OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	) OTA Case No. 18011256
JANELLE R. ROBERTS	) Date Issued: May 13, 2019

OPINION

Representing the Parties:

For Appellant: David Polk

For Respondent: Andrew Amara, Tax Counsel, III
Maria Brosterhous, Tax Counsel IV

D. BRAMHALL, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, Janelle R. Roberts (appellant) appeals an action by the Franchise Tax Board (FTB) proposing additional tax and penalties as follows:

Year	Tax	Penalties
2011	$2,806	$ 701.50[1]
2013	$4,692	$2,346.00[2]
2014	$4,515	$2,257.50[3]
2015	$1,174[4]	$2,476.00[5]

Office of Tax Appeals (OTA) Administrative Law Judges Douglas Bramhall, Linda C. Cheng, and Jeffrey I. Margolis held an oral hearing for this matter in Los Angeles, California, on

[1] Delinquent-filing penalty - $701.50.

[2] Delinquent-filing penalty - $1,173; demand penalty - $1,173; a filing enforcement fee of $84 is not included in totals.

[3] Delinquent-filing penalty - $1,128.75; demand penalty - $1,128.75: a filing enforcement fee of $81 is not included in totals.

[4] The $1,174 amount is unpaid tax after credit for appellant's withholdings.

[5] Delinquent-filing penalty - $293.50; demand penalty - $2,182.50. FTB has agreed to abate the $2,182.50 demand penalty for 2015. The $293.50 delinquent-filing penalty remains at issue.

February 20, 2019. At the conclusion of the hearing, the record was closed and this matter was submitted for decision.

ISSUES

1. Has appellant established error in FTB's proposed assessment of additional tax for tax years 2011 and 2013-2015?
2. Has appellant established any basis for abatement of delinquent-filing penalties for tax years 2011 and 2013-2015?
3. Has appellant established any basis for abatement of the demand penalties for tax years 2013 and 2014?
4. Should OTA impose frivolous appeal penalties pursuant to Revenue and Taxation Code section 19174, and if so, in what amount?

FACTUAL FINDINGS

Tax Year 2011

1. Through its Integrated Non-Filer Compliance Program, FTB obtained information indicating that appellant received $60,905 in wage income from Warner Brothers Studio Enterprises, Inc., and Warner Brothers Entertainment, Inc. (collectively "WB"), which would trigger a return filing obligation.
2. FTB issued appellant a Request for Tax Return notice ("Request"), on or about February 5, 2013. Appellant failed to file a tax return so FTB issued a July 22, 2013 Notice of Proposed Assessment ("NPA"). Appellant did not protest the NPA and it resulted in FTB assessing tax and the delinquent-filing penalty and filing enforcement fee.[6]
3. On or about October 15, 2014, appellant filed a return[7] with FTB, attesting to thereturn's accuracy under penalty of perjury, showing $1 of income. That return led FTB to reduce its assessment and refund amounts it had collected. Subsequently, FTB discovered the return conflicted with its information from WB, determined the return was a frivolous return and that FTB had erred in accepting the return and refunding assessed amounts.

[6] The assessment became a final liability in November 2013, and FTB began collections on that final liability.

[7] We take note of the fact that the return filed was on Form 540NR, a return for a part- or full-time non-resident of California, even though the return showed an address in Burbank, California.

Therefore, FTB issued appellant another NPA on or about October 24, 2016, proposing the tax deficiency, penalties, and filing enforcement fee listed above.

4. Appellant protested the NPA on or about December 23, 2016, asserting that the income information conveyed by WB was "erroneous, false and fraudulent," that appellant did not have enough gross income to require her to file a return based on the position that she earned "no wages" and that various documents confirm appellant's wages were zero.
5. FTB then issued a Notice of Action ("NOA") on or about September 25, 2017, sustaining its proposed assessment.
6. This timely appeal followed.

Tax Year 2013

7. On April 21, 2015, FTB issued appellant a Demand for Tax Return notice ("Demand") based on 2013 income information it obtained from WB and James Cameron. Subsequently, appellant represented to FTB that she was not a resident of California and did not receive any 2013 income.
8. Based on that information, FTB sent appellant an August 14, 2015 letter explaining that it would not take any further action at that time.
9. FTB subsequently determined appellant did indeed receive taxable income in 2013 and issued a second Demand to appellant on July 19, 2016 (Second Demand), requesting a reply by August 24, 2016.
10. Appellant responded on or about August 24, 2016, claiming appellant was not a United States (US) person, that no wages or any other payments connected to a trade or business within the United States were paid to her in 2013 by WB, and that appellant had no gross income for 2013. Appellant sent FTB a subsequent letter dated November 17, 2016, containing additional arguments.[8]
11. FTB sent appellant a letter dated October 17, 2016, entitled "Determination of Filing Requirement – Tax Return Demand," determining that appellant was required to file a 2013 return and demanding that she file one by November 17, 2016. The notice stated that if she did not file by that date, a demand penalty and cost recovery fee would be

[8] We again note that appellant's correspondence includes address information from Burbank, California with a notation "Without the United States" and "Non-domestic, without the United States."

imposed in addition to a delinquent-filing penalty. Appellant did not file a valid return in response to this notice.

