

1 William J. Stafford
Tax Counsel
2 Board of Equalization, Appeals Division
450 N Street, MIC:85
3 PO Box 942879
Sacramento CA 95814
4 Tel: (916) 206-0166
Fax: (916) 324-2618
5

6 Attorney for the Appeals Division

7 **BOARD OF EQUALIZATION**

8 **STATE OF CALIFORNIA**

9
10 In the Matter of the Appeal of:) **HEARING SUMMARY²**
11) **PERSONAL INCOME TAX APPEAL**
12 **NOLI J. LOZADA AND**) Case No. 297237
13 **MARIA IMPANG-LOZADA¹**)
14 _____)

15 Year Claim
16 1991 \$24,715³

17 Representing the Parties:

18 For Appellants: Rick Evia
19 For Franchise Tax Board: Diane L. Ewing, Tax Counsel III
20

21 **QUESTION:** Whether the statute of limitations bars appellants' claim for refund for 1991.

22 ///

23 _____
24 ¹ Appellants reside in Contra Costa County, California.

25 ² This appeal was filed January 4, 2005, and then deferred from August 1, 2005, through March 4, 2009, for appellants'
26 Chapter 13 bankruptcy.

27 ³This is the amount of the proposed assessment, which was collected via wage garnishment. Appellants initially claimed that
28 some portion of this amount should be refunded. In appellants' Reply Brief dated July 18, 2005, appellants indicate that the
claim for refund amount is \$1.00 or more. At the oral hearing, both parties should be prepared to discuss the correct refund
amount assuming that appellants' claim for refund is not barred by the statute of limitations.

1 HEARING SUMMARY

2 Background

3 Appellants did not file timely California and federal income tax returns for 1991. In late
4 1992, the FTB issued a notice demanding that appellants file a 1991 California return or explain why no
5 return was required. When appellants neither filed a 1991 California return nor demonstrated why such
6 a return was not required, the FTB issued a Notice of Proposed Assessment (“first NPA”) for the 1991
7 tax year, which became final on April 30, 1993.

8 On or about 1997, the Internal Revenue Service (IRS) discovered that appellants had
9 failed to file a 1991 federal return. Accordingly, the IRS initiated a filing enforcement action, which
10 culminated in a \$73,766 deficiency assessment based on a Substitute for Return (or “SFR”) that was
11 issued in October of 1997.

12 Subsequently, on October 2, 1998, appellants filed their 1991 California tax return.⁴
13 After reviewing information provided by the IRS, the FTB later issued a second NPA on May 17, 1999
14 (“second NPA”), asserting that appellants had additional California taxable income of \$114,500 in 1991.
15 The second NPA proposed an additional tax of \$9,835.00, and late filing penalty of \$2,397.63.
16 Appellants did not timely protest the second NPA, which the FTB asserts became final on August 9,
17 1999. Afterwards, the FTB proceeded with a collection action, with the last payment/garnishment
18 (hereinafter “payment”) apparently being made to appellants’ FTB account on December 11, 2002.⁵

19 In May 2003, appellants filed their 1991 federal return, self-assessing a total tax of
20 \$11,582. The IRS accepted appellants’ 1991 federal return and, on May 10, 2004, abated \$62,184 of the
21 tax previously assessed. Shortly thereafter, appellants filed an amended 1991 California return on
22 July 23, 2004, along with a claim for refund letter, appearing to assert a California tax liability of
23 \$3,193.00, and requesting a refund of the “greater part of \$24,715.00 which was paid through wage
24

25 _____
26 ⁴ In its Reply Brief dated May 8, 2009, the FTB concedes that appellants submitted their 1991 California return on October 2,
1998.

27 ⁵ In its Reply Brief dated May 8, 2009, the FTB asserts that its electronic records indicate that the last payment on appellants’
28 FTB account was received on December 11, 2002. In support, the FTB provided a copy of its electronic records. (See,
Exhibit F of the FTB’s Reply Brief dated May 8, 2009.) In comparison, in their Reply Brief of July 18, 2005, appellants
assert that (i) the “last [FTB] garnishment was taken in November 30, 2002,” and (ii) the IRS’s “wage garnishment continued
until September 9, 2003.” Appellants, however, did not provide any documents to support these statements.

1 garnishments.”

2 In a letter dated October 14, 2004, the FTB denied appellants’ claim for refund because
3 the statute of limitations had expired. Appellants then filed this timely appeal.

4 Contentions

5 Appellants make the following three arguments: First, appellants (apparently) assert that
6 their claim for refund was timely filed under the provisions of Revenue and Taxation Code (R&TC)
7 section 19311. In support, appellants contend that “the original return filed with the IRS in May, 2003
8 was an adjusted return based on the fact that negotiations had already begun with the IRS in 1998 to
9 garnish Appellants’ wages . . .”

