

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:

T. AUCHTER) OTA Case No. 21047701
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)**OPINION ON REHEARING**

Representing the Parties:

For Appellant:

T. Auchter

For Respondent:

Anne Mazur, Specialist

M. GEARY, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, appellant T. Auchter appealed an action by the respondent Franchise Tax Board proposing to assess a penalty under R&TC section 19133 (demand penalty) and a filing enforcement cost recovery fee (CRF) for the 2015 taxable year (OTA Case No. 18042726). On April 21, 2020, we issued an opinion in that appeal (Opinion) holding, as relevant here, that respondent did not correctly impose the demand penalty and directing respondent to abate the demand penalty and refund it to appellant.¹ Thereafter, respondent filed a timely petition for rehearing (PFR). On April 28, 2021, OTA issued its Opinion on PFR granting respondent's PFR in part, finding that respondent had established grounds for a new hearing on the narrow question of whether it was proper for the Opinion to order respondent to issue a refund of the demand penalty to appellant.²

Because appellant had previously waived his right to an oral hearing, the issue has already been fully briefed by the parties, and additional briefing would only delay a refund that

¹ The Opinion also sustained the proposed assessment of the CRF. Appellant did not file a petition for rehearing on the CRF issue.

² In its opening brief filed in opposition to the original appeal to OTA, respondent identified one of the issues as "Whether [appellant has] shown reasonable cause to abate the demand penalty (as recomputed)" On that basis, we infer that respondent does not object to the reference to abatement in the Holding or Disposition of the Opinion.

the parties agree is due, we have dispensed with briefing for this rehearing, and we decide the matter based on the written record in OTA Case No. 18042726.

ISSUE

Did the Opinion correctly order respondent to refund the demand penalty amount to appellant?

FACTUAL FINDINGS

1. Appellant did not timely file his 2015 California income tax return.
2. On June 19, 2017, respondent issued to appellant a Notice of Proposed Assessment (NPA), which proposed tax of \$24,330, a late-filing penalty of \$636.25, a demand penalty of \$6,082.50, and a filing enforcement fee \$81 (a total of \$31,129.75), plus applicable interest.
3. Appellant timely protested the NPA. Respondent denied the protest and on December 8, 2017, issued a Notice of Action (NOA) affirming the NPA.
4. By letter dated January 7, 2018, appellant timely appealed the NOA.
5. By letter dated July 10, 2018, respondent requested that the appeal proceedings be deferred until September 17, 2018, to allow appellant time to file a 2015 tax return and respondent time for review of that return.
6. On August 22, 2018, appellant filed his late 2015 income tax return, which reported total tax of \$6,731, withholding and payments totaling \$29,820, and an overpayment of \$23,089.³
7. By letter dated November 19, 2018, OTA informed the parties that, given that there had been no further request for deferral, the appeal was reactivated.
8. In its opening brief dated January 14, 2019, respondent agreed to revise appellant's total tax from \$24,330 to \$6,731, cancel the \$636.25 late-filing filing penalty, and recompute the demand penalty from \$6,082.50 to \$1,682.75 (25 percent of \$6,731). Respondent also stated (in its June 7, 2019, reply brief) that appellant then had payment credits on account totaling \$29,821 for the 2015 taxable year, and that respondent will apply those to the final liability and, to the extent appellant's 2015 account balance indicates an

³ This was a joint return, filed with D. Auchter. Our references are to appellant because the appeal is in appellant's name only.

- overpayment, interest will be allowed and refunded or credited pursuant to R&TC section 19340.
9. On April 21, 2020, OTA issued the Opinion, which stated that the matter was before OTA on an appeal from respondent's denial of a claim for refund and directed respondent to refund the demand penalty.
 10. Respondent filed a PFR arguing, as relevant here, that the matter was before OTA on an appeal from a NOA on a protested assessment, not on a denial of a claim for refund, and, therefore, OTA lacked authority to order a refund.
 11. On April 28, 2021, OTA issued its Opinion on Petition for Rehearing, which granted a rehearing for the sole purpose of "correct[ing] 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."

DISCUSSION

This matter came before OTA on an appeal from respondent's NOA. That was a matter within OTA's jurisdiction. (Cal. Code Regs., tit. 18, § 30103(a)(1).) Thus, it was within OTA's jurisdiction to conclude that respondent had improperly proposed imposition of the demand penalty and that appellant's protest had to that extent been improperly denied. However, OTA's authority to order a refund is at least questionable.

There is no question that appellant's late return constituted a timely claim for refund under R&TC section 19307. Respondent concedes this much. To our knowledge, there is also no dispute that there was a substantial overpayment for 2015. Also, respondent states in its January 14, 2019, opening brief that it was the "recomputed" demand penalty that was then at issue, which suggests that respondent then considered the protested amounts to be the recomputed amounts. On that basis, an argument can be made that respondent's inaction on the late-filed return for more than six months constituted a deemed denial as of February 22, 2019, pursuant to R&TC section 19133, and that OTA was required to treat the protest or the appeal as a claim for refund or an appeal from the denial of a claim for refund under R&TC section 19335. Nevertheless, we find that under the circumstances that existed when OTA issued the Opinion, it was error to hold that respondent must refund the demand penalty.⁴

⁴ It remains our understanding that a refund will be forthcoming at the conclusion of this appeal.

HOLDING

The Opinion incorrectly ordered respondent to refund the demand penalty amount to appellant.

DISPOSITION

The portion of Holding 1 of the Opinion that states the demand penalty shall be refunded to appellant is hereby vacated.

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

We concur:

DocuSigned by:
Sheriene Anne Ridenour
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Sheriene Anne Ridenour
Administrative Law Judge

DocuSigned by:
Cheryl L. Akin
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Cheryl L. Akin
Administrative Law Judge

Date Issued: 6/23/2021