OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	) OTA Case No. 19064962
S. REED	)
	)
	)
	)

OPINION

Representing the Parties:

For Appellant: S. Reed

For Respondent: Shanon Pavao, Tax Counsel III

J. JOHNSON, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, appellant S. Reed appeals actions by the respondent Franchise Tax Board in denying appellant's claims for refund of taxes paid with respect to his 2017 tax year.

Appellant elected to have this matter decided based on the written record and without an oral hearing.

ISSUES

1. Whether the Office of Tax Appeals (OTA) has jurisdiction in this matter.
2. If OTA has jurisdiction, whether appellant has shown error in respondent's denial of his claims for refund with respect to his 2017 tax year.[1]

FACTUAL FINDINGS

1. Appellant submitted a Form 540 (California Resident Income Tax Return) for tax year 2017 to respondent on or about April 15, 2018. Appellant's Form 540 is what is commonly referred to as a "zero return," meaning that he reported zeros for his wages, income, and tax liability. He claimed a personal exemption and the standard deduction,

[1] This matter was originally bifurcated to allow for resolution of the jurisdictional issue first. Subsequently, both parties provided their briefing as to all issues, and the matter was converted to a nonappearance matter to be decided based on the written record without a hearing at appellant's request. As a result, bifurcation is no longer necessary, and this Opinion will constitute the only Opinion on appeal.

and requested a refund of $1,809, the reported amount of tax withholdings. Appellant attached to his Form 540 two IRS Form 4852s (Substitute for Form W-2) on which he reported that he had received no wage income for the year but claimed that $1,809.27 had been withheld from his wages as state income tax withholdings.

2. Respondent treated appellant's Form 540 as a claim for refund and issued a letter dated June 26, 2018, stating, in pertinent part, as follows:

> "We denied your claim for refund because it was based on a frivolous return ..... [¶] You may appeal this decision with the Office of Tax Appeals."

3. On June 26, 2018, respondent sent another letter to appellant, this one entitled "Notice of Frivolous Return Determination and Demand for Tax Return." The letter stated, in pertinent part, as follows:

> "We received the form you filed as your California income tax return for tax year 2017. We determined that this purported return is frivolous. [R&TC] Section 18501 requires you to file a valid California tax return.
>
> "This is a formal legal demand notice which requires you to file a valid return for the tax year listed above within 30 days from this notice date. If you do not file a valid return with the 30 days, we will impose a $**5,000** frivolous return penalty, which will be due and payable upon notice. (R&TC Section 19179)"

4. On or about September 15, 2018, appellant submitted an amended Form 540 to respondent for 2017. The amended Form 540 was identical in all material respects to the originally filed return.

5. Respondent treated appellant's amended Form 540 as another claim for refund and issued appellant a letter dated November 13, 2018, stating, in pertinent part, as follows:

> "We denied your claim for refund because it was based on a frivolous amended return..... [¶] You may appeal this decision with the Office of Tax Appeals."

6. Appellant timely submitted an appeal from both of respondent's claim denial notices based on the timeframe provided on those notices for filing an appeal.

7. On or about March 22, 2019, respondent assessed a $5,000 frivolous return penalty against appellant pursuant to R&TC section 19179.

8. By letter dated August 8, 2019, respondent submitted a memorandum to OTA requesting, in effect, that OTA dismiss this appeal. The basis for respondent's request was its assertion that it had erred in treating appellant's Form 540s as valid claims for refund and, as a result, erroneously advised appellant that he had a right to appeal to OTA. Respondent contended in its memorandum that it "took no appealable action against the Appellant."
9. By letter dated August 29, 2019, OTA denied respondent's request.

DISCUSSION

Issue 1: Whether OTA has jurisdiction in this matter.

Appellant filed Form 540s that purported to be original and amended California tax returns for 2017. They claimed that appellant had zero wages, zero income, and zero tax liability. Appellant's Form 540s asked respondent to refund to him all of the taxes that had been withheld from his wages (although appellant denies having received any such wages). Respondent treated the returns as claims for refund and denied them, advising appellant that he could appeal respondent's action to OTA.

On appeal, respondent contends that the submitted Form 540s are zero returns, the filing of which does not constitute the filing of a return for tax law purposes. Respondent's position here is supported by *Appeal of Hodgson* (2002-SBE-001) 2002 WL 245667,[2] which concluded that zero returns are not valid returns for purposes of R&TC section 18501's filing requirement.

However, the question before us is not predicated on application of the filing requirement under R&TC section 18501 but is instead a question of whether appellant's Form 540s meet the requirements for a claim for refund under R&TC section 19322. The requirements under that section simply require that "[e]very claim for refund shall be in writing, shall be signed by the taxpayer or the taxpayer's authorized representative, and shall state the specific grounds upon which it is founded."

