

**OFFICE OF TAX APPEALS
STATE OF CALIFORNIA**

In the Matter of the Appeal of:) OTA Case No. 18011751
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BHARAT VERMA) Date Issued: July 17, 2018
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OPINION

Representing the Parties:

For Appellant: Bharat Verma

For Respondent: Donna L. Webb, Staff Operation Specialist

For Office of Tax Appeals: Neha Garner, Tax Counsel III

T. LEUNG, Administrative Law Judge: Pursuant to California Revenue and Taxation Code section 19045,¹ Bharat Verma (appellant) appeals an action by the Franchise Tax Board (FTB or respondent) proposing an assessment of additional tax in the amount of \$1,955, plus applicable interest, for the 2013 taxable year.

Appellant waived his right to an oral hearing and therefore the matter is being decided based on the written record.

ISSUES

1. Whether appellant qualified for the head of household (HOH) filing status for the 2013 taxable year.
2. Whether respondent erred in denying appellant’s claimed child and dependent care (CDC) credit for 2013.

¹ Unless otherwise indicated, all “Section” references are to sections of the California Revenue and Taxation Code.

FACTUAL FINDINGS

1. Appellant filed a 2013 California personal income tax return (Form 540) claiming the HOH filing status. On the return, appellant claimed a dependent exemption credit for his daughter and claimed a CDC credit of \$204.
2. Appellant claimed his daughter as the qualifying individual for his HOH filing status. In 2013, appellant provided more than one-half of his daughter's support, and his daughter: (a) was four to five years old; (b) was in school; (c) did not live with appellant for the entire taxable year; and (d) was a citizen of the United States or resident of the United States, Canada or Mexico. In addition, appellant stated that he was not married or in a registered domestic partnership (RDP) as of December 31, 2013, and that his daughter lived with him in California from October 16, 2013 to December 31, 2013, for a total of 77 days. Appellant stated that during the rest of 2013, his daughter lived with her mother in India. Appellant paid for his daughter's living expenses while she was living in India with her mother.
3. Respondent issued a Notice of Proposed Assessment (NPA), disallowing appellant's HOH filing status. Respondent explained that appellant did not qualify for the HOH filing status because his daughter did not live with him for more than one-half of the 2013 taxable year, or 183 days. The NPA revised appellant's filing status to single and disallowed the dependent exemption credit that appellant claimed and the CDC credit.²
4. Appellant protested the NPA. Appellant included a County of Merced Superior Court document entitled "Order After Hearing," entered on August 21, 2013, which indicated that appellant was awarded sole legal and physical custody of his daughter. Appellant also enclosed email correspondence and monthly transfer receipts to show that he paid various expenses relating to his daughter while she was in India with her mother.
5. Respondent sent appellant a letter stating that since appellant's daughter only lived with appellant for 77 days during 2013, which is less than one-half of the taxable year, appellant did not qualify for the HOH filing status. Respondent also stated that although

² Respondent noted that pursuant to Section 17052.6 and by reference to Internal Revenue Code section 21, one requirement for claiming the CDC credit is that the qualifying person must live with the taxpayer in the taxpayer's home for more than one-half of the tax year.

appellant did not qualify for the HOH filing status, it would revise the NPA to allow the dependent exemption credit based on the information appellant provided.

6. Appellant maintained that due to his travel schedule, his daughter could not physically be with him all the time; however, he paid for her school, her nanny, her clothes, and all her living expenses while she was temporarily living away from him.
7. Respondent issued a Notice of Action (NOA) that revised the NPA. The NOA allowed the dependent exemption for appellant's daughter and revised the proposed additional tax to \$1,995, plus applicable interest for the 2013 taxable year.

DISCUSSION

Issue 1 - Whether appellant qualified for the head of household (HOH) filing status for the 2013 taxable year.

A taxpayer has the burden of proving that he is entitled to the HOH filing status. (*Appeal of Richard Byrd*, 84-SBE-167, Dec. 13, 1984.)³ Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof. (*Appeal of Aaron and Eloise Magidow*, 82-SBE-274, Nov. 17, 1982.)

Section 17042 sets forth the California requirements for the HOH filing status by reference to Internal Revenue Code (IRC) sections 2(b) and 2(c). IRC section 2(b) provides that, for a person to claim the HOH filing status, he generally must be unmarried and maintain a household that constitutes the principal place of abode of a "qualifying person" for more than one-half of the year.

