

**OFFICE OF TAX APPEALS
STATE OF CALIFORNIA**

In the Matter of the Appeal of:) OTA Case No. 18010828
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SHANE AUGUST) Date Issued: July 9, 2018
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_____)

OPINION

Representing the Parties:

For Appellant: Shane August

For FTB: Anne Mazur, Specialist

For Office of Tax Appeals: Neha Garner, Tax Counsel III

M. Geary, Administrative Law Judge: Pursuant to California Revenue and Taxation Code section 19324,¹ Shane August (appellant) appeals an action by the Franchise Tax Board (FTB) in denying appellant’s claims for refund for the 2006, 2007, and 2009 tax years.

Appellant waived his right to an oral hearing. Therefore, we decide the matter based on the written record.

ISSUE

Whether appellant filed timely claims for refund for the 2006, 2007, and 2009 tax years.

FACTUAL FINDINGS

1. Appellant did not timely file his 2006 return. FTB received information indicating that appellant received income totaling \$26,259.32 in 2006, primarily from a Charles Schwab securities account.² Income in that amount would have required him to file a California

¹ Unless otherwise indicated, all statutory references are to sections of the California Revenue and Taxation Code.

² FTB’s annual Integrated Non-Filer Compliance Program annually matches income records obtained from various reporting sources against filed tax returns to identify individuals who may not have fulfilled their legal requirement to file a California income tax return. As part of the program, FTB obtains, among other types of information, wage information reported to the Employment Development Department (EDD), mortgage interest

income tax return for that year. On January 7, 2008, FTB sent appellant a Demand for Tax Return stating that it had no record of receiving appellant's 2006 return. The Demand instructed appellant to explain why he was not required to file a return, produce a copy of a previously filed return, or file a return by February 6, 2008.

2. Appellant failed to timely respond to FTB's Demand for Tax Return. Accordingly, FTB mailed a Notice of Proposed Assessment (NPA) for 2006 to appellant on March 17, 2008. The NPA reflected estimated taxable income of \$22,849.32, total tax of \$441.00, withholding credits of \$1.00, a late-filing penalty of \$110.00, a demand penalty of \$110.25, a filing enforcement fee of \$122.00, and applicable interest, for a total amount due of \$824.13. The NPA further indicated payment was due by May 16, 2008, unless appellant filed a timely protest. Appellant did not file a protest or otherwise respond to the NPA, which became a final liability on May 17, 2008.
3. On July 30, 2008, FTB mailed to appellant an Income Tax Due Notice, which again informed appellant regarding the amount due for 2006. This notice advised appellant that if he failed to pay the balance due by August 14, 2008, FTB could impose collection fees, file state tax liens, and take other collection action. The notice also informed appellant that (1) if he believed he did not owe the amount asserted, he should contact FTB to discuss the matter, and (2) he might be eligible for an installment payment agreement that would allow him to make periodic payments to satisfy the liability. Appellant did not respond to this notice.
4. On September 10, 2008, FTB mailed to appellant a Final Notice, which again advised appellant of the amount due (\$850.64 due to additional interest) and informed him that collection action could take place without any additional notice to appellant if he failed to pay the balance due by September 25, 2008. Appellant did not respond to the Final Notice.
5. On October 15, 2008, FTB imposed a \$187 collection fee and continued collection action through which FTB received payments totaling \$977.98 from May 15, 2010, to August 15, 2013.

information reported to the Internal Revenue Service (IRS) on Forms 1098, and payment information reported to the IRS on Forms 1099.

6. Appellant filed a 2006 return with FTB on or about September 1, 2015. Appellant reported no taxable income and no tax due. FTB processed appellant's return and revised his account accordingly by canceling the tax liability as listed on the NPA, the late-filing and demand penalties, the filing enforcement fee, and applicable interest, which resulted in an overpayment of \$790.98 (the total amount paid, \$977.98, less the collection fee of \$187.00).
7. Appellant also did not timely file a 2007 return. FTB received information (see footnote 2) indicating that appellant made mortgage interest payments during 2007, which suggested that appellant had sufficient income to require him to file a California income tax return for that year.³ On January 28, 2009, FTB sent appellant a Demand for Tax Return for 2007, requesting that appellant explain why he was not required to file a return for that year, produce a copy of a previously filed return, or file a return by March 4, 2009. Appellant did not respond to the demand.
8. On April 7, 2009, FTB sent appellant an NPA, which reflected estimated taxable income of \$59,127,⁴ total tax of \$3,208, a late-filing penalty of \$802, a demand penalty of \$802, a filing enforcement fee of \$119, and applicable interest. The NPA indicated the proposed assessment would become due and payable on June 8, 2009, unless a protest was filed with FTB by that date. The NPA also informed appellant that (1) he was required to file a return, even if he paid the amount assessed, and (2) if he believed the proposed assessment was incorrect, he should file a timely protest.
9. Appellant did not pay the assessment or protest the NPA, and the assessment became a final liability. FTB's collection activities included recording liens against appellant's property in Ventura and Los Angeles counties. FTB informed appellant of those liens by Tax Lien Notice dated December 11, 2009.
10. Appellant filed a 2007 return with FTB on or about September 1, 2015. In it, appellant reported no taxable income and no tax due. FTB processed appellant's return and revised his account accordingly by cancelling the NPA tax liability, the late-filing and demand