When it comes to federal caselaw, "[m]ost cases have concluded that tax returns reporting zero wages cannot serve as claims for refund because they fail to include information upon which a tax could be calculated." (*Kehmeier v. U.S.* (2010) 95 Fed.Cl. 442, 445.) We find

[2] This opinion is a precedential decision from the Board of Equalization, predecessor to OTA, and may be relied upon by OTA unless removed as precedent. (Cal. Code Regs., tit. 18, § 30504.)

the abundance of federal caselaw echoing this finding to be persuasive, and likewise find that a zero return, reporting merely the amount of tax withheld, the amount of the alleged overpayment, and the amount requested as a refund, does not meet the administrative requirements to be considered a valid claim for refund.[3] (See *Meissner v. U.S.* (2018) 136 Fed.Cl. 763; R&TC, § 19322.) As such, appellant's Form 540s, by themselves, do not qualify as claims for refund.

Attached to the zero returns, appellant also provided an accompanying statement from appellant. Appellant's accompanying statement is in writing, and signed, but we must also determine whether it "state[s] the specific grounds on which the claim is founded" to meet the California statutory requirements for a claim for refund.[4] (R&TC, § 19322.) Appellant's statement, as we read it, essentially asserts that amounts reported as wages on Form W-2s were incorrectly categorized as such, and that appellant did not engage in any taxable transactions or activity.[5] These contentions provide the specific grounds upon which appellant is basing his claim for refund (i.e., income reported as taxable was in fact not taxable). Accordingly, appellant's signed statement, accompanied by the numbers reported on the zero returns indicating the amount appellant is requesting as a refund, meet the bare requirements to constitute a claim for refund under R&TC section 19322.

OTA has jurisdiction to hear claim for refund disputes that are timely appealed after respondent "mails a notice . . . which denies any portion of a perfected claim for a refund of tax,

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[3] While most recent cases have reached this result, there are federal decisions that have found that a zero return meets the minimum requirements of providing information upon which a tax liability can be computed. (E.g., *Long v. U.S.* (9th Cir. 1980) 618 F.2d 74,76 (*Long*) ["a zero, like other figures, has significance"].) However, those cases can generally be distinguished based on the different statutory standards in question (e.g., *Long* dealt with criminal conviction under Internal Revenue Code (IRC) section 7203), or represent a prior interpretation of the law that has since been superseded over the last few decades. (See *Walbaum v. Commissioner*, T.C. Memo. 2013-173 [distinguishing *Long* based on differing IRC sections at issue]; *Kehmeier*, *supra* ["zero entry alone does not necessarily disqualify his claim, but . . . [the claim must provide] . . . information sufficient for it to be considered a valid tax return"].)

[4] We note here that federal law has slightly different standards, such as requiring that "[t]he claim must set forth in detail each ground upon which a credit or refund is claimed and facts sufficient to apprise the Commissioner of the exact basis thereof," and that "[t]he statement of the grounds and facts must be verified by a written declaration that it is made under the penalties of perjury." (Treas. Reg., § 301.6402-2(b).) As such, federal law is not as persuasive of a guide when dealing with whether written statements, as opposed to returns, constitute valid claims for refund under California law.

[5] Specifically, appellant's statement states, in parts, "[t]his Attachment . . . is submitted to rebut and disprove this document know as W-2 . . . which alleges a payment to [appellant] . . . as wages, and that there was no transactions . . . as defined . . ."; and "I hereby Rebutting and deny that said 'payer' and I had any R&TC section's and/or IRC section's transactions in the year 2017." (Sic.)

penalties, fees, or interest." (Cal. Code Regs., tit. 18, § 30103(a)(3); see also R&TC, § 19324(a).) Respondent mailed such notices here in response to submissions that met the requirements for claims for refund under R&TC section 19322, and therefore OTA has jurisdiction over the denial of appellant's claims for refund pursuant to R&TC section 19324.

The parties also present arguments regarding the frivolous return penalty imposed for the year at issue. R&TC section 19179 provides for a penalty to be imposed for the filing of a frivolous return in accordance with IRC section 6702 [6] This penalty was imposed for the tax year at issue; however, it was imposed after appellant filed his appeal with OTA and was not part of his refund claim that is the subject of this appeal.[7] Accordingly, this penalty is not properly before us at this time, and while OTA has jurisdiction over the denial of the claims for refund, we do not have jurisdiction to review respondent's imposition of the frivolous return penalty here.

Issue 2: If OTA has jurisdiction, whether appellant has shown error in respondent's denial of his claims for refund with respect to his 2017 tax year.

With respect to his appeal from respondent's notice pertaining to appellant's originally filed Form 540, appellant stated that the basis for his appeal was that:

- Appellant timely submitted his returns.
- Appellant was demanding to know the identity of the individual(s) who had conducted the examination.
- Appellant was demanding to be made aware of "the particular R&TC Section authorizing verification as to a correct amount of tax shown a tax return....."
- Appellant was demanding to know the specific line numbers of his return that did not have sufficient information and caused respondent to treat

[6] The frivolous *appeal* penalty under R&TC section 19714, imposed when an appellant institutes or maintains an appeal before OTA primarily for delay or based on frivolous or groundless claims, is separate and distinct from the frivolous *return* penalty, imposed under R&TC section 19179 by reference to IRC section 6702, which is imposed based on circumstances surrounding the filing of returns.

