

1 Saba Shatara
Legal Intern
2 John O. Johnson
Tax Counsel (Acting Supervisor)
3 Board of Equalization, Appeals Division
450 N Street, MIC:85
4 PO Box 942879
Sacramento CA 95814
5 Tel: (916) 323-3140
6 Fax: (916) 324-2618

7 Attorney for the Appeals Division

8 **BOARD OF EQUALIZATION**
9 **STATE OF CALIFORNIA**

10
11 In the Matter of the Appeal of:) **HEARING SUMMARY¹**
12) **PERSONAL INCOME TAX APPEAL**
13 **CHERYL MARTIN**) Case No. 595044
14)

<u>Year</u>	<u>Proposed Assessment</u>
2009	\$1,190

15
16
17
18 Representing the Parties:

19 For Appellant: Palma Mejia, EA
20 For Franchise Tax Board: Claudia L. Cross, Senior Legal Analyst
21

22 QUESTION: Whether appellant has shown that she is entitled to the head of household
23 (“HOH”) filing status for the 2009 tax year.

24 ///

25 ///

26
27 ¹ This matter was originally scheduled for oral hearing at the Board’s April 24-25, 2013 Culver City Board meeting, but was
28 postponed to allow appellant’s representative additional time to prepare for the hearing. This matter was rescheduled for the Board’s July 17-18, 2013 Culver City Board meeting.

1 HEARING SUMMARY

2 Background

3 Appellant filed a timely 2009 California tax return on which she claimed the HOH filing
4 status and one dependent exemption credit for Johnny Floyd (“Johnny”). (Resp. Opening, Br.,
5 Exhibit A.) To verify appellant’s entitlement to the HOH filing status, respondent sent appellant a 2009
6 Head of Household Audit Questionnaire (“Questionnaire”). (See *Id.* at Exhibit B.) Appellant completed
7 the Questionnaire under penalty of perjury and again claimed Johnny as her qualifying person for the
8 HOH filing status. Appellant described Johnny as the “father of [her] grandchildren” and included the
9 following information about him: Johnny was 42 years of age as of December 31, 2009; Johnny’s gross
10 income was less than \$3,650; appellant provided more than one-half of Johnny’s support in 2009; and
11 Johnny lived with appellant for the entire year in 2009. (*Id.*) Appellant also stated that she was not
12 married as of December 31, 2009. (*Id.*)

13 Based on appellant’s Questionnaire responses, respondent issued a Notice of Proposed
14 Assessment (“NPA”) on February 28, 2011, that denied appellant’s claim for the HOH filing status.
15 (*Id.*, Exhibit C.) The NPA stated that a non-relative may not be claimed as a qualifying person, revising
16 appellant’s filing status to single, and proposed additional tax of \$1,190, plus applicable interest for the
17 2009 tax year. (*Id.*) Respondent also allowed appellant one personal exemption credit and one
18 dependent exemption credit. (*Id.*)

19 Appellant protested the NPA, asserting that her tax preparer mistakenly claimed Johnny
20 as appellant’s qualifying person instead of appellant’s granddaughter, Hayley Floyd (“Hayley”).² (*Id.* at
21 Exhibit D.) Appellant attached an amended tax return, claiming Hayley as her qualifying person and
22 two exemption credits. (*Id.*) Respondent’s records also reflect that appellant spoke with respondent’s
23 representatives on October 5, 2011, who explained the requirements for the HOH filing status. (Resp.
24 Opening Br., p. 2.) During that conversation, appellant indicated that appellant’s daughter, Dawn
25 Leclerc (“Dawn”), claimed Hayley on her tax return and was unwilling to amend her return because
26 ///

27 _____
28 ² Respondent notes (Resp. Opening Br., p. 2, fn. 1) that appellant claimed Johnny as her dependent on both her 2009 tax
return and in her Questionnaire, which appellant signed on October 13, 2010.

1 Dawn provided medical coverage, food, and clothes for her daughter Hayley.³ (*Id.*) According to
2 respondent, appellant informed respondent's representative that she qualified for the HOH filing status
3 because she paid all of the household expenses.