³ For the 2007 tax year, single individuals under 65 with no dependents realizing gross income of at least \$14,138, or adjusted gross income of at least \$11,310 were required to file a California income return.

⁴ FTB estimated appellant's income by multiplying the amount of mortgage interest appellant paid by four, which was the income to mortgage payment ratio used by the lending industry at that time. FTB also allowed the total amount of mortgage interest appellant paid in 2007 as an itemized deduction.

penalties, the filing enforcement fee, and applicable interest. In order to release the liens, FTB imposed lien fees of \$28 (lien release fees), which appellant paid on November 24, 2015, resulting in an account balance of zero.

11. Appellant failed to timely file a 2009 return. FTB received information (see footnote 2) that appellant received miscellaneous and stock sale income reported on Forms 1099 totaling \$16,445.21 in 2009. This income was sufficient to prompt a return filing requirement. On April 25, 2012, FTB issued a Demand for Tax Return for 2009 to appellant, requesting that appellant explain why he was not required to file a return for that year, produce a copy of a previously filed return, or file a return by May 30, 2012. Appellant did not respond to the demand.
12. FTB sent appellant an NPA for 2009 dated June 25, 2012. The NPA reflected estimated taxable income of \$12,808.21,⁵ total tax of \$119.00, a late-filing penalty of \$100.00, a demand penalty of \$29.75, a filing enforcement fee of \$88.00, and applicable interest. The NPA indicated that the amount shown on the NPA would become due and payable on August 24, 2012, unless appellant submitted a 2009 return or a protest by that date.
13. Appellant did not pay the amount due, file his return, or protest the NPA by the due date, and the proposed assessment for 2009 became a final liability on August 25, 2012. FTB collected \$37 from appellant on January 17, 2014, and applied that amount to his 2009 liability.
14. Appellant filed a 2009 return with FTB on or about October 28, 2015. In it, he reported no taxable income and no tax due. FTB processed appellant's return and revised his account accordingly by cancelling the NPA tax liability, the late-filing and demand penalties, the filing enforcement fee, and applicable interest, resulting in an overpayment of the \$37 FTB had collected from appellant for 2009.
15. By letter dated September 11, 2016, appellant requested a refund of \$944.99 that FTB had collected by levy from his account with the American Society of Composers, Authors and Publishers. Although the letter refers to 2005, 2007, and 2008, FTB considered appellant's letter to constitute a claim for refund for the 2006, 2007, and 2009 tax years, as shown by FTB records.

⁵This amount includes estimated income of \$16,445.21 less \$3,637.00, which is the standard deduction for a single individual.

16. By letter dated December 14, 2016, FTB denied appellant's claim for refund because appellant failed to file his claim within the applicable statute of limitations.⁶
17. This timely appeal followed.

DISCUSSION

FTB's determination is presumed correct and a taxpayer has the burden of proving it is wrong. (*Todd v. McColgan* (1949) 89 Cal.App.2d 509; *Appeal of Michael E Myers*, 2001-SBE-001, May 31, 2001.)⁷ Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof. (*Appeal of Aaron and Eloise Magidow*, 82-SBE-274, Nov. 17, 1982.)

The general statute of limitations for filing a refund claim is set forth in section 19306. Under that section, the last day to file a claim for refund is the later of: (1) four years from the date the return was filed, if filed by the extended due date; (2) four years from the due date of the return, without regard to extensions; or (3) one year from the date of the overpayment.

