

**OFFICE OF TAX APPEALS  
STATE OF CALIFORNIA**

In the Matter of the Appeal of:

**ESTATE OF BARBARA D. GILLESPIE  
(dec'd)**

) OTA Case No. 18011018  
)  
) Date Issued: June 13, 2018  
)  
)  
)

**OPINION**

Representing the Parties:

For Appellant:

Mary Gillespie, Administrator for the Estate  
of Barbara D. Gillespie

For Respondent:

Brad Coutinho, Tax Counsel III

For Office of Tax Appeals:

Neha Garner, Tax Counsel III

ROBINSON, Administrative Law Judge: Pursuant to California Revenue and Taxation Code section 19324<sup>1</sup> Mary Gillespie, administrator for the estate of Barbara D. Gillespie (dec'd), (appellant) appeals an action by the Franchise Tax Board (FTB or respondent) denying appellant's claim for refund of \$21,751.16 for the tax years 2005 and 2006.

Administrative Law Judge Neil Robinson, Douglas Bramhall, and Sara Hosey heard this matter in Van Nuys, California on March 28, 2018. The record was closed, and the case was submitted for decision that same date.

**ISSUE**

Whether appellant's claim for refund is barred by the statute of limitations.

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

## FACTUAL FINDINGS

1. Barbara D. Gillespie did not work as a licensed attorney in 2005 and 2006 but instead collected government disability payments as a means of her support.<sup>2</sup>
2. Barbara D. Gillespie passed away on June 11, 2006.
3. Diane Williams Starbuck was appointed administrator of the Estate of Barbara D. Gillespie on November 2, 2006.
4. Mary Gillespie was appointed administrator of the Estate of Barbara D. Gillespie on November 13, 2012.
5. Neither Barbara D. Gillespie nor the administrators of her estate have filed California income tax returns for 2005 and 2006.
6. Respondent determined that Barbara D. Gillespie possessed an active professional license (law license) for 2005 and 2006.
7. Respondent determined that Barbara D. Gillespie earned interest income in 2005 from USAA Federal Savings Bank.
8. On February 5, 2007, respondent sent to Barbara D. Gillespie at her address of record located in Westminster, California, a demand for tax return for tax year 2005. Respondent received no response from the estate of Barbara D. Gillespie. Respondent issued a Notice of Proposed Assessment (NPA) on April 17, 2007 proposing tax in the amount of \$6,066,<sup>3</sup> a late filing penalty of \$1,516.50, a demand penalty of \$1,516.50 and a filing enforcement fee of \$125. This NPA became final without protest on July 9, 2007.
9. On January 14, 2008, respondent sent to Barbara D. Gillespie at her address of record located in Westminster, California, a demand for tax return for tax year 2006. Respondent received no response from the estate of Barbara D. Gillespie. Respondent

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<sup>2</sup> There is contradictory evidence in this record on whether decedent was collecting state disability or Social Security disability benefits during relevant periods. Without information in this record to reconcile this difference, we instead refer to the benefits she was receiving as government disability benefits or payments. There is also the possibility that Barbara D. Gillespie was receiving Social Security retirement benefits but this record is unclear.

<sup>3</sup> The proposed tax was estimated using the average income reported by individuals in the decedent's industry (members of the California Bar Association) of \$90,945 and interest income from USAA Federal Savings Bank of \$339 that was reported as received by the decedent on an IRA Form 1099.

issued a NPA on April 1, 2008 proposing tax in the amount of \$6,104,<sup>4</sup> a late filing penalty of \$1,526, a demand penalty of \$1,526, and a filing enforcement fee of \$122. The NPA became final without protest on June 23, 2008.

