OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	) OTA Case No. 18053229
RONNA J. ROBERTSON	)
	) Date Issued: April 23, 2019
	)
	)
	)

OPINION

Representing the Parties:

For Appellant: Ronna J. Robertson

For Respondent: Andrew Amara, Tax Counsel III

J. ANGEJA, Administrative Law Judge: Pursuant to California Revenue and Taxation Code (R&TC) section 19045, Ronna J. Robertson (appellant) appeals an action by respondent Franchise Tax Board (FTB) in proposing to assess additional tax of $902 and a $619 demand penalty for the 2015 tax year.

Appellant waived her right to an oral hearing and therefore the matter is being decided based on the written record.

ISSUES

1. Whether appellant has established that she did not have a California filing requirement for the 2015 tax year, and if not, whether appellant has established error in FTB's tax assessment.
2. Whether appellant is entitled to abatement of the proposed demand penalty of $619 for the 2015 tax year.

FACTUAL FINDINGS

1. FTB's search of the Lexis/Nexis public records database for nationwide addresses for appellant revealed only California addresses since 1980. Appellant has used a California Post Office Box in Brea, California, since 2002.

2. Appellant did not file a timely California return for the 2015 tax year. FTB received information from California's Employment Development Department (EDD) indicating that appellant received $60,173.36 from her employer United Airlines, which was sufficient income to require the filing of a 2015 return. The information also shows that United Airlines withheld California state tax from appellant's pay for 2015.
3. FTB issued a "Demand for Tax Return" (Demand) to appellant dated April 4, 2017, requesting that, by May 10, 2017, appellant file a 2015 return, provide FTB with a copy of her return if already filed, or explain why she was not required to file a 2015 return. The Demand warned that, if appellant did not timely respond, FTB would impose a demand penalty based on 25 percent of appellant's total tax without taking into consideration any timely payments.
4. Appellant also failed to timely file a return for 2014. On February 24, 2016, FTB issued a Demand for appellant to file a 2014 return by March 30, 2016. Appellant did not timely respond to that Demand, so FTB issued a Notice of Proposed Assessment (NPA) to appellant for that year on April 25, 2016.
5. Appellant responded to the April 4, 2017 Demand by letter dated April 29, 2017, in which she questioned the validity of the Demand but did not otherwise provide any of the information requested by the Demand.
6. FTB issued an NPA for appellant's 2015 tax year dated July 3, 2017, in which FTB proposed estimated tax of $902, a delinquent filing penalty of $225.50, a demand penalty of $619, a filing enforcement fee of $84, plus interest.[1]
7. Appellant responded by letter dated August 21, 2017, in which she again questioned the validity of the Demand but did not otherwise provide any information.
8. On January 19, 2018, FTB issued a Notice of Action sustaining the NPA. This timely appeal followed.

[1] The delinquent filing penalty, the filing enforcement fee, and interest are not at issue in this appeal, and thus we will not further address them.

DISCUSSION

Issue 1: Whether appellant has established that she does not have a California filing requirement for the 2015 tax year, and if not, whether appellant has established error in FTB's tax assessment.

California's personal income tax is imposed on the entire taxable income of a California resident. (R&TC, § 17041(a).) Every individual subject to this tax with income over a specified amount must file a tax return with FTB. (R&TC, § 18501(a).) In the case of a single individual under the age of 65, with no dependents, the filing threshold for 2015 was adjusted gross income of at least $13,005, or gross income of at least $16,256. (R&TC, § 18501(a), (b).)

In the case of a failure to file a return, FTB may issue a proposed tax assessment based on an income estimate and may make such estimate using any available information. (R&TC, § 19087(a).) FTB's proposed assessment is presumed correct once FTB shows a reasonable and rational basis for the estimation. (*Todd v. McColgan* (1949) 89 Cal.App.2d 509; *Appeal of Myers* (2001-SBE-001) 2001 WL 37126924.) Here, appellant failed to file a return, and FTB estimated appellant's income and tax liability for the 2015 tax year based on wage and California tax withholding information provided by the EDD. Therefore, we find that FTB's income estimate and tax determination was both reasonable and rational.

On appeal, appellant argues that FTB's proposed assessment violates United States Code, title 49, section 40116(f)(2)[2] and R&TC section 17951(b)(4). The federal statute allows a state to tax the airline income of nonresident airline employees under a specified condition, while R&TC section 17951(b)(4) excludes such income of nonresident airline employees from state tax. The exclusion in R&TC section 17951(b)(4) only applies to nonresidents, and does not apply to California residents. Thus, the resolution of this issue turns upon whether appellant has established that she is not a California resident.

