

**OFFICE OF TAX APPEALS**  
**STATE OF CALIFORNIA**

In the Matter of the Appeal of:  
**RICARDO BIRCHER**

) OTA Case No. 18032403  
)  
) Date Issued: April 10, 2019  
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)  
)

**OPINION**

Representing the Parties:

For Appellant: Ricardo Bircher  
For Respondent: Brian Werking, Tax Counsel  
Natasha Page, Tax Counsel IV

D. CHO, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, Ricardo Bircher (appellant) appeals an action by respondent Franchise Tax Board (FTB) denying appellant’s claim for refund of \$561.99 for the 2007 tax year.

Office of Tax Appeals (OTA) Administrative Law Judges Daniel K. Cho, Kenneth Gast, and Linda C. Cheng, held an oral hearing for this matter in Van Nuys, California, on January 25, 2019. At the conclusion of the hearing, the record was closed and this matter was submitted for decision.

**ISSUE**

Whether appellant’s claim for refund was filed within the statute of limitations for the 2007 tax year.

**FACTUAL FINDINGS**

1. Appellant did not file a 2007 California resident income tax return by April 15, 2008, the due date of the return.
2. Subsequently, FTB received information from First Tenn Bank First Horizon Home Loan that appellant paid mortgage interest for the 2007 tax year. Based on this information, FTB estimated that appellant had earned \$50,304 during the year to support his ability to

make the payments. This income was sufficient to require appellant to file a 2007 California income tax return. By Demand for Tax Return dated June 2, 2010 (Demand), FTB required appellant to file his 2007 California income tax return, provide evidence that he already filed his 2007 California income tax return, or explain why he did not have to file a 2007 California income tax return.

3. Appellant did not respond to the Demand, and FTB issued a Notice of Proposed Assessment (NPA) dated August 2, 2010, using the \$50,304 as appellant's estimated California income and imposing a corresponding tax due of \$1,310. The NPA also assessed penalties, interest, and a fee, which totaled \$973.48.
4. Appellant did not protest the NPA, which then went final.
5. Afterwards, FTB began collection activities against appellant, and on October 10, 2013, FTB collected \$577.99 through a levy against appellant's bank account. This payment was applied to appellant's 2007 tax year liability.<sup>1</sup>
6. By letter dated January 18, 2015,<sup>2</sup> appellant responded to the NPA and informed FTB that he sustained a permanent disability in 2000 and was tricked into a predatory mortgage.
7. Subsequently, appellant sent FTB additional letters explaining his position and requesting a refund of the levied amount.
8. On March 28, 2016, FTB received appellant's 2007 California income tax return, which reported a California adjusted gross income of \$0 and a tax due of \$0. FTB accepted this return and reduced appellant's tax liability to \$0, which caused any previous payments (e.g., the levy payment of \$561.99) to become an overpayment.
9. On March 27, 2017, FTB received a letter, dated March 15, 2017, from appellant requesting a refund of the levied funds because appellant did not have a tax liability.
10. FTB concluded that appellant's first correspondence of January 18, 2015, could be considered appellant's claim for refund, which was in appellant's favor. Nonetheless, FTB determined that this claim for refund was filed outside of the applicable statute of limitations and denied the claim for refund by letter dated September 28, 2017.

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<sup>1</sup> Of this amount, FTB applied \$16 toward a lien fee that was imposed when FTB recorded a county lien against appellant. Because this \$16 was not applied toward appellant's tax liability, appellant's overpayment was only \$561.99.

<sup>2</sup> FTB received this letter on January 22, 2015.

11. This timely appeal followed.

### 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. (R&TC, § 19306(a).) “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.)<sup>3</sup>

“[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.) Furthermore, the United States Supreme Court has concluded that the untimely filing of a claim for refund 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.)

In accordance with R&TC section 19306, appellant’s claim for refund must have been filed within the later of three different time periods to be within the statute of limitations. The first time period is only applicable if appellant filed his 2007 California income tax return on or before the due date of the return, which was April 15, 2008. There is no dispute that appellant did not file his 2007 California return by this date. Instead, appellant filed his 2007 California return on or about March 28, 2016, which is approximately eight years past the original deadline. As a result, this first time period is not applicable to this appeal.

The second time period is four years from the original due date of the return. As previously stated, the original due date of the return was April 15, 2008, and four years from this date is April 15, 2012. The third and final time period is one year from the date of payment. After FTB initiated its collection activities against appellant, it received a payment of \$577.99 on October 10, 2013. One year from this date is October 10, 2014. Based on the foregoing, the latest date of the three different time periods is October 10, 2014. In other words, appellant had until October 10, 2014, to file his claim for refund.

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<sup>3</sup> OTA opinions are viewable on OTA’s website: <[www.ota.ca.gov/opinions](http://www.ota.ca.gov/opinions)>.

Although there is a dispute as to exactly which document constitutes appellant’s claim for refund, there is no dispute that all of the documents that could be considered appellant’s claim for refund were filed after October 10, 2014. For example, the first correspondence that appellant filed with FTB that protested the NPA was dated January 18, 2015, which was approximately three months after the statute of limitations had already expired. As a result, this claim for refund was not timely. While appellant has argued that his letter dated March 15, 2017, constituted his claim for refund, this letter was also well beyond the October 10, 2014 statute of limitations imposed pursuant to R&TC section 19306(a).<sup>4</sup> Therefore, appellant’s claim for refund was not filed within the applicable statute of limitations, and FTB properly denied appellant’s claim for refund.

HOLDING

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

DISPOSITION

We sustain FTB’s denial of appellant’s claim for refund.

DocuSigned by:  
*Daniel K. Cho*  
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Daniel K. Cho  
Administrative Law Judge

We concur:

DocuSigned by:  
*Kenneth Gast*  
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Kenneth Gast  
Administrative Law Judge

DocuSigned by:  
*Linda C. Cheng*  
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Linda C. Cheng  
Administrative Law Judge

<sup>4</sup> Based on appellant’s statements at the hearing, it appears that appellant believes that the date of the overpayment occurred when appellant filed his 2007 California income tax return on or about March 28, 2016. While appellant’s filing and FTB’s acceptance of his 2007 California income tax return resulted in appellant’s tax liability being reduced to zero, which in turn recharacterized his previous payment as an overpayment, this recharacterization did not alter the date on which the payment was received. (See Treas. Reg. § 301.6611-1(b) & (c).) Therefore, the date of overpayment is October 10, 2013, which is the date on which FTB received the funds.