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7 **BOARD OF EQUALIZATION**
8 **STATE OF CALIFORNIA**
9

10 In the Matter of the Appeal of:) **HEARING SUMMARY**
11) **PERSONAL INCOME TAX APPEAL**
12 **DENNY L. LIRA**¹) Case No. 764604
13

14 Year Proposed
2011 Assessment
15 \$1,429

16 Representing the Parties:

17 For Appellant: Denny L. Lira
18 For Franchise Tax Board: Claudia L. Cross, Senior Legal Analyst
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20 QUESTION: Whether appellant is entitled to the head of household (HOH) filing status for the
21 2011 tax year.

22 HEARING SUMMARY

23 Appellant filed a California income tax return for the 2011 tax year, claiming the HOH
24 filing status and one personal exemption credit. Appellant did not claim a dependent exemption.
25 With his return, appellant filed an HOH Schedule (FTB Form 4803e) listing his daughter,
26 Serena Rios, as a “qualifying person” and stating, among other things, that: (1) Serena was 14 years
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28 ¹ Appellant resides in Fresno County.

1 old as of December 31, 2011; (2) Serena’s gross income was less than \$3,700 in 2011; (3) appellant
2 provided more than one-half of Serena’s support in 2011; (4) Serena was a full-time student at a
3 recognized educational institution for at least five months during 2011; and (5) Serena lived with
4 appellant for the entire year of 2011. In addition, appellant stated that he was married or in a
5 registered domestic partnership (RDP) as of December 31, 2011, and that he lived with his spouse or
6 registered domestic partner from January 1, 2011 to August 11, 2011. (Resp. Opening Br., p. 1,
7 exhibits A and B.)

8 Based on this information, the FTB issued a Notice of Proposed Assessment (NPA) on
9 June 27, 2013, denying appellant’s claim for the HOH filing status. The NPA explained that, to qualify
10 for the HOH filing status, appellant must be single or considered unmarried/not in a RDP. The NPA
11 informed appellant that, because he was married or in a RDP and lived with his spouse/registered
12 domestic partner during the last six months of 2011, he could not be considered unmarried or not in a
13 RDP. The NPA allowed appellant’s claimed personal exemption credit and revised appellant’s filing
14 status to married/RDP filing separately. After revising appellant’s alternative minimum tax, the NPA
15 proposed additional tax of \$1,429, plus interest. (Resp. Op. Br., pp.1-2, Exhibit C.)

16 Appellant protested the NPA, contending that he qualified for the HOH filing status.
17 Appellant asserted that his “tax situation” for the 2011 tax year was “the same” as that for tax years
18 2001 and 2006. Appellant contended that “[t]his matter was resolved in 2007” with a 2006 HOH
19 Questionnaire, a 2001 NPA dated January 30, 2003, and a Speed Message dated September 17, 2003.
20 Appellant attached to his protest letter the following: (1) an HOH Questionnaire for the 2006 tax year;²
21 (2) an HOH Audit Letter that the FTB sent to appellant for the 2006 tax year, dated August 15, 2007;

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25 ² On the 2006 HOH Questionnaire, appellant indicated that his daughter, Serena, who was 9-years-old as of December 31,
26 2006, qualified him for the HOH filing status, and stated, among other things, that Serena lived with appellant for 187 days
27 during 2006, from January 9, 2006 through June 9, 2006, and again from August 16, 2006 through December 16, 2006. In
28 addition, appellant stated that he was not “single.” It is unclear if appellant originally indicated that he did not live with his
spouse during all or part of the 2006 tax year and then crossed out the “No” selection to question 12 and then selected “Yes,”
or if he only selected “No.” Appellant did not, however, list the beginning and end dates of the period in which he lived with
his spouse during 2006, which is information the 2006 HOH Questionnaire requested of taxpayers who selected “Yes” to
question 12.

1 and (3) a Speed Message,³ dated September 17, 2003, that the FTB sent to appellant for the 2001 tax
2 year. (Resp. Op. Br., p. 2, Exhibit D.)

3 After reviewing appellant's protest, the FTB issued a Notice of Action (NOA) on
4 September 13, 2013, affirming the NPA. The NOA indicated that, during a telephone conversation
5 with an FTB representative on August 28, 2013, appellant stated that he made an error when he
6 indicated that he separated from his spouse on August 11, 2011, and that the correct date of separation
7 was August 11, 2012. The NOA stated that, during the telephone conversation, appellant was informed
8 that he must be unmarried or "considered unmarried" to use the HOH filing status and, that since he
9 was married and lived with his spouse during all or part of the last half of 2011, he is not "considered
10 unmarried." This timely appeal followed. (Resp. Op. Br., p. 2, Exhibit E.)

