

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:
C. PERRY

) OTA Case No. 18103864
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OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellant: Jeffery L. Joiner, CPA

For Respondent: Eric R. Brown, Tax Counsel III

T. STANLEY, Administrative Law Judge: On September 24, 2019, the Office of Tax Appeals (OTA) issued an Opinion, based on the written record, in which a majority found appellant was entitled to a refund of interest paid for 2015.¹ Respondent Franchise Tax Board (FTB) timely filed a petition for rehearing under R&TC section 19048. Upon consideration of FTB’s petition, we conclude the grounds set forth therein partially meet the requirements for a rehearing under California Code of Regulations, title 18, (Regulation) section 30604.

A rehearing may be granted where one of the following five grounds exists, and the substantial rights of the complaining party (here, FTB) are materially affected: (a) an irregularity in the appeal proceedings which occurred prior to the issuance of the written opinion and prevented fair consideration of the appeal; (b) an accident or surprise which occurred during the appeal proceedings and prior to the issuance of the written opinion, which ordinary caution could not have prevented; (c) newly discovered, relevant evidence, which the party could not have reasonably discovered and provided prior to the issuance of the written opinion; (d) insufficient evidence to justify the written opinion or the opinion is contrary to law; or (e) an error in law. (Cal. Code Regs., tit. 18, § 30604(a)-(e); *Appeal of Do* 2018-OTA-002P.)

¹ References to the Opinion hereafter refer to the majority Opinion.

In its petition, FTB claims that the Opinion contained errors in law and insufficient evidence to support the Opinion. The petition requests a rehearing on the second holding only.

FTB's first assertion is that OTA lacked jurisdiction to abate interest because it was not an issue on appeal. The record in the appeal indicates otherwise. On March 2, 2018, appellant responded to FTB's Income Tax Due Notice dated October 26, 2017, by requesting abatement of "assessed penalties and interest for 2015." FTB treated that request as a claim for refund and denied abatement of the late-filing penalty. In the petition, FTB asserts that our jurisdiction to consider a refund of interest is limited to cases where a Notice of Determination Not to Abate Interest is issued, pursuant to Regulation section 30103(a)(5). We disagree. FTB's failure to approve or deny appellant's express request for abatement of interest within six months of the request may be considered a deemed denial, which puts it within OTA's jurisdiction. (Cal. Code Regs., tit. 18, § 30103(a)(6).)

FTB asserts additionally that the holding in the Opinion with respect to interest is contrary to law² for the following reasons: 1) the Opinion incorrectly characterized a transfer from 2014 to taxable year 2015 as a "credit elect" payment;³ 2) the Opinion incorrectly applied statutes (namely, R&TC sections 19340 and 19341) to appellant's transferred payment; 3) there was a mistake of fact in the Opinion because interest was already allowed on transferred overpayments, from the date of filing of the relevant returns to the date of the credit transfers; and 4) there was insufficient evidence in the record to conclude FTB, and not appellant, should be compensated for the time during which appellant did not have use of the overpaid funds.

FTB submitted new evidence with its petition. The Notice of Proposed Assessment issued for 2012, the subsequent Order to Withhold Personal Income Tax, and the payment voucher submitted by FTB shows that appellant had not initially paid its 2012 tax liability until Wells Fargo Bank responded to the withholding order and paid \$15,615.39 on June 15, 2015. Therefore, the Opinion's conclusion that FTB had the use of appellant's funds since at least April 15, 2013, was incorrect. We conclude, on that basis, that we made findings that were not

² FTB asserts its grounds for rehearing based on an insufficiency of the evidence and an "error in law." The error in law standard is appropriate for the question of jurisdiction, resolved above, but for the arguments pertaining to the alleged substantive errors in the Opinion, discussed hereafter, "contrary to law" is the appropriate standard, as well as whether there was an insufficiency of the evidence to support the Opinion.

³ FTB's brief appears to claim this issue is related to its claim that OTA lacks jurisdiction over the interest issue. Because in the argument therein FTB asserts that OTA applied the incorrect law, we discuss it as an additional claim that the Opinion was contrary to law.

supported by the evidence. FTB's rights were materially affected, requiring that we partially grant a rehearing on the issue of the dates during which FTB had the use of appellant's funds.


FTB contends that the Opinion incorrectly treats the 2015 payment as a "credit elect," meaning that appellant, on a prior return, elected to apply an overpayment to a subsequent taxable year instead of requesting a refund. We disagree. When appellant filed a late 2014 tax return, he specifically elected (on line 102 of his Form 540) to apply \$11,073 to his 2015 tax return. The timing is inconsequential to the holding because the cases cited related to interest charged on funds that were in the taxpayer's hands as opposed to the government having the use of the funds it should have had. On rehearing, evidence of those dates will be determined from the rehearing record.

FTB takes issue with the Opinion's application of R&TC sections 19340 and 19341, in part because R&TC section 19341 provides that no interest will be allowed or paid on an overpayment prior to the date a late return is filed. In addition, FTB cites to *Appeal of Hoover*, 2019-OTA-052P, noting that ". . . the plain language of R&TC section 19341(d) still would apply and bar FTB from refunding interest for the period prior to the date appellant filed his original returns." Both R&TC section 19341 and *Appeal of Hoover*, however, relate to when and if FTB may *pay* interest on a refunded overpayment. The record reflects that FTB paid interest on appellant's 2015 refunded balance beginning on the date appellant filed his 2015 tax return.⁴ Because the Opinion did not determine the amount of interest to be refunded to appellant and did not do a setoff with interest already paid, a rehearing is also partially granted for the purpose of calculating the amount of interest to be refunded to appellant, for the time period during which FTB had use of appellant's funds.


Lastly, FTB requested that OTA clarify its decision to "specify the amount of interest in its holding" and whether interest abatement applies to both the tax liability and penalty. The partial rehearing will satisfy FTB's request.

⁴ Appellant's 2015 refund included approximately 3 months' interest (from April 9, 2018, through June 28, 2018), although appellant filed the 2015 return on October 5, 2017 (nearly 11 months before the refund was issued). We made no specific holding in the original Opinion with respect to interest paid on the refund, and we do not address it further.

FTB’s petition for rehearing is partially granted on the issues of 1) during what dates did FTB hold appellant’s funds while appellant did not have the use of the money, and 2) determination of the factual or legal issues required to calculate the amount of interest, if any, to be refunded pursuant to the holding in the original Opinion finding that interest is to be refunded.


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Teresa A. Stanley
Administrative Law Judge

I concur:

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Tommy Leung
Administrative Law Judge

J. JOHNSON, Dissenting:

I respectfully dissent from the majority’s partial denial of the petition for rehearing. For all the reasons stated in my dissent from the majority holding granting a refund of interest, I believe that part of the majority’s Opinion is contrary to law, and therefore a rehearing on the granting of interest abatement is warranted.

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John O. Johnson
Administrative Law Judge

Date Issued: 10/14/2020