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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

BAYARD M. ORDLOCK et al., Plaintiffs and Appellants, v. FRANCHISE TAX BOARD, Defendant and Respondent.	B169465 (Los Angeles County Super. Ct. No. BC278386)

APPEAL from a judgment of the Superior Court of Los Angeles County. Lee Smalley Edmon, Judge. Reversed with directions.

Bingham McCutchen and Clayton J. Vreeland for Plaintiffs and Appellants.

Bill Lockyer, Attorney General, W. Dean Freeman, Lead Supervising Deputy Attorney General, and Michael R. Weiss, Deputy Attorney General, for Defendant and Respondent.

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Plaintiffs Bayard M. Ordlock and Lois S. Ordlock (Taxpayers) appeal from a summary judgment in favor of defendant Franchise Tax Board (FTB) on their complaint for a refund of personal income taxes for the 1983 tax year. In 1998, about 14 years after May 1984 when Taxpayers filed their 1983 return, FTB noticed a proposed assessment of $12,350 in taxes and over $35,000 in interest, based upon Internal Revenue Service (IRS) reports in 1994 and 1996 for income tax examination changes for Taxpayers' 1983 federal tax return. Taxpayers contend that the 1998 notice of the proposed deficiency assessment was barred by the four-year statute of limitations (former Rev. & Tax. Code, § 18586, subd. (a)), which expired in 1988, four years after they filed their 1983 return.[1] FTB contends, and the trial court determined, that the deficiency assessment was timely

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[1] Statutory references are to the Revenue and Taxation Code.

With respect to the four-year statute of limitations, Taxpayers assert that the operative provision is former section 18586, which was repealed effective January 1, 1994, and replaced with section 19057 (added by Stats. 1993, ch. 31, § 26, amended by Stats. 1993, ch. 877, § 27). FTB asserts that the operative provision is the version of section 19057 in effect before 1999. As the provisions of former section 18586 are substantially similar to the provisions of section 19057 and the result here would not be different, we need not resolve the disagreement as to which four-year statute governs.

From 1983 to 1994, former section 18586, subdivision (a) provided: "Except in the case of a fraudulent return and except as otherwise expressly provided in this part, every notice of a proposed deficiency assessment shall be mailed to the taxpayer within four years after the return was filed. No deficiency shall be assessed or collected with respect to the year for which the return was filed unless the notice is mailed within the four-year period or the period otherwise fixed."

From its enactment in 1993 until its amendment in 1998, former section 19057, subdivision (a) provided: "Except in the case of a false or fraudulent return and except as otherwise expressly provided in this part [(part 10.2 of division 2 of the Revenue and Taxation Code)], every notice of a proposed deficiency assessment shall be mailed to the taxpayer within four years after the return was filed. No deficiency shall be assessed or collected with respect to the year for which the return was filed unless the notice is mailed within the four-year period or the period otherwise provided."

because the statute of limitations was kept open until 1998 under former sections 18622, subdivision (a) and 19060, subdivision (a).[2] We conclude that the trial court erred in interpreting sections 18622 and 19060 as reviving a claim for a deficiency assessment which was barred by the statute of limitations. Accordingly, we reverse the judgment with directions to enter judgment in favor of Taxpayers.

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[2] The parties agree that the operative statutes are the former versions of sections 18622 (added by Stats. 1993, ch. 31, § 26, amended by Stats. 1993, ch. 877, § 23.1) and 19060 (added by Stats. 1993, ch. 31, § 26) that were in effect from 1994 through May 1998. For convenience, we refer to sections 18622 and 19060 with the understanding that we are referring to the former versions of the statutes.

From its enactment in 1993 until its amendment in 1999, section 18622, subdivision (a) provided in pertinent part: "If the amount of gross income or deductions for any year of any taxpayer as returned to the United States Treasury Department is changed or corrected by the Commissioner of Internal Revenue or other officer of the United States or other competent authority . . . that taxpayer shall report the change or correction . . . within six months after the final federal determination of the change or correction . . . or as required by the Franchise Tax Board, and shall concede the accuracy of the determination or state wherein it is erroneous. The changes or corrections need not be reported unless they increase the amount of tax payable under this part [(part 10.2 of division 2 of the Revenue and Taxation Code, which included sections 19057 and 19060)]."