10. Respondent filed a creditor's claim for \$21,656.20,<sup>5</sup> for the 2005 and 2006 tax years in an open probate case in the Orange County Superior Court in the estate of Barbara D. Gillespie.
11. On December 15, 2013, respondent received appellant's payment in the amount of \$21,656.20. It applied \$11,237.29 as a full payment of the 2005 liabilities and \$10,418.91 to appellant's 2006 liabilities. On February 14, 2014 respondent discovered an overpayment of \$23.06 on appellant's 2005 account. This overpayment was applied to appellant's 2006 liabilities. Following this credit transfer, there was still an underpayment of \$71.78 for 2006. Respondent wrote off this balance at which time respondent deemed the liabilities for 2005 and 2006 paid in full.
12. On August 18, 2015, respondent received faxed correspondence from the estate's CPA stating that respondent overstated Barbara D. Gillespie's income for 2005 and 2006 because her only income was derived from Social Security (or another government benefit) and a small amount of interest income. As respondent acknowledges, this correspondence appears to be the earliest possible communication that could be viewed as a claim for refund.
13. Respondent received a letter dated November 19, 2015, from appellant's counsel in which appellant claimed a refund of the taxes and penalties for the 2005 and 2006 tax years based on appellant's assertion that the decedent was ill and had not worked during those years. On or about April 15, 2016, respondent received a completed Form 2917, "Reasonable Cause – Individual and Fiduciary Claim for Refund" from appellant claiming a refund, as well as an April 21, 2016 letter from appellant's counsel, attorney

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<sup>4</sup> The proposed tax was estimated using the average income reported by individuals in the decedent's industry (members of the California Bar Association) of \$92,864.

<sup>5</sup> Respondent noted that its creditor's claim did not include the demand penalties and filing enforcement fees referenced on the 2005 and 2006 NPAs because both penalties and fees were abated before the creditor's claim was filed.

Hayward, referencing and incorporating his letter of November 19, 2015, with enclosures.

14. No tax returns were filed for 2005 and 2006 for Barbara D. Gillespie.
15. After reviewing the documentation, respondent issued a Notice of Action dated July 22, 2016, denying appellant's claim for refund because the statute of limitations had expired.
16. This timely appeal followed.

### DISCUSSION

In an action for refund, the taxpayer has the burden of proof. (*Dicon Fiberoptics, Inc. v. FTB* (2012) 53 Cal.4th 1227, 1235; *Apple, Inc. v. FTB* (2011) 199 Cal.App.4th 1, 22; *Appeal of Edward Durley*, 82-SBE-154, July 26, 1982.) California Code of Regulations, title 18, section 30705, subdivision (c) states that unless there is an exception provided by law, "the burden of proof requires proof by a preponderance of the evidence."<sup>6</sup>

Before there can be an analysis of whether any taxes, penalties or interest are owed for 2005 and 2006 there must first be a determination whether appellant's claim for refund is timely. A taxpayer's failure to file a claim for refund within the statute of limitations, for any reason, bars her from later claiming a refund. (*Appeal of Earl and Marion Matthiessen*, 85-SBE-077, July 30, 1985.) Neither ill health of a taxpayer nor any other unfortunate circumstance can extend the statute of limitations for filing a claim for refund. (*Appeal of Earl and Marion Matthiessen, supra.*)

After discovering that Barbara D. Gillespie had not filed tax returns for 2005 and 2006, that she maintained a professional license to practice law,<sup>7</sup> and in 2005 had interest income, respondent sent to appellant a demand for tax returns for both 2005 and 2006.<sup>8</sup> Respondent sent

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<sup>6</sup> A preponderance of evidence means that the taxpayer must establish by documentation or other evidence that the circumstances it asserts are more likely than not to be correct. (*Concrete Pipe and Products of California, Inc., v. Construction Laborers Pension Trust for Southern California* (1993) 508 U.S. 602, 622.)

<sup>7</sup> Respondent obtained information from the California State Bar Association that Barbara D. Gillespie possessed a professional license. There is no evidence in this record proving that Barbara D. Gillespie worked as an attorney or earned professional fees during 2005 until her unfortunate demise on June 11, 2006. In attorney Hayward's correspondence dated November 19, 2015, he verifies that Barbara D. Gillespie utilized this address.

