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7 **BOARD OF EQUALIZATION**  
8 **STATE OF CALIFORNIA**

10 In the Matter of the Appeal of: ) **HEARING SUMMARY**  
11 ) **PERSONAL INCOME TAX APPEAL**  
12 **MICHAEL J. BARKLEY AND** ) Case No. 852234  
13 **LAURA ANN BARKLEY** )

14  
15 Year<sup>1</sup> Claim for  
16 2008 Refund  
\$25,795.51<sup>2</sup>

17 Representing the Parties:  
18 For Appellants: Michael J. Barkley and Laura Ann Barkley  
19 For Franchise Tax Board: Brian Werking, Tax Counsel  
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21 **QUESTION:** Whether appellants' claim for refund is barred by the statute of limitations pursuant  
22 to Revenue and Taxation Code (R&TC) section 19306.

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27 <sup>1</sup> The length of time between the year at issue and this appeal is due to appellants' claim for refund dated March 5, 2014,  
28 which the Franchise Tax Board denied in its Notice of Action (NOA) dated August 21, 2014. (Appeal Letter, attachment;  
Resp. Opening Br., p. 2, exhibit F.)

<sup>2</sup> The amount at issue is \$25,624.90, which is the amount of appellants' claim for refund, which the Franchise Tax Board  
denied in its Notice of Action (NOA) dated August 21, 2014. (Appeal Letter, attachment; Resp. Opening Br., p. 1, fn. 1.)

1 HEARING SUMMARY

2 Background

3 The Franchise Tax Board (FTB or respondent) received information indicating that  
4 appellant-husband earned income during 2008 that might require him to file a 2008 California tax  
5 return. As respondent's records indicated that appellant-husband had not filed a return, respondent  
6 issued a Demand for Tax Return (Demand) dated January 20, 2010, and a Notice of Proposed  
7 Assessment (NPA) dated March 29, 2010, after respondent did not receive a response to the Demand.  
8 The NPA estimated that appellant-husband's income was \$127,910.12, based on interest income,  
9 dividend income, Schedule K-1 income, miscellaneous income, and stock sales. The NPA proposed  
10 tax of \$9,149.00, a demand penalty of \$2,287.25, a late filing penalty of \$2,287.25, and a filing  
11 enforcement fee of \$113.00 plus interest. Respondent mailed the Demand and the NPA to appellant-  
12 husband's last-known address in Manteca, California; neither was returned as undeliverable by the  
13 United States Post Office. Appellant-husband did not file a protest and the assessment became a final  
14 liability. (Resp. Opening Br., pp. 1-2, exhibits A-B.)

15 Respondent initiated collection action with respect to appellants' 2008 assessment.  
16 Respondent received a payment of \$13,518.06 on August 9, 2010, and a payment of \$61.84 on  
17 November 8, 2010. (Resp. Opening Br., p. 4, exhibit E.)

18 As relevant to this appeal, appellants filed late California tax returns (Forms 540) for  
19 2007, 2009, and 2010 on April 15, 2011, September 15, 2011, and April 15, 2012, respectively. They  
20 filed an amended 2007 return on May 10, 2011, and remitted a payment of \$100 with their amended  
21 2007 return. Appellants reported zero taxable income and zero total tax on their original and amended  
22 2007 returns and their 2009 and 2010 returns. Respondent accepted appellants' original and amended  
23 2007 returns as filed and transferred 2007 overpayments totaling \$11,295 to appellants' 2008 account,  
24 as appellants requested. The 2007 overpayments of \$11,295.00 consist of payments in the amounts of  
25 \$3,916.66, \$12.00, \$7,266.34, and \$100.00, which were transferred to appellants' 2008 account  
26 effective November 1, 2011, November 10, 2011, January 5, 2012, and January 5, 2012, respectively.  
27 Respondent accepted appellants' 2009 return as filed, except with respect to the reported estimated tax  
28 payments of \$25,073. According to respondent, it only received the payment of \$100 that appellants

1 remitted with the filing of their 2009 return. On October 17, 2011, respondent refunded the \$100  
2 payment to appellants. Respondent accepted appellants' 2010 return as filed, except with respect to  
3 the reported estimated tax payments of \$25,073. According to respondent, appellants' 2010 account  
4 had a zero balance after it was adjusted for the erroneously claimed estimated tax payment. (Resp.  
5 Opening Br. pp. 5-6, fns. 8-13, exhibits D, L; Resp. Reply Br., pp. 2-3, exhibits M-Q.)

