OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of: **SQUARE, INC. AND SUBSIDIARIES**[1]	OTA Case No. 20025856

OPINION ON SEVERED ISSUE

Representing the Parties:

For Appellant:	Amy L. Silverstein, Attorney
For Respondent:	Marguerite Mosnier, Tax Counsel V Katie Frank, Tax Counsel IV
For the Office of Tax Appeals:	Grant S. Thompson, Tax Counsel V

C. AKIN, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, Square, Inc. (appellant)[2] and Subsidiaries appeal actions by respondent Franchise Tax Board (FTB) purporting to deny appellant's claims for refund of $1.00 for the 2013 tax year and $799.00 for the 2014 tax year.[3]

Office of Tax Appeals (OTA) Administrative Law Judges Cheryl L. Akin, Josh Aldrich, and Asaf Kletter held an electronic oral hearing for the jurisdictional issue in this matter on March 24, 2023. At the conclusion of the hearing, the record was closed with respect to the severed jurisdictional issue.

[1] Subsequent to filing this appeal, appellant changed its legal name to Block, Inc. Because the claim for refund denial letter was issued in the name of Square, Inc., this name will continue to be used for purposes of this appeal.

[2] Since the issue in this appeal relates solely to Square, Inc., this Opinion will refer to that entity in the singular as "appellant," even though appellant filed California unitary combined reports with one or more subsidiaries for the 2013 and 2014 tax years.

[3] However, as discussed below, appellant did not file a claim for refund with FTB for the 2013 or 2014 tax years.

ISSUE

Whether OTA has jurisdiction to hear and decide the substantive issue of whether appellant was a financial corporation for California franchise tax purposes for the 2013 and 2014 tax years.

FACTUAL FINDINGS

General Factual Background

1. Appellant filed timely California Corporation Franchise or Income Tax Returns (Forms 100) as a general corporation for the 2013 and 2014 tax years. On its returns, appellant reported California net income of $6,571,736 and $5,382,793 for the 2013 and 2014 tax years, respectively. For both tax years, the reported California net income was fully offset by net operating loss (NOL) carryovers, resulting in zero taxable income. Appellant reported and paid only the $800 minimum franchise tax for each tax year.[4]
2. FTB subsequently audited multiple issues on appellant's returns for the 2013 and 2014 tax years. During the audit, appellant advised FTB that it believed it should be classified and permitted to file as a financial corporation for the 2013 and 2014 tax years.[5]

FTB's Examination of the Financial Corporation Issue for the 2013 and 2014 Tax Years

3. On October 27, 2017, appellant sent FTB a letter responding to FTB's request that appellant address in writing the California "Financial Corporation" classification issue as it might apply to appellant "in connection with a pending audit." The letter stated that, for the 2013 and 2014 tax years, appellant's "transaction-based revenues comprised 99 [percent] and 98 [percent], respectively, of [its] total gross income." The letter provided a general explanation of its transaction-based revenues and asked FTB "whether

[4] For the 2013 tax year, appellant filed a California combined report with one unitary subsidiary and reported the $800 minimum franchise attributable to appellant only. For the 2014 tax year, appellant filed a combined report with four unitary subsidiaries. Appellant and three of its unitary subsidiaries each reported the $800 minimum franchise tax for a total of $3,200 ($800 x 4); however, only the $800 attributable to appellant is at issue in this appeal.

[5] The R&TC and the regulations thereunder distinguish between general corporations and financial corporations. (See R&TC, § 23183; Cal. Code of Regs., tit. 18, § 23183; see also *Marble Mortg. Co. v. Franchise Tax Bd.* (1966) 241 Cal.App.2d 26 [discussing certain differences between the tax treatment of general and financial corporations].) For example, bank and financial corporations are taxed in California at a rate of 10.84 percent compared to 8.84 percent for general corporations and apply different rules for the apportionment of their income to California. (See, e.g., R&TC, §§ 23151, 23186; Cal. Code Regs., tit. 18, § 25137-4.2.)

or not the fees it receives for transaction-based services would be considered 'financial income' for purposes of the [California Code of Regulations, title 18, (Regulation) section] 23183 test [defining a financial corporation]."

4. On February 7, 2018, FTB issued Audit Issue Presentation Sheet (AIPS) No. 6 to appellant, tentatively concluding that appellant did not qualify as a financial corporation for the 2013 and 2014 tax years and therefore was a general corporation for these tax years.[6]

5. On May 23, 2018, at appellant's request, FTB held a conference with appellant's representatives to discuss the financial corporation issue. According to an internal FTB document describing the meeting, appellant was represented by its Chief Tax Officer, GH; a Senior Tax Manager, AW; and an attorney and director of a national accounting firm, BM. FTB was represented by an individual from the technical resources section of the audit division, PN, and individual from FTB's field office, EY. FTB described the results of the conference as follows:

    1. Bifurcate the issue (resend AIPS [No.] 6 stating this issue is undetermined due to no tax effect),
    2. Close out current cycle regarding other issues ([statute of limitations (SOL)] is 10/15/2018),
    3. Seek help from Legal, and
    4. Continue this issue (put some dollar amount so taxpayer has all rights)[.]

    a. At the conference, FTB asked appellant why it wanted to address the financial corporation issue in the 2013 and 2014 audit cycle when there is no tax effect.[7] FTB's conference notes indicate that appellant responded as follows:

        > GH [appellant]: We want to clarify it now, because right now we can only take about 18 [percent] of losses. I don't want four or five years later you [to] come in and say we are financial and at that time we are profitable and we have to take a larger percentage of it.

[6] A copy of AIPS No. 6 is not in the record. However, there appears to be no dispute that FTB issued this AIPS to appellant in February 2018, and tentatively concluded that appellant was a general rather than a financial corporation for the 2013 and 2014 tax years.

[7] The FTB document describing the meeting contains several pages of notes regarding the discussion at the meeting. These factual findings only include statements that appear helpful to the jurisdictional issue here or which contain representations FTB made to appellant regarding the existence of appeal rights for the financial corporation issue.

b. The conference notes also contain the following summary of exchanges regarding bifurcating the financial corporation issue from the other audit issues for the 2013 and 2014 tax years, and FTB's representations regarding assigning a value to, and appeal rights for, the financial corporation issue:

> PN [FTB]: [W]e do not hope to close this issue soon. This case has no tax effect. So we want to bifurcate the issue from this case, and close out everything else in this case.
>
> BM [appellant]: The concern is then it is not technically a claim.
>
> PN [FTB]: It is not a claim. You have to protest with [a Notice of Proposed Assessment (NPA)]. [In] [t]his case you don't have [an] NPA, because you don't have a tax effect. So you will not have any right to protest.
>
> BM [appellant]: [W]ill you treat it as a claim?
>
> PN [FTB]: [O]ne suggestion is that we close out this audit, [and] we make [a] new determination on [the] next cycle for this issue. Based on the materiality, no determination of this issue for [the] current cycle. Because if there is no dollar amount, you don't have any right to go to protest and settlement.
>
> GH [appellant]: So 2013 is closed, but [2013] is profitable. Do you really want to do that?
>
> PN [FTB]: If it's closed we don't go back.
>
> GH [appellant]: Can we just bifurcate the issue?
>
> PN [FTB]: We can do that as well, and put some dollar amount so you have the right. I want [the] taxpayer to have all the rights.
>
> GH [appellant]: [I]f we bifurcate the issue and you determine later we are [a] financial corp. for [2013] and [2014], can you still adjust [the] carryover?
>
> PN [FTB]: Yes. It's the carryover we can adjust it.
>
> BM [appellant]: (explained about SOL doesn't bar carryover adjustment[s.])
>
> GH [appellant]: How will you put a dollar amount?