<sup>8</sup> Respondent sent a demand for tax return for 2005 to Barbara D. Gillespie on February 5, 2007 giving Ms. Gillespie until March 7, 2007 to file a tax return. Respondent sent another demand for tax return for 2006 to Barbara D. Gillespie on January 14, 2008 for 2006 to Ms. Gillespie giving her until February 13, 2008 to file a return. Neither Ms. Gillespie nor her successors in interest filed returns for either 2005 or 2006.

the demand for tax returns to her address of record, in Westminster, California.<sup>9</sup> The estate of Barbara D. Gillespie's first administrator did not respond to the demands for tax returns, file returns for either 2005 or 2006, or demonstrate why returns were not required.<sup>10</sup> When a taxpayer does not file a return, respondent is empowered to assess the amount of tax, interest, and penalties due based on "any available information." (Section 19087.)<sup>11</sup> Respondent issued a NPA on April 17, 2007 for tax year 2005 proposing to assess tax on income in the amount of \$91,284 based "on the average income amount reported by individuals" in the practice of law. (Respondent's Exhibit B.) Similarly, respondent issued another NPA on April 1, 2008 for tax year 2006 proposing to assess tax on income in the amount of \$92,864 utilizing the same methodology in estimating income that was used for tax year 2005.

The liabilities in the NPAs for 2005 and 2006 became final without protest on July 9, 2007 and June 23, 2008 respectively. By late 2013, respondent learned from appellant's representative that there was an open probate case for the estate of Barbara D. Gillespie. Respondent filed a creditor's claim in the estate of Barbara D. Gillespie's probate case on November 7, 2013 for liabilities related to the 2005 and 2006 tax years. On December 15, 2013 respondent received from appellant \$21,656.20. This payment satisfied the tax, penalty and interest liabilities for both 2005 and 2006.<sup>12</sup>

The general statute of limitations for filing a refund claim is set forth in section 19306. Under that statute, the last day to file a claim for refund is the later of, (1) four years from the

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<sup>9</sup> Section 18416 requires respondent to send notices to appellant's last known address. (Section 18416(b).)

<sup>10</sup> After Mary Gillespie was appointed administrator of the estate of Barbara D. Gillespie, Patricia G. Scurich, CPA on August 18, 2015 faxed correspondence to respondent pointing out that because Barbara D. Gillespie was not working in 2005 or 2006 and had only social security and a small amount of interest income, she was not obligated to file returns for either year. This document was considered by respondent to be a claim for refund. (Respondent's Exhibit I.)

<sup>11</sup> An example of respondent estimating income is the *Appeal of Michael E. Myers*, 2001-SBE-001, May 30, 2001, where Mr. Myers had not filed returns or explained why he did not need to after FTB's demand to provide returns. Mr. Myers' income was estimated based upon Mr. Myers being a licensed dentist in California, information reported to the Employment Development Department, a miscellaneous insurance payment and interest income.

<sup>12</sup> Respondent applied \$11,237.29 to Ms. Gillespie's 2005-tax year account, resulting in full payment on that date for the 2005 tax year liability. On December 15, 2013, respondent applied \$10,418.91 to Ms. Gillespie's 2006 tax year account. On February 14, 2014, respondent determined that there was an overpayment of \$23.06 on Ms. Gillespie's 2005 account and transferred that overpayment to the 2006 tax year account. Following that credit transfer, the 2006 reflected a \$71.78 balance owed which respondent wrote off pursuant to Government Code section 13943.1.

date the return is filed, if filed within 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.

