BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
HARRY H. and ALICE P. FREER)

For Appellants: Harry H. Freer,
in pro. per.

For Respondent: Terry Collins
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 Harry H. and Alice P. Freer against a proposed assessment of additional personal income tax in the amount of $777.34 for the year 1977.

The sole issue to be determined in this appeal is whether respondent properly assessed additional personal income tax against appellants for the taxable year 1977.

Appellants, husband and wife, were both residents of California until 1977. On May 9, 1976, appellants separated. In June 1977 Mrs. Freer moved to Austin, Texas. Appellants filed a joint California individual income tax return for the 1977 taxable year which included a casualty loss incurred by Mrs. Freer after she moved to Texas. Appellants' marriage was dissolved by a California court in September, 1980. In January 1980 respondent received information from the Internal Revenue Service (IRS) which indicated that appellants may have underreported their gross income for taxable year 1977 (see Resp. Ex. B). Subsequently, on March 16, 1981, respondent mailed an inquiry to appellants regarding the following income amounts: (i) Texas wages $5,402.55; and (ii) other compensation - The Mutual Benefit (sic) - $4,928. Mr. Freer replied to respondent's inquiry by indicating that the first amount was earned by Mrs. Freer in Texas after they had separated and the latter amount was income for which he had not received a W-2 form.

Upon learning that Mrs. Freer had moved to Texas on a permanent basis, respondent concluded that she became a nonresident of California in June 1977. Respondent further concluded that pursuant to Revenue and Taxation Code section 18402, subdivision (b)(1), appellants were not eligible to file a joint return for 1977 because Mrs. Freer was a part-year resident during that year.

On September 23, 1981, respondent issued a Notice of Additional Tax Proposed to be Assessed (NPA) which: (i) disallowed joint return filing status; (ii) increased appellant-husband's gross income by $4,928: and (iii) disallowed the casualty loss in the amount of $3,733.43 which was attributable to appellant-wife after she became a nonresident of California. Appellant-husband filed a timely protest which respondent determined to be without merit. The NPA was affirmed on December 31, 1981, and this timely appeal followed.

Mr. Freer argues that he and his wife should be allowed to file a joint return for the taxable year 1977 because he was told by an employee in respondent's Long Beach office that he could do so. He also argues that

respondent's disallowance of the claimed casualty loss is incorrect because the property damaged was community property at the time the loss was sustained.

We turn first to the question of whether appellants were eligible for joint return filing status for the taxable year 1977. Revenue and Taxation Code section 18402, subdivision (b)(2), provides, in pertinent part, that no joint return shall be made if one spouse was a resident for the entire year and the other spouse was a nonresident for all or any portion of the taxable year. The record is clear that Mrs. Freer became a nonresident of California in June of 1977 by virtue of her move to Texas. Mr. Freer was a full-year resident of California. Therefore, we must conclude, on the basis of section 18402 of the Revenue and Taxation Code, that respondent's action in denying appellants' joint filing status for the year 1977 was proper. (See Appeal of Patricia A. Green, Cal. St. Bd. of Equal., June 22, 1976; Appeal of Richard D. and Mary Jane Niles, Cal. St. Bd. of Equal., March 26, 1974.)

Our inquiry does not end here, however, because Mr. Freer argues that respondent should be estopped from denying joint filing status for the year in question because it provided incorrect advice. Mr. Freer states that prior to filing his 1977 return, he personally visited respondent's Long Beach office to inquire if he could legally file a joint return due to the fact he was forced to pay all of his wife's expenses while she lived in Austin and that he received an answer in the affirmative.

Respondent contends that the application of the doctrine of estoppel is not appropriate in the instant case because appellant has not established that respondent, in fact, provided erroneous advice.

It is well established that the doctrine of estoppel will not be invoked against the state except where grave injustice would otherwise re-sult. (City of Long Beach v. **Mansell,** 3 **Cal.3d** 462, 493 **[91 Cal.Rptr. 23]** (1970); Cal. Cigarette Concessions **v.** City of L.A., 53 **Cal.2d** 865, 869 (3 **Cal.Rptr.** 6751 **(1960).)** We have consistently refused to invoke the doctrine of estoppel in situations where taxpayers have understated their tax -liability on tax returns in alleged reliance on the erroneous statements of respondent's employees. (Appeal of E. J., Jr. and Dorothy Saal, Cal. St. Bd. of Equal., Feb. 1, 1983.) The burden of proving estoppel is on the

party asserting it. (Girard v. Gill, 261 F.2d 695 (4th Cir. 1958).) Appellant-husband's mere allegation, without more, that he talked to respondent and was told he and his wife could file a joint return does not satisfy the burden of proof necessary to support a finding of estoppel. As such, we cannot conclude that respondent's action in disallowing joint return filing status should be barred by estoppel, and must sustain respondent's action in this regard.

Even if joint filing status is disallowed, Mr. Freer objects to the disallowance of the claimed casualty loss because, of his contention that he and his wife were both legal owners of the property which sustained the casualty loss. In support of this contention, he submitted a copy of the Final Judgment of Dissolution of Marriage, and the Marital Termination Agreement incorporated therein, which Indicates that any transmutation of appellant's property from community to separate occurred after the 1977 taxable year. (App's Memo. dated June 12, 1984.) Although respondent has conceded this fact to be true, it argues that no deduction should be allowed for the $424 value assigned to personal labor expended by Mrs. Freer as this is not "property" within the meaning of Revenue and Taxation Code section 17206, subdivision (c)(3)- (Resp. 's Memo., July 10, 1984.) Respondent also contends that Mr. Freer has not carried his burden of proof in establishing the basis of the claimed property or demonstrated what portion, if any, of the property was community property.

While we recognize that after 30 years of marriage, Mrs. Freer no doubt had many items of community property in her possession at the time of the casualty loss, we agree with respondent's position that many of the items could have also been acquired after separation. In reviewing appellants' schedule of losses (Resp. Ex. A) we note that it lists a bedroom set ($1,388) purchased in 1977 after the date of separation. In addition to the $424 claimed for labor expended by *Mrs.* Freer, there are also listings for dry cleaning ($45.50); work loss ($300); cleaning detergents ($27.83); and clothing to be cleaned ($200). The schedule also includes items which are generally bought for a particular residence including curtains, rugs, and centerpieces. Finally, we agree with respondent that Mr. Freer has not satisfied his burden *of* establishing the basis of the claimed property or demonstrated what portion, if any, of the property was community property. On this basis, respondent's disallowance of the claimed casualty loss must be sustained.

No objections have been raised to the adjustment made to Mr. Freer's taxable income based upon information furnished by the IRS, In the case of such an adjustment, appellants must demonstrate that the adjustment is in error or concede its accuracy. (Rev. & Tax. Code, § 18451) They have not done so. Accordingly, this adjustment is also sustained.

For the reasons stated above, all of respondent's actions in this matter must be sustained.

Appeal of Harry H. and Alicb P. Freer

ORD 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 Harry H. and Alice P. Freer against a-proposed assessment of additional personal income tax in the amount of $777.34 for the ye-ar.1977, be and the same is hereby sustained.

Done at Sacramento, California, this 12th day of September , 1984, by the' State Board of Equalization, with Board Members Mr. Nevins, Mr'. Dronenburg, Mr. Collis and Mr. Bennett present.

Richard Nevins , Chairman

Ernest J. Dronenburg, Jr. , Member

Conway H. Collis , Member

William M. Bennett' , Member

_____ , Member