

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:) OTA Case Nos. 18011726
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TECHNICORP INTERNATIONAL II, INC.) Date Issued: January 29, 2019
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OPINION

Representing the Parties:

For Appellant: Brian T. McCarthy, Chief Financial Officer
Mark Andrus, Partner, Grant Thornton LP

For Franchise Tax Board (FTB): Bradley J. Coutinho, Tax Counsel
Marguerite Mosnier, Tax Counsel IV

G. THOMPSON, Administrative Law Judge: On January 13, 2016, appellant filed an appeal with our predecessor, the State Board of Equalization (BOE), contesting FTB’s interest and penalty determinations for tax years 2005, 2006 and 2008.

On October 22, 2018, after the appeal was transferred from BOE to the Office of Tax Appeals (OTA), Administrative Law Judges Grant S. Thompson, Linda C. Cheng and Douglas Bramhall held an oral hearing in the matter. When the hearing concluded, Administrative Law Judge Grant S. Thompson closed the record and took the matter under submission.

ISSUES

1. Whether appellant filed a timely appeal such that OTA has jurisdiction; and
2. If OTA has jurisdiction, whether appellant timely filed refund claims and has shown error in FTB’s determination of interest, a late payment penalty for 2006, estimated tax penalties, and electronic funds transfer penalties.

FACTUAL FINDINGS

1. From approximately 2005 to 2014, appellant and FTB disputed research and development credits (R&D credits) claimed by appellant for tax years 2002 to 2003. During most of

this period, appellant and FTB also disputed R&D credits claimed by appellant for tax years 2005 to 2008. As noted below, in late 2013 or early 2014, FTB allowed nearly all the disputed R&D credits and issued refunds for the tax years at issue based on its allowance of the disputed R&D credits. However, the refund amounts were reduced due to FTB's determination of penalties and interest for tax years 2005, 2006 and 2008. As noted above, appellant disputes FTB's penalty and interest determinations.

2. Appellant filed timely California tax returns for the years at issue.¹
3. Appellant's initial tax return for 2005 reported an unpaid tax liability of \$38,565. In early 2007, appellant filed an amended tax return for 2005 that reduced its unpaid tax liability by \$22,468. On November 28, 2007, FTB received a \$21,421.09 payment from appellant. FTB imposed an EFT penalty because the payment was made by check. FTB also imposed an estimated tax penalty of \$553.65. On January 10, 2008, appellant paid the remaining amount due and an overpayment of \$1,441.05 was transferred to appellant's account for the 2006 tax year.
4. Appellant's initial tax return for 2006 reported a total tax of \$234,000 and \$335,629 in overpayments from prior tax years, resulting in a claimed overpayment of \$100,825. FTB states on appeal that its records at that time did not show any payments or credits for 2006, and it therefore billed appellants for unpaid tax, an estimated tax penalty of \$10,213.97 and a late payment penalty of \$31,655.31.² On July 18, 2008, and August 26, 2008, appellant submitted payments that satisfied the tax and penalty amounts determined by FTB for 2006.
5. Appellant's initial tax return for 2008 reported a total tax of \$279,896, \$224,558 in overpayments from prior years and \$100,000 in estimated tax payments, resulting in an overpayment of \$44,662. FTB imposed an estimated tax penalty of \$1,003.94, but it later abated the penalty. On September 29, 2009, FTB received a payment that satisfied all but \$7.04 of the amount owed and wrote off the \$7.04 amount pursuant to Government Code section 13943.1.

¹ Appellant's tax returns for 2005, 2006 and 2008 were filed within the extended due date for each tax year. Specifically, the returns were filed on, respectively, October 13, 2006, October 15, 2007, and September 11, 2009.

² It appears FTB posted the \$1,441.05 overpayment from 2005 after it processed the 2006 tax return. FTB indicates it subsequently reduced the estimated tax penalty for 2006. Also, when FTB later partially granted appellant's refund claim for the 2006 tax year, it reduced the late payment penalty to \$15,613.26.

