

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

In the Matter of the Appeal of:

**T. GARFIAS**) OTA Case No. 20076341  
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)**OPINION**

Representing the Parties:

For Appellant:

T. Garfias

For Respondent:

Noel Garcia, Tax Counsel  
Angelina Yermolich, Legal Assistant

E. S. EWING, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, T. Garfias (appellant) appeals an action by respondent Franchise Tax Board proposing \$1,739 of additional tax, plus applicable interest, for the 2018 tax year.

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

**ISSUE**

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

**FACTUAL FINDINGS**

1. Appellant timely filed a 2018 California tax return. On that return, appellant filed using the HOH filing status and included the appropriate HOH Filing Status Schedule (Form 3532), identifying one of appellant's sons as the "qualifying person" for HOH qualification purposes.<sup>1</sup> On the Form 3532 appellant checked the box to indicate that appellant had "received final decree of divorce, legal separation, dissolution, or

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<sup>1</sup> We note that appellant claimed two dependent exemption credits for appellant's sons. However, appellant only identified one of the sons as the HOH "qualified person" on the Form 3532.

- termination of marriage/RDP by 12/31/2018” and indicated that appellant’s son lived with appellant a total of 42 days during the 2018 tax year.
2. Respondent reviewed appellant’s 2018 tax return and issued a Notice of Proposed Assessment (NPA) denying the claimed HOH filing status. The NPA proposed additional tax of \$1,739 plus applicable interest.
  3. Appellant protested the NPA.
  4. Following the protest, respondent issued a Notice of Action affirming the NPA.
  5. Appellant then filed this timely appeal.
  6. On appeal, appellant provided an order from the Superior Court of California, County of Riverside, issued on or about June 22, 2011, which provides that appellant shall have joint custody of appellant’s children. Also on appeal, appellant submitted affidavits by appellant’s son, as well as appellant’s spouse, both of which were signed under penalty of perjury. These affidavits state that appellant’s son, who appellant claimed as appellant’s qualifying child, lived with appellant during the entire 2018 tax year.

#### DISCUSSION

Taxpayers have the burden of producing sufficient evidence to substantiate that they are entitled to the HOH filing status, and the presumption that respondent properly determined HOH eligibility cannot be overcome by unsupported statements. (*Appeal of Sedillo*, 2018-OTA-101P.) The applicable standard of proof is by a preponderance of the evidence. (Cal. Code Regs., tit. 18, § 30219(c).) That is, a party must establish by documentation or other evidence that the circumstances it asserts are more likely than not to be correct. (*Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California* (1993) 508 U.S. 602, 622.) Preponderance of the evidence “means what it says, viz., that the evidence on one side outweighs, preponderates over, is more than, the evidence on the other side, not necessarily in number of witnesses or quantity, but in its effect on those to whom it is addressed.” (*Glage v. Hawes Firearms Co.* (1990) 226 Cal.App.3d 314, 325 (italics omitted), quoting *People v. Miller* (1916) 171 Cal. 649, 652.) Unsupported assertions are insufficient to satisfy a taxpayer’s burden of proof. (*Appeal of Talavera*, 2020-OTA-022P.)

R&TC section 17042 sets forth the California 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, for a person to claim the HOH filing status, he or she generally must be unmarried at the close of

the tax year and maintain a household that constitutes the principal place of abode of a “qualifying person” for more than one-half of the tax year. The determination of whether an individual is married shall be made as of the close of the tax year (in this case, December 31, 2018). (IRC, §§ 2(b)(1) & 7703(a)(1).)

Here, appellant checked the box on the Form 3532 in Part 1, Marital Status, indicating that appellant “[r]eceived a final decree of divorce, legal separation, dissolution, or termination of marriage/RDP by 12/31/2018.” While appellant checked the box indicating that she received a final divorce decree before December 31, 2018, she has not provided any final divorce decree issued by the court in 2018 (or any other prior tax year). Additionally, appellant’s assertion (made by checking this box on her 2018 returns) is inconsistent with her filings in both the prior (2017) and subsequent (2019) tax years where she checked the boxes indicating that that she was legally married but did not live with her spouse. Because appellant has not provided a final divorce decree, she has not established by a preponderance of the evidence that she was unmarried at the end of 2018.

