

**OFFICE OF TAX APPEALS  
STATE OF CALIFORNIA**

In the Matter of the Appeal of:

**L. CARPENTER AND  
C. CARPENTER (DEC'D)**

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) OTA Case No. 21119096  
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**OPINION**

Representing the Parties:

For Appellants:

L. Carpenter

For Respondent:

Leoangelo C. Cristobal, Tax Counsel  
Maria Brosterhous, Tax Counsel IV

For Office of Tax Appeals:

Oliver Pfof, Tax Counsel

J. JOHNSON, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, L. Carpenter and C. Carpenter (deceased) (appellants) appeal an action by respondent Franchise Tax Board (FTB) proposing additional tax of \$951, and applicable interest, for the 2013 tax year.

Office of Tax Appeals (OTA) Administrative Law Judge John O. Johnson held an electronic oral hearing for this matter on July 27, 2022. At the conclusion of the hearing, OTA closed the record and submitted the matter for a decision.

Appellants elected to have this appeal determined pursuant to the procedures of the Small Case Program. Those procedures require the assignment of a single administrative law judge. (Cal. Code Regs., tit. 18, § 30209.1.)

**ISSUES**

1. Whether FTB’s proposed assessment is barred by the statute of limitations.
2. Whether appellants are entitled to further interest abatement.

FACTUAL FINDINGS

1. Appellants filed a timely 2013 California Resident Income Tax Return on March 15, 2014.
2. On October 1, 2015, the IRS informed FTB that an IRS audit of appellants' 2013 federal tax return concluded with federal adjustments that increased appellants' federal tax liability. The information received from the IRS indicated the final federal determination occurred on July 3, 2015. Appellants had not previously informed FTB of the federal adjustments.
3. On August 11, 2016, FTB issued appellants a Notice of Proposed Assessment (NPA) for the 2013 tax year based on the information it received from the IRS. The NPA proposed to assess the additional tax at issue in this appeal, plus applicable interest.
4. Appellants timely protested the NPA. Appellant-husband signed and dated the written protest on August 23, 2016. Appellants included in their protest a copy of an IRS Notice CP2005. The CP2005 stated the IRS's inquiry into appellants' 2014 tax year was resolved with no additional tax owed.
5. FTB issued appellants a "protest acknowledgment letter" on September 12, 2016.
6. In May 2017, FTB requested a copy of appellants' 2013 federal account transcript. FTB determined the transcript showed the IRS had not reduced or canceled the federal assessment for the 2013 tax year.
7. FTB drafted a "position letter" in June 2017. The position letter stated it remained FTB's position that its NPA was correct. FTB records indicated this position letter was "canceled" in October 2017, and not issued to appellants.
8. Almost four years later, on April 1, 2021, FTB again requested and received from the IRS a copy of appellants' 2013 federal account transcript. FTB again determined the transcript showed the IRS had not reduced or canceled the federal assessment for the 2013 tax year.
9. FTB drafted a second position letter dated April 6, 2021, stating it remained FTB's position the NPA issued in 2016 was correct. Appellants received the April 2021 position letter.

10. FTB and appellant-husband corresponded following the April 2021 position letter. FTB acknowledged the delay in issuing its position letter, which it attributed to a processing error, and agreed to abate interest from September 19, 2016, to April 6, 2021.<sup>1</sup>
11. FTB issued appellants a Notice of Action in October 2021, affirming the NPA. It is from this Notice of Action that appellants timely appealed to OTA.
12. On appeal, FTB agrees to revise its interest abatement determination. FTB agrees to abate interest for the period beginning September 12, 2016, the date FTB acknowledged appellants' protest, through April 6, 2021, the date FTB issued appellants a position letter in response to their protest.

