



BEFORE THE STATE BOARD OF EQUALIZATION  
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of )  
TIMOTHY J. EVANS )

For Appellant: Timothy J. Evans,  
in pro. per.

For Respondent: John A. Stilwell, Jr.  
Counsel

O P I N I O N

This appeal is made pursuant to section 18593 of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protest of Timothy J. Evans against a proposed assessment of additional personal income tax in the amount of \$262.28 for the year 1977.

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The issue in this appeal is whether appellant qualified as a head of household for 1977.

During part of 1977, appellant lived with his second wife and his children from a former marriage'. Appellant and his second wife separated during 1977 but were still married to each other on the last day of that year. Appellant continued to maintain the household for his children. On his personal income tax return for 1977, he claimed head of household status.

After an exchange of correspondence, respondent learned that appellant was still married at the close of 1977, recomputed appellant's tax liability as that of a single person with dependents, and issued a notice of tax proposed to be assessed. After a protest and a hearing, respondent affirmed its proposed assessment. This appeal followed.

Appellant argues (1) that he was no longer married to the natural mother of the children for whom he maintained the household in 1977, and so he should qualify under the statute, and (2) a statute which would deny him head of household status is invalid as it would deny him the equal protection of the laws. (U.S. Const., Amend. XIV.)

The term "head of household" is defined in section 17042 of the Revenue and Taxation Code, which provides, in pertinent part:

For purposes of this part, an individual shall be considered a head of a household if, and only if, such individual is not married at the close of this taxable year ....

\* \* \*

For purposes of this section, an individual who, under subdivision (c) of Section 17173 is not to be considered as married, shall not be considered as married.

An individual is considered as legally married unless separated from his spouse under a final decree of divorce or of separate maintenance at the close of the taxable year. (See Appeal of Enis V. Harrison, Cal. St. Bd. of Equal., June 28, 1977.) Since appellant was legally married at the close of 1977, he was not entitled to head of household status for that year unless he qualified as "an

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individual who, under subdivision (c) of Section 17173 is not to be considered as married." Subdivision (c) of section **17173** in part provides:

If--

(1) An individual who is married ... and who files a separate return maintains as his home a household which constitutes for more than one-half of the taxable year the principal place of abode of a dependent (A) who ... is a son, stepson, daughter, or stepdaughter of the individual, and ...

\* \* \*

(3) During the' entire taxable year such individual's spouse is not a member of such household,, such individual shall not be considered as married.

Appellant's spouse (his second wife) did live in **the household** during part of **1977**. Therefore, for purposes of determining head of household status, appellant-was married and not entitled to head of household status.

Insofar as appellant argues that any statute which denies him head of household status for 1977 is constitutionally invalid, we believe that the adoption of section 3.5 to article III of the California **Constitution**,<sup>1/</sup> precludes our contemplation of such an argument.

1/ **Section 3.5** of article III provides:

An administrative agency, including an administrative agency created by the Constitution **or** an initiative statute, has no power:

(a) To declare a statute unenforceable, or refuse to enforce a statute, on the basis of it being unconstitutional unless an appellant court has made a determination that such statute is unconstitutional;

(b) To declare a statute unconstitutional;  
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In any event, this board has a well established policy of abstention from deciding constitutional questions in appeals involving deficiency assessments. (Appeal of Ruben B. Salas, Cal. St. Bd. of Equal., Sept. 27, 1978; Appeal of Iris E. Clark, Cal. St. Bd. of Equal., March 8, 1976.) This policy is based upon the absence of specific statutory authority which would allow respondent to obtain judicial review of an adverse decision in a case of this type, and our belief that such review should be available for questions of constitutional interpretation.

Respondent's action must be sustained.

(Continued)

(c) To declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement of such statute unless an appellant court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulations.

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O R D E R

Pursuant to the views expressed in the opinion of the board on file in this proceeding, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to section 19595 of the Revenue and Taxation Code, that the action of the Franchise Tax Board on the protest of Timothy J. Evans against a proposed assessment of additional personal income tax in the amount of \$262.28 for the year 1977, be and the same is hereby sustained.

Done at Sacramento, California, this, 26th day of **July**, 1982, by the State Board of Equalization, with Board **Members** Mr. Bennett, Mr. Dronenburg and Mr. Nevins present.

William M. Bennett, Chairman

Ernest J. Dronenburg, Jr., Member

Richard Nevins, Member

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