10 Second, appellants (apparently) contend that they never received the first NPA, which
11 became final on April 30, 1993. Specifically, in their Reply Brief of July 18, 2005, appellants state that
12 they “never received the proposed assessment dated April 30, 1993.”⁶

13 Finally, appellants appear to question the timeliness of the second NPA, which was
14 issued on May 17, 1999. Specifically, in their Reply Brief of July 18, 2005, appellants state that
15 “[r]espondent **re-opened** Appellants’ file on **May 17, 1999** . . .” (Emphasis in original.)

16 The FTB contends that appellants’ claim for refund is barred by the applicable statute of
17 limitations set forth in R&TC section 19306 because appellants failed to file their claim for refund
18 within four years of the due date of their return or one year from the date of the last payment. The FTB
19 also contends that the statute of limitation provision set forth in R&TC section 19311 is not applicable
20 because appellants’ claim for refund did not result from an IRS “change or correction” to appellants’
21 federal return. Specifically, FTB contends that the IRS (in the absence of a return from appellants)
22 assessed tax based on its estimate of appellants’ income (called a Substitute for Return or “SFR”), later
23 accepted appellants’ late filed federal return (the original return), and made no changes to appellants’
24 original return. FTB contends that this demonstrates that there is no federal change or correction to
25 appellants’ federal return and that this is supported by the Individual Master File (IMF) for 1991 as well
26

27
28 ⁶ A copy of the first NPA was not provided in the appeal file. The FTB’s electronic records (attached as Exhibit A of the
FTB’s Opening Brief) indicate that the first NPA became final on April 30, 1999, which means that the first NPA had to have
been issued before April 30, 1999.

1 as appellants' briefs.

2 Second, the FTB asserts that whether appellants received the first NPA became irrelevant
3 when appellants submitted their 1991 return. Specifically, the FTB states that when appellants filed
4 their 1991 California return, the FTB accepted the return (as filed) and deleted the amounts set forth on
5 the first NPA.

6 Finally, the FTB asserts that "the validity of the [second] NPA is not an issue in this
7 appeal" and "[a]ny objections appellants had to the [second] NPA must have been raised in a timely
8 protest to the [second] NPA."

9 Applicable Law

10 Burden of Proof

11 The FTB's determination of tax is presumed to be correct, and a taxpayer has the burden
12 of proving error. (*Todd v. McColgan* (1949) 89 Cal.App.2d 509; *Appeal of Aaron and Eloise Magidow*,
13 82-SBE-274, Nov. 17, 1982.)⁷ Unsupported assertions are not sufficient to satisfy a taxpayer's burden
14 of proof. (*Appeal of Aaron and Eloise Magidow, supra.*)

15 Claim for Refund

16 *1. General Statute of Limitations*

17 The general statute of limitations for filing a refund claim is set forth in R&TC section
18 19306. Under that section, the last day to file a claim for refund is the later of:

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

22 The language of the statute of limitations is explicit and must be strictly construed.
(*Appeal of Michael and Antha L. Avril*, 78-SBE-072, Aug. 15, 1978.) It is a taxpayer's responsibility to
23 file a claim for refund within the timeframe prescribed by law. (*Appeal of Earl and Marion*
24 *Matthiessen*, 85-SBE-077, July 30, 1985.) Federal courts have stated that fixed deadlines may appear
25 harsh because they can be missed, but the resulting occasional harshness is redeemed by the clarity of
26 the legal obligation imparted. (*Prussner v. United States* (7th Cir. 1990) 896 F.2d 218, 222-223 [citing
27

28 ⁷ Board of Equalization cases are generally available for viewing on the Board's website (www.boe.ca.gov).

1 *United States v. Locke* (1985) 471 U.S. 84; *United States v. Boyle* (1985) 469 U.S. 241, 249].)

2 2. *R&TC section 19311*

3 R&TC section 19311 adds a qualification to the R&TC section 19306 refund limitation
4 period, by providing in part:⁸

5 If a change or correction is made or allowed by the Commissioner of Internal
6 Revenue . . . a claim for credit or refund resulting from the adjustment may be
7 filed by the taxpayer within two years from the date of the final federal
8 determination (*as defined in Section 18622*), or within the period provided in
9 Section 19306 . . . whichever period expires later. [Emphasis supplied.]

8 R&TC section 18622, subdivision (a), provides in part:⁹

9 If any item required to be shown on a federal tax return, including any gross
10 income, deduction, penalty, credit, or tax for any year of any taxpayer is
11 changed or corrected by the Commissioner of Internal Revenue . . . , that
12 taxpayer shall report each change or correction . . . within six months after the
13 date of each final federal determination of the change or correction . . .

12 As it existed from 1994 to 1998, R&TC section 19311, provided in part:

13 If a change or correction is made or allowed by the Commissioner of Internal
14 Revenue . . . a claim for credit or refund resulting from the adjustment may be
15 filed by the taxpayer within two years from the date of the final federal
16 determination, or within the period provided in Section 19306 . . . whichever
17 period expires later.

16 As it existed from 1994 to 1998, R&TC section 18622, subdivision (a), provided in part:

17 If the amount of gross income or deductions for any year of any taxpayer *as returned*
18 to the United States Treasury Department is changed or corrected by the
19 Commissioner of Internal Revenue . . . that taxpayer shall report the change or
20 correction . . . within six months after the final federal determination of the change or
21 correction . . . [Emphasis supplied.]

