OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	OTA Case No. 19014177
M.A.C. COSMETICS, INC.	CDTFA Case ID 976742
	CDTFA Account No. 97-890907

OPINION

Representing the Parties:

For Appellant: James Kuhl, Director, KPMG
Ted Matthies, Tax Manager, KPMG

For Respondent: Mengjun He, Tax Counsel III
Christopher L. Brooks, Tax Counsel IV
Randy Suazo, Hearing Representative

J. ANGEJA, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 6561, appellant M.A.C. Cosmetics, Inc. (appellant) appeals a decision issued by respondent California Department of Tax and Fee Administration (CDTFA)[1] denying appellant's timely petition for redetermination of a Notice of Determination (NOD) dated August 31, 2016, for $701,107.85 of additional tax, plus applicable interest, for the period April 1, 2012, through March 31, 2015. The NOD is based on four audit items with an aggregate deficiency measure of $8,431,167, of which appellant only protests one item: disallowed "self-help" credits[2] measured by $7,181,644.

Office of Tax Appeals (OTA) Administrative Law Judges Teresa A. Stanley, Andrew J. Kwee, and Jeffrey G. Angeja held an oral hearing for this matter in

[1] Sales taxes were formerly administered by the Board of Equalization (BOE). Effective July 1, 2017, functions of the BOE relevant to this case were transferred to CDTFA. (Gov. Code, § 15570.22.) When referring to acts or events that occurred before July 1, 2017, the term "CDTFA" refers to CDTFA's predecessor, the BOE.

[2] A self-help credit or deduction is where a taxpayer claims credits or deductions arising from overpayments of tax from prior periods on subsequent tax returns, without filing a claim for refund. (See *Philips and Ober Electric Co. v State Bd. of Equalization* (1991) 231 Cal.App.3d 723.)

Sacramento, California, on February 26, 2020. At the conclusion of the hearing, the record was closed, and this matter was submitted for decision.

ISSUE

Whether appellant properly claimed deductions on its tax returns for the second quarter of 2012 (2Q12), 3Q12, 4Q12, 1Q13, and 2Q13 for amounts it overpaid on its 2Q11 tax return.

FACTUAL FINDINGS

1. Appellant is a Delaware corporation that manufactures, distributes, and sells cosmetics and beauty supplies.
2. In June of 2011, appellant believes that it inadvertently over-reported California sales tax for the month of June on its 2Q11 tax return, resulting in an overpayment of $595,702 in tax.
3. Instead of filing an amended return or filing a claim for refund to substantiate the potential overpayment, appellant reduced its reported taxable measure by the same aggregate amount in its 2Q12, 3Q12, 4Q12, 1Q13, and 2Q13 sales and use tax returns, which is referred to as a self-help credit (see fn. 2).[3]
4. Appellant filed its 2Q12 tax return on July 18, 2012.[4]
5. On July 23, 2012, CDTFA's auditor met with appellant to commence an audit for the period April 1, 2008, through March 31, 2012 (the "First Audit").[5] On July 24, 2012, the auditor requested appellant to provide the detail of general ledger accounts for sales and use tax payables so that the auditor could reconcile tax reported versus tax accrued.
6. On August 15, 2012, the auditor received the requested information from appellant and began the tax accrual reconciliation.

[3] Appellant claimed credits by the following amounts: (1) $340,528 in 2Q12; (2) $251,534 in 3Q12; (3) $3,571 in 4Q12; (4) $52 in 1Q13; and (5) $17 in 2Q13.

[4] Appellant asserts that CDTFA discovered the overpayment during its audit of the period April 1, 2008, through March 31, 2012 (the "First Audit") and that CDTFA concealed its findings. However, as discussed in greater detail below, appellant began taking self-help credits prior to the First Audit's commencement.

[5] On March 29, 2012, CDTFA assigned an auditor to audit appellant the First Audit. On that same date, the auditor attempted to contact appellant via telephone and left a voicemail message for appellant regarding the commencement of the audit. The auditor left a similar voicemail message on April 5, 2012. On April 10, 2012, appellant contacted the auditor, requesting a postponement of the commencement of the audit until the week of July 23, 2012, because appellant was busy with other audits.

7. CDTFA found no material differences between appellant's recorded and reported tax for the First Audit but did determine a deficiency of approximately $109,000 arising from other audit items. Appellant agreed to the determined measure.
8. Subsequently, CDTFA audited appellant for the period April 1, 2012, through March 31, 2015 (the "Current Audit"), which is the audit period at issue in this appeal. During the Current Audit, CDTFA conducted a sales tax accrual analysis, during which CDTFA determined that appellant claimed the above-referenced self-help credits. CDTFA assessed a deficiency based on the underreporting and issued the August 31, 2016 NOD at issue in this appeal. Appellant filed a petition for redetermination, which CDTFA denied.
9. This appeal followed.