6. In 2010, appellant filed amended tax returns claiming refunds for the tax years at issue. These claims for refund will be referred to as “the 2010 refund claims.”
7. In late 2013 or early 2014, FTB substantially revised its position that had denied R&D credits and allowed nearly all the R&D credits claimed by appellant for the 2002 to 2003 tax years and the 2005 to 2008 tax years.
8. In a letter to FTB dated January 15, 2014, appellant requested a refund of penalties and interest for the tax years at issue. This letter will be referred to as “the 2014 refund claim.” In the letter, appellant noted that FTB had approved R&D credits for tax years 2002 and 2003 and was in the process of approving R&D credits for tax years 2005 to 2008. Appellant argued that, if the amounts had been properly credited to its account originally, the taxes, penalties and interest would not have been assessed or paid.
9. On March 11, 2014, FTB’s audit staff responded to appellant’s January 15, 2014 letter. FTB stated that the audit staff was not responsible for the penalty and interest charges and did not have authority to abate them. FTB further stated it “realize[d] the taxpayer may feel that [the R&D credit audits] directly or indirectly led to these charges or otherwise hindered the taxpayer’s ability to pay the underlying tax or resulting changes in a timely manner.” However, FTB stated that it “respectfully disagreed” because “[t]he charges were automatically incurred when the taxpayer filed [its] original tax returns.”
10. On March 14, 2014, FTB issued a closing letter for the 2005 to 2008 tax years that reflected the determination of FTB auditors to allow nearly all the R&D credits claimed for those years.
11. On October 22, 2014, FTB issued Notices of Action on Cancellation, Credit or Refund (Refund NOAs) for the tax years at issue (2005, 2006 and 2008). The Refund NOAs allowed or partially allowed claimed refunds and reflected FTB’s interest and penalty determinations.³ Each Refund NOA stated that if appellant disagreed with FTB’s action it could file an appeal with BOE, and stated that a FTB publication (FTB 1087) regarding

³ The Refund NOAs for 2005, 2006 and 2008 showed overassessments of \$134,562.35, \$152,408.65 and \$133,634.74, respectively, after giving effect to FTB’s determinations of tax, penalties and interest.

- appeal procedures was enclosed.⁴ FTB subsequently issued refunds based on the determinations reflected in the Refund NOAs.
12. On October 22, 2014, FTB also issued a Notice of Proposed Adjusted Carryover Amount (NPACA or Proposed Carryover Determination) for tax years 2005 to 2008. The Proposed Carryover Determination reflected a proposed \$1,602 reduction in the amount of R&D credit carryover and stated that appellant could file a protest of the Proposed Carryover Determination with FTB.
 13. Also on October 22, 2014, FTB issued a Notice of Account Adjustment (NAA) for tax year 2007. The NAA stated it was allowing appellant's refund claim for 2007 without audit, although it could later propose adjustments.
 14. On December 14, 2014, appellant timely protested the October 22, 2014 Proposed Carryover Determination with FTB. Although appellant protested the Proposed Carryover Determination, appellant stated that it did not object to the proposed \$1,602 reduction in the amount of the R&D credit carryover that was reflected in the Proposed Carryover Determination. However, appellant stated that it did object to the penalties and interest levied against it and argued that FTB had erroneously calculated overpayment interest.
 15. On December 17, 2015, following appellant's protest of the Proposed Carryover Determination, FTB issued a "NPACA Notice of Action – Affirmation" (Carryover NOA). This document affirmed the Proposed Carryover Determination dated October 22, 2014 (which is described in Finding No. 12 above). The Carryover NOA stated that, if appellant disagreed with the notice, it must file an appeal with BOE by January 18, 2016.
 16. On January 13, 2016, appellant filed this appeal.
 17. Appellant's appeal letter states it is appealing "two [NPACAs or Proposed Carryover Determinations], dated October 22, 2014 ('NPACA 1') and December 17, 2015

⁴ While it is not essential to our resolution of this appeal, we find it more likely than not that the referenced publication was enclosed, as the Refund NOAs state it was enclosed and it is FTB's practice to provide the publication with its Refund NOAs.

(‘NPACA2’) respectively.”⁵ It further states that both notices are attached and refers to Exhibits A and B, which attach the following documents:

- a. the Refund NOAs for 2005, 2006 and 2008, which are dated October 22, 2014 (see Finding No. 11 above);
- b. the Proposed Carryover Determination for tax years 2005 to 2008, which is also dated October 22, 2014 (see Finding No. 12 above);
- c. the NAA for the 2007 tax year, which is also dated October 22, 2014 (see Finding No. 13 above); and
- d. the Carryover NOA, dated December 17, 2015, which affirmed the Proposed Carryover Determination issued on October 22, 2014 (see Finding No. 15 above).

