

BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)	
)	No. 97A-0441
Louis P. Halvas)	
)	

Representing the Parties:

For Appellant:	Louis P. Halvas
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For Respondent:	Karen D. Smith Counsel
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Counsel for Board of Equalization:	Craig R. Shaltes Tax Counsel III
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OPINION

This appeal is made pursuant to section 19045¹ of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protest of Louis P. Halvas against a proposed assessment of additional personal income tax in the amount of \$808 for the year 1994.

The single issue for determination is whether appellant qualifies as “head of household.” Appellant Louis P. Halvas filed his 1994 California income tax return, claiming a dependent exemption for “Halvas Andrew/son,” and using head of household filing status.

In order to verify appellant’s claimed head of household filing status, respondent sent appellant an audit letter dated May 22, 1996. Appellant responded, stating under penalty of perjury, that he was never married prior to January 1, 1995, and that “Andrew Griffith,” his stepson, lived with him for all of 1994 and qualified appellant for head of household filing status. Further, appellant also

¹ Unless otherwise specified, any further section references in the text of this opinion are to sections of the Revenue and Taxation Code as in effect for the year at issue.

stated that “Michleane Daley,” his “wife,” lived with him for all of 1994. Because appellant stated that he was unmarried during all of 1994, and normally an unmarried person could not have a “stepson,” respondent denied appellant’s use of head of household filing status and issued a Notice of Proposed Assessment (NPA) on September 5, 1996.

In a letter to respondent dated September 10, 1996, appellant asked for reconsideration of the determination of his filing status. Appellant explained that, at the time he filled out the audit letter (in 1996), he had married his fiancée (Michleane Daley), and her child (Andrew Griffith) had thus become his stepson. However, appellant then claimed that Andrew Griffith was his “foster child” for all of 1994. Therefore, he argued that he qualified for head of household filing status.

However, because appellant had indicated that his alleged foster child, Andrew Griffith, had lived all year in the same household with Andrew’s mother, respondent affirmed the NPA and issued a Notice of Action. This appeal followed.

Appellant contends that he is entitled to head of household filing status for the following reasons:

- “1. with my income of \$34,671 I paid more than 50% of my foster child’s support and 100% of the maintenance of my household.
2. for the entire year, my foster child lived with me from January 01, 1996 thru December 31, 1996.
3. the person qualifying me for Head of Household
Andrew Griffith
Foster Child
D.O.B. 11/04/1988
Age 6
Status: Single
4. additional person living in my home during 1994: Michleane E. Daley
5. regulation 1.152-2(c)(4) addresses any taxpayer who is not the child’s parent. It is immaterial whether the parent is in the household.”

(App. Br.)

Revenue and Taxation Code section 17042 defines “head of household” by reference to sections 2(b) and 2(c) of the Internal Revenue Code (IRC). IRC section 2(b) provides in relevant part that an individual shall be considered a head of a household if, and only if, such individual is not married at the close of his tax year, and maintains as his home a household that constitutes for more than one-half of such tax year the principal place of abode, as a member of such household, any person that is a dependent of the taxpayer, if the taxpayer is entitled to a deduction for the taxable year for such person under IRC section 151.

The term “dependent” includes individuals such as a son or daughter, stepson or stepdaughter, or a brother or sister of the taxpayer. (Int.Rev. Code, § 152(a)(1)-(8).) Also included in the term dependent is an individual over half of whose support, for the calendar year in which the taxable year of the taxpayer begins, was received from the taxpayer. (Int.Rev. Code, § 152(a)(9).) A

taxpayer, however, cannot be considered to be a head of household by reason of an individual who would not be a dependent for the taxable year but for paragraph (9) of section 152(a). (Int.Rev. Code, § 2(b)(3)(B)(i).)

Simply put, to qualify as a head of household, appellant's dependent (Andrew Griffith) must be one of the individuals enumerated in IRC section 152(a)(1)-(8), i.e., a child or stepchild of the taxpayer. A foster child is treated as a child of the taxpayer if the child, for the taxable year of the taxpayer, has as his principal place of abode the home of the taxpayer and is a member of the taxpayer's household for the entire year. (Int.Rev. Code, § 152(b)(2).)

Respondent does not appear to dispute that Andrew qualifies as appellant's dependent pursuant to IRC section 152(a)(9), but it does dispute appellant's claim that Andrew qualifies as appellant's foster child. Thus, the threshold question here is whether Andrew Griffith qualifies as appellant's foster child. Appellant argues that, in determining whether Andrew qualified him for head of household filing status, it is immaterial that Andrew's mother was in the same household.

This question has recently been addressed by the Board. In the Appeal of Michael E. Curtis (97-SBE-012), decided on August 1, 1997, we held that a child who lives with his or her parent² cannot be considered another individual's "foster child." We reached that result based on Treasury Regulation section 1.152-2(c)(4), which defines a "foster child" as a child who is removed from his or her parents. (See also: Black's Law Dict. (5th ed. 1979) p. 590, col.2 [A foster child is one "whose care, comfort, education and upbringing has been left to persons other than his natural parents."].)³

Therefore, because Anthony Griffith lived with his mother during 1994, he cannot be considered appellant's foster child. In view of the above, we must sustain the action of respondent.

² A "parent" of a foster child includes both natural and adopted parents. (Treas. Reg. § 1.152-2 (c)(4).)

³ We note that our decision in the Appeal of Michael E. Curtis, *supra*, referred to a "foster parent" being one who provided care, custody and control of a foster child in a licensed foster family home. (Citing Health & Saf. Code, § 1527, subd. (d).) However, the reference to a "licensed" home was only made as an example of how a person may show they were supporting a foster child; it was not intended to be a part of our test for determining who is a foster child. That test is set forth in Treasury Regulation section 1.152-2(c)(4), which states in pertinent part:

"For purposes of determining the existence of any of the relationships specified in section 152(a) . . . , a foster child of an individual . . . shall . . . be treated as a child of such individual by blood. For the purposes of this subparagraph, a foster child is a child who is in the care of a person or persons (other than the parents or adopted parents of the child) who care for the child as their own child."

ORDER

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 19047 of the Revenue and Taxation Code, that the action of the Franchise Tax Board on the protest of Louis P. Halvas against a proposed assessment of additional personal income tax in the amount of \$808 for the year 1994 be and the same is hereby sustained.

Done at Sacramento, California, this 20th day of November, 1997, by the State Board of Equalization, with Board Members Mr. Dronenburg, Mr. Klehs, Mr. Andal, Mr. Halverson and Mr. Chiang present.

Ernest J. Dronenburg, Jr., Chairman

Johan Klehs, Member

Dean F. Andal, Member

Rex Halverson*, Member

John Chiang**, Member

*For Kathleen Connell, per Government Code section 7.9.

**Acting Member, 4th District.