

**OFFICE OF TAX APPEALS  
STATE OF CALIFORNIA**

In the Matter of the Appeal of:	)	OTA Case No. 18011285
	)	
<b>FREDERICO M. ISABELLA</b>	)	Date Issued: November 29, 2018
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**OPINION**

Representing the Parties:

For Appellant:	Frederico M. Isabella
For Respondent:	Rachel Abston, Senior Legal Analyst

J. ANGEJA, Administrative Law Judge: Pursuant to California Revenue and Taxation Code section 19045,<sup>1</sup> Frederico M. Isabella (appellant) appeals an action of the Franchise Tax Board (FTB or respondent) on appellant’s protest against respondent’s proposed assessment, which substituted his claimed head of household (HOH) filing status with the married/registered domestic partnership filing separately status, resulting in additional tax of \$670, plus interest, for the 2013 tax year.

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

**ISSUE**

Whether appellant has established that he is entitled to the HOH filing status.

**FACTUAL FINDINGS**

1. During the 2013 tax year, appellant and his spouse were both active-duty members of the United States Army. Appellant was stationed in San Diego, California, and his spouse was stationed in Fresno, California, as ordered by the U.S. Army.

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<sup>1</sup> Unless otherwise indicated, all further statutory references are to sections of the California Revenue and Taxation Code for the tax year at issue.

2. Appellant filed a timely California Nonresident Income Tax Return for the 2013 tax year using the HOH filing status, claiming his mother as his qualifying person.
3. In response to an HOH Audit Questionnaire (Questionnaire) sent by respondent, appellant stated, in relevant part and under penalty of perjury, that he was married as of December 31, 2013, and that he lived with his spouse from January 1, 2013, to August 1, 2013, and from December 2, 2013, to December 31, 2013. Appellant also indicated that his mother, aged 61 and whom he supported, was his qualifying dependent.
4. Based on appellant's responses to the Questionnaire, respondent issued a Notice of Proposed Assessment (NPA) that allowed a dependent exemption credit of \$326 for appellant's mother and substituted appellant's HOH filing status for the 2013 tax year with the married/registered domestic partnership filing separately status, which resulted in an additional tax of \$670 for that year. The NPA explained FTB's position that appellant could not claim his mother as a qualifying person for HOH status unless appellant was considered unmarried on the last day of the tax year, and that appellant was not considered unmarried because appellant lived with his spouse during part of the last six months of 2013.
5. Appellant protested the NPA, contending that he and his spouse qualified as "married persons living apart" and that therefore he qualified for HOH status.
6. Subsequently, FTB issued a Notice of Action affirming the NPA, and this timely appeal followed.
7. Appellant submitted a Reply Brief, asserting that his wife lived with him from January 1, 2012, through August 1, 2012, and that the references in the Questionnaire to January 1, 2013 through August 1, 2013, were erroneous. Appellant confirmed in his Reply Brief that his wife was living with him from December 2, 2013 through December 31, 2013, as indicated in his Questionnaire.

### DISCUSSION

Appellant has the burden of proving that he is entitled to HOH filing status. This includes proving each applicable requirement for HOH filing status. (*Appeal of Richard Byrd*, 84-SBE-167, Dec. 13, 1984.)<sup>2</sup> Appellant has the further burden of proving that respondent's

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<sup>2</sup> Board of Equalization (BOE) opinions are generally available for viewing on the BOE's website: <<http://www.boe.ca.gov/legal/legalopcont.htm#boeopinion>>.

assessment - which is presumed correct - is erroneous. (*Todd v. McColgan* (1949) 89 Cal.App.2d 509, 514; *Appeal of Ismael R. Manriquez*, 79-SBE-077, Apr. 10, 1979.)

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, generally, for a person to claim the HOH filing status, the person must be unmarried and must maintain a household that constitutes the principal place of abode of a qualifying person for more than one-half of the year. Here, it is undisputed that appellant was married at the end of 2013, and thus he cannot qualify for HOH status under IRC section 2(b).

However, under certain circumstances, a married taxpayer may be treated as unmarried for purposes of the HOH filing status, in accordance with IRC sections 2(c) and 7703(b). IRC section 7703(b) sets forth the requirements that: (1) the taxpayer must file a separate income tax return; (2) the taxpayer must maintain a household that constitutes the principal place of abode of a “child” (within the meaning of IRC section 152(f)(1)) for more than one-half of the year; (3) the taxpayer must provide over one-half of the cost of maintaining such household during the year; and (4) during the last six months of the tax year, the taxpayer’s spouse must not have been a member of the household at any time. (See § 17042; IRC, §§ 2(c), 7703(b).)

Unfortunately, two of the foregoing criteria are unsatisfied here. First, for purposes of IRC section 7703(b), the qualifying person must be a taxpayer’s *child* (i.e., birth child, stepchild, adopted child, or eligible foster child). (IRC, § 152(f).) Appellant’s mother is not appellant’s child, and therefore she is not a qualifying person for purposes of qualifying appellant for HOH filing status under IRC section 2(c). Thus, appellant fails to meet this criterion.

Second, the uncontroverted evidence establishes that appellant’s spouse lived with him during the last six months of 2013. Specifically, both in his Questionnaire and on appeal appellant admits that his spouse lived with him from December 2, 2013 through December 31, 2013. That undisputed fact by itself means that appellant fails to meet the fourth criterion listed above. But in addition, it is undisputed that his spouse’s absence from his home during any

portion of 2013 was the result of her military service, which is considered a temporary absence. Specifically, Treasury Regulation section 1.7703-1(b)(5)<sup>3</sup> provides:

An individual's spouse will be considered to be a member of the household during temporary absences from the household due to special circumstances. A nonpermanent failure to occupy such household as his abode by reason of . . . military service shall be considered a mere temporary absence due to special circumstances.

In other words, appellant's spouse's absence from his home due to military service is considered a temporary absence for purposes of determining HOH filing status, and she is thus considered to have lived with appellant during 2013. For both of the foregoing reasons, appellant does not qualify for HOH filing status for the 2013 tax year.

We are sympathetic to appellant's circumstances, and we commend appellant and his spouse for their honorable military service. We note that in its brief, FTB indicated that appellant and his spouse may wish to amend their 2013 tax return by filing "married filing joint." Appellant may wish to contact FTB to explore the possibility of that option.

HOLDING

Appellant has not established that he is entitled to the HOH filing status.

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<sup>3</sup> When a California statute is substantially identical to a federal statute, interpretations of the federal statute are considered relevant in interpreting the California statute. (*Andrews v. Franchise Tax Bd.* (1969) 275 Cal.App.2d 653, 658.)

DISPOSITION

Respondent's action is sustained.

DocuSigned by:  
*Jeff Angeja*  
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Jeffrey G. Angeja  
Administrative Law Judge

We concur:

DocuSigned by:  
*Tommy Leung*  
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Tommy Leung  
Administrative Law Judge

DocuSigned by:  
*Kenneth Gast*  
FD75A3136CB94C2...  
Kenneth Gast  
Administrative Law Judge