

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:) OTA Case No. 18011449
)
JACK ATKINS AND) Date Issued: April 4, 2019
YVONNE DARLING-ATKINS)
)
_____)

OPINION

Representing the Parties:

For Appellants: Kenneth Curry

For Respondent: Andrew Amara, Tax Counsel III

A. ROSAS, Administrative Law Judge: Under California Revenue and Taxation Code section 19324,¹ appellants Jack Atkins and Yvonne Darling-Atkins (collectively, the Atkinses) appeal respondent Franchise Tax Board’s (FTB) action denying their claim for refund of \$2,238 for the 2014 tax year.

Administrative Law Judges Sara Hosey, Jeffrey Angeja, and Alberto Rosas held an oral hearing in this matter on October 30, 2018, in Sacramento, California. Prior to concluding the hearing, the panel kept the hearing record open to allow the parties an opportunity to file post-hearing briefs. After the parties filed their post-hearing briefs, the record was closed on January 15, 2019, and this matter was submitted for decision.

ISSUE

Did FTB properly impose the demand penalty? If so, did the Atkinses establish reasonable cause to abate it?

¹ Statutory references are to the California Revenue and Taxation Code.

FACTUAL FINDINGS

The Request for Tax Return for Tax Year (TY) 2013

1. The Atkinses did not file a California income tax return for TY 2013 by the due date.
2. On January 21, 2015, FTB issued to Ms. Darling-Atkins a Request for Tax Return for TY 2013, requesting a reply by February 25, 2015.² She did not reply by the due date.
3. On March 23, 2015, FTB issued to Ms. Darling-Atkins a Notice of Proposed Assessment (NPA) for TY 2013. The NPA indicated it would become final unless FTB received her tax return or her protest by May 22, 2015.
4. On or about April 12, 2015, the Atkinses filed their 2013 California income tax return.

The Demand for Tax Return for TY 2014

5. The Atkinses made estimated California tax payments for TY 2014 totaling \$20,000.
6. They did not file a California income tax return for TY 2014 by the due date.
7. On December 21, 2015, FTB issued to Ms. Darling-Atkins a Demand for Tax Return for TY 2014, requesting a reply by January 20, 2016.³ She did not reply by the due date.
8. On February 22, 2016, FTB issued to Ms. Darling-Atkins an NPA for TY 2014. The NPA proposed a demand penalty (\$2,238.50⁴) and indicated it would become final unless FTB received her tax return or her protest by April 22, 2016. Ms. Darling-Atkins neither sent her 2014 tax return nor filed a protest by this date.

The Protest, Refund Claim, and Appeal

9. Although FTB issued the TY 2014 NPA only to Ms. Darling-Atkins, the Atkinses filed a joint protest. FTB responded to this protest by granting the Atkinses additional time to file their 2014 tax return. But they did not file by the May 27, 2016 deadline. FTB issued to Ms. Darling-Atkins a Notice of Action dated August 1, 2016; FTB affirmed the demand penalty.

² A reply to the Request for Tax Return would require Ms. Darling-Atkins either (1) file a 2013 California income tax return; (2) send FTB a copy of her previously filed 2013 California income tax return; or (3) explain why she did not have a requirement to file a 2013 California income tax return.

³ A reply to the Demand for Tax Return would require Ms. Darling-Atkins either (1) file a 2014 California income tax return; (2) send FTB a copy of her previously filed 2014 California income tax return; or (3) explain why she did not have a requirement to file a 2014 California income tax return.

⁴ This penalty amount equals 25% of the \$8,954.00 tax amount determined in the NPA for TY 2014.

10. In October 2016, the Atkinses filed a return for TY 2014, showing a total tax liability of \$9,514, estimated payments of \$20,000, and an overpayment of \$10,486. FTB processed the return and applied the claimed overpayment toward the demand penalty. Thus, FTB, instead of paying a refund of the overpaid tax (\$10,486) reported on the return, refunded approximately \$8,247 after accounting for the \$2,238.50 demand penalty.
11. On December 19, 2016, the Atkinses filed a refund claim for the penalty amount.
12. In a Notice of Action Upon Taxpayer’s Claim for Refund dated June 20, 2017, FTB denied the refund claim. The Atkinses then filed this timely appeal.

