BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
) No. 81J-1153-GO
DAVID WALLY OTT)

For Appellant: Paul L. Gabbert
Attorney

For Respondent: Phillip M. Farley
Counsel

OPINION

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 David Wally Ott for reassessment of jeopardy assessments of personal income tax and penalties in the total amounts of $9,652.50 and $12,564.00 for the year 1979 and for the period January 1, 1980, to December 18, 1980, respectively. Although this appeal has been docketed in these amounts, as indicated in the opinion, the correct assessments of tax and penalties are $16,562.70 for 1979 and $30,439.00 for the period January 1, 1980, to December 18, 1980.

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

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The central issue presented in this appeal is whether respondent has properly reconstructed the amount of unreported income from illegal sales of drugs which appellant received during the periods at issue.

On October 22, 1980, appellant was arrested on a traffic warrant at which time live ammunition was found in plain view in the interior of the vehicle. A search of the trunk revealed $16,941 in cash and weapons. (Resp. Br., Exs. M-8 6 n-9.) On December 17 1980, Special Agent James V. Dower, Bureau of Alcohol, Tobacco, and Firearms, United States Treasury Department, stated in an affidavit for a search warrant that he had received information from a fellow agent, Brooks Ohlson, that a Confidential Reliable Informant (hereinafter "CRI-1") had seen appellant on many occasions during the prior three months armed and in possession of methamphetamine. CRL-1 had previously proven reliable by giving information which was the basis for at least six search warrants, resulting in the seizure of contraband, three of which led to felony convictions. Special Agent Dower., also received information from a second Confidential Reliable Informant (hereafter "CRI-2") that within the prior three weeks CRI-2 had seen appellant twice armed and in possession of more than one ounce of methamphetamine. CRI-2 reported that in the last six weeks he had seen appellant with approximately two pounds of methamphetamine and had seen him sell it to at least three people. The reliability of CRT-2 had been established by prior reliable information that led to three felony arrests. (Resp. Br., Ex. N-6.) On this same date, Special Agent Dower obtained information from Detective Tom Hauser of the Vallejo Police Department indicating that Hauser had received information from a third Confidential Reliable Informant who, during the past month, had observed appellant in possession of methamphetamine at his residence in Vallejo, California. Special Agent Dower reported in the affidavit for the search warrant that appellant had been arrested on 13 separate occasions for narcotics violations and on five occasions for firearms violations. (Resp. Br., Rx, N-7.)

On December 18, 1980, Special Agent Frank Wandrell of the Bureau of Alcohol, Tobacco, and Firearms, executed a federal search warrant for appellant's Vallejo residence. Seized from that location were the following items:

(1) $10,000 in cash

(2) .62 grams of methamphetamine
(3) 18.23 grams of secobarbital
(4) An OHAS triple beam balance scale
(5) A jar of Mannitol which is used as a cutting agent for narcotics
(6) Narcotics packaging materials
(7) A 12 gauge shotgun
(8) A .308 caliber rifle.

(Resp. Br., Rxs. O & Q.)

Special Agent Charles M. Pratt also took part in the search of appellant's residence on December 18, 1980. In his report, Special Agent Pratt stated that during the search, it was his responsibility to control appellant at which time appellant made several voluntary statements to him. For example, appellant stated that the agents would find cash and drugs in certain places where they were, in fact, found during the search. The report further noted that appellant also stated 'that 'last year' be made $80,000 in dealing dope.' (Resp. Br., Rx. Q.)

The record indicates that previous to the December 18, 1980, search, appellant had a long history of criminal activity. For example, on December 11, 1969, the California Highway Patrol made a traffic stop of appellant and observed within his vehicle a large bayonet protruding from underneath the driver's seat. Also found within the vehicle were an automatic pistol, stolen credit cards, 1.5 grams of amphetamines, and a narcotics injection kit containing a needle and a syringe with residue of amphetamine present. (Resp. Br., Rx. A.)