A portion of appellant's arguments on appeal concern constitutional questions and issues of due process at the audit or protest level; issues over which OTA does not have jurisdiction. Arguments such as these have been found to be frivolous or groundless in prior precedential opinions. (See *Appeal of Balch*, 2018-OTA-159P.) Appellant is hereby notified for future reference that if an appeal is maintained primarily for delay or based on frivolous or groundless positions, then a frivolous appeal penalty of up to $5,000 under R&TC section 19714 may apply.

[7] There is no evidence in the record showing that the penalty has been paid and a refund of the penalty has been requested. Pursuant to R&TC section 19180(b), the standard rules allowing for the appeal of a proposed assessment do not apply to the frivolous return penalty. (See R&TC, §§ 19179, 19180(b), 19045.)

appellant's returns as "frivolous returns."

- Appellant was demanding to know which of the frivolous positions listed in IRS 2010-33 respondent claims appellant had taken.
- Appellant informed respondent that he was not a "business entity," and that he had "NO California source income or State wages ..... "
- Appellant was not aware of having been subject to a tax audit, and was demanding to know the identity of the individual(s) who scoped and surveyed his tax return, the identity of the audit supervisor who initiated the audit, the date the audit was initiated, the date completed and to be provided with copy of the audit report.
- Appellant claimed "[respondent] was informed that [appellant] had not been identified as a 'frivolous activity-nonfiler."

With respect to his appeal from respondent's notice pertaining to appellant's amended Form 540, appellant reiterated the foregoing allegations, as well as the following additional allegations:

- Appellant "did not make a 'claim for refund' and no amount was paid by [appellant] to allow [him] to make such a claim."[8]
- Respondent's employee that had signed the claim denial notices issued to appellant was making "false claims" against appellant that should be "retracted from [respondent's] files and the amount shown on the 2017 amended return [should] be promptly provided [to appellant]."

Appellant's arguments primarily relate to alleged failures by respondent to comply with his various demands and requests.[9] Section 30104 of OTA's Rules for Tax Appeals makes it clear that OTA has no jurisdiction to consider appellant's arguments. (Cal. Code Regs., tit. 18, section 30104.) It provides, in pertinent part, that OTA does not have jurisdiction to consider any of the following arguments:

(a) Whether a California statute is invalid or unenforceable under the United States or California Constitutions, unless a federal or California appellate court has already made such a determination.

(b) Whether a provision of the California Constitution is invalid or unenforceable under the United States Constitution, unless a federal or California appellate court already has made such a determination.

(c) Whether respondent violated the Information Practices Act (Civil Code sections 1798 et seq.), the Public Records Act (Government Code sections

[8] By letter dated January 29, 2019, appellant reiterated that he "hereby appeal[s]" from the claim denial notices he had received from respondent for 2017.

[9] As detailed above, appellant filed two claims for refund for the same tax year, that are essentially duplicative. Accordingly, we will discuss the claims and the assertions made on appeal jointly.

6250 et seq.), or any similar provision of the law.

(d) Whether the appellant is entitled to a remedy for respondent's actual or alleged violation of any substantive or procedural right, unless the violation affects the adequacy of a notice, the validity of an action from which a timely appeal was made, or the amount at issue in the appeal.

The numerous questions and demands appellant poses have nothing to do with the sole issue we have jurisdiction over in this appeal, namely, whether appellant is entitled to a refund of amounts that were withheld from his wages in 2017. Appellant's Form 540s do not constitute proof that appellant had no income for the year at issue, and appellant's allegation that he had "NO California source income or State wages," appears to be untrue in light of the fact that appellant is seeking a refund of tax withholdings from California wages that were paid to him. Appellant has failed to produce any evidence other than his own statements that the refund amount should be allowed.

Furthermore, appellant's claim for refund is wholly related to withheld taxes. R&TC section 19307 provides that "No refund of tax withheld or estimated tax paid shall be allowed to an employee or taxpayer who fails to file a return for the taxable year in respect of which the tax withheld or estimated tax was allowable as a credit." As shown above, appellant's zero returns do not qualify as valid returns under R&TC section 18501 and pursuant to *Appeal of Hodgson*, *supra*, and therefore appellant's claims for refund are barred by statute per R&TC section 19307.

Accordingly, we sustain respondent's action in denying appellant's claims for tax refund for 2017.

HOLDINGS

1. OTA has jurisdiction in this matter over the denied claims for refund, but not over the frivolous return penalty.
2. Appellant has not shown error in respondent's denial of his claims for refund.

DISPOSITION

The denial of the claims for refund is sustained.

DocuSigned by:
John O Johnson
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John O. Johnson
Administrative Law Judge

We concur:

DocuSigned by:
Josh Lambert
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Josh Lambert
Administrative Law Judge

DocuSigned by:
Andrea LH Long
272945E7B372445...
Andrea L.H. Long
Administrative Law Judge

Date Issued: 9/28/2021