6 After filing their late 2007, 2009, and 2010 returns, appellants filed a late 2008 return  
7 on August 5, 2013. On their 2008 return, appellants reported a total tax liability of zero, 2008  
8 estimated tax and other payments of \$25,885, and an overpayment of \$25,885. Respondent accepted  
9 the return and revised the amount of reported tax payments from \$25,885.00 to \$25,624.90,<sup>3</sup> and the  
10 late filing penalty and the demand penalty to zero, and abated the filing enforcement fee. According to  
11 respondent's records, appellants made a timely estimated tax payment of \$750 for 2008, which was  
12 effective April 15, 2009. (Resp. Opening Br., pp. 2, 4, fn. 4, exhibits C-E.)

13 Respondent subsequently received a letter from appellant-husband dated March 5,  
14 2014, requesting that respondent allow appellants their claimed carryover from 2008 to their 2009 and  
15 2010 returns. Respondent treated the March 5, 2014 letter as a claim for refund. Respondent issued  
16 an NOA to appellants dated August 21, 2014, notifying them that their claim for refund of \$25,624.90  
17 was denied because the statute of limitations had expired. (App. Opening Br., attachment; Resp.  
18 Opening Br., p. 2, exhibit F.)

19 This timely appeal followed.

#### 20 Additional Briefing

21 In a letter dated August 21, 2015, Appeals Division staff requested that respondent file  
22 a brief to address appellants' arguments and evidence in their reply brief, including their argument  
23 with regard to claims asserted to have been made within the statute of limitations on September 22,  
24 2011, and April 28, 2012.<sup>4</sup> Appellants were provided with an opportunity to file a brief responding to  
25 respondent's brief. Respondent and appellants filed additional briefs, which are discussed below.

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27 <sup>3</sup> See Respondent's Contentions below for detail regarding appellants' payments applied to 2008 that total \$25,624.90.

28 <sup>4</sup> Appellants assume that their 2009 and 2010 returns were filed on September 22, 2011, and April 28, 2012. As discussed above, these returns were filed on September 15, 2011, and April 15, 2012.



1 to appellants' reply brief are copies of excerpts from appellants' 2006, 2009, 2010, 2011, 2012 returns,  
2 schedules of stock transactions, a 2011 Return Information Notice dated November 7, 2013, a letter  
3 from appellant-husband to respondent dated November 11, 2013 regarding a carryover of \$25,795.51,  
4 a 2009 Notice of Tax Change dated October 24, 2011, a 2010 Return Information Notice dated July 9,  
5 2012, and a letter from the FTB to appellant-husband dated September 4, 2013, concerning a zero  
6 balance for 2008. (Apps. Reply Br., pp. 1-5, exhibits 1-10.)

7 In their supplemental brief, appellants argue that their 2009 and 2010 returns constitute  
8 valid claims for refund of carryovers from 2008 to subsequent years totaling \$25,795.51. Appellants  
9 contend that respondent falsely claims that it was unaware of appellants' 2008 tax liability until  
10 appellants filed their 2008 return. Appellants assert that, on their 2009 and 2010 returns, they claimed  
11 an overpayment for 2008 and requested that the overpayment be applied as an estimate payment for  
12 2009 and 2010. Appellants claim that the filing of their 2008 return was their third refund claim for  
13 2008 after they filed their 2009 and 2010 returns, reporting their carryover claims. Appellants argue  
14 that, prior to the expiration of the statute of limitations for 2008, respondent improperly failed to notify  
15 them that it "intended to confiscate" appellants' 2008 overpayment. In addition, appellants contend  
16 that, for the 2013 tax year, respondent fabricated an improper assessment which estimated that  
17 appellants' 2013 income was \$109,796 based in part on estimated income of \$108,885 due to the fact  
18 that appellant-husband was a member of the State Bar of California. Attached to appellants'  
19 supplemental brief is a copy of the NPA dated May 5, 2015, issued to appellant-husband for 2013.  
20 (Apps. Supp. Br., pp. 1-4, exhibit 11.)

