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

10 In the Matter of the Appeal of:) **HEARING SUMMARY²**
11) **PERSONAL INCOME TAX APPEAL**
12 **MICHAEL JOHN KLEMP¹**) 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 are barred by
23 the statute of limitations.

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26 ¹ Appellant resides in Placer County, California.

27 ² This matter was originally scheduled for an oral hearing at the Board's December 14-15, 2011 meeting. Appellant
28 requested a postponement, due to a scheduling conflict, and this matter was rescheduled to the Board's February 28-29, 2012 meeting. Appellant again requested a postponement and this matter was rescheduled to the Board's March 20-21, 2012 meeting.

1 HEARING SUMMARY

2 Facts

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

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

15 Respondent did not receive a protest, and the NPA went final. Thereafter, respondent
16 began collection activity. On April 10, 2006, respondent collected payment of appellant's liability of
17 \$4,296.03. (Resp. Op. Br., p.1, Ex. C.)

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

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

26 This timely appeal then followed.

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1 Contentions

2 Appellant

3 Appellant contends that his claim for refund is not barred by the statute of limitations
4 because the claim for refund is based on changes or corrections made by the Internal Revenue Service
5 (IRS) in October 2010. Appellant contends that the statute of limitations in R&TC section 19311
6 supersedes the statute of limitations in R&TC section 19306. Appellant contends that a change or
7 correction was made to appellant's amended 2003 federal tax return as evidenced in a letter from the
8 IRS dated October 20, 2010. Appellant contends that this "change or correction" made by the IRS
9 resulted in the reduction, or the elimination, of any tax liability for the 2003 tax year. (App. Op. Br.,
10 p. 5; Att.)

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

20 Respondent

21 Respondent contends that appellant's claim for refund is barred by the four-year and one-
22 year statute of limitations pursuant to R&TC section 19306. In addition, respondent contends that the
23 statute of limitations for a claim for refund based on a final federal determination under R&TC section
24 19311 is inapplicable to appellant's claim for refund. Respondent emphasizes that the statute requires
25 the claim to result from a federal adjustment. Respondent contends that, in appellant's matter, there was
26 no change. (Resp. Op. Br., pp. 2-3.)

27 Respondent further notes that the IRS's Individual Master File transcript (IMF) for
28 appellant's 2003 tax year indicated that appellant failed to file a timely federal return. Respondent notes

1 that the IRS, like the FTB, initiated filing enforcement action by preparing a return based on income
2 estimates (i.e., a substitute tax return). The IMF also indicated that the IRS assessed additional tax of
3 \$193,977 on May 19, 2008, and appellant did not file his original federal return until March 21, 2010.³
4 Thereafter, the IRS accepted the return and abated all but \$70 of the tax previously assessed on the
5 substitute tax return. Respondent asserts that while the IMF lists an amended return posted on August 9,
6 2010, the IRS did not make any changes to appellant's 2003 federal tax based on the amended return.
7 (Resp. Op. Br., p. 3, Ex. G.)

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

17 Applicable Law

18 Burden of Proof

19 The FTB's determination of tax is presumed to be correct, and a taxpayer has the burden
20 of proving error. (*Todd v. McColgan* (1949) 89 Cal.App.2d 509; *Appeal of Aaron and Eloise Magidow*,
21 82-SBE-274, Nov. 17, 1982.)⁴ Unsupported assertions are not sufficient to satisfy a taxpayer's burden
22 of proof. (*Appeal of Aaron and Eloise Magidow, supra.*)

23 Claim for Refund

24 Under R&TC section 19306, a refund is generally permitted if made within either of the
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26 ³ 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.

⁴ Board of Equalization cases are generally available for viewing on the Board's website (www.boe.ca.gov).

1 two following periods, whichever is later: (1) four years from when the return was timely filed or four
2 years from the last day prescribed for filing the return⁵ (determined without regard to any extension of
3 time for filing the return) (the four-year period); or (2) one year from the time of actual payment (the
4 one-year period).

5 R&TC section 19311, subdivision (a)(1), adds a qualification to the general statute of
6 limitations period in R&TC section 19306, by providing in part:

7 If a change or correction is made or allowed by the Commissioner of Internal Revenue
8 . . . a claim for credit or refund resulting from the adjustment may be filed by the
9 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 . . . whichever period
expires later. (Underlines added.)

