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

10 In the Matter of the Appeal of:) **HEARING SUMMARY**
11) **PERSONAL INCOME TAX APPEAL**
12 **HARRY CHO**¹) Case No. 449340

	<u>Year</u>	<u>Claim</u> <u>For Refund</u>
	2005	\$ 504.15
	<u>Year</u>	<u>Proposed</u> <u>Assessment</u> ²
	2006	\$1,118.00

18 Representing the Parties:

19 For Appellant: Harry Cho
20 For Franchise Tax Board: George M. Damon, Senior Legal Analyst

22 QUESTION: Whether appellant has established that he qualifies for head of household (HOH) filing
23 status for tax years 2005 and 2006.

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27 ¹ Appellant resides in Mount Prospect, Illinois.

28 ² Respondent should be prepared to provide the accrued interest amount at the time of the oral hearing.

1 HEARING SUMMARY

2 Background

3 2005

4 Appellant filed a timely 2005 California nonresident or part-year resident income tax
5 return on which he claimed HOH filing status. (Resp. Opening Br., exhibit A.) On the return, appellant
6 did not claim any dependent exemption credit. To verify appellant's filing status, the Franchise Tax
7 Board (FTB or respondent) sent appellant an audit questionnaire to complete. (*Id.*, exhibit B.)
8 Appellant stated in the audit questionnaire (under penalty of perjury) that his father, Charles Cho, was
9 the person who qualified him for HOH filing status and that his father's gross income in 2005 was not
10 less than \$3,200. He also stated that he provided more than half of his father's support in 2005, and that
11 his father lived with him for the entire year. Appellant also stated that, as of December 31, 2005, he was
12 single and his father was married. In addition, appellant stated that his father and his spouse filed a joint
13 tax return for 2005.

14 Based upon appellant's responses, respondent issued a Notice of Proposed Assessment
15 (NPA) that disallowed the HOH filing status for 2005 and revised appellant's filing status to single,
16 resulting in a proposed additional tax assessment of \$473 plus applicable interest. (App. Opening Br.,
17 attachment.) Appellant protested the NPA, arguing that he qualified for HOH filing status because he
18 paid more than half of his parents' cost of living. (Resp. Opening Br., exhibit C.) Respondent and
19 appellant had a telephone conversation and exchanged correspondence concerning appellant's filing
20 status. (Resp. Opening Br., p. 2, exhibits D, E, F.) In a letter dated April 3, 2008, respondent advised
21 appellant that it applied an overpayment of \$504.15 from tax year 2006 to appellant's account for tax
22 year 2005, which paid the 2005 balance due in full. (*Id.*, exhibit E.) In a letter dated May 16, 2008,
23 respondent informed appellant that it was denying his claim for refund for 2005. (App. Opening Br.,
24 Attachment.) This timely appeal followed.

25 2006

26 Appellant filed a timely 2006 California nonresident or part-year resident income tax
27 return on which he claimed HOH filing status. (Resp. Opening Br., exhibit G.) On the return, appellant
28 did not claim any dependent exemption credit. To verify appellant's filing status, respondent sent

1 appellant an audit questionnaire to complete. (*Id.*, exhibit H.) Appellant stated in the audit
2 questionnaire, under penalty of perjury, that his father was the person who qualified appellant for HOH
3 filing status and he provided more than half the support for his father. Appellant further stated that his
4 father's gross income in 2006 was less than \$3,300 and that his father lived with him for the entire year.
5 Appellant also stated that, as of December 31, 2006, he was single and his father was married. In
6 addition, appellant stated that his father and his spouse filed a 2006 joint tax return.

7 Based upon appellant's responses, respondent issued an NPA that disallowed the HOH
8 filing status for 2006 and revised appellant's filing status to single, resulting in a proposed additional tax
9 assessment of \$1,188 plus applicable interest. (App. Opening Br., attachments.) Appellant protested the
10 NPA, arguing that he qualified for HOH filing status because he paid more than half of his parents' cost
11 of living. (Resp. Opening Br., exhibit I.) Respondent and appellant exchanged correspondence and had
12 a telephone conversation concerning appellant's filing status. (Resp. Opening Br., p. 3, exhibits J, K, L.)
13 After further consideration, respondent issued an NOA, affirming the NPA. (App. Opening Br.,
14 attachments.) This timely appeal followed.

15 Contentions

16 On appeal, appellant contends that he meets all of the requirements for claiming HOH
17 filing status for tax years 2005 and 2006. Appellant also contends that he provides more than half of the
18 cost of living for his parents who live at his residence. Appellant further contends that he is neither
19 claiming his father as a dependent nor is he claiming an exemption credit for his father. Appellant
20 argues that permitting a taxpayer to claim a parent as a qualifying person for purposes of HOH filing
21 status promotes a public policy of supporting the elderly. Lastly, appellant contends that respondent's
22 Publication 1540 needs to be revised to clarify ambiguities concerning the requirements for HOH filing
23 status.