#### 21 Respondent's Contentions

##### 22 Final Assessment

23 In its opening brief, respondent contends that it properly estimated appellant-husband's  
24 tax liability after appellants failed to file a timely return for 2008. Citing R&TC section 19087, the  
25 *Appeal of Michael E. Myers*, 2001-SBE-001, decided on May 31, 2001, and the *Appeal of Walter R.*  
26 *Bailey*, 92-SBE-001, decided on February 20, 1992, respondent argues that, in the absence of a filed  
27 return reporting the necessary information to calculate a tax liability, "respondent is empowered to  
28 estimate appellants' net income from 'any available information' and assess the amount of tax,

1 interest, and penalties.” Respondent asserts that it based its assessment on appellant-husband’s federal  
2 wage and income transcript, which showed that he received \$663,763 of IRS Form 1099-B income,  
3 \$499 of partnership income, \$1,473 of dividend income, \$9,729 of interest income, \$9,912 of  
4 miscellaneous payments, and \$16,980 of social security benefits and paid \$116,799 of mortgage  
5 interest. Citing the *Appeal of Myron E. and Alice Z. Gire*, 69-SBE-029, decided on September 10,  
6 1969, respondent states, “Respondent’s determinations, based on information provided on the IRS  
7 Form 1099-B, in the absence of information to the contrary provided by the taxpayer, is presumed  
8 correct.” (Resp. Opening Br., p. 3, exhibit H.)

9 Respondent contends that appellants have not shown any error in respondent’s reliance  
10 on the information it received from the K-1, 1099-B, 1099-DIV, 1099-INT, and 1099-MISC payors  
11 when it issued the NPA, and after the proposed assessment became final, “respondent had no basis to  
12 make adjustments to appellants’ account until appellants filed a 2008 income tax return establishing  
13 their tax liability, or until they provided information that they did not have sufficient taxable income so  
14 that they did not have a filing requirement.” Respondent argues that it properly pursued collection  
15 action after the 2008 assessment became final. (Resp. Opening Br., p. 3, exhibit H.)

#### 16 Statute of Limitations

17 Respondent argues that appellants’ claim for refund for 2008 is barred by the statutes of  
18 limitations set forth in R&TC section 19306. (Resp. Opening Br., p. 4.)

#### 19 Four-Year Statute of Limitations

20 Respondent contends that appellants’ refund claim is barred by the first four-year  
21 statute of limitations, which expired on April 15, 2013, because the original due date for filing the  
22 2008 return was April 15, 2009, and appellants filed their 2008 return on August 5, 2013. Respondent  
23 asserts that the second four-year statute of limitations does not apply because appellants failed to file  
24 their 2008 return during the extension period, which ended on October 15, 2009. (Resp. Opening Br.,  
25 p. 4.)

#### 26 One-Year Statute of Limitations

27 Respondent contends that the one-year statute of limitations expired with respect to the  
28 two payments it received through collection action on August 9, 2010, and November 8, 2010, in the

1 amounts of \$13,518.06 and \$61.84, respectively. Respondent states, “Payments made by a taxpayer  
2 received through FTB’s collection efforts are effective the date the payments are received.”  
3 Respondent asserts that the 2008 return was filed on August 5, 2013, which is more than one year after  
4 either of these two payments was effectively paid. (Resp. Opening Br., p. 4, exhibit E.)

5 Respondent contends that the one-year statute of limitations expired with respect to the  
6 2008 timely estimate tax payment of \$750. Respondent states that, under R&TC section 19002,  
7 subdivision (c)(2), “[p]ayments from withholding, estimated tax, and refundable credits are effective  
8 as of the original due date of the return.” Respondent asserts that the estimated tax payment of \$750  
9 was thus effective on April 15, 2009, which is more than one year before appellants’ 2008 return was  
10 filed on August 5, 2013. (Resp. Opening Br., p. 4, exhibit E.)

