

**OFFICE OF TAX APPEALS
STATE OF CALIFORNIA**

In the Matter of the Appeal of:)
M. LIBITZKY AND) OTA Case No. 18124095
S. LIBITZKY)
_____)

OPINION

Representing the Parties:

For Appellants: S. Ross Kochenderfer Jr.

For Respondent: Christopher T. Tuttle, Attorney
Maria Brosterhous, Attorney Supervisor

K. LONG, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, M. Libitzky and S. Libitzky (appellants) appeal an action by respondent Franchise Tax Board (FTB) denying appellants' claim for refund of \$216,523.76 for the 2011 tax year.

Office of Tax Appeals (OTA) Panel Members Veronica I. Long, Greg Turner, and Keith T. Long held an oral hearing for this matter in Sacramento, California, on October 15, 2024. At the conclusion of the hearing, the record was closed, and this matter was submitted for an Opinion pursuant to California Code of Regulations, title 18, (Regulation) section 30209(b).

ISSUE

Whether appellants' claim for refund or credit from overpayment for the 2011 tax year is barred by the statute of limitations.

FACTUAL FINDINGS

1. FTB had no record of receiving appellants' 2011 California income tax return, but received information that appellants earned sufficient income to require the filing of a return.¹ Based on this, FTB issued Requests for Tax Return, Notices of Proposed Assessment (NPAs), and other notices to appellants during the period January 4, 2013, through March 4, 2014. Appellants did not respond to FTB until March 13, 2014.
2. On March 13, 2014, appellants' CPA, Mr. Albrecht, contacted FTB in response to a Personal Income Tax Earnings Withholding Order for Taxes. According to conversation notes recorded by FTB, Mr. Albrecht stated that he would fax a copy of the return to FTB and mail a completed return on that day.
3. On March 14, 2014, Mr. Albrecht faxed to FTB a cover letter and copy of the first three pages of appellants' unsigned 2011 return. The faxed return showed a tax liability of \$314,455, and estimated tax payments of \$561,142, which resulted in an overpayment of \$246,687. Line 92 of the faxed return requested that the overpayment be credited to appellants' 2012 estimated tax payments. The fax cover letter stated that appellants' "complete return, with signatures," would be mailed on that same day. Mr. Albrecht called FTB to confirm receipt of the fax that same day and stated that he would mail a signed copy of the return to FTB by March 20, 2014.
4. FTB did not receive a signed copy of appellants' return following the March 14, 2014 fax. During the period September 8, 2014, through January 27, 2016, FTB issued to appellants notices indicating amounts due and informing appellants of pending collections actions for the 2011 tax year.
5. On October 14, 2016, Mr. Albrecht contacted FTB by telephone to verify whether FTB received appellants' 2011 and 2012 returns. Mr. Albrecht stated that he would send copies and file the 2011 return.
6. On October 17, 2016, FTB received a signed copy of appellants' 2011 return. The signed return includes the same tax and overpayment information as the March 14, 2014 faxed return (faxed return). Specifically, appellants' reported tax of \$314,455, estimated

¹ At the oral hearing, appellants asserted that they placed a 2011 California income tax return in the mail on October 15, 2012. Appellants stated that it was their practice to file without a certified mail receipt if there was no payment. However, appellants concede that they cannot prove that the filing occurred on this date.

- payments of \$561,142,² and a claimed overpayment of \$246,687. Appellants' signed return requests that the overpayment be credited to their 2012 estimated payments.
7. On September 18, 2018,³ FTB issued a letter stating that it processed appellants' return, and their account shows an overpayment of \$216,523.76. The letter also states that the FTB fully denied the claim for refund due to the passage of the statute of limitations.⁴
 8. This timely appeal followed.

DISCUSSION

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 under an extension; (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).) Tax returns for calendar year taxpayers are due on or before April 15th following the close of the calendar year. (R&TC, § 18566.) A return filed before the due date for that return, is considered filed on the due date. (R&TC, §§ 19002(d)(1), 19066(b).)

