



BEFORE THE STATE BOARD OF EQUALIZATION  
 OF THE STATE **OF** CALIFORNIA

In the Matter of the Appeal of )  
 )  
 HOWARD AND EILEEN BURKE )

For Appellants: George Applebaum  
 Staff Attorney  
 Legal Center for, the Elderly

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 Howard and Eileen Burke against a proposed assessment of additional personal income **tax** in the amount of \$213.60 for the **year 1978.**

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The issue for determination is whether appellants are entitled to a credit for the elderly for the year 1978.

Appellants Howard and Eileen Burke are married, and were both under 62 years of age in 1978, During that year Mr. Burke received \$7,959 in taxable pension payments from the United States Civil Service Commission, and Mrs. Burke earned **\$9,452.75** in wages.

On their joint California personal income tax return for 1978, appellants claimed a \$213.63 credit for the elderly, based upon Mr. Burke's retirement pension. In computing the credit, they treated the entirety of Mrs. Burke's wages as her earned income, rather than treating it as community property and dividing it equally between the spouses. Appellants formulated their claim on the appropriate Schedule RP form provided by respondent for this purpose; they also apparently referred to a detailed "Volunteer Tax Assistance Program" instruction booklet issued by respondent to clarify 1978 state income tax requirements. Neither the form nor the booklet stated that community income should be apportioned between the spouses for purposes of the 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, subds. (e)(5), (e)(6) and (e)(7).) The amount is reduced by tax exempt pensions and by earned income in excess of age-specific 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. In the instant case, where appellants are under age 62 and have no tax-free pension income, neither spouse is entitled to claim the credit if his or her earned, income exceeds \$3,400.** (Rev. & Tax. Code, § 17052.9, subds. (e)(5)(B) and (e)(6).)

Respondent treated Mrs. Burke's wages as community property, and recalculated the credit by allocating half the wages, or **\$4,726.38,** to each spouse. Since both spouses therefore had earned **income** in excess of the \$3,400 maximum amount permitted under section 17052.9,

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subdivision (e), respondent determined that appellants were ineligible for the credit.

**Appellants** acknowledge the community nature of Mrs. Burke's wages. However, **they** argue that the state credit for the elderly should follow its federal counterpart and ignore the community property laws. Under this construction, all of the wife's wages would be allocated to her alone, nothing would be subtracted from the husband's "designated maximum amount," and he would become eligible for the credit.

To support their argument, appellants submitted into evidence a Volunteer Tax Assistance Program Handbook, which **respondent** issued to help taxpayers prepare their state income tax returns for 1978. Respondent's instructions and sample forms in this handbook **seem to** indicate that community property laws should be ignored in computing the 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 section 17052.9, subdivision (e).. They contended that respondent should follow federal law in applying the credit, and should allocate wage income entirely to the spouse whose services gave rise to it, even if the income is community property. We noted that Internal Revenue Code section 37(e), upon which subdivision (e) of section 17052.9 is based, contains a provision directing that community property laws be disregarded, but that its California counterpart contains no such provision. We then held that income earned by either spouse **during the marriage** must be equally **divided** between husband and wife, to determine the amount of California credit for the elderly to which they may be entitled. This holding is dispositive of the issue before us.

The erroneous instructions in respondent's handbook are of no effect here, since an agency's instructions are invalid if they 'contradict or alter the clear command of a statute. (Dillman v. McColgan, 63 Cal.App.2d 405 (146 P.2d 978) (1944); Appeal of Melvin D. Collamore, Cal. St. Bd. of Equal., Oct. 24, 1972.)

For the reasons above, we will 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 Howard and Eileen Burke against a proposed assessment of additional personal income tax in the amount of **\$213.60** for the year 1978, be and the same is hereby sustained.

Done at Sacramento, California, this 31st day of March, 1982, by the State Board of Equalization, with Board Members Mr. Reilly, Mr. Dronenburg, and Mr. Nevins present.

\_\_\_\_\_, Chairman  
George Reilly \_\_\_\_\_, Member  
Ernest J. Dronenburg, Jr. \_\_\_\_\_, Member  
Richard Nevins \_\_\_\_\_, Member  
\_\_\_\_\_, Member