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2018 – OTA – 101P

OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	OTA Case No. 18010800
JOHN M. SEDILLO	Date Issued: August 10, 2018

OPINION

Representing the Parties:

For Appellant: Carlos Robles, TAAP[1]

For Respondent: Joel M. Smith, Tax Counsel

K. GAST, Administrative Law Judge: Pursuant to California Revenue and Taxation Code (R&TC) section 19045, John M. Sedillo (appellant) appeals an action by the Franchise Tax Board (FTB or respondent) in proposing additional tax in the amount of $1,685, plus interest, for the 2014 tax year.

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

ISSUES

1. Is appellant entitled to claim the Head of Household (HOH) filing status?
2. Is appellant entitled to rely on the doctrine of equitable estoppel to bar respondent from denying appellant's claim to the HOH filing status?
3. Is appellant entitled to claim the dependent exemption credit?

[1] Appellant filed his opening brief on his own behalf. Subsequent representation was provided by the Tax Appeals Assistance Program (TAAP).

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FACTUAL FINDINGS

1. Appellant timely filed a 2014 California resident income tax return, claiming the HOH filing status. On that return, appellant identified two sons as his dependents and therefore claimed dependent exemption credits for them.
2. Subsequently, respondent sent appellant a HOH Audit Questionnaire for purposes of verifying whether he met the requirements to claim the HOH filing status for the 2014 tax year. On September 28, 2015, appellant completed the questionnaire and signed under penalty of perjury that, among other responses, one of his two sons was his qualifying person and lived with appellant for a total of 128 days during the 2014 tax year.[2] Appellant, however, did not respond to, or left blank, several questions, one of which asked him to check a box that best explained why his son was absent from his home for those days his son did not live with him during the tax year.
3. As a result of appellant's incomplete responses to the HOH Audit Questionnaire, respondent sent appellant a HOH Audit Letter, again asking him why his son was absent from his home during the days his son did not live with him. On March 15, 2016, appellant completed the letter and signed under penalty of perjury, indicating this time that his son lived with his other parent (i.e., appellant's former spouse) when his son was absent from appellant's home during the 2014 tax year.
4. Respondent then issued appellant a Notice of Proposed Assessment (NPA), dated September 21, 2016, which proposed additional tax of $1,685, plus interest. The NPA explained that appellant could not claim the HOH filing status because his qualifying person, his son, did not live with him for more than half the year. In addition, the NPA disallowed the dependent exemption credit for his son.
5. In a letter dated September 26, 2016, appellant timely protested the NPA, asserting that, pursuant to a final divorce decree between him and his former spouse, he was entitled to

[2] In his completed HOH Audit Questionnaire, appellant only listed one of his two sons as his qualifying person for HOH filing status purposes, even though he claimed dependent exemption credits for both sons on his 2014 California tax return. Appellant, therefore, did not indicate on the questionnaire that his other son was a qualifying person, and does not allege in his briefings or anywhere else in the record that this other son is a qualifying person. Therefore, we will not address whether this other son could have alone qualified appellant as the HOH for the tax year at issue. For ease of reading and to avoid confusion, any subsequent unattributed reference herein to appellant's "son" refers to the son appellant claimed was his qualifying person for HOH filing status purposes, unless indicated otherwise.

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claim his son as his dependent.[3] Therefore, appellant contended, he qualified for the HOH filing status and dependent exemption credit.

6. In a letter dated April 3, 2017, respondent replied to appellant's protest and reexplained that the reason it denied him the HOH filing status was his son did not live with him for more than half the tax year. Respondent also asked appellant to provide any additional information to support his position if he still disagreed.[4]

7. Respondent affirmed its NPA with a Notice of Action, dated June 29, 2017. This timely appeal followed.

DISCUSSION

Issue 1 – Is appellant entitled to claim the HOH filing status?

