

Appeal of Russel D. Jackson

The issues presented by this appeal are whether appellant received income from the illegal sale of narcotics and, if **so**, whether respondent has properly reconstructed appellant's income from such sales to support the resulting jeopardy assessments and penalties.

On July 22, 1980, at approximately **3:30** p.m., Officers Michael J. **Zapian** and Mark D. Melville of the Half Moon Bay Police Department (**HMBPD**) were dispatched to 748 Lemau Way in **Half** Moon Bay to investigate a report of gunshots at that location. Upon their arrival, the officers observed appellant outside the residence carrying a gun and dressed only in his pants.

Appellant told the officers that there were intruders in the house, and that he had shot two of them. Officer Melville then asked appellant if the officers could go into the house to check for suspects. Upon appellant's affirmative reply, Officer Melville walked into the open garage and tried to open the door, but found it locked. Appellant began kicking the door with his bare feet, attempting to break it open. Officer **Zapian** then suggested that they enter through the front door. Appellant stated that the front door was also locked to keep the burglars **inside**, but he had the key and would let the officers in. The officers then entered **the residence and searched for the burglars.** The officers searched the hallway and found it empty. The officers found nobody in the bathroom, but observed bullet holes in the door, a butane blowtorch **and** a water pipe, of the type used for the freebasing of cocaine, in the bathtub, and a mirror with white powder on it in plain view. The officers then came to the double doors leading to the master bedroom and observed numerous bullet holes in the doors and nearby hallway walls. After searching the rest of the house and finding no evidence of any burglary, and in light of the narcotics and drug paraphernalia in plain view throughout the house, the officers concluded that appellant had been hallucinating, and had been shooting at imaginary intruders. Accordingly, appellant was placed on a 72-hour psychiatric hold pursuant to Welfare and Institutions Code Section 5150 (providing for the involuntary detention of dangerous or gravely disabled persons).

As a result of the amount of drugs and drug paraphernalia seen in appellant's house, Officers Melville and **Zapian** issued a complaint against appellant for possession of a controlled substance. A search warrant was obtained, and various members of the HMBPD and the

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San Mateo County Sheriff's Office (SMCSO) searched the residence. The search revealed various items commonly used in the large-scale sale and distribution of cocaine, including two Ohaus triple beam scales, one equipped with a set of weights to allow the weighing of objects over one kilogram., and an Ohaus reload scale, various containers and plastic bags, marijuana, and 900 grams of cocaine. The search also revealed items commonly used in the manufacture and use of purified "free base," a strainer, alkaloid solvent, graduated-scale thermometers, a butane torch and striker, glass water pipes, and various other items of free base paraphernalia. Thirteen thousand dollars in cash was also found hidden in a brown valise in a closet of the master bedroom, and a Radio Shack TRS-80 computer with memory storage tapes was found in the dining room. A search of Department of Motor Vehicle records disclosed that a 1979 Datsun 280-Z sports car and a 1978 Chevrolet pickup truck were registered to appellant as sole owner.

Based on the above information, respondent determined that appellant had earned California taxable income for at least the period January 1, 1980, to July 21, 1980. It was further determined that the collection of tax would be jeopardized in whole or in part by delay. Respondent estimated appellant's taxable income to be \$116,500 during the subject period. Therefore, a jeopardy assessment was issued on July 24, 1980, in the amount of \$11,804,

Subsequent to respondent's assessment, the SMCSO notified respondent that it had been able to extract information from the computer system found in appellant's residence. The information was in the form of a ledger showing various cocaine purchases throughout 1979 and 1980, and specifically showed two large purchases on October 30, 1979, and November 15, 1979. Based on these records, respondent recomputed appellant's income, allocating the income between 1979 and 1980. (Resp. Ex. F at 2.) Respondent again determined that the collection of tax would be jeopardized in whole or in part by delay, and on August 5, 1980, issued additional jeopardy assessments in the amounts of \$21,822 for 1979 and \$67,101 for January 1, through July 22, 1980. Penalties for failure to file and negligence were also imposed for 1979 in the amounts of \$4,364.43 and \$1,091.10, respectively.

