OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	) OTA Case No. 18042726
T. AUCHTER	)
	)
	)
	)

OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellant: T. Auchter

For Respondent: Marguerite Mosnier, Tax Counsel V

M. GEARY, Administrative Law Judge: On April 21, 2020, we issued an opinion in this appeal (Opinion) holding, as relevant here, that respondent Franchise Tax Board did not correctly impose the penalty under Revenue & Taxation Code (R&TC) section 19133 (demand penalty) on T. Auchter (appellant) for the 2015 taxable year and should, therefore, abate and refund it to appellant. Pursuant to the California Code of Regulations, title 18, (Regulation) section 30602, respondent filed a timely petition for rehearing (PFR). Upon consideration of the matters stated therein, we find that respondent has not established grounds for a new hearing on the question whether respondent correctly imposed the demand penalty on appellant, but respondent has established grounds for a new hearing on the narrow question of whether it was proper for us to order respondent to abate the demand penalty and issue a refund to appellant for 2015.

Regulation section 30604 provides that a rehearing may be granted where any of the six stated grounds exist and the rights of the complaining party are materially affected. (See also *Appeal of Do*, 2018-OTA-002P.) Here, respondent relies on three of those grounds, alleging that there was insufficient evidence to justify the Opinion, the Opinion was contrary to law, and that

there was an error of law that affected the appeal proceeding. (Cal. Code Regs., tit. 18, § 30604(a)(4)-(6).[1])

Respondent argues that the Opinion is contrary to law or based on an error of law because it concludes that, under Regulation section 19133(b)(2), respondent's imposition of the demand penalty could not be sustained unless the evidence showed that respondent had proposed an assessment of tax, after appellant failed to timely respond to prior request or demand, during the four taxable years prior to the taxable year at issue. Respondent contends that the Opinion should have concluded that Regulation section 19133 is internally inconsistent due to a conflict between the language of subsection (b)(2) and Example 2 of subsection (d), and that the regulation is therefore ambiguous, which requires the Office of Tax Appeals (OTA) to defer to respondent's long-standing interpretation and to sustain the demand penalty. In addition, respondent argues that the Opinion mischaracterizes the relevant issue, which is only whether the proposed demand penalty should be sustained, and not also whether it should be abated and refunded to appellant, because this is not an appeal from a denial of a claim for refund. As respondent correctly notes, this is an appeal from a Notice of Action (NOA) on a proposed deficiency assessment.

Appellant opposes the PFR, arguing that the Opinion correctly decided that the demand penalty should not be applied while also noting that he has always paid more in estimated and withheld taxes than were due and has always received a tax refund from respondent.[2]

A PFR on the ground that our Opinion was contrary to law cannot be granted unless, after indulging in all legitimate and reasonable inferences to uphold our Opinion, we conclude that our Opinion was, as a matter of law, unsupported by substantial evidence. (*Sanchez-Corea v. Bank of America* (1985) 38 Cal.3d 892, 907 [interpreting California Code of Civil Procedure (CCP) section 657].[3]) Our Opinion regarding the application of R&TC section 19133 and the

[1] We cite to the current version of the regulation, which went into effect on March 1, 2021.

[2] Appellant also reiterated some of the same arguments that he made before issuance of the Opinion regarding the adequacy of notices mailed and requested waiver of interest. These issues are not properly before us in this PFR and we will not address them further.

[3] Regulation section 30604 is essentially based upon the provisions of CCP section 657. (See *Appeal of Wilson Development, Inc.* (94-SBE-007) 1994 WL 580654 [State Board of Equalization (SBE) refers to CCP section 657 in interpreting grounds for rehearing]; *Appeal of Do*, *supra* [OTA adopts SBE's grounds for rehearing].) Therefore, the language of CCP section 657 and case law pertaining to its operation are relevant to our interpretation of the provisions of Regulation section 30604.

regulation thereunder was correct.[4] The examples contained in Regulation section 19133 purport to illustrate the language that precedes them. However, the language of Regulation section 19133(b)(2) is clear. Example 2 of subsection (d) is inconsistent with the language it purports to illustrate, and we have correctly concluded that respondent cannot rely on the illustrative example to create an ambiguity that would require us to look beyond the unambiguous language that precedes it. And while we recognize that there is a scarcity of authority on the resolution of conflicts between illustrative examples and the regulatory language they purport to interpret, we note that respondent has not cited any authority on that exact issue.[5]

