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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 **TAWFIK H. RIZKALLAH<sup>1</sup>** ) Case No. 536082  
13 )  
14 )

15 Year Proposed  
2007 \$2,027  
16

17 Representing the Parties:

19 For Appellant: Amber Bridges,  
Tax Appeals Assistance Program (TAAP)<sup>2</sup>  
20

21 For Franchise Tax Board: Jaclyn N. Appleby, Tax Counsel  
22

23 QUESTION: Whether appellant has established that he qualifies for head of household (HOH) filing  
24 status for 2007.

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27 <sup>1</sup> Appellant resides in San Diego County, California.

28 <sup>2</sup> Appellant was previously represented by Samantha Lohman-Creer from TAAP.

1 HEARING SUMMARY

2 Background

3 Appellant filed a timely 2007 California return, claiming HOH filing status. On the  
4 return, appellant claimed dependent exemption credits for his daughter, Tina (age 36), and his  
5 granddaughter, Hannah (age 5). To verify appellant's filing status, the Franchise Tax Board (FTB or  
6 respondent) sent appellant an HOH audit questionnaire to complete. In response, appellant completed  
7 and signed two questionnaires—one identifying Tina as a qualifying person, and a second identifying  
8 Hannah as a qualifying person. On the questionnaires, appellant indicated, among other things, that (i)  
9 both Tina and Hannah had gross incomes of less than \$3,400 and were fulltime students, (ii) appellant  
10 provided more than half of Tina and Hannah's support in 2007, and (iii) neither Tina nor Hannah lived  
11 with appellant for the entire year of 2007. In addition, appellant attached a statement to the  
12 questionnaires, indicating that appellant owned a condominium within walking distance of his home and  
13 that Tina and Hannah lived in the condominium rent-free. (FTB OB pp 1-2, Ex. B.)

14 Based upon appellant's responses, the FTB issued a Notice of Proposed Assessment  
15 (NPA) that disallowed appellant's HOH filing status for 2007, resulting in a proposed additional tax  
16 assessment of \$2,027 plus applicable interest. In the NPA, the FTB explained that appellant's HOH  
17 filing status was disallowed because his qualifying person did not live with appellant for more than half  
18 of 2007. (App. Ltr. Attachment.)

19 Appellant timely protested the NPA, arguing that he qualified for HOH filing status in  
20 2007 because, even though the two condominiums units are apart, they serve as if they were one main  
21 home. Appellant also stated that the family eats and socializes together 365 days of the year, each  
22 family member has access to both units at all times, and appellant provided 100 percent of the financial  
23 support. (FTB OB, p 2, Ex. C.)

24 On June 1, 2010, the FTB issued a Notice of Action (NOA), affirming the NPA. (Copy  
25 attached to App. Ltr.) This timely appeal followed.

26 Contentions

27 Appellant

28 Appellant argues that he has met the statutory requirements to qualify for HOH status for

1 the 2007. Appellant states that the “main point of contention” in this appeal is whether appellant  
2 maintained as his home “a household which constitutes for more than one-half of such taxable year the  
3 principal place of abode of a qualifying child . . .” (App. Reply Br., 2/16/11, p 2.)

4 In his reply brief, appellant provided the following rendition of the facts:

5 Appellant moved with his daughter and granddaughter to California from Arizona. The  
6 three family members moved together to a foreign state, where they had no immediate  
7 family members, with the intention of residing together as a family while appellant’s  
8 daughter returned to school. However, there was an unavailability of affordable homes  
9 that would be large enough for all three, so appellant made the decision to purchase two  
10 condominium units within walking distance of each other. Appellant owns both homes  
11 and considers both roofs as one big roof encompassing two separate locations.

12 Additionally, both homes served as one household not only financially, but socially. The  
13 living situation was not one in which appellant, as a father, merely paid his daughter and  
14 granddaughter’s bills. Appellant was the caregiver for his granddaughter while her  
15 mother was at school. The families socialized together daily, ate meals together, and  
16 literally moved freely between the two condominiums as if one household. (App. Reply  
17 Br., 11/4/10, p 4.)

18 Appellant contends that (i) Tina and Hannah lived in appellant’s home year round, (ii)  
19 Tina and Hannah also lived in the other condominium owned by appellant, (iii) the two condominiums  
20 were only 1.6 miles apart, (iv) both condominiums combined constitute the “main home,” and (iv) each  
21 family member could move freely between the two condominiums as if the family members were under  
22 one roof, as one household. (App. Reply Br., 2/16/11, at pp 2-3.)

