

**OFFICE OF TAX APPEALS
STATE OF CALIFORNIA**

In the Matter of the Appeal of:
C. PERRY

) OTA Case No. 20116929
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OPINION ON REHEARING

Representing the Parties:

For Appellant: Jeffery L. Joiner, CPA

For Respondent: Eric R. Brown, Tax Counsel III

T. STANLEY, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, C. Perry (appellant) appealed an action by respondent Franchise Tax Board (FTB) denying appellant’s claim for refund of \$1,398.28, plus interest, for the 2015 taxable year. On September 24, 2019, the Office of Tax Appeals (OTA) issued an Opinion (original Opinion) holding that 1) appellant was not entitled to a refund of the late-filing penalty, and 2) that appellant was entitled to a refund of interest paid. FTB petitioned for rehearing with respect to our second holding only. On October 14, 2020, the OTA issued an Opinion on Petition for Rehearing (PFR Opinion), partially granting a rehearing 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 to be refunded pursuant to the holding in the original Opinion finding that interest is to be refunded.”

Appellant did not request an oral hearing; therefore, the matter is being decided based on the written record.

ISSUES

1. During what dates, if any, did FTB hold appellant's funds while appellant did not have the use of the money?
2. Pursuant to the holding in the original Opinion that interest is to be refunded, what is the time period for which interest should be abated for the 2015 taxable year?¹

FACTUAL FINDINGS

1. Appellant filed a 2015 tax return late on August 17, 2017.
2. FTB determined that appellant's tax account reflected an amount in excess of appellant's 2015 tax liability.² FTB transferred \$5,793.01³ from appellant's 2014 tax account to his 2015 tax account to satisfy appellant's 2015 tax liability of \$4,419, a late-filing penalty of \$1,104.75, and interest of \$293.53.
3. The interest of \$293.53 was charged on the tax and late-filing penalty due for the 2015 taxable year for the period beginning April 15, 2016, (the filing due date for appellant's 2015 return) through October 5, 2017 (the date when the overpayment from the 2014 taxable year was applied to appellant's 2015 taxable year).
4. On October 5, 2017, FTB scheduled a refund to appellant of the remaining overpayment.
5. FTB allowed interest in the amount of \$24.27 on the \$5,793.01 applied to appellant's 2015 tax account for the period beginning August 28, 2017, (the date appellant's 2014 tax return was filed) through October 5, 2017 (the date the overpayment from the 2014 taxable year was applied to appellant's 2015 taxable year).
6. OTA issued an Opinion finding that appellant was entitled to a refund of interest paid on his 2015 tax liability while FTB had use of appellant's funds.

¹ A majority of this OTA appeals panel would not have joined the majority in the original Opinion upon which the partial rehearing was granted or the PFR Opinion to the extend it limited the scope and purpose of this partial rehearing on the interest abatement issue. The rehearing was partially granted for the limited purpose of determining the dates for which interest abatement should be made based on the holding in the original Opinion that interest is to be abated for the time period for which FTB had use of appellant's money.

² Pursuant to collection activity relating to appellant's 2012 taxable year, FTB collected more than \$15,000 from appellant's bank account on June 15, 2015. After appellant filed his tax returns for the 2012, 2014, and 2015 taxable years, the amount collected was first applied to appellant's 2012 taxable year, and subsequently applied to appellant's 2014 and 2015 taxable years. On October 5, 2017, FTB scheduled a refund of the remaining overpayment related to this collection activity to appellant.

³ As noted in Finding of Fact number 5, *post*, FTB allowed interest of \$24.27 on the \$5,793.01 transferred from the 2014 taxable year, resulting in a total of \$5,817.28 that was applied to appellant's 2015 tax account.

7. FTB subsequently filed a Petition for Rehearing, which OTA granted in part, to determine whether interest paid by appellant was imposed for time period(s) during which FTB had use of the funds, while appellant had no use of the funds held by FTB.
8. In its rehearing briefing, FTB conceded that it “had use of the funds for the entire time period from June 15, 2015, when the amounts were initially collected for the 2012 tax year, to October 5, 2017,” when FTB refunded the remaining overpayment related to its collection activity.

DISCUSSION

Issue 1: During what dates, if any, did FTB hold appellant’s funds while appellant did not have the use of the money?