On September 22, 1980, appellant filed petitions for reassessment of all three jeopardy assessments, asserting that the assessments were based on the fruits

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of an illegal search and seizure, and that such evidence may not be used by respondent to support the assessments.

On December 5, 1980, respondent accepted appellant's petitions for reassessment, and advised appellant that it would be necessary for him to furnish information and documentation to substantiate his claim that the assessments were in error. Respondent also sent appellant a financial statement and questionnaire and urged appellant to make a full and complete financial disclosure. In a memorandum dated March 24, 1981, however, appellant refused to submit any evidence concerning his income for the taxable period at issue, arguing that he was not required to do so until respondent **produced** evidence to sustain its assessments other than the evidence obtained from local law enforcement officers incident to, or derived **from**, the search of his house on July 22, 1980, 'as all evidence from that search was ordered suppressed by the San **Mateo** County Municipal Court on January 20, 1981. On July 7, 1981, respondent advised appellant of its position that such evidence could **be used** in this case, and requested appellant to suggest possible dates for an oral hearing. By letter of July 31, 1981, appellant requested that the hearing be postponed until the related criminal case was resolved.

On August 3, 1981, the charges against appellant were refiled. Appellant was charged in San Mateo County Superior Court with four felony counts: simple possession of marijuana and cocaine, and possession for sale of marijuana and cocaine. A second motion to suppress the evidence was denied by the new judge. On October 28, 1981, appellant entered a plea of **nolo** contendere to a single count of possession of cocaine for sale. Pursuant to a plea negotiation, the remaining counts were dismissed.

Following his conviction, appellant appealed the trial **court's** order denying his motion to suppress evidence seized in the search of his residence. On March 11, 1983, the validity of the search was upheld by the Second District Court of Appeals in its decision in People v. Justin, **140 Cal.App.3d** 729 (1983). No further appeals were taken.

On December 23, 1981, respondent held a hearing on appellant's petitions for reassessment. Respondent denied appellant's petitions for reassessment, giving rise to this timely appeal.

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At the hearing on his petitions for reassessment, **appellant** offered the following explanation regarding his activities. Appellant retired from his job in Florida in 1979. He rented a motor home and began traveling around the country. At some point **while** traveling, he was informed by his parents that the FBI was attempting to locate him to place him in protective custody because the rumor in Miami was that he had stolen a large quantity of drugs and a contract to kill him had been made. As a **result**, appellant changed his name and traveled to **Marin** County, California, where he resided at Samuel P. Taylor State Park.

Through a friend from Miami, appellant met an individual named Leo Bergstrom. Mr. Bergstrom offered to pay appellant's rent in return for appellant's agreement to care for property which Mr. Bergstrom wanted to store in the house. After agreeing to this arrangement, appellant rented a house in El Granada for \$750 per month and Mr. Bergstrom advanced cash to appellant to pay the rent for several months in advance.

During August 1979, a fire in the El Granada house damaged a major area of the second floor. Appellant moved to another house in Half Moon Bay where the rental agreement with Leo Bergstrom continued.

In the latter part of August 1979, Leo Bergstrom told appellant he was interested in learning to operate a small computer. He gave appellant \$1,000 to purchase a computer, and appellant learned how to program it and instructed Leo Bergstrom on its use. Appellant stated that after Leo Bergstrom mastered some of the basic elements of programming and computer operation, appellant no longer made use of the computer personally.

In April 1980, appellant learned that Leo Bergstrom had been killed. After waiting several days, appellant opened Mr. Bergstrom's safe and found over 1,000 grams of cocaine and other illegal drugs. Appellant began using the cocaine and consumed approximately one gram of cocaine daily during the period April through July 1980.