23 Appellant asserts that even though he did not retain records of the number of days his  
24 daughter and granddaughter spent at one condominium versus the other condominium, “it is more than  
25 likely that [his] daughter and granddaughter spent at least 183 days (4,392 hours) of the 2007 taxable  
26 year at [his] condominium unit.” (App. Reply Br., 11/4/10, at p 4.) In the alternative, however,  
27 appellant asserts that “[a]lthough Tina and Hannah may not have spent 183 consecutive days at the  
28 condominium on Avenida Del Mundo [as opposed to the condominium on “F” Avenue], it is more than  
likely that they spent the hourly equivalent of 183 days there.” (*Id.*)

In support of his arguments, appellant provided a letter from his daughter in which she  
states, among other things:

I am writing to you in concern of my housing relating to my father, Tawfik H. Rizkallah.  
My daughter. . . and I reside at [a condominium located on F Avenue]. We moved into  
our residence mid 2006 and live there rent free. My father pays the HOAs, maintenance,  
utilities and related expenses. I have been divorced since 2005 and do not receive any  
child support and am unemployed, currently trying to complete college for my Bachelor’s

1 degree in Business. In addition, my father grants us the privilege of using his vehicle to  
2 get to and from my daughter's school . . .

3 Although our residence is located only a mile from his home, we stay at his place at  
4 minimum half of the week and often have family meals together. Please let me  
5 emphasize that my father is beyond a shadow of a doubt the head of household of both  
6 residences. We may physically live at two separate addresses, but it is basically one roof  
7 covering two places. We reside at both homes, since we have a room at my father's and  
8 at the other residence. \*\*\*\* (Copy attached to App. Ltr as an exhibit.)

9 Also, appellant provided the following additional documents, copies of which are attached to his appeal  
10 letter:

- 11 • A property tax bill for the condominium on "F" Avenue. The property tax bill is addressed to
- 12 the "Rizkallah Mary & Tawfik Family Trust," with an address listed on Avenida Del Mundo.
- 13 • A utility bill for the condominium on "F" Avenue. The utility bill is addressed to appellant's
- 14 daughter.
- 15 • Bank statements, showing that appellant paid utility, telephone, and other payments.
- 16 • Cancelled checks, showing that appellant paid, among other things, homeowners' association
- 17 fees.

18 Based on the foregoing, appellant argues that "[a]ppellant's condominium was the principal place of  
19 abode for his daughter and granddaughter." (App. Reply Br., 2/16/11 at p 3.)

20 Finally, appellant argues that "even if this Board finds that his home was not the main  
21 home of his daughter and granddaughter," he is entitled to HOH status because he "fulfilled his familial  
22 obligation to his daughter and granddaughter by providing 100 percent of their financial support, and at  
23 the same time allowed his adult daughter autonomy and independence, which was in the same spirit of  
24 'providing' that the treasury regulations provide an exception for if the qualifying person is a parent."  
25 (App. Reply Br., 11/4/10, p 3.)

26 The FTB

27 The FTB argues that appellant is not entitled to claim HOH filing status for 2007. First,  
28 the FTB argues that "Appellant's home was not Tina and Hannah's Principal Place of Abode." (FTB  
Reply Br., 12/21/10, p 1.) In this respect, the FTB asserts that a parent's home will not be considered as  
the principal place of abode where the child established a separate habitation and only returns for  
periodic visits. (*Id.* p 2.) The FTB states that "regardless of the hours that appellant alleges Tina and

1 Hannah spent at his residence during the 2007 tax year or the fact that appellant paid for their  
2 condominium and other expenses, his condominium does not constitute the principal place of abode for  
3 Tina and Hannah as it was not their main home.” (*Id.*)

4 Second, the FTB argues that “Appellant has not provided any evidence to support the  
5 time that Tina and Hannah allegedly lived at his home.” (*Id.*) In this respect, the FTB asserts that “[the  
6 FTB] has provided appellant with the opportunity to provide documentation to establish that Tina and  
7 Hannah lived with appellant in his condominium unit for more than half the year; however, to date  
8 appellant has failed to produce any evidence beyond his unsupported assertions.” (*Id.*)

9 Applicable Law

10 Burden of Proof

11 Appellant has the burden of proving he is entitled to HOH filing status. (*Appeal of*  
12 *Richard Byrd*, 84-SBE-167, Dec. 13, 1984.)<sup>3</sup> The FTB’s determinations are generally presumed correct,  
13 and an appellant bears the burden of proving error. (*Appeal of Sheldon I. and Helen E. Brockett*,  
14 86-SBE-109, June 18, 1986; *Todd v. McColgan* (1949) 89 Cal.App.2d 509.) Unsupported assertions are  
15 insufficient to carry appellant’s burden of proof. (*Appeal of Aaron and Eloise Magidow*, 82-SBE-274,  
16 Nov. 17, 1982.)