It is settled law that "the statute of limitations on claims for refund is explicit and must be strictly construed, without exception." (*Appeal of James C. and Florence Meek*, 2006-SBE-001, March 28, 2006 [citing *Appeal of Michael and Antha L. Avril*, 78-SBE-072, Aug. 15, 1978, and *Appeal of Earl and Marion Matthiessen*, 85-SBE-077, July 30, 1985].) Therefore, "a taxpayer's failure to file a claim for refund, for whatever reason, within the statutory period bars him from doing so at a later date." (*Appeal of Earl and Marion Matthiessen, supra.*) Generally, neither ill health of a taxpayer nor other unfortunate circumstance will extend the statute of limitations for filing a claim for refund. (*Appeal of Earl W. and Patricia A. McFeaters*, 94-SBE-012, Nov. 30, 1994; but see § 19316.) Federal courts have stated that fixed deadlines may appear harsh because such deadlines can be missed, but the resulting occasional harshness is redeemed by the clarity of the legal obligation imparted.

"Deadlines are inherently arbitrary; fixed dates, however, are often essential to accomplish necessary results. The Government has millions of taxpayers to

⁶ FTB concluded that some of the payments were not subject to refund for other reasons as well. Because the claim was filed late, we need not address those reasons.

⁷ Pursuant to the Office of Tax Appeals Rules for Tax Appeals, California Code of Regulations, tit. 18, § 30501(d)(3), precedential opinions of the State Board of Equalization (BOE) that were adopted prior to January 1, 2018, may be cited as precedential authority to the Office of Tax Appeals unless a panel removes, in whole or in part, the precedential status of the opinion. BOE's precedential opinions are available for viewing on the BOE's website: <http://www.boe.ca.gov/legal/legalopcont.htm#boeopinion>.

monitor, and our system of self-assessment in the initial calculation of a tax simply cannot work on any basis other than one of strict filing standards.” *United States v. Boyle*, 469 U.S. 241, 249, 105 S.Ct. 687, 691, 83 L.Ed.2d 622 (1985) (upholding penalty for late filing of estate tax return). There is no general judicial power to relieve from deadlines fixed by legislatures or, as here, by agencies exercising legislative-type powers. “To extend the time [for filing an amended return] beyond the limits prescribed in the Act is a legislative not a judicial function.” *J.E. Riley Investment Co. v. Commissioner*, 311 U.S. 55, 59, 61 S.Ct. 95, 97, 85 L.Ed. 36 (1940).

(*Prussner v. United States* (7th Cir. 1990) 896 F.2d 218, 222-223.)

Appellant contends that he repeatedly contacted FTB asking for more time to file his returns, but that FTB pursued its involuntary collection actions and took his money without any justification. Although it is true that FTB overestimated appellant’s income, the estimate was required because appellant failed to timely file his returns. Furthermore, while FTB’s estimates may have overstated appellant’s taxes due, appellant had ample time to file timely claims for refund to recover amounts overpaid. To be timely, the law required appellant to file his refund claim or claims within the later of four years from the return due dates (April 15 following the close of each taxable year) or one year of the dates of the overpayments. Appellant’s 2006, 2007, and 2009 returns were due on April 15, 2007, 2008, and 2010, respectively. Appellant filed his letter claim for refund on September 11, 2016, which was more than two years after the four-year statute of limitations had expired for all the years at issue. Even if we treat appellant’s tax returns as claims for refund, the claims would still be untimely under the four-year statute of limitations, since appellant’s returns were all filed more than one year after that limitations period had expired. Finally, regarding the one-year statute of limitations, appellant made the latest payment for 2006 on August 15, 2013, and he made the only payment for 2009 on January 17, 2014, more than one year before he filed his returns for those years and more than two years before he filed his claim for refund.⁸ Therefore, appellant’s claims also were untimely under the one-year statute of limitations.

We find that appellant did not file timely claims for refund for the 2006, 2007, and 2009 tax years. Accordingly, we conclude that FTB properly denied appellant’s claim for refund.

⁸There was no overpayment for 2007.

HOLDING

Appellant's claim for refund for the 2006, 2007, and 2009 tax years was untimely and is barred by the statute of limitations.

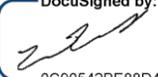
DISPOSITION

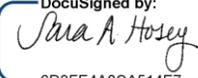
FTB's action in denying appellant's claim for refund is sustained in full.

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Michael F. Geary
Administrative Law Judge

We concur:

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Tommy Leung
Administrative Law Judge

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Sara A. Hosey
Administrative Law Judge