Since appellant has not established that she was unmarried at the close of the 2018 tax year she does not qualify for HOH filing status under IRC section 2(b). The next question is whether appellant meets the specific requirements to nevertheless be treated as unmarried for purposes of HOH filing status under IRC section 2(c). IRC section 2(c) provides that married persons living apart will be treated as not married at the close of the tax year if they satisfy the requirements of IRC section 7703(b). To claim the HOH filing status, married individuals must meet the following requirements: 1) the individual must file a return separate from their spouse; 2) the individual must maintain a household which constitutes the principal place of abode for a child (within the meaning of IRC section 152(f)) for more than one-half of the tax year; 3) the individual must furnish over one-half of the cost of maintaining the household; and 4) during the last six months of the tax year the individual must not live with their spouse. (IRC, § 7703(b).) Because appellant has not established that she was unmarried at the end of the 2018 tax year, appellant must therefore prove by a preponderance of the evidence that each of these requirements are met. Respondent does not appear to dispute that appellant meets the first and third requirements. However, the second and fourth requirements are in dispute.

One of the two requirements in dispute is that appellant must have maintained a household that constitutes the principal place of abode of a child for more than one-half of the

tax year (i.e., 183 days or more). (IRC, §§ 2(c) & 7703(b)(1).) While appellant's claimed qualifying person is one of appellant's sons, appellant provided conflicting information as to whether that child lived with appellant for more than half of the tax year as set forth in IRC section 7703(b)(1). On the Form 3532 filed with the tax return for the 2018 tax year, appellant indicated that appellant's son lived with appellant a total of 42 days during the 2018 tax year. At protest, appellant asserted that appellant's son lived with appellant during the entire 2018 tax year.

On appeal, appellant provided an order from the Superior Court of California, County of Riverside, issued on or about June 22, 2011, which provides that appellant shall have joint custody of appellant's children.<sup>2</sup> The order further provides that appellant shall have custody of the children during the school year. Also on appeal, appellant submitted affidavits by appellant's son, as well as appellant's spouse, which were both signed under penalty of perjury. These affidavits state that appellant's son, who appellant claimed as appellant's qualifying child, lived with appellant for the entire 2018 tax year. Considering all the available evidence, appellant has established by a preponderance of the evidence that appellant's son, who was appellant's claimed qualifying person for HOH status, did live with appellant for at least 183 days during the 2018 tax year. Thus, appellant has met the burden of proof to show that appellant maintained a household that constitutes the principal place of abode of a child for more than one-half of the tax year for HOH filing status purposes. (See IRC, §§ 2(c) & 7703(b)(1).)

The remaining requirement in contention is that a person who is married must have lived apart from their spouse during the last six months of the tax year. (See IRC, § 7703(b)(3).) Here, the evidence is unclear whether appellant lived apart from appellant's spouse during the last six months of the 2018 tax year. Respondent notes that appellant and appellant's spouse used the same address on their tax returns for different years and for correspondence with respondent, suggesting that appellant and appellant's spouse may not have lived apart during the

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<sup>2</sup> This order indicates that during school periods the father had custody of the children on the first, third, and fourth weekends starting at 6 PM on Friday and ending at 6 PM on Sunday, and the mother had custody of them the rest of the time. During the summer vacation, appellant and appellant's spouse shared custody equally, alternating custody each week.

2018 tax year.<sup>3</sup> Respondent also points out that appellant has not provided any evidence, such as proof of the spouse's address during the 2018 tax year, to show that appellant lived apart from appellant's spouse.<sup>4</sup>

Further, when given the opportunity to rebut respondent's contention that appellant lived with appellant's spouse during the 2018 tax year, appellant did not provide any such evidence. It is appellant's burden of proof to show that all of the requirements for HOH filing status are met. (*Appeal of Sedillo, supra.*) The failure of a party to introduce evidence which is within his or her control gives rise to the presumption that, if provided, it would be unfavorable. (*Appeal of Bindley, 2019-OTA-179P.*) Accordingly, we find that appellant has not shown by a preponderance of the evidence that appellant lived apart from appellant's spouse during the last six months of the 2018 tax year and therefore did not qualify for HOH status.

#### HOLDING

Appellant did not qualify for HOH filing status for the 2018 tax year.

#### DISPOSITION

Respondent's action is sustained.

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Elliott Scott Ewing  
Administrative Law Judge

We concur:

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Cheryl L. Akin  
Administrative Law Judge

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Administrative Law Judge

Date Issued: 11/29/2021

<sup>3</sup> Respondent advises appellant's tax return filing history shows that "[t]he address that is reflected in [appellant's] 2014 and 2015 joint tax returns with [appellant's spouse], and subsequent head of household tax returns for 2016 through 2019" is the same address for all six tax years.

<sup>4</sup> We note that the affidavit of appellant's spouse provided on appeal does not state, or otherwise indicate, that appellant and appellant's spouse lived apart during the 2018 tax year. We further note that it states appellant lived at the same address reflected on the various tax returns referenced by respondent in its assertion that appellant and respondent did not live apart during the 2018 tax year (see footnote 3 ante).