OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	) OTA Case No. 18012040
	) CDTFA Case ID 971602
T-M OBILE RESOURCES CORPORATION	)
	)
	)
	)
	)
	)

OPINION

Representing the Parties:

For Appellant:	Elizabeth S. Cha, Attorney Timothy A. Gustafson, Attorney Eric S. Tresh, Attorney Lee Drury, Tax Manager (Witness) Shih Feng Hsu, Senior Manager (Witness)
For Respondent:	Kevin Smith, Tax Counsel III Monica Silva, Tax Counsel IV Jason Parker, Chief of Headquarters Ops.
For Office of Tax Appeals:	Corin Saxton, Tax Counsel IV

A. KWEE, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 6901, T-Mobile Resources Corporation (appellant) appeals a decision issued by respondent California Department of Tax and Fee Administration (CDTFA)[1] denying appellant's claim for refund dated July 20, 2016. Appellant claimed a refund of $301,620 in use tax paid for the period April 1, 2009, through March 31, 2013 (claim period).

Office of Tax Appeals (OTA) Administrative Law Judges Andrew J. Kwee, Keith T. Long, and Josh Aldrich held an oral hearing for this matter on September 29, 2020.[2] At the

[1] Sales taxes were formerly administered by the State Board of Equalization (board). Effective July 1, 2017, functions of the board relevant to this case were transferred to CDTFA. (Gov. Code, § 15570.22.) When this opinion refers to acts or events that occurred before July 1, 2017, "CDTFA" shall refer to its predecessor, the board, to the extent those acts, or events, would have been performed by CDTFA on and after July 1, 2017.

[2] The oral hearing was noticed for Sacramento, California, and conducted electronically due to COVID-19. A portion of the oral hearing was closed to the public to avoid disclosure of proprietary information.

conclusion of the oral hearing, we held the record open to allow for additional briefing on the issue of timeliness. Thereafter, we closed the record, and this matter was submitted for decision.

ISSUES

1. Whether appellant's July 20, 2016 refund claim is timely.[3]
2. Whether appellant is entitled to a refund of tax paid.

FACTUAL FINDINGS

1. On July 19, 2012, appellant filed a timely claim for refund of $8,576,222.22 in use tax paid for the period April 1, 2009, through September 30, 2011.
2. On September 22, 2014, appellant filed a timely claim for refund of $3,424,978.13 in use tax paid for the period October 1, 2011, through March 31, 2013.
3. In an audit covering the claim period, CDTFA examined both refund claims. The refund claims totaled $12,001,200.35 in overpaid use tax during the same claim period at issue in this appeal.[4]
4. Upon audit, CDTFA determined that appellant erroneously overpaid use tax on nontaxable transactions totaling $141,823,177 during the claim period.[5] CDTFA further determined that appellant underreported taxable transactions by $3,527,342, and erroneously and untimely claimed self-help deductions of $38,860 during the claim

[3] Appellant filed a refund claim on each of the following three dates: (1) July 19, 2012; (2) September 22, 2014; and (3) July 20, 2016. However, the CDTFA decision that is the subject of this appeal only addresses and denies the July 20, 2016 refund claim. The board granted the other two refund claims in a separate matter. Thus, only the July 20, 2016 refund claim is before OTA. As such, we phrased the issue as whether the July 20, 2016 refund claim was timely. Nevertheless, in analyzing this issue, we address the other two refund claims to the extent the parties reference them in their contentions.

[4] $8,576,222.22 + $3,424,978.13 = $12,001,200.35.

[5] CDTFA allocated the overreporting as follows: $98,744,631 during the period covered by the first claim, and $43,078,546 during the period covered by the second claim.

period. After netting these items together, CDTFA ultimately determined that appellant overreported $138,256,975 during the claim period.[6]

5. On or about September 10, 2015, CDTFA's auditor discussed the results of the audit with appellant's Tax Manager, Lee Drury. Appellant disagreed with any reduction to the total claimed refund amount of $12,001,200.35 in overpaid use tax.

6. On September 17, 2015, appellant discussed the results of the audit with CDTFA's District Principal Auditor (DPA) for the Out-of-State District. On September 21, 2015, the DPA prepared and signed a Report of Discussion of Audit Findings, recommending that the auditor "[p]rocess the audit as disagreed."

7. On September 30, 2015, CDTFA mailed a copy of the audit report, which detailed the above findings, to appellant. The audit report disallowed the refund claims as to $305,266.29 in tax (i.e., the tax allocable to the audited understatement of $3,566,202).[7] The audit report allowed the balance of the $12,001,200.35 in refund claims. In summary, the audit report concluded that appellant's refund claims were allowable as to $11,695,934.06 in overpaid tax.[8] This represents an audited net overreporting of $138,256,975 (see footnote 5). The audit report states that appellant "does not agree with the audit findings."

