OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	) OTA Case No. 18042634
JACOB A. ELY	) Date Issued: August 14, 2019

OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellant: Jacob A. Ely

For Respondent: Michael J. Cornez, Tax Counsel V

T. STANLEY, Administrative Law Judge: On March 18, 2019, we issued an Opinion finding that the Franchise Tax Board (FTB) improperly imposed a demand-to-file penalty (found in Revenue and Taxation Code (R&TC) section 19133) of $702, for the 2015 taxable year. Pursuant to R&TC section 19334, FTB petitioned for a rehearing. Upon consideration of FTB's petition according to the standards expressed in *Appeal of Do* (2018-OTA-002P) and California Code of Regulations, title 18, section 30604(a)-(e), we conclude that the grounds set forth do not constitute good cause for a new hearing.

The petition alleges a single ground for a rehearing; the Opinion is contrary to law. (See Cal. Code Regs., tit. 18, § 30604(e); see also *Appeal of Do, supra*.) We find that the Office of Tax Appeals applied the law correctly, and therefore, FTB has not shown that it is entitled to a rehearing.

DISCUSSION

FTB alleges that the Office of Tax Appeals issued an Opinion in this appeal that is contrary to law, based on an incorrect legal definition of "regulation," "erroneous rules of regulatory construction," and improper rejection of FTB's "long-standing" interpretation and application of California Code of Regulations, title 18, section 19133 (the Regulation). Specifically, FTB points to a claimed ambiguity between subdivision (b)(2) and Example 2 of

the Regulation, and asserts that we must give deference to its interpretation of the Regulation. To do otherwise, FTB claims, would potentially create an absurd result.

In our Opinion, we did not specifically hold that the Regulation and its example are ambiguous. FTB points to footnote 7 of the Opinion, in which we discuss the relevance of Example 2 of the Regulation, for its assertion that we found an ambiguity in the Regulation. Example 2 of the Regulation expressly states that it is intended only for illustrative purposes, not for the purpose of creating a new or different interpretation of the main body of the Regulation. Example 2, FTB claims, constitutes its interpretation of the Regulation. While courts have held that an agency's interpretation of its own regulation is entitled to deference (see *Auer v. Robbins* (1997) 519 U.S. 452; *Stinson v. United States* (1993) 508 U.S. 36), that deference is not unlimited. If the agency's interpretation is plainly erroneous or inconsistent with a regulation that is unambiguous, it is not entitled to deference. (*Stinson v. United States, supra,* at p. 45; *Bowles v. Seminole Rock & Sand Co.* (1945) 325 U.S. 410, 414.) The agency's interpretation becomes only one of several tools to interpret the regulation, but independent review is required. (*Yamaha Corp. of America v. State Bd. of Equalization,* (1998) 19 Cal.4th 1, 7-8; *Agnew v. State Bd. of Equalization* (1999) 21 Cal.4th 310, 322.) In this appeal, we decline to give deference to an interpretation that is plainly erroneous and inconsistent with the unambiguous body of the Regulation.

FTB asserts that we should apply the "plain intent" of the Regulation, rather than the plain language. For that proposition, FTB cites to *Dept. of Industrial Relations v. Occupational Safety and Health Appeals Bd.* (2018) 26 Cal.App.5th 93. In that case, the court determined that the word "outdoor" was susceptible of more than one meaning. Therefore, "the plain text of the regulation was not helpful in determining regulatory intent." (*Id.,* at p. 100.) Thus, the court looked at the agency's interpretation of the regulation containing that word, noting that "[a]n agency's interpretation of a regulation is contextual and is only one among several tools available to the court . . . ." (*Id.* at p. 100, See also *Yamaha Corp. of America v. State Bd., supra,* at p. 7.) In this appeal, however, the word "during" is not susceptible of more than one meaning. Moreover, consideration of agency interpretation is not the same as the "plain intent" standard that FTB urges us to accept.

In the Opinion in this appeal, we did not find Example 2 to create an ambiguity in the Regulation. Example 2 of the Regulation expressly states that it is illustrative. It does not

correctly apply the plain meaning in the body of the Regulation. The body of the Regulation has no ambiguity. The word "during" used in the Regulation is commonly used to mean "from the beginning to the end of (a particular period)" or "at some time between the beginning and the end of (a period). (Cambridge Dictionary Online <dictionary.cambridge.org/us/dictionary/english/during> [as of July 16, 2019].)

A fundamental rule of statutory construction is that we must "examine the actual language of the statute." (*Draeger v. Reed* (1999) 69 Cal.App.4th 1511, 1520, citing *Halbert's Lumber Inc. v. Lucky Stores, Inc.* (1992) 6 Cal.App.4th 1233, 1238-1239.) In doing so, we "must accord meaning to every word and phrase in the regulation . . . ." (*Butts v. Bd. of Trusteees of Cal. State University* (2014) 225 Cal.App.4th 825, 835.) Furthermore, only if the plain meaning of the Regulation is unclear, do we need to proceed to the second step in construing the Regulation by looking to legislative history. (*Draeger v. Reed, supra*.) The phrase in the Regulation "at any time during the four-taxable-year period preceding the taxable year for which the current Demand for Tax Return is issued" means that FTB's notice and demand must occur sometime between the beginning of the four-taxable-year period that precedes the taxable year at issue (the current year) to the end of that four-taxable-year period.

Where the common usage is clear upon application of the fundamental rule of statutory construction (plain language), as here, we decline to apply FTB's asserted "plain intent" to reach a conclusion that the Regulation means something other than what it expressly states.

FTB further asserts that applying the plain language in the Regulation might produce an absurd result. The opposite is true. As FTB noted in its brief, the intent of the Regulation was to avoid the harsh and severe result that might occur if the law were applied strictly to first-time nonfilers. (Cal. Reg. Notice Register 2004, No. 17-Z, p. 504.) Were we to interpret the Regulation by replacing "during" with "for," an absurd result might occur when the FTB issues its demand notice followed by a Notice of Proposed Assessment (NPA) in a year subsequent to the year at issue (the current year). That scenario would not provide the sort of notice FTB intended when it issued the Regulation, which is to give individuals the opportunity to alter their filing behavior. For example, a demand "for" a year prior to 2015 could be issued well after taxable year 2015, resulting in the current year's notice potentially being issued before the prior

year's notice.[1] FTB could issue a notice "for" a prior year and penalize an individual who had not yet received the notice for a prior year's failure before the taxpayer's noncompliance with regard to the current taxable year at issue. This absurd result does not comport with the intent of the Regulation, which was to gain compliance by giving notice and an opportunity for the taxpayer to correct filing behavior *before* applying the penalty. We find the Regulation itself to be unambiguous, and therefore, we do not need to consider whether deference to FTB's alleged interpretation is appropriate. Regulation section 19133 is unambiguous – its plain language says what it means. Deferring to the agency's interpretation here would permit FTB to "create *de facto* a new regulation . . . ." which we decline to do. (See *Christensen v. Harris County* (2000) 529 U.S. 576, 588 [rejecting deference to an agency letter that was intended to interpret the agency's regulation].) The Regulation is unambiguously written and, therefore, the Opinion was not contrary to law. FTB's petition for rehearing is hereby denied.

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Teresa A. Stanley
Administrative Law Judge

We concur:

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Douglas Bramhall
Administrative Law Judge

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Neil Robinson
Administrative Law Judge

[1] Where no return is filed, FTB could potentially issue a demand 20 or more years after the current taxable year, as there would be no time limit to issue the requisite demand and NPA. (See R&TC, § 19057.)