4 Respondent's records also reflect a telephone conversation between respondent's
5 representative and appellant's representative on October 11, 2011. (*Id.*) In that conversation,
6 appellant's tax representative argued that both appellant and her daughter were entitled to claim Hayley
7 as their qualifying person for the HOH filing status. (*Id.*) Respondent's representative explained that
8 Hayley could only be claimed on one return, meaning if Dawn claimed Hayley then appellant could not.
9 (*Id.*) Appellant's representative also claimed that an Internal Revenue Service ("IRS") representative
10 informed her that both appellant and Dawn could claim Hayley as a dependent. (*Id.*; see also App.
11 Opening Br.)

12 On October 21, 2011, respondent issued a Notice of Action ("NOA"), affirming the NPA
13 and informing appellant that she did not qualify for the HOH filing status because another individual
14 (appellant's daughter) claimed Hayley as her qualifying individual on her 2009 tax return. (*Id.*, Exhibit
15 E.) Respondent did not accept appellant's amended 2009 tax return, and this timely appeal followed.
16 (*Id.*)

17 Contentions

18 Appellant's Contentions

19 Appellant contends that both appellant (Hayley's grandmother) and her daughter
20 (Hayley's mother) can claim Hayley as their qualifying individual for the HOH filing status. (App.
21 Opening Br.) Appellant contends that her representative spoke with an IRS employee who supplied her
22 with this information, and that respondent is required to grant her the HOH filing status based on the
23 information provided by an IRS employee. (See *Id.*) Appellant argues that her daughter claimed Hayley
24 as a dependent but did not use her as a qualifier for the HOH filing status, thereby allowing appellant to
25 claim Hayley as her qualifying individual for the HOH filing status. (See *Id.*) By reference to IRS
26

27 ³ Respondent included in its exhibits, the tax return (Form 1040) of appellant's daughter. On her return, Dawn listed both
28 Hayley and her sister, Kelly Floyd, as qualifying children for the child tax credit, when listing these individuals as dependents
on page 1 of her return. (Resp. Opening Br., Exhibit H, p. 6.) Appellant's daughter also checked the box to claim the HOH
filing status. (*Id.*)

1 Publication 501, appellant also contends that she can claim the HOH filing status without taking the
2 child care exemption -- suggesting that appellant's daughter may list Hayley as a qualifying child for
3 this purpose. (*Id.*) Furthermore, appellant asserts that she makes more money than her daughter, which
4 allows her to claim the HOH filing status over her daughter, pursuant to the "tiebreaker" rules in IRS
5 Publication 501. (*Id.*)

6 Respondent's Contentions

7 Respondent first contends that, as an unmarried taxpayer, appellant must claim a
8 qualifying individual who bears a specified relationship to appellant to qualify for the HOH filing status.
9 (Resp. Opening Br., p. 3.) Respondent argues that an individual (such as Johnny) who is not related by
10 blood or marriage bears no relationship to the taxpayer that would qualify her for the HOH filing status.
11 (*Id.*, citing *Appeal of Stephen M. Padwa*, 77-SBE-078, May 10, 1997; *Appeal of Priscilla L. Campbell*,
12 79-SBE-03, Feb. 8, 1979.) Therefore, respondent argues, there is no question that Johnny cannot serve
13 as appellant's qualifying individual, as he is not related to appellant.

14 In her amended return, appellant claimed that her tax preparer mistakenly listed Johnny
15 as her qualifying individual and instead claimed Hayley as her qualifying child for the HOH filing
16 status. Respondent now contends that appellant may not use Hayley as her qualifying person because
17 Hayley's mother claimed Hayley as her dependent and received the tax benefit of the dependent
18 exemption credit and the child tax credit for her daughter. (*Id.* at p. 5.) Respondent argues that the
19 Board should apply the first "tiebreaker" rule found in IRS Publication 501's "Special Rule for
20 Qualifying Child of More than One Person" to determine whether appellant can claim Hayley as a
21 qualifying person over Dawn. (*Id.* at p. 4.) The rule states that "if only one of the persons is the child's
22 parent, the child is treated as the qualifying child of the parent." (*Id.* at pp. 4-5, citing IRS Publication
23 501, p. 14.) Respondent argues that appellant could have only claimed Hayley as a qualifying person if
24 neither of Hayley's parents claimed Hayley as a qualifying child for any of the following: an exemption
25 for the child, the child tax credit, the HOH filing status, the credit for child and dependent care expenses,
26 the exclusion from income for dependent care benefits, or the earned income credit. (*Id.* at p. 4.)
27 Respondent notes, however, that appellant's daughter (Dawn) claimed and was allowed the dependent
28 exemption credits and the child tax credits for Hayley and her sister in 2009, thereby barring appellant

