

**OFFICE OF TAX APPEALS**  
**STATE OF CALIFORNIA**

In the Matter of the Appeal of: ) OTA Case No. 18042575  
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**KIMBERLY-CLARK WORLDWIDE, INC.** ) Date Issued: May 10, 2019  
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**OPINION**

Representing the Parties:

For Appellant: Julie C.H. Walsh, Assistant Treasurer

For Respondent: Anne Mazur, Specialist

For Office of Tax Appeals: Sarah Fassett, Tax Counsel

S. HOSEY, Administrative Law Judge: Pursuant to California Revenue and Taxation Code (R&TC) section 19324, Kimberly-Clark Worldwide, Inc. (appellant) appeals an action by respondent Franchise Tax Board denying appellant’s claim for refund of \$677,145 for the tax year ended (TYE) December 31, 2011 (TYE 2011).

Appellant waived its right to an oral hearing; therefore, the matter is being decided based on the written record.

**ISSUE**

Whether appellant has established that the large corporate understatement penalty (LCUP) imposed under R&TC section 19138 for TYE 2011 should be abated.

**FACTUAL FINDINGS**

1. Appellant timely filed its California Corporation Franchise or Income Tax Return for TYE 2011, reporting a total tax liability of \$3,945,930.
2. Respondent subsequently audited appellant’s TYE 2010 and TYE 2011 accounts and as a result proposed an overpayment for TYE 2010 and a deficiency assessment for TYE 2011. With respect to TYE 2011, respondent issued a Notice of Proposed Assessment (NPA) on September 29, 2016, proposing additional tax of \$3,385,729. The NPA

included a paragraph regarding the LCUP provided under R&TC section 19138. The NPA explained that the penalty applies to a taxpayer with an understatement of tax exceeding the greater of one million dollars or twenty percent of the tax shown on an original return or on an amended return for any tax year beginning on or after January 1, 2010. The penalty equals twenty percent of the total understatement of tax and the penalty is assessed when the additional tax liability becomes final.

3. On November 17, 2016, appellant paid the additional tax assessed on the NPA.
4. Appellant did not protest the NPA. As a result, the NPA became final. Respondent imposed an LCUP for TYE 2011 in the amount of 677,145.80. Respondent applied a portion of appellant's TYE 2010 overpayment to appellant's TYE 2011 outstanding balance, and then issued a refund of the remaining TYE 2010 overpayment on February 23, 2017. Because there was no balance due for TYE 2011, respondent did not issue a billing notice for the LCUP.
5. On April 25, 2017, upon appellant's request, respondent issued a Notice of Balance Due, which included the LCUP.
6. Appellant sent a letter, dated June 28, 2017, to respondent's Taxpayers' Rights Advocate office arguing that the LCUP should be waived and refunded because appellant was denied proper notice and due process regarding the LCUP assessment procedure and because respondent failed to satisfy the requirements of R&TC section 19187, subdivision (a), which requires respondent to include on each notice imposing a penalty the name of the penalty, the section number authorizing imposition, and a description of the computation of the penalty. Because the TYE 2010 overpayment fully satisfied the TYE 2011 tax account, appellant's letter was treated as a claim for refund.
7. Respondent denied appellant's claim for refund on December 1, 2017, and this timely appeal followed.
8. In this appeal, appellant argues, in addition to the violations of due process and the failure to satisfy the requirements of R&TC section 19187, that it disputes the way respondent satisfied the LCUP liability by applying the overpayment from TYE 2010 to the LCUP imposed for TYE 2011 without providing appellant notice of its actions.

## DISCUSSION

R&TC section 19138, subdivision (a), requires a penalty to be imposed when a corporate taxpayer has an understatement of tax that exceeds the greater of one million dollars or twenty percent of the tax reported on an original or amended return filed on or before the original or extended due date of the return for the taxable year. The penalty is computed as twenty percent of the understatement of tax.<sup>1</sup> The sections of the R&TC relating to deficiency assessments do not apply to the assessment or collection of an LCUP. (Rev. & Tax. Code, § 19138, subd. (d).) The only grounds upon which to claim a refund or credit of monies paid to satisfy an LCUP is that the amount of the penalty was improperly computed by respondent. (Rev. & Tax. Code, § 19138, subd. (e).) The LCUP has no reasonable cause exception and none of the listed exceptions<sup>2</sup> to the imposition of the LCUP apply to this appeal.

Here, respondent properly imposed an LCUP for TYE 2011 because appellant's understatement of tax, in the sum of \$3,385,729,<sup>3</sup> exceeded one million dollars. In addition, respondent properly computed the LCUP ( $\$3,385,729.00$  understatement of tax  $\times$  20% = \$677,145.80).