DISCUSSION

I. Whether appellant filed a timely appeal such that OTA has jurisdiction.

OTA is the successor to BOE with respect to most types of tax appeals, including franchise and income tax appeals.⁶ Like BOE’s prior jurisdiction over franchise and income tax appeals, OTA’s jurisdiction over franchise and income tax appeals is defined by statute. OTA only has the powers granted to it by statute. “An administrative agency’s jurisdiction depends upon the provisions of the statute, or other act of delegation, from which its powers are derived; and it cannot validly act in excess of the limits of jurisdiction which have been conferred upon it.” (*Appeal of Schillace*, 95-SBE-005, Aug. 2, 1995.)⁷

Under the Revenue and Taxation Code (R&TC), OTA, as the successor to BOE, only has the authority to consider appeals from certain types of actions by FTB. For example, OTA has the authority to consider appeals from FTB’s notice of action on a proposed deficiency assessment, its notice of action denying a claim for refund, its failure to act on a refund claim

⁵ As discussed later, while appellant states it is appealing two NPACAs, there is only one NPACA. As noted in Finding No. 12, we refer to this document as the Proposed Carryover Determination. The second document is the Carryover NOA. The Carryover NOA is not an NPACA. Instead, the Carryover NOA affirms the Proposed Carryover NOA (alternatively referred to as an NPACA).

⁶ With certain exceptions not relevant to this appeal, OTA “is the successor to, and is vested with, all of the duties, powers, and responsibilities of the State Board of Equalization necessary or appropriate to conduct appeals hearings.” (Gov. Code, § 15672(a).) OTA has authority to “conduct all appeals hearings for those duties, powers, and responsibilities transferred to the office pursuant to Section 15672.” (Gov. Code, § 15674(a)(1).)

⁷ Precedential decisions by BOE, indicated by “SBE” in the caption, are viewable on its website: <<http://www.boe.ca.gov/legal/legalopcont.htm>>.

within six months (often referred to as a “deemed denial”), and its notice affirming a proposed adjusted carryover amount.⁸ Furthermore, in order for OTA to have jurisdiction, the taxpayer must file its appeal within any time period provided by statute. (*Appeal of Rossiter*, 82-SBE-014 (*Rossiter*); Cal. Code Regs., tit. 18, § 30203.)

Accordingly, we must first consider the FTB action or actions appellant is appealing from, and whether OTA has authority to consider such an appeal. Since appellant’s appeal letter states that it is appealing Proposed Carryover Determinations issued by FTB, we first consider whether we have jurisdiction on this basis.

A. Proposed Carryover Determination

As noted above, the Proposed Carryover Determination (or NPACA) issued by FTB is entitled “Notice of Proposed Adjusted Carryover Amount.” R&TC section 19043.5(b) states that the provisions applicable to protesting and appealing deficiency assessments apply to notices proposing an adjusted carryover amount. Under the provisions applicable to proposed deficiency assessments, a notice of proposed assessment may be contested by filing a protest with FTB. (R&TC § 19041.) If FTB rules against the taxpayer on the protest, it will mail a notice of action to the taxpayer. (R&TC § 19045.) The notice of action will become final unless the taxpayer appeals the action to OTA within 30 days. (*Id.*) Pursuant to R&TC section 19043.5(b), these same provisions apply to a Proposed Carryover Determination that is sent by FTB.

Here, while appellant refers to two Proposed Carryover Determinations (or NPACAs), there is only one Proposed Carryover Determination. It was issued on October 22, 2014, and appellant timely protested it with FTB. On December 17, 2015, FTB issued the Carryover NOA (which is entitled “NPACA Notice of Action – Affirmation”) that affirmed the Proposed Carryover Determination. Under R&TC section 19043.5(b), this Carryover NOA is treated like an FTB notice of action affirming a proposed deficiency assessment. Therefore, the action must be appealed to OTA within 30 days. (R&TC § 19045.)