A return filed within the statute of limitations period described above which shows a credit for tax withholdings or estimated tax payments may be treated as a timely refund claim for the excess amount. (R&TC, § 19307.) No refund may be allowed to taxpayers who fail to file a return for the taxable year in respect of which the withholding or estimated tax was allowable as a credit. (*Ibid.*)

R&TC section 19322.1, provides for an informal claim for refund, allowing taxpayers to toll the statute of limitations where a claim for refund is made prior to payment of the tax. An informal claim must be otherwise valid under R&TC section 19322, which means that the claim must: (1) be in writing; (2) bear the signature of each taxpayer or the taxpayer's authorized representative; and (3) state the specific grounds on which the claim is founded. An informal claim is perfected and deemed filed on the date that the full payment of tax is made. However,

² Appellants' estimated payments include the following: \$141,177 on April 15, 2011; \$140,000 on June 16, 2011; \$100,000 on September 15, 2011; and \$150,000 on April 12, 2012.

³ The record shows that between October 17, 2016, and September 18, 2018, FTB corresponded with appellants in regard to their claimed credit for 2011.

⁴ The record reflects that appellants made payments totaling \$58.27 during the period June 10, 2016, through December 15, 2016. Because these payments were made within one year of October 17, 2016, FTB credited this amount to appellants' account for the 2012 tax year.

no credit or refund may be made or allowed for any payment made more than seven years before the date that full payment of the tax is made. (R&TC § 19322.1.)⁵

A refund claim that fails to meet the essential statutory criteria may not be authorized as valid. (*Shiseido Cosmetics (America) Ltd. v. Franchise Tax. Bd.* (1991) 235 Cal.App.3d 478, 493.) Taxpayers have the burden of proof in showing entitlement to a refund and that the claim is timely. (*Appeal of Carr*, 2022-OTA-157P.) Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence. (Cal. Code Regs., tit. 18, § 30219(b).) A preponderance of evidence means the taxpayers must establish by documentation or other evidence the circumstances they assert are more likely than not to be correct. (*Appeal of Carr, supra.*)

Here, appellants failed to file a return for the 2011 tax year by the due date of April 15, 2012, or within the automatic extension period. As such, the four-year statute of limitations began to run on the return's original due date and expired four years later, on April 15, 2016. (R&TC, § 19306(a).) Appellants filed their claim for refund in the form of a signed return on October 17, 2016, which is after the deadline for filing a claim for refund. Accordingly, FTB processed appellants' return and issued a claim for refund denial.

The alternative one-year statute of limitations applies only to payments made within one year of the date the claim for refund is filed. (R&TC, § 19306(a).) As noted above, FTB credited \$58.27 to appellants account for the 2012 tax year for payments made within one year of October 17, 2016.⁶ Appellants remaining payments were each made on or before April 12, 2012, which is more than one year prior to October 17, 2016. Thus, because appellants' claim for refund is considered filed on October 17, 2016, the claim for refund is barred under the one-year statute of limitations.

Additionally, R&TC section 19307 states that no refund of estimated tax paid shall be allowed to a taxpayer who fails to file a return for the taxable year. There is no dispute that FTB did not receive a valid (signed) return until October 17, 2016. Thus, even if appellants filed a claim for refund during the statutory period, no refund could be allowed because there was no valid return. While the foregoing is dispositive, OTA continues in order to address the contentions made by appellants in this appeal.

⁵ In this case, there is no dispute that appellants paid their tax liability in full prior to filing a claim for refund.

⁶ See footnote 4.

On appeal, appellants concede that the faxed return is not signed and is therefore not a formal claim for refund.⁷ That the faxed return is unsigned is also corroborated by the evidence. For example, the faxed return's cover letter (which is also unsigned) indicates that a signed return would follow by mail. Appellants' CPA also contacted FTB on the same date and stated that appellants would mail a signed return.⁸ As such, the faxed return does not meet the signature requirement for a claim for refund under R&TC section 19322.

