



76-SBE-053

BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
VIRGIL E. AND IZORA GAMBLE)

For Appellants: Virgil E. and Izora Gamble, in pro. per.

For Respondent: Bruce W. Walker
 Chief Counsel

James C. Stewart
Counsel

OPINION

This appeal is made pursuant to section 18594 of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protest of Virgil E. and Izora Gamble against a proposed assessment of additional personal income tax in the amount of \$248.44, plus interest, for the year 1972. Appellants have expressed acquiescence in the tax assessment but object to the imposition of interest.

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The Internal Revenue Service audited appellants' 1972 federal income tax return. It disallowed a deduction for certain claimed child care expenses. Respondent issued the proposed tax assessment on the basis of the corresponding federal adjustment.

As already indicated, appellants do not object to the proposed tax assessment. They maintain, however, that after they received notice of it, Mrs. Gamble went to one of respondent's offices, in April of 1974, and was advised by a representative of respondent that the interest would be waived. According to appellants, pursuant to this understanding they expected the notice of action on their protest to reflect only an assessment of the tax which they would then have paid promptly. However, on May 22, 1974, respondent issued a notice of action affirming the liability for interest as well as the original proposed tax assessment. Appellants then filed this timely appeal.

Section 18688 of the Revenue and Taxation Code provides that interest on a deficiency shall be assessed from the date prescribed for payment of the tax until the date the tax is paid. This is a clear statutory mandate.

It is true, however, that, in a proper case, the state can be estopped because of acts of its employees from collecting interest from a taxpayer even though the **imposition of interest is** required by statute. (Market Street Railway Co. v. State Board of Equalization, 137 Cal. hpp. 2d 87 [290 P. 2d 20].) As a general rule, however, estoppel is invoked against governmental entities only where grave injustice would otherwise result. (California Cigarette Concessions, Inc. v. City of Los Angeles, 53 Cal. 2d 865, 869 [3 Cal. Rptr. 675, 350 P. 2d 715]; see also U. S. Fidelity & Guaranty Co. v. State Board of Equalization, 47 Cal. 2d 384 389 [303 P. 2d 1034].) Equitable estoppel will be invoked against the government where justice and right require it. (Farrell v. County of Placer, 23 Cal. 2d 624 [145 P. 2d 570].)

Estoppel, however, is an affirmative defense and the burden is on the party asserting it to establish the facts necessary to support it. (Appeal of U. S. Blockboard Corp., Cal. St. Bd. of Equal., July 7, 1967; Appeal of Richard W. and Ellen Campbell, Cal. St. Bd. of Equal., Aug. 19, 1975; Appeal of Lee J. and

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Charlotte Wojack, Cal. St. Bd. of Equal., March 22, 1971.)
Appellants have offered no evidence to substantiate their allegation that misleading information was furnished them by a representative of respondent.

Moreover, we would not regard an informal oral promise by an employee of a taxing agency as a sufficient basis to create an estoppel against that agency, particularly where the performance of that promise would result in the contravention of an unambiguous statute mandating the contrary. (See Appeal of Richard W. and Ellen Campbell, supra; Appeal of Joseph A. and Elizabeth Kugelmass, Cal. St. Bd. of Equal., Oct. 27, 1964; Appeal of Lee J. and Charlotte Wojack, supra.)^{1/}

Accordingly, we conclude that respondent's action must be sustained.

^{1/} In addition, there could have been no possible detrimental reliance with respect to that interest which had already accrued prior to the time the alleged promise was made. Such reliance must be shown to warrant application of the estoppel doctrine. (Appeal of Arden K. and Dorothy S. Smith, Cal. St. Bd. of Equal., Oct. 7, 1974.)

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ORDER

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 Virgil E. and Izora Gamble against a proposed assessment of additional personal income tax in the amount of \$248.44, plus interest, for the year 1972, be and the same is hereby sustained.

Done at Sacramento, California, this 4th day of May, 1976, by the State Board of Equalization.

H. L. Bynum, Chairman
George R. Hickey, Member
Robert L. Hickey, Member
_____, Member
_____, Member

ATTEST: W. W. Dunlop, Executive Secretary