11 Respondent argues that the one-year statute of limitations has expired with respect to  
12 payments that were transferred to appellants’ 2008 account from 2007. Respondent states that, under  
13 R&TC section 19383, “[p]ayments that are transferred from another tax year are effective as of the  
14 date the payments are transferred.” According to respondent, appellants filed their original and  
15 amended 2007 returns on April 15, 2011, and May 10, 2011, respectively, and on both of these returns,  
16 they requested a transfer of their 2007 overpayments to their 2008 account. Respondent asserts that it  
17 transferred to appellants’ 2008 account their 2007 overpayments of \$3,916.66 and \$12.00 on  
18 November 1, 2011, and November 11, 2011, respectively. Respondent also asserts that it transferred  
19 to appellants’ 2008 account their 2007 overpayments of \$7,266.34 and \$100.00 on January 5, 2012.  
20 Respondent contends that the credit or refund of these 2007 overpayments are barred by the one-year  
21 statute of limitations because they were effective prior to August 5, 2012, which is one year prior to  
22 the filing of appellants’ 2008 return. (Resp. Opening Br., p. 5, fn. 8-20, exhibit E.)

23 Citing *United States v. Dalm* (1990) 494 U.S. 596, 602, respondent argues that, after  
24 the statute of limitations expires, a taxpayer is barred from filing a claim for refund or credit at a later  
25 date, even when the tax was not owed in the first place. Citing *Rothensies v. Electric Storage Battery*  
26 *Co.* (1946) 329 U.S. 296, 301 and *Prussner v. United States* (7th Cir. 1990) 896 F.2d 218, 222,  
27 respondent states that “a statute of limitations promotes fairness and practicality in the administration  
28 of an income tax policy.” (Resp. Opening Br., p. 6.)

1 Respondent sets forth the following table that summarizes the payment information and  
2 the one-year statute of limitations discussed in respondent's opening brief.<sup>6</sup>

3	4	5	6	7	8
Payment Type	Amount	Tax Year Payment Transferred From	Tax Year Payment Transferred To	Effective Date of Payment	One-Year Statute of Limitations Expiration Date
9	10	11	12	13	14
Estimated Payment for the 2008 tax year	\$750.00	N/A	N/A	4/15/2009	4/15/2010
15	16	17	18	19	20
Bill Payment for the 2008 tax year	\$13,518.06	N/A	N/A	8/9/2010	8/9/2011
21	22	23	24	25	26
Bill Payment for the 2008 tax year	\$61.84	N/A	N/A	11/8/2010	11/8/2011
27	28	29	30	31	32
Transfer Payment	\$3,916.66	2007	2008	11/1/2011	11/01/2012
33	34	35	36	37	38
Transfer Payment	\$12.00	2007	2008	11/10/2011	11/10/2012
39	40	41	42	43	44
Transfer Payment	\$7,266.34	2007	2008	1/5/2012	1/5/2013
45	46	47	48	49	50
Transfer Payment	\$100.00	2007	2008	1/5/2012	1/5/2013

19 (Resp. Opening Br. pp. 6-7.)

20 In response to the request for additional briefing, respondent contends that appellants  
21 make the following two arguments: 1) respondent was on notice that the 2008 assessment was  
22 incorrect because appellants' 2007, 2009, and 2010 returns indicate that they had no taxable income;  
23 and 2) appellants' 2009 and 2010 returns constitute timely claims for refund for 2008. Respondent  
24 asserts that, after it processed appellants' 2007 original and amended returns, overpayments totaling  
25 \$11,295 were available and were transferred to appellants' 2008 account, as appellants requested.  
26 Respondent also asserts that, after it processed appellants' 2009 return, appellants' 2009 account had a  
27

28 <sup>6</sup> Appeals Division staff notes that the amounts of the payments and the effective dates of the payments as set forth in respondent's table are not at issue in this appeal.

1 credit balance of \$100 that respondent refunded to appellants on October 17, 2011. Respondent  
2 further asserts that, after it processed appellants' 2010 return, appellants' 2010 account had a balance  
3 of zero. Respondent states, "The first time appellants asserted that there was an overpayment for the  
4 2008 tax year and requested the overpayment be applied as an estimated payment to the 2009 tax year  
5 was when they filed their 2008 return on August 5, 2013, which was after the expiration of the statute  
6 of limitations for the 2008 tax year [.]” (Resp. Opening Br, exhibit D; Resp. Reply Br., pp. 1-3, fn. 1-  
7 8, exhibits M, P.)