Initially, we will address three contentions posed by appellant. Appellant argues that he did not earn any income in California during the appeal period; that he was not a resident of California for income tax purposes during the appeal period; and that evidence which is finally adjudicated to have been illegally

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seized by state law enforcement officers in violation of appellant's constitutional rights, privileges and immunities cannot be used by the same state as evidence to prove or support the assessment of civil tax liabilities. For the reasons expressed below, we conclude that all three of these contentions are without merit.

Appellant contends that he was still a resident of Florida and did not earn any income in California; therefore, he was not required to file California personal income tax returns. Whether or not appellant was a resident of California, he was nevertheless required to file a return for income earned from sources within the State of California. (Rev. & Tax. Code, § 17951.) Appellant stated that after moving to California he had a net monthly income of between \$1,000 and \$1,200 earned from freelance photography, doing security checks for bail-bondsmen, and by gambling in Las Vegas. (Resp. Ex. G at 7.) The California-source income generated by the first two activities, at least, would necessitate the filing of a California income tax return. Finally, the question of whether respondent can **utilize** evidence seized in the search of appellant's house is now moot, as the validity of the search of appellant's house was upheld by the California Court of Appeals in People v. Justin, 140 Cal.App.3d 729 (1983).

The next question presented by this appeal is whether appellant received any income from the illegal sale of narcotics during the period in issue. The fact that the search of appellant's house revealed various items commonly used in the conduct of a large-scale sale and distribution of cocaine operation, including a large amount of cocaine, a large amount of cash, sophisticated scales, various containers and plastic bags, items commonly used for the manufacture and distribution of purified "free-base" cocaine, and computer records indicating sales of cocaine, establishes at least a prima facie case that appellant received unreported income from the sale of narcotics during the appeal period. Appellant has offered no credible evidence to refute this prima facie showing. Accordingly, we conclude that he did receive unreported income from the sale of illegal drugs during the appeal period.

The second issue is whether respondent properly reconstructed the amount of appellant's taxable income from drug sales. Under the California Personal Income Tax Law, a taxpayer is required to specifically state the items of his gross incomes during the taxable year. (Rev.

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& Tax. Code, § 18401.) Gross income is defined to include "all income from whatever source derived," unless otherwise provided in the law. (Rev. & Tax. Code, § 17071.) It is well established that any gain from the illegal sale of narcotics constitutes gross income. (Farina v. McMahon, 2 **A.F.T.R.2d** (P-H) ¶ 58,5246 at 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 his 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); Appeal of John and Codelle Perez, Cal. St. Bd. of Equal., Feb. 16, 1971.) 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); Appeal of Marcel C. Robles, Cal. St. Bd. of Equal., June 28, 1979.)

-We acknowledge the fact that there are inherent difficulties in obtaining evidence in cases involving illegal activities. Therefore, both 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), affd. sub nom., Fiorella v. Commissioner, 361 **F.2d** 326 (5th Cir. 1966); Appeal of Burr MacFarland Lyons, Cal. St. Bd. of Equal., Dec. 15, 1976.) It has also been recognized that a dilemma confronts the taxpayer whose income has been reconstructed. The taxpayer bears the burden of proving that the reconstruction is erroneous and therefore 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 the taxing authority's reconstruction 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); Commissioner v. Shapiro, 424 U.S. 614 [47 **L.Ed.2d** 278] (1976); Appeal of Burr MacFarland Lyons, supra.) In summary, there must be

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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 MacFarland Lyons, *supra*; Appeal of David Leon Rose, Cal. St. Bd. of Equal., Mar. 8, 1976.)