R&TC section 17014 describes "resident," and the purpose of this definition "is to include in the category of individuals who are taxable upon their entire net income, regardless of whether derived from sources within or without the State, all individuals who are physically present in this State enjoying the benefit and protection of its laws and government, except

[2] In relevant part, that section provides that the pay of an employee of an air carrier having regularly assigned duties on aircraft in at least two states is subject to the income tax laws of only: 1) the state in which the employee resides; and 2) the state in which the employee earns more than 50 percent of the pay received by the employee from the carrier. (49 U.S.C. § 40116(f)(2).)

individuals who are here temporarily . . . .” (*Whittell v. Franchise Tax Bd.* (1964) 231 Cal.App.2d 278, 285, fn. 3.)

In *Noble v. Franchise Tax Bd.* (2004) 118 Cal.App.4th 560, 569, the court found that there existed overwhelming facts of California contacts which demonstrated that the taxpayers were “physically present in this State enjoying the benefit and protection of its laws and government . . . [citation].” In *Noble,* one of the facts showing the taxpayers’ California contacts was that “they maintained a post office box in California.” (*Ibid*.)

Here, appellant claims that she has not been a California resident since 2002, but appellant has provided no evidence to corroborate the assertion (e.g., an out-of-state driver’s license, or proof of renting or purchasing a home outside this state). To the contrary, appellant has used only California mailing addresses since 1980, including a California Post Office Box in Brea, California, since 2002. Appellant’s Post Office Box in this state creates a reasonable inference that appellant was a California resident. Appellant has provided no evidence or argument in support of her assertion that she was not a resident of California in 2015. Based on the foregoing, we conclude that appellant has failed to establish that she was not a resident of California for the 2015 tax year. Likewise, appellant has provided no evidence to establish that FTB’s determination is erroneous. Therefore, we find that appellant was a California resident for the 2015 tax year, and that she failed to establish error in FTB’s tax assessment.

Issue 2: Whether appellant is entitled to abatement of the proposed demand penalty of $619 for the 2015 tax year.

California imposes a penalty for the failure to file a return or to provide information upon FTB’s demand to do so, unless reasonable cause prevented the taxpayer from responding to the demand. (R&TC, § 19133.) For individual taxpayers, FTB may only impose a demand penalty if a taxpayer fails to respond to a current Demand, and FTB issues an NPA under the authority of R&TC section 19087(a), after the taxpayer failed to timely respond to a Request for Tax Return (Request) or Demand, at any time during the four taxable years preceding the year for which the current Demand is being issued. (Cal. Code Regs., tit. 18, § 19133(b).) The demand penalty is designed to penalize the failure of a taxpayer to respond to a notice and demand, and not a taxpayer’s failure to pay the proper tax. (*Appeal of Bryant* (83-SBE-180) 2019 WL 1187161; *Appeal of Hublou* (77-SBE-102) 1977 WL 4093.)

Pursuant to R&TC section 19503, FTB has the authority to prescribe rules and regulations necessary to enforce the Personal Income Tax Law. FTB exercised that authority in promulgating Regulation section 19133, which states how FTB will exercise the discretion granted in the demand penalty statute. (See R&TC, § 19133 [FTB "may" add a penalty].) That regulation provides that for individuals, the demand penalty will only be imposed if the following two conditions are satisfied:

1. the taxpayer fails to timely respond to a current Demand for Tax Return in the manner prescribed, and
2. the FTB has proposed an assessment of tax under the authority of Revenue and Taxation Code section 19087, subdivision (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*.

(Regulation § 19133(b)(1)-(2), emphasis added.)

The rules of statutory construction apply when interpreting regulations promulgated by administrative agencies. (*Butts v. Board of Trustees of California State University* (2014) 225 Cal.App.4th 825, 835 (*Butts*).) A regulation, and each word and phrase in a regulation, must be given its plain, common sense meaning. (*Ibid.*) Only if the meaning cannot be determined from the plain language of the regulation, do we look to extrinsic aids to ascertain its intent. (*Id.*, at p. 836.) Moreover, when the plain language of a regulation is unambiguous, we need not inquire into FTB's interpretation of it. (See *Barnhart v. Sigmon Coal Co.* (2002) 534 U.S. 438, 450 [The inquiry ceases "if the statutory language is unambiguous and 'the statutory scheme is coherent and consistent.'"]; *Desert Palace, Inc. v. Costa* (2003) 539 U.S. 90 ["Where, as here, the words of the statute are unambiguous, the judicial inquiry is complete."].)