Because Barbara D. Gillespie or the administrators of her estate filed no returns, the first analysis is inapplicable. To assess the timeliness of appellant's claim for refund, we must first determine whether appellant filed the claims for refund within four years of the due date of the return for both 2005 and 2006. Barbara D. Gillespie's 2005 return was due on April 15, 2006 making the claim for refund due on or before April 15, 2010 to be timely. The 2006 return was due on April 15, 2007. Therefore, a claim for refund for 2006 would be timely if filed on or before April 15, 2011. Appellant faxed its claim for refund for both tax years to respondent on August 18, 2015, more than four years after the expiration of the statute of limitations for both 2005 and 2006 tax returns. Thus, appellant did not file the claim for refund timely to satisfy the four-year statute of limitations for both 2005 and 2006.

The final option for filing a timely claim for refund is the one-year statute of limitations which requires appellant to file a claim for refund within one year from the date of the overpayment. Appellant paid the assessed liabilities for both tax years on December 15, 2013.<sup>13</sup> For a claim for refund to be timely, appellant would need to file the claim for refund on or before December 15, 2014; however, as noted above, the refund claim was not filed until August 18, 2015. Because appellant filed the claim for refund more than one year from the date appellant paid the liabilities, the refund claim is late and not compliant with the one-year statute of limitations.

#### FINANCIAL DISABILITY

Pursuant to section 19316, the time for filing a claim for refund may be extended if a taxpayer is "financially disabled," as defined by that provision. The running of the period for filing a claim for refund pursuant to section 19306 is suspended if (1) "an individual taxpayer is unable to manage his or her financial affairs by reason of a medically determinable physical or mental impairment that is either deemed to be a terminal impairment or is expected to last for a continuous period of not less than 12 months, and (2) there is no spouse or other legally authorized person to act on the taxpayer's behalf in financial matters.

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<sup>13</sup> December 15, 2013 is the date that respondent indicates the payment was received, however, there is inconsistent information. According to attorney Hayward in his correspondence dated November 19, 2015, appellant sent this payment to respondent on December 19, 2013. We do not have evidence to reconcile this discrepancy, so we will utilize the earlier date for this analysis.

When an appellant alleges financial disability to suspend and thus extend the limitations period to file a timely claim for refund, a physician's affidavit must be provided that identifies the disability period when appellant was unable to manage her financial affairs. (*Appeal of James C. and Florence Meek*, 2006-SBE-001, March 28, 2006.) Disability that qualifies for suspending the statute of limitations is distinguishable from the definition of disability used to determine whether someone is eligible for Social Security disability.<sup>14</sup> Disability for Social Security purposes means a person is unable to engage in gainful employment which is distinguishable from an inability to manage financial affairs. (*Appeal of James C. and Florence Meek, supra.*) To suspend the statute of limitations, the period of financial disability must occur during the limitations period. (*Ibid.*)

It is uncontested that, during 2005 and 2006 and until her unfortunate demise on June 11, 2006, Barbara D. Gillespie was very ill and was not working as an attorney. Attorney Hayward stated in his November 19, 2015 correspondence that starting in early 2006 Barbara D. Gillespie "developed a persistent cough that occasionally contained bloody sputum and was then diagnosed with lung cancer." In her October 13, 2016 appeal, Mary Gillespie states that Barbara D. Gillespie was too ill to work in both 2005 until her death in June 2006. In her testimony at hearing, Mary Gillespie stated that Barbara D. Gillespie was receiving state disability benefits in 2005 and 2006 and would not have been eligible for those benefits if she had been working in her profession.

However, we do not have evidence showing whether, or how long, Barbara D. Gillespie was unable to manage her financial affairs prior to her death in 2006. She was diagnosed with lung cancer in the early part of 2006; however, it is unknown when that condition was deemed terminal or when the diagnosis was made. Furthermore, there is no evidence in this record that, while she was ill, Barbara D. Gillespie did not have a legally authorized person to handle her financial affairs. Without evidence showing when Barbara D. Gillespie was unable to handle her financial affairs during her illness, such as a doctor's affidavit, it is not possible to define the period when the statute of limitations for filing a claim for refund must be suspended. The fact that Barbara D. Gillespie was receiving government disability in the years preceding her death is

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<sup>14</sup>To become eligible to receive California State Disability benefits a claimant is required to show, among other criteria, that he or she is disabled. California Unemployment Insurance Code §2626 defines "disability" as a "physical or mental condition" causing a claimant an inability to "perform his or her regular or customary work." This standard is also distinguishable from the definition of disability for purposes of a claim of financial disability.

also not determinative because the definition of disability for purposes of receiving disability benefits differs from the test for tolling a statute of limitations for financial disability. Receipt of disability benefits depends on a person's employability whereas financial disability requires proof that a taxpayer is unable to manage financial affairs.