Appellant does not dispute the computation of the LCUP based on the understatement of tax stemming from respondent's audit of appellant's TYE 2011, nor does appellant argue that it falls under the limited exceptions to imposition of the LCUP. Instead, appellant argues that respondent's imposition of the penalty violated its due process rights because proper notice was not provided. Specifically, appellant argues that an explanation of the R&TC section under which the penalty was imposed was missing on the notice, as was a description of the computation of the penalty, all of which appellant asserts are required under R&TC section 19187 and the California Taxpayers Bill of Rights. Appellant also disputes the way the LCUP

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<sup>1</sup> The understatement of tax is the difference between the tax reported on an original or amended return filed on or before the original or extended due date of the return and the correct amount of tax. (Rev. & Tax. Code, § 19138, subd. (b)(1).)

<sup>2</sup> See Rev. & Tax. Code, § 19138, subs. (f) & (g).

<sup>3</sup> The correct tax, per the audit, was \$7,332,459, while the tax reported on appellant's original return was \$3,946,730 ( $\$7,332,459 - \$3,946,730 = \$3,385,729$ ).

liability was satisfied and argues that the involuntary satisfaction of the LCUP from appellant's TYE 2010 overpayment occurred without procedural due process.<sup>4</sup>

Appellant claims that it never received formal assessment of the LCUP or a bill showing any amount due with respect to the LCUP in order to protest its assessment or check its calculation. However, the NPA respondent issued to appellant on September 29, 2016 included information regarding the LCUP, when it would be assessed, the section number under which the penalty is imposed, and a description of the computation of the penalty. The LCUP was assessed after the NPA, which proposed additional tax assessment of \$3,385,729, went final. The NPA became final because appellant did not timely protest the NPA by the November 28, 2016 deadline. The LCUP statute specifically states that the statutory procedures relating to deficiency assessments (i.e., the additional tax assessment for TYE 2011 as found on the NPA), including administrative protests, do not apply to the imposition of an LCUP. As such, there was no protest period for the LCUP or any other statutorily authorized method to protest its assessment. Appellant argues that the remedy for the alleged violation of R&TC section 19187 is abatement of the LCUP. However, R&TC section 19138 clearly states that the only grounds on which to make a claim for refund or credit of monies paid to satisfy an LCUP is that the amount of the penalty was not properly computed by respondent, which appellant does not assert. Additionally, appellant did not receive a bill for the additional tax assessed on the NPA and any applicable interest on the LCUP because appellant paid the amount of additional tax and interest for TYE 2011 on November 18, 2016, and respondent applied appellant's TYE 2010 overpayment to the LCUP and applicable interest in February of 2017. R&TC section 19301, subdivision (a), authorizes respondent to apply an overpayment by a taxpayer for any year or for any reason to "any amount due from the taxpayer" and refund the balance to the taxpayer.

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<sup>4</sup> To the extent appellant is making a due process claim, we are generally precluded from ruling on the basis of such constitutional issues. (See *Appeal of Walter R. Bailey* (92-SBE-001) 1992 WL 44503.) In any event, as the Board of Equalization (the predecessor to the Office of Tax Appeals) stated:

[D]ue process is satisfied with respect to tax matters so long as an opportunity is given to question the validity of a tax at some stage of the proceedings. It has long been held that more summary proceedings are permitted in the field of taxation because taxes are the lifeblood of government and their prompt collection is critical.

(*Appeal of Walter R. Bailey, supra.*) Here, appellant has been provided an opportunity to question the validity of the imposition of the LCUP during this appeal. Additionally, we note that the California Court of Appeals has concluded R&TC section 19138 affords due process because the judicial refund action allowed by R&TC section 19138 provides a constitutionally adequate post-deprivation remedy. (*California Taxpayers Ass. v. Franchise Tax Bd.* (2010) 190 Cal.App.4th 1139.)

Respondent properly applied appellant’s TYE 2010 overpayment to appellant’s TYE 2011 outstanding balance, which consisted of the LCUP. Thus, as appellant has not shown a computational error or that it falls under one of the limited exceptions to the mandatory imposition of the LCUP, it has not established a basis upon which to abate the LCUP and refund or credit the monies it paid to satisfy the LCUP.

HOLDING

Appellant has not established a basis upon which to abate and refund or credit the TYE 2011 LCUP.

DISPOSITION

Respondent’s action in denying appellant’s claim for refund is sustained.

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*Sara A. Hosey*  
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Sara A. Hosey  
Administrative Law Judge

We concur:

DocuSigned by:  
*Grant S. Thompson*  
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Grant S. Thompson  
Administrative Law Judge

DocuSigned by:  
*Alberto T. Rosas*  
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Alberto T. Rosas  
Administrative Law Judge