

BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
HERBERT B. AND NORMA P. **ERB**)

For Appellants: Herbert B. Erb, in pro. per.

For Respondent: Kathleen M. **Morris**
 Counsel

O P I N I O N

This appeal is made pursuant to section 18593 of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protest of Herbert B. and Norma P. Erb against a proposed assessment of additional personal income tax in the amount of \$404.00 for the year 1977.

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The issue presented is whether respondent properly disallowed a **disability** income exclusion claimed by appellants on their 1977 return.

Appellant Herbert B. Erb retired from the United States Army in 1969 due to an arthritic condition. Thereafter, he received a disability pension from the federal government. In the California personal income tax return which they filed for the taxable year 1977, appellants reported an adjusted gross income of \$32,395, including Mr. Erb's disability retirement benefits. Attached to the return was a Statement to Support Exclusion of Sick Pay (Form FTB 3805T(11-74)), which indicated that appellants were claiming a "sick pay exclusion" in the amount of \$5,200, representing a portion of the disability retirement payments received by Mr. Erb in 1977..

Upon review of that return, respondent determined that, for reasons hereafter stated, appellants were not entitled to the \$5,200 sick pay exclusion claimed. On the basis of that determination, respondent made appropriate adjustments in appellants' reported tax liability for 1977 and issued the deficiency assessment here in question. That action gave rise to this appeal.

In 1977, the California Legislature made substantial changes in section 17139 of the Revenue and Taxation Code, which deals with the taxability to an employee of employer-financed health and accident benefits. Basically, the Legislature repealed the "sick pay exclusion" and substituted a more restrictive "disability income exclusion."¹⁷ Effective for 1977 and subsequent taxable years, a taxpayer receiving disability benefits paid by his employer may be entitled to a maximum annual exclusion of \$5,200 of such payments if he is under age 65, is retired on disability, and was permanently disabled at the time of his retirement. Unlike the former exclusionary provisions, the new law contains a "phaseout" provision. The maximum excludable amount is reduced on a dollar-for-dollar basis by the

¹⁷ The 1977 changes in the California law generally conformed to amendments to section 105 of the Internal Revenue Code which were enacted by Congress in the Tax Reform Act of 1976.

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taxpayer's adjusted gross income in excess of \$15,000. (Rev. & Tax. Code, § 17139, subd. (d)(3).) Thus, if in a given year a taxpayer otherwise eligible for the maximum disability income exclusion of \$5,200 has an adjusted gross income of \$20,200 or more, including his disability income, he is not entitled to any exclusion.

Respondent's disallowance of the \$5,200 "sick pay exclusion" claimed by appellants on their 1977 return was based upon the fact that appellants' reported adjusted gross income for that year was \$32,395. Obviously, that amount is well over the income level at which eligibility for the disability income exclusion under section 17139 is completely phased out. Appellants do not contend otherwise. They argue, however, that they nevertheless should be allowed the "sick pay exclusion" which they claimed, for the following reasons.

Appellants urge that they were misled as to the current law when they went to one of respondent's field offices to obtain the forms necessary to claim a disability income exclusion for 1977. They contend that they were assured by an employee of respondent that the obsolete form (FTB 3805T (11-74)) which they were given was the correct one to file for 1977. Appellants contend they relied on that information and completed the form in accordance with the instructions accompanying it, which did not mention any phaseout of the exclusion. Under those circumstances, they argue, they should be allowed the \$5,200 "sick pay exclusion" for 1977, notwithstanding the changes in the law.

Respondent confesses that it cannot explain how appellants happened to be given the outdated form, since revised forms reflecting the 1977 amendments to the law were issued in October 1977, and presumably were distributed to respondent's offices throughout the state. Be that as it may, however, appellants still cannot prevail on this argument. On a number of prior occasions we have rejected this type of argument, which is an attempt to raise an estoppel against respondent. We have done so where the taxpayer contended respondent's employees gave him obsolete forms or erroneous information (Appeal of Richard W. and Ellen Campbell, Cal. St. Bd. of Equal., Aug. 19, 1975; Appeal of Arden K. and Dorothy S. Smith, Cal. St. Bd. of Equal., Oct. 7, 1974.) and where there was alleged reliance on misleading statements, errors or omissions in respondent's instructions accompanying the tax return forms.

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(Appeal of Henry L. and Joyce Stein, Cal. St. Bd. of Equal., Dec. 5, 1978; Appeal of Amy M. Yamachi, Cal. St. Bd. of Equal., June 28, 1977; Appeal of Michael M. and Olivia D. MaKieve, Cal. St. Bd. of Equal., Nov. 19, 1975.) In those decisions we have repeatedly observed that, as a general rule, the doctrine of equitable estoppel will be invoked against the government only where the case is clear and the injustice great. (United States Fidelity and Guaranty Co. v. State Board of Equalization, 47 Cal.2d 384, 389 [303 p.2d 1034] (1956).)

Although it appears that appellants herein were misled by the advice and the obsolete form given to them by respondent's employee, those facts are insufficient to justify application of the estoppel doctrine. There must also be a showing of detrimental reliance on the part of the taxpayer. (Appeal of Arden K. and Dorothy S. Smith, supra.) No such reliance is shown where, as here, all of the facts giving rise to appellants' 1977 tax liability had occurred prior to their alleged reliance on misinformation and the obsolete form obtained from respondent. Under the circumstances, estoppel may not be invoked to relieve appellants of their liability for the tax deficiency.

It is undisputed that appellants were not entitled to any disability income exclusion for 1977 under section 17139 of the Revenue and Taxation Code. Since that is the only provision of the Personal Income Tax Law which could have afforded them such an exemption, respondent properly disallowed the exclusion claimed in their return for that year.

Appellants have also suggested that, in view of the facts of this case, it would be unfair to penalize them by requiring them to pay interest on the amount of additional tax determined to be due for 1977. We have consistently held that the payment of such interest is mandatory, under section 18688 of the Revenue and Taxation Code, regardless of the circumstances surrounding the underlying assessment. (Appeal of Henry L. and Joyce Stein, supra; Appeal of Audrey C. Jaegle, Cal. St. Bd. of Equal., June 22, 1976; Appeal of Allan W. Shapiro, Cal. St. Bd. of Equal., Aug. 1, 1974.) The interest is not in the nature of a penalty imposed on the taxpayer, but is merely compensation for the retention and use of the money. (Appeal of Ronald J. and Luella R. Goodnight, Cal. St. Bd. of Equal., June 28, 1979; Appeal of Audrey C. Jaegle, supra.) For these

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reasons, **we must also** deny appellants' request that they be relieved from liability for the interest accruing on the deficiency assessment to the date of payment.

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 Herbert B. and Norma P. Erb against a proposed assessment of additional personal income tax in the amount of **\$404.00** for the year **1977**, be and the same is hereby sustained.

Done at Sacramento, California, this 28th day of ~~October~~, ~~1980~~, by the State Board of Equalization, with **Members Nevins, Reilly, Dronenburg and Bennett** present.

Richard Nevins _____, Chairman
George R. Reilly _____, Member
Ernest J. Dronenburg, Jr. _____, Member
William M. Bennett _____, Member
_____- - _____, Member