Moreover, even if there was sufficient evidence to find that Barbara D. Gillespie was financially disabled during all of 2005 and until her death in 2006, the refund claim would still be untimely. The four-year statute of limitation period for the 2005 tax year began running on April 15, 2006. Even if the running of the statute of limitations was suspended for the entire 202-day period between April 15, 2006 (the date that the 2005 return was due and the date the four-year statute of limitations began running), and the time the first administrator of her estate was appointed, November 2, 2006,<sup>15</sup> appellant's claim for refund would remain untimely. If the statute of limitations was suspended during this entire 202-day period, the statute of limitations would have expired on November 2, 2010, and the claim for refund was not filed until August 18, 2015, which is years past the last possible date on which the four-year statute of limitations could have expired. Thus, even if there were an evidentiary basis for finding that Barbara D. Gillespie was financially disabled during her sickness, the statute of limitations would still have expired years past the date of appellant's refund claim.

For tax year 2006, the four-year limitations period for filing a timely claim for refund began on April 15, 2007, the date the 2006 return was due. Barbara D. Gillespie's unfortunate demise occurred in June of 2006, many months before the statute of limitations began to run for filing a claim for refund for the 2006 tax year. Thus, there can be no concurrence of financial disability with the limitations period and, therefore, no suspension of the limitations period for filing a claim for refund can be considered for the 2006 tax year.

The one year statute of limitations for filing a claim for refund begins to run on the date of the alleged overpayment. (§ 19603). As noted above, appellant paid the assessed liabilities arising from the 2005 and 2006 tax years on December 15, 2013. There can be no periods of financial disability that coincide with a limitations period beginning in December of 2013 because Barbara D. Gillespie passed away in June of 2006. Thus, even if there were proof of financial disability as defined by section 19316 and the appeal of *James C. and Florence Meek*,

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<sup>15</sup> The appointment of an administrator for the estate of Mary D. Gillespie on November 2, 2016, is the point in time that appellant's legal interests were clearly represented and no further tolling of the statute of limitations would be justified if financial tolling were applicable.



*supra*, suspending the one year statute of limitations for filing a claim for refund could not be legally supported.

### EQUITABLE TOLLING

Appellant has long claimed that it is erroneous for respondent to tax Barbara D. Gillespie based on an estimate of her income as an attorney in 2005 and 2006 when during that time Ms. Gillespie was ill, disabled and unable to work until her unfortunate death. To address this issue, we turn to *United States v. Brockamp*, (1997) 519 U.S. 347 where the United States Supreme Court addressed whether equitable considerations could provide an exception to the statute of limitations for filing a refund claim. In *Brockamp*, an elderly taxpayer named Stanley McGill<sup>16</sup> initially paid the Internal Revenue Service (IRS) several thousand dollars that he did not owe. The administrator of the taxpayer's estate, Marion Brockamp, filed a claim for refund several years after the statutory deadline to do so had expired, and later requested that the court read into the limitations statute a provision that would suspend, and thus extend, the period to file a refund claim for reasons of equity or fairness. Ms. Brockamp argued that Mr. McGill mistakenly paid tax that was not owed due to his mental incapacity.