> PN [FTB]: [T]he tax rate between general and bank and financial, the minimum tax. We can put $200.
>
> GH [appellant]: That works for me . . . .

5. FTB's internal event logs for appellant's 2013 and 2014 tax years indicate that on June 29, 2018, FTB changed the type or status indicated for appellant's 2014 tax year from "audit" to "claim."[8] On July 10, 2018, FTB made a similar change to the type or status for appellant's 2013 tax year and sent an Initial Contact Letter (ICL) to appellant.
6. On July 20, 2018, FTB also issued a letter to appellant regarding the financial corporation issue, referencing tax years "12/2013X" and "12/2014X."[9] The letter stated, "In order to process the claim, we have assigned [an] $800 value to this issue" and directed appellant to contact the assigned FTB auditor if it had any questions.
7. FTB's internal event log for appellant's 2014 tax year includes the following relevant notes for February through March 2019 regarding the financial corporation issue and whether appellant would have protest and/or appeal rights for this issue:
   a. February 12, 2019: FTB representative, YY, reported an outgoing call in which she was told by appellant's representative, BM, that "he discussed with [PN] and thought [appellant] will have protest right[s]. I told him this is a claim. If we deny the claim, [appellant] will have appeal right[s]. [BM] says [appellant] is expecting protest right[s]. Called [FTB representative, SL] regarding the above situation. [SL] will discuss with her [supervisor]. [SL] confirmed with her [supervisor] that [taxpayer] will have appeal right[s]."
   b. February 12, 2019: FTB representative, YY, reported an additional outgoing call to appellant's representative, BM, stating as follows:

      > Called him back that this is a claim and we are going to process it as a claim. We [will] deny the claim and [appellant] will have appeal right[s]. He was not satisfied with this answer. He thought [appellant] will have protest right[s]. I told him that we agreed to bifurcate this single issue and treat it as a claim. The claim started in July 2018. ICL of claim was sent and

[8] The logs include many entries. Some entries are redacted. These factual findings only include entries that appear potentially helpful in understanding the jurisdictional issue here or which contain representations by FTB regarding appeal rights for the financial corporation issue.

[9] The "X" is typically used by FTB to denote an amended return or claim for refund for the applicable tax year, as C corporations typically file amended returns on Form 100X.

> [appellant] responded.[10] So [appellant] is aware this is a claim. He asked me to call [the technical resources section] again to see if [appellant] can have protest right[s].

c. February 13, 2019: FTB representative, YY, reported another outgoing call to appellant's representative, BM, stating, "Informed him this is a claim and will be processed as a claim. [Appellant] sent the response to ICL of this claim in July 2018.[11] [Appellant] is aware this is a claim."

d. February 14, 2019: FTB representative, SL, reported that she returned a call from appellant's representative, BM, during which the following was stated:

> . . . [BM] stated that [appellant] would like us to close the case as NPAs. I stated there was no SOL for [tax year] 2013. [BM] stated it'll be OK to close [tax year] 2013 [as a] Claim Denial and [tax year] 2014 [as an] NPA. Told him I would check with management.

e. February 21, 2019: FTB representative, YY, reported an outgoing call to appellant stating as follows:

> . . . [Appellant] also stated they want both years to have protest right[s]. They want protest right[s] because [an] appeal has to go to OTA and [the] determination is final. They understand this case started as a letter claim.

f. March 15, 2019: FTB representative, YY, reported that she emailed appellant to "Inform [appellant] we will close as a letter claim."

g. March 26, 2019: FTB representative, YY, reported an outgoing call to appellant, stating, "I repeated that no NPA can be issued and no protest right[s] to the claim. They then want to meet legal "

FTB's Examination of Other Issues for the 2013 and 2014 Tax Years and Issuance of the Notice of Proposed Adjusted Carryover Amount (NPACA)

8. On June 12, 2018, FTB issued AIPS No. 9 to appellant for the 2013 and 2014 tax years, which proposed to reduce appellant's NOL carryovers available for use in future years by a total of $488,173.

[10] It appears that this reference is to the ICL sent to appellant on July 10, 2018. A copy of the ICL and appellant's response are not in the record.

[11] Again, the record does not include this response from appellant.

9. On June 22, 2018, appellant's Chief Tax Officer, GH, signed the AIPS No. 9 and checked a box stating that appellant agreed with the proposed adjustments as presented.
10. On August 7, 2018, FTB issued a NPACA to appellant for the 2013 and 2014 tax years. As relevant to this appeal, the NPACA proposed a $488,173 total reduction to appellant's NOL carryovers.[12] The NPACA was based on appellant's original filing status as a general corporation for these tax years and did not make any adjustments to appellant's NOL carryovers based on its claimed status as a financial corporation. The NPACA stated that, if appellant disagreed with the NPACA, appellant had the right to file a protest with FTB by October 8, 2018.
11. Appellant did not file a protest with FTB and the NPACA became final.
12. During this appeal, appellant submitted a declaration dated February 9, 2022, signed under penalty of perjury, by its current Head of Tax, PS (PS Declaration). PS stated that FTB assured appellant that it had the right to appeal FTB's claim for refund denial and that it had assigned the financial corporation issue a value of $800 for the 2013 and 2014 tax years. PS stated that had FTB not made these assurances, "[appellant] would have protested the NPACA for the tax years ended 2013 and 2014 on the basis that it was a financial corporation[,]" and, if "FTB upheld audit's determination that [appellant] was a general corporation in protest, [appellant] would have appealed the financial corporation issue" to OTA.[13]

Appellant's 2016 Amended Return

13. On or about December 18, 2018, appellant filed an amended California Corporation Franchise or Income Tax Return (Form 100X) for the 2016 tax year. The amended return indicates that appellant "incorrectly" filed as a general corporation on its originally filed return and that the amended return correctly reflects its status as a financial corporation both in the current 2016 tax year and in its NOL carryovers from prior years. The amended return also states that it "incorporates changes to [its NOL] carryforwards to

[12] The NPACA also made smaller adjustments to appellant's other credit carryovers. These adjustments to appellant's other credit carryovers will not be discussed further in this Opinion.

[13] The PS Declaration indicates that PS worked at other companies from 1991 to 2019. PS became Head of Tax at appellant in July 2019. Thus, it appears that PS did not join appellant until after the October 8, 2018 deadline to protest the NPACA had passed.

reflect prior year adjustments made by [FTB] on audit years 2013-2014." The Form 100X does not request a refund of tax for the 2016 tax year, as appellant only reported the $800 minimum franchise tax for appellant and each of its unitary subsidiaries. Instead, the amended return makes significant revisions to appellant's NOL carryovers for the 2013 through 2016 tax years.

14. A statement attached to appellant's 2016 amended return reports that for the 2013 and 2014 tax years, appellant would have used $21,227,323 and $19,822,362 of its NOL carryovers, respectively, to offset its net income for these tax years had it filed as a financial corporation during these tax years (instead of $6,626,592 and $5,817,874, as revised by FTB as a general corporation for these tax years).[14] For the 2015 and 2016 tax years, the statement reports that appellant would have generated NOLs of $5,970,511 and $154,605,596, respectively, had it filed as a financial corporation (instead of NOLs of $1,780,930 and $5,970,511, as originally reported as a general corporation for these tax years).[15]

15. The PS Declaration indicated that FTB was currently auditing appellant's California tax returns for the 2016 tax year. PS noted that before the 2016 tax year can be appealed to OTA, FTB must complete the audit, appellant must file a protest, and FTB must complete its review of the protest and issue a Notice of Action. PS also indicated that based on his experience, he believed the 2016 tax year "will not be ready for an appeal for at least two years."