Appellant's criminal activity is further evidenced by a December 1969 Vallejo Police Department report that, over the past year, it had maintained a nightly surveillance of appellant's Vallejo residence. During this period, the police made several narcotics arrests and were informed by the persons arrested that they had purchased drugs from appellant at his residence, often in exchange for stolen property. (Resp. Br., Rx. D.) On December 11, 1969, appellant's residence was searched pursuant to a search warrant and numerous items of stolen property were seized. (Resp. Br., Ex. E.) On January 21, 1970, a plea bargain was reached and appellant pled guilty to possession of dangerous drugs, with four prior convictions and was sentenced to one year in the Solano County Jail. (Resp. Br. at 2.)

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On February 11, 197.2, appellant was arrested in Napa, California, and charged with three violations of the Health and Safety Code, including possession of dangerous drugs for sale, and three violations of the Penal Code, including theft of credit cards and possession of a firearm by a drug addict. The following month, appellant was arrested for three additional violations of the Health and Safety Code. on May 25, 1972, appellant pled guilty to two counts of possession of dangerous drugs for sale and was sentenced to serve from two to ten years in prison. (Resp. Br. at 2, 3.)

In May 1976, an undercover police officer and an informant made arrangements to make a controlled buy of drugs from a Larry "Cherokee" Hershman. The undercover officer and the informant met Hershman in a room at the Travelers Inn in Vallejo and were told that appellant was delivering methamphetamine powder shortly. When the undercover officer and informant left the room they encountered appellant outside. Appellant stated he had a half an ounce of the substance with him and said, "What are you scoring from that turkey for? That's my dope he's selling. Why go through the middle man? You and I could do something better." (Resp. Br., Ex. G-1.) Appellant sold the drugs to Hershman who, *in* turn, sold one-fourth ounce of methamphetamine to the undercover officer and informant for $80. (Resp. Br., Rx. G-1.) Thereafter, on July 26, 1976, police searched appellant's vehicle and home, seizing narcotic paraphernalia and other contraband. (Resp. Br., Bx. I.)

After the search, respondent issued a jeopardy assessment for $7,075 against appellant for his sale of methamphetamines for the period January 1, 1976, through July 26, 1976, (Resp. Br., Bx. K), but *later* allowed a 50 percent cost of goods sold resulting in a net tax liability of $3,088, an amount to which appellant acquiesced. (Resp. Br. at 4.) In 1977, appellant pled guilty to the sale of dangerous drugs and was committed to the Delancy Street Foundation, a drug rehabilitation center, for two years.

After the first mentioned search of appellant's residence on December 18, 1980, respondent was informed of appellant's past criminal activity related above. Respondent initially determined that appellant had sold controlled substances which resulted in taxable California income to him for the years 1977, 1978, 1979, and the period January 1, 1980, through December 18, 1980. A review of respondent's records indicated that

appellant had not filed California income tax returns for 1977, 1978, or 1979. Respondent further determined that the collection of tax would be jeopardized in whole or in part by delay in assessment. Based upon arrest reports, search warrants, supporting affidavits, evidence seized, and admissions by the appellant, and after allowing a 50 percent cost of goods sold deduction, respondent estimated appellant's total taxable income to be $130,000 for each of the years 1977, 1978, and 1979, and $125,000 for the period January 1, 1980, through December 18, 1980. (Resp. Br. at 6 & 7; Exs. R, S, T, & U.) Jeopardy assessments were issued for $13,400 for 1977, $13,279 for 1978, $13,289 for 1979, and $12,564 for the 1980 short period, plus penalties pursuant to sections 18681 and 18684. (Resp. Br., Exs. R, S, T, & U.) An "Order to Withhold" was issued and served upon the United States Treasury Department. (Resp. Br., Ex. V.)

On pages seven and eight of its brief, respondent indicates that the assessment of tax due was determined as follows:

> The determination of taxable income was reached by calculating a sale of only two ounces of methamphetamine per day times a five day week. The two ounces per day was established by the sale of methamphetamine by the appellant and a subsequent assessment on July 27, 1976 (Resp. Br., Ex. K], to which the appellant acquiesced to in June of 1979. The $500.00 per ounce selling price was taken from information supplied by the Department of Justice Training Center for the Sacramento/San Francisco area. [Exhibit W.]

Moreover, as indicated above, respondent deducted from the gross income so computed a 50 percent cost of goods sold factor to arrive at the net assessment in each year.

