BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
ROBERT C. AND BETTY L. LOPERT)

For Appellants: Robert C. Lopert, in pro. per.

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 Robert C. and Betty L. Lopert against a proposed assessment of additional personal income tax in the amount of $374.99 for the year 1978.

The issue presented is whether appellants are entitled to a retirement income credit for the year 1978.

Appellants, husband and wife, are under 62 years of age. During 1978, both received retirement income. Mr. Lopert received retirement income of $8,478.00 from the United States Civil Service Commission. Mrs. Lopert received retirement income of $1,522.08 from the State of California. In 1978, Mrs. Lopert also received wages in the amount of $9,747.32 from the Pleasant Valley Mutual Water Company,

Appellants filed a California joint personal income tax return for 1978 on which they claimed a retirement income credit of $375.00. Appellants calculated the amount of the credit by treating all of Mrs. Lopert's wages as her earned income rather than treating it as community property and dividing it equally between husband and wife. The form and instructions provided by respondent for 1978 did not indicate that community property should be divided between the spouses.

Respondent determined that Mrs. Lopert's wages were community property, and as such, should have been allocated equally to the spouses for purposes of determining whether they were entitled to a retirement income credit. As a result of the allocation of Mrs. Lopert's wages, each spouse was treated as having received earned income in the amount of $4,873.66, and neither was entitled to any retirement income credit. Appellants protested the disallowance of the credit, and the denial of the protest led to this appeal.

Section 17052.9 of the Revenue and Taxation Code provides a credit for a person receiving a pension under a public retirement system if certain conditions are met. One of these conditions is that an individual under 72 years of age must not have earned income exceeding a specified amount. (Rev. & Tax, Code, § 17052.9, subd. (e)(5)(B).) The amount. which an individual can earn is dependent upon his age, marital status, and the type of return filed. (Rev. & Tax. Code, § 17052.9, subds. (e)(5), (e)(6), & (e)(7).) The amount allocated to each of appellants by respondent, $4,873.66, exceeds the maximum earned income allowed for a married person under age 62 filing a joint return.

We have previously decided two appeals with substantially identical facts, and conclude that these

decisions control the instant appeal. (Appeal of C. and B. F. Blazina, Cal. St. Bd. of Equal., Oct. 28, 1980; Appeal of Merlyn R. and Marilyn A. Keay, Cal. St. Bd. of Equal., Dec. 9, 1980.) In both of these appeals, the taxpayers argued that earned income should be allocated entirely to the spouse who actually earned it, even if the income is community property. We held that any earned income which is community property must be equally allocated between spouses to determine if a person receiving a public retirement pension is entitled to a retirement income credit and, if entitled, to determine the amount of such credit. Thus, respondent correctly allocated Mrs. Lopert's wages between appellants, and neither appellant is entitled to a retirement income credit.

Appellants argue that respondent should be estopped from disallowing their retirement income credit because the form and instructions provided by respondent in 1978 were misleading in that they did not state that community property must be allocated between spouses.

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. (United States Fidelity and Guaranty Company v. State Board of Equalization, 47 Cal.2d 384 [303 P.2d 1034] (1956).) 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 find that appellants have not met this burden, and that the doctrine of estoppel is not applicable in the instant appeal.

We agree with appellants that respondent's 1978 form and instructions were misleading in that they omitted any reference to the community property laws. However, the doctrine of estoppel is not applicable merely because one party has misled another. Rather, there are additional elements which must be proved. The party to be estopped must have been aware of the true facts and must have intended that the other party rely upon his statement. The person seeking an estoppel must have been unaware of the true facts and must have been injured because he relied upon the other party's misrepresentation or omission. (City of Long Beach v. Mansell, 3 Cal.3d 462 [91 Cal.Rptr. 23, 476 P.2d 423] (1970).) Unless all of these elements are provel-3, respondent cannot be estopped. We find that appellants

have not shown any evidence indicating that they relied to their detriment on respondent's form and instructions.

Detrimental reliance is present only if, as a result of respondent's omission, the taxpayer takes action which leads to increased tax liability. (Appeal of Priscilla L. Campbell, Cal. St. Bd. of Equal., Feb. 8, 1979.) In the instant appeal, appellants were not entitled to the retirement income credit because Mrs, Lopert's wages were community property. In order to prove detrimental reliance, appellants would have to establish that *Mrs.* Lopert's wages were classifiable as community property *only* because of appellants' reliance on respondent's incomplete instructions and forms. They cannot do this since the wages constituted community property irrespective of the misleading contents of respondent's form and instructions. Thus, it is apparent that appellants took no action in reliance on respondent's form and instructions which increased their tax liability. This conclusion is in accord with this board's decisions in the Appeal of C. and B. F. Blazina, supra, and the Appeal of Merlyn R. and Marilyn A. Keay, supra.

Since appellants have not proven detrimental reliance, respondent cannot be estopped from disallowing the retirement income credit, Therefore, respondent's action in this matter must be sustained.

Appeal of Robert C. and Betty L. Lopert

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 Robert C. and Betty L. Lopert against a proposed assessment of additional personal income tax in the amount of $374.99 for the year 1978, be and the same is hereby sustained.

Done at Sacramento, California, this 5th day of January, 1982, by the State Board of Equalization, with Board Members Mr. Reilly, Mr. Dronenburg, and Mr. Nevins present.

_____, Chairman

George R. Reilly, Member

Ernest J. Dronenburg, Jr., Member

Richard Nevins, Member

_____, Member