16. At the hearing, both parties indicated that the audit of the 2016 tax year had been completed, FTB had issued an NPACA for the 2016 tax year, appellant timely protested the NPACA, and the 2016 tax year is now in protest with FTB.

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[14] The amended return and attached statement also make smaller adjustments to appellant's other credit carryover amounts. The adjustments made to appellant's other credit carryovers will not be discussed further in this Opinion.

[15] Thus, filing as a financial corporation for the 2013 and 2014 tax years would have *reduced* appellant's prior year NOL carryovers by a total of $28,605,219 ($21,227,323 + $19,822,362 (NOLs that appellant would have used if it were a financial corporation for 2013 and 2014) - $6,626,592 - $5,817,874 (NOLs that appellant reportedly used as a general corporation for 2013 and 2014 on its originally filed returns)). Filing as a financial corporation for the 2015 and 2016 tax years, however, would have *increased* the NOLs appellant generated during those years by a total of $112,065,642 ($5,970,511 + $154,605,596 (NOLs that appellant would have generated as financial corporation for 2015 and 2016) - $1,780,930 - $46,729,535 (NOLs that appellant reportedly generated as a general corporation for 2015 and 2016 on its originally filed returns)).

FTB's Claim Denial Letter and Appellant's Appeal to OTA

17. On November 18, 2019, FTB issued a letter entitled "Claim for Refund Denial," stating that it had denied claims for refund of $1.00 and $799.00 for the 2013 and 2014 tax years, respectively. It stated that FTB denied the claims for refund because it determined that appellant was not a financial corporation. It further stated that appellant may file an appeal of FTB's decision to OTA by February 16, 2020.

18. The evidentiary record does not include a claim for refund filed by appellant for the 2013 or 2014 tax years, and neither party contends on appeal that appellant filed a claim for refund requesting a refund of taxes paid for the 2013 or 2014 tax years.

19. On February 10, 2020, appellant filed this appeal. Appellant's Request for Appeal states that its "claims for refund should have been granted because it is a 'financial corporation' for purposes of [R&TC] section 23183 and Cal. Const. art. XIII, section 27."

20. OTA subsequently issued a letter stating that it was accepting appellant's February 10, 2020 correspondence as an appeal for the 2013 and 2014 tax years, in the amounts of $1.00 and $799.00, respectively, based on FTB's Claim for Refund Denial letter dated November 18, 2019.

21. Appellant then filed a supplemental opening brief, accompanied by voluminous exhibits and declarations, arguing that it was a financial corporation.

22. FTB submitted a memorandum arguing that OTA did not have jurisdiction over the appeal because the refund denial issued by FTB "was issued in error" and OTA only has jurisdiction over denials of perfected claims for refund. FTB stated that appellant had not argued that it had overpaid its tax and that a determination of whether appellant qualified as a financial corporation could not result in an overpayment for the 2013 or 2014 tax years at issue in this appeal. FTB asked that OTA bifurcate the jurisdictional issue and decide it as a threshold issue.

23. OTA severed the jurisdictional issue so it could be determined as a threshold issue. (See Cal. Code Regs., tit. 18, § 30212.1(b).)

DISCUSSION

Jurisdiction

Applicable Law

Unlike a court of general jurisdiction, "[a]n administrative agency's authority to act is of limited jurisdiction and it 'has no powers except such as the law of its creation has given it.'" (*Appeal of Moy,* 2019-OTA-057P (*Moy*); see also *Appeal of Eric H. Liljestrand Irrevocable Trust*, 2019-OTA-012P (*Liljestrand*); Cal. Const. art. VI, § 1 [vesting the judicial power of the state in the Supreme Court, courts of appeal and superior courts, not administrative agencies such as OTA]; Cal. Const., art. VI, § 10 [granting superior courts broad jurisdiction].) Even in a California court which has much broader jurisdiction, the "fundamental jurisdiction" to hear and determine a case is non-waivable and "cannot be conferred by waiver, estoppel, or consent." (*Kabran v. Sharp Memorial Hospital* (2017) 2 Cal.5th 330, 339 (*Kabran*).)

OTA is an independent administrative agency whose jurisdiction to hear taxpayer appeals is limited by its enabling legislation. (*Liljestrand*, *supra*.)[16] OTA's enabling legislation, the Taxpayer Transparency and Fairness Act of 2017 (Stats. 2017, Ch. 16), provides that OTA has the duties, powers, and responsibilities necessary or appropriate to conduct appeals of certain tax and fee programs. (Gov. Code, § 15672; *Appeal of Body Wise International, LLC*, 2022-OTA-340P (*Bodywise*).) As applicable here, OTA has statutory authority to conduct an appeal from an action of FTB filed under Part 10.2 (commencing with R&TC section 18401) of Division 2 of the R&TC. (Gov. Code, § 15671(a)(4).) Part 10.2 of Division 2 of the R&TC, Administration of Franchise and Income Tax Laws, includes R&TC sections 18401 through 19802. As relevant here, this includes R&TC section 19324 which permits to appeal from FTB's action on a claim for refund.

[16] Appellant argues that *Liljestrand*, *supra*, is distinguishable because FTB did not issue a claim denial in that case. However, *Liljestrand* stands for the general principle that OTA only has such jurisdiction that is granted to it by statute. Appellant further argues that *Liljestrand* and *Appeal of Cornerstone Compounding Pharmacy, Inc.*, 2021-OTA-196P (*Cornerstone*), indicate that OTA has jurisdiction when an appeal is filed from an FTB notice denying a claim for refund, and that these opinions show that OTA has jurisdiction here. However, *Liljestrand* and *Cornerstone* did not involve facts where FTB issued a *purported* refund denial letter, but no claims for refund had been filed by the taxpayers. As such, *Liljestrand* and *Cornerstone* do not demonstrate that OTA has jurisdiction in the circumstances present here.

The Parties' Contentions

Appellant contends that OTA has jurisdiction over this appeal because FTB issued a letter stating that it was denying appellant's claims for refund for the 2013 and 2014 tax years. FTB contends that OTA does not have jurisdiction because appellant did not file claims for refund for the 2013 or 2014 tax years. FTB asserts that its claim for refund denial letter was issued in error, and that this letter is not sufficient to confer jurisdiction on OTA where, as here, appellant has not actually filed claims for refund for the tax years at issue in the appeal. For the reasons discussed below, OTA finds in favor of FTB.

Application of R&TC section 19324(a) and OTA's Jurisdictional Regulation

R&TC section 19324(a) provides that FTB's action on a claim for refund is final unless the taxpayer appeals in writing within 90 days of FTB's mailing of the notice of its action on a claim for refund.[17] Both the context and terms of R&TC section 19324(a) require the existence of a claim for refund. R&TC section 19324(a) is part of a statutory process whereby a taxpayer may file a claim for refund, FTB may disallow the claim for refund, and the taxpayer may then file a timely appeal of the disallowed claim for refund with OTA. R&TC section 19322 sets forth the content requirements for a valid claim for refund. R&TC section 19323(a) provides that, if FTB "disallows any claim for refund, it shall notify the taxpayer accordingly and provide an explanation for the disallowance." R&TC section 19324(a) then provides that FTB's "action upon the claim is final unless within the 90-day period [following FTB's mailing of the notice of its action on the claim] the taxpayer appeals in writing from the action of [FTB] . . . ." Every step of this process requires the existence of a claim for refund.[18]

When R&TC section 19324(a) states that FTB's action on "the claim" is final unless the taxpayer timely appeals, its reference to "the claim" refers to the claim for refund that was filed

[17] R&TC section 19324(a) states that the action of FTB must be appealed "to the board." Previously, the "board" referred to the State Board of Equalization, OTA's predecessor, which decided franchise and income tax appeals prior to OTA's creation. Pursuant to R&TC section 20(b), unless the context requires otherwise, "board," with respect to an appeal, means OTA if the authority to handle appeals has been transferred from to OTA pursuant to Part 9.5 (commencing with section 15670) of Division 3 of Title 2 of the Government Code.

