

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:) OTA Case No. 18053236
KIMBERLY DENISE WESLEY)
) Date Issued: May 22, 2019
)
)
)
)

OPINION

Representing the Parties:

For Appellant: Kimberly Denise Wesley
For Franchise Tax Board (FTB): Rachel Abston, Senior Legal Analyst

G. THOMPSON, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, Kimberly Denise Wesley appeals an action by FTB proposing \$1,814 of additional tax, a penalty for failure to furnish information of \$453.50, and applicable interest, for the 2015 tax year.

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

ISSUES

1. Whether appellant is entitled to the head of household (HOH) filing status.
2. Whether the penalty under R&TC section 19133 for failure to furnish information should be abated.

FACTUAL FINDINGS

1. Appellant filed a timely California income tax return for the 2015 tax year claiming the HOH filing status. She claimed her daughter as her dependent. She did not provide a completed Head of Household Filing Status Schedule (FTB Form 3532) with her tax return.
2. On November 2, 2016, FTB sent a letter to appellant asking her to complete and return a Head of Household Information Request (Questionnaire) by December 2, 2016. FTB’s

letter warned that, if appellant failed to complete the Questionnaire by December 2, 2016, it would deny HOH filing status, assess additional tax and impose a failure to furnish information penalty.

3. Appellant did not complete and return the Questionnaire.
4. On July 27, 2017, FTB issued a Notice of Proposed Assessment (NPA) that denied appellant's claim for HOH filing status.
5. On August 26, 2017, appellant timely protested the NPA.
6. On January 29, 2018, FTB requested that appellant return a form providing information about whether she qualified for the HOH filing status.
7. On March 20, 2018, FTB sent appellant a follow-up letter stating that it had not received a response to its January 29, 2018 letter and requesting that, if appellant disagreed with FTB's position, she provide any new information that supports her position.
8. On April 6, 2018, appellant completed and returned a form provided by FTB to determine whether she qualified for the HOH filing status. She indicated that, during 2015, she was married or in a registered domestic partnership but did not live with her spouse or domestic partner during the year.
9. On May 1, 2018, FTB issued a Notice of Action affirming its NPA. In the Notice of Action, FTB acknowledged that appellant had stated that she did not live with her spouse. However, FTB stated that "upon further review . . . and information provided to us, it appears you were married and living with your spouse during the 2015 tax year."
10. Appellant then filed this timely appeal.
 - a. In her appeal, appellant stated that her estranged spouse lives in another city and commutes to Mississippi for his farming business. She also stated that he did not live with her at any time during 2015 and that her divorce was finalized on July 17, 2017.
 - b. In its brief, FTB asked appellant to provide information to verify that she meets the requirements to claim HOH filing status. FTB suggested that appellant provide a notarized statement signed under penalty of perjury from her former spouse, or from others, such as neighbors, relatives or friends, to verify when she and her spouse ceased to live together. FTB further suggested that appellant provide a copy of a lease agreement, proof of purchase of a separate home, utility

bills, or similar documents to verify whether separate households were established during 2015. FTB also requested a copy of appellant's divorce decree.

- c. Although the Office of Tax Appeals (OTA) notified appellant of her right to file a brief replying to FTB's brief, she did not do so.
- d. OTA then requested that appellant provide the following documents, to the extent she was able to do so: a copy of her divorce decree and any documents showing when she separated from her former husband; a statement or statements, signed under penalty of perjury, by any person or persons that can state whether appellant lived with her former husband during the last six months of 2015; and any other documents that might assist in determining whether her former husband lived with her during the last six months of 2015.
- e. In response, appellant provided a Superior Court judgment, dated May 11, 2017, dissolving appellant's marriage. Appellant also provided a property inspection report, listing her as the tenant and signed by her on April 29, 2011, with respect to her move into her residence in 2011.
- f. FTB provided a redacted copy of the 2015 tax return of appellant's former spouse, on which he listed the same address as appellant.

DISCUSSION

Issue 1: Whether appellant has shown she is entitled to the HOH filing status.

Appellant has the burden of providing evidence to show that she is entitled to the HOH filing status. (*Appeal of Sedillo*, 2018-OTA-101P, Aug. 10, 2018.) R&TC 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 2015, and thus she 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). Under these provisions, in order to be treated as unmarried, appellant has to show, among other things,

that her spouse was not a member of her household at any time during the last six months of 2015. (See R&TC, § 17042; IRC, §§ 2(c), 7703(b).)

Appellant has not shown that her former spouse was not a member of her household during the last six months of 2015. The divorce documents she provided are from 2017 and do not show that her former spouse did not live in her household during the last six months of 2015. The property inspection report she provided is from 2011, four years prior to the year at issue. Therefore, even if we could infer from the absence of her former husband's name on the report that he was not a member of her household during 2011, the report provides no information about whether he was a member of her household during the last six months of 2015.

OTA and FTB suggested other forms of evidence that appellant might be able to provide, such as statements, signed under penalty of perjury, from friends, relatives or others, indicating whether her former husband lived in her household during the last six months of 2015. However, appellant provided no evidence other than the divorce documents and property inspection report discussed above. Accordingly, appellant did not carry her burden of providing evidence to show that her former husband was not a member of her household during the last six months of 2015. Therefore, appellant did not show error in FTB's determination that she is not entitled to the HOH filing status.

Issue 2: Whether the penalty under R&TC section 19133 for failure to furnish information should be abated.

R&TC section 19133 allows FTB to impose a penalty for failing to furnish information requested in writing by FTB, unless the failure is due to reasonable cause and not willful neglect.¹ Here, on November 2, 2016, FTB requested information from appellant and provided a December 2, 2016 deadline to provide the requested information. FTB also warned that a failure to furnish information penalty would be imposed if appellant failed to timely provide the requested information. However, appellant failed to respond by the deadline, and did not offer any evidence or argument to suggest that she had reasonable cause for failing to timely provide the requested information. As a result, FTB has the right, under R&TC section 19133, to impose the penalty, and we have no legal basis to abate the penalty.

¹ Pursuant to R&TC section 19133, the penalty amount is, as applicable here, 25 percent of the amount of the tax deficiency. It appears FTB calculated the amount of the penalty correctly and appellant does not argue otherwise.

HOLDINGS

1. Appellant did not show she is entitled to the HOH filing status.
2. Appellant did not show that the penalty under R&TC section 19133 for failure to furnish information should be abated.

DISPOSITION

FTB's action is sustained.

DocuSigned by:
Grant S. Thompson
FC572D5881AE41B...
Grant S. Thompson
Administrative Law Judge

We concur:

DocuSigned by:
Tommy Leung
UC90542BE88D4E7...
Tommy Leung
Administrative Law Judge

DocuSigned by:
Jeffrey Margolis
5E9822FBB1BA41B...
Jeffrey I. Margolis
Administrative Law Judge