

**OFFICE OF TAX APPEALS  
STATE OF CALIFORNIA**

In the Matter of the Appeal of: )  
S. SOTELO ) OTA Case No. 230212613  
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**OPINION**

Representing the Parties:

For Appellant: S. Sotelo

For Respondent: Maria Brosterhous, Attorney Supervisor

For Office of Tax Appeals: Sean Erdman, Graduate Student Assistant

J. LAMBERT, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, S. Sotelo (appellant) appeals an action by respondent Franchise Tax Board (FTB) denying appellant’s claim for refund of \$1,176 for the 2017 tax year.<sup>1</sup>

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

**ISSUE**

Whether appellant’s claim for refund of the earned income tax credit (EITC) is barred by the statute of limitations.

**FACTUAL FINDINGS**

1. FTB received information that appellant may have earned income in 2017 that required her to file a California income tax return.
2. On July 5, 2019, FTB issued a Demand for Tax Return (Demand) for the 2017 tax year, requiring that appellant submit a copy of a return if previously filed, file a return, or provide information showing that she had no filing requirement.

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<sup>1</sup> Appellant’s return and the Notice of Proposed Assessment state that appellant’s last name is Mendez, though appellant has since changed her last name to Sotelo.

3. When appellant did not respond to the Demand, FTB issued a Notice of Proposed Assessment (NPA). The NPA estimated appellant's income and proposed a tax assessment, a late filing penalty, a notice and demand penalty, and a filing enforcement cost recovery fee, plus interest.
4. Appellant did not respond to the NPA, and the proposed assessment became final. FTB issued a State Income Tax Balance Due Notice, stating that appellant owed a balance of \$2,227.88. When FTB did not receive any payments, FTB pursued involuntary collection action and issued multiple withholding orders.
5. FTB's records reflect that it received appellant's 2017 California income tax return on November 4, 2022. On the return, appellant reported California adjusted gross income of \$3,067 and, after a reduction for the standard deduction, zero taxable income and zero total tax. Appellant reported zero tax payments, zero withholdings, and zero tax due. Appellant also claimed an EITC of \$1,176 and requested a refund of the same amount.
6. FTB accepted the return as filed and treated the return as a claim for refund. On December 15, 2022, FTB denied the claim for refund of \$1,176 based on the expiration of the statute of limitations.<sup>2</sup>
7. Appellant filed this timely appeal.
8. On March 17, 2023, appellant paid \$217.65 to FTB.<sup>3</sup>
9. On appeal, FTB agrees to refund the March 17, 2023 payment of \$217.65 to appellant pursuant to the one-year statute of limitations.<sup>4</sup>

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<sup>2</sup> The record includes FTB's "Statute of Limitations" notice dated December 15, 2022, which stated that appellant's claim for refund for the "Total Overpayment" of \$1,176 was barred by the statute of limitations.

<sup>3</sup> During FTB's original briefing, FTB asserted that appellant made no payments. During additional briefing, the Office of Tax Appeals requested that FTB provide its records of appellant's payments. FTB provided its records which reflect a payment of \$217.65 received by FTB with an effective date of March 17, 2023. FTB states that this is an In-Home Supportive Services payment made to FTB. FTB states that this amount was received in the form of a check dated March 6, 2023, and that, due to a processing delay, the check was not uploaded into FTB's accounting system until June 12, 2023, which was after FTB filed its opening brief on April 20, 2023.

<sup>4</sup> FTB's records indicate that appellant has a tax liability of zero and a balance of -\$1,393.65, which is comprised of the March 17, 2023 payment of \$217.65 and the EITC claimed on the return of \$1,176. The refund of \$217.65 that FTB agrees to on appeal is an amount separate from the claim for refund amount of \$1,176 which FTB denied in its letter dated December 15, 2022. Nevertheless, FTB considers appellant's November 4, 2022 claim for refund as a claim for the payment of \$217.65 and has agreed to grant a refund of that amount.

