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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 JOHN KLEMP<sup>1</sup>** ) Case No. 568733

	<u>Year</u>	<u>Claim for Refund</u>
	2003	\$4,296

17 Representing the Parties:

19 For Appellant: Michael John Klemp  
20 For Franchise Tax Board: Ted Tourian, Tax Counsel

22 QUESTION: Whether respondent properly determined appellant's claim for refund is barred by the  
23 statute of limitations.

24 HEARING SUMMARY

25 Facts

26 Appellant did not file a timely California income tax return for 2003. Respondent

28 <sup>1</sup> Appellant resides in Placer County, California.

1 received information that appellant received sufficient income from William L. Lyon & Associates,  
2 Prudential Insurance Company of America, and Amerus Group Company during 2003 to require  
3 appellant to file a return. Respondent issued a Demand for Tax Return (Demand) on January 18, 2005,  
4 requesting appellant either to file a 2003 return or state why appellant was not required to file a 2003  
5 return, by February 23, 2005. (Resp. Op. Br., p.1, Ex. A.)

6 Respondent did not receive any response from appellant by the Demand's due date and  
7 thereafter respondent issued a Notice of Proposed Assessment (NPA) on March 21, 2005. The NPA  
8 estimated appellant's income at \$52,022. The NPA allowed the standard deduction of \$3,070.00 and a  
9 personal exemption credit of \$82.00, resulting in a proposed tax of \$2,559.00 and included a late filing  
10 penalty of \$639.75, a demand penalty of \$639.75, a filing enforcement fee of \$90.00, and applicable  
11 interest. (Resp. Op. Br., p.1, Ex. B.)

12 Respondent did not receive a protest, and the NPA went final. Thereafter, respondent  
13 began collection activity. On April 10, 2006, respondent collected payment of appellant's liability of  
14 \$4,296.03. (Resp. Op. Br., p.1, Ex. C.)

15 On September 15, 2010, respondent received appellant's 2003 California tax return. In  
16 the return, appellant reported California adjusted gross income (AGI) of negative \$2,485 and California  
17 tax liability of zero. Respondent treated the return as a claim for refund and denied the claim because it  
18 was filed more than four years from the due date of the return and more than one year from the date of  
19 the last payment. (Resp. Op. Br., p. 2; App. Op. Br., Att.)

20 According to respondent's records, appellant filed a second 2003 California return on  
21 October 11, 2010, in which he reported the same information as in his September 15, 2010 return.  
22 (Resp. Op. Br., p. 2, Ex. E.)

23 This timely appeal then followed.

#### 24 Contentions

##### 25 Appellant

26 Appellant contends that his claim for refund is not barred by the statute of limitations  
27 because the claim for refund is based on changes or corrections made by the Internal Revenue Service  
28 (IRS) in October 2010. Appellant contends that the statute of limitations in R&TC section 19311

1 supersedes the statute of limitations in R&TC section 19306. Appellant contends that a change or  
2 correction was made to appellant's amended 2003 federal tax return as evidenced in a letter from the  
3 IRS dated October 20, 2010. Appellant contends that this "change or correction" made by the IRS,  
4 resulted in the reduction, or the elimination, of any tax liability for the 2003 tax year. (App. Op. Br.,  
5 p. 5; Att.)

6 Appellant contends that any ambiguity in the interpretation of the applicable statute of  
7 limitations must be resolved in favor of the taxpayer, citing *Agnew v. State Board of Equalization* (1999)  
8 21 Cal.4th 310 and *Edison California Stores v. McColgan* (1947) 30 Cal.2d 472. Appellant further  
9 contends that as tax laws are clearly in derogation of personal rights and property interests, they are  
10 subject to strict construction, and any ambiguity must be resolved against imposition of the tax, citing  
11 *Billings v. United States* (1914) 232 U.S. 261. Appellant asserts that R&TC section 19306 is ambiguous  
12 and therefore, he rejects the general applicability of R&TC section 19306 to appellant's case.  
13 Accordingly, appellant requests that the State of California refund him \$4,296. (App. Op. Br., pp. 6-7.)

14 Respondent

15 Respondent contends that appellant's claim for refund is barred by the four year and one  
16 year statute of limitations pursuant to R&TC section 19306. In addition, respondent contends that the  
17 statute of limitations for a claim for refund based on a final federal determination under R&TC section  
18 19311 is inapplicable to appellant's claim for refund. Respondent emphasizes that the statute requires  
19 the claim result from a federal adjustment. Respondent contends that in appellant's matter, there was no  
20 federal adjustment. (Resp. Op. Br., pp. 2-3.)

21 Respondent further notes that the IRS's Individual Master File transcript (IMF) for  
22 appellant's 2003 tax year indicated that appellant failed to file a timely federal return. Respondent notes  
23 that the IRS, like the FTB, initiated filing enforcement action by preparing a return based on income  
24 estimates (which the IRS designates as a substitute for return). The IMF also indicated that the IRS  
25 assessed additional tax of \$193,977 on May 19, 2008, and appellant did not file his original 2003 federal

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1 return until March 21, 2010.<sup>2</sup> Thereafter, the IRS accepted the return and abated all but \$70 of the tax  
2 previously assessed on the substitute for return. Respondent asserts that while the IMF lists an amended  
3 return posted on August 9, 2010, the IRS did not make any changes to appellant's 2003 federal tax based  
4 on the amended return. (Resp. Op. Br., p. 3, Ex. G.)