20 *Receipt of First NPA*

21 In general, notices sent by the FTB to a taxpayer's last known address are presumed to

23 ⁸ R&TC section 19311 was amended by SB 1229, effective October 10, 1999, to add the definition of "final federal
24 determination" by reference to R&TC section 18622; this section further provided that it was effective for any federal
25 determination that became final on or after January 1, 1993. (Here, it appears that appellants are asserting that a "change or
26 correction" occurred on May 10, 2004, which is the date the IRS accepted appellants' federal return and abated \$62,184 of
27 the tax previously assessed in the Substitute for Return.) The complete history of R&TC section 19311 provides as follows:
28 "Added Stats 1993 ch 31 § 26 (SB 3), effective June 15, 1993, operative January 1, 1994. Amended Stats 1993 ch 877 § 29
(SB 673), effective October 6, 1993, operative January 1, 1994; Stats 1999 ch 987 § 75.5 (SB 1229), effective October 10,
1999; Stats 2001 ch 543 § 13 (SB 1185). Amended Stats 2002 ch 807 § 14 (SB 219), effective September 23, 2002.

⁹ The history of R&TC section 18622 provides as follows: "Added Stats 1993 ch 31 § 26 (SB 3), effective June 15, 1993,
operative January 1, 1994. Amended Stats 1993 ch 877 § 23.1 (SB 673), effective October 6, 1993, operative January 1,
1994; Stats 1999 ch 987 § 56 (SB 1229), effective October 10, 1999."

1 have been received. (See *Appeal of Ronald A. Floria*, 83-SBE-003, Jan. 3, 1983.) If a taxpayer claims
2 that he or she did not receive a notice, the taxpayer bears the burden of proving that the notice was not
3 mailed to the taxpayer's last known address. (See *Grenczewicz v. Commissioner*, T.C. Memo. 1990-
4 597.) What is relevant is the FTB's knowledge of the taxpayer's last known address, rather than the
5 taxpayer's actual most current address. (See *Reding v. Commissioner*, T.C. Memo. 1990-278, aff. T.C.
6 Memo. 1990-536.) If the taxpayer moves after filing his or her return, the taxpayer must take the
7 necessary steps to ensure receipt of his or her mail. (*Appeal of Winston R. Schwyhart*, 75-SBE-035, Apr.
8 22, 1975.)

9 Timeliness of Second NPA

10 In general, the FTB must issue an NPA within four years of the date the taxpayer filed his
11 or her California return. (Rev. & Tax. Code, § 19057.)

12 STAFF COMMENTS

13 Claim for Refund

14 As discussed above, pursuant to R&TC section 19306, a taxpayer must file a claim for
15 refund within four years of the last date prescribed for filing the return, or within one year from the date
16 of overpayment, whichever period expires later. Here, appellants' 1991 return was due on April 15,
17 1992. Four years from that date was April 15, 1996. Therefore, appellants' claim for refund, filed on
18 July 23, 2004, is barred under the four-year statute of limitations. As noted above in footnote five,
19 appellants apparently made their last payment to the FTB on December 11, 2002. One year from that
20 date was December 11, 2003. Therefore, appellants' claim for refund, filed on July 23, 2004, is also
21 barred under the one-year statute of limitations. Thus, appellants' claim was not timely filed within
22 applicable limitations periods pursuant to R&TC section 19306.

23 Under the facts presented, the only possible exception to the limitations periods of R&TC
24 section 19306 is the two-year limitation period provided by R&TC section 19311.

25 Here, it appears that the IRS did not make a change or correction to an item required to
26 be shown on appellants' 1991 federal return because appellants did not file a federal return that could be
27 changed or corrected; instead the IRS assessed tax by estimating appellants' income in an SFR (and later
28 accepted appellants' late filed return). At the oral hearing, the parties should be prepared to argue (i)

1 whether R&TC section 19311 applies only when the IRS makes a change or correction to a taxpayer's
2 federal return, (ii) whether the IRS made a change or correction to appellants' 1991 federal return, and
3 (iii) whether appellants' claim for refund was timely filed under the provisions of R&TC section 19311.

4 Receipt of First NPA

5 It appears that the issue of whether appellants received the first NPA became irrelevant
6 when appellants submitted their 1991 California return on October 2, 1998, and the FTB accepted the
7 return (as filed) and deleted the amounts set forth on the first NPA.

8 Timeliness of Second NPA

9 The second NPA appears to have been issued in a timely manner. As stated above, in
10 general, the FTB must issue an NPA within four years of the date a taxpayer filed his or her California
11 return. (Rev. & Tax. Code, § 19057.) Here, appellants filed their 1991 California return on October 2,
12 1998, and the second NPA was issued on May 17, 1999. Accordingly, the second NPA appears to have
13 been issued in a timely manner. Appellants may want to clarify this argument at the oral hearing.

14 ///

15 ///

16 ///

17 Lozada_wjs

18
19
20
21
22
23
24
25
26
27
28