

**OFFICE OF TAX APPEALS
STATE OF CALIFORNIA**

In the Matter of the Appeal of:) OTA Case No. 18011434
)
DANE McCARTNEY) Date Issued: December 26, 2018
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_____)

OPINION

Representing the Parties:

For Appellant: Dane McCartney
For Respondent: Joel M. Smith, Tax Counsel

A. ROSAS, Administrative Law Judge: Pursuant to California Revenue and Taxation Code section 19324,¹ Dane McCartney (Appellant) appeals an action by the Franchise Tax Board (FTB) denying his claim for refund for \$4,808.31 for the 2010 tax year. Appellant waived his right to an oral hearing, and therefore we decide this matter based on the written record.

ISSUE

Whether the statute of limitations bars Appellant’s claim for refund.

FACTUAL FINDINGS

1. Appellant was a California nonresident during tax year 2010.
2. Appellant did not file his 2010 California income tax return by April 18, 2011.²
3. FTB obtained information indicating Appellant had sufficient income to trigger a return filing requirement. In 2013, FTB wrote to Appellant, requesting that he either file a 2010 income tax return, show he had already filed a return, or explain why he was not required to file a return. It is unclear whether Appellant received this correspondence.

¹ Statutory references are to the California Revenue and Taxation Code, unless otherwise noted.

² Because Emancipation Day was celebrated in Washington, D.C. on Friday, April 15, both federal and California returns normally due on April 15 would be treated as timely if filed on or before Monday, April 18, 2011.

4. When Appellant did not respond by the September 11, 2013 due date, FTB issued a Notice of Proposed Assessment (NPA), which estimated Appellant's income and proposed a tax liability of \$3,474 and a delinquent filing penalty of \$868.50. Appellant did not protest the NPA (it is unclear whether he received it), and it became final.
5. FTB initiated collection action against Appellant. On June 13, 2014, per an Order to Withhold Personal Income Tax, JPMorgan Chase Bank, N.A. (JPMorgan Bank) withheld \$4,808.31 from Appellant's account. JPMorgan Bank then paid this amount to FTB.
6. After JPMorgan Bank withheld his funds, Appellant called FTB. From June 13 to October 17, 2014, Appellant called FTB at least seven times. Per FTB's records, on several occasions an FTB representative explained to Appellant that he needed to file a 2010 California income tax return, that if he filed within one year of the June 13, 2014 payment date, the return would serve as a timely claim for refund of the amount paid.
7. During a call on June 25, 2014, Appellant informed FTB he wanted the funds taken from JPMorgan Bank refunded to him.³ On July 16, 2014, Appellant called the FTB representative and stated he would fax his 2010 income tax return to FTB. During a call on July 22, 2014, an FTB representative stated FTB had not received the 2010 tax return, Appellant stated he would fax it over, the representative explained it should be mailed, and Appellant agreed to mail his return. On July 24, 2014, FTB called Appellant and left him a message that he needed to file a California nonresident return (Form 540NR) for 2010. Appellant called FTB on September 10, 2014, stating he had not received his refund for 2010. The FTB representative reminded Appellant that he had a filing requirement for 2010 and needed to file a California nonresident return. A month later, on October 17, 2014, Appellant called again regarding his refund, stating he had mailed his tax return, but the FTB representative stated the 2010 tax return was not yet on file and that a refund could not be issued until after appellant's 2010 tax return was posted to his account.
8. On August 12, 2015, Appellant filed an undated 2010 Form 540NR, which reported no tax liability. FTB accepted Appellant's return as filed, reduced his tax liability to zero, and abated the delinquent-filing penalty. Although FTB accepted Appellant's 2010 Form

³ The FTB representative's notes of the conversation indicated: "Advised TP [he] has 1 yr to file rtn [return] or provide proof for ty [tax year 20]10 to get refund."

540NR as a claim for refund, FTB denied Appellant's refund claim. Appellant filed this timely appeal.

DISCUSSION

Under the applicable statute of limitations, the last day to file a claim for refund is the later of: (1) four years from the 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. (§ 19306.) “A taxpayer’s failure to file a claim for refund within the statute of limitations, for any reason, bars [the taxpayer] from later claiming a refund.” (*Appeal of Estate of Gillespie*, 2018-OTA-052P, June 13, 2018, at p. 4, internal citation omitted.)

Here, the filing of Appellant's 2010 income tax return functioned as his claim for refund. Appellant did not file his return within the extended due date. His 2010 income tax return was due on April 18, 2011—four years from this date is April 18, 2015. After FTB initiated collection action, it received payment of \$4,808.31 on June 13, 2014. One year from this date is June 13, 2015. Thus, based on the latter of these dates, Appellant's last day to file a claim for refund was June 13, 2015.

FTB first wrote to Appellant in 2013 and requested that he file a 2010 income tax return. But Appellant did not do so. Nor did Appellant respond to the NPA. Moreover, Appellant called an FTB representative at least seven times from June 13, 2014, to October 17, 2014, and during these calls, Appellant made multiple verbal statements requesting a refund of the funds that FTB received from JPMorgan Bank per the Order to Withhold Personal Income Tax. However, these verbal requests for refund do not meet the statutory requirement that “[e]very claim for refund shall be in writing [and] shall be signed by the taxpayer or the taxpayer's authorized representative” (§ 19322.) Moreover, during these phone calls, an FTB representative explained to Appellant that he needed to file a claim for refund by filing his 2010 Form 540NR within one year of the June 13, 2014 payment date. But Appellant did not file his 2010 Form 540NR until August 12, 2015—sixty days after the statute of limitations had expired.

“[W]ithout 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.” (*Appeal of Estate of Gillespie, supra*, at p. 10.) The United States Supreme Court has 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. (*United States v. Dalm* (1990) 494 U.S. 596.)

Here, the NPA estimated Appellant’s income and proposed a tax liability and a delinquent-filing penalty. FTB initiated collection action and received payment of \$4,808.31. After Appellant finally filed his return, FTB accepted the return as filed, reduced the tax liability to zero, and abated the delinquent-filing penalty. However, FTB did not refund Appellant’s overpayment because, although Appellant’s filing was sufficient as a return and claim for refund, it was filed after the statute of limitations had expired.

If Appellant had filed his return just sixty-one days earlier, because FTB reduced the tax liability, it may be presumed that FTB would have accepted his late-filed return as a timely claim for refund. Although this outcome may seem harsh, courts have 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 harness is redeemed by the clarity imparted. Therefore, for the reasons discussed above, FTB was correct to deny Appellant’s untimely claim for refund.

HOLDING

The statute of limitations bars Appellant’s claim for refund.

DISPOSITION

We sustain FTB’s action in full.

DocuSigned by:
Alberto T. Rosas
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Alberto T. Rosas
Administrative Law Judge

We concur:

DocuSigned by:
Michael F. Geary
1A9B52EF8BAC47...
Michael F. Geary
Administrative Law Judge

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