The next question is whether the Opinion correctly identifies, analyzes, and resolves the issues presented. OTA has jurisdiction to determine whether respondent has correctly taken action regarding a proposed deficiency assessment of additional tax, penalties, fees, or interest. (Cal. Code Regs., tit. 18, § 30103(a)(1).) The record shows that this appeal is from respondent's issuance of an NOA on a proposed deficiency assessment of additional tax, penalties, fees, and interest, all matters clearly within our jurisdiction. The Opinion identifies, addresses, and resolves those issues. But it goes beyond them. The Opinion purports to determine whether appellant is entitled to a refund; and while OTA also has jurisdiction to decide an appeal when respondent mails a notice of action on cancellation, credit or refund, or any other notice which denies any portion of a perfected claim for a refund of tax, penalties, fees, or interest, or when respondent fails to act on a claim for a refund of tax, penalties, fees, or interest within six months after the claim is filed with respondent (Cal. Code Regs., tit. 18, § 30103(a)(3)-(4)), none of these circumstances are clearly present here.[6] Thus, respondent is correct that the Opinion misidentifies the issue and purports to determine matters that are beyond the scope of this appeal. Although a refund may ultimately be due – and, in fact, respondent has stated that a refund will be forthcoming after it processes appellant's late-filed return at the conclusion of this appeal[7] –

[4] Respondent has explained how our interpretation of Regulation section 19133 was attributable to an "error in law." An "error in law" is generally limited to redressing procedural errors in the proceeding.

[5] The Opinion, on the other hand, cites to a federal case, *Cook v. Commissioner* (7th Cir. 2001) 269 F.3d 854, which provides at least some support for our conclusion.

[6] Our dissenting colleague believes otherwise.

[7] Respondent has indicated that appellant has payment credits on account that exceed the liability, even including the demand penalty. Thus, it appears that a refund will be due.

the record does not indicate that appellant fully paid the proposed assessment and filed a refund claim, or that a refund claim has been denied or deemed denied. Consequently, we lacked jurisdiction to abate any assessment because respondent has not yet made an assessment. It has only been proposed.[8] We also lacked jurisdiction to grant (or order) a refund because there was no claim denial before us. Accordingly, we grant the PFR in order to correct our Opinion to the extent that the Opinion ordered respondent to abate a penalty that had not yet been assessed and to refund it to appellant.

DocuSigned by:
1A9B52EF88AC4C7...
Michael F. Geary
Administrative Law Judge

I concur:

DocuSigned by:
177BAD36C0B3437...
Jeffrey I. Margolis
Administrative Law Judge

[8] If a taxpayer fails to timely appeal from an NOA, the taxpayer can contest an assessment by paying the assessment in full and thereafter filing a timely claim for refund and, if denied (or deemed denied) filing a timely appeal from the denial.

T. LEUNG, concurring in part, and dissenting in part:

I agree with the majority's denial of respondent's petition for rehearing (PFR) with respect to the Revenue and Taxation Code (R&TC) section 19133 issue, but I dissent to the extent the majority grants respondent's PFR on the issue whether an abatement and refund should be granted.

When "a taxpayer pays the tax protested before . . . [Office of Tax Appeals (OTA) acts] upon the appeal, . . . [OTA] shall treat the protest or the appeal as a claim for refund or an appeal from the denial of a claim for refund." (R&TC, § 19335.) In this case, the record shows that appellant filed his 2015 return in 2018, during the pendency of this appeal. The 2015 return reflected an overpayment of more than one dollar because of withholding and estimated tax payment credits, which the law treats as a claim for refund. (See R&TC, § 19307.) Respondent has agreed to "accept" the return and reduce the proposed assessment, which will result in an overpayment that respondent will refund to appellant when it processes the 2015 return after this appeal becomes final.

Because it has been more than six months since appellant filed his 2015 return (which reflected an overpayment), appellant's claim may be deemed denied. (See R&TC, § 19331.) Therefore, because this case was converted from an appeal of a proposed assessment under R&TC section 19045 to a claim for refund or an appeal from the denial of a claim for refund under R&TC section 19324, OTA properly ordered an abatement and refund of the R&TC section 19133 penalty pursuant to R&TC section 19335 after we held that it was improperly imposed. While respondent's argument highlights various internal procedures it must follow before converting a protest of a proposed assessment to a claim for refund, it does not show how those processes are applicable to OTA, and they certainly cannot trump R&TC sections 19307 and 19331.

DocuSigned by:
Tommy Leung
0C90542BE88D4E7...
Tommy Leung
Administrative Law Judge

Date Issued: 4/28/2021