

**OFFICE OF TAX APPEALS  
STATE OF CALIFORNIA**

In the Matter of the Appeal of:  
**M. VILLEGAS**

) OTA Case No. 21098689  
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**OPINION**

Representing the Parties:

For Appellant: M. Villegas

For Respondent: Joel M. Smith, Tax Counsel III

H. LE, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, M. Villegas (appellant) appeals an action by the Franchise Tax Board (respondent) proposing additional tax of \$1,268, and applicable interest, for the 2015 tax year.

This matter is being decided based on the written record pursuant to the provisions set forth in the Office of Tax Appeals’ Small Case Program.<sup>1</sup> (Cal. Code Regs, tit. 18, § 30209.1 et seq.)

**ISSUE**

Whether appellant qualified to use the head of household (HOH) filing status for the 2015 tax year.

**FACTUAL FINDINGS**

1. Appellant filed his 2015 tax return using the HOH filing status. Appellant attached to his return a 2015 Form 3532 HOH Filing Status Schedule reporting that he was legally married but did not live with his spouse and that his mother was his qualifying person.

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<sup>1</sup> Appellant waived the right to an oral hearing and made a qualifying and irrevocable election to have this matter decided under the Small Case Program authorized pursuant to Government Code section 15676.2.

2. Respondent issued a Notice of Proposed Assessment (NPA), disallowing appellant's HOH filing status because, as a married taxpayer, appellant may only claim his birth child, stepchild, adopted child, or eligible foster child as his qualifying person.
3. Appellant filed a protest.
4. Respondent issued a position letter and a Notice of Action affirming the NPA.
5. This timely appeal followed.

### DISCUSSION

The taxpayer has the burden of proving entitlement to the HOH filing status. (*Appeal of Verma*, 2018-OTA-080P.) Unsupported assertions are insufficient to satisfy a taxpayer's burden of proof. (*Ibid.*)

R&TC section 17042 sets forth the requirements for claiming the HOH filing status by reference to Internal Revenue Code (IRC) section 2(b) and 2(c). To claim the HOH filing status, the taxpayer must be unmarried at the close of the taxable year and maintain a household that constitutes the principal place of abode of a qualifying person for more than one-half of the taxable year. (IRC, § 2(b).)

As relevant here, certain married persons living apart will be treated as not married (for purposes of the HOH filing status) at the close of the taxable year if they satisfy the requirements of IRC section 7703(b). (IRC, § 2(c).) Under IRC section 7703(b), a married individual must meet several requirements to qualify for the HOH filing status. One of those requirements is that the taxpayer must maintain as her home a household that constitutes the principal place of abode for a child (within the meaning of IRC section 152(f)(1)) for more than one-half of the taxable year. A "child" is defined in this context (where a married person is seeking to be treated as not married) as an individual who is the taxpayer's son, daughter, stepson, stepdaughter, or eligible foster child. (IRC, § 152(f)(1).)


Here, appellant was legally married for the 2015 tax year and claimed his mother as his qualifying person. However, appellant's mother is not a child as defined under IRC section 152(f)(1) as a taxpayer's son, daughter, stepson, stepdaughter, or eligible foster child. Thus, appellant cannot be treated as not married for purposes of the HOH filing status for the 2015 tax year. Accordingly, appellant did not meet the requirements to claim the HOH filing status.

HOLDING

Appellant was not qualified to use the HOH filing status for the 2015 tax year.

DISPOSITION

Respondent’s action is sustained.

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Huy “Mike” Le  
Administrative Law Judge

Date Issued: 5/3/2022