[18] As discussed further below, in the analogous context of refund suits, the courts have made it clear that an administrative claim for tax refund is a jurisdictional prerequisite to a refund suit. (*Shiseido Cosmetics (America) Ltd. v. Franchise Tax Bd.* (1991) 235 Cal.App.3d 478, 486-487 (*Shiseido*).) It is "unexceptional, and [a] statutorily clear requirement that a taxpayer must file a post-payment refund claim before proceeding with a suit for refund." (*J.H. McKnight Ranch, Inc. v. Franchise Tax Bd.* (2003) 110 Cal.App.4th 978, 987, citing *Shiseido*.)

by the taxpayer pursuant to R&TC section 19322 and denied by FTB pursuant to R&TC section 19323(a). Here, FTB did not act on a claim for refund, because no claim for refund was filed by appellant.[19] FTB's erroneous issuance of a letter purporting to deny appellant's claims for refund does not alter the reality that appellant has not filed a claim for refund for the 2013 and 2014 tax years at issue in this appeal. As a result, the appeal right provided by R&TC section 19324(a) is inapplicable.

Regulation section 30103(a)(3) similarly provides that OTA has jurisdiction when FTB has mailed a notice of action on "cancellation, credit or refund, or any other notice *which denies any portion of a perfected claim for refund of tax, penalties, fees, or interest*." (Italics added.) However, there is no perfected claim for refund of tax, penalties, fees, or interest here; there is not even an unperfected claim for refund as appellant never filed a claim seeking a refund of tax, penalties, fees, or interest for the 2013 or 2014 tax years.

OTA's Role in the Appeals Process and Determination of Appellant's Correct Tax for the 2013 and 2014 Tax Years

As a general matter, OTA's function in the appeals process is to determine the correct amount of the taxpayer's California tax liability. (See *Appeal of Robinson*, 2018-OTA-059P (*Robinson*); *Appeals of Dauberger, et al*. (82-SBE-082) 1982 WL 11759 (*Dauberger*).) As noted by the State Board of Equalization (BOE) in *Dauberger*, "[O]ur jurisdiction to consider a particular income tax matter arises when a taxpayer files an appeal and thereby asks us to consider a matter and determine his or her correct tax liability. However, the power that this [agency] has is to determine the correct amount of appellant's California . . . tax liability for the appeal years. We have no power to remedy any other real or imagined wrongs that taxpayers believe they may have suffered at the hands of [FTB]."[20]

Appellant only reported and paid the $800 minimum franchise tax for each of the 2013 and 2014 tax years. Because R&TC section 23153(a) and (b)(3) require all corporations "doing

[19] Taxpayers may also appeal a claim for refund to OTA where FTB fails to act on the taxpayer's claim for refund with six months after the claim is filed. (See R&TC, § 19331.) However, an appeal pursuant to R&TC section 19331 would also require the existence of a valid claim for refund.

[20] Some statutes provide authority for OTA to consider certain types of appeals that do not require a determination of the correct amount of tax, such as appeals from FTB's actions granting or denying innocent spouse relief, denying interest relief, or revising a tax attribute carryover amount. (See R&TC, §§ 18533(e)(1)(A), 19006(c)(4), 19104(b)(2)(B), 19043.5(b).) However, no such statute applies here.

business" in California to pay the minimum franchise tax, and there is no dispute that appellant was doing business in California during both the 2013 and 2014 tax years, there is no overpayment of tax for these tax years. While there is an exception to the minimum franchise tax for credit unions and certain nonprofit cooperative associations, there is no similar exception for banks or financial corporations. (See R&TC, § 23153(c).) Thus, appellant owed the $800 minimum franchise tax for the 2013 and 2014 tax years regardless of whether it was a general corporation or a financial corporation. Here, there is no dispute regarding the correct amount of tax for the 2013 and 2014 tax years at issue in this appeal under the R&TC, and there is no statutory basis that enables OTA to issue what would amount to an advisory opinion over a matter which OTA lacks jurisdiction. (*Body Wise*, *supra*; see also *Appeal of Aroya Investment I, LLC*, 2020-OTA-255P, fn. 1.)

Moreover, as discussed above, the statutory provisions that provide OTA with jurisdiction to review FTB's denial of a claim for refund require, at a minimum, the presence of a claim for refund. In the absence of a claim for refund, OTA has no power to review a purported denial of such a claim or evaluate whether a taxpayer is entitled to a refund or credit.[21]

FTB's Assignment of an $800 Value to the Financial Corporation Issue

Appellant appears to acknowledge that it would owe the $800 minimum franchise tax for the 2013 and 2014 tax years pursuant to R&TC section 23153(a) and (b)(3) regardless of whether it was a general or financial corporation, but nevertheless argues that it would be entitled to a refund of $800 should it prevail on the financial corporation issue because FTB assigned an $800 value to this issue for these tax years. However, OTA has no statutory basis to order the grant of a refund where no claim for refund has been filed by appellant and where no refund is actually owed to appellant pursuant to the applicable R&TC. Instead, OTA finds R&TC section 19324(a), discussed above, and R&TC section 19301(a), discussed below, to be controlling here.

R&TC section 19301(a) provides that "[i]f [FTB] or [OTA], as the case may be, finds that there has been an overpayment of any liability imposed under Part 10 (commencing with

[21] OTA notes that even if it were to accept appellant's argument that OTA has jurisdiction over this appeal as a result of FTB's issuance of the November 18, 2019 letter purporting to deny appellant's claims for refund of $1.00 and $799.00 for the 2013 and 2014 tax years, respectively, OTA would resolve the appeal on the basis of R&TC section 23153. Because both general and financial corporations are subject to the $800 minimum franchise tax in R&TC section 23153, OTA would not need to reach the financial corporation issue in order to determine the correct amount of appellant's tax for these years.

[R&TC] [s]ection 17001), Part 11 (commencing with [R&TC s]ection 23001), or this part [Part 10.2] by a taxpayer for any year for any reason, the amount of the overpayment may be credited against any amount then due from the taxpayer and the balance shall be refunded to the taxpayer." Thus, under R&TC section 19301(a), OTA can only require FTB to refund the $800 to appellant *if* OTA finds that there has been an overpayment of appellant's liability for either the 2013 or 2014 tax years, as relevant here, under Part 11, the Corporate Tax Law, or Part 10.2, Administration of Franchise and Income Tax Law.

As previously noted, there is no dispute that appellant owed the $800 minimum franchise tax for the 2013 and 2014 tax years pursuant to R&TC section 23153(a) and (b)(3). This is true regardless of whether appellant was a general or financial corporation for these tax years. Appellant does not cite to any R&TC provision in Parts 10.2 or 11, which would establish overpayment of its tax liability for the 2013 or 2014 tax years, nor does it cite to any statutory or case authority which would permit FTB to issue a refund (or which would permit OTA to require FTB to issue a refund) to a taxpayer absent such an overpayment under the relevant R&TC sections. OTA, therefore, does not have statutory authority or jurisdiction to order FTB to refund appellant the assigned $800 value should it prevail on the financial corporation issue.

