

Appeal of Judith Ann Russell

The primary issue for determination is whether appellant qualified for head of household status in 1975.

Appellant filed her 1975 personal income tax return claiming head of household status. She named her daughter as the qualifying dependent. Appellant and her husband lived together until July 1975 when they separated. They lived separate and apart the remainder of the year. Although formal proceedings for a dissolution of the marriage **were instituted** during 1975, a final judgment of dissolution of marriage was not obtained until after the close of the 1975 taxable year. Respondent denied the claimed head of household status since appellant was still legally married on the last day of 1975 and did not live separate and apart from her spouse during the entire taxable year. Appellant brings this appeal from respondent's determination.

The term "head of household" is defined in section 17042 of the Revenue and Taxation Code which provides, in pertinent part:

For purposes of this part, an individual shall be considered a head of household if, and only if, such individual is not married at the close of his taxable year, and ...

(a) Maintains as his home a household which constitutes **for such taxable year the principal place of abode, as a member of such household, of--**

(1) A ... daughter ... of the taxpayer . ..

* * *

For purposes of this section, an individual who, under subdivision (c) of Section 17173 is not to be considered as married, shall not be considered as married.

An individual is considered as legally married unless separated from her spouse under a final decree of divorce or of separate maintenance at the close of the taxable year. (See Appeal of Enis V. Harrison, Cal. St. Bd. of Equal., June 28, 1977; Appeal of Mohammed M. Siddiqui, Cal. St. Bd. of Equal., Sept. 14, 1972.) Since appellant was legally married throughout the year in issue, she is not entitled to head of household status for that year unless she can qualify as "an individual who, under subdivision (c) of Section 17173 is not to be considered as married." Subdivision (c) of section 17173 provides that, under certain circumstances, an individual who is otherwise married shall not be considered as married

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if, during the entire taxable year, that individual's spouse is not a member of the household. Since appellant's spouse was a member of her household for part of 1975, she cannot be considered as unmarried within the terms of section 17173.

Appellant points out that her qualifying dependent was her daughter from her first marriage and maintains that since her spouse during 1975 never adopted her daughter, he had no legal responsibilities toward the daughter. Appellant concludes, therefore, that her marital status should not disqualify her from head of household status since she was primarily responsible for her daughter's support. However, it is appellant's marital status at the close of the taxable year that is controlling, not the relationship between her qualifying dependent and her spouse. Since appellant was still legally married at the close of the taxable year, she cannot qualify as a head of household.

Finally, appellant argues that interest should not be assessed because of respondent's delay in processing her protest. We have repeatedly held that interest is mandatory and cannot be waived. (See, e.g., Appeal of Amy M. Yamachi, Cal. St. Bd. of Equal., June 28, 1977, Appeal of Avis J. Luer, Cal. St. Bd. of Equal., June 3, 1975.) Section 18688 of the Revenue and Taxation Code provides without any qualification that interest upon the amount assessed as a deficiency shall be assessed, collected and paid at the appropriate rate from the date prescribed for the payment of the tax until the date the tax is paid. (See, e.g., Appeal of Avis J. Luer, supra; Appeal of Ruth Wertheim Smith, Cal. St. Bd. of Equal., Aug. 3, 1965.)

It is our conclusion that respondent's action in this matter must be sustained.

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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 Judith Ann Russell against a proposed assessment of additional personal income tax in the amount of \$326.71 for the year 1975, be and the same is hereby sustained.

Done at Sacramento, California, this 10th day of April, 1979, by the State Board of Equalization.

William B. Burnett, Chairman
Dwight Beer, Member
Christ W. Rosenberg, Member
George R. Buckley, Member