

BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
Patrick R. Lobo) No. 98A-0596
)

Representing the Parties:

For Appellant: Patrick R. Lobo

For Respondent: Katie Courtnier, Legal Assistant

Counsel for Board of Equalization: Donald L. Fillman, Tax Counsel

OPINION

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 Patrick R. Lobo against a proposed assessment of additional personal income tax in the amount of \$247 for the year 1996.

Appellant claimed head of household filing status, and respondent found that appellant did not qualify for this status. The sole legal issue concerns whether an unrelated adult dependent of appellant may be considered a “foster child” under California tax law, so that the adult dependent can be the qualifying individual for appellant to use head of household filing status.

Revenue and Taxation Code section 17042 sets forth the California requirements for head of household filing status by reference to Internal Revenue Code (IRC) sections 2 (b) and 2 (c).¹ Section 2 (b) (1) provides that for a person to claim head of household filing status, he or she must, in general, be unmarried and maintain a household which constitutes the principal place of abode of a qualifying individual for more than one-half of the year. The list of potential qualifying individuals is specifically limited in section (2) (b) (3) (B) by reference to IRC section 152 (a). This limitation excludes persons not listed in section 152, subsections (a) (1) through (8), and who may be generally described as persons closely related to the taxpayer. These are the closely related persons who may be qualifying individuals for head of household filing status. Nonrelatives and distant relatives, who may very well qualify as dependents under section 152 (a) (9), do not qualify a person to use head of household filing status.

A foster child is not one of the relatives listed in section 152 (a) (1) through (8). Nevertheless, section 152 (b) (2) provides that a foster child “shall be treated as a child . . . by blood” if the child meets the requirements of section 152 (a) (9). The section 152 (a) (9) requirements are that (1) the individual has as his or her principal place of abode the home of the taxpayer, and (2) the individual is a member of the taxpayer’s household (3) for the full taxable year.

When appellant filed his 1996 personal income tax return, he claimed head of household filing status, and named Benedick Revil, “Foster Adult,” as his sole dependent. To verify appellant's filing status, respondent sent appellant a Head of Household Audit Letter (questionnaire). In response, appellant indicated that he was single, and that Benedick Revil, his 37-year-old “Foster Adult,” was the qualifying individual for head of household filing status who lived with appellant for the entire year. Respondent issued a Notice of Proposed Assessment (NPA) which denied appellant's head of household filing status, changed appellant’s filing status to single, allowed two personal exemption credits (appellant and Mr. Revil), and proposed to assess additional tax in the amount of \$247. The NPA said that appellant was not eligible for head of household filing status because nonrelatives may not be claimed as qualifying individuals.

Appellant protested the NPA, stating that his qualifying individual was his 37-year-old dependent “foster individual,” Benedick Revil. Appellant went through a list which he created, and claimed to have met all of the requirements. He stated: “BENEDICK REVIL though NON-RELATIVE is my qualifying dependent under the category of ‘FOSTER INDIVIDUAL.’ ” Respondent issued a Notice of Action which affirmed its NPA, denying appellant’s eligibility. It stated: “A foster child ceases to be a foster child when the child turns age 19, or, if the child is a student, when

¹ Unless otherwise indicated, the term “section” shall refer to the Internal Revenue Code in effect for the year in issue.

the child turns age 24.” Appellant appealed, contending that his dependent meets all of the requirements for being a qualifying person to use head of household filing status.

Respondent does not contest the fact that during the year in question Mr. Revil lived with appellant in his home for the entire year and was appellant’s dependent. On that basis alone, appellant contends that Mr. Revil is a qualifying “foster individual” for head of household filing status. Respondent contends that the statute imposes the further requirement that the qualifying “foster child” must also be a “child.”

