

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:) OTA Case No. 18042896
M. CHANDRA SHEKARAN AND)
JENNIFER M. SHEKARAN) Date Issued: October 10, 2019
_____)
_____)

OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellants: M. Chandra Shekaran

For Respondent: Michael J. Cornez, Tax Counsel V

K. GAST, Administrative Law Judge: On April 24, 2019, the Office of Tax Appeals issued a decision, based on the written record, in which we found appellants were not liable for the notice and demand penalty (the demand penalty) under California Revenue and Taxation Code (R&TC) section 19133. Respondent Franchise Tax Board (FTB) timely filed a petition for rehearing under R&TC section 19048. Upon consideration of FTB’s petition, we conclude the ground set forth therein does not meet the requirements under California Code of Regulations, title 18, (Regulation) section 30604.

A rehearing may be granted where one of the following five grounds exists, and the substantial rights of the complaining party (here, FTB) are materially affected: (a) an irregularity in the appeal proceedings which occurred prior to the issuance of the written opinion and prevented fair consideration of the appeal; (b) an accident or surprise which occurred during the appeal proceedings and prior to the issuance of the written opinion, which ordinary caution could not have prevented; (c) newly discovered, relevant evidence, which the party could not have reasonably discovered and provided prior to the issuance of the written opinion; (d) insufficient evidence to justify the written opinion or the opinion is contrary to law; or (e) an error in law. (Regulation § 30604(a)-(e).)

In our decision, we concluded the following relevant language of Regulation section 19133(b)(2) was plain and unambiguous: “[A]t any time during the four-taxable-year period

preceding the taxable year for which the current Demand for Tax Return is issued.” (Emphasis added.) Consequently, we held FTB improperly imposed the demand penalty for the 2015 tax year, because FTB’s Notice of Proposed Assessment (NPA) for the 2014 tax year was issued on March 21, 2016, which is *after* the 2015 tax year, and therefore not “at any time during” January 1, 2011, through December 31, 2014, as required by subsection (b)(2).

FTB disagrees, arguing that a rehearing should be granted because the decision contains an error of law. (See Regulation § 30604(e).) FTB contends that our construction of Regulation section 19133 is erroneous because we concluded subsection (b)(2)’s language is “operative,” while Example 2’s language is not. In doing so, FTB asks that we reconsider our decision by concluding Example 2 is “regulatory,” i.e., the example itself is a rule that when interpreted as such, shows “that Regulation 19133 as a whole was ambiguous or unclear, and under the well-settled rules of regulatory construction, [we] should have deferred to [FTB’s] long standing interpretation and application of Regulation 19133.” In essence, FTB would have us disregard the plain meaning of subsection (b)(2), and interpret it as FTB has done in Example 2; i.e., by replacing the word “during” with “for.” Accordingly, under this construction, FTB would need to issue a prior year NPA for a tax year that is four years prior to the year for which FTB seeks to impose the demand penalty, regardless of when that prior year NPA is issued. We disagree.

Regulation section 19133(d) introduces two examples, including Example 2, by stating, “The following examples are intended to illustrate the provisions of this regulation.” Therefore, we find Example 2 is just that: An example illustrating, through hypothetical facts, how the operative language of subsection (b)(2) was intended to be applied. While “examples set forth in regulations remain persuasive authority *so long as they do not conflict with the regulations themselves*” (*Cook v. Commissioner* (7th Cir. 2001) 269 F.3d 854, 858, emphasis added), here, Example 2 does create such a conflict and we will not give it persuasive authority. Accordingly, because the words “at any time during” are unambiguous, FTB’s interpretation is not entitled to deference. (See *Kisor v. Wilkie* (June 26, 2019, No. 18-15) ___ U.S. ___ [139 S.Ct. 2400, 2415].)

For the foregoing reasons, FTB's petition is hereby denied.

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Kenneth Gast

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Kenneth Gast

Administrative Law Judge

We concur:

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Sara A. Hosey

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Sara A. Hosey

Administrative Law Judge

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Alberto T. Rosas

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Alberto T. Rosas

Administrative Law Judge