Pursuant to IRC section 2(b)(1)(A), a taxpayer who is not married may be eligible for the HOH filing status by maintaining a household for a "qualifying child," or any other person for whom the taxpayer is entitled to a dependent exemption under IRC section 151, if the taxpayer's household constitutes the principal place of abode of the qualifying individual, as a member of the household, for more than one-half of the year. As defined in IRC section 152(c), a "qualifying child" includes, for purposes of this discussion, the taxpayer's child or a descendant

³ Pursuant to the Office of Tax Appeals Rules for Tax Appeals, California Code of Regulations, tit. 18, § 30501(d)(3), precedential opinions of the State Board of Equalization (BOE) that were adopted prior to January 1, 2018, may be cited as precedential authority to the Office of Tax Appeals unless a panel removes, in whole or in part, the precedential status of the opinion. BOE's precedential opinions are available for viewing on the BOE's website: <http://www.boe.ca.gov/legal/legalopcont.htm#boeopinion>.

of such child or the taxpayer's brother, sister, stepbrother, or stepsister or a descendant of any such relative.

To qualify for the HOH filing status on his 2013 return, appellant, as an unmarried taxpayer, must establish that he maintained a household that was his daughter's principal place of abode for over one-half of 2013. However, in his responses to an FTB Audit Questionnaire, appellant indicated that his daughter lived with him for a total of 77 days (October 16 to December 31) during 2013. Based on this response, appellant did not satisfy the requirements for the HOH filing status for 2013.

On appeal, appellant continues to assert that he has legal and physical custody of his daughter and that he took care of all her educational and living expenses during 2013. As indicated above, based on this information, respondent allowed a dependent exemption; however, that does not mean that appellant is also entitled to the HOH filing status. Appellant appears to argue that his daughter's absence was only a "temporary absence." A taxpayer and his qualifying person are considered to live together even if one or both are temporarily absent from the taxpayer's household due to special circumstances such as illness, education, business, vacation, or military service. It must be reasonable to assume that the absent person will return to the household after the temporary absence and the taxpayer must continue to keep up the household during the absence. Treasury Regulation section 1.2-2(c)(1) provides in pertinent part:

A nonpermanent failure to occupy the common abode by reason of illness, education, business, vacation, military service, or a custody agreement under which a child or stepchild is absent for less than 6 months in the taxable year of the taxpayer, shall be considered temporary absence due to special circumstances. Such absence will not prevent the taxpayer from being considered as maintaining a household if (i) it is reasonable to assume that the taxpayer or such other person will return to the household, and (ii) the taxpayer continues to maintain such household or a substantially equivalent household in anticipation of such return.

(26 C.F.R. § 1.2-2(c)(1).) There must be an absence of an intent on the part of the taxpayer and the dependent to change the dependent's principal place of abode. (Rev. Rul. 66-28, 1966-1 C.B. 31.)

Appellant appears to argue that the time his daughter spent at school in India should be considered a temporary absence from his household. For a temporary absence to apply, an individual must live in the taxpayer's household prior to leaving it for a temporary time due to special circumstances, and the individual must return to the household when the special

circumstance ends. While attending school is considered a temporary absence due to special circumstances, appellant has not provided sufficient evidence to demonstrate that his daughter meets the legal requirements to be considered temporarily absent from his household in 2013. In fact, the information on appellant's Audit Questionnaire indicates that his daughter did not live in appellant's home prior to the time she spent with appellant in October, November and December of 2013, and instead lived with the other parent in India. Furthermore, appellant has not provided any evidence to show that it is reasonable to assume that his daughter would return to appellant's home after her absence, that his daughter intended to keep appellant's home as her principal place of abode, or that appellant's home was maintained for his daughter's return. Appellant's contention that he was awarded legal custody of his daughter is not dispositive as physical occupancy is the test for determining the HOH filing status, not legal custody. Therefore, appellant has not met his burden of proof to show that his daughter was temporarily absent and that appellant is entitled to the HOH filing status.

Issue 2 - Whether appellant has shown error in respondent's denial of the claimed CDC credit for 2013.

Section 17052.6 sets forth the eligibility criteria by reference to IRC section 21, for a state tax credit for expenses for household and dependent care services necessary for a taxpayer to obtain gainful employment (the CDC credit). Those criteria include the existence of a "qualifying individual," and the credit must be based on a percentage of employment-related expenses that include expenses for the care of the qualifying individual. (IRC § 21.) In the case of divorced parents, to be eligible for the CDC credit, the qualifying individual must live with the taxpayer/custodial parent for more than one-half of the taxable year. (IRC § 21(e)(5).)

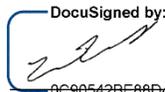
Based on the evidence, appellant's daughter did not live with appellant for more than one-half of the taxable year. Therefore, appellant does not meet the requirements to claim this credit and respondent properly disallowed the \$204 CDC credit.

HOLDINGS

1. Appellant failed to establish that he qualified for the HOH filing status.
2. Appellant failed to show error in respondent's denial of the claimed CDC credit.

DISPOSITION

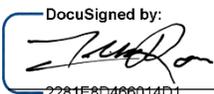
Respondent's action is sustained.

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Tommy Leung
Administrative Law Judge

We concur:

DocuSigned by:

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Jeffrey G. Angeja
Administrative Law Judge

DocuSigned by:

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Alberto T. Rosas
Administrative Law Judge