

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

In the Matter of the Appeal of:

**J. JONES**) OTA Case No. 19044623  
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)**OPINION**

Representing the Parties:

For Appellant:

Dehra Di'Fiore-Moles, Tax Appeals  
Assistance Program<sup>1</sup>

For Respondent:

Nancy Parker, Tax Counsel IV

C. AKIN, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, J. Jones (appellant) appeals actions by Franchise Tax Board (FTB) denying appellant's claims for refund of \$2,515.00, plus interest, for the 2013 tax year, and \$806.75, plus interest, for the 2015 tax year.

Appellant waived the right to an oral hearing; therefore, the matter is being decided based on the written record.

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<sup>1</sup> Appellant filed his own appeal letter and Dehra Di'Fiore-Moles of the Tax Appeals Assistance Program filed appellant's reply brief.

### ISSUES

1. Whether the statute of limitations was tolled for the 2013 tax year, such that appellant's 2013 claim for refund was timely filed.
2. Whether appellant is liable for the notice and demand (demand) penalty imposed for the 2015 tax year.

### FACTUAL FINDINGS

#### 2013 Tax Year

1. On September 6, 2018, appellant untimely filed his 2013 California income tax return, reporting an overpayment of \$2,515.
2. FTB accepted appellant's return as filed but did not refund the 2013 overpayment of \$2,515 due to the expiration of the statute of limitations for claiming a refund.
3. Appellant subsequently submitted a Reasonable Cause – Individual and Fiduciary Claim for Refund (FTB Form 2917) for 2013, again seeking a refund of \$2,515.
4. FTB denied appellant's claim for refund and this timely appeal followed.
5. Appellant provided medical records with his reply brief indicating that he had four separate knee surgeries on: July 6, 2015; January 29, 2016; May 2, 2016; and October 12, 2016.

#### 2015 Tax Year

6. On April 26, 2017, because FTB did not have a record of a 2015 tax return filed by appellant, FTB issued a Demand for Tax Return (2015 Demand) to appellant. The 2015 Demand required a response by May 31, 2017, by providing a copy of a return if already filed, explaining why appellant had no filing requirement, or filing a return.
7. Appellant responded via fax requesting a 90-day extension to file his 2015 tax return.
8. FTB granted appellant's request for an extension and instructed appellant that his 2015 tax return must be filed by September 1, 2017.
9. When no return was filed, FTB issued a Notice of Proposed Assessment (NPA) to appellant on September 25, 2017, based on appellant's estimated income and imposing, among other things, a demand penalty and interest.

10. On February 15, 2018, appellant untimely filed his 2015 California income tax return, reporting an overpayment of \$2,350.
11. FTB accepted the return as filed but reduced the refund by a demand penalty of \$806.75. FTB issued a refund of \$1,543.25 to appellant.
12. Appellant subsequently submitted a Reasonable Cause – Individual and Fiduciary Claim for Refund (FTB Form 2917) for 2015, requesting a refund of the \$806.75 demand penalty.
13. FTB denied appellant's claim for refund and this timely appeal followed.

Previous Request for Tax Return and NPA for the 2012 Tax Year

14. On January 10, 2014, FTB issued a Request for Tax Return to appellant for the 2012 tax year (2012 Request).
15. On February 9, 2014, appellant responded via an internet chat request, requesting additional time to respond to the 2012 Request.
16. FTB granted appellant until March 14, 2014, to file a return for the 2012 tax year.
17. When no return was filed, FTB issued an NPA to appellant on April 14, 2014, for the 2012 tax year.

DISCUSSION

Issue 1: Whether the statute of limitations was tolled for the 2013 tax year, such that appellant's 2013 claim for refund was timely filed.

Appellant concedes that his 2013 claim for refund was filed five months after the applicable statute of limitations had passed but contends that this late filing was due to medical reasons and the statute of limitations should be tolled as a result. Appellant explains that he had four separate knee surgeries between July 2015, and October 2016, and contends that it generally takes three months to recover from such knee surgeries and return to normal activities. Appellant further asserts that during this recovery time, he was essentially incapacitated and nonmobile. As a result of these four surgeries, appellant contends that he lost approximately 12 months of the statutory time period and argues that the statute of limitations should be tolled to reflect these lost months.

We, however, do not agree that the statute of limitations can be tolled as a result of appellant's knee surgeries. The statute of limitations is "strictly construed and . . . a taxpayer's

failure to file a claim for refund, for whatever reason, within the statutory period bars him from doing so at a later date.” (*Appeal of Matthiessen* (85 SBE-077) 1985 WL 15856.) There is no reasonable cause or equitable basis for suspending the statute of limitations. (*Appeal of Estate of Gillespie*, 2018-OTA-052P.) Neither ill health of a taxpayer nor any other unfortunate circumstance can extend the statute of limitations for filing a claim for refund. (*Ibid.*) A taxpayer’s untimely filing of a claim for any reason bars a refund, even if the tax is alleged to have been erroneously, illegally, or wrongfully collected. (*Ibid.*)

