98-SBE-006

BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of	)	
	)	No. 97A-0556
Barbara Godek	)	
	)	

Representing the Parties:

For Appellant:	Henry Taylor, CPA
For Respondent:	Ann C. Hoover, Counsel
Counsel for Board of Equalization:	Donald L. Fillman, Tax Counsel

O P I N I O N

This appeal is made pursuant to section 19045 of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protest of Barbara Godek against a proposed assessment of additional personal income tax in the amount of $1,052 for the year 1994.

Appellant claimed head of household filing status, and respondent found that appellant did not qualify for that status. The sole legal issue concerns which days may be counted in calculating whether appellant's household was the principal place of abode for appellant's child for more than one-half of 1994. Specifically, whether appellant, who was still married at the close of 1994, may count any

of the time during which she and her ex-husband[1] occupied the same household with the qualifying child. Respondent makes no other challenges to appellant's head of household filing status, so we will presume that appellant meets all other requirements.

Appellant and her daughter, Monica, lived in the same house with appellant's exhusband from January 1, 1994, through March 8, 1994 (67 days). From March 9, 1994, through December 31, 1994, Monica lived with appellant for another 163 days. While appellant contends that her ex-husband lived "separately" from her (although still in the same house) during the period ending on March 8, 1994, appellant did not include sufficient information to establish that a separate "household" existed within the same house.[2] However, if appellant is entitled to count one-half of the 67 days (33 days), the total number of days during which appellant and her daughter occupied the same household for head of household purposes would be 196 days, which is over one-half of the taxable year.

Revenue and Taxation Code section 17042 sets forth the definition of head of household by reference to Internal Revenue Code sections 2[3] (b) and 2 (c). Under section 2 (b), in order to claim head of household filing status, an individual must be unmarried at the close of the tax year, may not be a surviving spouse, and either (A) maintain as his or her home a household which is the principal place of abode, for more than one-half of the year, of a son or daughter, or the descendant of a son or daughter (but if they are married, only if the descendant is also the taxpayer's dependent), or other person who is a dependent and is named in section 152 (a) (l)- (8);[4] or (B) maintain a household (that need not be his or her home), which is the principal place of abode for the entire year of a dependent parent. Under section 2 (c), a married individual living apart from his or her spouse is "treated as not married" if he or she meets all the requirements outlined in section 7703 (b).

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[1]Appellant states that she was divorced from her husband on October 10, 1995. In this opinion, we will refer to appellant's former spouse as her "ex-husband," even though as of the end of 1994, they were still married.

[2] There is precedent for recognizing two distinct "households" within the same house for head of household purposes. (Fleming v. Commissioner (1974) ¶ 74,137 T.C.M. (P-H).) However, in Fleming there were two distinct families who did not contribute to the support of each other. A widow and her unmarried daughter were considered one household, and a married daughter and the married daughter's husband and children were considered another household. The court relied upon the fact that separate households were intended and that the parties conducted themselves as separate households during the years involved.

[3] Unless otherwise specified, all section references are to sections of the Internal Revenue Code as in effect for the year in issue.

[4] Section 152 (a), subsections (1) through (8), list the close relatives that may be qualifying individuals. Included are the following relatives by blood: son, daughter, and their descendants; father, mother, and their ancestors; and nieces, nephews, uncles, and aunts; and the following relatives not by blood: stepson, stepdaughter, stepbrother, stepsister, stepfather, stepmother, son-in-law, daughter-in-law, brother-in-law, sister-in-law, father-in-law, and mother-in-law.

Section 7703 (b) provides that a taxpayer must meet five requirement[5] to be treated as not married. To meet these five requirements the person must (1) file a separate tax return; (2) maintain as his or her home a household which constitutes for more than one-half of the year the principal place of abode of a child;[6] (3) be entitled to claim the child as a dependent; (4) furnish over one-half of the cost of maintaining the household; and (5) during the last six months of the year the person's spouse may not be a member of the household. (Int.Rev. Code, § 7703 (b) (1)-(3).) Requirement (2) is the only one in issue in the present case. And it is, in effect, merely a repetition of one of the requirements of section 2 (b) (1) (A)--except that now it restricts the qualifying individual to a "child."

In our recent opinion in Appeal of William Tierney (97-SBE-006-A), decided on September 10, 1997, we determined that a taxpayer who was not legally married at the end of the taxable year was entitled to count one-half of the time during which the other parent of taxpayer's qualifying child, and the qualifying child, resided together in the same household as the taxpayer (hereinafter, the Tierney rule). Thus, for example, if a taxpayer and the qualifying child's other parent lived together with the qualifying child for 90 days during one portion of the taxable year, and the qualifying child lived with the taxpayer for an additional 140 days during another portion of that taxable year (and during which time the other parent lived in a separate household), the taxpayer would be entitled to include 45 days (one-half of 90) plus 140 days, to equal 185 days. We have not previously determined whether the 'Tierney rule" should apply to a taxpayer under the circumstances where the taxpayer is still legally married at the end of the taxable year.