With respect to appellant's assertion that it would be entitled to an $800 refund based solely on FTB's representations (i.e., its assignment of an $800 value to the financial corporation issue for these tax years) rather than application of the R&TC, OTA notes that this is an estoppel type argument and it is well settled that "state officers and state agencies have no power to estop the state from collecting a validly owed tax." (*Transamerica Occidental Life Ins. Co. v. State Bd. of Equalization* (1991) 232 Cal.App.3d 1048, 1055 (*Transamerica*), citing *Fischbach & Moore, Inc. v. State Bd. of Equalization* (1987) 117 Cal.App.3d 627, 632.) In *Transamerica*, the California court of appeal held that the state cannot be "estopped from collecting a tax which was due and owing, even though the state's representatives may have previously adopted an incorrect interpretation of the law and advised the public that no taxes would become due on a particular transaction or transactions." (*Transamerica*, *supra*, at p. 1055.) Because the state generally cannot be estopped from collecting a tax which was due and owing, OTA cannot require FTB to refund tax paid by appellant which was clearly due and owing under the relevant R&TC

sections (here R&TC, §23153(a), (b)(3)) based solely on FTB's representations or assignment of an $800 value to the financial corporation issue.

At the hearing, appellant asserted that "all government agencies are allowed to compromise claims" and "make deals not based on the merits but to return money even where [it is] not absolutely determined that a refund is due." To the extent appellant is arguing that the assignment of an $800 value to the financial corporation issue is either a settlement or offer in compromise which OTA should enforce, OTA notes that FTB's settlement and offer in compromise programs are governed by R&TC sections 19442 and 19443, respectively. While R&TC sections 19442 and 19443 authorize FTB to enter into settlement and offer in compromise agreements with taxpayers, both statutes have very specific requirements that must be satisfied before FTB may settle a tax dispute or compromise the amount of tax due, and neither statute provides OTA with authority or jurisdiction to review or enforce a settlement or offer in compromise agreement between FTB and a taxpayer.

Appellant did not file a claim for refund for the 2013 and 2014 tax years and would not be entitled to a refund under the relevant R&TC sections should it prevail on the financial corporation issue. Thus, OTA does not have jurisdiction to hear and decide the financial corporation issue pursuant to either R&TC section 19324 or Regulation section 30103(a)(3), or because FTB assigned an $800 value to the financial corporation issue for the 2013 and 2014 tax years.

Equitable Estoppel

Applicable Law

Appellant also asserts that equitable estoppel applies and that FTB should be "'estopped from asserting as a defense a failure to exhaust administrative remedies' because it has 'negligently or intentionally caused' [appellant] 'to fail to comply with a procedural precondition to recovery.'" In *Appeal of Sedillo*, 2018-OTA-101P (*Sedillo*), OTA explained the required elements for equitable estoppel as follows:

> (1) the government agency (FTB) must be shown to have been aware of the actual facts; (2) the government agency (FTB) must be shown to have made an incorrect or inaccurate representation to the relying party (appellant) and intended that its incorrect or inaccurate representation would be acted upon by the relying party or have acted in such a way that the relying party had a right to believe that the representation was so intended; (3) the relying party (appellant) must be shown to

> have been ignorant of the actual facts; and (4) the relying party (appellant) must be shown to have detrimentally relied upon the representations or conduct of the government agency (FTB). (*Appeal of Western Colorprint* [(78-SBE-071) 1978 WL 3544].) The party asserting an estoppel bears the burden of proof and, thus, appellant must establish each of these four elements. (*Ibid*.)

Sedillo further explains that "[e]quitable estoppel is applied against the government only in rare and unusual circumstances and when its application is necessary to prevent manifest injustice." (*Ibid*.)

Appellant contends that all four of these elements are met and that it need not show "grave" or "manifest" injustice, as FTB contends, in order for estoppel to apply. Appellant asserts that while some of the applicable cases use the terms "grave" or "manifest" injustice, the injustice requirement only arises where public policy would be negatively impacted if the government agency is estopped, and even then it is applied as a balancing test. Appellant cites *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462 (*Mansell*), as support. In *Mansell*, the court stated that the government may be estopped if the elements for equitable estoppel are established and "the injustice which would result from a failure to uphold an estoppel is of sufficient dimension to justify any effect upon public interest or policy which would result from the raising of an estoppel."[22] (*Id*. at pp. 496-497.) OTA generally agrees that the injustice that would result if the government is not estopped should be balanced or weighed against the impact or effect (if any) on public interest or policy which would result from the application of estoppel. (See, e.g., *J.H. McKnight Ranch, Inc. v. Franchise Tax Bd.* (2003) 110 Cal.App4th 978, 991 (*McKnight*) [to determine if the government may be equitably estopped, the court "must determine whether the traditional elements necessary for assertion of an estoppel against a private party are present[]" and "must weigh the equities and consider the impact on public policy of permitting an estoppel"].)

OTA generally agrees that equitable estoppel does not necessarily require "grave" or "manifest" injustice and is typically applied as a balancing test where the party is seeking to apply it against the government. Nevertheless, regardless of the injustice suffered, OTA concludes that equitable estoppel cannot apply if the result is to directly contravene statutory or

[22] The Ninth Circuit Court of Appeals has held that, to establish equitable estoppel against the government, the taxpayer must show: "(1) the government engaged in affirmative misconduct going beyond mere negligence; (2) the government's wrongful acts will cause a serious injustice; and (3) the public's interest will not suffer undue damage by imposition of estoppel." (*Baccei v. U.S*. (9th Cir. 2011) 632 F.3d 1140, 1147.)

constitutional limitations on a government agency's authority to act. OTA notes "there is a line of cases holding that estoppel cannot lie to contravene any statutory limitation on an agency's authority." (*City of Oakland v. Oakland Police & Fire Retirement System* (2014) 224 Cal.App.4th 210, 243 (*City of Oakland*) [contrasting cases where there were statutory limitations on the agencies' authority with cases involving areas where the agencies had discretion].) Similarly, the court has noted that "estoppel will not be applied against the government if the result would be to nullify a strong rule of policy adopted for the benefit of the public *or to contravene directly any statutory* or constitutional *limitations*." (*Transamerica*, *supra*, 232 Cal.App.3d 1048, 1054, citations omitted, italics added.)

Additionally, estoppel generally addresses factual representations rather than misstatements of law. (See, e.g., *Jordan v. City of Sacramento* (2007) 148 Cal.App.4th 1487, 1496 (*Jordan*); *Transamerica*, *supra*, at pp. 1054-1055; *Adams v. County of Sacramento* (1991) 235 Cal.App.3d 872, 883-884 (*Adams*).) "[W]here the material facts are known to both parties and the pertinent provisions of law are equally accessible to them, a party's inaccurate statement of the law . . . cannot give rise to an estoppel.[23] (*Jordan, supra*, at p. 1496.) In such circumstances, "[t]he invocation of estoppel is particularly inappropriate where the party seeking it was represented by counsel at the time of the misrepresentation of law." (*Id*. at p. 1497.)

