

**OFFICE OF TAX APPEALS  
STATE OF CALIFORNIA**

In the Matter of the Appeal of: ) OTA Case No. 18011067  
)  
) Date Issued: March 16, 2018  
**MARGARET M. SANTO PIETRO** )  
)  
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**OPINION**

Representing the Parties:

For Appellant: Mark Suarez, TAAP<sup>1</sup>  
For Respondent: Lynn Gidding-Theobald, Legal Assistant

J. JOHNSON, Administrative Law Judge: Pursuant to California Revenue and Taxation Code (R&TC) section 19045, Ms. Pietro (appellant) appeals an action by the Franchise Tax Board (FTB or respondent) in proposing additional tax in the amount of \$916, plus interest, for the 2014 tax year.

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

**ISSUES**

1. Has appellant shown that she is entitled to claim the Head of Household (HOH) filing status?
2. Is respondent's proposed assessment otherwise barred for equitable reasons?

**FACTUAL FINDINGS**

1. Appellant filed a timely California income tax return for the 2014 tax year using the HOH filing status. Appellant claimed and received a refund of \$1,142.

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<sup>1</sup> Appellant filed her appeal letter on her own behalf. Subsequent representation was provided by the Tax Appeals Assistance Program (TAAP).

2. With her return appellant provided an HOH Schedule, on which appellant identified her daughter as her qualifying person for the HOH filing status, and reported that her daughter was not less than 24 years of age and had gross income not less than \$3,950 in 2014.
3. Respondent issued appellant a Notice of Proposed Assessment (NPA) proposing additional tax of \$916, plus interest, based on the denial of the HOH filing status. The NPA explained that appellant could not claim the HOH filing status because her qualifying person's gross income exceeded the allowable amount for the year in question.
4. Appellant protested the NPA, contending that the HOH schedule she submitted with her return did not indicate that there was a maximum amount that her qualifying person could earn. Appellant submitted a new HOH Schedule with her protest, which reaffirmed that her qualifying person was not less than 24 years of age and had gross income not less than \$3,950 in 2014, but contended that she is entitled to the HOH filing status nevertheless.
5. Respondent acknowledged appellant's protest and responded by letter, reasserting its position that appellant did not qualify for the HOH filing status. Respondent explained that a qualifying relative cannot have gross income of \$3,950 or greater, and a qualifying child cannot be 24 years of age or older, and explained that appellant's qualifying person did not meet either of these requirements.
6. Respondent issued a Notice of Action on March 30, 2017, affirming the NPA, and this timely appeal followed.

## DISCUSSION

### Issue 1– Has appellant shown that she is entitled to the HOH filing status for the 2014 tax year?

R&TC section 17042 incorporates the requirements for the HOH filing status as contained in Internal Revenue Code section 2(b).<sup>2</sup> Section 2(b)(1)(A) provides that, among other requirements, a taxpayer who claims the HOH filing status must have a qualifying person who is either a qualifying child or a dependent as discussed in Section 151.

Section 2(b)(1)(A)(i) provides the requirements for a qualifying child by reference to

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<sup>2</sup> All further statutory references are to the Internal Revenue Code unless otherwise stated. R&TC section 17042 also references IRC 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.

Section 152(c). In pertinent part, Section 152, subsections (c)(1)(C) and (c)(3), provide that a qualifying child must be under the age of 19 or, if a full-time student, under the age of 24 as of the end of the tax year. Here, appellant has verified that her intended qualifying person, her daughter, was not under the age of 24 as of the end of the tax year, and therefore does not satisfy the requirements of a qualifying child under Section 152(c).

Section 2(b)(1)(A)(ii) provides that a dependent can serve as a qualifying person if he or she is a dependent of the taxpayer for which the taxpayer is entitled to a deduction for the taxable year in accordance with Section 151. Section 151, in turn, refers back to Section 152 for the definition of a dependent. In addition to the qualifying child, discussed above, Section 152(a) provides that the definition of dependent includes a qualifying relative. In pertinent part, Section 152(d)(1)(B) provides that a qualifying relative must have gross income for the calendar year that is less than the exemption amount for that tax year (as defined in Section 151(d)). The exemption amount for the 2014 tax year was equal to \$3,950. Appellant has verified that her daughter had gross income not less than \$3,950, and therefore does not satisfy the requirements of a qualifying relative under Section 152(d).

In accordance with the above, we find that appellant's daughter does not satisfy the qualifying person requirements of Section 2(b)(1)(A), and therefore appellant is not entitled to claim the HOH filing status for the 2014 tax year.

Issue 2 - Is respondent's proposed assessment otherwise barred for equitable reasons?

In addition to contending that she is entitled to the HOH filing status, appellant also raises the assertion that it is inequitable for respondent to collect funds that it should not have issued to her in the first place. In other words, appellant contends that, if she was not entitled to the portion of the refund she reported and received based on her claiming the HOH filing status, then respondent should not have issued the refund in the first place. Appellant asserts that either her tax preparation software or respondent should have rejected her filing status upon the submission of her HOH Schedule, which, on its face, indicates that she was not eligible for the HOH filing status.

Respondent is provided four years from the filing of a timely return within which to propose a deficiency assessment. (R&TC, § 19057.) Respondent is not obligated to, nor should it, delay the issuance of claimed refunds pending an audit of each return filed claiming a refund. As such, it is not outside of respondent's authority or practice to issue claimed refunds and then


subsequently review a return for accuracy. Moreover, the law authorizes respondent to recover erroneous refunds issued to a taxpayer. (*Id.* at § 19411.) Furthermore, respondent does not have control over third-party software used for filing returns. Although we sympathize with the economic realities faced by an individual who has to repay funds that were issued based on an incorrectly filed return, this assertion by appellant does not change the fact that, under the law, she is not eligible for the HOH filing status, as reflected in respondent's proposed assessment.

HOLDINGS

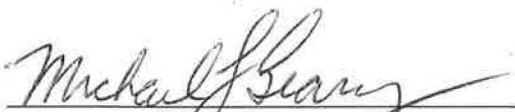
1. Appellant has not shown that she is entitled to claim the HOH filing status for the 2014 tax year.
2. Respondent's proposed assessment is not otherwise barred based on asserted equitable grounds.


DISPOSITION

Respondent's proposed assessment for the 2014 tax year is sustained.

  
John O. Johnson  
Administrative Law Judge

We concur:

  
Michael F. Geary  
Administrative Law Judge

  
  
Tommy Leung  
Administrative Law Judge