

BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
J. R. AND CLAUDIA HENGELMANN) No. **83A-95-AJ**

For Appellants: J. R. Hengemann,
in pro. per.

For Respondent: Timothy W. Bayer
Supervising Counsel

O P I N I O N

18593^{1/} This appeal is made pursuant to section of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protest of J. R. and Claudia Hengemann against a proposed assessment of additional personal income tax in the amount of \$463 for the year 1981.

1/ Unless otherwise specified, all section references are to sections of the Revenue and Taxation Code as in effect for the year in issue.

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The issue in this appeal is whether appellants remained taxable on wages despite an assignment of those wages.

On their 1981 joint personal income tax return, appellants reported only \$10,618 as wages, although attached to the return were two W-2 forms in Mr. **Hengelmann's** name totaling **\$30,905.53**. Mrs. Hengelmann is a party to this appeal solely because a joint return was filed; therefore, "appellant" shall refer to Mr. Hengelmann. Included with the return was appellant's statement that he had "sold his personal services property assets" to Professional and Technical Services and was, therefore, not taxable on the total amount shown on the W-2 forms. Respondent determined that appellant was taxable on his entire income and **issued a proposed** assessment reflecting **this determination**. After considering appellant's protest, respondent affirmed the proposed assessment, and this timely appeal followed.

Section 17071 provided, in part; that gross income means all income from whatever source derived, unless excluded by law. Section 17071 was substantially the same as section 61 of the Internal Revenue Code. Therefore, the interpretation of section 61 of the Internal Revenue Code is persuasive as to the proper **interpretation** and application of section 17071. (See Rihn v. Franchise Tax-Board, 131 **Cal.App.2d** 356, 360 [**280 P.2d 893**] (1955); Meanley v. McColgan, 49 **Cal.App.2d** 203 [**121 P.2d 45**] (1942).) It is a fundamental principle of income taxation that income **must be taxed to the one who** earns it. (Commissioner v. Culbertson, 337 U.S. 733, 739-740 [**93 L.Ed. 16591**] (1949).) Further, one who earns income cannot avoid taxation by diverting it to another entity, since anticipatory assignment of income is **ineffective as a means of avoiding tax liability**. (United States v. Basye, 410 **U.S. 441**, 449-450 [**35 L.Ed. 2d 412**] (1973); Gregory v. Helvering, 293 U.S. 465 [**79 L.Ed. 5961**] (1935); (Lucas v. Earl, 281 U.S. 111 [**74 L.Ed. 731**] (1930).)

Regardless of whether an assignment of income is an irrevocable assignment, and regardless of whether the income is assigned for a substantial period of time, the true earner of the income realizes economic gain from the disposition of such income and is taxable on it. (Galt v. Commissioner, 216 **F.2d** 41 (7th Cir. 1954).) In resolving the question of who earns the income, the court will look to who has actual control over the earning of

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the income rather than who has apparent control over the income. (Wesenberg v. Commissioner, 69 T.C. 1005 (1978); (American Savings Bank v. Commissioner, 56 T.C. 828 (1971).)

Appellant contends **that he** had no control over his wages and that he received them merely as an agent for Professional and Technical Services. Appellant has not put forth any evidence indicating that the direction and control over the earning of compensation rested in Professional and Technical Services, rather than in appellant. Without such a showing, he has not established that he was employed as an agent. (Wesenberg v. Commissioner, supra.)

We hold, therefore, that appellant's conveyance **of his services**, and the **income earned through** those services, was an assignment of income **and** that the total amount of the wages appellant earned was includable in his gross income.

For the reasons **expressed** above, respondent's action must be sustained.

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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 J. R. and Claudia Hengemann against a proposed assessment of additional personal income tax in the amount of **\$463** for the year 1981, be and the same is hereby sustained.

Done at Sacramento, California, this 29th day of July, 1986, by the State Board of Equalization, with Board Members Mr. Nevins, Mr. Bennett, Mr. Dronenburg and Mr. Harvey present.

~~Richard~~ _____, Chairman
William M. **Bennett** _____, Member
Ernest J. Drone-a. Jr. _____, Member
Walter Harvey* _____, Member
_____, Member

*For Kenneth Cory, per Government Code section 7.9