

Appeal of Peter Lenz (aka John Richard Diamond)

The issue presented on appeal is whether respondent properly reconstructed appellant's taxable income from his illegal bookmaking activities during the period in question.

During July 1981, law enforcement officers of the City and County of San Diego learned through an informant that appellant was conducting an illegal bookmaking operation in San Diego. A four-month investigation resulted in appellant's arrest on November 14, 1981. Subsequently, appellant **entered a** plea of nolo contendere to charges of accepting bets and **bookmaking.**

Upon being notified of appellant's arrest, respondent determined that the collection of appellant's personal income tax for 1981 would be jeopardized by delay. After reviewing **the** evidence **immediately** available upon his arrest, respondent determined that appellant's most recent week of bookmaking showed a profit of \$72,908. Respondent arrived at this figure by subtracting the payouts made by appellant from the bets that he won. With this information, the Franchise Tax Board made a linear projection estimating appellant's income for the 17-week period that appellant was known by the police to have been conducting his bookmaking operation, Based on the assumption that appellant's business started small and built up to the final week's total sales, respondent decided that appellant made \$686,887 during that period. Before an assessment was issued, however, respondent realized it had committed an addition error in its projection. Respondent, therefore, reduced the estimate of appellant's income to \$656,167. On the strength of this revised projection, a jeopardy assessment for **\$70,992.37** was issued.

Appellant subsequently asked for a reassessment of respondent's estimate of income. Another projection was made by a Franchise Tax Board field auditor using a more detailed set of records discovered after appellant's arrest. This analysis resulted in a finding of \$979,133 in taxable income. Respondent re-evaluated this second estimate when it was discovered that the records used to develop the projection did not **cover** the entire **17-week** period of known bookmaking. Upon projecting this known income over the entire period **of operation**, respondent determined appellant made **\$2,215,574** in taxable income. Both of the latter figures were based solely on the gross receipts taken in by appellant. Rather than issue a new assessment based upon either of the latter projections,

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respondent used the projections to affirm its original assessment. This appeal followed.

Appellant's argument centers on section 17297's prohibition against a bookmaker deducting his payouts from his gross receipts in determining his taxable income. Mr. Lenz contends that an assessment based only upon a bookmaker's gross receipts is invalid because section 17297 singles bookmakers out for special punishment under California's tax laws and, thereby, violates the equal protection clauses of both the state and federal Constitutions. This contention has been argued in prior cases and has consistently been rejected by this board. We have repeatedly held that respondent may use an income projection based on the gross receipts a bookmaker collected. (See, **e.g.**, Appeal of Theodore Halushack, Cal. St. Ed. of Equal., Nov. 14, 1984; Appeal of Edwin V. Barmach, Cal. St. Bd. of Equal., July 29, 1981.)

Finally, appellant alludes to the fact that several income estimations were developed during respondent's attempt to accurately reconstruct appellant's gross income. Mr. Lenz, however, does not make the effort to develop an argument against respondent's income reconstruction method.

It is well settled that a reasonable reconstruction of income is presumed correct and the taxpayer bears the burden of proving it is **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 has failed to present us with any evidence, or even a complete argument, which demonstrates error or unreasonableness in respondent's determination.

Consequently, appellant has failed to present any evidence or reason why **respondent's** income **reconstruction** for the period at issue should be modified. Accordingly, respondent's action in this matter will be sustained.