DISCUSSION

R&TC section 6901 provides that CDTFA may refund any amount, penalty, or interest that has been paid more than once or that has been erroneously or illegally collected or computed. In order to obtain a refund of an overpayment, a taxpayer must file a timely claim for refund. (R&TC, § 6902(a).) A claim for refund is timely if filed within 3 years from the last day of the month following the close of the quarterly periods for which the overpayment was made, or if filed within 6 months after the date a determination becomes final if the overpayment was made pursuant to that determination, or within 6 months from the date of overpayment. (R&TC, § 6902(a).) CDTFA may also grant a refund for any period for which a waiver is given under R&TC section 6488. (R&TC, § 6902(b).) Failure to file a claim for refund within the applicable time limits constitutes a waiver of any demand against the state for the overpayment. (R&TC, § 6905.) Every claim for refund must be in writing, state the specific grounds or reasons upon which the claim is founded, be signed by the taxpayer, and identify the reporting period in which the overpayment occurred, the amount of the refund being claimed, and the contact information of the taxpayer or the taxpayer's representative. (R&TC, § 6904; Cal. Code Regs., tit. 18, § 35036.)

Here, it is undisputed that appellant did not file a timely, written claim for refund as required by the foregoing authorities. Instead, appellant claimed self-help credits.

It is well established that self-help credits are *not* claims for refund. A self-help credit does not state the specific grounds upon which a claim is founded, nor does it identify the

reporting period in which the applicable overpayment allegedly occurred. Further, a self-help credit fails to put the CDTFA on notice of any alleged overpayment and, in effect, allows a taxpayer to grant its own claim for refund. There is no statute permitting a taxpayer to grant itself a refund. (See *Philips and Ober Electric Co. v State Board of Equalization* (1991) 231 Cal.App.3d 723, 728 (*Philips and Ober*), [a taxpayer who failed to file for a timely claim for refund could not deduct the refund amount on a current tax return].) Accordingly, CDTFA properly disallowed appellant's self-help credits.

On appeal, appellant raises various equitable arguments. Although our analysis and conclusion under *Philips and Ober, supra*, are dispositive of this appeal, from abundant caution we briefly address appellant's contentions. First, appellant argues that its abundant communications with CDTFA during the First Audit, and CDTFA's review of appellant's sales tax accruals during the First Audit, constitute an informal claim for refund, and appellant cites to federal case law for support.[6] However, none of the federal authorities on which appellant relies are applicable here, because none of them purport to apply to the California Sales and Use Tax Law. While general principles of State and Federal Income Tax law can be persuasive in a California Sales and Use Tax case, where there is specific on point California Sales and Use Tax authority, that must be followed rather than Federal Income Tax law. That specific Sales and Use Tax law is controlling here and specifically requires a written claim for refund that specifies the grounds on which it is based. (R&TC, § 6904(a).)[7] Appellant filed no written claim, and neither appellant's provision of its sales invoices, sales journals, and ledgers, nor oral communications with CDTFA qualify as a written claim for refund of overpaid tax. Thus, we reject appellant's first contention.

Second, appellant cites additional federal case law (e.g., *U.S. v. Kwai Fun Wong* (2015) 575 U.S. 402, 409) in support of its assertion that the statute of limitations for its claim for refund should be equitably tolled. However, the authorities on which appellant relies do not involve tax law. In contrast, both the U.S. Supreme Court and the Office of Tax Appeals (OTA)

[6] Appellant's cites include *Mobil Corp. v. U.S.* (Fed. Cl. 2005) 67 Fed. Cl. 708, 716; *Night Hawk Leasing Co. v. U.S.* (Ct. Cl. 1937) 84 Ct. Cl. 596, 602-03; and *American Radiator & Standard Sanitary Corp. v. U.S.* (Ct. Cl. 1963) 162 Ct. Cl. 106, 115.

[7] Written claims for refund will be broadly construed, and contentions that are unstated but still implied by the express terms of a written claim for refund will be recognized. (*Preston v. State Bd. of Equalization* (2001) 25 Cal.4th 197, 206, citing *Wallace Berrie & Co. v. State Bd. of Equalization* (1985) 40 Cal.3d 60, 66, fn. 2.) But a written claim for refund is always mandatory.

have held that there is no reasonable cause or equitable basis for suspending the statute of limitations on a claim for refund of tax. (*U.S. v. Brockamp* (1997) 519 U.S. 347, 351-352; *Estate of Gillespie* (*dec'd*), 2018-OTA-052P.) Accordingly, we reject appellant's second contention.

Third, appellant argues that the NOD should be deleted on the basis of equitable recoupment, but appellant cites no authority establishing that the OTA has equity powers. We are aware of no such authority. Our predecessor, the Board of Equalization (BOE), may have exercised equity power in income tax appeals (see *Appeals of Winkenbach, et al.* (75-SBE-081) 1975 WL 3565); however, the BOE is an agency created by the California Constitution (Cal. Const. Art. XIII, § 17 *et seq.*), whereas OTA is an administrative agency created by statute (see Gov. Code, § 15672). Accordingly, OTA is not a court (Gov. Code, § 15672(b)), and BOE's precedential opinion in *Appeal of Winkenbach, supra,* does not apply to OTA; therefore, OTA lacks equity powers. As a result, equitable recoupment is inapplicable in this forum.

