activities. As appellant has presented no evidence to refute this prima facie showing, we must conclude that he did receive unreported income from illegal bookmaking activities during the appeal period.

The second *issue* is whether respondent properly reconstructed the amount of appellant's income from illegal bookmaking activities. 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), repealer filed June 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, 336 (6th Cir. 1955); Appeal of Carl E. Adams, Cal. St. Bd. of Equal., March 1, 1983.) 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.)

In view of the inherent difficulties in obtaining evidence in cases involving illegal activities, the courts and this board have recognized that the use of some assumptions must be allowed in cases of this sort. (See, e.g., 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.)

It has also 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, supra.)

In the instant appeal, respondent relied on evidence obtained by both a surveillance of and a search of appellant's residence by the Riverside Sheriff's Department. Specifically, respondent relied on several notebooks where bets were recorded from bettors who placed their bets over the telephone. Investigator

Gary L. Jensen has stated that bookmakers dealing with sports will set the odds for the week on Thursday or Friday. Most of the+ betting is then done on Saturday, Sunday, and Monday. By the next Wednesday, the betting sheets are usually destroyed and the bookmaker will retain only the tally sheet. Respondent used the betting ledgers for the weekend of December 18, 1981, through December 21, 1981. These ledgers showed that 23 bettors had wagered about $197,930. Respondent concluded that this weekend'was the fourteenth week of appellant's illegal bookmaking activities. Not only was that weekend the fourteenth week of the football season, but there were two pages in the ledgers seized which had the numbers 1 through 13 written on the left side. These correspond with the weeks that football had been played that season. Based on the amounts bet during the fourteenth weekend, respondent ultimately concluded that only $41,867 in income should be attributed to appellant for that week. Appellant was given the benefit of offsetting when there was a combination bet made by one bettor on .one day and only amounts unsuccessfully wagered were considered. Using the calculations from the fourteenth week, a projection was made for the previous thirteen weeks. The income for the week ended September 21 was set at $20,000 as appellant employed only two "phone spots" at.that time. The income was increased $1,008 a week until the sixth week, when he began to use four 'phone spots" and when more betting was likely because of the opening of the basketball season. Income for the sixth week was estimated to increase to $33,000, and thereafter increase again at $1,000 per week. The total income was estimated at $443,867 which results in a tax liability of $47,540. This estimate takes into consideration the fact that bettors usually bet less on early season. games than they do on games played later in the season. It also takes into consideration the fact that appellant may have started with a smaller clientele of bettors. In sum, we must conclude that the reconstruction of appellant's income has a foundation in fact and is not arbitrary or unreasonable.

Appellant's final argument is that the jeopardy assessment cannot be sustained since it was determined by reference to evidence that was obtained by law enforcement authorities in violation of his constitutional rights. In support of this'contention, appellant has relied upon United States v. Janis, 428 U.S. 433 (49 L.Ed.2d 1046] (1onclude, as we did in Appeal of Edwin v. Barmach, Cal. St. Bd. of Equal., July 29, 1981, that respondent may take into consideration evidence unlawfully

obtained by law enforcement authorities in order to determine tax liability. In that appeal, we stated that:

> In Janis, the United States Supreme Court was confronted with a factual situation distinguishable from that present in the instant appeal. In that case, the Court was called upon to decide whether evidence obtained by a state law enforcement officer in good faith reliance on a warrant that later proved to be defective should be inadmissible in a federal civil tax proceeding. The issue in Janis, consequently, dealt with the admissibility of unconstitutionally obtained evidence in an "intersovereign" context, i.e., one in which the officer having committed the unconstitutional search and seizure was of a sovereign that had no responsibility or duty to the sovereign seeking to use the evidence. While the Court was careful to note that it need not consider the applicability of the exclusionary rule in an "intrasovereign" context, the holding of that case and the reasoning adopted by the Court are helpful for purposes of resolving the final issue presented by this appeal.
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> The Court in Janis commenced its discussion by noting that the "prime purpose" of the exclusionary rule, if not the only one, "is to deter future unlawful police conduct." (United States v. Calandra, 414 U.S. 338, 347 [38 L.Ed.2d 561] (1974).) It also observed that in those cases in which it had opted for exclusion in the anticipation that law enforcement officers would be deterred from violating Fourth Amendment rights, it had acted in the absence of any convincing empirical evidence on the effects of the exclusionary rule and relied, instead, "on its own assumptions of human nature and the inter-relationship of the various components of the law enforcement system." (United States v. Janis, supra, 428 U.S. 433, 459.) Holding that the exclusionary rule should not be extended to preclude the use of evidence unlawfully obtained by police officers in cases in which its deterrent purpose would not be served, the Court refused to extend the rule to prohibit the use of such evidence when it was obtained by state authorities and was sought to be used in a

> federal civil proceeding. This holding was based on the Court's conclusion that "exclusion from federal civil proceedings of evidence unlawfully seized by a state criminal enforcement officer has not been shown to have a sufficient likelihood of deterring the conduct of state police . ..." (Janis, supra, at p. 454.) Finally, the Court observed that it had never applied the exclusionary rule to exclude evidence from a civil proceeding, federal or state.

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In sum, we must again conclude that exclusion of evidence obtained in violation of appellant's constitutional rights would not have the effect of deterring illegal conduct on the part of criminal law enforcement agencies and can, therefore, be used by respondent to determine appellant's tax liability.

Appeal of Carmine T. Prenesti

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 Hoard in denying the petition of Carmine T. Prenesti for reassessment of a jeopardy assessment of personal income tax in the amount of $47,540 for the taxable period January 1, 1981, to December 21, 1981, be and the same is hereby sustained.

Done at Sacramento, California, this 9th day of April , 1985, by the State Hoard of Equalization,. with Board Members Mr. Dronenburg, Mr. Collis, Mr. Nevins and Mr. Harvey present.

Ernest J. Dronenburg, Jr., Chairman

Conway H. Collis, Member

Richard Nevins, Member

Walter Harvey*, Member

, Member

*For Kenneth Cory, per Government Code section 7.9