



Appeal of Dorothy H. Salata

The question presented is whether appellant was entitled to file as a head of household for the year 1973.

Appellant filed her California personal income tax return for the year 1973 as head of household, claiming her daughter as the person qualifying her for that status.

Throughout that year appellant owned two residences and paid all the costs of maintaining them. She resided in one and her daughter and grandchildren resided in the other. The daughter and her children were supported by appellant and qualified as appellant's dependents.

Respondent disallowed head of household filing status to appellant and recomputed her tax liability on the basis of the rates applicable to single persons. This action led to the proposed assessment before us.

When a taxpayer claims head of household status on the ground that she has maintained a home for a daughter, the Revenue and Taxation Code specifies that the taxpayer will qualify as a head of household only if she "[m]aintains as ... [her] home a household which constitutes for such taxable year the principal place of abode, as a member of such household of" the daughter. (Rev. & Tax. Code, § 17042, subd. (a).) (Emphasis added.) The clear indication that the taxpayer and her child must occupy a common household is confirmed by respondent's regulations, which state:

In order for the taxpayer to be considered a head of a household by reason of any individual described in subsection (a) of Section 17042, the household must actually constitute the home of the taxpayer for his taxable year. ... Such home must also constitute the principal place of abode of at least one of the persons specified in such subsection (a). It is not sufficient that the taxpayer maintain the household without being its occupant. ... (Cal. Admin. Code, tit. 18, reg. 17042-17043, subd. (b) (1).) (Emphasis added.)

The federal law and regulation are the same as California's on the point in issue here. (Int. Rev. Code of 1954, §2(b)(1); Treas. Reg., §1.2-2(c)(1).)

Appellant, however, relies upon the case of Smith v. Commissioner, 332 F.2d 671 (9th Cir. 1964) in

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support of her position. In Smith, the taxpayer owned and maintained two homes. One home was in Nevada and the other in California. Her son's principal place of abode was in the California home and, when not traveling, the taxpayer divided her time almost equally between the two homes, living approximately 40 percent of the time in the California home and about 60 percent of the time in the Nevada residence.

In the context of such factual situation, the court, in Smith, construed the applicable statutory provision to mean that the household required to be maintained has to be, in some sense, the taxpayer's actual, though not principal, place of abode. (See W. E. Grace, 51 T.C. 685 (1969), affd. per curiam, 421 F.2d 165 (5th Cir. 1969); Roberts v. United States, 337 F. Supp. 1188 (N.D. Cal. 1971); Doris I. Leeds, 1174,110 P-H Memo. T.C. (1974).) Having found that the taxpayer had two homes and that the California home was an "actual place of abode" of the taxpayer, the Smith court concluded that the taxpayer qualified as a "head of household."

In the present appeal, however, the appellant has not established that the household she maintained for her daughter was one of her actual places of abode. (See Appeal of James A. Hotchkiss, Cal. St. Bd. of Equal., Oct. 18, 1978.)

Consequently, respondent's action in this matter will be sustained.

