



BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of }
WILLARD S. **SCHWABE** }

For Appellant: Willard S. **Schwabe**,
in pro. per.

For Respondent: Crawford H. Thomas
Chief Counsel

Noel J. Robinson
Counsel

O P I N I O N

This appeal is made pursuant to section 18594 of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protest of Willard S. **Schwabe** against a **proposed assessment** of additional personal income tax in the amount of \$105.45 for the year **1970**.

The question presented is whether appellant qualified as the head of a household for the year 1970.

Appellant, who resides in the Sacramento area, has been a widower since **1967**. For the taxable years

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1968 and 1969, he filed California personal income tax returns as a head of a **household**, claiming his unmarried daughter Kristine as the individual qualifying him for that status. During those years Kristine apparently was away at college most of the time. For the taxable year 1970, the only year in issue, appellant again filed his return as a head of a household, and again used Kristine as the qualifying individual. In that year Kristine attained age 24 and received her undergraduate degree from the University of California at Berkeley. During June, the same month she graduated, Kristine secured full-time employment in Sacramento with the League of California Cities. Although she could have resumed living in **appellant's** home, she rented an unfurnished apartment and moved into it in June. Appellant apparently **helped her** furnish the apartment and partially subsidized her living expenses. Kristine resided in the apartment for only four months, however because she became disenchanted with the neighborhood. In November she returned to live in appellant's home, and continued to live there until she was married in January of 1971.

On May 5, 1972, respondent determined that appellant did not qualify for head of household status in 1970 because Kristine had n&occupied his household for the entire year. A proposed assessment of additional tax was issued to appellant reflecting this determination, but the computation of tax erroneously gave him credit for the previous payment of two penalties for failure to file declarations of estimated tax for 1970 and 1971. When appellant protested this initial assessment denying him head of household status, respondent noted the computational error and withdrew the assessment. Subsequently, it issued a **second** proposed assessment that did not credit the penalty payments against the deficiency. That assessment is the one at issue before us.

The term "head of a **household**" is defined in Revenue and Taxation Code section 17042. In pertinent part that section reads:

17042. For purposes of this part, an individual shall be considered a head of a household if, and only if, such **indi-**vidual is not married at the close of his taxable year, and...

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(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...daughter...of** the taxpayer....

Since respondent has conceded that appellant meets all the other requirements of section 17042, the only question is whether appellant's home constituted **Kristine's** principal place of abode in 1970.

In support of its position that appellant's home was not **Kristine's** principal place of abode within the meaning of the statute, respondent relies on the regulation promulgated under section 17042. The relevant portion of that regulation provides as follows:

In order for the taxpayer to be considered a head of a household by reason of any individual described in subparagraph (a) of Section 17042, the household must actually constitute the home of the taxpayer for his taxable year. . . . Such home must also constitute **the principal place of abode** of at least one of the persons specified in such subparagraph (a).
. . . The taxpayer and such other person must occupy the household for the entire taxable year of the taxpayer. . . . The taxpayer and such other person will be considered as occupying the household for such entire taxable year notwithstanding temporary absences from the household due to special circumstances. A nonpermanent failure to occupy the common abode by reason of illness, education, business, vacation, military service, or a custody agreement under which a child or stepchild is absent for less than six months in the taxable year of the taxpayer, shall be considered temporary absence due to special circumstances. Such absence will not prevent the taxpayer from qualifying

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as the head of a household if (i) it is reasonable to assume that the **tax-**payer or such other person will return to the household, and (ii) the taxpayer continues to maintain such household or a substantially equivalent household in anticipation of such return. (Cal. Admin. Code, tit. 18, reg. 17042-17043, subd. **(b)(1).**) (Emphasis added.)

Under the regulation, Kristine clearly "**occupied**" the household during the six months she was away at college and during the two months she actually physically occupied appellant's home. In respondent's view, however, Kristine did not "**occupy**" the household during the four months she lived in her own apartment, because her absence from appellant's household, though temporary, was not due to "**special circumstances**" within the meaning of the regulation.

The California statute and regulation are based on virtually identical federal counterparts, section 2(b)(1) of the Internal Revenue Code and section 1.2-2(c)(1) of the Treasury regulations. **Where that** is the case, the interpretations and effect given to the federal statute and regulation by the federal courts are highly persuasive of the proper construction to be placed on the California provisions. (Rihn v. Franchise Tax Board, 131 Cal. App. 2d 356, 360 [280 P 2d 893].) **in** two recent cases involving fact patterns' quite **similar** to the one presented by this appeal, the Tax Court determined that an individual who graduated from college, accepted full-time employment, **and** established a separate habitation away from his parent's home was not temporarily absent from that home due to special circumstances. (Estate of Louise K. Adams; T.C. Memo., Nov. 3, 1967; James J. Prendergast, 57 T.C. 475.) Under those **circumstances the** court held that granting head of household status to the parent would not be consistent with the purpose of the statute, which was to extend some of the benefits of income-splitting to unmarried taxpayers who found it "necessary" to maintain a household for the benefit of a child or qualified dependent..

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We believe these decisions of the Tax Court are sound, and we see no reason not to follow them in applying the California statute and regulation to an indistinguishable set of facts. Appellant does not contend that he meets the requirements of the statute, as construed by the regulation, but rather argues that he qualifies as a head of a household because he believes he satisfied the requirements set forth in the instructions accompanying his 1970 California return. In essence his contention is that respondent is estopped to deny him head of household benefits because the instructions did not explicitly state that **Kristine** had to have actually occupied his household during all of 1970. Only in a very unusual situation, however, will an estoppel be raised against the government in a tax case. **The** facts must be clear and the injustice great. (Appeal of Esther Zoller, Cal. St. Bd. of Equal., Dec. 13, 1960; Appeal of Harlan R. and Esther A. Kessel, Cal. St. Bd. of Equal., March 27, 1963, Here the facts that are fatal to **appellant's claim** to head of household status had already occurred before he even received the instructions for filing his 1970 return. He could not, therefore, have relied to his detriment on any alleged misinformation appearing therein. Consequently, we find that respondent is not estopped to deny appellant head of household treatment.

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,

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IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to section 18595 of the Revenue and Taxation Code, that the action of the Franchise Tax Board on the protest of Willard S. Schwabe against a proposed assessment of additional personal income tax in the amount of \$105.45 for the year 1970, be and the same is hereby sustained.

Done at Sacramento, California, this 19th day of February, 1974, by the State Board of Equalization.

Chas. H. [unclear], Chairman
John W. Lynch, Member
Julius [unclear], Member
[unclear], Member
Dellmon [unclear], Member

ATTEST: W.W. [unclear], Secretary