

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:
TONNETTE WISE

) OTA Case No. 18103884
)
) Date Issued: August 14, 2019
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)

OPINION

Representing the Parties:

For Appellant: Al Michel, Certified Public Accountant

For Respondent: Bradley J. Coutinho, Tax Counsel

For Office of Tax Appeals: Philip Wahlquist, Graduate Student Assistant

N. ROBINSON, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, Tonnette Wise (appellant) appeals an action by respondent Franchise Tax Board (FTB) proposing \$1,109 in additional tax, plus applicable interest, for the 2016 tax year.

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

ISSUES

1. Has appellant established that she is entitled to the Head of Household (HOH) filing status for the 2016 tax year?
2. May appellant rely on purported oral advice from FTB when claiming HOH filing status?

FACTUAL FINDINGS

1. Appellant timely filed a California Resident Income Tax Return (Form 540) in which she claimed the HOH filing status. Appellant claimed her grandchild as her dependent.

2. On the Head of Household Schedule (Form 3532), appellant indicated that she was legally married, but did not live with her spouse in 2016. Appellant states that her grandchild lived with her for all of 2016.
3. On March 13, 2018, FTB issued a Notice of Proposed Assessment (NPA) denying appellant HOH filing status. FTB recalculated appellant's tax liability based on the "married/RDP filing separately" filing status, and proposed to assess \$1,109 of additional tax. FTB contends that a married taxpayer may claim HOH filing status "only if the qualifying child is a birth child, step child, adopted child, or foster child."
4. Appellant filed a protest letter and asserted that she qualified for HOH filing status because she provided over half the support of her grandchild, who lived with her for all of 2016, and the grandchild had no earnings.¹
5. On July 16, 2018, FTB issued a letter in response to appellant's protest letter. The letter stated that taxpayers who are married or registered domestic partners may not claim a grandchild for head of household status, unless the grandchild was placed with the taxpayer as a foster child, by an authorized placement agency, or by the court. In this letter, FTB further concluded that its NPA was correct in changing appellant's filing status to "married/RDP filing separately" and assessing additional tax.
6. On August 3, 2018, appellant made a new contention that she should be allowed to claim the HOH filing status, because two of FTB's employees verbally explained to her that a married grandparent can claim a grandchild for HOH filing status. Appellant claimed that she filed her 2016 Form 540 using the HOH filing status because of FTB's advice.
7. On September 17, 2018, FTB issued a Notice of Action (NOA) affirming the NPA and restating FTB's position that a married individual cannot claim a grandchild as a qualifying person for purposes of the HOH filing status. The NOA also stated that the law does not provide any waiver of penalties or interest for instances in which a taxpayer or taxpayer's representative relied on oral advice from FTB's employees.²
8. Appellant then filed this timely appeal.

¹ The name of the child listed in appellant's protest letter to the FTB is different than the name listed on appellant's Form 540 and Form 3532. However, appellant's references to a child at appeal in the record indicates that appellant is still asserting that her qualifying person is a grandchild.

² No penalties were imposed for the year at issue, and interest is not separately argued as an issue on appeal.

DISCUSSION

1. Has appellant established that she is entitled to the HOH filing status for the 2016 tax year?

A taxpayer has the burden of proving that he or she qualifies for the HOH filing status. (*Appeal of Richard Byrd* (84-SBE-167) 1984 WL 16246.) The requirements for claiming the HOH filing status are set forth in R&TC section 17042 which references Internal Revenue Code (IRC) sections 2(b) and (c) which provides that, among other requirements, a taxpayer who claims the HOH filing status must have a qualifying person who is either: 1) a qualifying child; or 2) a dependent. Further, to be eligible for the HOH filing status, a taxpayer must be either “unmarried” or “married/considered unmarried” on the last day of the tax year. There is no dispute that appellant was married at the end of 2016.

IRC section 2(c) provides that certain married persons 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).³ It is the first requirement 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 child as defined in IRC section 152(f)(1). A “child” means a taxpayer’s son, daughter, stepson, stepdaughter, or eligible foster child. (IRC, § 152(f)(1).) Here, appellant claimed her grandchild for purposes of establishing appellant as a head of household. A grandchild is not a relationship that falls under the definition of a “child” under IRC sections 2(c) and 152(f)(1). Therefore, appellant does not qualify for HOH status for the 2016 tax year.

2. May appellant rely on oral advice from FTB when claiming the HOH filing status?

Appellant also contends that she is entitled to HOH filing status because appellant’s accountant relied on oral advice from FTB employees that a married grandparent could claim a grandchild as a qualifying person for HOH filing status.⁴ However, a tax filing status must be meet the requirements of the R&TC, not on oral statements of FTB’s employees. (*Appeal of*

³ The four requirements are as follows: first, the married individual must maintain as her 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 her 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).)

⁴ We note that FTB’s records do not indicate that any such oral advice was given.


Raymond E. and Joy Lecompte (89-SBE-025) 1989 WL 137369.) Reliance on an alleged oral advice from an FTB employee is not a sufficient basis to create an estoppel argument against the FTB. (*Appeal of Western Colorprint* (78-SBE-071) 1978 WL 3544; *Appeal of Richard W. and Ellen Campbell* (75-SBE-049) 1975 WL 3533.) Therefore, appellant has failed to establish she is entitled to the head of household filing status for the 2016 tax year.

HOLDINGS

1. Appellant failed to establish that she is entitled to the HOH filing status for the 2016 tax year.
2. Appellant may not rely on alleged oral advice given by FTB employees as the basis for estopping FTB from disallowing her claim for HOH filing status.


DISPOSITION

FTB's action is sustained.

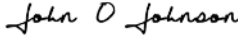
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We concur:

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 John O. Johnson
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