STATE BOARD OF EQUALIZATION
PERSONAL INCOME TAX APPEAL

CALIFORNIA STATE BOARD OF EQUALIZATION

SUMMARY DECISION UNDER REVENUE AND TAXATION CODE SECTION 40

In the Matter of the Appeal of:	Case No. 461570
	Adopted: September 16, 2015
THOMAS E. RUBIN	

Representing the Parties:

For Appellant: Thomas E. Rubin[1]

For Respondent: Christopher Haskins, Tax Counsel III

Counsel for the Board of Equalization: John O. Johnson, Tax Counsel III

LEGAL ISSUES

Whether this Board has jurisdiction to hear appellant's appeal and, if so, whether appellant has shown that the Franchise Tax Board (FTB or respondent) erred in denying his claim for refund based on an alleged flow-through loss and the cancellation of bad debt.

FINDINGS OF FACT

Appellant and his spouse filed a joint California return for 2000 on October 15, 2001, reporting a tax liability of $3,187,583, total payments of $2,933,489, and a balance due of $254,094 plus interest. Appellant and his spouse did not remit a payment for the balance due. Beginning no later than December 26, 2001, respondent sent numerous Income Tax Due Notices and other notices related to the unpaid liability, requesting immediate payment, but appellant did not remit payment.

On October 15, 2005, appellant filed an amended tax return, claiming a $2,901,733 refund based on asserted flow-through losses from Focus Media, Inc. (Focus Media), of which appellant was

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[1] Appellant was represented at the inception of the appeal and throughout the briefing process, but that representation ended shortly after appellant filed his final additional brief.

the former CEO and sole shareholder.[2] Appellant's amended tax return did not follow the tax return information reported by Focus Media through its court-appointed trustee.[3] Instead, appellant's amended return attached a "pro forma" California return for Focus Media and a "pro forma" amended Schedule K-1, which were prepared by appellant. The pro forma return claims a net loss for the 2000 tax year of $30,563,376, and the pro forma Schedule K-1 allocates the entire loss to appellant, asserting an increase in the ordinary loss from the $8,803,852 originally reported on the Schedule K-1 filed by the court-appointed trustee. On his amended personal California tax return, appellant reported an increased tax basis in the Focus Media stock and a reduction in the distributions received from Focus Media to create a $16,809,110 decrease in income from distributions. Based on the foregoing positions, appellant's amended personal California tax return asserted that he had no taxable income.

In 2006, appellant was convicted of 25 counts of wire fraud, mail fraud, bankruptcy fraud, and money laundering, and was sentenced to five and one-half years in prison. Appellant's scheme involved taking money paid by Focus Media's clients for advertisement placement and using it for his personal liabilities, as well as conspiring with an attorney to commit bankruptcy fraud by funneling money out of the company after it was forced into involuntary bankruptcy.

Respondent treated appellant's amended return as a claim for refund and denied it. This appeal arises from appellant's timely filed appeal from respondent's denial of his claim for refund.

The briefing process on appeal was suspended for approximately two years at appellant's representative's continued requests based on the need to gather documentation and prepare his arguments after appellant's release from prison. This matter was calendared for this Board's October 2011 oral hearing calendar, but was postponed at appellant's request. Appellant subsequently received

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[2] Appellant filed the amended tax return individually as his spouse passed away in 2001.

[3] Focus Media was forced into involuntary bankruptcy proceedings in 2000. The company's bankruptcy court-appointed trustee filed a corporate tax return for that year in late 2001, listing several loans and distributions to appellant. The return included a Schedule K-1 for appellant, which showed him as the 100-percent owner of the company's shares, having an ordinary loss from trade or business activities of $8,803,852, and a non-dividend property distribution of $30,437,050.

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additional postponements.[4] This matter was subsequently scheduled for this Board's adjudicatory nonappearance calendar after appellant failed to respond to a hearing notice. This adjudicatory matter satisfies the amount-in-controversy standard established by Revenue and Taxation (R&TC) Code section 40 and, because it is not on the consent calendar, requires the preparation of a written opinion under that provision.

APPLICABLE LAW

Generally, personal income tax returns are due on the 15th day of April, and the tax asserted is due and payable at the time and place fixed for filing the return (determined without regard to any extension of time for filing the return). (Rev. & Tax. Code, §§ 18566, 19001.)

R&TC section 19322.1 provides: "A claim for refund that is otherwise valid under section 19322, but that is made in the case in which payment of the entire tax assessed or asserted has not been made, shall be a claim only for purposes of tolling the [statute of limitations for filing a claim for refund]."[5] Under this provision, a claim for refund is not valid if payment of the entire tax assessed or asserted has not been made, except that the claim may serve to toll the statute of limitations if it is otherwise valid. R&TC section 19322.1 further states that, for all purposes other than tolling the statute of limitations, including for purposes of an appeal to this Board under R&TC sections 19324 and 19331, a claim for refund that is made before full payment shall not be deemed filed until full payment is made.[6] The statutory provisions immediately following R&TC section 19322.1, R&TC section 19323 et seq., then set forth procedures for appealing the denial or deemed denial of a claim

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[4] The primary bases for appellant's deferrals were additional time needed to prepare and the alleged existence of a federal review of his amended tax return for the same year, including a request for postponement in October 2013 based on the assertion that the Internal Revenue Service (IRS) was reviewing his amended return for the 2000 tax year. Records provided by respondent through additional briefing indicate that any federal examination concluded by February 2013 with no change to his liability. Appellant provides a letter from the IRS Appeals office dated February 11, 2013, indicating appellant appealed the decision of the IRS. Appellant was then asked to provide documentation showing the matter was still under review at the federal level, but he failed to do so.