Appellant's Equitable Estoppel Argument and Summary of OTA's Conclusion

Appellant contends that this is "a quintessential estoppel case obliging [OTA] to review the merits of this appeal." However, as noted above, equitable estoppel cannot provide jurisdiction for OTA to hear this appeal, because OTA lacks statutory authority providing it with jurisdiction over the appeal where, as here, no claim for refund was ever filed by appellant and there is no dispute between the parties as to the correct amount of appellant's tax for the 2013 and 2014 tax years at issue in this appeal. Additionally, as will be discussed in detail below, equitable estoppel is not appropriate because appellant claims reliance on a legal representation, rather than a representation of fact, and, unlike some cases applying equitable estoppel, this appeal does not involve a procedural timing issue, such as a statute of limitations, or the application of the judicial doctrine of exhaustion of administrative remedies. Finally, while there

[23] The court in *Jordan* noted that "[s]ome cases assert that this simply amounts to a 'mutual mistake of law' and others remark that the estoppel elements of ignorance and *reasonable* reliance are absent." (*Jordan*, *supra*, at p. 1496, italics in original.)

are significant equities favoring appellant's position, a weighing of all equities does not favor estoppel in this appeal.[24]

Appellant Relies on a Legal Rather than Factual Representation

Appellant was aware that it had not filed claims for refund for the 2013 and 2014 tax years.[25] Therefore, it could not have relied on FTB's statements that there was a claim for refund. Appellant contends that it was not aware that no refund could have resulted from the financial corporation issue, stating that it relied on FTB's assignment of an $800 value to the issue, and "reasonably believed that if it prevailed on the financial corporation issue, it would be entitled to a refund of $800[.]" However, there is no evidence in the record that FTB ever expressly represented or stated that appellant would be entitled to the $800 assigned value should it prevail on the financial corporation issue. Additionally, as noted above, OTA has concluded that FTB cannot be estopped from collecting tax that is due and owing based solely on statements made by FTB representatives, and OTA cannot require FTB to refund tax to appellant which was due and owing under the relevant R&TC sections. (See, e.g., *Transamerica*, *supra*, 232 Cal.App.3d 1048, 1055.) Thus, the only remaining representation at issue in this appeal is FTB's representation that appellant would have the right to appeal the financial corporation issue following FTB's determination of that issue for the 2013 and 2014 tax years. However, FTB's statements that appellant would have appeal rights were assertions of law, not of fact. As noted above, equitable estoppel is generally not available for statements of law. (See, e.g., *Jordan*, *supra*, 48 Cal.App.4th 1487, 1496; *Transamerica*, *supra*, at p.1054-1055; *Adams*, *supra*, 235 Cal.App.3d 872, 883-884.)

Appellant's Reliance on Statute of Limitations Cases

Appellant cites cases where courts have deviated from the general rule that equitable estoppel generally requires reliance on a statement of fact, but OTA concludes they involve the application of procedural timing limitations such as the statute of limitations and are therefore

[24] Because OTA concludes that equitable estoppel cannot provide OTA with jurisdiction where statutory jurisdiction is lacking, and that equitable estoppel is otherwise inapplicable here for the reasons just stated, the equitable estoppel analysis in this Opinion focuses on these controlling issues rather than performing a step-by-step analysis of each of the four elements of equitable estoppel noted in *Sedillo*, *supra.*

[25] Appellant's representative, BM, expressly acknowledged this at the May 23, 2018 conference stating, "The concern is then it is not technically a claim."

inapplicable here. For example, appellant cites numerous cases, such as *Lerner v. Los Angeles City Bd. of Ed.* (1963) 59 Cal.2d 382, 396-397 (*Lerner*); *Tyra v. Bd. of Police and Fire Pension Comrs. of the City of Long Beach et al.* (1948) 32 Cal.2d 666, 670-671 (*Tyra*); *Farrell v. Placer County* (1944) 23 Cal.2d 624, 626-628 (*Farrell*); *Citizens for a Responsible Caltrans Decision v. Depart. of Transportation* (2020) 46 Cal.App.5th 1103, 1129-1135, where courts estopped the assertion of statute of limitations or other timing defenses.[26] However, the statute of limitations and similar procedural timing limitations are defenses that courts have found can be waived in some circumstances.[27] In contrast to such procedural timing limitations, courts have held that estoppel cannot apply to directly contravene statutory limitations on an agency's authority. (*City of Oakland*, *supra*, 224 Cal.App.4th 210, 243; *Transamerica, supra*, 232 Cal.App.3d 1048, 1054.) Even in California courts, which generally have broader jurisdiction than OTA, the "fundamental jurisdiction" to hear and determine a case is non-waivable and "cannot be conferred by waiver, estoppel, or consent." (*Kabran*, *supra*, 2 Cal.5th 330, 339.)[28]

Here, the issue is not whether appellant filed an untimely appeal of FTB's claim for refund denial, or even whether appellant filed an untimely claim for refund; the issue is that there is no claim for refund for OTA to review. Because there is no claim for refund and because appellant's status as a general versus financial corporation does not impact appellant's California tax liability for the 2013 or 2014 tax years, OTA does not have statutory jurisdiction over this appeal and the issue of whether appellant was a general or financial corporation for the 2013 and 2014 tax years is not properly before OTA in this appeal.

[26] Of note, the U.S. Supreme Court has held that the federal statute of limitations for filing a claim for refund may not be extended based on equitable considerations. (*U.S. v. Brockamp* (1997) 519 U.S. 347.)

[27] See, e.g., *Kabran*, *supra*, 2 Cal.5th 330, 339 [distinguishing various procedural limitations from a court's "fundamental jurisdiction" to hear and determine a case]; *Kurwa v. Kislinger* (2017) 4 Cal.5th 109, 117 [noting that the parties agreed to waive or toll the applicable statute of limitations]; *Lerner*, *supra*, at p. 397 [stating that the ability to waive certain defenses follows from the ruling in *Tyra*, *supra*, at p. 666]; *Farrell*, *supra*, at p. 630 [time element of claim was procedural in nature and analogous to a statute of limitation which can be waived or excused by estoppel].)

[28] The U.S. Tax Court has similarly held that, even where the jurisdictional issue arises from the untimely filing of a petition, jurisdiction cannot be conferred by the agreement, actions, or inactions of a party, and "[a] party cannot be estopped from claiming that [the court] does not have jurisdiction, for [the court] is entitled to determine on its own whether it has jurisdiction." (*Slattery v. Commissioner*, T.C. Memo. 1995-274.)

Appellant's Reliance on Exhaustion of Administrative Remedies Cases and OTA's Analysis and Application of *McKnight* to this Appeal

Appellant also argues that cases such as *Shuer v. San Diego* (2004) 117 Cal.App.4th 476, 486; *McKnight*, *supra*, 110 Cal.App.4th 978, 990-991; and *Hittle v. Santa Barbara County Employees Retirement Assn.* (1985) 39 Cal.3d 374, 384, support its argument. However, those cases involved the judicial doctrine of exhaustion of administrative remedies, rather than the issue of whether an administrative agency can act when it lacks statutory jurisdiction over the subject matter of an appeal. They, therefore, do not provide assistance to appellant.

However, *McKnight*, *supra*, merits further discussion. In *McKnight*, FTB audited J. H. McKnight Ranch, Inc.'s (McKnight's) 1990 return and issued a proposed assessment proposing additional tax. McKnight protested the assessment disputing the additional income and FTB denied McKnight's protest. McKnight subsequently paid the disputed tax and filed a claim for refund indicating that it was challenging the denial of its original protest. FTB offered to summarily deny the claim for refund so that McKnight could proceed to court, and McKnight accepted the offer. (*McKnight*, *supra*, at pp. 982-983, 989, 992.)

On appeal, FTB conceded that no tax was owed, but argued that it should be allowed to retain the excess tax because the court lacked jurisdiction to decide the matter on two grounds. (*McKnight*, *supra*, at pp. 982, 985-986, 990.) First, FTB argued that R&TC sections 19322 and 19382 set out a pleading requirement which required McKnight to have specifically pleaded the particular ground raised in its refund suit filed in court within the four corners of its claim for refund filed with FTB. (*Id*. at p. 986.) *McKnight* rejected this argument. It held that claims for refund are construed liberally and that the scope of the claim for refund hinged on whether the FTB had actual notice of the arguments raised, rather than being limited to the "four corners" of the underlying claim for refund. (*Id.* at pp. 986-990.) In considering this first argument, *McKnight* rejected FTB's argument that *Shiseido Cosmetics (America) Ltd. v. Franchise Tax Bd.* (1991) 235 Cal.App.3d 478 (*Shiseido*) required a ruling in FTB's favor. *McKnight* explained that, rather than supporting FTB's argument, *Shiseido* "stands for the unexceptional, and statutorily clear, requirement that a taxpayer must file a post-payment refund claim before proceeding with a suit for refund." (*McKnight*, *supra*, at p. 987.) As this requirement was unquestionably satisfied, *McKnight* found that *Shiseido* was inapplicable. (*Ibid.*) Thus,

McKnight reiterated the principle that a claim for refund is a jurisdictional prerequisite to the filing of a refund lawsuit.