On February 20, 1981, appellant sent respondent a petition for reassessment. (Resp. Br., Ex. X.) In acknowledging the petition on March 20, 1981, respondent made its initial request that appellant make a full and complete financial disclosure, including the amount of income he received from the sale of controlled substances. (Resp. Br., Ex. CC.) No response was ever received. (Resp. Br. at 9.)

On February 27, 1981, subsequent to the issuance of these assessments, appellant was again arrested and indicted for a violation of two counts for the possession of controlled substances for sale. (Resp. Br., Ex. AA.) On April 3, 1981, appellant, in possession of 205 grams of methamphetamine, was once again arrested and on April 8, 1981, indicted for possession of a controlled substance for sale. (Resp. Br., Ex.EE.)On September 16, 1981, pursuant to a plea bargain, appellant pled guilty to the April 8, 1981, indictment. (Resp. Br., Ex. HH.) On November 3, 1981, appellant was sentenced to five years in federal prison with a special parole term of ten years. (Resp. Br., Ex. LL.)

On November 16, 1981, respondent received a statement from Special Agent James V. Dower of the Bureau of Alcohol, Tobacco, and Firearms. The statement disclosed that in November 1980, Special Agent *Dower* was in contact with an informant who was associated with appellant for the prior year for the purpose of selling methamphetamine for profit. During the month of November 1980, this informant observed appellant in possession of five pounds of methamphetamine. The informant stated that appellant was selling it to people in the Sacramento area. Later that same week, appellant told this informant that he had only two and one-half pounds left. The informant related that appellant always "cut" each pound 50 percent before reselling. Special Agent Dower further stated that on November 26, 1980, he received information from a narcotics officer in Sacramento County that one of the officer's informants had told him that appellant was in the area with eleven and one-half pounds of methamphetamine. In December 7980, Special Agent Dower spoke to the appellant who admitted to him that he had been dealing for years, usually purchasing in quantities for $30,000 and never buying less than a pound. In his report, Special Agent Dower stated that appellant told him "[t]hat he always dealt on a cash basis and never purchased quantities [of drugs] of less than a pound .... [Appellant] further stated that he would be considered a second level dealer in the drug circles." (Resp. Br., Ex. MM.) That same report indicated that in September of 1981, appellant had told a Sacramento County narcotics officer "that for at least the last six (6) months he had averaged the sale of a pound of meth eadh week."

Respondent also received a letter dated November 20, 1981, from Detective Thomas &user *of* the Vallejo Police Department in which he stated that between

1979 and 1981, he had received information from three different sources indicating that appellant was involved in the sale of drugs. (Resp. Br., Ex. NN.) One such informant indicated that appellant "had six different people selling methamphetamine for him in Vallejo during the 1980 time period." That same informant indicated that purchases from appellant "were always for one to two ounces" and that 'prices fluctuated anywhere from $700 to $1,000." (Resp. Br., Ex. NN.) Detective Eauser stated that another informant who lived at appellant's house during 1980 indicated that appellant received from one to two pounds of methamphetamine per week. On December 18, 1980, Detective Eauser participated in the search of appellant's residence which resulted in appellant's arrest. Detective Eauser stated in the November 20, 1981, letter, that while he was at appellant's residence during that search, he answered the telephone approximately 40 times. Detective Hauser's actual police report of that search is attached to his August 10, 1986, affidavit. In that report, prepared two days after the search, Detective Eauser kept a log of the telephone calls. Most of the calls appeared to be drug related with one caller actually asking on the telephone for one-quarter pound of the drug, later changing her request to two ounces.

In its continuing investigation of appellant, respondent learned that appellant had been under the direct care of the Delancy Street Foundation, Inc., from May 22, 1977, through July 6, 1979. Respondent concluded that appellant had thus been unable to engage in the illegal sale of drugs during this period and, accordingly, withdrew its assessments for 1977 and 1978 and modified its assessment for 1979 to coincide with the time when appellant left the care of the Delancy Street Foundation. However, the assessment for 1980 was affirmed. (Resp. Br., Exs. OO, PP, QQ, & RR.)