1 from claiming Hayley as her own qualifying individual. (*Id.* at p. 5.)

2 In response to appellant's contention that respondent is required to grant her the HOH
3 filing status based on information provided by an IRS employee, respondent asserts that neither the IRS
4 nor respondent is bound by erroneous legal advice given by IRS agents. (*Id.*, citing *Dixon v. United*
5 *States* (1965) 381 U.S. 68, 72-73; *Auto Club of Mich. v. Commissioner* (1957) 353 U.S. 180, 180-84.)
6 Furthermore, respondent notes that, even if appellant claimed the HOH filing status in 2009 and the IRS
7 accepted the return as filed, there was no indication that the IRS scrutinized appellant's entitlement to
8 the HOH filing status, and the IRS does not audit this issue as a general rule. (*Id.*) Respondent argues
9 that, even if the IRS performed a detailed examination of appellant's federal return on the issue of the
10 HOH filing status, neither respondent nor the Board are bound to adopt the conclusion reached by the
11 IRS. (*Id.*, citing *Appeal of David G. Bertrand*, 85-SBE-071, July 30, 1985; *Appeal of Kenneth J.*
12 *Aparicio*, 80-SBE-143, Nov. 18, 1980.)

13 Applicable Law

14 The initial findings of the FTB are presumptively correct if they have rational basis, and
15 the taxpayer bears the burden of proof to substantiate a contrary finding. (*Appeal of Richard Byrd*,
16 84 SBE-167, Dec. 13, 1984; *Todd v. McColgan*, (1949) 89 Cal.App.2d 509, 514.) This presumption
17 cannot be overcome by unsupported statements by the taxpayer. (*Appeal of Robert C., Deceased, and*
18 *Irene Sherwood*, 65-SBE-046, Nov. 30, 1965.) To successfully rebut the FTB's presumption, the
19 taxpayer must present "uncontradicted, credible, competent, and relevant evidence to the issues in
20 dispute." (*Appeal of Oscar D. and Agatha E. Seltzer*, 80-SBE-154, Nov. 18, 1980.) The Board is not
21 required to grant an appellant the HOH filing status solely because the IRS has done so, nor is it bound
22 by the determinations of the IRS. (*Appeal of David G. Bertrand, supra.*) The IRS is also not bound by
23 the erroneous legal advice given by its agents. (*Dixon v. United States, supra; Auto Club of Mich. v.*
24 *Commissioner, supra.*) The Board's obligation is to properly apply the law, even if the IRS is in error.
25 (See *Appeal of Der Wienerschnitzel International, Inc.*, 79-SBE-063, Apr. 10, 1979.)

26 Revenue and Taxation Code ("R&TC") section 17042 sets forth the requirements for the
27 HOH filing status by reference to Internal Revenue Code ("IRC") sections 2(b) and 2(c). To be eligible
28 for the HOH filing status, IRC section 2(b) provides that the taxpayer must be unmarried at the close of

1 the taxable year⁴ and must maintain a household that constitutes the principal place of abode, as a
2 member of such household, of a qualifying person for more than one-half the year. Relevant to this
3 case is IRC section 2(b), which defines a qualifying individual with reference to IRC section 152(c) as
4 one who bears a relationship to the taxpayer. For purposes of that paragraph, an individual bears a
5 relationship to the taxpayer if such an individual is the child of the taxpayer or a descendant of such a
6 child, or a sibling or stepsibling of the taxpayer or descendant of any such relative. (Int.Rev. Code
7 § 152(c)(2).)