The data relied upon by respondent in the instant case in reconstructing appellant's income was derived from information contained in the arrest reports, the affidavit for the search warrant of appellant's house, and the analysis of appellant's computer records made by the San Mateo County Sheriff's Office. On this basis, respondent determined that appellant: (i) had been selling cocaine continuously from November 1979 through July 1980; (ii) sold cocaine for approximately \$80 per gram (\$57 wholesale plus 40% markup); and (iii) realized a gross income of \$934,084 from such sales during the appeal period. This board has upheld respondent's use of reliable law enforcement data in **reconstructing** income. (Appeal of Philip Marshak, Cal. St. Bd. of Equal., Mar. 31, 1982; Appeal of Eduardo L. and Leticia Raygoza, Cal. St. Bd. of Equal., July 29, 1981.) Since respondent determined that appellant had received income from drug sales, and had apparently kept no record of such sales, it attempted to reconstruct his income in the following manner.

The first assessment, dated July 24, 1980, was computed using what is known as **the** expenditure-method, whereby appellant's income for the period at issue was computed on the basis of his expenditures, the value of items found in his possession, and his estimated personal living expenses during the taxable period as follows:

Value of Cocaine found (900 grams at \$100/gram)	\$ 90,000
Value of Marijuana found (3 pounds at \$500/lb)	1,500
Cash seized	13,000
Cost of living (6 months at \$2,000/month)	<u>12,000</u>
Total Expenditures	<u>\$116,500</u>

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The resulting tax liability was \$21,804.

When appellant's house was searched, the SMCSO found approximately 900 grams of **cocaine and 3 pounds** of marijuana. In order to utilize the expenditure method, respondent valued the cocaine at approximately \$100 per gram (the "street" price of cocaine at that time). According to information given to respondent, however, the wholesale price of cocaine was approximately \$57 per gram. We find this figure to be more reasonable in light of the fact that the basis of the expenditure method is to take the amount of **drugs found** and project the amount of income needed to buy that amount of inventory for subsequent sales. As a result, were we to sustain respondent's reconstruction by this method, we would revise respondent's computation to reflect a \$57 per gram wholesale cost of cocaine. The revised figures would be as follows:

Value of cocaine found (900 grams at \$57/gram)	\$51,300
Value of marijuana found.. (3 pounds at \$500/lb)	1,500
Cash seized	13,000
Cost of living (6 months at \$2,000/month)	<u>12,000</u>
Total Expenditures as Revised	<u><u>\$77,800</u></u>

The expenditure method has been held to be a reasonable method of income reconstruction. (United States v. Johnson, 319 U.S. 503 [87 L.Ed. 1546] (1942); Green v. Commissioner, ¶ 80,164 T.C.M. (P-H) (1980).) The expenditure method involves computing the taxpayer's income **on** the basis of his expenditures. Under this method, where a taxpayer has been found to have unreported income, the amount of that income is assumed to be the amount by which his total expenditures exceed his reported income plus **any** nontaxable receipts. (Green v. Commissioner, supra.) Included in the estimate of a taxpayer's total **expenditures** are the value of items',, including narcotics, found in his possession plus his **living expenses**. (Jackson v. Commissioner, ¶ 81,252 T.C.M. (P-H) (1981).)

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Generally, when faced with a case where the cash expenditure method is employed, we would expect from respondent "the establishment, with reasonable certainty, of an opening net worth, to serve as a starting point from which to calculate future increases in the taxpayer's assets." (Holland v. United States, 348 U.S. 121, 132 [99 L.Ed 150] (1954); Appeal of Fred Dale Stegman, Cal. St. Bd. of Equal., Jan. 8, 1985.) "[T]he application of the cash expenditure method . . . with neither a head nor a tail to it will not do." (Olinger v. Commissioner, 234 F.2d 823, 824 (5th Cir. 1956).) The necessity of establishing some sort of opening net worth is explained by the court in Taglianetti v. United States, 398 F.2d 558, 565 (1st Cir. 1968), because there "must be enough proof of both head and tail to rule them out as explanations of the expenditures." And, as pointed out in Dupree v. United States, 218 F.2d 781, 784 (5th Cir, 1955), "If there is no established figure showing the source from which expenditures during the year can be made, **or** the complete lack of such a source, then there is no relevance to proof of expenditures during the year,"

In atypical cash expenditures case, reasonable certainty may be established without attaching precise figures to opening and closing net worth positions for each of the taxable years to provide a basis for the critical subtraction, as long as the proof makes clear the extent of any contribution which beginning resources or a diminution of resources over time could have made to expenditures. (See Taglianetti v. United States, supra.) In the instant case, however, this was not done: in fact, respondent **neglected** to establish either an opening or closing net worth. Accordingly, its determination based on the expenditure method cannot be sustained.