McKnight then turned to FTB's second argument, which was that McKnight was "barred from recovering its unowed tax because it failed to pursue its refund claim to a merits-based denial." (*McKnight*, *supra*, at p. 990.) In raising this second argument, FTB argued that it denied McKnight's claim for refund "only after McKnight failed to provide information necessary to process the claim." (*Ibid.*) *McKnight* found that, having offered to deny McKnight's claim so McKnight could go to court, FTB could not then argue at court that its claim for refund denial was insufficient and that "McKnight was required to do more to exhaust his claims." (*Id.* at p. 992.) *McKnight* observed that there was a "critical distinction" between the facts before it and the facts in cases like *Transamerica.* (*Id.* at p. 993.) *McKnight* explained that, in *Transamerica*, the taxpayer argued that the Department of Insurance and BOE had erroneously advised it that a lower tax rate would apply, and *Transamerica* explained that it was the applicable statutes, not any representations by government agencies, that determined whether tax was due. (*Id*. at p. 992.) *McKnight* stated that, in contrast to the taxpayer in *Transamerica*, McKnight merely sought the application of estoppel "to defeat a *procedural barrier* to *the recovery of money never owed* . . . ." (*Id.* at p. 993, italics added.)

Here, in contrast to *McKnight*, there is no claim for refund, so the principle that claims for refund are construed liberally, with a focus on whether FTB received notice of the grounds for the claim for refund, is irrelevant. Moreover, this is not a case where, as a matter of substantive tax law, it has been shown that FTB collected money that was never due. As previously noted, appellant would not be owed a refund for the $800 minimum franchise tax paid for the 2013 and 2014 tax years if it were treated as a financial corporation instead of as a general corporation for these tax years. Rather than supporting appellant's case, *McKnight* illustrates the paramount importance of a claim for refund and reiterates the general principle that it is the R&TC, rather than the representations of FTB, that determine whether a refund is owed. Similarly, it is the statutes, not the representations of FTB, which provide OTA with jurisdiction to hear and decide appeals. OTA does not believe that *McKnight* would have estopped FTB if

McKnight had not filed a claim for refund or had McKnight failed to establish that it was indisputably owed a refund of taxes paid.[29]

Appellant's Assertion that It Would Have Appealed the NPACA

The NPACA was issued on August 7, 2018, and provided appellant until October 8, 2018, to file a protest with FTB. Appellant argues that, were it not for FTB's representations that it could file an appeal, it would have protested the NPACA with FTB and subsequently appealed it to OTA. However, appellant has not shown that it relied on FTB's representations when it chose not to protest the NPACA. Between February 2019, and March 2019, several months after the protest period for the NPACA had expired, appellant repeatedly questioned FTB's representations that the matter was a claim for refund for which no protest rights were available.[30] On March 26, 2019, FTB again advised that there were no protest rights, and appellant again objected.[31] Appellant's repeated questioning of FTB's representations in February and March 2019, casts doubt on its contention that it relied on these representations when it chose not to appeal the NPACA by the October 8, 2018 deadline.

The PS Declaration asserts that appellant did not protest (and subsequently appeal) the NPACA because it relied on FTB's representations. However, the declarant was not employed by appellant at the time the NPACA became final, and the declaration does not show how the declarant had personal knowledge that appellant relied on FTB's representations in choosing not to appeal the NPACA. Therefore, the PS Declaration does not establish that appellant relied on FTB in determining not to protest (and subsequently appeal) the NPACA.

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[29] To support its argument that equitable estoppel should apply, appellant also cites the nonprecedential BOE decisions, *Appeal of Ellis*, 2006 WL 2536278, and *Appeal of WI LV #2, A California Limited Partnership*, 2005 WL 3530189. As these appeals are nonprecedential, OTA gives them no weight. (See Cal. Code Regs., tit. 18, § 30504.) To the extent that appellant has cited other cases, or made other arguments, that OTA has not addressed in this Opinion, OTA has considered them and found that they do not alter the outcome of this appeal.

[30] See FTB's calls to appellant on February 12, 2019 (two calls), February 13, 2019, February 14, 2019, and February 21, 2019, and email to appellant on March 15, 2019. Appellant repeatedly questioned FTB's statement that the matter was a claim for refund, stated that it believed it would have protest rights, and requested that FTB close the audit by issuing NPAs (which would have provided protest rights) or otherwise provide appellant with protest rights. It is unclear why appellant believed it would have protest rights, as the record shows that FTB expressly informed appellant at the conference held on May 23, 2018, "you will not have any right to protest" because the issue needed to be "protest[ed] with [an] NPA," and an NPA would not be issued because there was no tax effect.

[31] Appellant requested a meeting with FTB attorneys to discuss the issue. The record does not show whether this meeting occurred.

Additionally, per the schedule provided with appellant's 2016 amended return, treating appellant as a financial corporation for the 2013 and 2014 tax years would have further *reduced* rather than *increased* appellant's NOL carryovers. This schedule shows that appellant would have used $28.6 million *more* NOLs had it filed as a financial corporation during the 2013 and 2014 tax years. Thus, the financial corporation issue was not an offset to FTB's NPACA, which reduced appellant's NOL carryovers for 2013 and 2014 by a total of $488,173. Here, filing as a financial corporation did not operate as an offset to FTB's reduction to appellant's NOL carryovers in the NPACA and did not have a favorable impact on appellant's California NOL carryovers until the 2015 tax year. This calls into question appellant's assertion that it would have protested and then appealed the NPACA to OTA for the 2013 and 2014 tax years.[32]

In any event, appellant has not asserted that OTA has jurisdiction over the NPACA (see, e.g., R&TC, § 19043.5(b) and Cal. Code Regs., tit. 18, § 30103(a)(2)), nor has appellant specifically asked OTA to determine the correct amount of its NOL carryover balance at the end of the 2013 and/or 2014 tax years based on appellant's claimed status as a financial corporation for these years.[33] Thus, the NPACA and the issue of appellant's NOL carryover balance at the end of the 2013 and/or 2014 tax years is not before OTA in this appeal.[34]

Balancing of Interests

As appellant recognizes, the determination of whether equitable estoppel applies requires a consideration of both the harm to appellant and the interests of the public and the government. (See, e.g., *Mansell*, *supra*, 3 Cal.3d 462, 496-497; *McKnight*, *supra*, 110 Cal.App.4th 978, 991.)

[32] OTA notes that it would be highly unusual for a taxpayer to appeal a proposed assessment on the basis that it owes more tax than was proposed by FTB. Similarly, it would be highly unusual for a taxpayer to appeal FTB's action on a NPACA asserting that further reductions to its carryover amounts (beyond those proposed by FTB) were warranted or required.

[33] Instead, appellant asserts that OTA has jurisdiction because of FTB's letter purporting to deny claims for refund for the 2013 and 2014 tax years and/or because it would be entitled to a refund of the $800 assigned value should it prevail on the financial corporation issue. In its equitable estoppel argument, appellant asserts that OTA should consider the substantive financial corporation issue (without asking OTA to determine its correct NOL carryover balance for the 2013 and 2014 tax years).

