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

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10 In the Matter of the Appeal of: ) **HEARING SUMMARY**  
11 ) **PERSONAL INCOME TAX APPEAL**  
12 **CLINTON T. BOOKMYER<sup>1</sup>** ) Case No. 492771

13  
14 Year Proposed  
2007 Assessment  
15 \$1,160<sup>2</sup>

16 Representing the Parties:

17 For Appellant: Clinton T. Bookmyer  
Chelsea Cooper, Tax Appeals Assistance Program

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19 For Franchise Tax Board: Claudia L. Cross, Legal Analyst

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21 **QUESTION:** Whether appellant is entitled to head of household (HOH) filing status for 2007.

22 HEARING SUMMARY

23 Background

24 Appellant timely filed a 2007 tax return claiming HOH status and a dependent exemption  
25 credit for his then 6-year-old granddaughter. On this return, appellant provided an HOH scheduled  
26

27 <sup>1</sup> Appellant resides in Burbank, California, in Los Angeles County.

28 <sup>2</sup> At the oral hearing, respondent should be prepared to provide an updated interest calculation.

1 which provided the following information:

- 2 1. appellant's granddaughter was the individual qualifying appellant for HOH status;
- 3 2. her gross income was less than \$3,400;
- 4 3. appellant provided more than half his granddaughter's support;
- 5 4. she was a full-time student;
- 6 5. she lived with appellant for all of 2007;
- 7 6. appellant was not single as of December 31, 2007; and
- 8 7. appellant did not live with his spouse at any time during 2007.

9 (Resp. Op. Br., exhibit B.) Based on these responses, respondent issued a Notice of Proposed  
10 Assessment (NPA) denying HOH filing status and changed appellant's filing status to married filing  
11 separately. The NPA (a copy is provided with appellant's appeal letter) indicated that appellant, as a  
12 married taxpayer, can only claim his birth child, stepchild, adopted child, or eligible foster child as his  
13 qualifying person for HOH filing status. In addition, respondent denied appellant's claimed renter's  
14 credit, because respondent states appellant's adjusted gross income exceeded the income amount  
15 allowable for this credit under Revenue and Taxation Code (R&TC) section 17053.5. (Resp. Op. Br.,  
16 footnote 1.)

17 Appellant protested the NPA contending: (1) he should be considered unmarried since his  
18 spouse did not live with him in 2007; (2) he paid for the maintenance of the home where his  
19 granddaughter lived; and (3) he claimed his granddaughter as a dependant on both his federal and state  
20 return for 2007. Respondent relied on its NPA argument, affirming the NPA in the issuance of its  
21 Notice of Action on May 22, 2009. This timely appeal followed.

## 22 Contentions

### 23 *Appellant's Contentions*

24 In appellant's appeal letter, (drafted by Mr. Bookmyer), appellant made similar  
25 contentions he raised during protest:

- 26 1. The California return instructions require the same filing status to be used for California  
27 purposes, as used for federal purposes. Therefore, appellant's federal HOH filing status should  
28 be respected for California purposes.

- 1 2. Appellant satisfied the "unmarried" criterion and his granddaughter satisfied the qualifying  
2 person criterion.
- 3 3. California does not require a divorce decree to be treated as "unmarried."<sup>3</sup>

4 Thereafter, in appellant's reply brief, the taxpayer's representative contended that  
5 appellant should be treated as unmarried under the HOH test (discussed, *infra*) because appellant's  
6 granddaughter should be viewed as his child. Appellant contends that respondent does not explain the  
7 definition of an "adopted child" or "eligible foster child." (App. Reply Br. (ARB) p. 1.) Appellant  
8 contends his granddaughter should be viewed as a "child" because he "has a special power of attorney  
9 [POA] issued by the State of Ohio that allows him to act as [his granddaughter's] parent." (*Id.* exhibit  
10 B.) Appellant contends that the birth mother has been substantially absent from his granddaughter's life  
11 since she was born and has a long arrest record and history of drug usage. Appellant claims his  
12 granddaughter is more his daughter than she is his granddaughter. (*Id.*) As of February 27, 2010 (the  
13 date of appellant's second reply brief), appellant stated that the granddaughter's birth mother has been in  
14 and out of jail, her whereabouts are currently unknown, and her biological father is unknown. Appellant  
15 contends that without her grandparents, the granddaughter would likely become a ward of the state.

16 Appellant contends that the California guidelines state that a "child" includes an eligible  
17 foster child or adopted child, but are unclear as to whether appellant's special POA qualifies appellant's  
18 granddaughter as his adopted child or foster child. Appellant contends the POA makes "him the de facto  
19 parent of [the granddaughter] and the State of Ohio recognizes him as such." Appellant claims he  
20 initially wanted to adopt her, but her birth mother indicated she would contest it. Accordingly, appellant  
21 claims his attorney suggested the best solution was to draw up the POA. Appellant claims that "[t]he  
22 Special POA is a certified court document from the State of Ohio, a competent jurisdiction, placing [the  
23 granddaughter] in the care of appellant and his wife."<sup>4</sup> Appellant also claims that under these  
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25 \_\_\_\_\_  
26 <sup>3</sup> It does not appear to Board staff that appellant is contesting the renter's credit in this appeal. If this is incorrect, appellant  
should be prepared to claim otherwise at the oral hearing.

