

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:)
E. HERNANDEZ (GOMEZ)) OTA Case No. 21088374
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OPINION

Representing the Parties:

For Appellant: Arthur Demerath,
Tax Appeals Assistance Program (TAAP)¹
E. Hernandez (Gomez)

For Respondent: Topher Tuttle, Attorney

For Office of Tax Appeals: Amber Poon, Attorney

L. KATAGIHARA, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, E. Hernandez (Gomez) (appellant) appeals an action by respondent Franchise Tax Board (FTB) denying appellant’s claim for refund of \$12,282.22 for the 2006 tax year.²

Office of Tax Appeals (OTA) Administrative Law Judges Huy “Mike” Le, Eddy Y.H. Lam, and Lauren Katagihara held an electronic oral hearing for this matter on October 20, 2023. At the conclusion of the hearing, OTA held the record open for additional briefing. After the

¹ Joshua Imeri-Garcia and Alexandra Poveda, both of TAAP, filed appellant’s reply brief and supplemental brief, respectively.

² Appellant’s claim for refund was for \$15,182.16, \$2,899.94 of which FTB approved and refunded prior to appellant filing this appeal. Therefore, any reference to a claim for refund made herein refers only to the \$12,282.22 in dispute, unless otherwise specified.

additional briefing period ended, OTA closed the record and this matter was submitted for an Opinion.³

ISSUE

Whether appellant's claim for refund for the 2006 tax year is barred by the statute of limitations.

FACTUAL FINDINGS

1. Appellant, a California resident, did not timely file a California income tax return for the 2006 tax year.
2. FTB received information from Pinnacle Estate Properties NR (Pinnacle) indicating that, in 2006, appellant received sufficient income from the sale of real property in California to trigger a filing requirement. Consequently, FTB issued to appellant a Request for Tax Return for the 2006 tax year, but appellant did not file her tax return or otherwise respond to the Request for Tax Return.
3. Following appellant's nonresponse to the Request for Tax Return, FTB estimated appellant's income for the 2006 tax year based on the amount of appellant's gain from the sale of the real property (as reported by Pinnacle). Using this estimate, FTB issued a Notice of Proposed Assessment (NPA) for the 2006 tax year. The NPA included a standard deduction of \$3,410 and an exemption credit of \$91, based on appellant being a single individual with no dependents. The NPA stated that FTB would revise any differences in filing status, additional deductions, exemptions, or credits when appellant filed her 2006 tax return.
4. Appellant continued to be nonresponsive, so the NPA became final.
5. To partially satisfy appellant's tax liability for the 2006 tax year, between September 10, 2014, and May 1, 2018, FTB collected \$12,282.22 through various Earnings Withholding Orders for Taxes and transfers from overpayments of tax appellant made towards other tax years (collectively, pre-2019 payments). To satisfy the remainder

³ The English version of the Opinion will be the official version of this Opinion. Any differences in the translated version are not binding on OTA or the parties. The differences, if any, shall have no legal effect. The translated version is provided as a courtesy only. If there are any questions related to the information contained in the translated version, refer to the official Opinion for clarification. Please note that the official Opinion published on OTA's website may be later updated to include revisions for errata. However, the translated version will not be updated for errata revisions.

- of appellant's tax liability for the 2006 tax year, between June 23, 2020, and June 24, 2021, FTB collected \$2,883.29 in the same manner.
6. On February 12, 2021, appellant filed her 2006 tax return, reporting \$6 in tax, \$91 in exemption credits, \$30 in withholdings, and an overpayment of \$30.⁴
 7. FTB accepted appellant's 2006 tax return as filed and treated it as a claim for refund. On July 26, 2021, FTB notified appellant that her overpayment for the 2006 tax year totaled \$15,182.16. FTB issued a refund of \$2,899.94⁵ for the involuntary payments made between June 23, 2020, and June 24, 2021, but due to the statute of limitations, FTB denied appellant's claim for refund as to the remaining \$12,282.22 (i.e., the pre-2019 payments).
 8. Although it is now undisputed that the real property appellant sold in 2006 was her principal residence, and that the income from the sale qualified for the principal residence exclusion under R&TC section 17152, FTB asserts at the time it issued the NPA, it was unaware that the sale qualified for the exclusion.
 9. This timely appeal followed.

DISCUSSION

The statute of limitations to file a claim for refund is set forth in R&TC section 19306(a). The statute of limitations provides, in relevant part, that no credit or refund may be allowed unless a claim for refund is filed within the later of: (1) four years from the date the return was filed, if the return was timely filed pursuant to an extension of time to file; (2) four years from the date the return was due, determined without regard to any extension of time to file; or (3) one year from the date of overpayment. (R&TC, § 19306(a).) The taxpayer has the burden of proof in showing entitlement to a refund and that the claim is timely. (*Appeal of Cornbleth*, 2019-OTA-408P.)