11 Contentions

12 Appellant's Contentions

13 Appellant contends that he qualifies for the HOH filing status. Appellant asserts that his
14 former spouse "physically stopped living" with him in March of 2011. Appellant contends that he
15 disagrees with the FTB's decision, which is "based on partial information and misunderstanding on
16 [appellant's] part." Appellant asserts that the HOH Questionnaire, which was submitted electronically,
17 "was submitted in error in an attempt to properly address [appellant's] situation." Appellant contends
18 that he was "driving and working" during the August 28, 2013 telephone conversation, and that he "did
19 not have information at hand." (Appeal Letter.)

20 Appellant asserts that his former spouse indicated August 7, 2011, as the date of
21 separation on the Petition for Dissolution of Marriage (Petition for Dissolution), which appellant
22 confused for August 11, 2011. Appellant attached to his appeal letter the first page of a Petition for
23 Dissolution filed with the Fresno County Superior Court on March 22, 2012, which indicates that
24 appellant's and his former spouse's date of marriage was December 31, 2002 and that the couple's date
25 of separation was August 7, 2011. Appellant contends that he believes his former spouse indicated the
26 date of separation as August 7, 2011, because that "was the day she stopped by to gather the rest of her
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28 ³ In the Speed Message, the FTB notified appellant that the FTB allowed appellant's claimed HOH filing status for the 2001 tax year, and that the 2001 NPA, dated January 30, 2003, was canceled.

1 personal belongings.” Appellant asserts that, in March of 2011, his former spouse stopped living with
2 him and she moved in with her mother in Fresno. Appellant attached to his appeal letter a copy of an
3 unsigned 2011 California Online e-file Return Authorization Form (Form 8453-OL), with an accepted
4 date of February 13, 2012, containing information regarding appellant’s former spouse and showing a
5 Fresno address. (Appeal Letter.)

6 Respondent’s Contentions

7 The FTB contends that appellant is not entitled to the HOH filing status because
8 he was married and has not met his burden of showing that he met the requirements to be “considered
9 unmarried” in 2011, and that he did not show an entitlement to a dependent exemption credit for his
10 claimed qualifying person. The FTB cites Revenue and Taxation Code (R&TC) section 17042, which
11 follows Internal Revenue Code (IRC) sections 2(b) and 2(c), and argues that, to qualify for the HOH
12 filing status, appellant must be either unmarried, or if married, must meet the legal requirements to be
13 “considered unmarried” on the last day of 2011. (Resp. Op. Br., p. 3.)

14 The FTB asserts that appellant “was married for tax purposes” in 2011. The FTB
15 contends that appellant remained married as of the last day of 2011 if he was legally married and had
16 not obtained a final decree of divorce or a final decree of separation by December 31, 2011. The FTB
17 contends that the incomplete Petition for Dissolution (the Petition for Dissolution is at least two pages
18 and appellant only provided the first page) shows that appellant and his former spouse filed for
19 dissolution for marriage in March of 2012 and that the date of separation was August 7, 2011. The
20 FTB asserts that the Petition for Dissolution does not show that appellant and his former spouse
21 obtained a final decree of legal separation or final decree of divorce by December 31, 2011. The FTB
22 contends that “living apart from one’s spouse in an ‘informal’ type of arrangement is not the same as”
23 being legally separated or divorced. The FTB contends that appellant has provided no evidence to
24 show that he was either legally separated or divorced from his former spouse by the last day of the 2011
25 tax year and that unsupported assertions are not sufficient to satisfy an appellant’s burden of proof.
26 (Citing *Appeal of James C. and Monablanche A. Walshe*, 75-SBE-073, Oct. 20, 1975.)⁴ (Resp. Op. Br.,
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⁴ Board of Equalization cases (designated “SBE”) may generally be found at: www.boe.ca.gov.

1 p. 4.)