8. CDTFA processed the audit as an *agreed* audit.

9. No evidence in the record indicates why CDTFA processed appellant's appeal as a consent (i.e., agreed) item. If the matter had been processed as disagreed, then CDTFA, via an options letter, would have given appellant an opportunity to request an appeals conference or an in-person oral hearing before the board acted on appellant's refund claims. (Cal. Code Regs., tit. 18, § 5235.) CDTFA concedes that it did not send an options letter to appellant. CDTFA further concedes that, instead of sending the options letter, CDTFA misinformed appellant that it may timely file a claim for refund as to the

[6] $141,823,177 - $3,527,342 - $38,860 = $138,256,975.

[7] $3,527,342 + $38,860 = $3,566,202.

[8] $12,001,200.35 – $305,266.29 = $11,695,934.06.

disallowed amount within six months after the board acts on the refund claims (i.e., by July 27, 2016).

10. Appellant did not request an appeals conference or an in-person oral hearing. As a result, CDTFA's recommendation to grant only $11,695,934.06 of appellant's refund claims totaling $12,001,200.35 (i.e., net of the offset) was scheduled on the board's oral hearing calendar as a "Tax Program Nonappearance Matters – Consent" item. This matter was calendared and heard by the board on January 26, 2016. During the oral hearing, the board voted to partially grant appellant's refund claims, as recommended by CDTFA staff.
11. On January 27, 2016, the board issued a Notice of Refund to appellant for $11,695,934.06 in use tax, plus credit interest, and CDTFA refunded this overpayment to appellant. The $11,695,934.06 refund was net of the $305,266.29 offset.
12. On July 20, 2016, appellant filed a claim for refund of $301,620 in overpaid use tax for the claim period. The $301,620 represents the use tax on the $3,527,342 underreporting on taxable transactions determined by CDTFA during its audit of appellant's earlier refund claims (i.e., the $38,860 disallowed self-help deduction is not at issue). The $301,620 underreporting reduced the total amount of use tax refunded to appellant in the prior appeal matter.
13. On October 23, 2017, CDTFA issued a decision denying appellant's July 20, 2016 claim for refund of $301,620 for the claim period.
14. It is undisputed that the $11,695,934.06 previously at issue in the July 19, 2012 and September 22, 2014 refund claims has been refunded to appellant. This amount is not at issue in the instant July 20, 2016 refund claim or otherwise subject to this appeal.
15. Appellant timely appealed CDTFA's decision to OTA.
16. On September 8, 2020, OTA notified the parties that in deciding this appeal, OTA will consider whether the July 20, 2016 claim for refund was timely, or whether the appeal was otherwise timely before OTA.
17. The parties addressed the issue of timeliness during the oral hearing. CDTFA contends that OTA has jurisdiction to hear this appeal and CDTFA defers to OTA to address the

issue of timeliness. CDTFA did not otherwise offer a position or argument on the issue of timeliness.

18. Following the oral hearing, we held the record open to allow for post-hearing briefing on the issue of timeliness. Appellant offered several legal arguments to support the timeliness of its refund claim. CDTFA elected not to submit a post-hearing brief.

DISCUSSION

Issue 1: Whether appellant's claim for refund is timely.

R&TC section 6901 provides that in the case of an overpayment of tax, the excess amount shall be credited on any amounts then due and payable from the taxpayer, and the balance shall be refunded to the taxpayer. The law provides, in pertinent part, that no claim for refund may be approved after the later of: (1) three years from the last day of the calendar month following the close of the reporting period for which the overpayment was made (i.e., the return due date); (2) with respect to a determination issued pursuant Article 2, 3 or 4 of the R&TC, no later than six months from the date the determination becomes final (i.e., the finality date of the determination); or (3) six months from the date of the overpayment (i.e., the overpayment date). (R&TC, § 6902(a)(1).) Failure to file a timely claim constitutes a waiver of any demand against the state on account of an overpayment. (R&TC, § 6905.)

We will discuss whether appellant's July 20, 2016 refund claim was timely within any of these three prongs (i.e., the return due date, the finality date, or the overpayment date) below.

The July 20, 2016 refund claim

Under the first prong (the return due date), the latest quarterly period at issue in appellant's July 20, 2016 claim for refund was the first quarter of 2013 (1Q13). Three years after the last day of the calendar month following the close of 1Q13 was April 30, 2016. Therefore, appellant's claim for refund is not timely on this basis because it was filed more than three years after the due date of the return.

With respect to the second prong (the finality date of a determination), appellant first contends that the statute of limitations to file a claim for refund is still open, and appellant may still timely file a claim for refund, because CDTFA did not issue an NOD. As a preliminary matter, the time period in which CDTFA may issue an NOD expired on April 30, 2016, as to the

latest-expiring reporting period at issue.[9] As such, there is no basis to conclude the statute of limitations is still open under this prong.

