

**OFFICE OF TAX APPEALS
STATE OF CALIFORNIA**

In the Matter of the Appeal of:
S. ROSS

) OTA Case No. 20056191
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OPINION

Representing the Parties:

For Appellant: S. Ross

For Respondent: Angelina Yermolich, Legal Assistant

For Office of Tax Appeals: Nicholas Awakuni,
Graduate Student Assistant

T. LEUNG, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, S. Ross (appellant) appeals an action by respondent Franchise Tax Board (FTB) proposing to assess additional tax of \$1,705, plus applicable interest, for the 2018 taxable year.

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

ISSUE

Whether appellant qualified to use the head of household (HOH) filing status for the 2018 taxable year.

FACTUAL FINDINGS

1. Appellant filed her 2018 tax return using the HOH filing status. Appellant attached to her return a 2018 FTB Form 3532 Head of Household Filing Status Schedule (Form 3532) reporting that she was legally married but did not live with her spouse and that her son was her qualifying person.

2. Appellant also reported that her son was three years of age, had no income and that he lived with her for 150 days in 2018. Appellant's spouse claimed this same child as his qualifying person for HOH purposes.
3. FTB disqualified appellant from using the HOH filing status because her son lived with her for only 150 days during the 2018 taxable year and was being used as the qualifying person for another taxpayer. FTB requested that appellant submit additional evidence to support her HOH filing status.
4. When FTB did not receive the requested additional evidence, it affirmed the denial of appellant's HOH filing status.
5. This appeal followed.

DISCUSSION

Taxpayers have the burden of proving that they qualify for the HOH filing status. (*Appeal of Sedillo*, 2018-OTA-101P; *Appeal of Verma*, 2018-OTA-080P.) Unsupported assertions are insufficient to satisfy a taxpayer's burden of proof. (*Appeal of Verma, supra*; *Appeal of Magidow* (82-SBE-274) 1982 WL 11930.) Moreover, FTB's determination cannot be successfully rebutted when the taxpayer fails to present credible, competent, and relevant evidence as to the issues in dispute. (*Appeal of Mazer*, 2020-OTA-263P; *Appeal of Seltzer* (80-SBE-154) 1980 WL 5068.)

R&TC section 17042 sets forth the 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 in order to claim the HOH filing status, the taxpayer must be unmarried at the close of the taxable year and maintain a household that constitutes the principal place of abode of a qualifying person for more than one-half of the taxable year. (IRC, §§ 2(b) & 152(d)(2).)

The determination of whether a taxpayer is married shall be determined as of the close of the taxable year. (IRC, § 7703(a)(1).) A taxpayer who is legally separated from his or her spouse under a decree of divorce or a decree of separate maintenance shall be considered not married. (IRC, § 7703(a)(2).) A final decree of legal separation does not include an interlocutory judgment for dissolution of marriage. (*Appeal of Savage* (82-SBE-168) 1982 WL 11845.) For HOH purposes, a married taxpayer remains married before a final decree of divorce is rendered. (*See ibid.*)

As relevant here, certain married persons living apart will be treated as not married (for purposes of the HOH filing status) at the close of the taxable year if they satisfy the requirements of IRC section 7703(b). (IRC, § 2(c).) Under IRC section 7703(b), a married individual must generally meet several requirements to qualify for the HOH filing status; two of those requirements are: (1) the taxpayer 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; and (2) that child qualifies the taxpayer for a dependent exemption. A “child” is defined in this context (where a married person is seeking to be treated as not married) as an individual who is the taxpayer's son, daughter, stepson, stepdaughter, or eligible foster child. (IRC, § 152(f)(1).)

There is no dispute that appellant was married at the end of 2018. Appellant asserts that even though she was married, she qualified for the HOH filing status because she did not live with her spouse in 2018 and her son was her qualifying person. As noted above, appellant has the burden of proving that her son lived with her for more than one-half of the 2018 taxable year. Even though appellant contends that her son lived with her every other week, which she argues is more than 50 percent of the time, appellant has not shown that her son lived with her for more than one-half of the 2018 taxable year, which would be 183 days or more. On her Form 3532, appellant indicated that her son only lived with her for 150 days, which is less than one-half of the taxable year. Therefore, appellant did not satisfy the requirement of showing that her son lived with her for more than one-half of the 2018 taxable year.¹ Because appellant failed to show that she met the 183-day threshold, she does not qualify for HOH filing status, and we need not address the dependent exemption requirement.

¹ FTB offered to reconsider its position in this appeal if appellant provided credible evidence such as her Judgment of Dissolution (including the agreement explaining the custody and visitation arrangements for her son), a statement from appellant signed under penalty of perjury that provided the exact dates appellant's son lived with her, and any notarized statements from individuals who can attest to appellant's son's living arrangements in 2018. However, no such evidence was submitted.

HOLDING

Appellant was not qualified to use the HOH filing status for the 2018 taxable year.

DISPOSITION

FTB’s action is sustained.

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

We concur:

DocuSigned by:
Keith T. Long
DC88A60D8C3E442/...
Keith T. Long
Administrative Law Judge

DocuSigned by:
Sara A. Hosey
6D3FE4A0CA514E7/...
Sara A. Hosey
Administrative Law Judge

Date Issued: 4/7/2021