## DISCUSSION

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 original due date for filing a return for the year at issue (determined without regard to any extension of time to file), or (3) one year from the date of overpayment.<sup>5</sup> (R&TC, § 19306(a).) The taxpayer bears the burden of proving entitlement to a refund. (*Appeal of Jali, LLC*, 2019-OTA-204P.) The burden of proof requires proof by a preponderance of the evidence. (Cal. Code Regs., tit. 18, § 30219(b).)

The law does not provide for the waiver of the statute of limitations based on reasonable cause or equity. (*Appeal of Benemi Partners, L.P.*, 2020-OTA-144P.) A taxpayer's failure to file a claim for refund within the statutory period prevents the taxpayer from claiming a refund later.<sup>6</sup> (*Appeal of Estate of Gillespie*, 2018-OTA-052P.) This is true even when it is later shown that the tax was not owed in the first instance. (*Appeal of Benemi Partners, L.P.*, *supra*.) Although the result of fixed deadlines may appear harsh, the occasional harshness is redeemed by the clarity imparted. (*Ibid.*)

Appellant contends that the 2017 return was mailed before the expiration of the statute of limitations, but the return was lost or misplaced after it was mailed. Taxpayers must provide evidence, such as a registered or certified mail receipt, showing that a return was filed on a date different from the date indicated by FTB's records. (See *Appeal of Fisher*, 2022-OTA-337P.) Here, appellant does not provide evidence to show that a return was mailed at an earlier date. Therefore, appellant has not shown that the return was filed prior to November 4, 2022, as indicated by FTB's records.

Because appellant did not file her 2017 tax return within the six-month extension period, the first four-year statute of limitations period does not apply. (See R&TC, § 19306(a).) The second four-year statute of limitations period expired on April 15, 2022, four years after the

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<sup>5</sup> On appeal, FTB does not dispute that appellant qualifies for the EITC, and FTB's records show that appellant received a credit to her account for the EITC. FTB only argues that appellant's claim for refund of the EITC is barred by the statute of limitations.

<sup>6</sup> The time for filing a claim for refund may be extended if an individual taxpayer is "financially disabled," meaning he or she 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. (R&TC, § 19316(b); *Appeal of Estate of Gillespie*, 2018-OTA-052P.) Appellant does not provide any argument or evidence to show that she was financially disabled.

original filing due date of April 15, 2018. (R&TC, §§ 18566, 19306(a).) Appellant did not file her claim for refund until November 4, 2022. Therefore, appellant’s claim for refund is barred under the second four-year statute of limitations. (R&TC, § 19306(a).)

As to the one-year statute of limitations, FTB has agreed to refund appellant’s only payment of \$217.65 made on March 17, 2023. Appellant’s remaining claim for refund relates to the refundable EITC of \$1,176 claimed on appellant’s 2017 return filed November 4, 2022.

With respect to the refund claim for the EITC of \$1,176, the Office of Tax Appeals (OTA) asked FTB during additional briefing to address whether the one-year statute of limitations applies where the “overpayment” is the result of a refundable tax credit like the EITC, rather than an amount collected by FTB from appellant or paid by appellant to FTB. If the one-year statute of limitations applied, OTA asked FTB to provide the date of the overpayment created by a refundable tax credit such as the EITC for purposes of applying the one-year statute of limitations period.

In its response, FTB asserts that R&TC section 19354 states that a refundable credit shall be “considered an overpayment” but does not set forth a refund statute of limitations solely for refundable tax credits.<sup>7</sup> Thus, FTB asserts that the EITC qualifies as an “overpayment,” but does not address whether the one-year statute of limitations applies to the EITC, and what date the “overpayment” is deemed to have been made for statute of limitations purposes.