On June 22, 1984, respondent issued additional assessments for the periods under review, disallowing the cost of goods sold deduction resulting in a total liability of tax and penalties of $16,562.70 for 1979 and $30,439 for the short period in 1980. (Resp. Br., Exs. UU & VV.) It is the accuracy of these assessments that is now at issue in this appeal.

It is, of course, well settled that 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.1037] (1927); Farina v. McMahon, 2 A.F.T.R.2d (P-H) ¶ 58-5246 (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).) 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, § 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).) Mathematical exactness is not required. (Harbin v. Commissioner, 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).)

In the instant appeal, respondent used the projection method to reconstruct appellant's income from the illegal sale of controlled substances. In short, respondent projected a level of income over a period of time. Because of the difficulty 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. v. Commissioner, ¶ 64,275 T.C.M. (P-H) (1964), aff'd. sub nom., Fiorella v. Commissioner, 361 F.2d 326 (5th Cir. 1966).) It has also been recognized, however, 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 use of the projection method does not lead to injustice by forcing the taxpayer to pay tax on income he did not receive, the courts and this board have held that each assumption involved in the reconstruction must be based on fact rather than on conjecture. (Lucia v. United States, 474 F.2d 565 (5th Cir. 1973).) 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 (2nd Cir. 1970).) If such evidence is not forthcoming, the assessment is arbitrary and must be reversed or modified. (Appeal of David Leon Rose, Cal. St. Bd. of Equal., Mar. 8, 1976.)

As indicated above, in this appeal respondent computed appellant's weekly income as follows:

Average Price Per Ounce	$ 500
Number of Ounces Sold Per Day	x 2
Daily Gross Sales	$1,000
Number of Active Sale Days Per Week	x 5
Weekly Gross Sales	$5,000

Respondent initially determined that appellant had been active all 52 weeks in 1979, which resulted in a yearly gross income of $260,000 and after a 50 percent cost of goods sold deduction, a net yearly income of $130,000. This computation resulted in an initial jeopardy tax assessment of $13,289 and penalties of $3,986.70. (Resp. Br., Ex. T.) However, based upon subsequent information from the Delancey Street Foundation, noted above, appellant's activity period for 1979 was determined to be from July 6, 1979, through December 31, 1979. Based upon this revised activity period of 25 weeks in 1979, respondent determined that appellant had a gross yearly income of $125,000 and, after a 50 percent cost of goods sold deduction, a net yearly income of $62,500. This computation resulted in a revised jeopardy assessment of $5,864 plus penalties of $1,761.20. (Resp. Br., Exs. RR & UU.) Subsequently, based upon section 17297.5, respondent recomputed appellant's income disallowing a deduction for cost of goods sold which resulted in a final jeopardy assessment for 1979 of $12,739 in tax and $3,823.70 in penalties under sections 18681 and 18684. (Resp. Br., Ex. UU.)

Appellant's activity period for 1980 was determined to be from January 1, 1980, through December 18, 1980, or 50 weeks resulting in a gross yearly income of $250,000. Initially, respondent also deducted a 50 percent cost of good sold deduction to arrive at a net yearly income of $125,000, which resulted in a tax of $12,564. (Resp. Br., Ex. U.) Subsequently,

again based upon section 17297.5, respondent recomputed appellant's taxable income for 1980 disallowing the cost of goods sold deduction which resulted in a final jeopardy tax assessment for 1980 of $26,314. In addition, respondent assessed penalties of $4,125 for 1980 under sections 18681 and 18684. (Resp. Br., Ex. VV.)

