



BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeals of)
GARY L. PEMBROKE)

For Appellant: Gary L. Pembroke,
in pro. per.

For Respondent: Kendall E. Kinyon
Supervising Counsel

O P I N I O N

These appeals are made pursuant to section 18593 of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protests of Gary L. Pembroke against proposed assessments of additional personal income tax in the amounts of \$236 and \$431 for the years 1980 and 1981, respectively.

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The question presented by this appeal is whether appellant was entitled to use head-of-household filing status for the years 1980 and 1981.

Appellant was unmarried during 1980 and 1981. In November 1979 appellant's daughter was removed from her mother's home because of child abuse. The child was then placed in a foster home.

The Santa Clara County Court agreed that appellant should have custody of his daughter, but required him to provide a home for her where she would have her own room. Appellant did move to a home with two bedrooms which he maintained while custody arrangements were completed. His daughter remained in the same foster home throughout this time. Appellant continued to make child support payments, apparently to the county, to defray the cost of maintaining his daughter in the foster home. He finally received physical and legal custody of his daughter on September 1, 1981, although he states that his daughter stayed with him 90% of the time from June 1981.

Appellant filed his California personal income tax returns for 1980 and 1981 using the head-of-household tax rates, listing his daughter as his qualifying dependent. On a questionnaire sent by respondent, appellant indicated that his daughter had not lived with him during 1980. A proposed assessment of additional tax was issued for that year. A proposed assessment was also issued for 1981 when respondent received information from appellant that he did not receive physical custody of his daughter until September 1981.

Respondent contends that appellant is not entitled to head-of-household filing status for 1980 and 1981 because his qualifying dependent, his daughter, did not live with him for the entire year during either of those years. Appellant argues that his daughter's absence from his household, due to being in a foster home, was merely temporary and that he continually maintained a home for her which was her principal place of abode.

Revenue and Taxation Code section 17042 provides 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 taxable year, and ...

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(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

The former regulation under section 17042 provided, in part:

The taxpayer and such other person must occupy the household for the entire taxable year of the taxpayer. ... The taxpayer and such other person will be considered as occupying the household for such entire taxable year notwithstanding temporary absences from the household due to special circumstances. A nonpermanent failure to occupy the common abode by reason of illness, education, business, vacation, military service, or a custody agreement under which a child or stepchild is absent for less than six months in the taxable year of the taxpayer, shall be considered temporary absence **due** to special circumstances. Such absence will not prevent the taxpayer from qualifying as the head of a household if (A) it is reasonable to assume that the taxpayer or such other person will return to the household, and (B) the taxpayer continues to maintain such household or a substantially equivalent household in anticipation of such return.

(Former Cal. Admin. Code, tit, 18, reg. 17042-17043, subd. (b)(1), repealer filed Dec. 23, 1981 (Register 81, No. 52).)

Revenue and Taxation Code section 17042 and the former regulation promulgated under it were patterned after, and substantially the same as, section 2(b)(1) of the Internal Revenue Code and Treasury regulation **§ 1.2-2(b)-(e)**, respectively. Interpretations of the federal law, therefore, are highly persuasive in construing the state statute and regulation,, (Holmes v. McColgan, 17 Cal.2d 426, 430 [110 P.2d 428] (1941); Rihn v. Franchise Tax Board, 131 Cal.App.2d 356, 360 [280 P.2d 893] (1955).)

Although respondent is correct in pointing out that the statute and regulation require that appellant's qualifying dependent live with appellant for the entire

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taxable year, it ignores the language of the regulation which provides an exception for a **temporary** absence due 'to special circumstances. It is upon this exception that appellant relies.

In considering the question of a qualifying **dependent's** principal place of abode, the courts have looked at the legislative history and the regulations and concluded that the provision is to be given a liberal construction in favor of the taxpayer. (Welsh v. United States, 5 Am.Fed.Tax R.2d 397, 399 (E.D.Wis. 1959); Reardon v. United States, 158 F.Supp. 745, 749 (D.S.D. 1958); Walter J. Hein, 28 T.C. 826, 832 (1957).) The tests suggested in the committee reports and regulations

were intended to be guides, and not to provide rules of thumb or formulas for handling all cases and situations which might arise. ... [I]n determining the principal place of abode, each case must be decided on its own particular facts and circumstances.

(Walter J. Hein, supra, 28 T.C. at 833.)

Presumably, the principal place of abode for appellant's daughter was her mother's household until she was removed from that household by the authorities because of child abuse. We do not believe that the foster home in which she was placed could be considered her principal place of abode for purposes of head-of-household filing status because it was, by its nature, merely a temporary placement and because the court agreed that appellant should have custody of his daughter, **subject to** certain conditions which he satisfied. Therefore, when the decision was reached that appellant should have custody of his daughter-, his household became her principal place of abode even though she remained temporarily in a foster home. (Cf. Welsh v. United States, supra, where the mother's principal place of abode was held to be her son's household even though she never lived there.) The fact that appellant did not get actual or legal custody until September 1981 is not, in this circumstance, determinative of his daughter's principal place of abode. (Allan L. Blair, 63 T.C. 214, 220-221 (1974).)

It is uncontested that appellant maintained a household in anticipation of his daughter's return to him, that it was reasonable to assume that his daughter would return to his household because the court agreed

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that appellant should have custody if he maintained a two-bedroom household, and that the daughter's stay in a foster home was temporary, because of both the generally temporary nature of foster home placements and appellant's satisfaction of the court's requirements. It appears to **us**, therefore, that appellant's situation falls squarely within the statute and regulations and that he was entitled to head-of-household status for both 1980 and 1981. We must, therefore, reverse respondent's action.

