

BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
ROBERT C. WHISENHUNT) No. **84R-1116-VN**

For Appellant: Fred L. Mesirov

For Respondent: Grace Lawson
Counsel

O P I N I O N

This appeal is made pursuant to section 19057, subdivision (a), 1 of the Revenue and Taxation Code from the action of the Franchise Tax Board in denying the claim of Robert C. Whisenhunt for refund of personal income tax in the amount of \$401 for the year 1978.

1/ Unless otherwise specified, all section references are to sections of the Revenue and Taxation Code as in effect for the year in issue.

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The issue presented for *our* decision is whether appellant's claim for refund **was** barred by the statute of limitations.

On March 27, 1979, appellant filed a timely California individual income tax return for 1978. In a federal audit report dated October 27, 1980, the Internal Revenue Service apparently disallowed deductions claimed by appellant on his 1978 federal return for expenses incurred in connection with a dwelling rented to a family member. Subsequently, the Franchise Tax Board obtained the federal report and determined that appellant's California taxable income for 1978 should be revised accordingly. Thus, on February 5, 1982, respondent issued a proposed assessment of additional tax in the amount of \$400.92 based on a **\$3,748.00** adjustment of appellant's income by the federal audit report. Appellant paid the deficiency assessment, including interest, on May 10, 1982.

In the next year, on September 19, 1983, ~~appellant~~ concurrently filed amended federal and state returns for 1978, claiming refunds of the additional taxes assessed as the result of the federal adjustment. On both amended returns, appellant asserted that ~~the~~ previously disallowed deduction was now ~~permitted~~ due to an amendment of the Internal Revenue Code.^{2/} On September 26, 1983, the Franchise Tax Board received the amended return (form 540X) which showed a \$3,748 decrease

^{2/} For the year in question, section **280A(a)** of the **Internal** Revenue Code originally stated that no deduction was allowed with respect to a dwelling unit if it was used by the individual taxpayer during the taxable year as a residence. Under section **280A(d)**, a taxpayer was deemed to have used a dwelling unit as a residence if the unit was used by any member of the family or by any **individual** under an arrangement that allowed the taxpayer to use another dwelling. In 1981, Public Law 97-119, section 113, amended section **280A(d)** by essentially **providing** that a taxpayer would not be treated as using a dwelling unit as his residence by reason of a rental arrangement so long as the unit was rented at a fair rental price to any person for use as that person's principal residence. (1981 U.S. Code Cong. & Ad. News 1641.) The amendment was retroactively effective for taxable years beginning after December 31, 1975. The comparable section under California law is section 17299.3 of the Revenue and Taxation Code.

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in taxable income and a corresponding tax refund claim in the amount of \$401.

In a letter to appellant dated December 1, 1983, the Franchise Tax Board acknowledged receipt of his amended return and informed him of its general policy to assent to adjustments made by the Internal Revenue Service when there is a section of the Revenue and Taxation Code similar to the applicable federal law. In order to evaluate his refund claim, respondent then requested that appellant forward a copy, if any, of a revised federal audit report making the comparable adjustment to his federal taxable income. Appellant did not provide the requested information.

On June 25, 1984, respondent denied appellant's claim for refund on the grounds that the claim had not been filed within the period prescribed by section 19053 and, consequently, was barred by the statute of limitations. Appellant thereupon filed this timely appeal.

Section **19053** sets forth the general statute of limitations for filing refund claims in the following pertinent language:

No credit or refund shall be allowed or made after four years from the last day prescribed for filing the return or after one year from the date of the overpayment, whichever period expires the later, unless before the expiration of the period a claim **therefor** is filed by the taxpayer, ...

In numerous prior appeals, this board has held that the statute of limitations under section 19053 must be strictly construed and that 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. (See, e.g., Appeal of Robert J. and Rosemarie R. Gentry, Cal. St. Bd. of Equal., Jan. 3, 1983; Appeal of Stanley R. and Cheryl J. Huddleston, Cal. St. Bd. of Equal., Aug. 17, 1982; Appeal of Wendell Jenkins, Sr., Cal. St. Bd. of **Equal.**, June 23, 1981.) **Here**, the four-year statutory period for filing the 1978 refund claim expired on April 15, 1983. On the other hand, the alleged overpayment of his 1978 tax was made on May 10, 1982, when appellant paid the deficiency assessment. This means that the alternative one-year statutory period for filing a refund claim based on an overpayment ended on May 10, 1983. The latest date that appellant could have therefore

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filed a timely refund claim under these circumstance was May **10**, 1983. Since he did not file his amended return until September 26, 1983, it is clear that appellant's claim for refund was not timely filed under section 19053.

Appellant contends that his claim for refund should be allowed because the Internal Revenue Service granted the federal claim and implicitly allowed the deduction that it had first disallowed in its October 27, 1980, audit report. Appellant's reasoning is that, since respondent's deficiency assessment was predicated on that federal audit report, the Franchise Tax Board is now bound to follow again the federal lead and allow the state claim for refund. Appellant has not supported his contention with any evidence of the federal determination. Nevertheless, we find his argument to be contrary to established authority.

'Where respondent's assessment is based on federal action and a subsequent resolution of the federal tax matter results in an alleged overpayment of California tax, section 19053 still bars a claim for refund if the taxpayer has failed to file the claim within the prescribed statutory periods. (See Appeal of Maurice and Carol B. Hyman, Cal. St. Bd. of Equal., Feb. 26, 1969; Appeal of Clarence L. and A. Lois Morey, Cal. St. Bd. of Equal., Aug. 3, 1965; Appeal of Cleo V. Mott, Cal. St. Bd. of Equal.; Aug. 7, 1963.) Section 19053 has been so construed even where the federal taxing authorities allowed a parallel federal refund claim (Appeal of Estate of James A. Craig, Deceased, and Viola F. Craig, Cal. St. Bd. of Equal., July 7, 1967) or granted a federal tax credit (Appeal of Goldie Kahn, Cal. St. Bd. of Equal., Apr. 6, 1978).

It is well settled that the taxpayer has the burden of proving that a claim for refund has been filed within the statutory period. (Appeal of Samuel Derikrara, Cal. St. Bd. of Equal., Feb. 18, 1970; Appeal of Clarence L. and A. Lois Morey, supra.) Whereas appellant has failed to show that his refund claim was timely filed under any of the statutes of limitation, we have no choice but to find that his claim was barred under section 19053. Accordingly, respondent's action in this matter must be sustained.

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O R D E R

Pursuant to the views expressed in the opinion of the board, on file in this proceeding, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to section 19060 of the Revenue and Taxation Code, that the action of the Franchise Tax Board in denying the claim of Robert C. Whisenhunt for refund of personal income tax in the amount of \$401 for the year 1978, be and the same is hereby sustained.

Done at Sacramento, California, this 4th day of **February**, 1986, by the State Board of Equalization, with Board Members Mr. Nevins, Mr. Collis, Mr. Bennett, Mr. Dronenburg and Mr. Harvey present.

<u>Richard Nevins</u>	, Chairman
<u>Conway H. Collis</u>	, Member
<u>William M. Bennett</u>	, Member
<u>Ernest J. Dronenburg, Jr.</u>	, Member
<u>Walter Harvey*</u>	, Member

*For Kenneth Cory, per Government Code section 7.9