



BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
EDMUND F. AND DELIA O. FOLEY)

For Appellants: Edmund F. and Delia O. Foley,
 in pro. per.

For Respondent: James T. Philbin
 Supervising 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 Edmund F. and Delia O. Foley against a proposed assessment of additional personal income tax in the amount of \$375.40 for the year 1978.

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The issue for determination is whether appellants may obtain a credit for the elderly for the year 1978.

Appellants Edmund F. and Delia O. Foley are married and are both under age 65. In 1978, Mr. Foley received \$18,739 in taxable pension payments from the United States Navy and Mrs. Foley earned wages in the amount of \$8,842. The couple also received \$633 in interest income.

On their joint California personal income tax return for 1978, appellants claimed a \$375 credit for the elderly, based on Mr. **Foley's** military pension. In computing the credit, they treated the entirety of Mrs. Foley's wages as her earned income, rather than handling it as community property and apportioning it equally between the spouses. Appellants formulated their claim on the appropriate schedule RP **form** provided by respondent for this purpose; they also referred to the instruction booklet which respondent designed to accompany the form. Neither the form nor the **instructions** stated that community income should be allocated between the spouses in computing this credit.

Respondent concluded that Mrs. Foley's wages were community property and that the credit should therefore have been calculated by distributing these wages equally between husband and wife. Respondent thus treated each spouse as having received \$4,421 in earned income, and concluded that neither spouse was entitled to a credit for the elderly.

Under certain conditions, Revenue and Taxation Code section 17052.9, subdivision (e), provides a credit for individuals under age 65 who receive pensions under a public retirement system. This credit is 15 percent of a "designated maximum amount" of retirement income, which amount depends upon the taxpayer and spouse's filing status and ages. (Rev. & Tax. Code, § 17052.9, subs. (e)(5), (e)(6) and (e)(7).) The amount **is reduced** by Social Security and other tax-exempt pensions, and by earned income in excess of specified maximums. (Rev. & Tax. Code, § 17052.9, subd. **(e)(5)**.) Thus, if an applicant's earned income and nontaxable pensions exceed a certain sum, they will negate any eligibility for the credit. Applying the statute to Mr. and Mrs. Foley, we find that neither spouse is entitled to claim the credit if his or her earned income exceeds \$3,950. (Rev. & Tax. Code, § 17052.9, subs. (e)(5)(B) & **(e)(6)**.)

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Respondent assigned half of Mrs. Foley's earned income, or **\$4,421**, to each spouse. Since both spouses therefore had earned income in excess of the maximum amount permitted under section 17052.9, subdivision (e), respondent determined that appellants were ineligible for the credit.

Appellants argue that all of the wife's wages should be treated as noncommunity property, and allocated to her alone, for purposes of the credit. Under such a distribution, nothing would be subtracted from the husband's "designated maximum amount", and he would become entitled to a credit for the elderly.

We considered this question in Appeal of C. and B. F. Blazina and Appeal of Merlyn R. and Marilyn A. Keay, decided by this board on October 28, 1980, and December 9, 1980, respectively. There, as in the instant case, the taxpayers had income from a public retirement system and sought a credit under § 47052.9, subdivision (e). They contended that wage income should be allocated entirely to the spouse whose services gave rise to it, even if the income is community property. We held that income earned by either spouse during the marriage must be equally divided between husband and wife, to determine the amount of subdivision (e) credit for the elderly to which they may be entitled. This holding is dispositive of the issue before us.

Appellants point out that the form and instructions provided by respondent for use in computing the credit for 1978 did not state that community property must be divided between the spouses. In fact, the instructions imply that taxpayers should ignore community property laws in determining the amount of the credit. Appellants contend that because respondent's instructions were misleading, it should be estopped from disallowing their credit for the elderly.

The fact that respondent erred in preparing its 1978 Schedule RP documents, however, does not automatically estop it from disallowing appellants' credit for the elderly. The doctrine of estoppel will be invoked against the state only where all of the elements of estoppel are proven and where the injustice at issue is great. (California Cigarette Concessions, Inc. v. City of Los Angeles, 53 Cal.2d 865, 869 [3 Cal.Rptr. 675, 350 P.2d 715] (1960); United States Fidelity and Guaranty Co. v. State Board of Equalization, 47 Cal.2d 384 [303 P.2d 1034] (1956).) One of the elements of

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estoppel is detrimental reliance: appellants must show that they relied upon respondent's misstatements and were injured thereby. (Market Street Railway Co. v. State Board of Equalization, 137 Cal.App.2d 87 [290 P.2d 20] (1955).)

In the instant case, we recognize, first, that Mrs. Foley's wages are community property, and, second, that each spouse's community earned income exceeds the amount permitted by statute for entitlement to a credit for the elderly. In order to prove detrimental reliance, appellants would have to show that they acted to bring about one of the above two conclusions because they relied upon respondent's instructions; and that in so acting, they incurred financial liability. They cannot show this, because the community nature of the wages is a principle of law irrespective of respondent's Schedule RP instructions, and because Mrs. Foley earned wages in excess of the statutory maximum before appellants ever received respondent's instructions. Since the facts fatal to appellants' claim for a credit occurred prior to, and independently of, appellants' reliance upon respondent's instructions, we must conclude that respondent is not estopped to disallow the credit. (Appeal of Merlyn R. and Marilyn A. Keay, Cal. St. Bd. of Equal., Dec. 9, 1980; Appeal of Priscilla L. Campbell, Cal. St. Bd. of Equal., Feb. 8, 1979.)

For the above reasons, we must sustain respondent's action.

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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 on the protest of Edmund F. and Delia O. Foley against a proposed assessment of additional personal income tax in the amount of \$375.40 for the year 1978, be and the same is hereby sustained.

Done at Sacramento, California, this 3rd day of March , 1982, by the State **Board** of Equalization, with Board Members Mr. Bennett, Mr. Reilly, Mr. Dronenburg, Mr. Nevins and Mr. Cory present.

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