2 The FTB contends that appellant also did not meet the requirements to be “considered
3 unmarried” in 2011. The FTB contends that one of the requirements a married taxpayer must meet to be
4 “considered unmarried” for HOH purposes is that the taxpayer’s spouse must not have lived in the
5 taxpayer’s home at any time during the last six months of the tax year. (Citing Int.Rev. Code,
6 § 7703(b)(2).) With respect to the period of time appellant and his former spouse lived together during
7 2011, the FTB asserts that “clearly” appellant has “created a conflict in the facts of the case.” The FTB
8 notes that appellant reported on the HOH Questionnaire that he was married as of December 31, 2011,
9 and that he lived with his spouse from January 1, 2011 to August 11, 2011. The FTB asserts that,
10 according to the information appellant provided, appellant and his spouse lived together during the last
11 6 months of 2011, and, therefore, appellant is precluded from qualifying for the HOH filing status.
12 Regarding appellant’s contention that he and his former spouse stopped living together in March of
13 2011, and that she moved in with her mother at the Fresno address referenced on the Form 8453-OL, the
14 FTB asserts that the Petition for Dissolution “verifies” that appellant had a separation date of August 7,
15 2011, “a difference of 4 days” from the August 11, 2011 separation date appellant reported on the HOH
16 Questionnaire. The FTB contends that, because appellant lived with his spouse during the last
17 six months of the 2011 tax year, he is not entitled to the HOH filing status. (Resp. Op. Br., p. 4.)

18 The FTB further contends that appellant, as a married taxpayer, must be entitled to a
19 dependent exemption credit for the child he claimed as his qualifying person to qualify for the HOH
20 filing status, citing IRC section 7703(b)(1). The FTB asserts that it is “unclear” why appellant, who
21 reported on the HOH questionnaire that he provided more than half of the support for his daughter in
22 2011 and that she lived with him for the entire year in 2011, did not claim his daughter as his dependent
23 on his 2011 tax return. The FTB asserts that, since appellant did not claim a dependent exemption for
24 his daughter, appellant does not meet the legal requirement of entitlement to a dependent exemption for
25 her and, therefore, appellant cannot be “considered unmarried” for purposes of the HOH filing status
26 for 2011. (Resp. Op. Br., p. 5.)

27 With regards to appellant’s contention that his tax circumstances were the same in 2011
28 as for the 2001 and 2006 tax years, the FTB asserts that appellant appears to believe that, if he qualified

1 for the HOH filing status in 2001 and 2006, he also qualifies for the HOH filing status in 2011. The
2 FTB contends that, although appellant may have been allowed the HOH filing status in previous years,
3 “such entitlement does not influence [appellant’s] current appeal” and “cannot be considered as
4 evidence in support of [appellant’s] present appeal” for the 2011 tax year. The FTB asserts that each
5 year “must stand on its own” and is controlled by the facts that existed for that particular year. The
6 FTB argues that the Board has “consistently” held that it should decide cases “wholly on their own
7 merit, without regard to any express or implied determination by [the FTB] with respect to other years,”
8 citing the Board’s decision in the *Appeal of Duane H. Laude*, 76-SBE-096, decided by the Board on
9 October 6, 1976. (Resp. Op. Br., p. 5)

10 The FTB asserts that appellant has not met his burden of producing sufficient evidence
11 to show that the FTB’s denial of his HOH filing status for 2011 was erroneous. To support this
12 contention, the FTB cites *Todd v. McColgan* (1949) 89 Cal.App.2d 509, as well as to various Board
13 formal opinions over the years. (Resp. Op. Br., p. 6.)

14 Applicable Law

15 Head of Household

16 R&TC section 17042 sets forth the California requirements for the HOH filing status by
17 reference to IRC sections 2(b) and 2(c). IRC section 2(b) sets forth the requirements applicable to
18 taxpayers that are not married as of the close of the applicable tax year (e.g., never married or legally
19 separated taxpayers).⁵ IRC section 2(c), by cross-reference to IRC section 7703(b), sets forth
20 additional requirements for taxpayers who are married but are seeking to be treated as not married.

21 Not Married Taxpayers (i.e., never married or legally separated)

22 Pursuant to IRC section 2(b)(1)(A)(i), a taxpayer who is not married may be eligible for
23 the HOH filing status by maintaining a household for a “qualifying child,” if, among other things, the
24 taxpayer’s household constitutes the principal place of abode of the qualifying child, as a member of
25 the household, for more than one-half of the year. As defined in IRC section 152(c), a “qualifying
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28 ⁵ IRC section 7703(a)(1) provides that the determination of whether a taxpayer is married shall be determined as of the close
of his or her taxable year. Furthermore, IRC sections 7703(a)(2) and 2(b)(2)(A) provides that a taxpayer who is legally
separated from his or her spouse under a decree of divorce or a decree of separate maintenance shall be considered not
married.

