

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:) OTA Case No. 18010901
)
DANIEL VASQUEZ) Date Issued: March 28, 2018
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OPINION

Representing the Parties:

For Appellant: Daniel Vasquez

For Respondent: Claudia L. Cross, Senior Legal Analyst

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

J. ANGEJA, Administrative Law Judge: Pursuant to California Revenue and Taxation Code section 19045,¹ Mr. Daniel Vasquez (appellant) appeals an action by the Franchise Tax Board (FTB or respondent) on a proposed assessment of additional tax in the amount of \$880, plus applicable interest, for the 2014 tax year.

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

ISSUE

Whether appellant has demonstrated that he is entitled to the head of household (HOH) filing status for 2014.

¹ Unless otherwise indicated, all “Section” references are to sections of the California Revenue and Taxation Code. Section 19045 states that taxpayers have 30 days to appeal FTB’s action upon taxpayer’s protest to the board (Board of Equalization). Effective July 1, 2017, Section 20(b) was amended to read, “Unless the context requires otherwise, as used in this code or any other code, ‘board’ with respect to an appeal, means the Office of Tax Appeals.”

FACTUAL FINDINGS

1. Appellant filed a California income tax return for the 2014 tax year, claiming the HOH filing status, and dependent exemption credits for his mother and grandchild.
2. It is undisputed that appellant was married as of December 31, 2014, and that during that year: he did not live with his wife, he and his wife had separate residences, and he provided over one-half of all living expenses for his parent and grandchild.
3. On March 24, 2016, respondent issued a Notice of Proposed Assessment (NPA) denying appellant's claim for the HOH filing status. Respondent denied the HOH filing status because, as appellant was a married person, neither his mother nor his grandchild could qualify him for HOH status. The NPA allowed the dependent exemption credits that appellant claimed in his return, and allowed him an additional \$425 as a dependent parent credit for his mother. The NPA revised appellant's filing status to married filing separately, recomputed appellant's tax liability, and proposed additional tax of \$880, plus interest.
4. Appellant protested the NPA, contending that he qualified for the HOH filing status. Appellant also contends that he should not be assessed additional tax because HOH status "does not affect his Itemized deduction of \$11,295.00."
5. Thereafter, on April 24, 2017, respondent issued a Notice of Action (NOA), affirming the NPA. This timely appeal followed.

DISCUSSION

A taxpayer has the burden of proving that he or she is entitled to the HOH filing status. (*Appeal of Richard Byrd*, 84-SBE-167, Dec. 13, 1984.) 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 in relevant part that, for a person to claim the HOH filing status, the taxpayer must be unmarried at the close of the taxable year. IRC section 2(b)(2)(A) provides that an individual who is legally separated from his or her spouse under a decree of divorce or of separate maintenance shall not be considered as married for HOH purposes. A final decree of legal separation does not include an informal separation agreement, a petition for divorce or separation, or an interlocutory judgment for the dissolution of marriage. (*Appeal of*

Richard F. Savage, 82-SBE-168, July 26, 1982.) It is well settled that, for HOH purposes, a married taxpayer remains married before a final decree of divorce is rendered. (*Appeal of Richard F. Savage, supra; Appeal of Norma Vaccaro (Alvarez)*, 82-SBE-051, Mar. 3, 1982; *Appeal of James H. Rooney*, 81-SBE-074, June 23, 1981.)

Here, it is undisputed that appellant was still married as of December 31, 2014. While appellant contends that he and his wife have not lived together since 1990 and there is no possibility of reconciliation, appellant does not contend, and the record does not reflect, that the couple was separated by a final decree of legal separation. Therefore, appellant is considered married as of the end of 2014, and IRC section 2(b) does not apply to this appeal.

IRC section 2(c) provides that certain married persons who are living apart will be treated as not married (for HOH filing status purposes) at the close of the taxable year, if they satisfy each of four requirements under IRC section 7703(b).² It is the first criterion that is dispositive here: a married taxpayer may be considered unmarried, for purposes of the HOH filing status, if the taxpayer maintains a household which is the principal place of abode for a *qualifying child*. A “qualifying child” means a taxpayer’s son, daughter, stepson, stepdaughter, or eligible foster child (IRC, § 152(f)(1)).

Here, appellant did not claim his child as his qualifying person, but instead claimed his mother and grandchild. Neither a mother nor a grandchild are relationships that fall under the definition of a “qualifying child” under IRC section 2(c). Therefore, appellant does not qualify for HOH status for the 2014 tax year.

We next turn to appellant’s contention that he should not be assessed additional tax since he itemized his deductions, and HOH filing status does not affect the amount of his itemized deductions. We acknowledge that regardless of appellant’s filing status, he was entitled to \$11,295 in itemized deductions. But here, respondent has not disallowed appellant’s itemized deductions, or increased appellant’s taxable income. The increase in appellant’s tax liability is entirely due to appellant erroneously claiming HOH filing status and determining his tax

²The four criteria are as follows: First, the married individual must maintain as his home a household that constitutes the principal place of abode for a child (within the meaning of IRC section 152(f)(1)) for more than one-half of the taxable year. (IRC, § 7703(b)(1).) Second, the taxpayer must be entitled to a dependency deduction for the child. (IRC, § 7703(b)(1).) Third, the taxpayer must furnish over one-half of the cost of maintaining his household during the taxable year. (IRC, § 7703(b)(2).) Fourth, the taxpayer’s spouse may not be a member of the taxpayer’s household during the last six months of the taxable year. (IRC, § 7703(b)(3).) IRC section 152(f)(1) provides that the term “child” means the taxpayer’s son, daughter, stepson, stepdaughter, or eligible foster child.

liability using the tax table applicable to HOH filing status rather than the tax table for a married filing separately filing status.

HOLDING

Appellant failed to establish that he is entitled to the HOH filing status for the 2014 tax year.

DISPOSITION

Respondent's action is sustained.

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

We concur:

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

DocuSigned by:
Teresa A. Stanley
0CC6C6ACCC6A44D...
Teresa A. Stanley
Administrative Law Judge