



BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
HELEN D. MILLER)

Appearances:

For Appellant: David Mackay, Counselor at Law
For Respondent: Burl D. Lack, Chief Counsel;
John S. Warren, Associate Tax
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 Helen D. Miller to a proposed assessment of additional personal income tax in the amount of \$933.34 for the year 1953.

Appellant is the widow of the late Alton G. (Glenn) Miller. She was housewife and not considered to be a public figure, In 1953, Universal Pictures Company, Inc., was preparing to produce a feature length motion picture entitled "The Glenn Miller Story," to be based on the life and career of Appellant's deceased husband. Appellant entered into a contract with Universal Pictures Company, Inc., under which the company paid her \$35,000 in exchange for the right to portray Mr. Miller and the family, The agreement contained a waiver and release of Appellant's right of privacy,

In her personal income tax return for 1953 Appellant reported the receipt of the \$35,000, but she excluded \$15,555.56 of this amount from her gross income. She explained in her return that she had been advised that this latter amount was not taxable because it had been paid to Appellant in exchange for the release of her right of privacy. The Respondent recomputed her gross income so as to include this sum and issued the proposed assessment,

The sole question presented for determination of this appeal is whether compensation received by Appellant for the waiver and release of her right of privacy should be included in gross income.

Section 17101 of the Revenue and Taxation Code, as it read in 1953, provided that gross income includes:

" . . . gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form

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paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any- source whatever."
(Emphasis added.)

Substantially similar language in the Federal Revenue Act of September 8, 1916 (39 Stats. at L. 756), was considered in Eisner v. Macomber, 252 U. S. 189, 64 L. Ed. 521, wherein the court defined income as "... the gain derived from capital, from labor, or from both combined . . ." This definition had been stated earlier in Stratton's Independence, Ltd. v. Howbert, 231 U. S. 399, 58 L. Ed. 285. Because the right of privacy is an incident of the person and not of property (Melvin v. Reid, 112 Cal. App. 285; Metter v. Los Angeles Examiner, 35 Cal. App. 2d 304), Appellant contends that the compensation received by her for the waiver of her right of privacy does not fit within the foregoing definition of income. In the alternative, Appellant's position is that the item of \$15,555.56 constitutes compensation or damages for personal injuries which is excludable from gross income under Section 17127 (now Section 17138) of the Revenue and Taxation Code,

The meaning of "gross income" as set forth in the court's opinion in Eisner v. Macomber, supra, does not have the narrow application which Appellant attributes to it. In Commissioner v. Glenshaw Glass Company, 348 U. S. 426, 99 L. Ed. 483, the court states that it must ascribe content to "the catchall provision" of § 22(a) of the 1939 Internal Revenue Code contained in the language "gains or profits and income derived from any source whatever." As noted above, this phrase also appears in Section 17101 of the Revenue and Taxation Code. In the Glenshaw Glass decision, the court stated that "The importance of that phrase has been too frequently recognized since its first appearance in the revenue act of 1913 to say now that it adds nothing to the meaning of 'gross income'." The Court also referred to the definition of income in Eisner v. Macomber by stating that in context it served a useful purpose, but that "it was not meant to provide a touchstone to all future gross income questions." We conclude that the amount received by Appellant for the waiver is income and is includible in her gross income, unless it is excluded or exempted by some provision of the Personal Income Tax Law,

In support of her assertion that the item of \$15,555.56 is excludable under former Section 17127, Appellant makes the argument that this amount was received from Universal as compensation for an invasion of her right of privacy. The courts have uniformly required that there be an "invasion" of a person's rights before permitting recovery, Stryker v. Republic-Pictures Corp., 108 Cal. App. 2d 191; Metter v. Los Angeles Examiner, 35 Cal. App. 2d 304. No such invasion has been shown in the instant case. Appellant has never been deprived of her right of privacy; she voluntarily surrendered it. One of the fundamental general principles concerning the right of privacy was summarized in Melvin v. Reid, 112 Cal. App. 285, as follows:

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"4. It does *not* exist where the person has published the matter complained of, or consented thereto," (Emphasis added,)

We can find no merit to Appellant's argument that payment for a release of privacy is equivalent to compensation for settlement or ~~release~~ of an already existing tort. In Ehrlich v. Higgins, 52 Fed. Supp. 805, the court held that a payment received as consideration for the waiver of the taxpayer's right of privacy in connection with the production of a motion picture was includible as gross income. In so holding the court determined that the rule which excludes from gross income damages which are compensatory for personal injuries was inapplicable. It is our opinion, accordingly, that the action of the Franchise Tax Board must be sustained.

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 Helen D. Miller to a proposed assessment of additional personal income tax in the amount of \$933.34 for the income year 1953 be and the same is hereby sustained,

Done at San Francisco, California, this 29th day of December, 1958, by the State Board of Equalization,

George R. Reilly, Chairman

Robert E. McDavid, Member

Paul R. Leake, Member

J. H. Quinn, Member

Robert C. Kirkwood Member

ATTEST: Dixwell L. Pierce, Secretary