The court held that absent congressional authorization, courts do not have general authority to abrogate the statute of limitations for a refund claim based on equitable arguments. (*United States v. Brockamp, supra.*) Allowing courts to apply equity to allow taxpayers the opportunity to file refund claims late would adversely impact a very large tax administration system that processes millions of refund claims. "The nature and potential magnitude of the administrative problem suggest that Congress decided to pay the price of occasional unfairness in individual cases (penalizing a taxpayer whose claim is unavoidably delayed) in order to maintain a more workable tax enforcement system." (*United States v. Brockamp, supra.*)

Applying similar reasoning, the United States Supreme Court in *United States v. Dalm*, (1990) 494 U.S. 596 concluded that the untimely filing of a claim bars a suit for refund regardless of whether the tax is alleged to have been erroneously, illegally, or wrongfully collected. Courts have also recognized the arbitrary and harsh nature of fixed deadlines. In *Prussner v. United States* (7th Cir. 1990) 896 F.2d 218, 222, the court held that fixed deadlines may appear harsh but the resulting occasional harshness is redeemed by the clarity imparted.

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<sup>16</sup> In *Brockamp*, Stanley McGill's appeal was consolidated with another similar case on appeal. The *Brockamp* decision resolves the appeals of two taxpayers.

Thus, even when we know, as here, that a respondent based a tax on an estimate of income that was later proved to be inaccurate, there is no recourse to refund taxes paid when the claim for refund is untimely. This is because, without a timely refund claim, respondent does not have the statutory authorization to refund amounts paid and OTA does not have statutory authorization to require respondent to do so.

The following facts were presented at the hearing in this matter and were not contested by respondent. The probate court initially appointed Diane Williams Starbuck as administrator of the estate of Barbara D. Gillespie. Years later, on November 13, 2012, Mary Gillespie, the decedent's daughter, hired an attorney to determine the status of her mother's estate. After many inquiries, a concern arose that the appointed administrator had not filed tax returns or may not have acted as an ethical fiduciary on behalf of the estate. Six years after the appointment of Ms. Starbuck, the probate court appointed Mary Gillespie as administrator of her mother's estate after Ms. Starbuck declined to continue serving in this role. Despite respondent sending appropriate notifications to Barbara D. Gillespie's last address on file, Mary Gillespie was unaware that California had assessed income tax on her mother's estimated income until November of 2013. (see Exhibit J, page 2.) At this time, attorney Hayward received information that respondent assessed taxes and associated penalties and interest on estimated income for 2005 and 2006 and advised Ms. Gillespie to make payment. As stated above, respondent received payment of \$21,656.20 on December 15, 2013 which resulted in full payment of the 2005 and 2006 liability. To complicate this situation, Mary Gillespie was living either in the eastern United States or in Austria while serving as administrator which sometimes caused delays in communication between Ms. Gillespie and the estate's lawyer.<sup>17</sup>

Appellant articulates why the imposition of tax on an inaccurate estimate of income and being unable to remedy this wrong because of a statute of limitations barrier is unjust. We appreciate appellant's perspective; however, we unfortunately do not have the legal authority to alter the outcome of this matter in a more satisfactory way for appellant. Without a legislatively enacted exception to the statute of limitations, we do not have the legal authority here to avoid a seemingly unfair or harsh outcome.

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<sup>17</sup> According to attorney Hayward's description of delays in communication with Mary Gillespie, when attorney Hayward emailed documents to Mary Gillespie in Europe, it might take several weeks and sometimes up to six weeks for attorney Hayward to receive the returned signed documents depending on the status of mail service between the United States and Europe. (See respondent's Exhibit J, pages 2 and 3.)

HOLDING

Appellant's claim for refund is barred by the statute of limitations.

DISPOSITION

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

DocuSigned by:  
*Neil Robinson*  
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Neil Robinson  
Administrative Law Judge

We concur:

DocuSigned by:  
*Sara A. Hosey*  
6D3FE4A0CA514E7...  
Sara A. Hosey  
Administrative Law Judge

DocuSigned by:  
*Douglas Bramhall*  
CA2E033C0906484...  
Douglas Bramhall  
Administrative Law Judge