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

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

14 In addition, R&TC section 18622, subdivision (d), provides in part:

15 . . .the date of each final federal determination shall be the date on which each adjustment
16 or resolution resulting from an Internal Revenue Service examination is assessed...
(Underlines added.)

17 California Code of Regulation, title 18, section (Regulation) 19059,⁶ subdivision (e), provides “a final
18 determination is an irrevocable determination or adjustment of a taxpayer’s federal tax liability from
19 which there exists no further right of appeal either administrative or judicial.”

20 Refunds can only be granted to the extent they fall within these above statutory periods.
21 (*Appeal of Robert A. and Nancy R. Jacobs*, 65-SBE-029, Aug. 3, 1965; *see also Prussner v. U.S.* (7th
22 Cir. 1990) 896 F. 2d 218.) The Board has determined the language of the statute of limitations is
23 explicit and must be strictly construed. (*Appeal of Michael and Antha L. Avril*, 78-SBE-072, Aug. 15,
24 1978.) The statute of limitations is “strictly construed and . . . a taxpayer’s failure to file a claim for
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27 ⁵ 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.)

28 ⁶ Regulation 19059 provides taxpayers with direction regarding their reporting responsibility to California as a result of
changes to the taxpayer’s federal liability. Consequently, the definition in subdivision (e) of the regulation is a reference to a
final federal determination.

1 refund, for whatever reason, within the statutory period bars him from doing so at a later date.” (*Appeal*
2 *of Earl and Marion Matthiessen*, 85-SBE-077, July 30, 1985.) It is a taxpayer’s responsibility to file a
3 claim for refund within the timeframe prescribed by law. (*Id.*) In addition, federal courts have stated
4 that fixed deadlines may appear harsh because they can be missed, but the resulting occasional harshness
5 is redeemed by the clarity of the legal obligation imparted. (*Prussner v. United States*, *supra*, 896 F.2d
6 at 222-223 [citing *United States v. Locke* (1985) 471 U.S. 84; *United States v. Boyle* (1985) 469 U.S.
7 241, 249].) Federal courts have also stated that there is no equitable tolling of the statute of limitations.
8 (*United States v. Brockamp* (1997) 117 S.Ct. 849.)⁷

9 STAFF COMMENTS

10 For the 2003 tax year, appellant’s original return was due by April 15, 2004 and the four-
11 year period for timely filing a claim for refund closed on April 15, 2008. Accordingly, it appears to
12 Appeals Division staff that appellant’s original California return, dated September 15, 2010, is beyond
13 the four-year statute of limitations. For purposes of the one-year period, respondent received payments
14 for the 2003 tax year on April 10, 2006. Appellant’s claim for refund, dated September 15, 2010, was
15 made well after one year from the date of these payments. Accordingly, it appears to Appeals Division
16 staff that appellant’s claim for refund is time barred under R&TC section 19306.

17 Under R&TC section 19311, a claim for refund resulting from federal adjustments may
18 be filed within two years from the date of the final federal determination. It appears to Appeals Division
19 staff that the IRS did not make a change or correction to an item required to be shown on appellant’s
20 2003 federal return because appellant had not filed a federal return that could be changed or corrected.
21 Rather, the IRS assessed tax by estimating appellants’ income via a substitute return (i.e., a return
22 prepared by the IRS) and later adjusted appellant’s account when it accepted appellant’s late-filed
23 return. Appellant should be prepared to discuss whether the IRS’s adjustment to appellant’s 2003 tax
24 year account was made as a result of a final federal determination for purposes of R&TC section 19311.

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27 ⁷ R&TC section 19316 contains the only exception to the statute of limitations under California law. R&TC section 19316
28 tolls the statute of limitations during a period of “financial disability,” meaning the taxpayer was unable to 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).)
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 are not applicable to this appeal.

1 Both parties should be prepared to discuss whether R&TC section 19311 only applies when the IRS
2 makes a change or correction to a taxpayer's federal return. In addition, appellant may wish to provide a
3 copy of his August 9, 2010 amended federal return and discuss whether the IRS made any adjustments
4 based on this amended return.

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