

**OFFICE OF TAX APPEALS
STATE OF CALIFORNIA**

In the Matter of the Appeal of:
W. APPELYARD

) OTA Case No. 19014259
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OPINION

Representing the Parties:

For Appellant: W. Appleyard

For Respondent: Eric A. Yadao, Tax Counsel III

J. MARGOLIS, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, W. Appleyard (appellant) appeals an action by respondent Franchise Tax Board (FTB) denying appellant’s claim for refund for his 2012 tax year.

Appellant waived his right to an oral hearing. Therefore, this matter is being decided based on the written record.

ISSUE

Whether appellant timely filed a claim for refund for tax year 2012.

FACTUAL FINDINGS

1. FTB received information suggesting that appellant had an obligation to file a California income tax return for 2012 but had failed to do so. Accordingly, on June 30, 2014, FTB wrote to appellant at his last known address in Las Vegas, Nevada, requesting that, by July 30, 2014, he either file a return for 2012, provide a copy of an already-filed return if he had previously filed one, or explain why he was not obligated to file. The letter indicated that FTB believed appellant had received California-source income from Conti Electric, Inc., and from Great Salt Lake Electric, Inc.

2. It appears that appellant received and responded to FTB's letter in some fashion, inasmuch as FTB issued a form letter, entitled "Deferral Letter," to appellant on August 11, 2014, indicating that FTB had approved appellant's request for additional time to file his California return for 2012 before FTB would issue a proposed assessment based upon the information in its possession. FTB's deferral letter stated that FTB would withhold further action until August 29, 2014, but that if appellant did not file his California return by that date, FTB would estimate appellant's income based on available information and impose applicable penalties and interest.
3. Appellant did not respond to FTB's Deferral Letter by the August 29, 2014 deadline, and on October 13, 2014, FTB issued a Notice of Proposed Assessment (NPA) to appellant determining that he had California-source income as follows during 2012: \$33,621 of wage income from Conti Electric, Inc., and \$48,643 of wage income from Great Salt Lake Electric, Inc.
4. The NPA proposed a tax liability of \$4,790 before payments and credits. After application of a wage withholdings credit of \$1,931, FTB proposed a tax deficiency of \$2,859 and a late-filing penalty of \$714.75, for a total amount due (including interest) of \$3,737.77.
5. On December 11, 2014, appellant filed his 2013 California tax return with FTB. The return claimed a refund of \$2,818. That amount was not paid out as a refund to appellant, however. Instead, on January 12, 2015, it was applied against the liability determined in the NPA that was issued to appellant for 2012. FTB's records indicate that this was the last payment that was credited to appellant's 2012 tax year effective January 12, 2015.
6. Appellant's 2013 return reported that appellant's address was in Henderson, Nevada.
7. FTB's records of telephone contacts, indicate that appellant contacted FTB on December 10, 2014, and on January 20, 2015. FTB's notes of the December 10, 2014 call indicate that appellant stated that he had filed his California returns for 2012 and 2013 and was waiting to receive his refund. FTB's notes also indicate that appellant was told in the call that FTB was "unable to take action till final date 01/01/15" and that "TP understood."

8. FTB's notes of the January 20, 2015 call indicate that appellant had called regarding an income tax due notice.¹ In the call, appellant stated that he had filed his 2012 and 2013 California tax returns and was still waiting for his refund. FTB's notes indicate that appellant was told in the call that FTB had not received appellant's 2012 return but had received his 2013 return and applied the overpayment reported thereon to the balance allegedly due from appellant for 2012. FTB's notes report that "Adv tp t/f up to 5 w/days, needs to resubmit or send by mail. Tp understood." We interpret this to mean that FTB advised appellant to resubmit his 2012 return within five working days.
9. On February 24, 2015, FTB issued an Income Tax Due Notice to appellant for 2012 at the address it had for him in Henderson, Nevada. The notice indicated that after application of appellant's tax withholdings of \$1,931 and other payments of \$2,825.42, there still was a remaining amount due from appellant for 2012 of \$943.75. This was followed by a Final Notice Before Levy and Lien dated April 3, 2015, showing an amount then due of \$946.70, and by an Account Status Notice dated April 6, 2016, showing an amount due of \$1,169.83 (which notice includes, for the first time, a collection fee of \$194). Both of these notices were sent to a Henderson, Nevada address which FTB had for appellant.
10. FTB issued an Account Status Notice to appellant dated April 11, 2017, indicating a balance due from him for 2012 of \$1,202.68. This notice was sent to appellant's address in New Jersey.
11. FTB's records of telephone contacts indicate that appellant contacted FTB again on April 25, 2017.² The notes indicate that appellant was calling about the balance due for 2012. According to FTB's notes, appellant promised to file his 2012 return by May 12, 2017.