DISCUSSION

If any taxpayer fails or refuses to make and file a return upon FTB’s notice and demand, then, unless the failure is due to reasonable cause and not willful neglect, section 19133 provides that FTB may add a notice and demand penalty. Although section 19133 provides FTB with the discretion to decide whether to add this penalty, it was formerly “the practice of [FTB] to assess the notice and demand penalty against all taxpayers who fail to respond to the notice and demand letter, without consideration of their past filing history.” (Initial Statement of Reasons for the Adoption of Regulation 19133 at p. 1 [submitted with FTB’s Post-Hearing Brief].) The penalty was “perceived by some as a harsh penalty” (*Id.* at p. 2.)

To remedy this perception, FTB proposed a regulation under section 19133. “Under the proposed regulation, [FTB] defines a repeat nonfiler as an individual who has received a proposed assessment of tax after receiving and failing to respond to a request for tax return or a demand for tax return *within the previous four years.*” (Initial Statement of Reasons for the Adoption of Regulation 19133 at p. 2, emphasis added.) The regulation was adopted with an operative date of December 23, 2004. (California Code of Regulations, title 18, section 19133.)⁵ The regulation states that, for individuals, FTB will only impose the notice and demand penalty if:

- (1) the taxpayer fails to timely respond to a current Demand for Tax Return in the manner prescribed, and
- (2) FTB has proposed an assessment of tax under the authority of section 19087(a), after the taxpayer failed to timely respond to a Request for Tax Return or a Demand for Tax Return in the manner prescribed, *at any time during the four-taxable-year period preceding the taxable year for which the current Demand for Tax Return is issued.*

⁵ Regulatory references are to sections of title 18 of the California Code of Regulations.

(Reg. § 19133(b), emphasis added.)

We asked the parties: what does “at any time during” mean? FTB argues that “during” means “for.” The Atkinses argue that we should give the word “during” its plain, common-sense meaning: “during” means during. To determine which meaning applies, we must first decide whether the language at issue is ambiguous or unambiguous.

On the one hand, if the reviewing adjudicative body concludes that the language at issue is ambiguous, this conclusion may require “giving *deference* to the determination of the agency *appropriate* to the circumstances of the agency action.” (*Yamaha Corp. of America v. State Board of Equalization* (1988) 19 Cal.4th 1, 8, emphasis in original.) When dealing with ambiguous texts, “[a] court is more likely to defer to an agency’s interpretation of its own regulation than to its interpretation of a statute, since the agency is likely to be intimately familiar with regulations it authored and sensitive to the practical implications of one interpretation over another.” (*Id.* at p. 12, internal quotes omitted.)

On the other hand, if the reviewing adjudicative body concludes that the language at issue is unambiguous, it should give no deference to the agency’s contrary interpretation; nor, in those circumstances, should the adjudicative body make use of any other extrinsic aid to interpretation. In the judicial interpretation of a statute, deference to the agency’s opinion comes into play only if the language is ambiguous. (*Bonnell v. Medical Bd. of Calif.* (2003) 31 Cal.4th 1255, 1264-1265; *Department of Corrections & Rehabilitation v. State Personnel Bd.* (2016) 247 Cal.App.4th 700, 708 [court gives no deference to agency’s clearly erroneous interpretation of an unambiguous statute].)

For the reasons stated below, we conclude that the language at issue is unambiguous. Accordingly, we turn to its plain meaning.

Courts often use the plain meaning rule when interpreting a statutory term. For example, the Supreme Court of California stated that “[w]ords used in a statute or constitutional provision should be given the meaning they bear in ordinary use.” (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735.) “If the language is clear and unambiguous there is no need for construction, nor is it necessary to resort to indicia of the intent of the Legislature (in the case of a statute) or of the voters (in the case of a provision adopted by the voters).” (*Ibid.*) Additionally, the Ninth Circuit Court of Appeals has stated that “ ‘[i]f the statutory language is unambiguous, its plain meaning controls unless Congress has “clearly expressed” a contrary legislative intention.’ ”

(*MK Hillside Partners v. Commissioner of Internal Revenue* (9th Cir. 2016) 826 F.3d 1200, 1204, quoting *Price v. Commissioner* (9th Cir. 1989) 887 F.2d 959, 963-964, citation omitted.)