17 IRC section 2(b)

18 R&TC section 17042 sets forth the requirements for HOH filing status by reference to  
19 Internal Revenue Code (IRC) sections 2(b). In general, IRC section 2(b)(1)(A)(i) provides that the  
20 taxpayer must be unmarried (at the close of the taxable year), and must maintain as his or her home a  
21 household which constitutes the principal place of abode, as a member of the household, of a qualifying  
22 individual for more than one-half of the year. (Int.Rev. Code, § 2(b)(1)(A)(i).) The list of potential  
23 qualifying individuals includes, for purposes herein, the taxpayer’s child, stepchild, or eligible foster  
24 child. (Int.Rev. Code, §§ 2(b) and 152(c)(2) and (f)(1).) R&TC section 152(c)(3) generally provides  
25 that for a taxpayer to be eligible for HOH status, the qualifying child must be *either* (i) under the age of  
26 19, (ii) a fulltime student less than 24 years of age, or (iii) disabled. A taxpayer shall be considered as  
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28 <sup>3</sup> State Board of Equalization cases can generally be viewed on the Board’s website ([www.boe.ca.gov](http://www.boe.ca.gov)).

1 maintaining a household only if over half of the cost of maintaining the household during the taxable  
2 year is furnished by such taxpayer. (Int.Rev. Code, § 2(b)(1).)

3 *Facts and Circumstances Test*

4 The extent of a **household** is not determined solely by physical or tangible boundaries,  
5 but by all facts and circumstances. (*Estate of Fleming v. Commissioner*, T.C. Memo 1974-137; see also  
6 *Robinson v. Commissioner* (1968) 51 T.C. 520, aff'd. (9th Cir. 1970) 422 F.2d 873.) For example, in  
7 *Estate of Fleming v. Commissioner, supra*, the Tax Court addressed the issue of whether two  
8 individuals, each with their own children, who share a dwelling can each be considered to maintain a  
9 separate household for tax purposes. The IRS contended that the house constituted only one household,  
10 and being only one household the petitioner failed to prove she furnished more than one-half the cost of  
11 maintaining such household. However, petitioner successfully argued that the house contained two  
12 households. The Tax Court stated that the extent of a household is not determined solely by physical or  
13 tangible boundaries, but by all the facts of the case. (*Id.*) The Tax Court also found that “it would be an  
14 elevation of form over substance to say only one household existed simply because only one building  
15 was involved and certain areas were used in common.” (*Id.*) The Court found that separate households  
16 were intended and resulted. Accordingly, the Court held the decedent qualified as a HOH. (*Id.* fn 2.)

17 *Cohabitation Requirement*

18 Under present law, for a taxpayer to be considered a HOH for maintaining a household  
19 that is the abode for more than six months of a qualifying child or other dependent, the household must  
20 be the taxpayer’s own home. (Int.Rev. Code, § 2(b)(1)(A); see also, 4-160 California Family Law  
21 Prac & Proc 2d ed. (hereinafter “CA Fam. Law”) § 160.62.) Under prior law, there was authority that  
22 with respect to a *child*, it was not sufficient if the taxpayer maintained the household without occupying  
23 it (see *Stanford v. Commissioner*, T.C. Memo 1995-78; CA Fam. Law §160.62.), but there was also  
24 authority that the household need not be the taxpayer’s sole or principal place of abode, as long as there  
25 is a substantial period of cohabitation with the child. (See *Smith v. Commissioner* (9th Cir. 1964) 332  
26 F.2d 671, 673, reversing (1963) 40 T.C. 591; see also *Grace v. Commissioner* (5th Cir. 1969) 421 F.2d  
27 165, 166; *Muse v. United States* (4th Cir. 1970) 434 F.2d 349, 352-353; CA Fam. Law §160.62.) There  
28 is no cohabitation requirement if the taxpayer maintains a household which for the taxable year is the

1 principal place of abode of the taxpayer's parent. (Int.Rev. Code, § 2(b)(1)(B); Treas.Reg.  
2 §§ 1.2-2(b)(1), (c)(1).)