R&TC section 17042 sets forth the California requirements for the HOH filing status by reference to Internal Revenue Code section 2(b).[5] In general, taxpayers filing under the HOH status enjoy lower tax rates and a higher standard deduction than those filing under either the single or married filing separately status. Section 2(b)(1)(A) provides that for an individual to claim HOH status, he or she must be unmarried[6] at the close of the taxable year and maintain a household which constitutes the principal place of abode of a qualifying person for "more than one-half" of the tax year. Taxpayers have the burden of producing sufficient evidence to

[3] The record only contains two court divorce documents. The first one is an undated and unsigned Marital Settlement Agreement that is missing 28 out of 30 pages as well as an unspecified number of attendant exhibits. The second one is a document entitled, "Stipulation to Establish or Modify Child Support and Order," filed August 19, 2014, which is also missing an unspecified number of pages. In any event, it appears from these documents that the parties were divorced in 2014.

[4] In addition to the request for any additional information sent to appellant prior to issuance of the NOA, respondent requested in its brief on appeal that appellant provide specific types of evidence to support his claim that his son lived with him for more than half the year in 2014. Appellant did not respond to this request.

[5] All further statutory references are to sections of the Internal Revenue Code (IRC), unless otherwise stated. For the 2014 tax year, R&TC section 17024.5, subdivision (a)(1)(O), provides that for Personal Income Tax Law (PITL) purposes, California conforms to the January 1, 2009, version of the IRC. Thus, references herein to the IRC are to that version. R&TC section 17024.5, subdivision (d), also provides that when applying the IRC for California PITL purposes, federal regulations (temporary or final) issued by "the secretary" shall be applicable as California regulations to the extent they do not conflict with the R&TC or regulations issued by the FTB. Further, it is well settled that where federal law and California law are the same, federal rulings and regulations dealing with the IRC are persuasive authority in interpreting the applicable California statute. (See *J. H. McKnight Ranch v. Franchise Tax Bd.* (2003) 110 Cal.App.4th 978, fn.1, citing *Calhoun v. Franchise Tax Bd.* (1978) 20 Cal.3d 881, 884.)

[6] R&TC section 17042 also references Section 2(c), but that section refers to treating married taxpayers as unmarried for purposes of the HOH filing status, and does not apply here.

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substantiate that they are entitled to the HOH filing status, and the presumption of correctness that attends respondent's determination cannot be overcome by unsupported statements. (*Appeal of Richard Byrd*, 84-SBE-167, Dec. 13, 1984.)[7] For purposes of the HOH filing status at issue, the parties solely dispute whether appellant's son lived with him for more than one-half of the 2014 tax year.

In the present case, appellant's responses to respondent's HOH Audit Questionnaire and HOH Audit Letter, both of which were provided under penalty of perjury, as well as his appeal briefs, all indicate that his son lived with him for only a total of 128 days in 2014 and that, for the remainder of the year, he lived with his mother. This amount of time falls short of the 183 days required by the federal statute.[8] Thus, by his own repeated admission, appellant failed to provide the principal place of abode of the child for more than one-half of the taxable year.

In addition, and contrary to appellant's contention, the requirements for entitlement to dependent exemption credits are different from the requirements for entitlement to the HOH filing status. Thus, even if the Marital Settlement Agreement between appellant and his former spouse provides that appellant is entitled to claim his son as a dependent—a separate and distinct issue we address below—appellant's household must still have constituted the principal place of abode of the dependent for more than one-half of the year for purposes of qualifying appellant for HOH filing status. (IRC, § 2(b)(1)(A); see also *Shenk v. Comm'r* (2013) 140 T.C. 200, 210.) As stated above, the evidence shows this was not the case. Accordingly, appellant does not meet the requirements to claim the HOH filing status for the 2014 tax year.

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[7] Pursuant to the Office of Tax Appeals Rules for Tax Appeals, Cal. Code Regs., tit. 18, § 30501, subdivision (d)(3), precedential opinions of the State Board of Equalization (BOE) which 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 as part of a written opinion that the panel issues pursuant to this section. BOE opinions are generally available for viewing on the BOE's website: http://www.boe.ca.gov/legal/legalopcont.htm#boeopinion.

[8] In other words, 2014, which is not a leap year, has 365 days, and therefore more than half the year is 183 days.

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Issue 2 - Is appellant entitled to rely on the doctrine of equitable estoppel to bar respondent from denying appellant's claim to the HOH filing status?