27 <sup>4</sup> It is unclear to Board staff from reviewing this exhibit, whether the POA was prepared and issued by the State of Ohio, or  
28 rather constituted a personal arrangement between appellant and the birth mother of appellant's grandchild that was simply  
acknowledged by a notary public licensed by the State of Ohio. At the oral hearing, appellant should be prepared to explain  
how this POA was issued by the State of Ohio, and how the State of Ohio has directly extended parental rights to appellant  
through this POA.

1 circumstances, his granddaughter should also be considered his foster child.

2 *Respondent's Contentions*

3 Respondent contends appellant failed to meet the statutory test for HOH filing status.

4 Respondent states that individuals who are married can only claim HOH filing status if a child who lives  
5 with them for more than half the tax year is the taxpayer's birth child, stepchild, adopted child, or  
6 eligible foster child.

7 Respondent contends that an "adopted child" under Internal Revenue Code (IRC) section  
8 152(f)(1)(B) is referred to as "a legally adopted individual of the taxpayer, or an individual who is  
9 lawfully placed with the taxpayer for legal adoption by the taxpayer..." and that an "eligible foster  
10 child" is specifically defined in IRC section 152(f)(1)(C) as "an individual who is placed with the  
11 taxpayer by an authorized placement agency or by judgment decree, or other order of any court of  
12 competent jurisdiction." Respondent contends the POA did not result in a legal adoption by appellant  
13 and did not constitute a placement via an authorized agency or court decree. Thus, respondent asserts  
14 appellant's granddaughter is not an adopted child or eligible foster child of appellant.

15 As for appellant's federal HOH conformity contention, respondent claims the California  
16 requirement means that appellant must use the same filing status for his California return that he is  
17 entitled to use for federal purposes. Respondent claims appellant was not entitled to the HOH filing  
18 status for federal or California purposes.

19 Applicable Law

20 R&TC section 17042 provides that California follows the HOH status as defined in IRC  
21 section 2(b) and (c). IRC section 2(b) provides that a person can claim HOH status, if and only if, such  
22 individual is:

- 23 1. not married at the close of his taxable year;
- 24 2. is not a surviving spouse;
- 25 3. maintains as his home a household for more than one-half of the tax year a principle place of  
26 abode for either:
  - 27 a. a qualifying child (as defined under IRC section 152(c) – which includes the taxpayer's  
28 children or the taxpayer's descendants (i.e., grandchildren)) but not if the qualifying child

- 1 i. is married;
- 2 ii. is not a dependent by reason of IRC section 152(b)(2) ("married dependents") or
- 3 152(b)(3) (citizens or nationals of other countries) or both.

4 or,

- 5 b. any other person who is a dependent of the taxpayer, if the taxpayer is entitled to a
- 6 deduction for the taxpayer year under IRC section 151.

7 IRC section 2(c) clarifies that an individual shall be treated as not married at the close of

8 the taxable year, if he qualifies for such treatment under IRC section 7703(b). IRC section 7703(b)

9 provides that an individual who is married shall not be considered as married if the individual:

- 10 1. files a separate return;
- 11 2. maintains as his home a principal place of abode for more than one-half of the year for a child
- 12 who is:
- 13 a. a child defined under IRC section 152(f)(1) with respect to whom, such individual is
- 14 entitled to a deduction under IRC section 151 (or would be so entitled to, but for IRC
- 15 section 152(e));
- 16 i. a child under IRC section 152(f)(1) is generally defined as an individual who is
- 17 the taxpayer's son, daughter, stepson, stepdaughter, adopted child, or eligible
- 18 foster child. (The detailed requirements of 152(f)(1) are discussed below.)
- 19 3. furnishes over one-half of the cost of maintaining such household during the taxable year; and
- 20 4. during the last 6 months of the taxable year, such individual's spouse was not a member of such
- 21 household.

22 IRC section 152(f)(1)(A) states that, for purposes of IRC section 152, in general, a

23 "child" means an individual who is (i) a son, daughter, stepson, or stepdaughter of the taxpayer, or (ii) an

24 eligible foster child of the taxpayer.

25 IRC section 152(f)(1)(B) provides that in determining whether any of the relationships

26 specified in subparagraph (A)(i) exists, a legally adopted individual of the taxpayer, or an individual

27 who is lawfully placed with the taxpayer for legal adoption by the taxpayer, shall be treated as a child of

28 such individual by blood.