Nevertheless, appellants argue their claim for refund or credit was improperly denied because the faxed return constitutes an informal claim for refund, which prevented the statute of limitations' expiration. Relying on *Newman v. Franchise Tax Bd. (Newman)* (1989) 208 Cal.App.3d 972,⁹ *Wertin v. Franchise Tax Bd. (Wertin)* (1998) 68 Cal.App.4th 961,¹⁰ *J.H. McKnight Ranch, Inc. v. Franchise Tax Bd. (J.H. McKnight)* (2003) 110 Cal.App.4th 978,¹¹ and *Focus Cable of Oakland, Inc. v. County of Alameda (Focus Cable)* (1985) 173

⁷ With regard to the faxed return, appellants stated at the oral hearing that "had there been a signature, it would have constituted a formal return. We would not be here. Even if it was the first three or four pages. That's -- we acknowledge that the signature was not there."

⁸ Under R&TC section 18621.5, a return may be filed electronically. However, any return, declaration, statement, or other document is not complete, and therefore not filed, unless an electronic filing declaration is signed by the taxpayer, in accordance with R&TC section 18621. (R&TC, § 18621.5.) Here, appellants have not argued that the faxed return constitutes an electronic filing. As discussed above, appellants concede that the faxed return is unsigned, and although appellants' CPA information is included on the return, it is not on the signature line. Additionally, appellants have not provided an electronic filing declaration in support of the faxed return.

⁹ In *Newman*, the court considered whether a letter nominally entitled "protest" sufficiently stated the grounds of a claim for refund. (*Newman, supra*, 208 Cal.App.3d 972,979-980.) There, the court found that the sufficiency of a claim does not turn on the nomenclature used, and that the protest letter put the FTB on notice that a claim for refund was being asserted. (*Id.* at pp. 979-980.)

¹⁰ In *Wertin*, the court considered whether a claim for refund was valid with respect to interest relief. (*Wertin, supra*, 68 Cal.App.4th 961. 970.) In that case, the taxpayers paid an assessment of tax and then filed a letter stating, "this letter constitutes a claim for refund." (*Id.* at p. 976.) While the refund claim letter did not make a claim for interest amounts paid, it did incorporate an earlier letter by reference, which did request interest relief. (*Ibid.*) Thus, the court found that the taxpayer's claim for refund had sufficient information to include the request for a refund of interest. (*Id.* at p. 977)

¹¹ In *J.H. McKnight*, the court considered whether a taxpayer had exhausted administrative refund requirements prior to filing a suit for refund in court. (*J.H. McKnight, supra*, 110 Cal.App.4th 978, 982.) In this case, the taxpayer paid an assessment of additional tax and filed a claim for refund. (*Id.* at p. 983.) FTB offered to deny the claim for refund summarily so the taxpayer could proceed to court. (*Id.* at p. 982.) Thereafter, FTB asserted that because of the summary denial, the taxpayer failed to exhaust administrative remedies. (*Ibid.*) Based on this FTB argued the claim for refund should be denied. (*Ibid.*) Upon consideration, the court found that the statutory requirement to exhaust administrative remedies need not be construed "so as to ignore actual notice the Board may have had from sources other than the four corners of the initial claim." (*Id.* at p. 987.)

Cal.App.3d 519,¹² appellants assert that the faxed return provided FTB with sufficient notice that the right to a claim for refund or credit was being asserted. Appellants argue that after March 14, 2014, their claim for refund was protected and that any defects (i.e., the lack of a signature) are immaterial and were remedied upon filing the signed October 17, 2016 return.