8 Respondent contends that there is no merit to appellants' argument that respondent  
9 should have known that the 2008 assessment was incorrect at the time it was issued. Respondent  
10 asserts that, after appellant-husband failed to file a 2008 return, respondent properly relied on income  
11 information which showed that, in 2008, appellant-husband received income from various sources  
12 totaling \$127,910.12. Respondent states that it first became aware of appellants' correct 2008 tax  
13 liability when appellants filed their 2008 return on August 5, 2013. Respondent contends that there is  
14 no indication on appellants' 2007, 2009, and 2010 returns, each of which reports a total tax of zero,  
15 that appellant-husband's 2008 assessment was incorrect. Citing R&TC section 19307, respondent also  
16 contends that appellants must file a 2008 return before respondent is authorized to credit or refund any  
17 overpayments. Respondent states that "appellants filed their 2008 return on August 5, 2013, after the  
18 expiration of the statute of limitations, and therefore their overpayment was prohibited from being  
19 credited or refunded." (Resp. Reply Br., pp. 2-4, fn. 11.)

20 Respondent also argues that there is no merit to appellants' argument that their 2009  
21 and 2010 returns constitute timely claims for refund for 2008. Respondent contends that, pursuant to  
22 R&TC section 19322, every refund claim must be in writing, signed by the taxpayer or his or her  
23 representative, and state the specific grounds upon which it is based. Citing *Shiseido Cosmetics*  
24 *(America) Ltd. v. Franchise Tax Board* (1991) 235 Cal.App.3d 478, respondent asserts that a  
25 document that fails to meet this criteria is not a valid claim for refund. Respondent contends that  
26 appellants' 2009 and 2010 returns "do not qualify for a valid claim for refund for the 2008 tax year,"  
27 because they "do not provide the specific grounds for allowing a refund for the 2008 tax year, much  
28 less even assert that a refund was due for the 2008 tax year." Respondent asserts that appellants' 2009

1 and 2010 returns: (1) concern “items of income, credit, and deduction for the 2009 and 2010 tax  
2 years;” (2) “claim overpayments for the 2009 and 2010 tax years;” and (3) “qualify as claims for  
3 refund for the 2009 and 2010 tax years;” but (4) “do not claim any overpayment for the 2008 tax year,  
4 nor do [those returns] provide the basis for any such overpayment.” (Resp. Reply Br., pp. 4-5.)

### 5 Applicable Law

#### 6 Burden of Proof

7 The FTB’s determination is presumed correct and a taxpayer has the burden of proving  
8 it to be wrong. (*Todd v. McColgan* (1949) 89 Cal.App.2d 509, 514; *Appeal of Michael E. Myers*,  
9 2001-SBE-001, May 31, 2001.)<sup>7</sup> This presumption is a rebuttable one and will support a finding only  
10 in the absence of sufficient evidence to the contrary. (*Appeal of George H. and Sky Williams, et al.*,  
11 82-SBE-018, Jan. 5, 1982.) Respondent’s determinations cannot, however, be successfully rebutted  
12 when the taxpayer fails to present credible, competent, and relevant evidence as to the issues in  
13 dispute. (*Id.*) It is also well established that the failure of a party to introduce evidence which is  
14 within his or her control gives rise to the presumption that, if provided, it would be unfavorable.  
15 (*Appeal of Don A. Cookston*, 83-SBE-048, Jan. 3, 1983.)

#### 16 Assessment

17 R&TC section 18501, subdivision (a), provides that “[e]very individual taxable under  
18 Part 10 (commencing with Section 17001) shall make a return to the Franchise Tax Board, stating  
19 specifically the items of the individual’s gross income from all sources and the deductions and credits  
20 allowable, . . .” R&TC section 19087, subdivision (a), provides that if an individual fails to file a  
21 return, respondent may, at any time, make an estimate of the net income, from any available  
22 information, and may propose an assessment of the amount of tax, interest, and penalties due. The  
23 income estimation method used by respondent will be sustained where an appellant fails to indicate  
24 how the estimate was erroneous. (*Appeal of Harold G. Jindrich*, 77-SBE-058, Apr. 6, 1977.)

