

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

In the Matter of the Appeal of: ) OTA Case No. 18083523  
ANN THOMAS )  
 ) Date Issued: November 7, 2019  
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**OPINION**

Representing the Parties:

For Appellant: Ann Thomas

For Respondent: Paige Chang, Graduate Student Assistant

For Office of Tax Appeals: William Stafford, Tax Counsel III

N. ROBINSON, Administrative Law Judge: Pursuant to California Revenue and Taxation Code (R&TC) section 19324 Ann Thomas (appellant), appeals from the action of the Franchise Tax Board (FTB) denying appellant’s claim for refund of \$40,872.79<sup>1</sup> for the 2011 tax year.

On June 13, 2019, the Office of Tax Appeals (OTA) sent a Notice of Oral Hearing with a Response to Notice of Oral Hearing form with instructions to return the form before June 28, 2019. Failing to timely return the Response to Notice of Oral Hearing form results in appellant waiving her right to an oral hearing. Appellant did not return the form; therefore, this appeal is being decided based on the written record.

**ISSUE**

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

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<sup>1</sup> Appellant claimed a refund of \$40,872.79. FTB issued appellant a partial refund of \$58.28. Thus, the amount on appeal is \$40,791.51.

### FACTUAL FINDINGS

1. Appellant did not file a timely California income tax return for 2011.
2. FTB obtained information from J.P. Morgan Chase Bank, N.A. (Chase Bank) reporting that appellant paid mortgage interest in 2011 in the amount of \$68,594, indicating income sufficient to trigger the filing requirement.<sup>2</sup>
3. On January 16, 2013, FTB issued a notice requesting that appellant file a return or explain why no return was required.
4. When appellant neither filed a return nor otherwise responded to the request, on March 25, 2013, FTB issued a Notice of Proposed Assessment (NPA) setting forth a total tax of \$29,544, a late-filing penalty of \$7,386, and applicable interest.
5. Appellant failed to protest the NPA and thus the proposed assessment became a final assessment.
6. FTB instituted collection action, placed liens on appellant's properties, and issued Orders to Withhold to various financial institutions. FTB collected a total of \$40,872.06 as follows: \$310.86 on October 29, 2014; \$699.86 on April 15, 2015; \$39,803.79 on August 7, 2015; and \$57.55 on September 13, 2016.
7. On August 31, 2017, appellant filed a California return for 2011 reporting taxable income of \$0 and a total tax of \$0. FTB accepted appellant's return as filed.
8. FTB treated appellant's return as a claim for refund and subsequently refunded \$58.28, representing the amount FTB collected on September 13, 2016, of \$57.55, plus interest of \$0.73. FTB denied the remainder of the refund claim as being untimely.
9. Appellant filed this timely appeal.

### 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) 1982 WL 11831.) California Code of Regulations, title 18,

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<sup>2</sup>For the 2011 tax year, FTB estimated appellant's income to be \$411,564 by multiplying the amount of mortgage interest by six (\$68,594 x 6 = \$411,564).

section 30219, 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>3</sup>

Before there can be an analysis of whether any taxes, penalties or interest are owed for 2011 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 the taxpayer from later claiming a refund. (*Appeal of Earl and Marion Matthiessen* (85-SBE-077) 1985 WL 15856.)

The statute of limitations for filing a refund claim is set forth in R&TC section 19306. Under that statute, 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.

Appellant’s 2011 return was due on April 15, 2012, with an extended due date of October 15, 2012. The first deadline for appellant to file a timely claim for refund was no later than October 15, 2016, four years from the extended filing date but only if appellant had filed a return on or before October 15, 2016. Because appellant did not file a return until August 31, 2017, more than four years after the extended due date, the first statute of limitations cannot be applied. The second statute of limitations required appellant to file a claim for refund on or before April 15, 2016, four years after the 2011 return was due, without regard to extensions. Appellant filed a return, considered by FTB to be appellant’s claim for refund, more than four years from the date appellant’s return was due. Thus, appellant did not comply with the second limitations period. We must now consider whether appellant’s claim for refund was filed within one year of any overpayment.