Furthermore, this second prong only serves to extend the statute of limitations *if* CDTFA issues a NOD. In other words, CDTFA may offset a refund from amounts "due and payable" from the taxpayer. (R&TC, § 6901.) This "due and payable" language includes self-assessed amounts and amounts for which CDTFA did in fact issue an NOD. (R&TC, § 6483.) Nevertheless, issuance of an NOD is only required in order to offset amounts for a *different* period (i.e., outside the period covered by the claim for refund). In evaluating a claim for refund, CDTFA may deny, in whole or in part, the claim for refund based on any underreporting discovered within the period at issue in a claim for refund. (*Sprint Communications Co. v. State Bd. of Equalization* (1995) 40 Cal.App.4th 1254.) To find otherwise would require CDTFA to issue an NOD before it may deny, in whole or part, a claim for refund, which is contrary to the law. The law authorizes CDTFA to deny a refund claim, in whole or in part. (See R&TC, §§ 6901, 6906, 6933.) Therefore, an NOD is only required if CDTFA seeks to recover a payment from the taxpayer in an amount *more* than the amount claimed in the refund. The non-issuance of an NOD for a period in which an overpayment was allegedly made cannot serve to extend the timeframe for a taxpayer to timely file a claim for refund, let alone in perpetuity. In summary, the second prong does not apply to this case because CDTFA did not issue a determination. Appellant's refund claim is not timely on this basis.

Under the third prong (the date of overpayment), the claimed overpayments were made by the time appellant filed its September 22, 2014 claim for refund. Appellant filed the instant claim for refund on July 20, 2016, which is more than six months after September 22, 2014. Therefore, the claim for refund is also untimely under the third prong.

Appellant contends that the January 27, 2016 Notice of Refund constitutes the date of overpayment for the $301,620 claimed in the instant appeal because CDTFA reduced the total refund in its earlier appeal before the board to account for the underpayment. Payment is a prerequisite to filing a claim for refund. Appellant filed a $12,001,200.35 claim for refund. Thus, the $12,001,200.35 payment was made prior to the date appellant filed the refund claim for the $12,001,200.35 (i.e., the payment was made with the returns for the claim period). For the

[9] In the case of a timely-filed 1Q13 return, three years after the last day of the calendar month following the close of the quarterly period for which the amount is proposed to be determined was April 30, 2016, for 1Q13, the latest expiring quarterly period. (R&TC, § 6487(a).)

reasons explained above, CDTFA was entitled to deny, in whole or in part, the claim for refund based on underreporting discovered within the period at issue in the claim for refund. (*Sprint Communications Co.*, *supra*.) In summary, we find that a denial, in whole or part, of a claim for refund does not constitute a "payment" as to any portion of the claimed overpayment for purposes of R&TC section 6902.

Appellant separately contends that the partial denial of the refund claim constitutes the date of payment of tax collected by means of lien, levy, or other enforcement procedure for purposes of R&TC section 6902.3. R&TC section 6902.3 provides for an extended three-year statute of limitations where CDTFA collected an overpayment by means of lien, levy, wage garnishment or other affirmative collection actions taken against the taxpayer. Here, appellant self-assessed its liabilities on returns filed for the claim period and made the alleged overpayments at issue with those returns. Subsequently, appellant filed claims for refund. As such, we find the alleged overpayments were voluntary and not made through an enforcement procedure. Thus, R&TC section 6902.3 is inapplicable. Accordingly, we find that a partial denial of a refund claim does not constitute a lien, levy, or other enforcement action within the meaning of R&TC section 6902.3.

In summary, appellant's refund claim was not timely under any prong. Therefore, we find that appellant's July 20, 2016 claim for refund was untimely as to all reporting periods. As such, we find the July 20, 2016 claim for refund was barred by statute as untimely.

The July 19, 2012, and September 22, 2014 claims for refund[10]

The board is required to mail notice of its action denying, in whole or part, a claim for refund within 30 days of its decision on the claim.[11] (R&TC, § 6906.) Within 90 days after the mailing of the notice of the board's action upon a claim for refund, the claimant may bring action against the board for the recovery of the whole or any part of the amount with respect to which

[10] As indicated above (see footnote 3, *ante*), the board's actions on these claims, which were granted in part, were never appealed to OTA. We address these claims only to the extent relevant to CDTFA's denial of appellant's July 20, 2016 refund claim.

