

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:
N. BRAUNGER (DEC'D)

) OTA Case No. 18042557
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OPINION

Representing the Parties:

For Appellant:

Heidi Braunger, Executor
Jae Lee, Tax Appeals Assistance Program
(TAAP)¹

For Respondent:

David Kowalczyk, Tax Counsel

N. DANG, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, decedent N. Braunger (appellant), by and through executor Heidi Braunger, appeals an action by respondent Franchise Tax Board (FTB) denying appellant's refund claim for the 2008 and 2009 tax years.

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

ISSUES

1. Whether FTB's levy resulted in an overcollection for the 2008 tax year which is not subject to the general statute of limitations for filing a refund claim.
2. Whether appellant's refund claim for the 2009 tax year was timely.

¹ Erika Ziaei of TAAP filed appellant's reply brief and Ki Evelyne Kim of TAAP filed appellant's supplemental brief.

FACTUAL FINDINGS2008 Tax Year

1. As reflected in FTB's records, appellant had a total of \$16,705 in withholding payments effective April 15, 2009.
2. When appellant did not file a California income tax return for the 2008 tax year, FTB issued a Notice of Proposed Assessment (NPA) for \$20,835 additional tax before payments/credits, a \$5,204.25 late-filing penalty, a \$5,208.75 demand penalty, a \$113 filing enforcement fee, and applicable interest.
3. The proposed amounts listed in the NPA were computed using a \$252,498 estimate of appellant's gross income based on third-party information reporting, less a standard deduction of \$3,692 and \$18 withholding credit.
4. The NPA became final and FTB initiated collection action against appellant.
5. The following payments totaling \$25,008.32 were thereafter applied toward appellant's outstanding liability: (1) \$160.40 of voluntary payments made from August 2011 through June 2012; (2) an FTB levy for \$7,939.38 on September 15, 2012; (3) the application of a \$201.49 credit from the 2011 tax year; (4) a \$2.05 interest allowance; and (5) a \$16,705 withholding credit.
6. On February 15, 2015, appellant late filed a 2008 California income tax return using the married filing separately status and claiming a refund of \$10,317.
7. FTB accepted appellant's return as filed but refunded only \$203.54 of the requested amount.

2009 Tax Year

8. Appellant had a \$108 withholding payment effective April 15, 2010.
9. On August 4, 2014, appellant late filed a California income tax return, claiming a refund of the \$108 withholding payment.
10. FTB accepted appellant's return as filed but did not issue the requested refund to appellant.

DISCUSSION

Issue 1 – Whether FTB’s levy resulted in an overcollection for the 2008 tax year which is not subject to the general statute of limitations for filing a refund claim.

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.)

It is undisputed that appellant’s refund claim is untimely as to appellant’s voluntary payments and withholdings. Appellant instead seeks a return of the \$7,939.38 levy amount, on the basis that this is an “overcollection” not subject to the general limitation period for making a refund claim.

According to FTB, “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.’” (FTB Technical Advice Mem. 2007-01 (Apr. 23, 2007).) An overcollection occurs where, as the result of a clerical or mechanical error, FTB has collected through its enforcement mechanisms (e.g., liens, levies, or garnishment orders) an amount exceeding that which is actually due under the law. (*Ibid.*)

To determine whether an overcollection has occurred, it therefore follows that we must first determine the amount FTB was legally entitled to collect; in other words, the amount due after correcting for any clerical or mechanical errors. Once that amount has been established, it must then be compared to the total payments received by FTB. The portion of any excess amount that is attributable to an FTB collection action constitutes an overcollection.

Appellant appears to rely on the assumption that the tax due should be calculated based on its withholdings. We disagree. For an individual using the married filing separately status, this amount is computed as \$2,071.76 plus 9.3 percent of the amount over \$47,055. (FTB Personal Income Tax Booklet 2008, p. 26 [the 2008 California Tax Rate Schedules].) Based on appellant’s receipt of \$252,498 of income less a standard deduction of \$3,692, we compute a tax due, before payments and credits, of \$20,834.60 $[(\$252,498 - \$3,692 - \$47,055) \times 0.093] + \$2,071.76$. This is the same amount reflected on the NPA (after rounding).

Nevertheless, appellant is correct in its assertion that the NPA contains a clerical error. Despite FTB records reflecting appellant's \$16,705 withholding, the NPA shows total payments of only \$18, which is clearly erroneous. This impacts the late-filing penalty and interest amount, both of which are computed directly from the tax due less timely payments and credits.² After correcting this error, we calculate a revised late-filing penalty amount of \$1,032.50 $(\$20,835 - \$16,705] \times 0.25)$.³

In summary, we find the tax, penalties, and fee due under the law to be \$27,189.25 (\$20,835 tax + \$1,032.50 late-filing penalty (revised) + \$5,208.75 demand penalty + \$113 filing enforcement fee). Appellant's 2008 account reflects payments totaling \$25,008.32, which is less than the tax, penalties, and fee FTB was entitled to collect pursuant to its assessment.⁴

Accordingly, we find that no overcollection occurred.

Issue 2 – Whether appellant's refund claim for the 2009 tax year was timely.

R&TC section 19306(a) provides that no credit or refund shall be allowed unless a claim for refund is filed within the later of one of the following three periods: (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's August 4, 2014 return was not timely filed. Therefore, the first period is inapplicable here. This return was also not filed within either one or four years from

² In contrast, the filing enforcement fee is a flat amount (adjusted annually) that is set by statute. (R&TC, § 19254(a)(2)(A), (b).) And the demand penalty amount is computed from the tax due before any payments or credits. (R&TC, § 19133.)

³ The penalty amount is 5 percent for each month or fraction thereof between the due date of the return, determined without regard to any extension of time for filing, and the date on which filed, up to a maximum of 25 percent. (R&TC, § 19131(a).)

⁴ It is not necessary for us to compute an adjustment to interest because the amount paid does not exceed the amount owed for just the taxes, penalties, and fees.

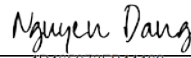
April 15, 2010, which is the effective date of appellant's withholding payment and the due date for the 2009 return. Hence, appellant did not make a timely refund claim for the 2009 tax year.

HOLDINGS

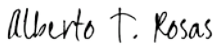
1. FTB's levy did not result in an overcollection for the 2008 tax year.
2. Appellant's refund claim for the 2009 tax year was untimely.


DISPOSITION

We sustain FTB's action.

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Nguyen Dang
Administrative Law Judge

We concur:

DocuSigned by:

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Alberto T. Rosas
Administrative Law Judge

DocuSigned by:

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Andrew Wong
Administrative Law Judge

Date Issued: 7/21/2020