Appellant timely filed its appeal from the Carryover NOA on January 20, 2016. While the appeal was not filed within 30 days, it was timely under former BOE regulation 5422(b)(1),

⁸ See R&TC §§ 20 [stating that statutory references to “board” generally mean “OTA” with respect to appeals for which authority has been transferred to OTA], 19045, 19047, 19324, 19331, 19333, and 19043.5(b).

which allows a five-day extension where FTB's notice is mailed to an address within the United States.⁹

However, appellant does not contest what the Carryover NOA determined. The Carryover NOA affirmed the Proposed Carryover Determination, which merely determined a \$1,602 reduction in the amount of R&D credit carryover for tax years 2005 to 2008. In its protest to FTB, appellant expressly stated that it did not object to the \$1,602 reduction in the amount of R&D credit carryover.

Rather than objecting to the amount of the R&D credit carryover, appellant is contesting FTB's penalty and interest determinations. In appellant's protest of the Proposed Carryover Determination, which was filed with FTB on December 14, 2014, appellant stated that, while it did not contest the reduction in the R&D credit carryover, it did contest FTB's interest and penalty determinations. Since December 14, 2015 is within the 90-day period within which appellant might have filed a timely appeal to BOE from FTB's October 22, 2014 Refund NOAs, one might wonder whether appellant's protest to FTB could be considered a timely appeal to BOE of the Refund NOAs. However, the protest is addressed and directed to the Protest Section of FTB, rather than BOE, which is contrary to the relevant statutes that require appeals to BOE be filed with BOE. (R&TC §§ 19324 [requiring an appeal in writing to BOE]; 19332 [requiring that the appeal be mailed to BOE].) Consistent with these statutes, BOE has rejected the argument that an attempted appeal to BOE can be considered timely if it is mailed to FTB within the applicable deadline for appeal to BOE. (*Appeal of Karbacher*, 73-SBE-016, Mar. 27, 1973 (*Karbacher*)).

In short, appellant filed a timely appeal of the Carryover NOA, but its timely appeal of the Carryover NOA is of no help to it because appellant does not contest the carryover determination that is affirmed in the Carryover NOA. However, appellant's appeal letter references and attaches other FTB notices, so we will consider whether one of these other FTB actions might provide jurisdiction for OTA to consider the issues raised by appellant.

B. Refund NOAs

Appellant's appeal letter attaches the October 22, 2014 Refund NOAs allowing or partly allowing appellant's refund claims, with adjustments for penalties and interest. However, R&TC

⁹This extension is based on Code of Civil Procedure section 1013. OTA's regulations provide the same extension. (Cal. Code of Regs., tit. 18, section 30204(a).)

section 19324 provides that FTB's action on refund claims becomes final in 90 days unless the taxpayer files an appeal with BOE within that period. Here, appellant did not file its appeal until January 20, 2016, which is more than a year after the issuance of the Refund NOAs.

Accordingly, appellant's appeal was filed well after the statutory deadline for appeal of the Refund NOAs.

Pursuant to R&TC section 19324, FTB's October 22, 2014 Refund NOAs became final 90 days after they were issued. After FTB's Refund NOAs became final, neither OTA nor BOE had the ability to consider an untimely appeal of the Refund NOAs. (See, e.g., *Rossiter, supra*; *Appeal of Ray Cavagnaro, Inc.*, 78-SBE-055, July 26, 1978; *Karbacher, supra*.)

Appellant argues that FTB submitted several notices dated October 22, 2014 in a single envelope and that, as a result, it did not receive adequate notice and reasonably determined that the next step was to file a protest with FTB.¹⁰ However, there is no reasonable cause exception to the statutory deadline. Even if there were, the Refund NOAs clearly stated that, if the taxpayer disagreed with the Refund NOAs, it should file an appeal with BOE. Even if the Refund NOAs were submitted with other documents, ordinary business care would require that a taxpayer read the Refund NOAs to determine how they might be contested, especially where, as here, the Refund NOAs involved several hundred thousand dollars. Furthermore, it appears that the Refund NOAs enclosed an FTB publication that explained the deadline for filing an appeal to BOE.¹¹

II. If OTA has jurisdiction, whether appellant timely filed a refund claim and has shown error in FTB's determination of interest, a late payment penalty for 2006, estimated tax penalties, and electronic funds transfer penalties.

On appeal, FTB stated that it had not acted on appellant's 2014 refund claim and that the refund claim might be deemed denied and appealable pursuant to R&TC section 19133.

