2019 – OTA – 342
Nonprecedential

OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	) OTA Case No. 18042776
ANITA ORTEGA	)
	) Date Issued: September 27, 2019
	)
	)
	)

OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellants: Anita Ortega

For Respondent: Michael J. Cornez, Tax Counsel V

J. ANGEJA, Administrative Law Judge: On April 25, 2019, this panel issued an Opinion reversing the Franchise Tax Board's (FTB) denial of a claim for refund of a $3,071.50 demand penalty for the 2014 tax year. FTB then filed a petition for rehearing pursuant to Revenue and Taxation Code (R&TC) section 19048, in which FTB asserts that the demand penalty should be upheld. FTB raises two arguments: that the Opinion in this case is contrary to law, and that appellant is a repeat non-filer who has received multiple Demands for Tax Return that support the imposition of the demand penalty. Upon consideration of the petition for rehearing, we conclude that the grounds set forth therein do not constitute good cause for a new hearing. (Cal. Code Regs., tit. 18, § 30604; *Appeal of Sjofinar Masri Do,* 2018-OTA-002P.)

Good cause for a new hearing may be shown where one of the following grounds exists, and the rights of the complaining party are materially affected: 1) irregularity in the proceedings by which the party was prevented from having a fair consideration of its case; 2) accident or surprise, which ordinary prudence could not have guarded against; 3) newly discovered evidence, material for the party making the petition for rehearing, which the party could not, with reasonable diligence, have discovered and produced prior to the decision of the appeal; 4) insufficiency of the evidence to justify the decision, or the decision is against law; or 5) error in law. (Cal. Code Regs., tit. 18, § 30604; *Appeal of Sjofinar Masri Do, supra*.)

Regarding FTB's first argument, the language in controversy includes the following: "[*A*]*t any time* during the four-taxable-year period preceding the taxable year for which the current Demand for Tax Return is issued." (Cal. Code Regs., tit. 18, § 19133(b), emphasis added.) In its petition for rehearing, FTB sets forth the same arguments made prior to issuance of our decision; that we should give deference to FTB's opinion that the word "during" should be interpreted as meaning "for," and that any other interpretation is contrary to the legislative history of R&TC section 19133 and the associated regulation.

As noted in our April 25, 2019 Opinion, we reject that interpretation; and because we concluded that the word "during" is unambiguous, the panel was not required to give deference to FTB's interpretation. (*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.) Instead, we interpreted "during" based on the plain meaning rule: "The term "during" denotes a temporal link; that is surely the most natural reading of the word as used in the statute." (*United States v. Ressam* (2008) 553 U.S. 272, 274-275.)

Regarding FTB's second argument, FTB now asserts for the first time in this appeal that it issued a Demand for Tax Return and Notice of Proposed Assessment to appellant during 2011 for the 2009 tax year. FTB asserts that these notices satisfy the requirements of Regulation 19133, as OTA has applied it, and therefore the penalty should be sustained. However, we specifically requested this information by letter dated October 3, 2018, and in its November 5, 2018, response, FTB merely repeated its primary argument and provided no response or evidence regarding our request. The evidence that FTB now provides was previously available, and thus is not newly discovered evidence that FTB could not have discovered and produced prior to the decision of the appeal. Therefore, the new evidence does not establish grounds for a rehearing.

FTB's petition for rehearing simply repeats the arguments it previously asserted on appeal. FTB has not demonstrated irregularity in our proceedings; provided newly discovered evidence that FTB could not, with reasonable diligence, have discovered and produced prior to issuance of our decision; or established that the evidence was insufficient to justify our decision. Furthermore, FTB has not demonstrated that our reliance on the plain meaning rule of statutory construction constituted an error in law.

Thus, we deny FTB's petition for rehearing, and we affirm our April 25, 2019 Opinion.

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Jeff Angeja
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Jeffrey G. Angeja
Administrative Law Judge

I concur:

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Teresa A. Stanley
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Teresa A. Stanley
Administrative Law Judge

N. DANG, Dissenting:

I would grant the petition for rehearing on grounds that the majority Opinion is contrary to law. An Opinion is contrary to law if it is "unsupported by any substantial evidence." (*Sanchez-Corea v. Bank of America* (1985) 38 Cal.3d 892, 906.) Here, there is insufficient evidence to support the majority's finding that the applicable rule set forth in California Code of Regulations, title 18, section (Regulation) 19133 is clear and unambiguous.

The majority Opinion acknowledges that there is a direct conflict between the plain language of subdivisions (b) and (d) of Regulation 19133, but resolves that conflict by disregarding regulatory language considered to be merely illustrative, or interpretive. In reaching this result, the majority confuses the standard for assessing the validity of an agency's post-enactment, extrinsic interpretations of existing law (whether via the regulatory process or an informal one), with that of interpreting language contained within the law itself. The latter requires that every *word, phrase, sentence and part of a regulation be given significant consideration* in discerning its purpose. (*Curle v. Superior Court* (2001) 24 Cal.4th 1057, 1063.) "Interpretations that lead to absurd results or *render words surplusage* are to be avoided." (*Tuolumne Jobs & Small Business Alliance v. Superior Court* (2014) 59 Cal.4th 1029, 1037, italics added.) It is clear from applying these rules, that further inquiry is necessary to resolve the conflicting language of Regulation 19133.

Accordingly, I find that the majority Opinion is contrary to law.

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Nguyen Dang
Administrative Law Judge