24 Respondent contends that appellant has failed to establish that he is entitled to HOH
25 filing status in 2005 or 2006. Respondent states that appellant's father and mother filed joint returns and
26 received refunds of their entire tax withholdings for both years. Respondent contends that, in both 2005
27 and 2006, appellant's father's community share of reported gross income exceeded the federal
28 exemption amounts for 2005 and 2006 and thus appellant was not entitled to a dependent exemption

1 credit for his father for either year.

2 With respect to the 2005 year, respondent contends that there is an additional reason that
3 appellant is not entitled to HOH status. Respondent contends that Internal Revenue Code (IRC)
4 section 152(b)(2) disallows a dependent exemption credit for 2005 because, in that year, one of
5 appellant's parents would have owed federal tax if he or she filed a 2005 federal separate return. (See
6 Rev. Rul. 65-34, 1965-1 C.B. 86; Rev. Rul. 54-567, 1954-2 C.B. 108 (cited in Resp. Opening Br.,
7 exhibit L, fn. 23.) Respondent concedes that this basis for disallowing the claim does not apply for
8 2006. However, as noted above, respondent asserts that appellant is still not entitled to HOH filing
9 status for 2006 (or 2005) because appellant's father's community share of reported gross income
10 exceeded the federal exemption amounts for 2006 (and 2005). Assuming that the instructions in
11 Publication 1540 are unclear or misleading, as alleged by appellant, respondent argues that a taxpayer is
12 nonetheless required to comply with the law, notwithstanding the instructions.

13 Applicable Law

14 Revenue and Taxation Code (R&TC) section 17042 sets forth the California
15 requirements for HOH filing status by reference to IRC sections 2(b) and 2(c). IRC section 2(b)(1)(B)
16 provides that a taxpayer seeking to file as a HOH must, as relevant here, maintain for the taxable year a
17 household that is the principal residence of the taxpayer's father or mother and, further, that the taxpayer
18 be entitled to a dependent exemption deduction for his or her father or mother under IRC section 151.
19 (Int.Rev. Code, § 2(b)(1)(B).)

20 Since appellant's father was married as of December 31, 2005, we must look to IRC
21 section 152(b)(2) for guidance regarding married dependents. (Int.Rev. Code, § 151(c).) The joint
22 return test under IRC section 152(b)(2) disallows a dependent exemption if the dependent filed a joint
23 return with his or her spouse. However, a dependent exemption is permitted if the dependent was not
24 required to file a federal tax return, but filed a return only to secure a refund. (Rev. Rul. 65-34, 1965-1
25 C.B. 86; Rev. Rul. 54-567, 1954-2 C.B. 108.) A husband and wife are not required to file a federal
26 return if their combined income is less than the standard deduction for joint filers plus twice the federal
27 exemption amount, but only if, at the close of the taxable year, they had the same household. (Int.Rev.
28 Code, § 6012(a)(1)(A)(iv).)

1 When the dependent at issue is someone other than the taxpayer's child, IRC section
2 152(d)(1)(B) disallows a dependent exemption if the dependent's gross income for the calendar year is
3 greater than the federal exemption amount. The federal exemption amount for 2005 was \$3,200 per
4 person. (See IRS Publication 501 (2005), pp. 1, 9, 14.) The federal exemption amount for 2006 was
5 \$3,300 per person. (See IRS Publication 501 (2006), pp. 1, 8-9, 14.) Gross income is defined as all
6 income from whatever source derived including compensation for services. (Int.Rev. Code, § 61(a)(1).)
7 As a community property state, the community earnings of a person domiciled in California and his or
8 her spouse are combined and each is considered to have earned one-half of the total amount. (See Fam.
9 Code, § 760.) For residents of community property states, the IRS applies this community income rule
10 to a claimed dependent's gross income to determine a taxpayer's eligibility for the dependent
11 exemption. (Rev. Rul. 54-567, 1954-2 CB 108, *supra*.)

12 Appellant has the burden of proving that he is entitled to HOH filing status. (*Appeal of*
13 *Richard Byrd*, 84-SBE-167, Dec. 13, 1984.)³ Respondent's determinations are generally presumed
14 correct, and an appellant bears the burden of proving error. (*Appeal of Sheldon I. and Helen E. Brockett*,
15 86-SBE-109, June 18, 1986; *Todd v. McColgan* (1949) 89 Cal.App.2d 509, 514.) Incomplete and
16 unsupported assertions are insufficient to carry this burden of proof. (*Appeal of Aaron and Eloise*
17 *Magidow*, 82-SBE-274, Nov. 17, 1982.) In the absence of uncontradicted, credible, competent, and
18 relevant evidence showing that respondent's determinations are incorrect, they must be upheld. (*Appeal*
19 *of Oscar D. and Agatha E. Seltzer*, 80-SBE-154, Nov. 18, 1980.)