In 2015, California enacted the California EITC, a refundable tax credit, which is based on the federal EITC (codified at Internal Revenue Code (IRC) section 32), subject to various modifications. (R&TC, § 17052; *Appeal of Akhtar*, 2021-OTA-118P.)<sup>8</sup> If the amount allowable as an EITC exceeds the tax liability computed under the Personal Income Tax Law, the excess, after application to any other amounts due, shall be refunded to the taxpayer. (R&TC, § 17052(f).)

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<sup>7</sup> FTB also asserts that a credit such as the EITC may not be claimed without filing a return because, according to R&TC section 18501(a), taxpayers are required to “make a return to [FTB], stating specifically the items of the individual’s gross income from all sources and the deductions and credits allowable . . . [.]” FTB asserts that there was no overpayment on appellant’s account until she filed her 2017 return on November 4, 2022, approximately seven months after the expiration of the four-year statute of limitations. However, when the overpayment appeared on appellant’s account does not resolve the question of when the EITC is deemed to be paid for purposes of the one-year statute of limitations.

<sup>8</sup> Among various other requirements, both the federal and California EITCs require the taxpayer to have had “earned income” during the tax year at issue. (IRC, § 32(a)(1); R&TC, § 17052(a)(1).)

R&TC section 19354 states: “If the amount allowable as a credit under [R&TC] [s]ection 19002 (relating to credit for tax withheld) and the amount, if any, allowable as a refundable tax credit . . . exceeds the tax imposed by [the Personal Income Tax Law], against which the credits are allowable, the amount of the excess shall be considered an overpayment.”<sup>9</sup> R&TC section 19306(a) provides, as relevant here, that a claim for refund is untimely if it is filed after one year from the “date of the overpayment.”

To summarize, the EITC is a refundable tax credit, meaning it allows for the excess of the credit over the taxpayer’s tax liability to be refunded to the taxpayer. (See R&TC, § 17052(f).) In addition, the excess of the EITC over the tax liability is considered an “overpayment” that may be refunded to the taxpayer unless the claim for refund, as relevant here, was filed “after one year from the date of the overpayment.” (See R&TC, § 19354; 19306(a).)<sup>10</sup>

If the EITC is deemed “paid” on the date the return was filed, then appellant’s claim for refund would be within the one-year statute of limitations because the overpayment and the filing of her claim for refund (the return) occurred on the same date. If, however, the EITC is deemed “paid” on the original due date for filing a return, similar to tax withholding and other tax payments made during the taxable year, then appellant’s claim is barred by the statute of limitations because the due date for filing a 2017 return was April 15, 2018, and the claim for refund was filed more than one year later on November 4, 2022. Therefore, at issue is when an overpayment originating from a refundable tax credit such as the EITC is deemed “paid” for purposes of the one-year statute of limitations under R&TC section 19306(a).

R&TC sections 19002(c)(1) and (c)(2), and 19363 state that, for purposes of R&TC section 19306, withheld taxes and estimated tax payments are deemed paid on the filing due date of the return, without regard to any extension of time for filing the return.<sup>11</sup> However, OTA is

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<sup>9</sup> In 2002, prior to the enactment of the California EITC in 2015, R&TC section 19354 was amended to add: “and the amount, if any, allowable as a refundable tax credit (including the Child and Dependent Care Credit allowable under Section 17052.6)” (R&TC, § 19354, added by Stats.2002, ch. 374, § 7.) According to the Senate Revenue & Taxation Committee on Assembly Bill No. 2979 (2001-2002 Reg. Sess.) June 12, 2002, comments: “This bill will enhance administration of refundable credits for both the taxpayer and the FTB.”

<sup>10</sup> See also *Israel v. U.S.* (2d Cir. 2004) 356 F.3d 221, 223, citing *Sorenson v. Sect. of Treas. of U.S.* (1986) 475 U.S. 851, 854: “[D]eeming refund amounts generated by the [federal EITC] as overpayments makes sense because the [federal EITC] is a credit unlike other credits in the [federal] tax code—not only can it be used ‘to off-set tax that would otherwise be owed,’ it is ‘refundable’ even if the taxpayer had no tax liability.”