1 In determining whether an individual is one's adopted child, it appears state law controls.  
2 In *Young v. Comm'r*, T.C. Memo 1960-272, the taxpayer's father died leaving the taxpayer to care for his  
3 brother (Leo) and mother. The taxpayer did not go through any legal procedure to adopt Leo, but  
4 claimed him as a dependent. Under these facts, the tax court stated:

5 [The taxpayer] admits he did not follow any adoption procedure with respect to his  
6 brother. He asks us to give the New Jersey laws a liberal construction and treat Leo as  
7 adopted for tax purposes so that he may receive the benefit of a dependency exemption.  
8 If we did this we would be giving those laws an erroneous, rather than a liberal  
9 construction. They clearly contemplate that certain requirements must be met before a  
10 child can become an adopted child. Because they have not been met by [the Taxpayer,]  
11 Leo is not his adopted child and cannot be considered to be his child for dependency-  
12 exemption purposes.

13 IRC section 152(f)(1)(C) provides that an "eligible foster child" means an individual who  
14 is placed with the taxpayer by an authorized placement agency or by judgment, decree, or other order of  
15 any court of competent jurisdiction.

16 Treasury Regulation 1.52-3(c) defines an "authorized placement agency" as "any agency  
17 which is authorized by a State, the District of Columbia, a possession of the United States, a foreign  
18 country, or a political subdivision of any of the foregoing to place children for adoption."

19 IRC section 152(c)(2)(A), in defining what constitutes a "qualifying child" for purposes  
20 of defining what constitutes a dependent, the following relationships (among others) are specified: "a  
21 child of the taxpayer or a descendant of such a child, ..." Thus, the express language used within IRC  
22 section 152 appears capable of distinguishing between a "child" (as specifically defined under IRC  
23 section 152(f)(1)(A)), and the concept of a "grandchild" which would appear to be "a descendant of such  
24 child."

#### 25 STAFF COMMENTS

26 The primary issue of this appeal is whether appellant can be considered as unmarried at  
27 the close of 2007, by demonstrating that his granddaughter is a "child" for purposes of IRC section  
28 152(f)(1). Staff notes that IRC section 152(f)(1) does not include grandchildren; instead, it is  
specifically limited to sons, daughters, stepsons, stepdaughters, adopted children, or eligible foster  
children. Appellant contends that the POA and the facts of the relationship (i.e., appellant has been the

1 sole caregiver since birth, the birth mother's whereabouts are unknown, the biological father is  
2 unknown) should allow the granddaughter to be treated as appellant's child within the meaning of IRC  
3 section 152(f)(1) either as a daughter, adopted child or eligible foster child

4           It appears to Board staff that IRC section 152(f)(1) on its face is a relationship provision,  
5 i.e., it asks for a specific relationship to exist; it is silent to the level of care required of the taxpayer.  
6 The relevant level of care requirements (i.e., that the taxpayer maintain a home and provide support for  
7 an individual) are separate requirements that must also be satisfied. Respondent does not appear to be  
8 contesting these other separate "care" requirements. Thus it appears that, in order for appellant to  
9 prevail, he must demonstrate that his granddaughter was one of the following: a daughter, stepdaughter,  
10 adopted daughter, or an eligible foster child. It does not appear appellant is contesting the  
11 granddaughter was a "stepdaughter" within the meaning of IRC section 152(f)(1). Therefore, at the oral  
12 hearing, the parties should be prepared to discuss the following:

- 13       1. Whether the granddaughter is a daughter within the meaning of IRC section 152(f)(1). If  
14       appellant believes this construction is possible, appellant should be prepared to explain why the  
15       commonly understood distinction between a daughter and a granddaughter does not exist in the  
16       express language of IRC section 152(f)(1), while such a distinction is specifically referenced  
17       elsewhere within the statute through the use of the term "descendant," i.e., "a child of the  
18       taxpayer or a descendant of such a child." (*See* Int.Rev. Code, § 152(c)(2)(A).) With respect to  
19       this observation, the parties should be prepared to discuss whether any relevant statutory  
20       construction rules should apply in such situations.
- 21       2. Whether the granddaughter is an adopted daughter within the meaning of IRC section 152(f)(1).  
22       To support this position, appellant should identify how the POA resulted in a legal adoption  
23       under California or Ohio law.
- 24       3. Whether the granddaughter is an eligible foster child within the meaning of IRC section  
25       152(f)(1). To support this position, appellant should demonstrate that the granddaughter was  
26       placed with appellant through an "authorized placement agency" or that the POA constitutes a  
27       judgment, decree or other order of a court of competent jurisdiction.

28           In order to prevail, appellant will need to demonstrate that his granddaughter met one of

1 the relationships listed under IRC section 152(f)(1), i.e., she was either a daughter, stepdaughter, foster  
2 child or legally adopted child of the taxpayer in 2007.

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