



BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
JOSE MALBERTI)

For Appellant: Jose Malberti, in pro. per.

For Respondent: Bruce W. Walker
Chief Counsel

Jon Jensen
Counsel

O P I N I O N

This appeal is made pursuant to section 18594 of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protest of Jose Malberti against proposed assessments of additional personal income tax in the amounts of \$226.54 and \$366.32 for the years 1973 and 1974, respectively. Appellant has paid the proposed assessments. Consequently, pursuant to section 19061.1 of the Revenue and Taxation Code, this appeal is treated as an appeal from the denial of a claim for refund.

Appeal of Jose Malberti

The sole issue for our determination is whether appellant qualified as a head of household for the years 1973 and 1974.

Appellant and his wife were divorced in 1961. The final decree of divorce granted custody of their daughter, Josephine, who was born July 4, 1959, to appellant's wife. Josephine lived with her mother until sometime in the year 1968. In that year appellant and his ex-wife decided to live at the same residence. They established a common residence with their daughter at Lomita, California. However, on July 17, 1972, they again decided to live apart. Appellant's ex-wife and daughter moved to Florida and established permanent residence there.

On June 25, 1973, Josephine moved from Florida and lived with appellant in his Lomita, California, home, where she remained the rest of the year. In July of 1974 she returned to her mother's residence in Florida. At the beginning of 1975 appellant was sent by his employer to Brazil on a work assignment which lasted until the middle of May. Upon his return to the United States he visited his daughter in Florida. On June 26, 1975, at the end of her school year, she returned to California to reside with appellant.

During the entire period in question appellant retained the same principal place of abode. **At the same time** there was no amendment of the custody agreement set forth in the divorce decree. Appellant had no formal arrangement with his ex-wife concerning the physical custody of Josephine during 1973 and 1974. He explains that he merely acquiesced in the various moves at the time they developed. Josephine attended school in both Florida and California.

Appellant filed his California personal income tax returns for the years 1973 and 1974 as head of household, claiming Josephine as the person qualifying him for that status. Respondent determined that appellant did not qualify for such status either in 1973 or 1974 on the ground that his daughter had not occupied appellant's household for the entire year.

Appellant contends that his daughter did not establish a principal place of abode other than his household in 1973 and 1974 because her absences were "temporary".

The term "head of a household" is defined in section 17042 of the Revenue and Taxation Code which provides, in pertinent part:

Appeal of Jose Malberti

[A]n individual shall be considered a head of a household if, and only if, such individual is not married at the close of his taxable year, and ...

(a) maintains as his home a household which constitutes for such taxable year the principal place of abode, as a member of such household, of--

(1) A ... daughter ... of the taxpayer

In prior appeals we have held that the statute, which requires that the taxpayer's home constitute the principal place of abode of the qualifying individual for the "taxable year," means that such person must occupy the household for the taxpayer's entire taxable year. (Appeal of Douglas R. Railey, Cal. St. Bd. of Equal., Aug. 15, 1978; Appeal of Harlan D. Graham, Cal. St. Bd. of Equal., Oct. 18, 1977; Appeal of Willard S. Schwabe, Cal. St. Bd. of Equal., Feb. 19, 1974; see, construing the similar federal statutory provision (Int. Rev. Code of 1954, §2(b)(1)) Stanback, Jr. v. United States, 39 AFTR 2d 77-805 (M.D.'N.C. 1977); see also Cal. Admin. Code, tit. 18, reg. 17042-17043, subd. (b) (1).) In the present appeal appellant's daughter did not physically occupy appellant's household for the entire taxable year either in 1973 or 1974.

Respondent's applicable regulation does provide that the person qualifying a taxpayer as head of household will be considered as occupying the household for the entire taxable year notwithstanding temporary absences from the household due to special circumstances, and that a nonpermanent failure to occupy the common abode by reason of a custody agreement under which a child is absent for less than six months in the taxable year, shall be considered a temporary absence due to special circumstances. (Cal. Admin. Code, tit. 18, reg. 17042-17043, subd. (b) (1); Treas. Reg. § 1.2-2(c)(1).)

It is obvious that Josephine's absence during 1973 was more than a temporary absence from any common abode of her and her father due to special circumstances. Under the facts presented, it is evident that the household of the ex-wife, not that of appellant, constituted Josephine's principal place of abode until she moved in with appellant more than five months after the beginning of 1973. Consequently, his daughter's absence in 1973 was not a temporary absence due to special circumstances within the meaning of the regulation. (Appeal of Harlan D. Graham, supra; Donald G. Teeling, 42 T.C. 671 (1964); see Appeal of Lillian J. Bailey, Cal. St. Bd. of Equal., June 29, 1978; Judith O. Lynch, Cal. St. Bd. of Equal., May 4, 1978.)

Appeal of Jose Malberti

Moreover, appellant has not established that his daughter's absence during 1974 merely reflected a nonpermanent failure by her to occupy appellant's home due to special circumstances. On the contrary, based on the record before us, we conclude that Josephine's departure from appellant's home in 1974 was carried out pursuant to an understanding that Josephine would remain with her mother until circumstances indicated to all concerned that her return to appellant's home would be possible and desirable. Clearly, no showing has been made of any agreement in 1974, tacit or otherwise, whereby the daughter would retain her principal place of abode in appellant's household, with his ex-wife merely acquiring temporary custody. (See Stanback, Jr. v. United States, supra; see also David H. Rotroft, ¶78,046 P-H Memo. T.C. 1978.) Consequently, we conclude that Josephine's departure in July of 1974 indicated an abandonment at that time by her of appellant's home as her principal place of abode. Therefore, appellant did not qualify for head of household status in 1974.

Thus, as to both years, we must sustain respondent's action.

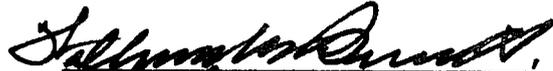
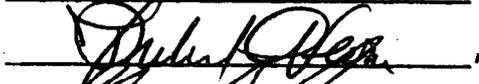
Appeal of Jose Malberti

O R D E R

Pursuant to the views expressed in the opinion of the board on file in this proceeding, and good cause appearing therefor,

IT IS HEREBY ORDERED, & ADJUDGED AND DECREED, pursuant to section 19060 of the Revenue and Taxation Code, that the action of the Franchise Tax Board in denying the claim of Jose Malberti for refund of personal income tax in the amounts of \$226.54 and \$366.32 for the years 1973 and 1974, respectively, be and the same is hereby sustained.

Done at Sacramento, California, this 8th day of February, 1979, by the State Board of Equalization.


_____, Chairman

_____, Member

_____, Member
_____, Member
_____, Member