On March 25, 2013, FTB issued an NPA proposing to assess appellant \$29,544 in tax, a late-filing penalty of \$7,386 and interest of \$1,127.44 resulting in a total proposed assessment of \$38,057.44. Appellant did not protest the NPA resulting in the proposed assessment becoming final. Through various collection actions, FTB collected a total of \$40,814.51 between October 29, 2014 and August 7, 2015. These alleged overpayments occurred more than one year

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<sup>3</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.)

before the August 31, 2017 claim for refund and are thus outside the statute of limitations and untimely.<sup>4</sup>

Appellant alleges that her illnesses prohibited her from filing a timely return for 2011. If appellant is found to have a financial disability pursuant to R&TC section 19316,<sup>5</sup> then the statute of limitations is suspended for the length of time appellant is disabled if (1) “that 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” (R&TC, § 19316, subd. (b)(1) and (2) there is no spouse or other legally authorized person to act on the taxpayer’s behalf in financial matters. (R&TC, § 19136, subd. (b)(2).)

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 Estate of Barbara D. Gillespie (dec’d)* (2018-OTA-052P); *Appeal of James C. and Florence Meek* (2006-SBE-01) 2006 WL 864344.) 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>6</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 Estate of Barbara D. Gillespie (dec’d)*, *supra*.) To suspend the statute of limitations, the period of financial disability must occur during the limitations period. (*Ibid.*)

Appellant alleges that she suffered from a debilitating illness, including kidney cancer, and was unable to work or handle her personal matters for a five-year period. Evidence submitted by appellant to support her claim of financial disability includes: an October 16, 2013

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<sup>4</sup> As stated above, appellant did make one payment for the 2011 tax year less than one year prior to August 31, 2017, in the amount of \$57.55, and this amount was refunded, with interest, by FTB.

<sup>5</sup> R&TC section 19316, subdivision (a), allows for a financial disability to suspend the statute of limitations for a claim for refund as defined in R&TC section 19306.

<sup>6</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 section 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.

nerve study; an email containing a May 22, 2015 surgical pathology report; documents from appellant's November 2013 petition for bankruptcy; copies of prescription medication labels from November 8, 2015, to July 2, 2018; and a copy of instructions for an April 18, 2013 medical procedure. There is no evidence showing that any of the illnesses suffered by appellant caused her an inability to address financial affairs. Furthermore, this record is silent about whether appellant had someone during her period of disability capable of legally managing her financial affairs. Finally, appellant has not provided an affidavit from a physician identifying the periods of time when appellant was financially unable to handle her financial affairs, thus appellant has not shown that she suffered a financial disability during the relevant limitations period.<sup>7</sup> Although it is unfortunate that appellant has suffered from serious illness, there is insufficient evidence to qualify appellant for financial disability that would suspend the statute of limitations for any length of time.

Absent legislative authorization, OTA does not have authority to abrogate the statute of limitations for a refund claim, even if the imposition of tax and penalties appear to be unequitable. (*Appeal of Estate of Gillespie (dec'd), supra.*) 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 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. Thus, even when we know, as here, that FTB based a tax on an estimate of income that was later determined 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, FTB does not have the statutory authorization to refund amounts paid and OTA does not have statutory authorization to require FTB to do so.

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<sup>7</sup> With FTB's opening brief, it provided to appellant a form entitled Financially Disabled-Suspension of the Statute of Limitations (Form 1564) that contains instructions on how to qualify as financially disabled taxpayer. This form includes instructions on how to obtain a completed physician's form necessary to successfully prove financial disability.

HOLDING

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

DISPOSITION

FTB’s denial of appellant’s claim for refund is sustained.

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

We concur:

DocuSigned by:  
*[Signature]*  
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Andrew J. Kwee  
Administrative Law Judge

DocuSigned by:  
*Amanda Vassigh*  
7B17E958B7C14AC...  
Amanda Vassigh  
Administrative Law Judge