[11] During the time period at issue, the board was responsible for conducting sales and use tax appeals. As such, we cite to the board's Rules for Tax Appeals where appropriate. The board no longer administers the sales and use taxes or conducts appeals with respect to them. These functions were transferred to CDTFA and OTA, respectively. Beginning July 1, 2017, CDTFA is successor to the board with respect to administering the sales and use taxes (see footnote 1, *ante*). Beginning January 1, 2018, OTA is successor to the board with respect to all the duties, powers, and responsibilities of the board necessary or appropriate to conduct sales and use tax appeals.

the claim has been disallowed. (R&TC, § 6933.) Failure to bring action within the time specified constitutes a waiver of any demand against the State on account of alleged overpayments. (*Ibid*.)

Here, it is undisputed that appellant timely filed these claims under R&TC section 6901. The issue, instead, is that these refund claims have already been granted and refunded to appellant (i.e., CDTFA Case ID #846349), and are not even before OTA in the instant appeal (i.e., CDTFA Case ID #971602). The board served notice of its action granting, in part, appellant's July 19, 2012, and September 22, 2014 claims for refund to appellant on January 27, 2016. That appeal matter is now closed. The board's Rules for Tax Appeals allowed 30 days to file a petition for rehearing of a decision of the board. (Cal. Code Regs., tit. 18, § 5561.) A petition was never filed with the board. The law authorizes 90 days (in this case, until April 27, 2016) to file an action in court for recovery of the disallowed claimed overpayment of $301,620. (R&TC, § 6933.) Appellant did not bring such an action, and the claimed overpayment, net of the underpayment, was refunded to appellant. The appeal matters deciding the July 19, 2012, and September 22, 2014, claims for refund are now closed and final. As a matter of law, appellant's failure to bring an action in superior court constitutes a waiver of any demand against the state for the disallowed amount of $301,620. (R&TC, § 6933.)

Appellant contends that it was not afforded an oral hearing during the prior appeals process before the board. We find this contention unpersuasive because the prior appeal is final, and the board's decision was never appealed to OTA. Nevertheless, even if the prior appeal matter were before OTA, there is no statutory right to receive an oral hearing before the board, or an appeals conference, on a claim for refund. The statutory right to an oral hearing is limited to a timely petition for redetermination. (R&TC, § 6562.) Thus, the board's Rules for Tax Appeals authorized the board to deny a claim for refund without offering an appeals conference or oral hearing.[12] (Cal. Code Regs., tit. 18, § 5236.) Furthermore, OTA lacks jurisdiction to determine whether a taxpayer is entitled to a remedy for CDTFA's actual or alleged violation of a procedural due process right, such as failing to offer an oral hearing or appeals conference, unless the violation impacts the adequacy of the NOD, the validity of CDTFA's decision, or the

[12] OTA's Rules for Tax Appeals, which governs appeals before OTA, provide that every appellant has the right to an oral hearing before a Panel upon written request. (Cal. Code Regs., tit. 18, § 30401(a).) OTA's rules did not apply at the time of the appellant's appeal before the board in 2016.

amount at issue. (Cal. Code Regs., tit. 18, § 30104(d).) As such, we find that the board's failure to offer an in-person oral hearing, or an appeals conference, before acting on the prior appeal matter (i.e., partially granting the July 19, 2012, and September 22, 2014 claims for refund) has no impact on the timeliness of the instant appeal matter before OTA (i.e., the July 20, 2016 claim for refund).[13]

Issue 2: Whether appellant is entitled to a refund of tax paid.

Based on our finding that the July 20, 2016 claim for refund is not timely, the amount claimed cannot be refunded to appellant regardless of whether we find an overpayment was made. (R&TC, § 6902(a)(1).) Therefore, we need not address the substantive issue of whether appellant overpaid tax to the state. Furthermore, we need not, and do not, make any factual findings with respect to this substantive issue.

[13] CDTFA's failure to correctly inform appellant of its appeal rights before the board may have been detrimental to appellant. There is no evidence or allegation of intentional wrongdoing, and neither party has raised the issue of equitable remedies. This opinion concludes that there is no remedy which OTA is legally authorized to provide appellant under the facts of this case. We would not, and do not, condone any attempts to misinform taxpayers of their appeal rights, and we do not offer an opinion on whether an equitable remedy may be available, such as in the case of intentional wrongdoing.

HOLDINGS

1. Appellant's July 20, 2016 claim for refund is not timely.
2. Appellant is not entitled to a refund of tax paid because the amount claimed cannot be refunded to appellant.

DISPOSITION

CDTFA's action in denying the July 20, 2016 claim for refund is sustained.

DocuSigned by:
715CE19AD48041B...
Andrew J. Kwee
Administrative Law Judge

We concur:

DocuSigned by:
Josh Aldrich
48745BB806914B4...
Josh Aldrich
Administrative Law Judge

DocuSigned by:
DC88A60D8C3E442...
Keith T. Long
Administrative Law Judge

Date Issued: 12/23/2020