

Appeal of James A. Hotchkiss

The question presented is whether appellant was entitled to file as a head of household for 1974.

Appellant, who was unmarried during 1974, filed as a head of household for that year for both federal and state income tax purposes. In response to respondent's inquiry, appellant stated that he maintained a home for his three dependent children and that this home was separate from his own. Based on this response, respondent disallowed head of household filing status to appellant and recomputed his tax liability on the basis of the tax rates applicable to single persons. This action led to the deficiency assessment now before us.

When a taxpayer claims head of household status on the grounds that he has maintained a home for a son or daughter, the Revenue and Taxation Code specifies that the taxpayer will qualify as a head of household only if he "[m]aintains as his home a household which constitutes for such taxable-year the principal place of abode, as a member of such household, of" the child. (Rev. & Tax. Code, § 17042, subd. (a).) (Emphasis added.) The clear indication that the taxpayer and his child must occupy a common household is confirmed by respondent's regulations, which state:

In order for the taxpayer to be considered a head of a household by reason of any individual described in subsection (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 subsection (a). It is not sufficient that the taxpayer maintain the household without being its occupant. . . . (Cal. Admin. Code, tit. 18, reg. 17042-17043, subd. (b)(1).) (Emphasis added.)

Since appellant admits that he was not an occupant of the household which he maintained for his children, it is abundantly clear that he does not qualify as a head of household.' (See Appeal of John V. Durand, Cal. St. Bd. of Equal., Nov. 5, 1963.) Nonetheless, appellant argues that he should be allowed head of household status because the Internal Revenue Service allowed it to him after an audit. If IRS investigated appellant's filing status., and it is not clear that they did, their decision is inexplicable. Federal law is the same as California's on the point in issue here (see Grace v. Commissioner,

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421 F.2d 165 (5th Cir. 1969); Biolchin v. Commissioner, 433 F.2d 301 (7th Cir. 1970)), and on the admitted facts appellant simply does not qualify as a head of household. In any event, we are satisfied that respondent's determination comports with the law, and appellant perhaps should consider himself fortunate to have been the beneficiary of an IRS error **or** oversight in his favor.

For the reasons expressed above, respondent's action in this matter will be sustained.

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 James A. Hotchkiss against a proposed assessment of additional personal income tax in the amount of \$257.34 for the year 1974, be and the same is hereby sustained.

Done at Sacramento, California, this 18th day of October, 1978, by the State Board of Equalization.

George C. Healy, Chairman
Mrs. Sandberg, Member
Paul Dean, Member
Sullivan B. B..., Member
_____, Member