FTB appears to apply the regulation in a manner that would substitute the word "for" in place of "during." Based upon the plain meaning of the regulation above, we find, contrary to FTB's interpretation and application to the facts here, that this subsection requires that an NPA (following a Request or Demand) for a prior taxable year to have been issued (and therefore dated) at any time "*during* the four-taxable-year period preceding" the current tax year for which FTB seeks to impose the demand penalty. The regulation may not be rewritten "to make it conform to a presumed intention which is not expressed." (*Seaboard Acceptance Corp. v. Shay* (1931) 214 Cal. 361, 365.) The plain meaning of the word "during" in the regulation must be

interpreted to mean that a taxpayer's failure to respond to a Request or Demand must have occurred at any time within or during the four-taxable-year period preceding the taxable year for which the demand penalty is at issue. Moreover, giving each phrase its plain, common meaning, as required by *Butts*, the usage of "at any time," followed by the word "during" does not lend itself to an alternate meaning. (See R&TC, § 19133(b)(2).) If "during" is interpreted as "for," the words "at any time" become meaningless surplus words. FTB's proposed application would ignore that phrase, while we must give significance to every word, phrase, and sentence. (*Curle v. Superior Court* (2001) 24 Cal.4th 1057, 1063.)

The taxable year for which FTB desires to impose the demand penalty is 2015. In order to apply the demand penalty under the regulation, appellant's failure to respond to a prior Demand that resulted in an NPA having been issued, must have occurred in either 2011, 2012, 2013, or 2014 (during the four tax years preceding 2015). However, in this case, appellant's failure to respond to FTB's prior Request (for tax year 2014) occurred in 2016. Appellant's failure occurred on or after March 30, 2016, which was not during one of the four taxable years preceding 2015.[3]

Although the plain meaning of the regulation is clear, an ambiguity exists between the regulation and its Example 2. To the extent that Example 2 of Regulation section 19133 is inconsistent with the result herein, we decline to defer to Example 2's illustration of the regulation. (See Regulation § 19133(d).) In that example, an NPA was issued in 2001 after the taxpayer failed to respond to a Request for 1999. (*Ibid.*) Subsequently a Demand and NPA were issued for 2001, and the example states that the demand penalty would apply. (*Ibid.*) The application in the illustrative example conflicts with the plain language of the regulation.

As stated in section 19133(d), the examples are only "intended to illustrate the provisions of this regulation." The examples at issue here constitute FTB's interpretation of its regulation. FTB, in promulgating the regulation, exercised its discretion and determined under what circumstances the statutory penalty would apply. When assessing the validity of an

[3] We note that as applied to this appellant, FTB's interpretation of Regulation section 19133 operates in a way that was expressly rejected by the FTB's three-member board. Here, the first NPA issued (April 25, 2016) after appellant failed to file her 2014 tax return. Thus, the notice to the taxpayer of the need to comply with filing requirements (i.e., the NPA from the prior year) was received *after* the taxpayer already failed to comply with the filing requirement for the current year (2015). The application of the regulation in this manner does not provide the notice to taxpayers intended by the regulation, nor does it effectively "target [] only repeat nonfilers." Thus, FTB's application would penalize appellant in a way that it expressly rejected when adopting the regulation. (Cal. Reg. Notice Register 2004, No. 17-Z, p. 504; https://www.ftb.ca.gov/law/regs/19133_isr.pdf.)

interpretation, such as in example 2 of this regulation, the scope of review does not require the same level of deference as would a quasi-legislative rule. (*Yamaha Corp. of America v. State Board of Equalization* (1988) 19 Cal.4th 1, 11 (*Yamaha*).) While courts have held that an agency's interpretation of its own regulation is entitled to deference, that deference is not unlimited. (See *Auer v. Robbins* (1997) 519 U.S. 452; *Stinson v. United States* (1993) 508 U.S. 36.) 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, supra,* at pp. 7-8; *Agnew v. State Board of Equalization* (1999) 21 Cal.4th 310, 322.)

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." (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].) As discussed above, the plain language of Regulation section 19133(b) states that an NPA following the taxpayer's failure to respond to a prior Request or Demand must have occurred during one of the four taxable years preceding the taxable year for which the second Demand and NPA were issued. To the extent that Example 2 of Regulation 19133, which is simply an interpretation of the rule, suggests that the first failure must have occurred *for* one of the four preceding taxable years, we hold that it is inconsistent with the unambiguous language of the regulation and is incorrect.

Because appellant's failure to respond to the 2016 Demand did not occur during any of the four taxable years prior to 2014, the demand penalty may not be imposed for 2015.

HOLDINGS

1. Appellant had a California filing requirement for the 2015 tax year, and has failed to establish error in FTB's tax assessment.
2. FTB did not properly apply its regulation in assessing the demand penalty; therefore, we abate the proposed penalty.

DISPOSITION

FTB's action in imposing the $619 demand penalty is reversed, but otherwise FTB's action is sustained.

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Jeff Angeja
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Jeffrey G. Angeja
Administrative Law Judge

We concur:

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John O Johnson
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John O. Johnson
Administrative Law Judge

DocuSigned by:
Sara A. Hosey
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Sara A. Hosey
Administrative Law Judge