

BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
FRANK and JOAN MILLER)

Appearances:

For Appellant: Saul Braverman
Certified Public Accountant

For Respondent: John A. Stilwell, Jr.
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 Frank and Joan Miller against a proposed assessment of additional personal income tax in the amount of \$28,612.80 for the year 1972.

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The issue in this appeal is whether appellants are entitled to an offset of alleged overpayments for 1973 and 1974.

Appellants filed joint California personal income tax returns for the years 1972 through 1974, during which time they were members of a partnership. The Internal Revenue Service (IRS) examined the partnership's **returns** for those years, and on October 8, 1980, appellants and the IRS agreed that appellants owed additional tax for 1972 and were entitled to a refund for 1973 and 1974. Appellants failed to notify respondent of the final IRS adjustment as required by section 18451 of the Revenue and Taxation Code. Sometime prior to January 15, 1981, the IRS notified respondent of the agreement it had reached with appellants.

By a letter dated March 31, 1981, respondent told appellants that the IRS had informed respondent of the adjustments made to their returns for 1972, 1973, and 1974; explained that respondent could not locate appellants' returns for those years and requested copies of the returns; and finally, explained that the time within which a notice of proposed assessment based on the federal report could be issued was extended to four years from the date of the final federal determination because appellants had failed to notify respondent of the federal determination. Appellants promptly sent copies of their returns.

There was no further correspondence between respondent and appellants until October 4, 1982, when respondent issued a proposed assessment for 1972 based on the federal report. At that time, respondent told appellants that it would **not make** adjustments to appellants' 1973 and 1974 returns since the statute of limitations for filing claims for refund for those years had expired. Respondent considered appellants' protest and again denied the claims for refund. This timely appeal followed.

Appellants concede that the 1972 proposed assessment was timely under section 18586.2 of the Revenue and Taxation Code since it was issued within four years from the date the federal adjustment became final. They also concede that their claims for refund for 1973 and 1974 were not timely filed. Finally, appellants agree that section 19053.9 of the Revenue and Taxation Code is not applicable. Under certain circumstances, that section allows an overpayment barred by the

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applicable statute of limitations to be offset in computing the deficiency in tax for another year. The section would normally apply to the situation presented by this appeal, where the barred overpayment and deficiency result from the transfer of income or deductions from one year to another. However, section 19053.9 provides that no offset shall be **allowed** after the expiration of seven years from the due date of the return on which the overpayment is determined. Thus, in this case, the offsets for the years 1973 and 1974 could not be **allowed** after April 15, 1981 and 1982, respectively. Appellants do not dispute this, but they contend they should nevertheless be allowed an offset in the amount of the 1973 and 1974 overpayments. Appellants' argument is that since the IRS told respondent of the federal adjustment sometime prior to January 15, 1981, respondent could have issued the 1972 proposed assessment before April 15, 1981, at which time appellants would have been entitled to offsets of both the 1973 and 1974 overpayments.

The doctrine of estoppel is applied against a government agency only when the elements of estoppel are clearly present and when estoppel is needed to prevent serious injustice. (U.S. Fid. & Guar. Co. v. State Bd. of Equal., 47 Cal.2d 384 [303 P.2d 1034] (1956).) The **doctrine of** estoppel is applicable against the government only when there has been governmental action which has induced reasonable, detrimental reliance by the party asserting the defense and where the doctrine's use is required to prevent severe injustice. (Schuster v. Commissioner, 312 F.2d 311 (9th Cir. 1962); see generally Thompson, Equitable Estoppel of the Government, 79 Colum. L.Rev. 551 (1979).) Since estoppel is an affirmative defense, the person claiming it has the burden of proving the existence of all **of the** elements of estoppel. (Appeal of U. S. Blockboard Corporation, Cal. St. Bd. of Equal., July 7, 1967,) We **believe that** the doctrine of estoppel is clearly not applicable in the instant appeal.

In this appeal, there was no governmental action which could possibly have misled appellants. While respondent apparently could have issued the proposed assessment earlier, it certainly had no duty to do so. The proposed assessment was timely issued; in fact, it was issued two years before the expiration of the period within which respondent could issue a proposed assessment against appellants for 1972. Furthermore, there is nothing to indicate that respondent purposefully delayed issuing the proposed assessment in order to cause

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appellants not to be entitled to the corresponding offset. Finally, appellants could have prevented this situation had they either complied with the reporting requirements of section 18451 of the Revenue and Taxation Code or filed timely protective claims for refund. We must conclude that there was no governmental action which misled appellants and, therefore, the doctrine of estoppel is not applicable.

While we believe appellants' situation to be regretful, we must conclude that this board is without legal authority to find in appellants' favor. Section 19053.9 of the Revenue and Taxation Code clearly prohibits the allowance of an offset more than seven years from the due date of the return for the year in which the overpayment is determined. Since more than seven years passed before the appellants requested the offset of their 1973 and 1974 overpayments, and since the doctrine of estoppel is not applicable, we must sustain respondent's action in this matter.

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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 Frank and Joan Miller against a proposed assessment of additional personal income tax in the amount of **\$28,612.80** for the year 1972, be and the same is hereby sustained.

Done at Sacramento, California, this 1st day of August , **1984**, by the State Board of Equalization, with Board Members Mr. Nevins, Mr. Dronenburg, Mr. Collis, Mr. Bennett and Mr. Harvey present.

Richard Nevins , Chairman
Ernest J. Dronenburg, Jr. , Member
Conway H. Collis , Member
William M. Bennett , Member
Walter Harvey* , Member

*For Kenneth Cory, per Government Code section 7.9