Equitable estoppel is applied against the government only in rare and unusual circumstances and when its application is necessary to prevent manifest injustice. (See *Appeal of Richard R. and Diane K. Smith*, 91-SBE-005, Oct. 9, 1991.) The four elements of equitable estoppel are: (1) the government agency (FTB) must be shown to have been aware of the actual facts; (2) the government agency (FTB) must be shown to have made an incorrect or inaccurate representation to the relying party (appellant) and intended that its incorrect or inaccurate representation would be acted upon by the relying party or have acted in such a way that the relying party had a right to believe that the representation was so intended; (3) the relying party (appellant) must be shown to have been ignorant of the actual facts; and (4) the relying party (appellant) must be shown to have detrimentally relied upon the representations or conduct of the government agency (FTB). (*Appeal of Western Colorprint*, 78-SBE-071, Aug. 15, 1978.) The party asserting an estoppel bears the burden of proof and, thus, appellant must establish each of these four elements. (*Ibid.*)

Here, appellant asserts that respondent should be estopped from disallowing the HOH filing status because he relied on misleading statements contained in a HOH law summary published on respondent's website. It is not clear from the record if appellant relied on the law summary before or after filing his California return. In any event, appellant has not established that he meets the four elements necessary to find equitable estoppel.

Appellant, among other things, has not shown any detrimental reliance. His reliance on respondent's pamphlets and instructions does not by itself mean the doctrine applies. When FTB's instructions are alleged to be unclear or misleading, taxpayers must follow the law and not the instructions. (*Appeal of Melvin D. Collamore*, 72-SBE-031, Oct. 24, 1972; *Appeal of Robert P. and Carolyn R. Schalk*, 76-SBE-072, June 22, 1976.) Taxpayers should also not regard tax instruction pamphlets as sources of authoritative law. (*Appeal of Priscilla L. Campbell*, 79-SBE-035, Feb. 8, 1979.) Appellant has not indicated with specificity exactly what was unclear or misleading in respondent's HOH law summary. Indeed, Section J of that law summary, which is the same section appellant alleges he relied upon, clearly states, in no uncertain terms, that the child must be in the custody of one or both of the child's parents for *more* than half of the year,

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which appellant continuously concedes throughout his briefs was not met. Accordingly, appellant's equitable estoppel claim is without merit.

Issue 3 - Is appellant entitled to claim the dependent exemption credit?[9]

R&TC section 17054, subdivision (d)(1), allows a taxpayer to claim a dependent exemption credit for each dependent (as defined in R&TC section 17056) for whom an exemption is allowable under Section 151(c). R&TC section 17056 defines a dependent by reference to Section 152. Section 152(a), in turn, provides that the term "dependent" means either a "qualifying child" or a "qualifying relative." Section 152(e), however, provides a special rule for a child of divorced or separated parents that permits a noncustodial parent, who does not otherwise have a "qualifying child" or "qualifying relative," to claim the dependent exemption credit under certain circumstances.

1) Qualifying child

Section 152(c) provides the requirements for a qualifying child. In pertinent part, Section 152(c)(1)(B) requires the qualifying child to have the same principal place of abode as the taxpayer for more than one-half of the taxable year. As discussed above, appellant's son did not live with him for more than half of 2014. Therefore, appellant's son is not a qualifying child.

2) Qualifying relative

Section 152(d) provides the requirements for a qualifying relative. In pertinent part, Section 152(d)(1)(D) requires the qualifying relative must not be a qualifying child of appellant or a qualifying child of any other taxpayer for the 2014 tax year. Although, as concluded above, appellant's son was not his qualifying child for the 2014 tax year, it appears from the limited evidence in the record that his son was the qualifying child of the son's mother, appellant's former spouse. Specifically, his son (1) is the child of appellant's former spouse, (2) lived with appellant's former spouse for more than half of 2014, (3) is less than 19 years old, (4) did not provide over one-half of his own support in 2014, and (5) has not filed a joint tax return. (IRC, §152(c)(1)(A)-(E).) Therefore, appellant's son is not his qualifying relative.

[9] As noted above, appellant claimed dependent exemption credits on his return for both his two sons. In respondent's NPA, it disallowed a dependent exemption credit only for that son appellant also claimed was his qualifying person for HOH filing status purposes, which was the first issue addressed herein. As such, only the denied dependent exemption credit for this son is discussed in this section of the opinion.