8 In certain circumstances a child can be the qualifying child of more than one person;
9 however, only one eligible person can actually claim the child as a qualifying child to take the
10 following tax benefits: (1) an exemption for the child; (2) the child tax credit (see IRC section 24);
11 (3) the HOH filing status; (4) the credit for child and dependent care expenses (see IRC section 21);
12 (5) the exclusion from income for dependent care benefits (see IRC section 129); and (6) the earned
13 income credit. (See IRS Publication 501 (2009), p. 14.) Furthermore, only one such taxpayer can take
14 any of these benefits based on a single qualifying child, i.e., taxpayers who share the same qualifying
15 child for these benefits cannot agree to divide these tax benefits between themselves. (*Id.*) To
16 determine who will claim a child when she is a qualifying child of more than one person, IRS
17 Publication 501 puts forth various “tiebreaker” rules, the first of which states that “if only one of the
18 persons is the child’s parent, the child is treated as the qualifying child of the parent.” (*Id.* at pp. 14-15)
19 Furthermore, “if a parent can claim the child as a qualifying child but no parent does so claim the child,
20 the child is treated as the qualifying child of the person who had the highest adjusted gross income
21 (“AGI”) for the year, but only if that person’s AGI is higher than the highest AGI of any of the child’s
22 parents who can claim the child.” (*Id.*)

23 STAFF COMMENTS

24 For appellant to claim Hayley as her qualifying child for the HOH filing status, appellant
25 must show that Dawn (her daughter and Hayley’s mother) did not claim Hayley as a qualifying child for
26 ///

27 _____
28 ⁴ The marital status of appellant is not at issue; appellant was unmarried at all relevant times.

1 the child tax credit and the dependent exemption credit.⁵ In that case, appellant would also need to
2 demonstrate that her AGI for 2009 was higher than the highest AGI of any of Hayley’s parents who may
3 claim her. (*Id.*) Alternatively, appellant could show that Dawn cannot claim Hayley as a qualifying
4 child,⁶ in which case Hayley would be treated as the qualifying child of the person who had the highest
5 AGI of the year. (*Id.*) To date, it appears that appellant has not submitted evidence to show that
6 respondent is in error and that her daughter (Dawn) did not or could not claim Hayley as her qualifying
7 child. Unless appellant provides such evidence, and consistent with IRS Publication 501’s “tiebreaker”
8 rules, it appears that appellant is not entitled to the HOH filing status for 2009.

9 At the hearing, appellant should be prepared to explain and provide evidence to
10 demonstrate that Dawn could not or did not claim Hayley as her qualifying person for the child tax
11 credit and the dependent exemption credit. Pursuant to California Code of Regulations, title 18, section
12 5523.6, if either party has any additional evidence to present, it should be provided to the Board’s Board
13 Proceedings Division at least 14 days prior to the oral hearing.⁷

14 ///

15 ///

16 ///

17 MartinC_ss
18
19
20
21

22 ⁵ Appellant cites to IRS Publication 501 (2009), p. 15, Example 1, for the proposition that both she and her daughter could
23 claim Hayley as their qualifying person. However, this example states that the grandmother of a child can claim her
24 granddaughter as a qualifying person “if [the parent does] not claim [the child] for any of those tax benefits,” i.e., the
25 exemption of the child credit, the child tax credit, the HOH filing status, the credit for child and dependent care expenses, the
26 exclusion from income for dependent care benefits, or the earned income credit. The more relevant example provided by IRS
27 Publication 501 may be example 3 in the same section, entitled “two persons claim the same child.” In that example, both a
28 parent and a grandparent claim a child as their qualifying child. In that case, the child’s parent was the only one allowed to
claim the child as a qualifying child. (IRS Publication 501, p. 15, Example 3.)

⁶ In her appeal, appellant argues that both she and her daughter may claim Hayley as a qualifying child, not that appellant’s
daughter is unable to claim Hayley.

⁷ Evidence exhibits should be sent to: Claudia Madrigal, Appeals Analyst, Board Proceedings Division, State Board of
Equalization, P.O. Box 942879 MIC:80, Sacramento, California, 94279-0080.