Our inquiry does not stop here. Respondent also made subsequent assessments, resulting in a tax liability of \$21,822 for 1979 and additional net tax liability of \$67,101 for the period January 1, 1980, through July 22, 1980, which were based on appellant's own records of his transactions, extracted from his computer, analyzed by San Mateo County Sheriff's Office personnel, and reviewed by respondent's audit staff. The reconstruction of income based on sales, as applied by respondent in its subsequent amounts, has been approved by the courts and this board. (See, e.g., Appeal of Mart Conrad Wende, Cal. St. Bd. of Equal., Mar. 1, 1983.)

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According to respondent's analysis, the computer ledger showed large multi-gram purchases and sales of cocaine during 1979 and 1980. Each entry in the ledger contained the following notations: date, quantity, cost, and paid. By comparing the figures listed in the various columns, the SMCSO determined that appellant was purchasing large amounts of cocaine for an approximate price per unit of \$57, a price consistent with the normal price per gram of multi-gram quantities of cocaine.

In computing the later assessments, respondent used two of the ledger entries, dated October 30 and November 15, respectively. The October 30 entry shows 20,790 grams (approximately 46 1/2 pounds) of cocaine purchased for \$57.80 per gram. The November 15 entry shows 20,860 grams (again approximately 46 1/2 pounds) of cocaine purchased for \$56.80 per gram. Respondent then subtracted the value of the 900 grams of unsold cocaine seized at the time of appellant's arrest^{2/} from the inventory purchased on October 30 and November 15 to arrive at the wholesale value of cocaine sold of \$2,335,210. Respondent then estimated a 40 percent markup from the wholesale value to arrive at taxable income of \$934,084.^{3/} As the first purchase date was at the end of October, 1979, appellant apportioned the taxable income over the nine-month period of November 1979 through July 1980. Two months of the income was, therefore, apportioned to 1979, and seven-ninth's (\$726,510) apportioned to 1980.

2/ When this amount was computed, respondent correctly used the wholesale price of \$57 per gram.

3/ Respondent subtracted the \$1,401,126 cost of goods sold from the estimated total gross receipts of \$2,335,210 to arrive at gross income of \$934,084. Prior to 1982, as a result of this board's decision in the Appeal of Felix L. Rocha, decided February 3, 1977, respondent allowed taxpayers engaged in the illegal sale of controlled substances to deduct the cost of goods sold from gross sales to arrive at their taxable income. This deduction is now prohibited by statute. Effective September 14, 1982, Revenue and Taxation Code section 17297.5 provides that no deduction shall be allowed in cases where the income is derived from the sales of a controlled substance such as cocaine. Section 17297.5 is specifically made applicable with respect to taxable years which have not been closed by a statute of limitations, res judicata, or otherwise.

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Since respondent had **already** issued an assessment for 1980 based on taxable income of \$116,500, respondent subtracted this amount in computing appellant's total additional income for purposes of the second 1980 assessment. This resulted in a net increase of \$610,010 in 1980 taxable income. However, because of the \$38,700 error in the first 1980 assessment, discussed above, the offset should not have been greater than \$77,800, leaving a net increase of \$648,710.

On the basis of all **of the** above, we conclude that respondent's reconstruction of appellant's income by use of the sales method was reasonable.