<sup>11</sup> See also R&TC section 19002(d)(2) providing that for purposes of R&TC section 19306, payment of any portion of the tax made before the due date for the return shall be considered paid on the due date.

not aware of any similar California authority stating when the EITC is deemed paid for purposes of applying R&TC section 19306 and, therefore, this issue appears to be one of first impression in California.

Federal courts, however, have addressed this issue. In *Israel v. U.S.* (2d Cir. 2004) 356 F.3d 221 (*Israel*), the taxpayers did not file their joint federal income tax returns for the 1993, 1994, and 1995 tax years until the year 2000, claiming the federal EITC for each year with the respective return. (*Id.* at pp. 221-222.) For each tax year, the taxpayers claimed a federal EITC more than the amount of tax paid or withheld, and each return claimed refunds for the excess. (*Id.* at p. 222.) Therefore, as with this appeal, the taxpayers in *Israel* simultaneously filed their returns and claimed refunds of the EITC in excess of the tax paid or withheld. (*Id.* at pp. 222-223.) As explained by the *Israel* court, however, the statute of limitations bars claims for refund of payments that were not “paid” within three years immediately preceding the filing of the claim plus any extensions granted (the “look back rule” under IRC section 6511(b)(2)(A)). (*Id.* at pp. 224-225.) Consequently, as is the case in this appeal, the court examined when the EITC was deemed (or constructively) “paid” for purposes of the relevant statute of limitations. (*Id.* at p. 224.)

The court noted that the IRC states that the federal EITC is an “overpayment” of tax but fails to inform as to the date to deem those overpayments “paid.” (*Israel, supra*, 356 F.3d at pp. 222, 224.) The court ultimately held that the federal EITCs were deemed constructively paid on April 15 following the tax years at issue – more than three years from the filing of the claims – and thus the refunds were barred by the “look back rule.” (*Id.* at p. 226.) To reach this holding, the court looked to IRC section 6513(b) which, for purposes of the federal statute of limitations under IRC section 6511, deems withheld tax as paid on the original filing due date. (*Id.* at pp. 225-226.)

The court reasoned that it is “logical and consistent” for IRC section 6513(b) to apply to overpayments created by the federal EITC, and that there should be no difference in the treatment of a claim for refund where the overpayment was comprised of withholdings as opposed to the EITC. (*Id.* at p. 225.) Thus, the court determined that amounts refundable by operation of the EITC are sufficiently “similar to excess withholding taxes” to justify similar treatment, citing *Sorenson v. Sect. of Treas. of U.S.* (9th Cir.1985) 752 F.2d 1433, 1443, fn. 1, *aff’d.* (1986) 475 U.S. 851. (*Id.* at p. 226; see also *Little v. Commissioner*, T.C. Memo. 1995-1

[the federal EITC is necessarily based on the taxpayer's earned income, which can be determined when the tax return is due to be filed, so any overpayment resulting from the EITC, as well the taxes withheld on their wages, is deemed to have been paid on the date the return is due]; *Harriman v. IRS* (E.D.N.Y. 2002) 233 F.Supp.2d 451, 459 [federal EITC and withholding credits are both deemed paid on the date the return was due].)

The court in *Israel* reasoned that the purpose of the “look back rule” is to prevent taxpayers from asserting stale claims for credits or refunds and deduced that Congress's intent to prevent stale claims extended to claims for the federal EITC. (*Israel, supra*, 356 F.3d at p. 226.) The court explained that a claim for the federal EITC requires a taxpayer to demonstrate a host of facts about his or her income and dependent children and verifying this information many years later may be difficult. (*Ibid.*) Thus, the court determined that its holding effectuates “Congress's intention of preventing untold numbers of claims for credits and refunds many years after the fact.” (*Ibid.*) In conclusion, the court in *Israel* held that “amounts refundable by operation of the [federal EITC] are deemed paid as of the filing deadline for the tax year in question,” and, therefore, the claims were barred by the statute of limitations. (*Id.* at pp. 225-226.)