5 Respondent contends that in order for R&TC section 19311 to apply, there must be a  
6 change by the IRS to the amount of income or deductions shown or disclosed by appellant on an original  
7 or amended return. Respondent asserts that the IRS simply revised its previous assessment based on the  
8 substitute for return of appellant's tax liability and related penalties and interest upon acceptance of  
9 appellant's late filed federal tax return for the 2003 tax year. Respondent further asserts that the plain  
10 language of section 19311 requires the claim for refund to result from the adjustment and here, the claim  
11 was appellant's original return. Accordingly, respondent contends that the abatement of the proposed  
12 federal deficiency assessment was not a change or correction to a previously filed original or amended  
13 return. (Resp. Op. Br., pp. 3-4.)

#### 14 Applicable Law

15 Under R&TC section 19306, a refund is permitted if made within either of the two  
16 following periods, whichever is later: (1) four years from when the return was timely filed or four years  
17 from the last day prescribed for filing the return<sup>3</sup> (if filed within the extension of time for filing the  
18 return) (the four-year period); or (2) one year from the time of actual payment (the one-year period).

19 R&TC section 19311, subdivision (a)(1), provides:

20 If a change or correction is made or allowed by the Commissioner of Internal Revenue or other  
21 officer of the United States or other competent authority, a claim for credit or refund resulting  
22 from the adjustment may be filed by the taxpayer within two years from the date of the final  
federal determination (as defined in Section 18622), or within the period provided in Section  
19306, 19307, 19308, or 19316, whichever period expires later.

23 Similarly, respondent is authorized to allow a credit, make a refund or mail a notice of proposed  
24 overpayment resulting from a final federal determination within the later of (1) two years from the date

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26 <sup>2</sup> According to the IMF, the IRS received an unprocessable return from appellant on May 12, 2008, in response to the IRS's  
27 December 11, 2007 Notice of Deficiency. Due to the insufficiency of the unprocessable return, the IRS assessed tax of  
28 \$193,977.

<sup>3</sup> In California, an individual who filed a return on a calendar year basis is required to file the return by April 15 following the  
close of the calendar year. (Rev. & Tax. Code, § 18566.)

1 of the final federal determination or (2) within the period provided in R&TC section 19306, 19307,  
2 19308 or 19316. (Rev. & Tax. Code, § 19311, subd. (a)(2).) A final federal determination is defined in  
3 R&TC section 18622 as a change or correction to “any item required to be shown on a federal tax return,  
4 including any gross income, deduction, penalty, credit, or tax for any year.”

5 Refunds can only be granted to the extent they fall within these above statutory periods.  
6 (*Appeal of Robert A. and Nancy R. Jacobs*, 65-SBE-029, Aug. 3, 1965; *see also Prussner v. U.S.* (7th  
7 Cir. 1990) 896 F. 2d 218.)<sup>4</sup> The Board has determined the language of the statute of limitations is  
8 explicit and must be strictly construed. (*Appeal of Michael and Antha L. Avril*, 78-SBE-072, Aug. 15,  
9 1978.) Generally, a taxpayer’s failure to file a claim for refund, for whatever reason, within the  
10 statutory period bars him from doing so at a later date. (*Appeal of Earl and Marion Matthiessen*,  
11 85-SBE-077, July 30, 1985.) It is a taxpayer’s responsibility to file a claim for refund within the  
12 timeframe prescribed by law. (*Id.*) In addition, federal courts have stated that fixed deadlines may  
13 appear harsh because they can be missed, but the resulting occasional harshness is redeemed by the  
14 clarity of the legal obligation imparted. (*Prussner v. United States, supra*, 896 F.2d at 222-223 [citing  
15 *United States v. Locke* (1985) 471 U.S. 84; *United States v. Boyle* (1985) 469 U.S. 241, 249].) Federal  
16 courts have also stated that there is no equitable tolling of the statute of limitations. (*United States v.*  
17 *Brockamp* (1997) 117 S.Ct. 849.)<sup>5</sup>

#### 18 STAFF COMMENTS

19 For the 2003 tax year, appellant’s original return was due by April 15, 2004 and the four-  
20 year period for timely filing of a claim for refund closed on April 15, 2008. Accordingly, it appears to  
21 Appeals Division staff that appellant’s original California return dated September 15, 2010, is beyond  
22 the four year statute of limitations. For purposes of the one-year period, the payments were received on  
23 April 10, 2006. Appellant’s claim for refund dated September 15, 2010, was made well after one year  
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25 <sup>4</sup> Board of Equalization cases are generally available for viewing on the Board’s website ([www.boe.ca.gov](http://www.boe.ca.gov)).

26 <sup>5</sup> R&TC section 19316 contains the only exception to the statute of limitations under California law. R&TC section 19316  
27 tolls the statute of limitations during a period of “financial disability,” meaning the taxpayer was unable to manage his or her  
28 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).)  
Appellant has not argued (or provided any evidence to support a finding) that the statute of limitation should be tolled due to  
a “financial disability.” Accordingly, the provisions of R&TC section 19316 do not appear to be applicable to this appeal.

1 from the date of these payments. Accordingly, it appears to Appeals Division staff that appellant's  
2 claim for refund is time barred under R&TC section 19306.

3 Under R&TC section 19311, a claim for refund resulting from federal adjustments may  
4 be filed within two years from the date of the final federal determination. Appellant should be prepared  
5 to discuss whether the IRS's revisions to the proposed federal deficiency assessment based on  
6 appellant's original 2003 federal return filed late on March 21, 2010, constitutes a "change or  
7 correction" for purposes of R&TC section 19311. In addition, appellant may wish to provide a copy of  
8 his August 9, 2010 amended federal return and discuss whether the IRS made any adjustments based on  
9 this amended return.

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