### DISCUSSION

#### Issue 1: Whether FTB's proposed assessment is barred by the statute of limitations.<sup>2</sup>

Generally, FTB must issue a proposed assessment within four years of the original due date or the date the taxpayer filed his or her California return, whichever is later. (R&TC, §§ 19057, 19066(a).) Unless otherwise provided, calendar-year individual taxpayers, such as appellants, must file a return on or before April 15 following the close of the calendar year. (R&TC, § 18566.) For the 2013 tax year, under the general four-year statute of limitations, FTB had until April 15, 2018, to issue a proposed assessment. Here, FTB issued its NPA on August 11, 2016. FTB therefore issued its proposed assessment within the applicable statute of limitations.<sup>3</sup>

Appellants offer two arguments why FTB's proposed deficiency assessment is nevertheless barred by the statute of limitations. Initially, appellants argue that they did not

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<sup>1</sup> FTB's April 2021 position letter originally agreed to abate interest beginning on May 31, 2017, based on its records showing that it left a voicemail for appellant on that date. FTB then revised the start date for interest abatement based on appellant's assertion that the voicemail was never received.

<sup>2</sup> During the oral hearing in this matter, appellant-husband confirmed he does not dispute the proposed additional tax of \$951. Rather, appellants contend FTB's proposed assessment is barred by the statute of limitations. If OTA finds FTB's proposed assessment is not barred by the statute of limitations, then OTA will sustain the proposed additional tax.

<sup>3</sup> FTB's proposed assessment is based on IRS adjustments to appellants' 2013 federal income tax return. Although the four-year statute of limitations under R&TC section 19057 is controlling since it expires last, the NPA would also have been timely under the two-year statute of limitations provided for in R&TC section 19059(a).

receive adequate notice of the proposed deficiency assessment.<sup>4</sup> However, at the hearing, appellant-husband conceded that the NPA was timely, stating, “I can see that [FTB] did get to me within four years.” Based on this, and the above facts and analysis regarding the statute of limitations, FTB’s NPA was timely sent within the applicable statute of limitations.

Appellants’ second argument concerns the unfairness of FTB’s delay in processing the proposed deficiency assessment, which appellant-husband describes as “unconscionable.” FTB issued the NPA and received appellants’ protest in August 2016. FTB acknowledged appellants’ protest by letter a month later. For some unknown reason, FTB canceled and did not mail its first position letter. A period of nearly four years elapsed before appellants were contacted by FTB with a position letter in response to their protest.

The law concerning the processing of a protest is concise. If a protest is filed, FTB shall reconsider the proposed deficiency assessment and grant the taxpayer a hearing if requested. (R&TC, § 19044(a).) FTB may act on the protest in whole or in part. (R&TC, § 19044(b).)

OTA is not aware of, and appellants do not point to, any statutory or regulatory authority which prescribes a statute of limitations under which FTB must process a taxpayer’s protest once a protest is received. Although FTB appears to have made a ministerial or managerial mistake in processing the protest, there is no statutory or regulatory basis to nullify the proposed deficiency for processing delays. Rather, the statutory remedy provided is the potential for an abatement of interest, as discussed below.

Under the doctrine of laches, a defendant may assert as an affirmative defense the unreasonable delay by a plaintiff in bringing a lawsuit as a basis for barring the plaintiff relief. (Restatement (Second) of Torts, § 939.) Laches, however, is an equitable defense suitable for a court of law. OTA is not a court, and therefore lacks the authority to provide appellants with a remedy on this basis. (Gov. Code, § 15672(b).) It is unsurprising appellants believed the proposed deficiency assessment had been “resolved” given FTB did not respond to their protest for four years. OTA is nevertheless constrained by the powers granted to it by statute, and for this reason appellants cannot be granted relief from the tax liability under the doctrine of laches.<sup>5</sup>

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<sup>4</sup> In the appeal letter, appellants appear to indicate that they never received the NPA. However, the evidence shows appellant-husband signed and dated the protest of the NPA on August 23, 2016, less than two weeks after FTB issued the NPA, and a copy of the NPA was included in appellants’ protest.