¹ FTB has not provided us with a copy of this notice of income tax due, although it has provided us with several others that it sent to appellant.

² Appellant claims to have made numerous other phone calls to FTB that were not reflected in FTB's phone records. While we have no reason to disbelieve appellant's assertions, no notes of what transpired during these calls were provided by either party.

12. A facsimile transmittal sheet dated May 10, 2017, indicates that appellant transmitted to FTB a copy of his 2012 return “for review”; it was marked “DO NOT FILE,” presumably because appellant believed he had previously filed it with FTB. However, appellant has presented no evidence indicating that he transmitted his 2012 return to FTB prior to May 10, 2017.
13. Appellant’s 2012 return used a Las Vegas, Nevada address for appellant. It was undated. The return was a California Form 540NR (California Nonresident or Part-Year Resident Income Tax Return) filed jointly with his wife. The return reports a total California tax of \$1,466, tax withholdings of \$1,931, and requests a tax refund of \$465.
14. FTB’s records of telephone contacts indicate that appellant (or, more likely, his spouse) contacted FTB on October 27, 2017, inquiring as to the status of the refund that had been claimed on appellant’s 2013 California return, and was informed that it had been applied to the balance due for 2012.
15. On October 15, 2018, appellant and his wife jointly filed claims for refund for 2012 and 2013 on Forms 2917, entitled Reasonable Cause – Individual and Fiduciary Claim for Refund, seeking refunds of the overpaid amounts reflected on their 2012 and 2013 returns.
16. FTB issued a letter to appellant and his wife on November 20, 2018, advising them that FTB had recently processed their 2012 return and that there was an overpayment of \$3,096.42 in their 2012 tax account that could not be refunded to appellants because the return had been filed after the statute of limitations for permitting a refund for that year had expired.
17. Appellant timely filed this appeal from FTB’s November 20, 2018 letter.

DISCUSSION

There is no dispute in this appeal that appellant has overpaid his California tax liability for 2012. FTB’s accounting records for appellant’s 2012 tax year reflect an overpayment of \$3,096.42. The only issue is whether the statute of limitations bars refunding this overpayment to appellant.

The applicable statute of limitations is set forth in R&TC section 19306(a). It provides as follows:

No credit or refund shall be allowed or made after a period ending four years from the date the return was filed (if filed within the time prescribed by Section 18567 or 18604, whichever is applicable), four years from the last day prescribed for filing the return (determined without regard to any extension of time for filing the return), or after one year from the date of the overpayment, whichever period expires later, unless before the expiration of that period a claim therefor is filed by the taxpayer....

“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.) “[W]ithout a timely refund claim, [FTB] does not have the statutory authorization to refund amounts paid and [the Office of Tax Appeals] does not have statutory authorization to require [FTB] to do so.” (*Ibid.*) The issue in this case is whether appellant timely filed a refund claim for 2012.

A refund claim must “be in writing, shall be signed by the taxpayer or the taxpayer’s authorized representative, and shall state the specific grounds upon which it is founded.” (R&TC, § 19322.) The first written document that appellant submitted to FTB requesting a refund of the amounts that he had paid for 2012 was his 2012 California tax return. FTB is treating that document as appellant’s refund claim because it was filed earlier than appellant’s Form 2917 claims for refund. In this regard, we note that:

[A] return filed within four years from the last day prescribed for filing the return showing a credit allowable by Section 19002 or estimated tax paid pursuant to Section 19023, 19024, or 19136 in excess of the tax due, shall be considered a claim for refund of the excess if the amount thereof is more than one dollar (\$1).”

(R&TC, § 19307.)

Although FTB contends that it did not receive appellant’s undated 2012 tax return/refund claim until it was sent to FTB by facsimile on May 10, 2017, appellant contends that he filed his 2012 return earlier (although he does not specify the date). In light of the facts that (1) appellant’s 2012 and 2013 returns were prepared by the same preparer, and (2) FTB acknowledges that it received appellant’s 2013 return on December 11, 2014, one might suspect that appellant’s 2012 return was prepared at or before the date appellant’s 2013 return was prepared. But there is nothing to indicate that appellant’s 2012 return was actually *filed* with the

FTB before May 10, 2017. The burden of proof is on appellant to establish the date his return was filed (see generally *Dicon Fiberoptics, Inc. v. Franchise Tax Bd.* (2012) 53 Cal.4th 1227, 1235), and we do not accept appellant’s unsupported assertion that his 2012 return was filed earlier than May 10, 2017.