20 STAFF COMMENTS

21 It appears undisputed that appellant's parents reported gross income of \$16,974 and
22 \$15,428 on their federal returns in 2005 and 2006, respectively. (Resp. Opening Br., exhibits M, N.)
23 Based on the community income rule discussed above, it appears that in 2005, appellant's father is
24 deemed to have earned \$8,487, which is one-half of \$16,974, the total amount earned by both spouses.
25 Similarly, it appears that in 2006, appellant's father is deemed to have earned \$7,714, which is one-half
26 of \$15,428, the total amount earned by both spouses. Because appellant's father's community share of
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28 ³ State Board of Equalization cases (designated "SBE") can generally be viewed on the Board's website (www.boe.ca.gov).

1 gross income in 2005 and 2006 exceed the federal exemption amounts, it appears that appellant is not
2 entitled to a dependent exemption for his father in either year due to the application of IRC
3 section 152(d)(1)(B). It would thus appear that appellant does not qualify to file as a HOH in 2005 or
4 2006.

5 If the Board determines that appellant is not entitled to HOH status because his father's
6 community share of reported gross income exceeded the applicable amount in 2005 and 2006, it does
7 not need to consider respondent's additional argument, with respect to 2005, that IRC section 152(b)(2)
8 disallows a dependent exemption credit for 2005. As noted previously, respondent argues that, for 2005,
9 IRC section 152(b)(2) disallows HOH status because, in that year, one of appellant's parents would have
10 owed federal tax if he or she filed a 2005 federal separate return. (See Rev. Rul. 65-34, 1965-1 C.B. 86;
11 Rev. Rul. 54-567, 1954-2 C.B. 108 (cited in Resp. Opening Br., exhibit L, fn. 23.)

12 With regard to appellant's apparent argument that it would violate a public policy of
13 supporting the elderly not to grant him HOH filing status in 2005 and 2006, this Board has determined
14 that a taxpayer's disagreement with the law should be directed to the Legislature, which is charged with
15 formulating the law, rather than to those who are charged with enforcing the law as it is written.
16 (*Appeal of Thomas C. and Donna G. Albertson*, 84-SBE-002, Jan. 17, 1984; *Appeal of Chester A.*
17 *Rowland*, 75-SBE-071, Oct. 21, 1975; *Appeal of Samuel R. and Eleanor H. Walker*, 73-SBE-020,
18 Mar. 27, 1973.)

19 To the extent that appellant may be arguing that he was misled into improperly claiming
20 HOH filing status because respondent's Publication 1540 was unclear or misleading, this argument
21 sounds in the nature of an equitable estoppel argument. The following four elements must be present in
22 order to apply the doctrine of equitable estoppel: (1) the party to be estopped must be apprised of the
23 facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the
24 estoppel has a right to believe it was so intended; (3) the other party must be ignorant of the true state of
25 facts; and (4) the other party must rely upon the conduct to his injury. (*Strong v. County of Santa Cruz*
26 (1975) 15 Cal. 3d 720, 725.) Equitable estoppel may be applied against the government in order to
27 prevent a grave injustice, but the doctrine is inapplicable if it would result in the nullification of a strong
28 rule of policy adopted for the benefit of the public. (*Ibid.*) The Board has consistently refused to invoke

1 the doctrine of equitable estoppel when taxpayers have understated their tax liability on tax returns in
2 alleged reliance on erroneous information provided by FTB employees. (*Appeal of Richard R. and*
3 *Diane K. Smith*, 91-SBE-005, Oct. 9, 1991; *Appeal of Harry H. and Alice P. Freer*, 84-SBE-127, Sept.
4 12, 1984. In addition, respondent, an administrative agency, does not have the legal authority to
5 interpret a statute in such a way as to change its meaning or effect. (*Appeal of Melvin D. Collamore*, 72-
6 SBE-031, Oct. 24, 1972.) As respondent properly asserts, informal publications, such as Publication
7 1540, do not constitute sources of authoritative law that trigger the doctrine of equitable estoppel due to
8 allegedly misleading statements contained therein. (*Appeal of Priscilla L. Campbell*, 79-SBE-035,
9 February 8, 1979.)

10 Staff notes that appellant asserts that he has already paid the outstanding adjustments and
11 is seeking a refund of the adjustments in this appeal. (App. Opening Br.) Respondent should be
12 prepared to explain the status of appellant's 2005 and 2006 accounts.

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