“It is well settled that ‘[w]hen construing a regulation or statute, it is appropriate first to examine the regulatory language itself to determine its plain meaning [And] if the regulatory language is clear and unambiguous, the inquiry ends with the plain meaning.’ ” (*General Mills, Inc. v. United States* (Fed.Cl. 2015) 123 Fed.Cl. 576, 584, quoting *Roberto v. Dep’t of the Navy* (Fed.Cir. 2006) 440 F.3d 1341, 1350.) An adjudicative body must “give the regulatory language its plain, commonsense meaning. If possible, we must accord meaning to every word and phrase in the regulation, and we must read regulations as a whole so that all of the parts are given effect.” (*Butts v. Board of Trustees of California State University* (2014) 225 Cal.App.4th 825, 835.)

As we try to accord meaning to every word and phrase in regulation 19133, we look to the United States Supreme Court for guidance. In a criminal case, the United States Supreme Court looked to the plain meaning of the word “during” when it held that a defendant carried explosives “during” the commission of the underlying felony. (*United States v. Ressam* (2008) 553 U.S. 272.) The court stated, “There is no need to consult dictionary definitions of the word ‘during’ in order to arrive at the conclusion that respondent engaged in the precise conduct The term ‘during’ denotes a temporal link; that is surely the most natural reading of the word as used in the statute.” (*Id.* at pp. 274-275.)

We agree. The United States Supreme Court did not think “during” was a term of art in criminal law. Similarly, it is not a term of art in tax law. The word “during” and the phrase “at any time during” are not specialized tax terms. “During” and “at any time during” denote a temporal link.

There is additional support for concluding that the regulation’s use of the term “during” denotes a temporal link. For instance, Regulation 19133(d), Example 2,⁶ and the Initial Statement of Reasons for the Adoption of Regulation 19133 all refer to the period at issue as being “within the previous four years.” Giving meaning to every word and phrase in the regulation, we conclude that this phrase (“within the previous four years”) also denotes a

⁶ As stated in section 19133(d), the examples are only intended to “illustrate the provisions of this regulation.” Although Example 2 supports our conclusion that the term “during” denotes a temporal link, we decline to defer to Example 2’s illustration of the regulation to the extent that this illustrative example is inconsistent with the plain, common-sense meaning of the word “during.”

temporal period. In fact, regulation 19133(d), Example 2, and the Initial Statement of Reasons for the Adoption of Regulation 19133 do not use the phrase “for the previous four years.”

If we interpreted “during” to mean something else, this would constitute rewriting the regulation “to make it conform to a presumed intention which is not expressed.” (*Seaboard Acceptance Corp. v. Shay* (1931) 214 Cal. 361 365.) Adjudicative bodies “should presume that the statute says what it means.” (*Wetzler v. FDIC* (2d Cir. 1994) 38 F.3d 69, 73.) The same can be said about a regulation; it should say what it means.

Applying FTB’s regulation to the facts of this case, the 2014 calendar year is “the taxable year for which the current Demand for Tax Return is issued” within the meaning of regulation 19133(b)(2). Accordingly, for purposes of the temporal period, we focus on the four-taxable-year period beginning January 1, 2010, and ending December 31, 2013. Next, we analyze whether FTB issued the prior NPA (for TY 2013) at any time *during* the four-taxable-year period beginning on January 1, 2010, and ending on December 31, 2013. It did not. FTB issued the prior NPA on March 23, 2015.

Consequently, this means that the Atkinses will avoid the demand penalty—although they are multiyear nonfilers.⁷

Therefore, based on the plain, common-sense meaning of the phrase “at any time during” in regulation 19133—that is, that “during” means during—FTB improperly imposed the demand penalty.

HOLDING

FTB improperly imposed the demand penalty for the 2014 tax year.

DISPOSITION

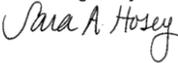
We reverse FTB’s action in full.

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Alberto T. Rosas
Administrative Law Judge

⁷ Based on the evidence, there is no doubt that the Atkinses are multiyear nonfilers. First, they did not file California income tax returns for either TY 2013 or TY 2014 by the respective due dates. Then, after FTB issued a Request for Tax Return for TY 2013 and a Demand for Tax Return for TY 2014, they did not reply by the respective due dates. However, we make no determination of whether the failure to make and file the 2014 return, upon FTB’s Demand for Tax Return, was due to reasonable cause and not willful neglect.

We concur:

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Sara A. Hosey
Administrative Law Judge

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Jeffrey G. Angeja
Administrative Law Judge