[34] In a footnote to one of its briefs, appellant argues that *Appeal of Peringer* (75-SBE-041) 1975 WL 3525 (*Peringer*), supports the proposition that a refund denial may be considered a Notice of Action on a protest of the NPACA. However, the purported refund denial here was issued nearly a year after the NPACA became final; therefore, by the time the purported refund denial was issued, the NPACA was no longer pending. Finally, in *Peringer*, *supra*, the taxpayer had filed a claim for refund for the year at issue, and the claim for refund had been deemed denied by the FTB, so its facts are materially different from the facts here.

As a preliminary matter, FTB asserts in its additional brief that "[u]nless a taxpayer's [tax] liability is increased based on [FTB's] actions, there is no detrimental reliance," citing *Appeals of Wesley and Couchman* (2005-SBE-002) 2005 WL 3106917 (*Wesley*). FTB argues that because appellant would be required to pay the $800 minimum tax for both the 2013 and 2014 tax years regardless of whether it is characterized as a general or financial corporation, appellant cannot establish detrimental reliance, or a relevant harm suffered as a result of FTB's actions. Appellant disagrees and provides an analysis of *Wesley* and other BOE cases such as *Appeal of Lopert* (82-SBE-011) 1982 WL 11689 and *Appeal of Campbell* (79-SBE-049) 1979 WL 4076.

OTA agrees with appellant's general conclusion that these cases primarily stand for the proposition that the alleged harm for equitable estoppel must result from FTB's conduct (rather than the underlying law) and that a "tax increase" is not the only potential harm that may satisfy the detrimental reliance element for equitable estoppel, or as applicable to the analysis here, for purposes of weighing the equities. However, to the extent that a taxpayer alleges harm other than a tax impact, OTA notes that it may not have jurisdiction to resolve or remedy the other alleged harm. (See, e.g., *Dauberger*, *supra* [OTA's power is generally limited to determining the correct amount of a taxpayer's California tax liability and OTA has no power to remedy any other real or imagined wrongs that taxpayers believed they may have suffered at the hands of FTB]; see also Cal. Code Regs., tit. 18, § 30104(d).) Thus, OTA will consider all harms alleged by appellant in weighing the equities here.

While there are significant equities favoring appellant's position, a weighing of the equities does not favor estoppel in this appeal. Equities favoring appellant include the fact it has undoubtedly incurred substantial expense in preparing this appeal and in responding to FTB's audit of the financial corporation issue for the 2013 and 2014 tax years. Moreover, appellant credibly contends that delay in resolving the financial corporation issue will cause it to suffer additional difficulties and expenses.[35]

[35] Appellant asserts that its status as a general or financial corporation will impact its tax attributes, which are important to investors and must be reported on its U.S. Securities and Exchange Commission filings. Appellant also assets that it will suffer the additional harm of paying substantial additional amounts in local taxes and county-administered property taxes, and that it could potentially be subject to inconsistent decisions across local jurisdictions from having the financial corporation issue decided by multiple courts lacking expertise in this area. While OTA finds appellant's asserted harms to be credible, OTA notes that it does not have jurisdiction to decide local tax or property tax matters except as provided in Regulation section 30101. Additionally, this asserted harm is not a direct result of FTB's actions, as FTB administers the income and franchise taxes, not local or property taxes, FTB did not make a determination with respect to appellant's local or property taxes, and appellant is not precluded from raising the financial corporation issue with the relevant local and county taxing authorities.

While these factors are significant, they are outweighed by several other factors. First, deciding this appeal would not provide appellant with the legal clarity and certainty it seeks. If OTA issued an advisory opinion on FTB's purported refund denial that attempted to decide an issue that does not impact whether appellant is legally entitled to a tax refund, OTA's decision on the issue would, at best, constitute nonbinding dicta. (See *Appeal of Aroya Investment I, LLC*, *supra*, fn. 1.) At worst, the Opinion could be considered an ultra vires act with no legal significance. (See *Water Replenishment Dist. of Southern California v. City of Cerritos* (2012) 202 Cal.App.4th 1063, 1072 ["An agency that exceeds the scope of its statutory authority acts ultra vires and the act is void"]; see also *Kabran*, *supra*, 2 Cal.5th 330, 339 ["[A]n act beyond a court's jurisdiction in the fundamental sense is null and void *ab initio*" (i.e., void from the beginning)].)

Second, it appears that appellant has an appeal right that would provide a vehicle for OTA to review the financial corporation issue without taking the extraordinary measure of issuing an advisory opinion that is not permitted by law. On December 18, 2018, appellant filed an amended California tax return for the 2016 tax year revising its NOL carryover balance, on the ground that appellant should be treated as a financial corporation. In this amended return, appellant asserted that it should be permitted to file as a financial corporation not only for the 2016 tax year, but also for the 2013, 2014, and 2015 tax years, and revised its NOL carryovers for all four of these tax years accordingly. At the oral hearing, the parties indicated that FTB has issued an NPACA to appellant for the 2016 tax year, that appellant has protested the NPACA, and the NPACA is now in protest with FTB. OTA notes that appellant will be able to appeal the Notice of Action on the NPACA once FTB resolves appellant's protest of the NPACA for the 2016 tax year. (See R&TC, §§ 19043.5(b), 19045(a); Cal. Code Regs., tit. 18, § 30103(a)(2).) The apparent existence of such a legal remedy weighs against the application of the equitable remedy of estoppel.[36]

Third, whether or not appellant would have appeal rights is a legal issue, rather than a factual issue, and appellant was represented by experienced tax advisors, including its own in-house tax department staff, and an attorney and director of a major accounting firm, and these advisors had knowledge of the underlying facts. (See *Jordan*, *supra*, 148 Cal.App.4th 1487,

[36] In this respect, this appeal differs from cases such as *Driscoll v. City of Los Angeles* (1967) 67 Cal.2d 297, 310, in which a party's right to relief on a fundamental issue would be unavailable unless equitable estoppel applied.

1497.) At the oral hearing, appellant argued that appellant's representative, BM, worked for an accounting firm, was not representing appellant as an attorney, and was not permitted to "practice law in that capacity." However, OTA is not persuaded by appellant's arguments here. BM was both an attorney and director of a major accounting firm during the relevant time period. He was acting as appellant's representative during the audit of appellant's 2013 and 2014 tax years and is an experienced attorney and tax practitioner. Appellant had the resources and ability to review the R&TC relating to claims for refund (e.g., R&TC sections 19322 through 19324), and the relevant case law regarding jurisdiction over claims for refund and evaluate the legal risks of asking OTA to decide a purported claim for refund denial when claims for refund had not been filed.

Conclusion

In sum, OTA does not have statutory jurisdiction to consider appellant's appeal because appellant has not filed a claim for refund for the 2013 and 2014 tax years at issue in this appeal. The filing of a claim for refund is a statutory prerequisite to OTA's fundamental jurisdiction under R&TC section 19324, which cannot be established by estoppel. In addition, equitable estoppel is not appropriate because appellant claims reliance on a legal representation, rather than a representation of fact. Finally, while there are significant equities favoring appellant's position, a weighing of the equities does not favor estoppel in this appeal.

HOLDING

OTA does not have jurisdiction to decide the substantive issue of whether appellant was a financial corporation for the 2013 and 2014 tax years.

DISPOSITION

OTA does not have jurisdiction over this appeal.[37]

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

We concur:

DocuSigned by:
Josh Aldrich
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Josh Aldrich
Administrative Law Judge

DocuSigned by:
Asaf Kletter
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Asaf Kletter
Administrative Law Judge

Date Issued: 6/22/2023

[37] In light of this disposition, OTA has no authority to consider, and will not hold an oral hearing on, the substantive merits of this appeal involving the financial corporation issue. However, this does not prevent appellant from raising the financial corporation issue in any future appeal where OTA has jurisdiction to determine the issue.