



BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
BARBARA J. WALLS)

Appearances:

For Appellant: Barbara J. Walls, in pro. per.

For Respondent: David M. Hinman
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 Barbara J. Walls against a proposed assessment of additional personal income tax in the amount of \$183.04 for the year 1974.

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The question presented is whether appellant qualified as a head of household for the year 1974.

Appellant was divorced from her former husband in 1966. At the time of the divorce appellant had four children: Michael, age 10; Marla, age 9; Patrick, age 7; and Lori Ann, age 6. Lori Ann died in 1971. Appellant was awarded legal custody of the children, and the children's father was ordered to pay child support. The children's father settled in Colorado where the three older children spent the summers. In the fall of 1972, at the children's request, they remained in Colorado where they were enrolled in a private school. During the year in issue the father provided substantially all of the children's support, including the cost of transportation for the children to visit appellant during the summer,

On her 1974 personal income tax return appellant claimed head of household status naming her son Patrick as the individual qualifying her for that status. Respondent denied the claimed head of household status on the basis that appellant's household did not constitute the children's principal place of abode during the year as required by Revenue and Taxation Code, section 17042.

section 17042 of the Revenue and Taxation Code provides, in pertinent 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 son ... of the taxpayer, ...

Respondent's regulations interpreting section 17042 provide, in part:

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

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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 as the head of a household if (A) it is reasonable to assume that the taxpayer or such other person will return to the household, and (B) the taxpayer continues to maintain such household or a substantially equivalent household in anticipation of such return. (Cal. Admin. Code, tit. 18, req. 17042-17043, subd. (b)(1).)

The above quoted regulation is identical to the **corresponding** federal regulation. (See Treas. Reg. § 1.2-2(c) (2) (1956).) Where two divorced parents are involved, it is well settled at the federal level that when a child lives a majority of the time with his father, the child is considered to have his principal place of abode with the father, not the mother. (See, e.g., Donald G. Teeling, 42 T.C. 671 (1964); Charles W. Bate, ¶67,165 P-II Memo. T.C. (1967).) In the instant matter it is apparent from the evidence that Patrick resided with and was supported by his father for most of the year and only visited appellant for temporary purposes during the Summer. **Consequently**, we conclude that appellant's home was not Patrick's principal place of abode during 1974.

Appellant argues that she should be allowed to **claim** head of household status since she was awarded **legal custody** of the children. This argument is without merit since physical occupancy is the test for determining head of household status, not **legal custody**. (See John A. Bayless, 61 T.C. 394 (1973).) The **physical** occupancy test requires that the qualifying dependent live in the taxpayer's home for the entire year less temporary absences. Here, appellant did not have physical custody of Patrick except for a short period during the summer and does not satisfy the physical occupancy test.

Appellant also argues that Patrick's presence with his father in Colorado was only for temporary educational purposes. However, it is apparent that Colorado became Patrick's principal place of abode in 1972 when, in accordance with his request, he remained with his father and was still his principal place of abode throughout 1974. Thus, it was Patrick's summer visits with

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appellant, not the remainder of the year spent with his father, which were temporary.

Appellant maintains that she claimed head of household status upon the advice of one of respondent's employees and contends that respondent should be estopped from assessing the tax in issue. Estoppel will only be invoked against the government where the case is clear and the injustice great. (United States Fidelity and Guaranty Co. v. State Board of Equalization, 47 Cal. 2d 384, 389 [303 P.2d 1034] (1956).) We have consistently refused to invoke estoppel in cases where taxpayers understated their tax liability on their returns in alleged reliance on erroneous statements made by employees of respondent. (Appeal of Virgil E. and Izora Gamble, Cal. St. Bd. of Equal., May 4 1976; Appeal of Richard W. and Ellen Campbell, Cal. St. Bd. of Equal., Aug. 19, 1975; Appeal of Tirzah M. G. Roosevelt, Cal. St. Bd. of Equal., May 19, 1954.) For the reasons set forth in those opinions, we must similarly refuse to enforce an estoppel against respondent in this matter.

Finally, appellant has objected to the assessment of interest on the deficiency assessment. Section 18688 of the Revenue and Taxation Code provides that interest on a deficiency "shall be assessed, collected and paid in the same manner as the tax. ..." The interest is not a penalty imposed on the taxpayer; it is merely compensation for the use of money. (Appeal of Audrey C. Jaegle, Cal. St. Bd. of Equal., June 22, 1976.) The language of section 18688 is clear and mandatory. (But see Market Street Railway Co. v. State Board of Equalization, 137 Cal. App. 2d 87, 103-106 [290 P.2d 20] (1955).) Under the facts of this case there is no basis for relieving the taxpayer of the statutory interest accruing on the unpaid deficiency assessment. (See Appeal of Allan W. Shapiro, Cal. St. Bd. of Equal., Aug. 1, 1974.)

For the reasons stated above, respondent's action in this matter must be sustained.

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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 18595 of the Revenue and Taxation Code, that the action of the Franchise Tax Board on the protest of Barbara J. Walls against a proposed assessment of additional personal income tax in the amount of **\$183.04** for the year 1974, be and the same is hereby sustained.

Done at Sacramento, California, this 6th day of **April**, 1978, by the State Board of Equalization.

George J. Seely, Chairman

Michael C. Bell, Member

Eric S. Sweeney, Member

William H. Burnett, Member

_____, Member