

BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
MARCEL C. ROBLES)

For Appellant: Lee Brewster
Attorney at Law

For Respondent: Bruce W. Walker
Chief Counsel

Jon Jensen
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 Marcel C. Robles for redetermination of a jeopardy assessment of personal income tax of **\$47,500.00** for the period January 1, 1974 through October 7, 1974.

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Respondent is prepared to exclude **\$88,000.00** from appellant's income for the cost of goods sold; therefore, the tax at **issue** has been reduced to **\$36,896.00**.

The facts forming the basis for the jeopardy assessment are as follows, On October 1, 1974, a confidential informant advised the Los Angeles Police Department that a man fitting appellant's description was supplying heroin to a third party for sale. Following an investigation, appellant and the third party were arrested **on October 7**, in the course of what officers believed to be a sale of heroin; a package containing .5 grams of heroin was found in appellant's automobile. Later, appellant consented to a search of his residence, during which police seized quantities of heroin and other controlled substances as well as \$31,070 in cash. During this search, the police questioned appellant about his involvement with narcotics. In the arrest report and preliminary hearing transcript, appellant is quoted as having made these statements: (1) that he had been selling narcotics for just over one year; (2) that the \$31,070 was from a large narcotics transaction a long time ago; (3) that the normal amount of heroin he received from his source was ten to twelve ounces; (4) that he had not had a major sale of heroin for over six months, though he was presently selling small quantities; (5) that his source of heroin was in Mexico.

The charges subsequently filed against appellant were for selling heroin, possession of heroin for sale, and possession of heroin, amphetamines and marijuana. After being advised of appellant's arrest, respondent terminated appellant's taxable year and issued the jeopardy assessment in question. Pursuant to Revenue and Taxation Code section 18817, respondent obtained the **\$31,070.00** seized during the search of appellant's home.

On March 25, 1976, a hearing was held on appellant's petition for reassessment. Appellant had **submitted a** financial statement (Form **FTB 3860 (3-68)**) for 1974 but had not filed a return for that year; The financial statement indicated appellant earned over **\$8,000.00** as a mechanic in **1974, but** did not show any income from the sale of drugs. Respondent sustained the assessment, which had been revised to allow an exclusion for the cost of heroin sold, and this appeal followed.

On April 16, 1976, appellant pled guilty to the charge of possession of heroin but was found not guilty of the charge of selling heroin. The other charges were dismissed because the 'court found that appellant's consent to the search of his residence was coerced and it suppressed the evidence seized therein.

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The sole issue to be decided here is whether respondent's reconstruction of appellant's income, as modified, was reasonable. Respondent's authority to reconstruct a taxpayer's income is found in section 17561, subdivision (b), of the Revenue and Taxation Code, and its corresponding regulation:

If the taxpayer does not regularly employ a method of accounting which clearly reflects his income, the computation of taxable income shall be made in a manner which, in the opinion of the Franchise Tax Board, does clearly reflect income. (Cal. Admin. Code, tit. 18, req. 17561, subd. (b) (1).)

Further; if a taxpayer fails to file a **return**, respondent may make an estimate of his net income from any available information, and assess the tax due. (Rev. & Tax. Code, § 18648, subd. (a).) 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., 1164,275 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 John and Codelle Perez, Cal. St. Bd. of Equal., Feb. 16, 1971.)

In the instant case, respondent used the now familiar projection method of reconstructing income, relying on the statements reported made by appellant at the time of his arrest. Other factors considered, such as the estimated cost and selling price of the heroin, were derived from data compiled by the State Department of Justice Bureau of Narcotic Enforcement, as well as literature concerning the international drug market. Finally, respondent applied some of the general principles accepted in previous appeals before this board, such as that a dealer usually has on hand an amount of drugs that can be disposed of easily so that inventory is turned over frequently. (See, e.g., Appeal of Clarence P. Gonder, Cal. St. Bd. of Equal., May 15, 1974.)

In contrast, appellant has offered little to dispute respondent's calculations except bare denials that he ever made the cited statements when arrested. Appellant's Declaration, dated November 8, 1976 (more than two years' after his arrest and after the related criminal charges were resolved)

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appears to be a self-serving attempt to erase his earlier admissions, which we have no reason to believe were false. Although appellant's consent to the search incident to his arrest may have been coerced, that issue was resolved by the application of the exclusionary rule in the criminal proceeding and does not preclude our consideration of the entire record for purposes of deciding the instant appeal. (See Cal. Admin. Code, tit. 18, § 50.35, subd. (c); see also, Gov. Code, § 11513.) Further, respondent may take cognizance of the fruits of an illegal search, in order to satisfy a valid tax claim. (See Borack v. Franchise Tax Board, 18 Cal. App. 3d 363 [95 Cal. Rptr. 717] (1971).)

Finally, with respect to appellant's claim that his automobile and motorcycle were seized and sold without a prior hearing on the accuracy of the assessment, we note that the record is devoid of evidence on this point. In any event, procedural due process does not require a judicial determination of the correctness of the jeopardy assessment before collection of the tax. (Horack v. Franchise Tax Board, supra; see also Dupuy v. Superior Court, 15 Cal. 3d 410 [124 Cal. Rptr. 900] (1975).)

We simply do not find appellant's arguments **persuasive**. They amount to nothing more than general allegations and we must conclude that he has failed to carry his burden of disproving respondent's reconstruction. (See Appeal of Walter L. Johnson, Cal. St. Bd. of Equal., Sept. 17, 1973.) Therefore, the assessment, as modified to exclude the cost of goods sold, must be sustained.

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,

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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 Marcel C. Robles for redetermination of a jeopardy assessment of personal income tax of **\$47,500.00** for the period January 1, 1974 through October 7, 1974, be and the same is hereby modified to reflect the exclusion of the cost of goods sold. In all other respects, the action of the respondent is sustained.

Done at Sacramento, California, this 28th day of
June , 1979, by the State Board of Equalization.

William G. Burgess, Chairman
Julius Berg, Member
Scott Lewis, Member
_____, Member
_____, Member