1 child” means, among other things, the taxpayer’s child or descendant of such child or the taxpayer’s
2 brother, sister, stepbrother, or stepsister or a descendant of any such relative.

3 Married Taxpayers Treated as Not Married

4 IRC section 2(c) provides that certain married persons living apart will be treated as not
5 married (for the HOH filing status purposes), at the close of the taxable year, if they satisfy the
6 requirements of IRC section 7703(b). Under IRC section 7703(b), a married individual must generally
7 meet four separate requirements to qualify for the HOH filing status: (1) the taxpayer must maintain as
8 his or her home a household that constitutes the principal place of abode for a child (within the meaning
9 of IRC section 152(f)(1)) for more than one-half of the taxable year (Int.Rev. Code, § 7703(b)(1));
10 (2) the taxpayer must be entitled to a dependency deduction for the child (Int.Rev. Code, § 7703(b)(1));
11 (3) the taxpayer must furnish over one-half of the cost of maintaining his or her household during the
12 taxable year (Int.Rev. Code, § 7703(b)(2)); and (4) the taxpayer’s spouse may not be a member of his
13 or her household during the last six months of the taxable year (Int.Rev. Code, § 7703(b)(3)). IRC
14 section 152(f)(1) defines the word “child” in this context (where a married person is seeking to be
15 treated as not married) as an individual who is the taxpayer’s son, daughter, stepson, stepdaughter or
16 eligible foster child. (Int.Rev. Code, § 152(f)(1).)

17 Dependent Exemption

18 To be eligible for a dependent exemption pursuant to IRC section 151, a taxpayer must
19 show that his or her claimed individual is a dependent as defined in IRC section 152. A “dependent” is
20 defined as a “qualifying child” or a “qualifying relative.” (Int.Rev. Code, § 152(a).) A “qualifying
21 child” is defined as an individual who: (1) is a child of the taxpayer (or a descendant of such a child) or
22 a brother, sister, stepbrother, or stepsister of the taxpayer (or a descendant of any such relative); (2) has
23 the same principal place of abode as the taxpayer for more than one-half of the year; (3) meets the age
24 requirements of IRC section 152(c)(3); (4) has not provided over one-half of his/her own support during
25 the year; and (5) has not filed a joint return (other than to file a claim for refund) with the individual’s

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1 spouse for that year.⁶ (Int.Rev. Code, § 152(c)(1).) The age requirement of IRC section 152(c)(1) is
2 met if the individual is: (1) under 19 years of age; (2) a full-time student under 24 years of age; or
3 (3) permanently and totally disabled, as defined in IRC section 22(e)(3). (Int.Rev. Code,
4 §§ 152(c)(3)(A) and (B).)

5 Burden of Proof

6 A taxpayer has the burden of proving that he or she is entitled to the HOH filing status.
7 (*Appeal of Richard Byrd, supra.*) The FTB's eligibility determination is presumed correct and a
8 taxpayer bears the burden of proof to show that the determination is erroneous. (*Todd v. McColgan,*
9 *supra; Appeal of Ismael R. Manriquez, 79-SBE-077, Apr. 10, 1979.*) It is well-settled law that tax
10 deductions and credits are a matter of legislative grace and that the burden of showing a right to the
11 claimed credits is clearly on the taxpayer. (*Segel v. Commissioner, 89 T.C. 816, 842 (1987), citing*
12 *Interstate Transit Lines v. Commissioner (1943) 319 U.S. 590, 593; Appeal of Robert R. Telles,*
13 *86-SBE-061, Mar. 4, 1986.*) Unsupported assertions are not sufficient to satisfy a taxpayer's burden of
14 proof. (*Appeal of Aaron and Eloise Magidow, 82-SBE-274, Nov. 17, 1982.*) A taxpayer's failure to
15 produce evidence that is within his/her control gives rise to a presumption that such evidence is
16 unfavorable to his or her case. (*Appeal of Don A. Cookston, 83-SBE-048, Jan. 3, 1983.*) It is well
17 established that each tax year must be examined individually and considered on its own merits (see
18 *Appeal of Duane H. Laude, supra.*)

19 STAFF COMMENTS

20 For appellant to claim his daughter as his qualifying child for the HOH filing status,
21 appellant must show either that he was not married (i.e., never married or legally separated) as of
22 December 31, 2011, or if he was married, that his spouse was not a member of his household during the
23 last six months of 2011 and that he was entitled to a dependent exemption deduction in 2011 for his
24 daughter.