In opposition to the assessments noted above, appellant does not appear to vigorously contend that he did not receive unreported income from the illegal sale of controlled drugs during the period under review. While arguing against respondent's computation of his income, appellant maintains that repondent has offered no evidence of "even the fact of [his] alleged 1979 drug sales beyond the purported statement of an informant that 'purchases had been made' by the informant in the year 1979: (App. Br. at 8.) However, his vigor in this argument appears to be tepid at best. Although it is true that the indictment (Resp. Br., Ex. AA) relates to incidents in 1981, we note that prior to 1979 appellant had a long history of drug dealing. In 1977, he pled guilty to the sale of dangerous drugs and was committed to a rehabilitation program for two years. As indicated above, appellant voluntarily stated at the time of his arrest on December 18, 1980, to the arresting officer that "'last year' he had made $80,000 dealing dope." (Resp. Br., Ex. Q.) The clear inference from this statement is that appellant was active in 1979. Appellant argues, however, that while respondent concluded that the year referred to in appellant's above statement was 1979, "[i]t is obvious that appellant was bragging about his profits during . . . 1980 . . . ." (App. Br. at 6.) Appellant's "obvious' deduction is not obvious at all: the period that the statement literally refers to is clearly 1979, and not 1980 as appellant contends. In such a situation, we must hold that appellant's statement is credible evidence of his drug sales activity in 1979 and, coupled with the other evidence noted above, indicates that it is reasonable to believe that appellant was active in selling drugs in 1979 as outlined by respondent.

Appellant next argues that respondent has relied on stale and unreliable hearsay to support its projections. (App. Br. at 9.) Appellant contends that such reliance is impermissible under Appeal of Peter O. and Sharon J. Stohrer, decided by this board on December 1, 1976. The regulations, of course, outline the kind of evidence that is admissible in appeals.

California Administrative Code, section 5035, subdivision (c), provides in relevant part:

> Any relevant evidence, including affidavits and other forms of hearsay evidence, will be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs. The board will be liberal in admitting evidence, but objections to the admission of and comments on the weaknesses of evidence will be considered in assigning weight to the evidence. The board may deny admission of evidence which it considers irrelevant, untrustworthy or unduly repetitious.

In Stohrer, letters received during the course of the appeal from the arresting officers stated that the taxpayer admitted that he "had been transporting marijuana to Sacramento 'for the last couple of years'." We found that these letters were not credible evidence because, at the hearing, the taxpayer denied making the statement and the statement was not recorded in the crime report prepared shortly after the taxpayer's arrest which presumably it would have been if it had been made. We stated in Stohrer that since the admission was not contained in the crime report but in subsequent letters, and no explanation had been offered as to why the arresting officers had waited so long before revealing the alleged admission, "the chances for errors in memory are so great that we cannot accept these letters as accurate statements . . . ." Accordingly, we held that the admission contained in the subsequent letters was not credible evidence.

However, in the instant appeal, critical evidence is contained in the crime report. For example, at the time of the arrest on December 18, 1980, appellant stated to the arresting officers that "'last year' he made $80,000 dealing dope." (Resp. Br., Ex. Q.) Moreover, unlike the taxpayer in Stohrer, appellant has offered no testimony that the subject admission is in any way inaccurate. Additionally, the record indicates that an informant advised the police that during 1979, he made drug purchases of one to two ounces each time paying from $700 to $1,000 per ounce. (Resp. Br., Ex. NN.) Moreover, unlike the taxpayer in Stohrer, appellant has a long history of violations for drug sales. Again, in such circumstances, we find that credible evidence exists

that appellant was active with respect to drug sales during the entire period under review.

Notwithstanding the above, appellant argues that the data used by respondent to project his income is inaccurate. Appellant contends that the figures for the price per ounce charged by appellant ($500 per ounce) (App. Br. at 2, 3 & 4) and the amount and frequency of his sales (two ounces per day, five days per week) (App. Br. at 5, 6, 8, & 9) which were used by respondent are inaccurate. Appellant states that various statements made by him at the time of the 1976 arrest indicate that the price per ounce was $320 and that this figure, rather than the $500 per ounce figure, should be used for the 1979 and 1980 recomputation. Respondent answers that inflation had increased the price charged since 1976 and that Department of Justice data indicates that, while the $320 price might have been accurate for 1976, the price of methamphetamine in 1979 and 1980 was $500 to $1,000 per ounce in the San Francisco and Sacramento areas. In light of the evidence contained in the Department of Justice report (Resp. Br., Ex. W), we must find that respondent's price per ounce is based upon credible evidence which appellant has not rebutted.

Based upon information contained in the crime report, such as the monitoring of the telephone at the time of the arrest, appellant appears to have been involved in a flourishing drug business during the period under review. As indicated above, the crime report indicates that at the time of the arrest, the arresting officer answered appellant's telephone and received about 40 calls, most of which were drug related, with one caller asking specifically for drugs. In light of such evidence, respondent's projection of sales of two ounces per day, five days per week, also appears to be reasonable and based upon credible evidence which appellant has not rebutted.