#### 25 Statute of Limitations

26 The general statute of limitations for filing a refund claim is set forth in R&TC section  
27

28 <sup>7</sup> Board of Equalization cases (designated “SBE”) may generally be found at: [www.boe.ca.gov](http://www.boe.ca.gov).

1 19306. Under that statute, the last day to file a claim for refund is the later of:

- 2 1. Four years from the date the return was filed, if filed within the extended due date;
- 3 2. Four years from the due date of the return, without regard to extensions; or
- 4 3. One year from the date of the overpayment.

5 R&TC section 19002, subdivision (c)(2), provides, “For purposes of Sections 19306  
6 and 19340, any amount paid as estimated tax under Section 19025 or 19136 of this code . . . for any  
7 taxable year shall be deemed to have been paid on the last day prescribed for filing the return under  
8 Article 1 (commencing with section 18501) or Article 2 (commencing with section 18661) of  
9 Chapter 2 (without regard to any extension of time for filing the return).”

10 R&TC section 19383 provides, “The credit of any overpayment of any tax in  
11 satisfaction of any tax liability shall, for the purpose of any suit for refund of the tax liability so  
12 satisfied, be deemed to be a payment in respect of the tax liability at the time the credit is allowed.”

13 The Board “has consistently held that the statute of limitations on claims for refund is  
14 explicit and must be strictly construed, without exception.” (*Appeal of James C. and Florence Meek*,  
15 2006-SBE-001, March 28, 2006; *Appeal of Michael and Antha L. Avril*, 78-SBE-072, Aug. 15, 1978;  
16 *Appeal of Earl and Marion Matthiessen*, 85-SBE-077, July 30, 1985.) The Board has held that, absent  
17 direction from the Legislature, there is no equitable tolling of the statute of limitations. (*Appeal of*  
18 *James C. and Florence Meek, supra.*)<sup>8</sup> Federal courts have stated that fixed deadlines may appear  
19 harsh because such deadlines can be missed, but the resulting occasional harshness is redeemed by the  
20 clarity of the legal obligation imparted. (*Prussner v. United States* (1990) 896 F.2d 218, 222-223  
21 [quoting *United States v. Locke* (1985) 471 U.S. 84].)

22 The FTB does not have a duty to inform taxpayers of an overpayment or to inform  
23 taxpayers of the statute of limitations. (*Appeal of Marshall T. and Arlene W. Gleason*, 86-SBE-113,  
24 June 10, 1986; *Appeal of Earl and Marion Matthiessen, supra.*)

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26 <sup>8</sup> R&TC section 19316 contains an exception to the statute of limitations under California law. R&TC section 19316 tolls  
27 the statute of limitations during a period of “financial disability.” A taxpayer is “financially disabled” if he is unable to  
28 manage his or her financial affairs due to a medically-determinable physical or mental impairment that is expected to be a  
terminal impairment or is expected to last for a continuous period of not less than 12 months. (Rev. & Tax. Code, § 19316,  
subd. (b)(1).) Appellants do not contend and the evidence in the appeal record does not show that the statute of limitations  
should be suspended due to a financial disability pursuant to R&TC section 19316.



1 incorrect when issued. However, appellants did not file their 2007, 2009, or 2010 returns until after  
2 the 2008 assessment was proposed, finalized, and collected upon. Moreover, appellants did not file  
3 their 2008 return until *after* they filed their 2009 and 2010 returns. It would have been impossible for  
4 respondent to determine appellants' 2008 tax liability, and any possibly overpayment or refund  
5 amount for 2008, until appellants filed their 2008 return.

6 If either party has any additional documentary evidence to present, the evidence should  
7 be provided to the Board Proceedings Division and to the opposing party at least 14 days prior to the  
8 oral hearing pursuant to Regulation 5523.6.<sup>9</sup>

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<sup>9</sup> Evidence exhibits should be sent to: Khaaliq Abd'Allah, Appeals Analyst, Board Proceedings Division, State Board of Equalization, P.O. Box 942879 MIC:80, Sacramento, California, 94279-0080.