

BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
MARTIN J. BENEDIK)

Appearances:

For Appellant: Martin J. Benedik,
in pro. per.

For Respondent: Noel J. Robinson
Counsel

O P I N I O N

This appeal is made pursuant to section 18593^{1/} of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protest of Martin J. Benedik against a proposed assessment of additional personal income tax and penalty in the total amount of \$574.42 for the year 1981.

^{1/} Unless otherwise specified, all section references are to sections of the Revenue and Taxation Code as in effect for the year in issue.

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The sole issue presented for our resolution is whether appellant was entitled to head-of-household filing status for the year 1981.

In May 1980, appellant obtained an interlocutory decree of dissolution of marriage from his spouse. During the year under review, appellant's teenage daughter, **Michele**, resided with him in his southern California home for the first nine months. On October 1, 1981, appellant was apparently required to relocate to Louisiana to perform a temporary job assignment in Mississippi. His daughter, however, stayed in California to continue attending school in this state for the remainder of the school year. She began living with her mother upon appellant's departure for his out-of-state assignment. In December 1981, the final judgment of dissolution was entered while appellant was **still** working in the South. Appellant eventually returned to California in January 1983.

For the year 1981, appellant filed a California personal income tax return claiming status as a head of household. Appellant named his daughter as the individual qualifying him for such **filing** status. Respondent determined that appellant did not qualify as a head of household since the qualifying dependent did not reside with him for the entire year. Consequently, respondent recomputed appellant's tax liability using the rates prescribed for single persons and issued a proposed assessment of additional tax. In addition, respondent assessed a **25-percent** penalty under section 18683 for failure to furnish requested information and a 5-percent penalty under section 18681 for failure to file a timely return. Upon appellant's protest, respondent withdrew the penalty assessment for failure to furnish information but affirmed the proposed assessment in all other respects.

In this appeal, appellant contends that he qualified as a head of household for 1981 because his daughter lived with him for nine months and he furnished over one-half of the cost of supporting her during the remaining three months of the year. In explaining why his daughter did not live with him for the entire year, appellant states that she would have moved with him to Louisiana except that she desired to finish school here. Appellant takes the position that his daughter's residence with her mother was a temporary arrangement,

The term "head of household" is defined in section 17042, which provided, in pertinent part:

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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 his taxable year, and . . .

(a) Maintains as his home a household which constitutes for such taxable year the principal place of abode, as a member of such household, of--

(1) A son, stepson, daughter, or stepdaughter of the taxpayer

Section 17042 requires that the taxpayer's home constitute the principal place of abode of a qualifying individual for the taxable year. This statutory requirement is **clarified** by Treasury Regulation section 1.2-2(c)(1), which is substantially similar to respondent's former regulation 17042-17043, subdivision (b)(1). (Former Cal. Admin. Code, tit. 18, reg. 17042-17043, subd. (b)(1), repealer filed December 23, 1981 (Register 81, No. 52).) Treasury Regulation 1.2-2(c)(1) explicitly provides, in pertinent part, that the taxpayer and his child must physically occupy a common household for the entire year:

In order for a taxpayer to be considered as maintaining a household by reason of any individual described in paragraph (a)(1) or (b)(3) of this section, the household must actually constitute the home of the taxpayer for his taxable year. 'A physical change in the location of such home will not prevent a taxpayer from qualifying as a head of a household. Such home must also constitute the principal place of abode of at least one of the persons specified in such paragraph (a)(1) or (b)(3) of this section. It is not sufficient that the taxpayer maintain the household without being its occupant. The taxpayer and such other person must occupy the household for the entire taxable year of the taxpayer. (Emphasis added.)

(See also Prendergast v. Commissioner, 57 T.C. 475 (1972), affd., 483 F.2d 970 (9th Cir. 1973); Appeal of Dorothy H. Salata, Cal. St. Bd. of Equal., Jan. 9, 1979; Appeal of James A. Hotchkiss, Cal. St. Bd. of Equal., & s t . . . 1978.) In a decision upholding the validity of this regulation, the United States Tax Court added that the

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household, which a taxpayer is required to maintain for the entire year to qualify as a head of household, must be occupied by the taxpayer as his home in the sense that it is his actual place of abode. (Grace v. Commissioner, 51 T.C. 685, affd. per curiam, 421 F.2d 165 (5th Cir. 1969); see also Biolchin v. Commissioner, ¶ 69,197 T.C.M. (P-H) (1969), affd., 433 F.2d 301 (7th Cir. 1970); Muse v. United States, 434 F.2d 349 (4th Cir. 1970), revg. 303 F.Supp. 172 (M.D.N.C. 1969).)

In the instant appeal, appellant maintained a household which both he and his daughter occupied for nine months. During the rest of the year, appellant maintained a California household for his child by furnishing over half of its costs. (Rev. 6 Tax. Code, § 17042; Treas. Reg. § 1.2-2(d).) He did not, however, **occupy that household**, for in these months his actual place of abode was in Louisiana or Mississippi.. The fact that a taxpayer substantially contributed to his child's support and to the maintenance of a household for the benefit of his child may entitle the taxpayer to claim a dependency exemption or credit, but it does not allow him to claim head-of-household filing status where he did not occupy the same household for the entire taxable year. (Grace v. Commissioner, supra; Marlowe v. Commissioner, ¶ 67,012 T.C.M. (P-H) (1967); Appeal of Larry Anderson, Cal. St. Bd. of Equal., July 28, 1983; see also Appeal of Edward J. Rozcicha, Cal. St. Bd. of Equal., Mar. 4, 1980.) Since appellant was not an occupant for the entire year of a household that he maintained for his daughter, we must conclude that appellant did not qualify as a head of household for 1981,

In addressing appellant's contention that his teenage daughter's move into her mother's residence was a temporary measure, respondent has assumed that appellant is making the argument that his daughter was temporarily absent from his household. In general, a taxpayer may maintain head-of-household status when the qualifying individual has not occupied his household for the entire year if he can show that the specified person was only temporarily absent due to special circumstances. (Treas. Reg. § 1.2-2(c)(1); Manning v. Commissioner, 72 T.C. 838 (1979); Appeal of Gwen R. Fondren, Cal. St. Bd. of Equal., May 13, 1977.) The record in this appeal does not **demonstrate** the existence of any special circumstance to warrant the application of this exception. Appellant has stated that his daughter would have moved out of state with him but stayed with her mother in order to finish the school year here. On the other hand, appellant

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indicated in a response to respondent's inquiry that he originally planned to return to California in early 1982, We observe, in any case, that when appellant returned to this state in 1983, his daughter did not move back into his home. These facts lead us to believe that appellant's daughter abandoned their common abode upon his departure and, consequently, acquired a new principal place of abode in her mother's residence. Thus, the daughter's absence from appellant's home did not constitute a temporary absence within the meaning of the regulation, but a change in her principal place of abode. (Ruff v. Commissioner, 52 T.C. 576 (1969); Stanback, Jr. v. United States, 39 **A.F.T.R.2d** (P-H) ¶ 77,444 (1977).)

Finally, appellant has not presented any argument against the imposition of the penalty to file a timely return. Where a taxpayer has offered no evidence to show that the failure to file a timely return was due to reasonable cause and not willful neglect, we must assume that the penalty applies. (Appeal of Valley View Sanitarium and Rest Home, Inc., Cal. St. Bd. of Equal., Sept. 27, 1978.)

Based upon the record before us, we find that appellant has failed to establish that he maintained as his home a household that was the principal place of abode for his daughter for the entire year 1981. Accordingly, respondent's action in this matter must be sustained.