Here, appellant does not contest FTB's determination that her claim for refund is barred by the statute of limitations set forth in R&TC section 19306(a). Instead, appellant contends that

⁴ In appellant's reply brief, she argues that she filed her 2006 tax return on March 17, 2011. However, at the oral hearing, appellant conceded that her 2006 return was not filed in 2011 and that it was ultimately filed in 2021. Therefore, OTA considers appellant to have abandoned her argument that the return was filed on March 17, 2011.

⁵ The \$2,899.94 is comprised of \$2,883.29 in payments made between June 23, 2020, and June 24, 2021, and \$16.65 in interest. The \$2,899.94 is not in dispute.

the pre-2019 payments constituted “overcollections” as described in FTB’s Technical Advice Memorandum 2007-01 (TAM), and thus, the statute of limitations found in R&TC section 19306(a) is inapplicable and a refund is not barred.

According to the TAM, even if the statute of limitations for filing a claim for refund has expired, FTB may return payments that were the result of “overcollection.” “An ‘overcollection’ occurs when the amount collected exceeds the amount actually due under the law as the result of clerical or mechanical error.” (TAM, p. 1; see also *Appeal of Cornbleth, supra.*) “The basic rule utilized in distinguishing between an ‘overcollection’ and a barred overpayment is whether amounts collected were based on an assessment that was accurate based on the information available to . . . FTB at the time the assessment was made.” (TAM, p. 4.)

Appellant argues that FTB’s assessment was inaccurate because FTB had access to information indicating that the sale of appellant’s real property qualified for the principal residence exclusion, yet FTB failed to consider the exclusion when estimating appellant’s taxable income. Appellant’s argument relies on the following language found on page 2 of the TAM: “[FTB] is often compelled to make an assessment of tax based on available information . . . includ[ing] records from the Employment Development Department, the [IRS], and various other reliable sources.” Appellant asserts the following information or records were available to, but not considered by, FTB when it made its assessment: (1) an IRS Form 1099-S, Proceeds from Real Estate Transaction submitted by Pinnacle to the IRS; (2) appellant’s previously filed California income tax returns listing, as her home address, the same address of the real property sold in 2006, and not including any investment properties; (3) the deed of sale which listed appellant’s home address as the real property sold; (4) appellant’s 2006 federal income tax return, which was not adjusted by the IRS to include income from the sale of the real property;⁶ (5) the Claim for Homeowners’ Property Tax Exemption (ASSR-515) recorded with the Los Angeles County Assessor’s Office, wherein the real property sold is identified as appellant’s principal residence; and (6) a Real Estate Withholding Statement (Form 593) that appellant alleges was submitted to FTB and indicates that the real property sold qualified for the principal residence exclusion.

⁶ Internal Revenue Code section 121 also excludes from gross income the gain from the sale of a principal residence.

Aside from the Form 593 and ASSR-515, the information upon which appellant relies does not definitively establish that appellant's sale of the real property qualified for the principal residence exclusion. Moreover, appellant has not proved by a preponderance of the evidence that FTB received the Form 593, ASSR-515, or any of the other documents listed above (other than appellant's previous California income tax returns), at the time FTB made its assessment.⁷

Although the TAM states that FTB may make an assessment of tax based on available information, it does not require FTB to seek out or request documentation from other government agencies or make assumptions in appellant's favor when determining the amount of tax owed. In Example 6 of the TAM on page 4, FTB made a valid assessment against a real estate broker by using the average business income of real estate brokers. Indeed, the example does not require FTB look at past returns to determine if its assessment was in line with previously reported income or to reduce its assessment based on deductions or exemptions that were previously claimed by the real estate broker. Instead, the onus is upon appellant to timely file a tax return and claim any applicable deductions or exclusions. The NPA specifically stated that FTB would revise its assessment to include any additional deductions, exemptions, or credits when appellant filed her 2006 tax return. Still, appellant remained nonresponsive. Therefore, FTB's assessment was not inaccurate at the time it was made. Even if it were, the alleged inaccuracy would not have constituted a "clerical or mechanical error." Examples of clerical and mechanical errors are the transposition of numbers or the receipt of a payment that FTB did not intend to collect. (See TAM, Examples 1-3, pp. 2-3.) Neither situation is present here. Accordingly, appellant's pre-2019 payments were not "overcollections" and instead, were "overpayments." As such, R&TC section 19306(a) applies, and appellant is not entitled to any further refund.

⁷ OTA also requested that FTB submit any evidence in its possession reflecting that appellant, the purchaser, or the remitter of the real property filed a Form 593, or a copy of the Form 593 itself if one was received. In response, FTB stated that no such evidence exists.

HOLDING

Appellant’s claim for refund for the 2006 tax year is barred by the statute of limitations.

DISPOSITION

FTB’s action in denying appellant’s claim for refund is sustained.

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Lauren Katagihara
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Lauren Katagihara
Administrative Law Judge

We concur:

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Huy “Mike” Le
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Huy “Mike” Le
Administrative Law Judge

DocuSigned by:
Eddy Y.H. Lam
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Eddy Y.H. Lam
Administrative Law Judge

Date Issued: 3/19/2024