Moreover, even if equitable recoupment were available, which it is not, the facts of this appeal lack one of the four required elements of the doctrine: that the same transaction, item, or taxable event has been subject to two taxes. (*Estate of Branson v. Comm'r of Internal Revenue* (9th Cir. 2001) 264 F.3d 904, 909-910.) The facts of this appeal involve separate transactions. Specifically, appellant allegedly overpaid tax on specific sales made during June 2011, and then during subsequent quarters during the Current Audit, appellant underreported different sales by claiming self-help credits on those separate sales. Clearly, sales made in June 2011 are not the same transactions as sales made during the periods at issue here (i.e., 2Q12, through 2Q13). Accordingly, we reject this contention.

Fourth, appellant claims that the NOD at issue herein should be cancelled based on the doctrine of equitable estoppel.[8] Briefly summarized, appellant contends that during the First Audit, CDTFA's auditor discovered that appellant overpaid its tax in June 2011, but the auditor concealed that fact in the tax accrual reconciliation, thereby inducing appellant to believe that there had been no overpayment. Appellant contends that as a result of the deception, appellant

[8] The four elements of equitable estoppel are: (1) the government agency must be shown to have been aware of the actual facts; (2) the government agency must be shown to have made an incorrect or inaccurate representation to the relying party and intended that its incorrect or inaccurate representation would be acted upon by the relying party or have acted in such a way that the relying party had a right to believe that the representation was so intended; (3) the relying party must be shown to have been ignorant of the actual facts; and (4) the relying party must be shown to have detrimentally relied upon the representations or conduct of the government agency. (*Strong v. County of Santa Cruz* (1975) 15 Cal.3d 720, 725.) Where one of these elements is missing, there can be no estoppel. (*Hersch v. Citizens Savings & Loan Assn*. (1983) 146 Cal.App.3d 1002, 1010.)

did not file a claim for refund of the overpayment. We disagree. Under the facts of this appeal, the auditor did not physically start the First Audit until July 23, 2012, and the auditor did not obtain information for the sales tax accrual reconciliation until August 15, 2012. Thus, the earliest date on which the auditor could have learned of the June 2011 overpayment was August 15, 2012. But appellant had already claimed a self-help credit on its 2Q12 tax return, filed on July 18, 2012, *prior* to the earliest time in which the auditor could have discovered the potential overpayment. In other words, the third element of equitable estoppel is lacking because appellant already knew of its overpayment before any action or alleged concealment by CDTFA. For the same reason, we conclude that the fourth element is also lacking (i.e., appellant did not rely on CDTFA's alleged actions in failing to claim a refund, because appellant had already helped itself to credit on the 2Q12 tax return). Accordingly, equitable estoppel does not apply here.

Appellant also asserts that it is entitled to relief under R&TC section 6596 because CDTFA did not advise appellant of its June 2011 overpayment, and did not secure a claim for refund from appellant. In relevant part, R&TC section 6596 provides that if a person's "failure to make a timely return or payment is due to the person's reasonable reliance on written advice from [CDTFA], the person may be relieved of the taxes imposed by Sections 6051 and 6201 and any penalty or interest added thereto." Here, appellant did not fail to make a return or pay tax. Instead, appellant claims that it made an *overpayment*, to which R&TC section 6596 is simply inapplicable. Accordingly, we reject this contention.

Lastly, appellant argues that the NOD is invalid because CDTFA did not follow the Audit Manual's policy for obtaining waivers in connection with the Current Audit.[9] As a result, appellant asserts that the NOD at issue in this matter must be cancelled. However, we need not decide whether CDTFA failed to follow its waiver policy, because appellant cites no authority authorizing the deletion of an NOD on this basis, and we find none. Accordingly, we reject appellant's contention.

For the foregoing reasons, we conclude that appellant's claimed self-help credits on its 2Q12 through 2Q13 tax returns were properly disallowed.

[9] Appellant validly executed two Waiver of Limitation forms during the Current Audit, pursuant to which the August 31, 2016, NOD was timely issued; however, appellant contends that CDTFA: failed to explain in the audit workpapers the reasons for the first waiver; did not list the date on which it delivered the second waiver to appellant; did not list the date that either waiver was signed by appellant; and did not list the dates on which CDTFA delivered the executed waivers to appellant.

HOLDING

Appellant's claimed self-help credits on its 2Q12 through 2Q13 tax returns were properly disallowed.

DISPOSITION

CDTFA's action in denying appellant's petition is sustained.

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Jeff Angeja
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Jeffrey G. Angeja
Administrative Law Judge

We concur:

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Andrew J. Kwee
Administrative Law Judge

DocuSigned by:
Teresa Stanley
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Teresa A. Stanley
Administrative Law Judge

Date Issued: 4/3/2020