¹⁰ Appellants stated that they thought that language in the Proposed Carryover Determination (stating that the Proposed Carryover Determination could be contested by filing a protest with FTB) meant that an appeal from that notice would cover all the notices. Appellants apparently overlooked language in the Refund NOAs stating that, if the taxpayer disagreed with FTB's actions on the refund claims, it should appeal the Refund NOAs to BOE (and stating that a FTB publication, FTB 1087, regarding appeal procedures, was enclosed).

¹¹ Appellant's appeal letter also attaches an October 22, 2014 NAA (Notice of Account Adjustment) for tax year 2007. However, there is no statutory provision allowing for an appeal of such a notice, so the notice does not provide appeal rights. Moreover, the NAA stated that FTB was allowing appellant's refund claim for that year. While the NAA cautioned that FTB could later propose adjustments, it did not take any type of adverse action from which appellant might appeal.

However, FTB argued that the 2014 refund claim was made after the expiration of the statute of limitations for filing a refund claim, so it provides no relief to appellant. We agree.

The general statute of limitations for filing a refund claim is set forth in R&TC section 19306.¹² Under that provision, the last day to file a claim for refund is the later of: (1) four years from the date the return was filed, if filed by the extended due date; (2) four years from the due date of the return, without regard to extensions; or (3) one year from the date of the overpayment. It is settled law that “the statute of limitations on claims for refund is explicit and must be strictly construed, without exception.” (*Appeal of Meek*, 2006-SBE-001, March 28, 2006.)

Here, appellant timely filed each of its original tax returns by the extended due date, with its latest return, for 2008, filed on September 11, 2009. Therefore, the latest possible four-year statute of limitations expired on September 11, 2013 (i.e., four years after the filing of the 2008 return). The four-year statute of limitations for the 2005 and 2006 tax years expired earlier. As appellant’s 2014 refund claim was filed after September 11, 2013, it was not filed within any four-year period provided by R&TC section 19306. Appellant also made no payments for the tax years at issue within the year preceding the 2014 refund claim that might potentially be refunded under the one-year statute of limitations. As a result, the 2014 refund claim is barred by the statute of limitations.

As noted above, appellant also filed a timely appeal of FTB’s Carryover NOA. However, appellant does not contest the determination made in the Carryover NOA, therefore appellant’s appeal of the Carryover NOA provides no assistance to appellant.

At the oral hearing, appellant argued that, in FTB’s March 11, 2014 letter, FTB erred and acted contrary to FTB’s audit manual procedures when it stated that audit staff could not address appellant’s arguments with regard to penalties and interest. Appellant also argued that FTB erred in not recording the R&D credits sooner and that this caused penalties to be incurred.

We are sympathetic to appellant’s contentions with regard to the 2006 late payment penalty, but we have no jurisdiction to determine whether appellant’s arguments constitute

¹² There is no indication or argument that any other extended statute of limitations would be potentially applicable.

grounds for abatement of penalties or interest because appellant’s 2014 refund claim was not filed within the statute of limitations.¹³

In summary, we recognize appellant’s frustration with FTB’s handling of appellant’s tax issues and how long it took FTB to resolve appellant’s claimed R&D credits. However, we have no legal basis to grant appellant the relief it requests.

HOLDINGS

OTA does not have jurisdiction to consider appellant’s appeal, to the extent it arises from FTB’s Refund NOAs. While we have jurisdiction to review FTB’s Carryover NOA, appellant does not dispute the determination made in that notice. Further, while we have jurisdiction to consider FTB’s deemed denial of appellant’s 2014 refund claim, the refund claim was filed outside of the statute of limitations and does not provide a basis for relief.

DISPOSITION

We sustain FTB’s Carryover NOA and its deemed denial of appellant’s 2014 refund claim. To the extent appellant appeals FTB’s Refund NOAs, its appeal is untimely and is dismissed.

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Grant S. Thompson
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Grant S. Thompson
Administrative Law Judge

We concur:

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Linda C. Cheng
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Linda C. Cheng
Administrative Law Judge

DocuSigned by:
Douglas Bramhall
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Douglas Bramhall
Administrative Law Judge

¹³ We note that, while appellant raised reasonable arguments with regard to the 2006 late payment penalty, we see no error in FTB’s interest calculations.