

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

In the Matter of the Appeal of:  
**HOWARD O. CORNBLETH**

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) OTA Case No. 18093718  
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) Date Issued: October 3, 2019  
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**OPINION**

Representing the Parties:

For Appellant: Christopher Engelmann

For Respondent: Joel Smith, Tax Counsel

N. DANG, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, Howard O. Cornbleth (appellant) appeals an action by respondent Franchise Tax Board (FTB) denying appellant's claim for refund of \$1,580 for the 2012 tax year.

Appellant waived the right to an oral hearing, and therefore, we decide this matter based on the written record.

**ISSUE**

Whether appellant is entitled to a refund for the 2012 tax year.

**FACTUAL FINDINGS**

1. On November 4, 2012, appellant received \$26,345 in gambling winnings, from which \$1,844 in California income tax was withheld by the payor.
2. Appellant failed to timely file a California income tax return for the 2012 tax year.
3. On November 28, 2016, FTB issued to appellant a Notice of Proposed Assessment (NPA) for the 2012 tax year. FTB computed the liability stated in the NPA from third-party payor information indicating that appellant received \$52,690 in income.
4. On May 12, 2017, appellant filed a 2012 California Nonresident or Part-Year Resident Income Tax Return, claiming an overpayment of \$1,580 based on withholdings of \$1,844 less total tax of \$264.

5. FTB accepted appellant's 2012 return as filed but denied appellant's refund claim because it was untimely.

### DISCUSSION

If it is determined that there has been an overpayment of any liability imposed under the Personal Income Tax Law, by a taxpayer for any year for any reason, the amount of the overpayment may be credited against any amount due from the taxpayer and the balance shall be refunded to the taxpayer. (R&TC, § 19301(a).) The taxpayer bears the burden of proving entitlement to any refund. (*Appeal of Durley* (82-SBE-154) 1982 WL 11831.)

R&TC section 19306(a) provides that no credit or refund shall be allowed unless a claim for refund is filed within: (1) four years from the date the return was filed, if the return was timely filed within the extended filing period pursuant to an extension of time to file; (2) four years from the due date prescribed for filing the return (determined without regard to any extension of time for filing the return); or (3) one year from the date of the overpayment. The language of R&TC section 19306 is explicit and must be strictly construed, without exception. (See *Appeal of Avril* (78-SBE-072) 1978 WL 3545.) Federal courts have stated that fixed deadlines may appear harsh because they can be missed, but the resulting occasional harshness is redeemed by the clarity of the legal obligation imparted. (*Prussner v. United States* (7th Cir. 1990) 896 F.2d 218, 222.)

Appellant asserts that FTB is required to return the amount at issue because it constitutes an "overcollection" pursuant to FTB's Technical Advice Memorandum (TAM) 2007-01, dated April 23, 2007.

TAM 2007-01 distinguishes between two types of payments resulting from FTB's involuntary collection actions (e.g., liens, levies, or withholding orders); "overpayments," which are subject to the provisions of R&TC section 19306(a), and "overcollections," which may be returned to the taxpayer after the statute of limitations for claiming a refund has expired. According to TAM 2007-01, "there is a narrow exception where the statute of limitations provisions do not apply to the return of payments that exceed what FTB is legally allowed to collect and were the result of 'overcollection.' An 'overcollection' occurs when the amount collected exceeds the amount actually due under the law as the result of clerical or mechanical error."

The distinction provided for in TAM 2007-01 is an exceedingly narrow one, which applies only to involuntary collection actions taken by FTB. Here, the payor withheld the amount at issue from appellant's income and remitted the funds to FTB prior to the issuance of the NPA; thus, the payment of funds to FTB was not the result of any FTB collection action. Therefore, this amount does not constitute an "overcollection" within the meaning of TAM 2007-01. In other words, TAM 2007-01 is inapplicable to situations, such as here, where FTB took no collection action against the taxpayer.

Accordingly, the amount at issue constitutes an overpayment of tax subject to the statute of limitations for making a refund claim. It is undisputed that appellant's refund claim was filed outside the statute of limitations (i.e., more than four years after April 15, 2013, the due date of appellant's 2012 tax return, and more than one year after the funds were withheld in November of 2012). Therefore, FTB acted properly in denying appellant's untimely refund claim.

#### HOLDINGS

Appellant is not entitled to a refund for the 2012 tax year.

#### DISPOSITION

FTB's action is sustained.

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*Nguyen Dang*

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Nguyen Dang  
Administrative Law Judge

We concur:

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*Linda C. Cheng*

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Linda C. Cheng  
Administrative Law Judge

DocuSigned by:

*Suzanne B. Brown*

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Suzanne B. Brown  
Administrative Law Judge