

BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
ESTHER ZOLLER)

For Appellant: Esther Zoller, in pro. per.

For Respondent: Wilbur F. Lavelle, Junior Counsel

O P I N I O N

This appeal is made pursuant to Section 18594 of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protest of Esther Zoller to a proposed assessment of additional personal income tax in the amount of \$18.43 for the year 1954.

Appellant married in 1952, but difficulties arose and she and her husband separated early in 1954. Each filed a separate California income tax return for 1954. Appellant's husband reported one-half of his earnings as community income and one-half of a loss from the operation of an apartment house as a community loss. Appellant failed to declare any part of her husband's earnings as income and claimed the entire loss on the operation of the apartment house as a deduction.

Respondent's assessment is based on the inclusion in Appellant's gross income of one-half of her husband's earnings and the disallowance of one-half of the net loss on the apartment house. Respondent contends that the husband's earnings were community property, one-half of which accrued to Appellant, and that the apartment house was community property. Appellant contends that her husband retained for his personal use all of his earnings and that she never received any portion of such earnings. Appellant further contends that the apartment house was her separate property.

Section 163 of the Civil Code provides: "All property owned by the husband before marriage, and that acquired afterwards by gift, bequest, devise, or descent, with the rents, issues, and profits thereof, is his separate property." Section 164 provides: "All other property acquired after marriage by either husband or wife . . . is community property ..." Therefore, the earnings of the husband in question in this appeal were community property. Section 161a provides: "The respective interests of husband and wife in community property during continuance of the marriage relation are present, existing and equal interests ..." It follows that the earnings of the husband belonged one-half to the husband and one-half to Appellant. Her legal interest in this

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property was not changed by the fact that she received none of it (Mark v. Title Guarantee and Trust Company, 122 Cal. App. 301) nor by the fact that she was separated from her husband. (Commissioner v. Cavanagh, 125 Fed. 2d 366.) It does not appear that the separation was pursuant to a judgment or decree of separate maintenance. (See Section 169.1 of the Civil Code.) Half of the husband's earning were thus taxable to Appellant.

At the time of filing the appeal, a suit was still pending between Appellant and her former husband concerning the question of whether the apartment house was community property or her separate property. Since then the matter has been finally adjudicated adversely to Appellant with a holding that the apartment house was community property. (Hummel v. Hummel, 161 Cal. App. 2d 272.) We have been presented with no basis for departing from this holding. Accordingly, we find that Respondent's disallowance of one-half the loss on the operation of the apartment house was justified,

Appellant states that "I had my tax form filled out at the Tax Franchise office desk and they were advised of all the legal complications and yet filled it out as filed." Only in an unusual case will estoppel be applied against the government in tax matters; the case must be clear and the injustice great. (U. S. Fidelity and Guaranty Co. v. State Board of Equalization, 47 Cal. 2d 384.) Appellant has not clearly established that she fully and correctly disclosed to Respondent's employees all of the details relating to this problem. Furthermore, since she made her inquiry after the close of the taxable year, there could have been no detrimental reliance on any advice given to her because she could not then have altered her tax liability. We conclude that Respondent is not estopped to collect the tax.

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 on the protest of **Esther** Zoller to a proposed assessment of additional personal income tax in the amount of \$18.43 for the year 1954, be and the same is hereby sustained.

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Done at Sacramento, California, this 13th day of December,
1960, by the State Board of Equalization.

John W. Lynch, Chairman

Richard Nevins, Member

Paul R. Leake, Member

 , Member

 , Member

ATTEST: Dixwell L. Fierce, Secretary