Next, appellant attacks respondent's use of section 17297.5 to disallow the previously allowed cost of goods sold deduction. (App. Br. at 10.) As indicated above, respondent initially allowed a 50 percent cost of goods sold deduction for the period at issue. However, pursuant to section 17297.5, effective September 14 1982, to be applied with respect to taxable years which had not been closed by a statute of limitations, res judicata, or otherwise, no deduction for the cost of goods sold from illegal sales of controlled substances is allowed. (Appeals of Manual Lopez Chaidez and Miriam Chaidez, Cal.

St. Bd. of Equal., Jan. 3, 1983.) Accordingly, respondent computed reassessments for the years at issue disallowing such deductions. In opposition to these reassessments, appellant argues that the years under appeal were closed before September 14, 1982, the effective date of section 17297.5. (App. Br. at 11.) However, since appellant did not file a return for either year, under section 18648, subdivision (a), the respondent may "at anytime. . . make an estimate of the net income ...." Clearly and contrary to appellant's allegation, the years at issue were not closed before September 14, 1982, so as to prevent the application of section 17297.5.

Next, appellant argues that the "actions of the Franchise Tax Board in dealing with appellant during the impending enactment of § 17297.5 must estop the Board f tom applying the statute to appellant ...." (App. Br. at 11.) Apparently, appellant contends that respondent concealed the impending enactment of section 17297.5 from him so that it should now be estopped from relying upon that section. It is well established that the doctrine of estoppel will not be invoked against the state except where grave injustice would otherwise result. (City of Long Beach v. Mansell, 3 Cal.3d 462, 493 (91 Cal. Rptr. 23](1970).) The burden of proving estoppel is on the party asserting it. (Girard v. Gill, 261 P.2d 695 (4th Cir. 1958).) In order to prove estoppel, the asserting party must show the following: (1) a misrepresentation or concealment of a material fact (2) to a party ignorant of the true fact; (3) with the intention that the latter act: upon it; and (4) the latter must rely to his injury upon the conduct of the party to be estopped. (See Banco Mercantil v. Saus Inc., 140 Cal.App.2d 316 [295 P.2d 55] (1956).) No facts supporting appellant's allegation have been established and without more (Appeal of Barry H. and Alice P. Freer, Cal. St. Ed. of Equal., Sept. 12, 1984) we must hold that estoppel is not applicable in this'matter.

Lastly, appellant raises a variety of constitutional objections to respondent's use of section 17297.5. We believe, however, that the adoption of Proposition 5 by the voters on June 6, 1978, adding section 3.5 to article III of the California Constitution, precludes our determining that question. Additionally, this board has a well-established policy of abstaining from deciding constitutional questions in appeals involving deficiency assessments. (Appeal of Leon C. Harwood, Cal. St. Bd. of Equal., Dec. 5, 1978.)

With respect to the penalties at issue, it is well settled that the taxpayer has the burden of showing that their imposition was improper. (Appeal of Thomas T. Crittenden, Cal. St. Bd. of Equal., Oct. 7, 1974.) Since appellant has introduced no evidence regarding the propriety of such penalties, we have no choice but to sustain their imposition.

Accordingly, based upon the above, respondent's action must be sustained.

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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 Taxatiod. Code, that the action of the Franchise Tax Board in denying the petition of David Wally Ott for reassessment of jeopardy assessments of personal income tax and penaltie) in the total amounts of $16,562.70 and $30,439.00 for the year 1979 and for the period January 1, 1980, to December 18, 1980, respectively, be and the same is hereby sustained.

Done at Sacramento, California, this 17th day of June , 1987, by the State Board of Equalization,, with Board Members Mr. Collis, Mr. Dronenburg, Mr. Bennett, Mr. Carpenter and Ms. Baker present.

Conway H. Collis , Chairman

Ernest J. Dronenburg, Jr. , Member

William M. Bennett , Member

Paul Carpenter , Member

Anne Baker* , Member

*For Gray Davis, per Government Code section 7.9