While the statute of limitations cannot be tolled on equitable grounds, the time for filing a claim for refund may be extended if a taxpayer is “financially disabled,” as defined by R&TC section 19316. The running of the period for filing a claim for refund pursuant to R&TC section 19306 is tolled if: (1) an “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”; and (2) there is no spouse or other legally authorized person to act on the taxpayer’s behalf in financial matters. (R&TC, § 19316(b)(1)-(2).) When a taxpayer alleges financial disability to toll and thus extend the limitations period to file a timely claim for refund, at a minimum, a physician’s affidavit must be provided that identifies the disability period when the taxpayer was unable to manage his or her financial affairs. (*Appeal of Estate of Gillespie, supra*; *Appeal of Meek* (2006-SBE-01) 2006 WL 864344.) To toll the statute of limitations, the period of financial disability must occur during the limitations period. (*Appeal of Estate of Gillespie, supra.*)

While appellant provided medical records establishing that he had four separate knee surgeries between July 2015 and October 2016, there is no evidence showing that appellant was unable to manage his financial affairs as a result of, or while recovering from, these surgeries or that his impairment was a “terminal impairment” or expected to last for a *continuous* period of not less than 12 months,<sup>2</sup> as required by R&TC section 19136(b)(1). Without an affidavit from a physician identifying the periods of time when appellant was unable to manage his financial affairs, appellant’s unsubstantiated statements that he was essentially incapacitated and

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<sup>2</sup> While appellant states it generally takes three months to recover from each knee surgery, appellant’s first and second knee surgeries on July 6, 2015, and January 29, 2016, respectively, were separated by more than six and a half months. Appellant’s third and fourth knee surgeries on May 2, 2016, and October 12, 2016, respectively, were separated by more than five months. Thus, accepting for the sake of argument that appellant was impaired and unable to manage his financial affairs during a three-month period following each knee surgery, appellant’s impairment was not for a *continuous* period of not less than 12 months.

nonmobile during the approximate three month recovery period following each surgery is insufficient to establish that appellant suffered a financial disability during the relevant limitations period. Furthermore, the record is silent about whether appellant had someone during any period of disability capable of legally managing his financial affairs.

Appellant has failed to establish that he had a financial disability that would toll the statute of limitations for any length of time. Absent legislative authorization, Office of Tax Appeals does not have authority to abrogate the statute of limitations for a refund claim, even if the imposition of tax and penalties appears to be inequitable. (*Appeal of Estate of Gillespie, supra.*)

Appellant also argues that he is entitled to a refund because he was unaware of the statute of limitations for filing a claim for refund and FTB failed to notify him that he needed to file a return for the 2013 tax year. However, FTB is not obligated to inform a taxpayer of the time within which a claim for refund must be filed. (*Appeal of Matthiessen, supra.*)

Issue 2: Whether appellant is liable for the demand penalty imposed for the 2015 tax year.

In an action for refund, the taxpayer has the burden of proof. (*Dicon Fiberoptics, Inc. v. Franchise Tax Bd.* (2012) 53 Cal.4th 1227, 1235.) R&TC section 19133 provides that if a taxpayer fails to file a return upon notice and demand by FTB, then FTB may impose a penalty of 25 percent of the amount of tax assessed pursuant to R&TC section 19087, unless the failure is due to reasonable cause and not willful neglect. Pursuant to California Code of Regulations, title 18, section (Regulation) 19133(b), FTB will only impose a demand penalty if: (1) the taxpayer fails to respond to a current Demand for Tax Return in the manner prescribed, and (2) FTB has proposed an assessment of tax under the authority of R&TC section 19087(a), after the taxpayer failed to timely respond to a Request for Tax Return or a Demand for Tax Return in the manner prescribed, at any time during the four-taxable year period preceding the taxable year for which the current Demand for Tax Return is issued.

FTB previously issued to appellant a 2012 Request on January 10, 2014, and an NPA on April 14, 2014, for the 2012 tax year. Therefore, the prerequisite imposed by Regulation 19133(b) is satisfied. While appellant asserts that the requirements of Regulation 19133(b)(2) are not met because he never received a request or demand during the four-year period between 2010 and 2014, we find any argument or suggestion that appellant did not receive the 2012 Request (dated January 10, 2014) to be without merit. Appellant requested additional time to

respond to the 2012 Request on February 9, 2014, which clearly establishes that appellant did in fact receive the 2012 Request.

Appellant also argues that he made timely tax payments through withholdings on his wages and suggests that no penalty is owed since his taxes were paid on time and he was entitled to a refund for the 2015 tax year. However, the demand penalty is computed *without* regard to payments and withholding credits. It is designed to penalize a taxpayer for failing to respond to a demand, not for failing to timely pay the proper tax due. (*Appeal of Scott* (83-SBE-148) 1983 WL 15480; *Appeal of Hublou* (77-SBE-102) 1977 WL 4093.) Accordingly, the demand penalty was properly imposed for the 2015 tax year.

Appellant provides no argument or evidence to show reasonable cause for failing to respond to the 2015 Demand. Therefore, appellant has not shown that the demand penalty should be abated.

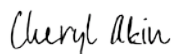
### HOLDINGS

1. The statute of limitations to file a timely refund claim was not tolled for the 2013 tax year, and therefore, appellant's refund claim was untimely filed.
2. Appellant is liable for the demand penalty imposed for the 2015 tax year.

### DISPOSITION

FTB's actions denying appellant's claims for refund for the 2013 and 2015 tax years are sustained.

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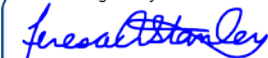


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Cheryl L. Akin

Administrative Law Judge

We concur:

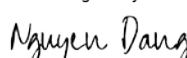
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Administrative Law Judge

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Administrative Law Judge

Date Issued: 6/16/2020