

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:	)	OTA Case No. 240917346
K. BERNHOFT AND	)	
Y. BERNHOFT	)	
	)	
	)	
	)	

OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellants: K. Bernhoft

For Respondent: Jeffrey Gates, Attorney

S. KIM, Administrative Law Judge: On February 17, 2026, the Office of Tax Appeals (OTA) issued an Opinion sustaining the action of respondent Franchise Tax Board (FTB) denying appellants' claim for refund of \$9,491 for the 2019 tax year. In the Opinion, OTA held the claim for refund was barred by the statute of limitations.

On March 18, 2026, appellants timely filed a petition for rehearing (petition) with OTA under Revenue and Taxation Code (R&TC) section 19334 on the basis that the Opinion was contrary to law. Upon consideration of appellants' petition, OTA concludes that the ground set forth in this petition does not constitute a basis for granting a new hearing.

OTA will grant a rehearing where one of the following grounds for a rehearing exists and materially affects the substantial rights of the party seeking a rehearing: (1) an irregularity in the appeal proceedings which occurred prior to issuance of the Opinion and prevented fair consideration of the appeal; (2) an accident or surprise, occurring during the appeal proceedings and prior to the issuance of the Opinion, which ordinary caution could not have prevented; (3) newly discovered evidence, material to the appeal, which the party could not have reasonably discovered and provided prior to issuance of the Opinion; (4) insufficient evidence to justify the Opinion; (5) the Opinion is contrary to law; or (6) an error in law in the OTA appeals hearing or proceeding. (Cal. Code Regs., tit. 18, § 30604(a)(1)-(6); *Appeal of Shanahan*, 2024-OTA-040P.)

The "contrary to law" standard of review shall involve a review of the Opinion for consistency with the law. (Cal. Code Regs., tit. 18, § 30604(b).) The question of whether the

Opinion is contrary to law is not one which involves a weighing of the evidence, but instead, requires a finding that the Opinion is “unsupported by any substantial evidence”; that is, the record would justify a directed verdict against the prevailing party. (*Appeal of Martinez Steel Corporation*, 2020-OTA-074P.) This requires a review of the Opinion in a manner most favorable to the prevailing party and indulging in all legitimate and reasonable inferences to uphold the Opinion if possible. (*Ibid.*) The question before OTA on a petition for rehearing does not involve examining the quality or nature of the reasoning behind OTA’s Opinion, but whether that Opinion can be valid according to the law. (*Ibid.*) A rehearing may be granted when, examining the evidence in the light most favorable to the prevailing party (here, FTB), with all legitimate inferences to uphold the Opinion, the petitioning party (here, appellants) establishes that the Opinion incorrectly stated or applied the law and, therefore, is contrary to law. (*Appeal of Shanahan*, 2024-OTA-040P.)

The Opinion held that appellants’ claim for refund was barred by the statute of limitations.

Here, appellants argue that the Opinion incorrectly applied R&TC section 19306(a), which provides that no credit or refund shall be allowed after the expiration of the statute of limitations periods “unless before the expiration of that period [FTB] allows a credit, makes a refund, or mails a notice of proposed overpayment on a preprinted form prescribed by [FTB].” Appellants assert that they received “Unclaimed Nonwage Withholding Credits” notices prior to the expiration of the statute of limitations period, and that these notices constitute notices of proposed overpayments. Therefore, appellants argue that the Opinion is contrary to law in finding that the claim for refund was barred by the statute of limitations.

However, a “notice of proposed overpayment” is a term of art to describe FTB Form 5851 - Computation of Proposed Overpayment (NPO). (See FTB’s Manual of Audit Procedures, § 13.4.9.)¹ An NPO is the form prescribed by FTB to be used in situations where an audit results in the issuance of a Notice of Proposed Assessment (NPA) and a proposed overassessment,² and is issued (along with a Consent Letter) to inform the taxpayer that the proposed overassessment will be offset to the balance owing. (*Ibid.*; see also FTB 985 Publication³.) A notice of Unclaimed Nonwage Withholdings Credit is not a notice of proposed

¹ <https://www.ftb.ca.gov/tax-pros/procedures/manual-of-audit-procedures/chapter-13.pdf>, last accessed 6/25/26.

² Such a situation may occur when an audit of an individual taxpayer results in an NPA for one tax year and an overassessment for another tax year, or when an audit includes both corporation and individual taxpayers and results in an NPA for one and an overassessment for another.

overpayment because it is not used for the same prescribed purpose as an NPO (i.e., a notice of Unclaimed Nonwage Withholdings Credit is used to inform a taxpayer that the taxpayer may be entitled to credits not claimed on the taxpayer's California income tax return for the account and tax year shown on the notice).

Accordingly, OTA finds that appellants have not established that the Opinion was contrary to law such that a rehearing should be granted. Consequently, the petition for rehearing is denied.

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Steven Kim
Administrative Law Judge

We concur:

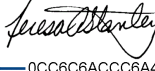
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Hans Famularo
Administrative Law Judge

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Teresa A. Stanley
Administrative Law JudgeDate Issued: 8/6/2026

³ <https://www.ftb.ca.gov/forms/misc/985.html>, last accessed 6/25/26.