California courts have broadly interpreted whether a filing is sufficient to be considered a valid claim for refund. As relevant here, courts have found that “the purpose of a claim for refund” is to give notice that a right is being asserted with respect to an overpayment of tax. (*Newman, supra*, 208 Cal.App.3d at p. 980; see also *Wertin, supra*, 68 Cal.App.4th at p. 977.) The purpose of statutory requirements is to ensure that there is “sufficient notice of the claim and its basis” and to allow FTB “an opportunity to correct any mistakes, thereby conserving judicial resources.” (*J.H. McKnight Ranch, supra*, 110 Cal.App.4th at p. 986.) Satisfaction of this goal does not hinge on whether a particular issue is recited expressly in the initial claim for refund. (*Ibid.*) “It has long been the policy of California courts to liberally construe claims for refund of taxes.” (*Focus Cable, supra*, 173 Cal.App.3d at p. 526.)

However, in each of the cases cited above, the issue was whether the taxpayers sufficiently stated the grounds for the claim for refund. In the current appeal, there is no question as to the claim’s grounds. The faxed return clearly claims a refund based on an overpayment of estimate taxes for the 2011 tax year. Instead, the question is whether OTA may find that there is an informal claim for refund even though the faxed return does not meet the statutory requirements, including the requirement to file a return under R&TC section 19307, and, even if that section were not applied, the statutory signature requirement of R&TC section 19322.

Under the California Constitution, administrative agencies, including OTA, have no power to refuse to enforce a statute unless an appellate court has determined that such a statute is unconstitutional. (See Cal. Const. art. III, § 3.5; *Appeal of Porreca*, 2018-OTA-095P; see also Cal. Code Regs., tit. 18, § 30104(a).) An administrative agency’s authority to act is of limited jurisdiction and it has no powers except such as the law of its creation has given it. (*Appeal of Moy*, 2019-OTA-057P.) An administrative agency must act within powers conferred

¹² In *Focus Cable*, the court considered whether a claim for refund of property tax was valid with respect to R&TC section 533, where the claim had not specifically alleged that the property tax assessor had violated R&TC section 533. (*Focus Cable, supra*, 173 Cal.App.3d. at pp. 526-527.) Despite this fact, the court found that appellants’ claim discussed all of the material facts, the amount of the original assessment, the true value established, and the amount of refund requested. (*Id.* at p. 527.) The court also noted that it was clear from the facts presented in appellants’ claim for refund and in its complain that the original assessment was erroneous. (*Id.* at pp. 526-527.)

on it by law and may not validly act in excess of such powers. (*Ferdig v. State Personnel Bd.* (1969) 71 Cal.2d 96, 104.)

In other words, OTA may not overlook a statute's requirements. R&TC section 19322 requires all claims for refund to be signed. R&TC section 19322.1, the only statutory provision in the Personal Income Tax Law describing an informal claim for refund, also requires that the claim for refund be signed. Thus, OTA cannot conclude that appellants' faxed return is a valid claim for refund because it does not meet statutory requirements. (R&TC, §§ 19307, 19322.)

Finally, OTA notes an "informal claim doctrine" was created by federal courts "to provide equitable relief to taxpayers who made good faith attempts to amend harmless errors in their refund claims [such as the omission of a signature] even though the statute of limitations would otherwise bar those amendments." (*Kikalos v. U.S.* (7th Cir. 2007) 479 F.3d 522, 526-527.)¹³ However, OTA is not a court (See Gov. Code, § 15672(b)) and there is generally no reasonable cause or equitable basis under the California income tax law for suspending the statute of limitations. (*Appeal of Benemi Partners, L.P.*, 2020-OTA-144P.) Thus, OTA may not apply the equitable informal claim doctrine in the same way that a federal court might, but instead is limited to that which is allowed under R&TC section 19322.1. Appellants did not file a *signed* claim for refund until October 17, 2016, well after the April 15, 2016 deadline. As such, appellants' claim for refund is barred by the statute of limitations.