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3) Special rule for child of divorced or separated parents

Even if a taxpayer does not have a child who satisfies the requirements of being a "qualifying child" or "qualifying relative," a special rule exists for children of divorced or separated parents. If a child receives over one-half of the child's support during the calendar year from the child's parents who are either divorced or separated, and the child is in the custody of at least one of the child's parents for more than half of the year, such child shall be treated as being the "qualifying child" or "qualifying relative" of the noncustodial parent if the custodial parent "releases" any claim to the dependency exemption.[10] (IRC, § 152(e)(1)(A)-(B).) Consequently, the noncustodial parent may claim a dependent exemption credit. For this purpose, "custodial parent" is defined as "the parent having custody for the greater portion of the calendar year," and "noncustodial parent" is defined in the negative as "the parent who is not the custodial parent." (IRC, § 152(e)(4)(A)-(B).)

The release of the custodial parent's claim, however, must be accomplished in a specific way. The custodial parent (here, appellant's former spouse) must have signed a written declaration "in such manner and form as the Secretary may by regulations prescribe" stating that appellant's former spouse will not claim the child as a dependent for the 2014 tax year, and the noncustodial parent (here, appellant) must have attached such written declaration to appellant's 2014 California personal income tax return. (IRC, § 152(e)(2)(A)-(B).) The interpretative Treasury Regulation indicates that the required written declaration must be an "unconditional release" of the appellant's former spouse's claim to the dependent exemption credit, it must name the appellant to whom the exemption applies, and it must specify that it is effective for the 2014 tax year. (Treas. Reg. § 1.152-4(e)(1)(i).)

To facilitate the statutory requirement for a written release, the regulation provides that the written declaration may be made on a particular form designated by the Internal Revenue Service (IRS), known as Form 8332, "Release/Revocation of Release of Claim to Exemption for Child by Custodial Parent." (Treas. Reg. § 1.152-4(e)(1)(ii).) A taxpayer is not required to use Form 8332 in order to comply with the "written declaration" requirement; however, any written declaration not on the form designated by the IRS "must conform to the substance of that form and must be a document executed for the sole purpose of serving as a written declaration under

[10] Section 152(e)(3) is inapplicable here as it applies to divorce and separation agreements executed before January 1, 1985.

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this section." (*Ibid*.) Importantly, a "court order or decree or a separation agreement may *not* serve as a written declaration." (*Ibid*., italics added.)

Here, appellant concedes in his briefs that his former spouse never executed a Form 8332. In addition, appellant never complied with the written declaration requirement by providing an alternative to Form 8332 that conformed to the substance of that form and that was executed for the sole purpose of serving as a written declaration under Section 152(e). The only relevant writing in the record are appellant's court divorce records (i.e., his Marital Settlement Agreement and Stipulation to Establish or Modify Child Support and Order, both of which are missing an unspecified number of pages and are therefore vague and unclear as to their terms). While these court documents may be binding as to appellant's obligation to pay his child support, they fail to satisfy the requirements of the tax law. Specifically, there is no language of an "unconditional release" of the appellant's former spouse's claim to the dependent exemption credit for the 2014 tax year. Rather, under Marital Settlement Agreement, appellant's former spouse is merely providing a promise to deliver a signed Form 8332 in the future and that her failure to do so gives rise to her indemnifying appellant for any additional tax liabilities. There is also no indication that the documents were executed for the sole purpose of serving as a written declaration under Section 152(e) and the regulation promulgated thereunder. Perhaps most importantly, the regulation specifically disallows any court order or decree or separation agreement from serving as a qualifying written declaration releasing a claim of dependency exemption.

While we are sympathetic to appellant's situation, we must follow the law as written. Accordingly, appellant is not entitled to the dependent exemption credit.

HOLDINGS

1. Appellant has not shown that he is entitled to claim the HOH filing status.
2. Appellant is not entitled to rely on the doctrine of equitable estoppel to bar respondent from denying appellant's claim to the HOH filing status.
3. Appellant is not entitled to the dependent exemption credit.

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DISPOSITION

Respondent's action in assessing additional tax is sustained in full.

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Kenneth Gast
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Kenneth Gast
Administrative Law Judge

We concur:

DocuSigned by:
John O Johnson
484A85964FFD4CE...
John O. Johnson
Administrative Law Judge

DocuSigned by:
0C90542BE88D4E7...
Tommy Leung
Administrative Law Judge