[5] R&TC section 19322 provides, generally, that a claim for refund must be a signed writing from the taxpayer or his representative stating the specific grounds upon which the claim for refund is founded.

[6] R&TC section 19322.1 applies to all claims for refund filed on or after January 1, 2002, without regard to the tax year at issue. (Rev. & Tax. Code, § 19322.1, subd. (b).) R&TC section 19322.1 further provides that no refund will be allowed for any payment made more than seven years before the date that full payment of the tax is made. (*Id.* at subd. (a).) A claim for refund that is filed prior to the payment of the entire tax assessed or asserted is sometimes referred to as an informal claim for refund.

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for refund to this Board.

In *State Bd. of Equalization v. Superior Court* (1985) 39 Cal.3d 633 (*SBE*), the Board issued a notice of determination to the taxpayer for sales tax due, and the taxpayer made a partial payment of the amount due. Prior to paying the remaining amount due, the taxpayer filed a claim for refund of the partial amount paid and subsequently filed a claim for refund action with the Superior Court when the Board did not act on the claim for refund within eight months. The California Supreme Court stated that ". . . where such partial payment is made and accepted by the taxing authority, an action for refund may not be maintained until the full amount claimed due for a given reporting period is paid." (*SBE*, at p. 643.) The decision was based upon the application of article XIII, section 32 of the California Constitution, which provides, generally, that an action cannot be brought before a court in this State against the collection of a tax claimed to be illegal until after that tax has been paid.

In *City National Corp. v. Franchise Tax Bd.* (2007) 146 Cal.App.4th 1040 (*City National*), the California Court of Appeal determined a claim for refund was not barred by the limitations imposed by California Constitution, article XIII, section 32, where there were pending proposed assessments for the same tax year which had not yet become final and due. The taxpayer in that appeal had filed protests against proposed assessments issued by the FTB, and then filed a claim for refund for tax already paid, prior to the FTB taking action on the protests against the proposed assessments. The court determined that, since the proposed assessments were not final and due, the taxpayer was not required by article XIII, section 32 of the California Constitution to pay the proposed amounts, which were not self-assessed, before filing its claim for refund.

Federal courts have determined that the filing of the amended return generally will not restrain a tax agency from collecting a self-assessed tax liability. (*Fayeghi v. Commissioner* (9th Cir. 2000) 211 F.3d 504 (*Fayeghi*); *Knoefler v. Schneider* (9th Cir. 1977) 565 F.2d 1072 (*Knoefler*).)

ANALYSIS

As noted above, appellant and his spouse asserted and self-assessed a tax liability of $3,187,583 for the 2000 tax year on their income tax return filed on October 15, 2001, and reported unpaid tax due of $254,094. Despite numerous billing notices, appellant failed to pay the tax due. In 2005, appellant filed an amended tax return, asserting that he is owed a refund. Accordingly, appellant

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has an asserted tax liability that was unpaid at the time he filed his claim for refund and that liability remains unpaid today.

Appellant argues that a claim for refund where the tax assessed or asserted has not been paid may be considered by this Board even though California Constitution, article XIII, section 32 prohibits the consideration of such a refund claim by a court. This argument finds no support in the statutes or relevant case law.[7]

R&TC section 19322.1 states that, for all purposes other than tolling the statute of limitations, including for purposes of an appeal to this Board under R&TC sections 19324 and 19331, a claim for refund that is made before full payment shall not be deemed filed until full payment is made. R&TC section 19323 et seq. then sets forth procedures for appealing the FTB's denial or deemed denial of a claim for refund to this Board. Thus, the relevant statutes clearly provide that, except with regard to the tolling of the statute of limitations where an otherwise valid claim for refund is made prior to the payment of the tax, a claim for refund is not valid unless the tax assessed or asserted has been paid.[8]

Appellant's amended return was submitted prior to full payment of the entire tax asserted, and appellant has not paid the tax asserted, despite receiving billing notices. Under R&TC section 19322.1, although appellant's amended tax return may toll the statute of limitations, it cannot be deemed filed and perfected until full payment of the entire tax asserted is made. As a result, this Board does not have jurisdiction to review respondent's action denying appellant's claimed refund.

DISPOSITION

For the foregoing reasons, appellant's appeal is dismissed.

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[7] *City National*, *supra*, 146 Cal.App.4th 1040, does not support appellant's argument as it only addresses when an assessment by respondent becomes final. It does not address tax that is reported by the taxpayer on the taxpayer's own return but not paid despite the FTB's repeated efforts to collect the liability.

[8] This principle is also supported by federal case law. As discussed in *Fayeghi* and *Knoefler*, an amended return generally will not restrain a tax agency from collecting an unpaid tax liability that was self-assessed on a return.

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ORDER

Pursuant to the analysis of the law and facts above, this appeal is dismissed. Adopted at Sacramento, California, this 16th day of September, 2015.

Jerome E. Horton, Chairman

George Runner, Member

Fiona Ma, Member

Diane L. Harkey, Member

Yvette Stowers, Member*

*For Betty T. Yee, pursuant to Government Code section 7.9.