Respondent contends that the Tierney rule should not apply to a taxpayer that is still "legally married" at the end of the year, even if the taxpayer otherwise qualifies to be "treated as not

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[5] It should be noted that section 7703 (b) is intended to define who will be "treated as not married" for many purposes in addition to meeting the qualification purposes of section 2. For example, it is used in defining whether a personal exemption may be claimed under section 151. If section 7703 (b) were only used to qualify a taxpayer under section 2, it would be unnecessary for it to require the taxpayer to "file a separate tax return," because a head of household return is already a separate tax return. Again, section 2 already requires that the taxpayer furnish over one-half of the cost of maintaining the household. And finally, the requirement that the taxpayer's household "constitutes for more than one-half of the taxable year the principal place of abode" of the qualifying person, is also already required by section 2.

[6] The term "child" is defined in section 151 (c) (3). It includes a person's natural child, stepchild, adopted child, or foster child. Section 152 (b) (2) provides that a child who is placed with a taxpayer by an authorized placement agency for legal adoption, and who is a member of the taxpayer's household, may also be a qualifying person; also, that a foster child of the taxpayer must be a member of the taxpayer's household for the entire year to be a qualifying person.

married" under section 7703 (b).[7] We disagree. In Tierney, we quoted and discussed portions of the legislative history of section 2, one portion of which concerned the "sharing of income" that takes place by the individual who provides more than one-half of the support of a child and more than one-half of the expenses necessary to maintain a household which includes the child. We concluded in Tierney that taxpayers seeking to qualify under section 2 (b), merit some relief. In Tierney, we recognized:

> ". . . the need to balance the income sharing rationale of the statute against the competing policy goal of granting tax relief to those taxpayers who are single parents. For that reason, we are not willing to grant appellant credit for the entire time during which he and his ex-spouse shared the household. Rather, consistent with the general principles of the community property laws in this state, we will allow credit for one half of the time during which the ex-spouse and the children reside in the same household. Such an approach ... allows the taxpayer responsible for the children's welfare an opportunity to obtain some tax benefit as envisioned by the legislature. Any other approach is unfair and fails to recognize such a taxpayer's unique circumstances."

We see no valid reason to not allow the head of household filing status to any taxpayer who otherwise qualifies under section 2--whether "not married" or "treated as unmarried." Section 2 (b) (1) (A) requires that the taxpayer's household must constitute the principal place of abode of the qualifying person for more than one-half of the year. Tierney says that this provision may be satisfied when the calculation counts one-half of the days during which the taxpayer's household also included the qualifying child's other parent. For purposes of section 2 (b) (1) (A), appellant may make such a calculation and will meet that requirement. But, since appellant was still married at the end of 1994, she would not meet the requirement of section 2 (b) that she be "not married," unless she qualifies under section 2 (c), which states that "an individual shall be treated as not married at the close of the taxable year if such individual is so treated under the provisions of section 7703 (b)." (Emphasis added.) As noted above, the only requirement under section 7703 which is in issue is whether taxpayer's household constituted the principal place of abode of the qualifying person for more than one-half of the year. This is essentially the same requirement as appears in section 2 (b) (1) (A), and under which appellant qualifies. But respondent would have us use a different standard under section 7703 (b).

Is there a compelling reason for treating the nearly identical language in section 7703 (b) any differently? Legislative history suggests that there is no statutory basis for a different treatment. In

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[7] The only meaningful distinctions between the requirements of section 2 (b) (1) (A), and section 7703 (b), as applied to appellant, are that under the latter section, a taxpayer may not have his or her spouse as a member of the household for the last six months of the year, and the qualifying individual must be a "child."

1984, both section 2 (b) and section 7703 (b)[8] were amended "to provide consistent rules among various interrelated sections concerning family status of individuals living apart." (1984 Code Cong. & Admin. News, at p. 1141.) For section 2 (b) (1) (A), the amendment reduced the minimum time period that the household must be the principal place of abode of the qualifying person from one year to "more than one-half" of the year. This amendment made section 2 (b) (1) (A) read substantially the same as 7703 (b) (1). For section 7703 (b) (3), the amendment reduced the minimum time period during which the spouse must not be a member of the household from the full taxable year to the last six months of the taxable year. These amendments were intended to increase the desired consistency in the treatment of family status for individuals in both situations, i.e., those that are legally unmarried and those that are legally married but treated as unmarried. This consistency is best achieved by using the same standard, under both section 2 (b) and section 7703 (b), for calculating the number of days during which a taxpayer's household was the principal place of abode of the qualifying individual.

Therefore, we determine that the Tierney rule applies in calculating the number of days that appellant's daughter, Monica, made appellants home her principal place of abode in 1994. Appellant may count 33 days from the 67-day-period of January 1, 1994, through March 8, 1994. These days, combined with the uncontested 163 days from later in the year, total 196 days--which is over one-half of the year.

The action of respondent is reversed.

[8] Provisions relating to determination of marital status were formerly contained in section 143. In 1986, these provisions were renumbered as section 7703.

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 19047 of the Revenue and Taxation Code, that the action of the Franchise Tax Board on the protest of Barbara Godek, against a proposed assessment of additional personal income tax in the amount of $1,052 for the year 1994 be, and the same is hereby, reversed.

Done at Sacramento, California, this 19th day of November, 1998, by the State Board of Equalization, with Board Members Mr. Andal, Mr. Klehs, Mr. Dronenburg, Ms. Mandel* and Mr. Chiang** present.

Dean F. Andal Chairman

Johan Klehs Member

Ernest J. Dronenburg, Jr. Member

Mary Jo Mandel Member

John Chiang Member

* For Kathleen Connell, per Government Code section 7.9.
**Acting Member, 4th District

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