25 The parties should be prepared to discuss appellant's marital status as of
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28 ⁶ In addition, IRC section 152(b) requires that the qualifying child may not be (1) married at the close of the taxpayer's
taxable year; (2) a married dependent who filed a joint return with his or her spouse (Int.Rev. Code, §152(b)(2)); or (3) an
individual who is not a citizen or national of the United States unless that individual is a resident of the United States,
Canada, or Mexico. (Int.Rev. Code, §152(b)(3).)

1 December 31, 2011. Appellant has not asserted, nor does the Petition for Dissolution indicate, that
2 appellant and his former spouse were legally separated or divorced by December 31, 2011. At the
3 hearing, appellant should be prepared to clarify whether he contends that he and his former spouse
4 obtained a final decree of legal separation or final decree of divorce by December 31, 2011, with
5 supporting documentation.

6 If the Board concludes that appellant was not married (i.e., never married or legally
7 separated) as of December 31, 2011, then the Board will need to determine whether appellant is eligible
8 for the HOH filing status pursuant to IRC section 2(b)(1)(A)(i). Under this provision, appellant must
9 establish that his daughter is a qualifying child under IRC section 152(c) and that appellant's household
10 constitutes the principal place of abode, for the qualifying child, for more than one-half of the year, to
11 be eligible for the HOH filing status.

12 If the Board concludes that appellant was married as of December 31, 2011, then
13 appellant must establish that he meets the requirements of IRC section 7703(b), as referenced by IRC
14 section 2(c), to be treated as not married to be eligible for the HOH filing status. The FTB contends that
15 appellant has failed to meet the second and fourth requirements of IRC section 7703(b). Under the
16 second requirement, appellant must establish that he is entitled to a dependency deduction for his
17 daughter (Int.Rev. Code, § 7703(b)(1)), and under the fourth requirement, appellant must establish that
18 his spouse was not a member of his household during the last six months of 2011 (Int.Rev. Code, §
19 7703(b)(3)).

20 With regard to the fourth requirement, appellant has provided conflicting statements as to
21 when he and his former spouse lived together during 2011: (1) on the HOH questionnaire, appellant
22 indicated a date of separation of August 11, 2011; (2) with his appeal letter, appellant provided a
23 Petition for Dissolution which stated a date of separation of August 7, 2011; and (3) in his appeal letter,
24 appellant contends that the actual date of separation was in March of 2011 when his former spouse
25 moved to Fresno to live with her mother. In support of a March 2011 date of separation, appellant
26 provided a 2011 Form 8453-OL which contains information regarding appellant's former spouse and
27 showing a Fresno address. The Form 8453-OL indicates an accepted date of February 13, 2012, which
28 postdates all three indicated dates of separation. At the hearing, the parties should be prepared to

1 address the conflicting dates of separation. Appellant should be prepared to discuss the provided Form
2 8453-OL and how it substantiates his contention that the date of separation was in March 2011.
3 Appellant may also want to provide additional evidence substantiating a date of separation in March of
4 2011, such as a declaration from his former spouse, signed under penalty of perjury, stating a
5 March 2011 date of separation.

6 If the Board concludes that appellant and his former spouse separated on August 7, 2011
7 or August 11, 2011, then appellant apparently failed to meet the fourth requirement and, therefore, is
8 precluded from qualifying for the HOH filing status. If the Board concludes that appellant and his
9 former spouse separated in March of 2011, then appellant meets the fourth requirement. However, to be
10 eligible for the HOH filing status, appellant must establish that he meets the remaining three
11 requirements of IRC section 7703(b), which includes a showing that that he is entitled to a dependency
12 deduction for his daughter. At the hearing, the parties should be prepared to discuss whether appellant
13 meets the remaining three requirements of IRC section 7703(b).

14 Pursuant to California Code of Regulations, title 18, section 5523.6, if either party has
15 any additional evidence to present, it should be provided to the Board's Board Proceedings Division at
16 least 14 days prior to the oral hearing.⁷

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⁷ Evidence exhibits should be sent to: Khaaliq Abd'Allah, Associate Government Program Analyst, Board Proceedings Division, State Board of Equalization, P.O. Box 942879 MIC:80, Sacramento, California, 94279-0080.