Part 10.2 of division 2 of the Revenue and Taxation Code, titled Administration of Franchise and Income Tax Laws, was added by the Legislature in 1993 and included sections 18401 through 19802. In 1999, the Legislature amended section 18622, subdivision (a), so that the last sentence now provides that "[f]or any individual subject to tax under Part 10[, titled Personal Income Tax Law] (commencing with Section 17001), changes or corrections need not be reported unless they increase the amount of tax payable under Part 10 (commencing with Section 17001) for any year."

From its enactment in 1993 until its amendment in 1999, section 19060, subdivision (a) provided in pertinent part: "If a taxpayer fails to report a change or correction by the Commissioner of Internal Revenue . . . or fails to file an amended return as required by Section 18622, a notice of proposed deficiency assessment resulting from the adjustment may be mailed to the taxpayer at any time after the change, correction, or amended return is reported to or filed with the federal government."

FACTUAL AND PROCEDURAL BACKGROUND

In May 1984, Taxpayers, as husband and wife, filed joint federal and state tax returns for the 1983 tax year. During 1983, Bayard Ordlock was a minority investor in three partnerships. After Taxpayers filed their 1983 returns, the IRS began partnership-level audit proceedings as to the partnerships for the 1983 tax year. The audits were conducted at the partnership level and did not involve audits of Taxpayers' individual tax returns and Taxpayers were not parties to the audit proceedings. Taxpayers did not grant any extension of the federal statute of limitations period in connection with the partnership-level audits. FTB never audited Taxpayers' 1983 state tax return or took any action to extend the four-year limitations period with respect to their 1983 taxes.

In 1989 and 1992, Taxpayers accepted settlement offers by the IRS regarding the partnerships. In 1994 and 1996, the IRS issued reports of income tax examination changes for Taxpayers' 1983 tax year, showing the adjustments calculated by the IRS for the partnerships under the Taxpayers' settlement agreements. Taxpayers did not report the final changes in their 1983 federal income tax liability to FTB as section 18622 provided that federal changes did not need to be reported unless they increased the amount of state income tax payable, and Taxpayers believed that there was no state income tax payable in 1994 and 1996 because the four-year period for assessing additional income taxes had expired in 1988.

In May 1998, FTB issued a notice of proposed assessment for the 1983 tax year. Taxpayers filed a timely protest, claiming that the four-year statute of limitations barred FTB from assessing or collecting any tax deficiency for the 1983 tax year. FTB denied the protest and Taxpayers appealed to the State Board of Equalization, which denied their appeal and a request for a rehearing. In January 2002, FTB mailed to Taxpayers a notice of state income tax due for the 1983 tax year, claiming $12,350 in tax and $52,297.67 in interest. In February 2002, Taxpayers paid the full amount of the tax claimed to be due and filed a claim for a refund. In May 2002, FTB denied the claim for a refund.

In July 2002, Taxpayers filed this suit for a refund of personal income taxes, asserting that FTB's assessment of a tax deficiency was barred by operation of the four-

year statute of limitations. After FTB answered the complaint, both FTB and Taxpayers moved for summary judgment. FTB's motion was based on the argument that because Taxpayers failed to comply with section 18622, subdivision (a) by notifying it of the 1994 and 1996 adjustments or corrections by the IRS, section 19060 provided an exception to the four-year statute of limitations and permitted FTB to issue a notice of proposed deficiency at any time.

After hearing on the summary judgment motions, the trial court denied the motion of Taxpayers and granted the motion of FTB. The judgment states that "pursuant to the provisions of California Revenue and Taxation Code §§ 18622 and 19060, the assessments made by [FTB] were timely and not barred . . . ." Taxpayers filed a timely notice of appeal from the judgment.

DISCUSSION

The construction of statutes is a legal question over which we exercise our independent judgment. (*Klajic v. Castaic Lake Water Agency* (2001) 90 Cal.App.4th 987, 996.)

"[C]ourts, in interpreting statutes levying taxes, may not extend their provisions, by implication, beyond the clear import of the language used, nor enlarge upon their operation so as to embrace matters not specifically included. In case of doubt, construction is to favor the taxpayer rather than the government." (*Edison California Stores v. McColgan* (1947) 30 Cal.2d 472, 476.) "'[S]tatutes of limitation are to be viewed favorably as affording parties who may, by the lapse of time, have lost the ability to procure evidence, repose and security from stale demands.'" (*People v. Universal Film Exchanges* (1950) 34 Cal.2d 649, 659 [three-year statute of limitations barred action by state to recover use tax deficiencies nine years after taxpayer filed returns].) "And

when the Legislature intends to revive time-barred claims it does so expressly." (*Moore v. State Bd. of Control* (2003) 112 Cal.App.4th 371, 379.)[3]

Statutes must be harmonized by considering a particular clause or section in the context of the statutory framework as a whole. (*DuBois v. Workers' Comp. Appeals Bd.* (1993) 5 Cal.4th 382, 388.) If possible, significance should be given to every word, phrase, sentence and part of a statute. (*Ibid*.) "An interpretation that renders related provisions nugatory must be avoided . . . ." (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735.)