<sup>5</sup> OTA notes that even in a court of law the doctrine of laches is not a defense to the government’s enforcement of tax claims. (*Dial v. Commissioner* (9th Cir. 1992) 968 F.2d 898.)

In sum, FTB's proposed deficiency assessment is not barred by the statute of limitations.

Issue 2: Whether appellants are entitled to further interest abatement.

Interest is not a penalty. (*Appeal of Gorin*, 2020-OTA-018P.) Interest is compensation for a taxpayer's use of money after it should have been paid to the state. (*Ibid.*) To obtain relief from interest, a taxpayer must qualify under one of three statutes: R&TC sections 19104, 19112, or 21012. Only interest abatement under R&TC section 19104 is relevant to this appeal.<sup>6</sup>

Under R&TC section 19104, FTB may abate interest related to a proposed deficiency assessment to the extent the interest is attributable in whole or in part to: (1) an unreasonable error or delay; (2) by an officer or employee of FTB; (3) in performing a ministerial or managerial act; and (4) which occurred after FTB contacted the taxpayer in writing regarding the proposed deficiency assessment, provided no significant aspect of that error or delay is attributable to the taxpayer. (R&TC, § 19104(a)(1), (b)(1); *Appeal of Gorin*, *supra*.)

OTA's jurisdiction in an interest abatement case is limited to a review of whether FTB abused its discretion in determining whether to abate interest. (*Appeal of Gorin*, *supra*.) To show an abuse of discretion in refusing to abate interest, the taxpayer must establish FTB exercised its discretion arbitrarily, capriciously, or without sound basis in fact or law. (*Ibid.*) Interest abatement provisions are not intended to be routinely used to avoid the payment of interest and should be ordered only "where failure to abate interest would be widely perceived as grossly unfair." (*Ibid.*, quoting *Lee v. Commissioner* (1999) T.C. 145, 149.)

FTB agrees to abate interest from September 12, 2016, which is the date FTB acknowledged appellants' protest, through April 6, 2021, the date FTB issued its position letter in response to appellants' protest. FTB acknowledges the delay in processing appellants' protest, which it attributes to a processing error.

Interest abatement is not permitted by statute for the period before FTB first contacted appellants regarding the proposed deficiency assessment, which is August 11, 2016. OTA is therefore concerned with two periods: interest abatement from August 11, 2016, up to September 12, 2016, and interest abatement after April 6, 2021.

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<sup>6</sup> R&TC section 21012 is not relevant because there has been no reliance on any written advice requested by appellant of FTB. OTA does not have jurisdiction to review an FTB interest abatement determination made under R&TC section 19112, a section relating to extreme financial hardship. (*Appeal of Moy*, 2019-OTA-057P.)

FTB received appellants' protest 12 days after issuing its NPA in August 2016, and FTB acknowledged appellants' protest by letter in September 2016. OTA does not find FTB abused its discretion in denying interest abatement for the period between appellants' protest and the acknowledgement letter. FTB issued its acknowledgement letter less than a month after receiving the protest, which is reasonable. Appellants are therefore not entitled to interest abatement before September 12, 2016.

Concerning the period after April 6, 2021, OTA similarly finds FTB did not abuse its discretion. FTB and appellants corresponded for approximately six months before FTB issued its Notice of Action in October 2021. Appellants then timely filed this appeal with OTA. OTA does not find the six months between the position letter and the Notice of Action to be unreasonable. Appellants are therefore not entitled to interest abatement after April 6, 2021.

In sum, appellants are not entitled to further interest abatement.

#### HOLDINGS

1. FTB's proposed assessment is not barred by the statute of limitations.
2. Appellants are not entitled to further interest abatement.

#### DISPOSITION

Interest shall be abated for the period beginning September 12, 2016, through April 6, 2021, as conceded by FTB. FTB's action is otherwise sustained.

DocuSigned by:

*John O Johnson*

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John O. Johnson

Administrative Law Judge

Date Issued: 11/4/2022