

**OFFICE OF TAX APPEALS**  
**STATE OF CALIFORNIA**

In the Matter of the Appeal of:  
**MICHAEL P. WATSON**

) OTA Case No. 18042914  
)  
) Date Issued: September 26, 2019  
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)

**OPINION**

Representing the Parties:

For Appellant: Kari L. Pel, Certified Financial Planner

For Respondent: Bradley J. Coutinho, Tax Counsel

For Office of Tax Appeals: Ellen L. Swain, Tax Counsel

J. JOHNSON, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, appellant Michael P. Watson appeals an action by respondent Franchise Tax Board (FTB) in proposing an additional tax of \$1,776, plus applicable interest, for the 2014 tax year.<sup>1</sup>

Appellant requested that this matter be decided based on the written record.

**ISSUE**

Whether appellant has established that he is entitled to the Head of Household (HOH) filing status for the 2014 tax year.

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<sup>1</sup> As discussed below, FTB has stated on appeal that it will allow a \$425 joint custody head of household credit, reducing the amount at issue to \$1,351, plus interest.

### FACTUAL FINDINGS

1. Appellant timely filed a California resident income tax return for the 2014 tax year, claiming the HOH filing status. Appellant listed his daughter as his qualifying dependent, and stated that she lived with him for 183 days in 2014.<sup>2</sup>
2. FTB subsequently informed appellant by letter that his former spouse also claimed the HOH filing status and listed appellant's daughter as her qualifying child. FTB's letter requested additional information from appellant to determine which parent was entitled to the HOH filing status. FTB also sent a letter to appellant's former spouse around this time requesting the same information.
3. Appellant provided a letter and the following information: 1) a copy of the divorce agreement reflecting equal visitation and joint legal custody of appellant's daughter; 2) an agreement for appellant's former spouse to maintain the "primary residence," in exchange for appellant to claim appellant's daughter as a dependent; and 3) a calendar created by appellant reflecting that appellant's daughter lived with him for 183 days in 2014 (i.e., just greater than one-half of the year). Appellant's calculations of days of custody indicates that there was a two-month period during which appellant's former spouse was not employed full-time and was responsible for transporting appellant's daughter to and from school.
4. Information provided to FTB by appellant's former spouse included the following: 1) a letter from appellant's daughter's preschool indicating appellant's former spouse's address was the primary address on file; 2) a letter from the California Department of Child Support Services listing her as the custodial parent and appellant as the non-custodial parent; and 3) information that appellant's former spouse provided daily care of appellant's daughter for approximately two months between March and May of 2014 when she was not employed full-time.
5. FTB determined appellant failed to qualify for the HOH status, because appellant's daughter did not live with appellant for more than one-half of the year, appellant's former spouse had joint custody of appellant's daughter, and appellant's former spouse's residence was listed as the primary residence in the custody agreement.

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<sup>2</sup> All references to appellant's daughter in this Opinion refer to the same minor individual, who appears to be appellant's former spouse's daughter as well.

- FTB therefore issued a Notice of Proposed Assessment (NPA) on January 12, 2017. The NPA assessed \$1,776 of additional tax plus applicable interest.
6. Appellant filed a protest, maintaining that appellant's daughter lived with him for 183 days.
  7. FTB denied the protest and issued a Notice of Action affirming the NPA. This timely appeal followed.

### DISCUSSION

A taxpayer has the burden of proving that he or she qualifies for the HOH filing status, and the presumption of correctness that attends FTB's determination cannot be overcome by unsupported statements. (*Appeal of John M. Sedillo*, 2018-OTA-101P; see also *Appeal of Bharat Verma*, 2018-OTA-080P.)

R&TC section 17042 incorporates Internal Revenue Code (IRC) section 2(b) to define head of household. An unmarried taxpayer may be eligible for the HOH filing status if the taxpayer maintains a household which constitutes the principal place of abode for a qualifying child for more than one-half of the taxable year. (IRC, § 152(c)(1)(A), (B).) Under no circumstances can a qualifying child qualify more than one taxpayer for HOH filing status. (Treas. Reg. § 1.2-2(b)(2).) In the case of divorced parents, only the child's custodial parent may claim the HOH filing status.<sup>3</sup> (IRC, § 21(e)(5).) The parent with custody for the greater portion of the tax year is the custodial parent. (IRC, § 152(e)(1).)

Appellant and his former spouse each filed a return using the HOH filing status and claiming appellant's daughter as their qualifying child. Under the divorce agreement, appellant and his former spouse had joint custody of appellant's daughter, with essentially equal custodial rights (aside from appellant's former spouse's address being listed as the child's primary address). However, the facts show that appellant's former spouse actually had custody of appellant's daughter for more days during the year than appellant, based primarily on the approximately two months during which appellant's spouse was not employed full-time and was providing daily care for the child, including taking her to and from school. Appellant contends that this arrangement was in place during those two months only for the purpose of saving on childcare expenses, and had his former spouse been employed, he would have paid childcare

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<sup>3</sup> An exception exists when the custodial parent releases a claim to the exemption, pursuant to IRC section 152(e)(2). There was no such release in the facts of this appeal.

expenses. Appellant asserts that, in his mind, he was still responsible for his daughter during these periods when his former spouse was taking care of their daughter. Regardless of the reasons behind the arrangement, the result is that appellant's former spouse had custody over appellant's daughter for more than one-half of the year while appellant had custody for less than one-half of the year.

In addition to the extra days of custody afforded appellant's former spouse during the two months described above, appellant's daughter's preschool used appellant's former spouse as the child's primary address, the California Department of Child Support viewed appellant's former spouse as the primary custodial parent, and appellant's former spouse's home was listed as appellant's daughter's primary residence. Based on the above, appellant is not entitled to the HOH filing status.

R&TC section 17054.5 permits a "qualified joint custody" HOH credit for a parent with custody between 146 and 219 days, who meets other certain criteria. This credit allows for parents who do not qualify for or otherwise receive the HOH filing status to still receive a tax benefit. For 2014, the tax credit is equal to \$425. FTB has agreed to allow this credit to appellant on appeal.

HOLDING

Appellant did not establish that he is entitled to the HOH filing status for the 2014 tax year, but is instead entitled to a qualified joint custody HOH credit under R&TC section 17054.5.

DISPOSITION

FTB's action is amended to allow the \$425 qualified joint custody HOH credit, as conceded by FTB on appeal, and is otherwise sustained.

DocuSigned by:  
*John O Johnson*  
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John O. Johnson  
Administrative Law Judge

We concur:

DocuSigned by:  
*Alberto T. Rosas*  
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Alberto T. Rosas  
Administrative Law Judge

DocuSigned by:  
*Richard I. Tay*  
F8E81582726F448...  
Richard I. Tay  
Administrative Law Judge