3           The household must constitute the principal place of abode of the child for more than one  
4 half of the taxable year. (Int.Rev. Code, § 2(b)(1)(A); *Chappell v. Commissioner*, T.C. Memo 2001-146  
5 [HOH status denied when separated husband's home had only one bed and nowhere for child to sleep,  
6 work, and play].) Although Treasury Regulation section 1.2-2(c)(1) requires that the taxpayer and his  
7 child occupy the home for the entire taxable year, that regulation has not been revised in light of the  
8 amendments that changed the cohabitation requirement from the entire year to more than half of the  
9 year. (Int.Rev. Code, § 2(b)(1)(A); CA Fam. Law §160.62.)

10           Temporary absences from the household due to special circumstances do not disqualify  
11 the taxpayer under the cohabitation requirement. (*Id.*) A custody agreement under which a child is  
12 absent from the taxpayer's home for less than six months of the year is considered a temporary absence  
13 due to special circumstances. (Treas. Reg § 1.2-2(c)(1).) To establish a temporary absence, the  
14 taxpayer or child must be reasonably expected to return to the household, and the taxpayer must  
15 continue to maintain the household in anticipation of the return. (Treas. Reg § 1.2-2(c)(1); see *Addison*  
16 *v. Commissioner*, T.C. Memo 1992-349 [mother did not meet requirements for HOH filing status  
17 because daughter's absence from the home to attend school was not deemed temporary]; CA Fam. Law  
18 §160.62.)

#### 19 STAFF COMMENTS

20           As noted above, appellant asserts that he qualifies for HOH filing status in 2007 because,  
21 even though the two condominiums units are separate, they serve as if they were one main home.  
22 Appellant states that the family eats and socializes together [apparently] 365 days of the year, each  
23 family member has access to both units at all times, and appellant provided 100 percent of the financial  
24 support.

25           As indicated above, the extent of a household is not determined solely by physical or  
26 tangible boundaries, but by all facts and circumstances. (*Estate of Fleming v. Commissioner, supra.*)  
27 Accordingly, at the oral hearing, appellant should be prepared to explain how the two condominium  
28 units can be considered as one main home and to provide any supporting legal authority. In addition,

1 appellant asserts that it is likely his daughter and granddaughter spent more than 6 months living at his  
2 condominium. At the hearing, appellant should present any evidence to establish his daughter and  
3 granddaughter spent more than 6 months living at his condominium. Even if the Board finds that  
4 appellant's condominium was not the principal place of abode of his daughter and granddaughter,  
5 appellant argues that he is entitled to HOH status because he "fulfilled his familial obligation to his  
6 daughter and granddaughter by providing 100 percent of their financial support, and at the same time  
7 allowed this adult daughter autonomy and independence, which was in the same spirit of 'providing'  
8 that the treasury regulations provide an exception for if the qualifying person is a parent." (App. Reply  
9 Br., 11/4/10, pp 2-3.) As noted above, there is no cohabitation requirement if the taxpayer maintains a  
10 household which for the taxable year is the principal place of abode of the taxpayer's *parent*. (Int.Rev.  
11 Code, § 2(b)(1)(B); Treas.Reg. §§ 1.2-2(b)(1), (c)(1).) At the oral hearing, parties should be prepared to  
12 discuss the cohabitation requirements, as set forth above in the applicable law section of this Hearing  
13 Summary, or as the parties deem otherwise relevant.

14 Finally, as noted above, R&TC section 152(c)(3) generally provides that for a taxpayer to  
15 be eligible for HOH status, the qualifying child must be *either* (i) under the age of 19, (ii) a fulltime  
16 student less than 24 years of age, or (iii) disabled. Here, appellant's granddaughter apparently meets the  
17 foregoing age requirement, as she was allegedly only five years of age in 2007. However, appellant's  
18 daughter was a fulltime student over the age of 24 in 2007 (and appellant has provided no evidence that  
19 she was disabled); thus, barring further evidence to the contrary, if appellant is to qualify for HOH  
20 status, his qualifying child must be his granddaughter, not his daughter.

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