

Appeal of Pitooz Farmanfarmai, Transferee of
Parivash Varzi

he issue presented for our decision is whether appellant Pitooz Farmanfarmai is secondarily liable to pay the jeopardy assessment in question which was originally issued to his mother, Parivash Varzi.

On January 23, 1980, the Los Angeles County Sheriff's Department obtained a warrant to search the West Los Angeles apartment belonging to Morteza Varzi, appellant's uncle, and the nearby apartment of Parivash Varzi, who was Mr. Varzi's sister. Appellant lived with his mother at this apartment. The affidavit in support of the search warrant indicated that two informants purchased heroin from Morteza Varzi at his apartment and that, on several occasions, Mr. Varzi went to his sister's residence to first retrieve the controlled substance that he sold to the informants. (Resp. Br., Exs. 0 & P.)

Upon execution of the warrant, sheriff's deputies uncovered one gram of concentrated heroin and a gram scale from Morteza Varzi's apartment. In Parivash Varzi's home, they found \$5,049 in cash, gram scales, pager bindles, as well as 25 grams of opium or opium residue in a nightstand in her bedroom, (Resp. Br., Ex. 0 and P.) In addition, the deputies seized appellant's savings account passbook which showed that he had made bank deposits totalling \$83,373.66 between July 1979 and December 1979. (Resp. Br., Ex. I.)

Based on the "papers" and "personal checks from known heroin users" found at her apartment, the deputy in charge of the investigation formed the opinion that P. Varzi [was] involved in the interstate traffic of large amounts of drugs.' (Resp. Br., Ex. P at 6.) Morteza Varzi, Parivash Varzi, and appellant were arrested for possession of opium for sale. One year later, the district attorney's office filed complaints against Morteza Varzi and Parivash Varzi. Appellant, however, was never charged with any offense arising out of the aforementioned search.

On January 25, 1980, the Franchise Tax Board received information about the arrests and determined that Morteza Varzi, Parivash Varzi, and appellant had each received unreported income in 1979 from the illegal trafficking of heroin. In Parivash Varzi's case, respondent apparently made the assumption that she sold 21.26 grams of heroin at \$100 per gram every other day during the appeal year and therefore estimated her taxable income from heroin sales in 1979 to have been \$410,717.

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(App. Br. at 12; Resp. Br., Ex. A.) Respondent issued separate jeopardy assessments to **Morteza Varzi**, Parivash Varzi, and appellant. Pursuant to orders to withhold, respondent then collected \$44,168 by levying upon the money seized by the sheriff's department and bank accounts belonging to appellant and to his mother.

On March 26, 1980, the assessment became final under section 78644 when the taxpayers failed to file written petitions for reassessment. **However, on** April 21, 1980, respondent accepted a late petition for reassessment filed on behalf of all three taxpayers. On **March 2**, 1981, respondent affirmed the assessments since it had not received any supplemental **information..** that specified grounds for the joint petition for **reassessment**. Thirty days later, respondent's action on the joint petition for reassessment became final under section 18645 when the taxpayers did not **appeal** the action.

On July 15, 1981, appellant requested that the Franchise Tax Board reconsider its assessment against him. Subsequently, appellant filed a new petition for reassessment, claiming a tax refund and requesting an oral hearing. Respondent determined to refund **\$38,407.15 of the sum** that **it had** collected earlier but retained **\$5,979** for taxes due under the jeopardy assessment issued to appellant. Thereupon, appellant reiterated his demands for a full tax refund and an oral hearing, Respondent acceded by holding a hearing on appellant's petition for reassessment on July 28, 1982. As an apparent result of information that it obtained at the hearing, respondent decided on September 22, 1982, that there was no factual basis to assume appellant had been engaged in the illegal sale of **herion** in 1979 and **withdrew** the assessment issued to him. **Concurrently, the** Franchise Tax Board determined from his bank deposits that appellant had received \$60,000 during the latter half of 1979. Appellant had explained that the money was given to him by his mother after she sold her real property in her home country, Iran. Since it had previously found that his mother had failed to report income derived from the illegal sale of heroin in 1979, respondent ostensibly concluded that this transfer of money to appellant was **a fraudulent** conveyance. Consequently, respondent determined appellant was a transferee liable to pay his mother's unpaid 1979 tax liability and issued to him as transferee the same jeopardy assessment originally served on his mother. Appellant filed a petition

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for reassessment of this jeopardy assessment, arguing that the original assessment was unfounded and that the money in his bank account was not the proceeds of any illegal activity. After a hearing on the matter, respondent affirmed the assessment. This timely appeal followed.

In these proceedings, respondent contends that Parivash Varzi "transferred funds to her son as an alter ego in order to avoid paying taxes" on income from drug sales. (**Resp. Br. at 6.**) Without citing any authority, respondent simply concludes, that appellant is liable for his mother's unpaid 1979 tax liability as a transferee under sections 18621 and 18622.^{2/} Section 18621 provides, in relevant part, as follows:

The taxes imposed by this part upon any taxpayer for which any person **other** than the taxpayer is liable may be assessed against such person in the manner provided for the assessment of deficiencies.

