

BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of }
SHIRLEY A. GILLESPIE }

For Appellant: Shirley A. Gillespie, in pro. per
For Respondent: Bruce W. Walker
Chief Counsel
Paul J. Petrozzi
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 Shirley A. Gillespie against a proposed assessment of additional personal income tax in the amount of \$55.90 for the year 1973. During the course of these proceedings appellant paid the proposed assessment; therefore, pursuant to section 19061.1 of the Revenue and Taxation Code, the appeal is treated as an appeal from the denial of a claim for refund.

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The sole issue for determination is whether appellant qualified as head of household in 1973.

For 1973 appellant filed a California personal income tax return claiming head of household status. Appellant stated that her daughter, Crystal Dawn Gillespie, was **the** person qualifying her as a head of household. Appellant was separated from her husband in February 1973, and proceedings for the dissolution of the marriage were instituted in **March 1973**. However, the interlocutory decree was not granted until August 1974. The final **decree** was entered **in** November 1974.

Respondent denied the claimed head of household status, but concedes that appellant is entitled to a dependency credit of \$8.00 for her daughter for 1973.

Section 17042 of the Revenue and Taxation Code provides, in part:

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

(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...

During 1973, although the taxpayer was separated from her spouse, she was still considered married for purposes of claiming head of household status unless, at the **close** of the taxable year, she was legally separated from her spouse under a final decree of divorce or of separate maintenance. (Cal. Admin. Code, tit. 18, reg. 17042-17043, subd. (a)(D).) Since appellant was legally married on the last day of 1973, she was not eligible to file as a head of household for that year. This conclusion is not changed by the fact that

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appellant was separated from her husband at the end of the **year.** Without a final decree of divorce or separate maintenance, a married individual could not qualify as a head of household in 1973, even though separated from her spouse. (Appeal of Robert J. Evans, Cal. St. Bd. of Equal., Jan. 6, 1977; Appeal of Glen A. Horspool, Cal. St. Bd. of Equal., March 27 1973.) Accordingly, respondent's action in this matter must be sustained.

I/ For years beginning on or after January 1, 1974, Rev. & Tax. Code section 17173, subd. (c), provides that if a taxpayer's spouse is not a member of her household during the entire taxable year such taxpayer shall not be considered as married. Under such circumstances, and assuming all other requirements are fulfilled, the taxpayer would qualify as head of household. The federal law had contained a similar provision which was effective for years beginning after December 31, 1969. (See Int. Rev. Code of 1954, § 143(b) .)

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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 **19060 of** the Revenue and Taxation Code, that the 'action of the Franchise Tax Board in denying the claim of Shirley A. Gillespie for refund of personal income **tax** in the amount of \$55.90 for the year 1973 be and the same is hereby modified in accordance with **respondent's** 'concession. **In** all other respects the action of the Franchise **Tax** Board is sustained.

Done at Sacramento, California, 'this 28th day of June , 1977, by the State Board of Equalization.

William A. Brandt , Chairman
John P. ... , Member
John S. ... , Member
... Member
... Member