¹³ Federal statutes and regulations require that a claim "set forth in detail each ground upon which a credit or refund is claimed and facts sufficient to apprise the Commissioner of the exact basis thereof. The statement of the grounds and facts must be verified by a written declaration that it is made under the penalties of perjury." (Treas. Reg. § 301.6402-2(b)(1); see also IRC, § 7422.) Similarly, R&TC section 19322 requires that a claim for refund be in writing, signed by the taxpayer or taxpayer's authorized representative, and state the specific grounds on which the claim is founded.

HOLDING

Appellants claim for refund or credit for overpayment for the 2011 tax year is barred by the statute of limitations.

DISPOSITION

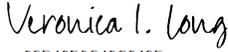
FTB's denial of appellants' claim for refund or credit for overpayment for the 2011 tax year is sustained.

DocuSigned by:

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Keith T. Long
Administrative Law Judge

I concur:

Signed by:

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Veronica I. Long
Administrative Law Judge

G. TURNER, concurring in result.

I write separately for two reasons. First, it is unnecessary to reach the question whether the March 14, 2014, filing constituted a valid claim for refund. Second, having nevertheless embarked on the journey, the majority's claim for refund analysis mistakes the difference between a claim for refund and a return while misconstruing the judicial doctrine of informal claims.

Revenue & Taxation Code (R&TC) section 19307 and California Code of Regulations, title 18, (Regulation) section 19002 provide that no refund or credit of tax withheld or estimated tax paid can be allowed unless and until a taxpayer has filed a valid return for the year. Appellants' submission of March 14, 2014, was not a valid *return*¹ because the return¹ included therein was not signed. No one contests otherwise. Because appellants did not have a return on file at that time and the submission was not the filing of a valid return, R&TC section 19307 precluded a refund. While the majority reaches the same conclusion, it is not obvious from the plain reading of the statute that R&TC section 19307 precludes relief for appellants because the statute places no limit on *when* a return must be filed for a refund to be available. Consequently, we must decide whether the filing of a valid return on October 17, 2016, well after the expiration of the statute of limitations for filing a *claim for refund*, reaches back to validate the March 14, 2014, submission.

Resolving this question requires OTA balance the important public policy goals of the statute of limitations in bringing finality to potential claims (*Addison v. State of California* (1978) 21 Cal.3d 313), the clear and simple language utilized by the Legislature to express claim for refund requirements (*Shiseido Cosmetics (America) Ltd. v. Franchise Tax Bd.* (1991) 235 Cal.App.3d 478), and there being no equitable relief to the sometimes harsh consequences of the statute of limitations (*Estate of Gillespie (dec'd)*, 2018-OTA-052P) with the long standing policy of California courts to liberally construe claims for refund (*J. H. McKnight Ranch, Inc. v. Franchise Tax Bd.* (2003) 110 Cal.App.4th 978, 988) in light of their purpose to give adequate notice to the State a tax is being contested (*Newman v. Franchise Tax Bd.* (1989) 208 Cal.App.3d 972).

Here, after appellants submitted the documents of March 14, 2014, more than two years passed before a valid return was filed, notwithstanding repeated notices from FTB. When

¹ Assuming for purposes of this discussion three pages of a return even if signed would have been a valid return. To qualify as a return, the form must contain sufficient data from which the taxing agency can compute and assess the tax liability of a particular taxpayer. (See *Appeal of Tonsberg* (85-SBE-034) 1985 WL 15812; *In re Sienege* (2021) 18 F.4th 1164, 1168.)

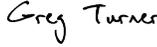
appellants filed the return, it was not until more than six months after the expiration of the statute of limitations for filing a claim for refund. As the Court noted in *Shiseido Cosmetics*, while a substantial grace is afforded taxpayers in meeting the statutory demands for valid claims to include even post statute of limitations filings to perfect otherwise insufficient claims, statutory demands cannot be altogether ignored. Allowing a return filed long after the purported claim for refund and long after the statute of limitations had expired on a claim for refund to resurrect even an otherwise valid claim places the cart before the horse. While the Legislature has chosen to allow such inverted sequencing in regard to post statute of limitations *payments* (see R&TC, § 19322.1) they have not done so with respect to the filing of returns. Consequently, whereas here because a valid return for the tax year was not on file, a valid claim for refund must either include a valid return or a valid return must be filed prior to the expiration of the statute of limitations for filing a claim for refund in order that the claim for refund be considered timely filed. Neither was accomplished here and for that reason FTB's actions should be sustained.