In the original Opinion the majority found that “[i]nterest may not be assessed on a deficiency for the period of time subsequent to the date an overpayment was made. (R&TC, § 19108(a).) The purpose of imposing interest is to compensate for the time a taxpayer had the use of funds which rightfully should have been in the possession of the [tax agency]. (*Manning v. Seeley Tube & Box Co. of New Jersey (Seeley Tube)* (1950) 338 U.S. 561, 566; *Avon Products, Inc. v. U.S. (Avon Products)* (1978) 588 F.2d 342.) Interest is not a penalty, but rather mere compensation for the use of money. (*Appeal of Jaegle* (76-SBE-070) 1976 WL 4086.)” Thus, the majority in the original Opinion concluded that interest must be abated and refunded for interest paid by appellant for time periods during which FTB had use of appellant’s money.

As noted above, FTB concedes that it had use of appellant’s funds for the entire time period between June 15, 2015, and October 5, 2017. During this same time period, FTB also concedes that it charged interest on the tax and late-filing penalty due for the 2015 taxable year from April 15, 2016, through October 5, 2017. Thus, FTB had use of appellant’s funds (in an amount exceeding the tax and penalty due for the 2015 taxable year) for the entire time period for which it charged interest for the 2015 taxable year.

Issue 2: Pursuant to the holding in the original Opinion that interest is to be refunded, what is the time period for which interest should be abated for the 2015 taxable year?

Although FTB concedes that it had the use of appellant’s funds, it alleges that it was proper to assess interest charges. However, these arguments by FTB were addressed in and resolved by the original Opinion and PFR Opinion, which specifically held that interest was to be

abated. This rehearing was granted for the limited purpose of determining the timeframe during which FTB had the use of appellant's funds and the resulting time period for which interest paid by appellant (for the same time period) must be abated and refunded. Because we find that the interest in the amount of \$293.53 charged on appellant's 2015 tax liability and late-filing penalty, from April 15, 2016, through October 5, 2017, was charged during a time FTB had the use of appellant's funds, this interest must be abated.

However, FTB also allowed and credited appellant for interest in the amount of \$24.27 on the \$5,793.01 overpayment that it applied to appellant's 2015 tax account for the period of August 28, 2017, through October 5, 2017. FTB asserts that the allowance of this interest was erroneous because "[u]nder the provisions of [R&TC] section 19341 (a) and (c), [FTB] shall not allow interest on an overpayment under [R&TC] section 19340 if the refund or credit is made within 45 days of an individual return's filing date." We agree.⁴ Thus, we find that FTB may reduce the amount to be refunded to appellant as a result of the interest abatement by the \$24.27 of interest it erroneously allowed and credited to appellant for the period of August 28, 2017, through October 5, 2017, on the \$5,793.01 overpayment it applied to appellant's 2015 tax account.


⁴ The \$5,793.01 overpayment from the 2014 taxable year was applied to appellant's 2015 taxable year within 45 days of appellant's filing of the 2015 tax return on August 28, 2017. Thus, the \$24.27 of interest FTB allowed as a credit to appellant for the period of August 28, 2017, through October 5, 2017, was erroneous pursuant to R&TC section 19341(a) and (c), as FTB contends.

HOLDINGS⁵

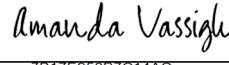
1. FTB had the use of appellant’s funds from June 15, 2016, through October 5, 2017, and charged appellant interest for the time period of April 15, 2016, through October 5, 2017.
2. The \$293.53 interest FTB charged appellant for the 2015 taxable year, for the period of April 15, 2016, through October 5, 2017, is abated. However, the amount to be refunded to appellant as result of this interest abatement may be reduced by the interest of \$24.27 FTB erroneously allowed and credited to appellant for the period of August 28, 2017, through October 5, 2017, on the \$5,793.01 overpayment applied to appellant’s 2015 taxable year.

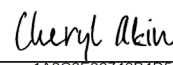
DISPOSITION

FTB’s denial of appellant’s claim for refund of interest paid from April 15, 2016, through October 5, 2017, is revised accordingly.

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 Teresa A. Stanley
 Administrative Law Judge

We concur:

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 Amanda Vassigh
 Administrative Law Judge

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 Cheryl L. Akin
 Administrative Law Judge

Date Issued: 8/11/2021

⁵ OTA did not grant a rehearing with respect to the holding in *Appeal of Perry*, case number 18103864, that appellant is not entitled to a refund of the late-filing penalty.