OTA finds the reasoning of the court in *Israel* to be persuasive and applicable here in determining when California refundable tax credits such as the EITC are deemed to be paid. OTA first notes that the relevant parts of the statute of limitations as to overpayments under both California and federal law require overpayments to be made within a certain time period of the filing of the claim for refund in order for the taxing agency to refund or credit that overpayment to the taxpayer.<sup>12</sup> Second, as with the federal statute of limitations for overpayments, the analogous California statutory provision serves a purpose to prevent taxpayers from asserting stale claims for refunds. (See *Appeal of Jacobs* (65-SBE-029) 1965 WL 1366 [“the primary purpose of the statute of limitations is to bar untimely though otherwise valid claims”]; see also

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<sup>12</sup> For California purposes, a claim for refund is untimely if it is filed after one year from the date of the overpayment; for federal purposes, a taxpayer must file a claim within three years of filing a tax return or two years of paying the tax, whichever period expires later, and: (1) if the claim was filed during the three-year period described above, the amount of the refund or credit shall not exceed the tax paid within a look-back period, which is three years plus any extension of time for filing the return; and (2) if the claim was not filed within the three-year period, the amount of the refund or credit shall not exceed the tax paid within a two-year look-back period. (Compare R&TC, § 19306(a) with IRC, § 6511(a) & (b)(2).)

*Gutierrez v. Mofid* (1985) 39 Cal.3d 892, 898.)<sup>13</sup> If a refundable tax credit, such as the EITC, is deemed “paid” when a return is filed, there could never be an untimely claim for refund of the credit under these circumstances. Essentially, there would be no statute of limitations, and taxpayers could request and potentially be entitled to refunds years or decades after the fact, even 20 years after the original filing date, thereby contradicting the purpose behind the enactment of the statute of limitations and rendering it useless.

Treating overpayments from refundable tax credits as “paid” on the original filing due date is consistent with California’s treatment of withheld taxes and estimated tax payments (i.e., deeming them paid on the filing due date of the return). (See R&TC, §§ 19002(c)(1)-(2), 19363.) Such treatment is also consistent with the purpose of the statute of limitations to prevent taxpayers from asserting stale claims for refunds. (See *Appeal of Jacobs, supra*; see also *Gutierrez v. Mofid, supra*, 39 Cal.3d at p. 898.) Therefore, OTA concludes that appellant’s EITC overpayment is deemed to have been “paid” on April 15, 2018, which is the original filing due date of appellant’s 2017 return (without regard to any extension to file). Appellant’s claim for refund was filed on November 4, 2022, which is more than one year from April 15, 2018. Accordingly, appellant’s claim for refund of the EITC is barred by the one-year statute of limitations.

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<sup>13</sup> “Statutes of limitation. . . are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.” (*Gutierrez v. Mofid, supra*, 39 Cal.3d at p. 898, citing *Wood v. Elling Corp.* (1977) 20 Cal.3d 353, 362.)

HOLDING

Appellant’s claim for refund of the EITC overpayment is barred by the statute of limitations.

DISPOSITION

As conceded by FTB on appeal, appellant is granted a refund of \$217.65. As to FTB’s denial of appellant’s claim for refund of the EITC overpayment of \$1,176, FTB’s action is sustained in full.

Signed by:  
*Josh Lambert*  
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Josh Lambert  
Administrative Law Judge

We concur:

Signed by:  
*Lauren Katagihara*  
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\_\_\_\_\_  
Lauren Katagihara  
Administrative Law Judge

DocuSigned by:  
*Kenneth Gast*  
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Kenneth Gast  
Administrative Law Judge

Date Issued: 10/30/2024