There is no statutory tax law definition of “foster child” in the head of household context. Therefore, to know how “foster child” is intended to be used in the tax law, we must look at the definitions found in both legal and standard dictionaries, the definition found in Treasury Regulation section 1.152-2 (c) (4), as well as the context of the words when used in the tax law. Black’s Law Dictionary (5th ed. 1979) page 590, column 2, defines a foster child as one “whose care, comfort, education and upbringing has been left to persons other than his natural parents.” (Emphasis added.) Webster’s New World Dictionary (3rd college ed. 1991) page 532, column 2, defines a foster home as one “in which a child or children are raised by people other than their natural or adoptive parents.” (Emphasis added.) The federal regulation defines “foster child” as a child who is removed from his or her parents, and “who is in the care of a person or persons . . . who care for the child as their own child.” (Treas. Reg. § 1.152-2 (c) (4), emphasis added.)

When tax laws use the terms “child” and “foster child,” they do not provide an express age limitation. However, these forms of the word “child” are used in contexts which suggest a young person who is still being cared for, and not yet emancipated. In contrast, when tax laws refer to a person’s descendent of any age (both youth and adult), they use the terms “son” or “daughter.” The terms “son” and “daughter” are not used by tax laws together with the word “foster” (“foster son” or “foster daughter”). The above definitions and uses imply that in order to acquire the designation of “foster child,” the child must have been “cared for” or “raised” (as these words are traditionally used) by a taxpayer beginning when the foster child is a preadult or not yet emancipated. Even the two terms used by appellant, “foster adult” (used on his tax return) and “foster individual” (used in his protest letter), suggest that to use the term “foster child” to refer to a 37-year-old man is a strain. We believe that the tax law used the term “foster child” with the intent to restrict it to a child that acquires this special relationship when he or she is a minor needing to be “cared for” or “raised” as these words are traditionally used.²

² This opinion does not address how the tax law should be applied if the person requiring care is a physically, mentally, or emotionally handicapped adult. That issue is not before us.

Respondent contends that the proper definition for “child” is the one used in section 151 (c) (1) (B), which is a portion of the section on personal exemptions.³ This section states that one type of person who will be allowed as an exemption is a dependent “who is a child of the taxpayer and who (i) has not attained the age of 19 at the close of the calendar year in which the taxable year of the taxpayer begins, or (ii) is a student who has not attained the age of 24 at the close of such calendar year.” This definition has the advantage of being precise as well as defining “foster child” in a way we believe to be close to what the drafters of the tax law intended. However, if the drafters had intended these precise terms, they could have included them in the legislation which created the head of household filing status.

We believe that the drafters intended for the term “child” to mean a minor, i.e., an individual under the age of 18 at the time the “foster child” relationship began. We hold, therefore, that for a foster child to be the qualifying individual for head of household filing status, a taxpayer’s “foster” relationship with the child must have begun before the child became an adult.

Accordingly, the action of respondent is sustained.

³ It should be noted that there are other references in the tax law to the age of persons receiving foster care, e.g., Internal Revenue Code section 131 places restrictions on the exclusion from gross income for income tax purposes of foster care payments based on the age of the person receiving the care. Moreover, section 131 is the only IRC section we could locate that defines “foster individual.” Section 131 defines a “qualified foster individual” as a person that has been placed in a foster home by a governmental agency or licensed charitable organization. However, if the person who is receiving the care has attained age 19, he or she may be a “qualified foster individual” only if placed in the home by a governmental agency (which suggests that he or she is not emancipated).

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 Patrick R. Lobo against a proposed assessment of additional personal income tax in the amount of \$247 for the year 1996 be, and the same is hereby, sustained.

Done at Sacramento, California, this 7th day of January 1999, by the State Board of Equalization, with Board Members Mr. Klehs, Mr. Andal, Mr. Chiang, Mr. Parrish, and Ms. Mandel* present.

Johan Klehs _____, Chairman

Dean F. Andal _____, Member

John Chiang _____, Member

Claude Parrish _____, Member

Marcy Jo Mandel* _____, Member

*For Kathleen Connell per Government Code section 7.9.