We agree with Taxpayers that there is no language in section 18622, subdivision (a) or section 19060, subdivision (a) expressing the Legislature's intent to revive a time-barred tax deficiency assessment. Instead, the last sentence of section 18622, subdivision (a) — providing that "[t]he changes or corrections [by the federal authorities] need not be reported unless they increase the amount of tax payable under this part" — reasonably interpreted, allows a taxpayer to rely on the time bar of the four-year statute of limitations. The reference to "this part" is to part 10.2 of division 2 of the Revenue and Taxation Code. Included in part 10.2 was section 19057, which afforded the statute of limitations for deficiency assessments. (See fns. 1 & 2, *ante*.) Accordingly, a taxpayer need not report the federal changes or corrections unless they "increase the amount of tax payable under this part," and a tax is not "payable under this part" when it is barred by the statute of limitations contained in part 10.2.

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[3] Not at issue here is the power of the Legislature to revive a civil claim that had become time barred under a former statute of limitations. (See *20th Century Ins. Co. v. Superior Court* (2001) 90 Cal.App.4th 1247, 1262 [Legislature may constitutionally revive a civil claim that had become barred under a former statute of limitations].) We are concerned only with the issue of whether by sections 18622 and 19060 the Legislature did revive or keep alive the right of FTB to issue a notice of proposed deficiency assessment in 1998 with respect to Taxpayers' 1983 tax liability.

As noted, the 1999 amendment to section 18622, subdivision (a) changed the last sentence by referencing part 10 instead of part 10.2. The parties have not raised, and we do not decide, the effect of this change.

FTB argues that because section 19060 is a special provision and section 19057 is a general one, "Former Section 19057's four-year limitations period is subordinated to Former Section 19060's unlimited period within which the FTB can issue a notice of proposed assessment." FTB's analysis ignores section 18622, which is also a special provision dealing with federal changes or corrections to a taxpayer's return. In particular, FTB fails to afford any import or meaning to the last sentence of section 18622, subdivision (a).

Because significance must be given to the statutory framework as a whole, section 19060 must be read in conjunction with section 18622. Under section 19060, subdivision (a), FTB may issue a notice of proposed deficiency assessment only when the taxpayer fails to report a change or correction by the IRS or fails to file an amended return "as required by Section 18622." Because section 19060 incorporates the provisions of section 18622, the last sentence of section 18622, subdivision (a) is applicable. That sentence permits the taxpayer to apply the four-year statute of limitations in determining whether the federal changes increase the amount of tax payable.

In short, Taxpayers need not have performed an idle act, namely, reporting to FTB the change or correction by the federal government when the statute of limitations barred FTB from assessing any tax deficiency. Because FTB's 1998 notice of a proposed deficiency assessment was barred by the four-year statute of limitations, the trial court should have granted Taxpayers' motion for summary judgment on its complaint for a refund.

Taxpayers' complaint also sought attorney fees, and their summary judgment motion included a request for litigation costs under section 19717.[4] Because the trial court did not consider Taxpayers' request for litigation costs, this matter — including whether FTB's position was substantially justified — should be addressed by the court on remand. (See, e.g., *Wertin v. Franchise Tax Bd.* (1998) 68 Cal.App.4th 961, 970 [award of attorney fees under section 19717 reviewed for abuse of discretion].)

DISPOSITION

The judgment is reversed. On remand the trial court is directed to grant the motion of Bayard and Lois Ordlock for summary judgment and to entertain their motion for litigation costs. Appellants are entitled to costs on appeal.

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MALLANO, J.

We concur:

SPENCER, P. J.

ORTEGA, J.

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[4]Section 19717 provides in part: "(a) The prevailing party may be awarded a judgment for reasonable litigation costs incurred, in the case of any civil proceeding brought by or against the State of California in a court of record of this state in connection with the determination, collection, or refund of any tax, interest, or penalty under this part. [¶] . . . [¶] (c)(2)(B)(i) A party shall not be treated as the prevailing party in a proceeding to which subdivision (a) applies if the State of California establishes that its position in the proceeding was substantially justified."