Section 18622 further states **that**, "The **provisions of** this part respecting the collection of taxes apply to the collection of the taxes from the person secondarily liable to the same extent and with the **same force** and effect as though he were the taxpayer." While sections 18621 and 18622 thus provide for the assessment and collection of an existing tax liability of a taxpayer from a person who is secondarily liable, these sections do not define transferee liability. In federal tax cases, however, the existence and extent of transferee liability are determined by the law of the state in which the transfer occurred. (Commissioner v. Stern, 357 U.S. 39, 45 [**2 L.Ed.2d 1126**] (1958).) **In cases involving**

^{2/} Citing Appeal of Chris A. Huelton and Florence K. gutter, decided on October 14, 1982, respondent has also argued that, because Parivash Varzi failed to appeal her jeopardy assessment after it was affirmed, this board lacks "jurisdiction to consider the merits of **Varzi's** assessment." (**Resp. Br. at 6.**) By this, we presume respondent means that we are foreclosed in these proceedings from examining whether or not **Mrs. Varzi** actually had unreported income from the illegal sale of narcotics or the reasonableness of respondent's method of reconstructing such income. It is not necessary, however, for us to delve into this point **since** we decide this appeal on other grounds.

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transfers in California, the federal courts have applied the provisions of the California Civil Code to determine whether a taxpayer is liable as a transferee. (See e.g., Stahl v. Commissioner, ¶ 63,201, T.C.M. (P-H) (1963).)

With the promulgation of Civil Code sections 3439.01 through 3439.72, California adopted the Uniform Fraudulent Conveyance Act which provides two distinct grounds for finding a conveyance to be fraudulent as to creditors. (Hansford v. Lassar, 53 Cal.App.3d 364, 374 [125 Cal.Rptr. 804] (1975).) **First**, under the constructive fraud test of Civil Code section 3439.04, a conveyance is fraudulent when it is made without fair consideration and the transferee is insolvent **at** the time of the conveyance or rendered insolvent thereby. (TWM Homes, Inc. v. Atherwood Realty and Inv. Co., 214 Cal.App.2d 826, 842-843 [29 Cal.Rptr. 887] (1963).) The statutory language of section 3439.04 provides that no intent to defraud creditors by **way of** the transfer need be shown under this test. (Headon v. Miller, 141 Cal.App.3d 169, 172 [190 Cal.Rptr. 198] (1983).) **Second**, under the 'actual fraud test of Civil Code section 3439.01, a conveyance made with actual intent to defraud present or future creditors is fraudulent as to both present and future creditors; neither lack of a fair consideration nor insolvency is material. (Hansford v. Lassar, supra.) A conveyance found to be fraudulent under either test may be set aside by the creditors. (Civ. Code, §§ 3439.09 & 3439.10; Headon v. Miller, supra.)

In the present appeal, there is no evidence in the record to suggest that we are dealing with actual fraud nor has respondent contended this to be the case. Accordingly, we are concerned here with the application of the constructive fraud statute. To find a conveyance fraudulent under Civil Code section 3439.04, the insolvency of the transferor must exist at the time of the conveyance **or** must result therefrom. (TWM Homes, Inc. v. Atherwood Realty and Inv. Co., supra, 214 Cal.App.2d at 847.) A transferor is insolvent under the Uniform Fraudulent Conveyance Act "when the present fair salable value of his assets is less than the amount that will be required to pay his probable liability on his existing debts as they become **absolute** and matured." (Civ. Code, § 3439.02, subd. (a).) Insolvency under the above statute means the insufficiency of the entire property and assets of an individual to pay his debts. (Aggregates Associated, Inc. v. Packwood, 58 Cal.2d 580, 589 [25 Cal.Rptr. 545] (1962).) As a general rule, solvency and not insolvency is presumed. (Stearns v. Los Angeles City

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School Dist., 244 Cal.App.2d 696, 737 [53 Cal.Rptr. 482] (1966); Miller v. Keegan 92 Cal.App.2d 846, 851-852 [207 2d 1073] (1949).) To overcome the presumption of solvency, there must be some basis in evidence for determining that the amount of the debtor's obligations **exceeded** the then present fair salable value of his non-exempt assets. (TWM Homes, Inc. v. Atherwood Realty and Inv. Co., supra, 214 Cal.App.2d at 847.)

Keeping in mind the foregoing principles; we turn to the facts of the present matter and find that there is no evidence whatsoever in the record regarding the solvency or insolvency of the transferor Parivash **Varzi**. Without evidence showing that the transfers of **money** to appellant by his mother were made when she was insolvent or that she was rendered insolvent by virtue of the transfers, we cannot find that the conveyances by Parivash Varzi to appellant were fraudulent conveyances under Civil Code section 3439.04. Therefore, we have no **choice** but to conclude that appellant is not liable as a transferee for his mother's unpaid jeopardy assessment. Respondent's action in this matter must be reversed,