For appellant’s May 10, 2017 refund claim to have been timely filed, appellant must have filed it within the limitations period set forth in R&TC section 19306(a). Under that section, the last day appellant could have filed a timely claim for refund for the amounts that he paid with respect to his 2012 year was the later of: (1) four years from the date the return was filed, if timely filed (taking into account a valid extension); (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).) The first of the three clauses listed above is inapplicable, because appellant’s return was not timely filed. The second clause also is inapplicable, because the due date of appellant’s 2012 return was April 15, 2013, and appellant filed his 2012 return slightly more than four years after that date. Finally, the third clause is inapplicable, because there is no indication that appellant made any payments on his 2012 tax liability during the one-year period that preceded the May 10, 2017 date he filed 2012 tax return.

Finally, we have considered whether the “informal claim doctrine” might apply to remedy the situation before us, in which FTB is refusing to refund an amount it acknowledges appellant overpaid. (See *Mobil Corporation v. United States* (Ct. Fed. Cl. 2005) 67 Fed.Cl. 708; *PALA, Inc. Employees Profit Sharing Plan and Trust Agreement v. United States* (5th Cir. 2000) 234 F.3d 873, 877; see also *Shiseido Cosmetics (America) Ltd. v. Franchise Tax Bd.* (1991) 235 Cal.App.3d 478.) Under the informal claim doctrine, a taxpayer’s formal claim for refund will be deemed to relate back to the date the tax agency was put on notice of the taxpayer’s contentions in a less-than-formal manner.

Federal tax cases have indicated that there are three components to an informal refund claim.

First, an informal claim must put the [tax agency] on notice that plaintiff is asserting a right to a refund. Second, the claim must describe the legal and factual basis for the refund. Finally, an informal refund claim must have a written component.

(*McNew v. United States* (Ct. Fed. Cl. 1997) 1997 WL 720820 at p. *3.) The only way in which appellant’s May 10, 2017 refund claim can be said to have been timely filed is if it relates back to an informal claim that was filed before the statute of limitations for refund expired on

April 15, 2017. Appellant's tax return for 2013 (filed December 11, 2014), requesting a refund of \$2,818 that was taken by FTB and applied to appellant's 2012 tax liability (as determined in FTB's NPA for 2012) cannot be said to be a refund claim (informal or otherwise) for 2012.

“A claim for one year is not a claim for another year, even though the issues involved may be identical.” (IRS Technical Advice Memorandum, TAM 8111016 (1980), citing *Rosengarten v. United States* (Ct. Cl. 1960) 181 F.Supp. 275, 279.)

Appellant’s phone calls to the FTB also are not sufficient for purposes of constituting an informal claim. As noted above, an informal claim must have a written component, and the writing must be in the tax agency’s possession prior to the expiration of the statute of limitations. (*Yuen v. United States* (9th Cir. 1987) 825 F.2d 244, 245 [“even an informal claim for a refund must have a written component”]; *Arch Eng’g Co. v. United States* (Fed. Cir. 1986) 783 F.2d 190, 192.) Although a few cases have indicated that writings by tax agency personnel themselves can constitute an informal claim (see, e.g., *McNew v. United States* (Ct. Fed. Cl. 1997) 1997 WL 720820; *Thomas G. Faria Corp. v. United States* (Ct. Cl. Trial Div. 1977) 1977 WL 3812), FTB’s notes of its phone calls with appellant (which took place in 2014 and 2015, before the statute of limitations had expired) are not sufficient to constitute an informal refund claim. They do not indicate the amount of appellant’s claimed overpayment for 2012 or the basis upon which the overpayment was claimed. According to FTB’s notes of those conversations, FTB advised appellant that it still had not received his 2012 return and urged him to file. Notwithstanding that advice, there is no indication that appellant filed his 2012 return until after the statute of limitations had expired on April 15, 2017. Accordingly, we find that appellant did not file a timely claim for refund for 2012 and sustain FTB’s action in denying appellant’s late-filed refund claim.

HOLDING

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

DISPOSITION

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

DocuSigned by:
Jeffrey I. Margolis
Jeffrey I. Margolis
Administrative Law Judge

We concur:

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

DocuSigned by:
Teresa Stanley
Teresa Stanley
Administrative Law Judge

Date Issued: 3/5/2020