The conclusion that the reconstruction is reasonable does not end our inquiry. Appellant may still prevail if he can prove, by a preponderance of the evidence, that the assessment is erroneous. (Appeal of Peter O. and Sharon J. Stohrer, Cal. St. Bd. of Equal., Dec. 15, 1976.) In an attempt to meet this burden, appellant claims that the drugs, cash, and computer records found in his house at the time of his arrest belonged to the now deceased Leo Bergstrom. Appellant's allegation is not supported by any evidence, other than his **self-serving** statement made to his probation officer and to respondent's hearing officer. Such an allegation is unconvincing **when weighed, against the other evidence** of his involvement in drug sales. Accordingly, we conclude that respondent's reconstruction of appellant's income was reasonable and appellant has failed to establish that the assessments were erroneous.

For the reasons stated above, we conclude that 'the jeopardy assessment in the amount of \$11,804 for the period January 1, **1980**, to July 21, 1980, should be reversed and in all other respects respondent's action should be sustained as modified **in accordance** with this opinion.

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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 Board in denying the petition of Russel D. Jackson for reassessment of a jeopardy assessment of personal income tax, in the amount of \$11,804 for the period January 1, 1980, to July 22, 1980, be and the same is hereby reversed; its action in denying the petition for reassessment of a jeopardy assessment of personal income tax in the amount of \$21,822, plus penalties of **\$5,455.53**, for the year 1979, be and the same is hereby sustained; and its action in denying the petition for reassessment of a jeopardy assessment in the amount of \$67,101 for the period January 1, 1980, to July 22, 1980, be and the same is hereby modified in accordance with this opinion.

Done at Sacramento, California, this 3rd day of December , 1984, by the State Board of Equalization, with Board Members Mr. Collis, Mr. Nevins, and Mr. Harvey present.

_____, Chairman
Conway H. Collis _____, Member
Richard Nevins _____, Member
Walter Harvey* _____, Member
_____, Member

*For Kenneth Cory, per Government Code section 7.9

BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
RUSSEL D. JACKSON) No. **81J-1086-MA**
aka RUSSEL A. JUSTIN, JR.)

OPINION ON PETITION FOR REHEARING

On December 3, 1985, we reversed the action of the Franchise Tax Board in denying the petition of Russel D. Jackson for **reassessment** of a jeopardy assessment of personal income tax in the amount of \$11,804 for the period January 1, 1980, to July 21, 1980, and sustained its action in denying the petition for reassessment of a jeopardy assessment of personal income tax in the amount of **\$21,822.00**, plus penalties of **\$5,455.53** for the year 1979 and modified its action in denying the petition for reassessment of a jeopardy assessment in the amount of \$67,101 for the period January 1, 1980, to July 22, 1980. Subsequently, respondent filed a petition for rehearing in which it argues that, in the original appeal, it advanced two alternative theories upon which to support all of the jeopardy assessments. Respondent argues that because one of its alternative arguments--the use of the sales method--supported the entire amount of the two assessments for the short period January 1, 1980, to July 22, 1980, it was improper to reduce the total amount of the assessment. Upon reconsideration, we agree with respondent's position. Both of the assessments are amply supported by respondent's second, or alternative, theory for reconstruction of appellant's income by use of the sales method. As such, respondent correctly points out that, for the short period January 1, 1980, to July 22, 1980, the amount of the first assessment was incorrectly subtracted from the amount of the second. Accordingly, our

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aka Russel A. Justin, Jr.

prior action in this case is modified to conform to the views expressed in this opinion.

Done at Sacramento, California, this 10th day of June , 1986, by the State Board of Equalization; with Board Members Mr. Nevins, Mr. Collis, Mr. Bennett, Mr. Dronenburg and Mr. Harvey present.

<u>Richard Nevins</u>	, Chairman
<u>Conway H. Collis</u>	, Member
<u>William M. Bennett</u>	, Member
<u>Ernest J. Dronenburg, Jr.</u>	, Member
<u>Walter Harvey*</u>	, Member

*For Kenneth Cory, per Government Code section 7.9