A return, however, should not be confused with a claim for refund. While a return can serve as a claim for refund, and the filing of a return a precondition to satisfying a claim for refund, they are distinct. Consequently, the majority's focus on the *return* included in the submission of March 14, 2014, not having been signed misstates the requirements of R&TC section 19322. Assuming for the sake of argument that R&TC section 19307 was not preclusive here, the taxpayer's signature did not have to be on the *return* submitted to be a valid *claim for refund*. That signature could have been on the cover page. What's more, if the taxpayer's signature was found wanting, a proper analysis of R&TC section 19322 would necessarily have also questioned whether the faxed cover constituted a signature of the taxpayer's authorized representative as expressly allowed under R&TC section 19322.²

While appellants stretch the judicially constructed informal claim doctrine beyond its breaking point in arguing R&TC section 19322's signature requirements for a valid claim can be satisfied by a post-statute of limitations return filing, the majority appears to embrace the antithesis, that the informal claim doctrine exists only in the confines of R&TC section 19322.1,

² While FTB objects to appellants' CPA as an "authorized representative" due to appellants lacking a Power of Attorney for him, their position is not consistent with their own guidance nor the many instances evidencing FTB engagement with appellants' CPA on the matter at issue here. As to whether the CPA's name being typed on the cover page is a valid signature, there is at least a question worthy of examination. See Uniform Electronic Transactions Act (Civ. Code, § 1633.1 et seq.); *J.B.B. Investment Partners, Ltd. v. Fair* (2014) 232 Cal.App.4th 974, as modified [a printed name or some other symbol might, under specific circumstances, be a "signature" under the Uniform Electronic Transactions Act (UETA) and might satisfy the even more rigorous requirements under the statute authorizing a judgment enforcing a signed settlement agreement.]

an equally erroneous construction.³ As the Court in *J.H. McKnight Ranch, Inc. v. Franchise Tax Board*, *supra*, 110 Cal.App.4th at p. 987 aptly pointed out, “*Shiseido* thus stands for the unexceptional, and statutorily clear, requirement that a taxpayer must file a post-payment refund claim before proceeding with a suit for refund.” *Shiseido* simply does not represent the abandonment of the informal claim doctrine. In examining the nature of the requirements of a claim under R&TC section 19322, the courts have long looked beyond the four corners of the alleged claim and the line of cases affording taxpayers some leeway in satisfying the statutory conditions of a claim for refund long. While satisfying the signature requirement is perhaps less ambiguous than establishing what constitutes a “claim” or “specific grounds,” concluding that appellants’ argument exceeds the reasonable boundaries of the judicially established “informal claim doctrine” should not suggest, as the majority does, that no such doctrine exists at all.

Signed by:

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Greg Turner
Administrative Law Judge

Date Issued: 1/15/2025

³ As the Legislature is empowered by the Constitution with setting the terms of a valid claim for refund (See Cal. Const. Art. XIII, sec. 32), labeling R&TC section 19322.1 an “informal claim”, nomenclature attributable to a doctrine of purely judicial origin, mixes apples and oranges. R&TC section 19322.1 is simply the exercise of Legislative power to define the circumstances predicate to a claim for refund, whereas the doctrine of “informal claims” stems from “the judge-made” effort to plug the gap between the “formal” requirements of the statute and varying degrees of “harmless noncompliance” with those formalities. *BCS Financial Corp. v. U.S.* (7th Cir. 1997) 118 F.3d 522, 524.