12. FTB issued an NPA to appellant for 2013 on or about July 3, 2017, proposing to assess tax, the delinquent-filing penalty, the demand penalty, and the filing enforcement fee.
13. Appellant protested the proposed assessment on or about September 1, 2017.
14. FTB affirmed its proposed assessment and issued its NOA on or about January 18, 2018.
15. This timely appeal followed.

Tax Year 2014

16. On May 25, 2016, FTB issued appellant a Demand for Tax Return notice for 2014 (2014 Demand). The 2014 Demand requested a response by June 29, 2016.
17. On or about June 29, 2016, appellant replied to the 2014 Demand and claimed, under penalty of perjury, that she did not receive 2014 income and attached a purported corrected Form W-2 (that she had prepared for herself) and a federal tax account transcript indicating that she had filed a return with the Internal Revenue Service (IRS) reporting zero income.
18. FTB issued an NPA on November 28, 2016, proposing tax and a delinquent-filing penalty, a demand penalty, and a filing enforcement fee for 2014.
19. Appellant protested the NPA on or about January 27, 2017.
20. FTB affirmed the NPA and issued an NOA on or about September 25, 2017 (2014 NOA).
21. This timely appeal followed.

Tax Year 2015

22. Appellant submitted a 2015 Form 540 2EZ dated February 22, 2016, showing zero income for the 2015 taxable year. Appellant again attested to the accuracy of the purported return, under penalty of perjury, and attached two Form W-2c's purportedly correcting Form W-2 information to show zero in 2015 income.
23. FTB initially responded by issuing a Notice of Tax Return Change and identifying a zero-tax balance based on appellant's filing.
24. Subsequently, FTB determined that appellant's return was invalid and issued an NPA on or about March 20, 2017, assessing tax (and granting credit for appellant's withholdings)

and imposing the delinquent-filing penalty, the demand penalty, and the filing enforcement fee.

25. Appellant protested the NPA.

26. FTB determined that appellant failed to demonstrate error in the proposed assessment, which it affirmed with an NOA dated November 29, 2017.

27. This timely appeal followed.

DISCUSSION

Issue 1: Has appellant established error in FTB's proposed assessment of additional tax for years 2011 and 2013-2015?

R&TC section 17041 imposes a tax "upon the entire taxable income of every resident of this state" and upon the entire taxable income of every nonresident or part-year resident which is derived from sources in this state. R&TC section 18501 requires every individual subject to the Personal Income Tax Law (§ 17001 et seq.) to make and file a return with FTB "stating specifically the items of the individual's gross income from all sources and the deductions and credits allowable …." R&TC section 19087(a) provides: "If any taxpayer fails to file a return, or files a false or fraudulent return with intent to evade the tax, for any taxable year, the Franchise Tax Board, at any time, may require a return or an amended return under penalties of perjury or may make an estimate of the net income, from any available information, and may propose to assess the amount of tax, interest, and penalties due." When FTB proposes a tax assessment based on an estimate of income, FTB's initial burden is to show that its proposed assessment is reasonable and rational. (*Appeal of Myers* (2001-SBE-001) 2019 WL 1187160.) When a taxpayer fails to file a valid return, and refuses to cooperate in the ascertainment of his or her income, FTB is given "great latitude" in estimating income. (*Appeals of Bailey*, (92-SBE-001) 1992 WL 44503 [estimate based on third-party information reporting]; *Appeal of Tonsberg*, (85-SBE-034) 1985 WL 15812 [use of third-party information reporting].) "A taxpayer is not in a good position to criticize respondent's estimate of his or her liability when he or she fails to file a required return and, in addition, subsequently refuses to submit information upon request." (*Appeals of Dauberger et al*., (82-SBE-082) 1982 WL11759.)

The essence of appellant's arguments in this appeal is that the payments she received were not wages, she is not an employee, and that she lives "without the United States" and is

therefore not subject to tax.[9] These essential arguments are wrapped into assertions that the NPAs issued for these years are invalid because they lack any reasonable basis and are thus arbitrary since they are based on FTB's conclusion that appellant earned wages and is subject to tax. Further, appellant asserts that documentation she provided is more reliable than information relied upon by FTB in assessing the validity of her zero or nominal "returns" that were rejected by FTB. Based upon her view of the evidence, appellant asserts she has rebutted FTB's presumption of correctness by a preponderance of evidence and should thus prevail.

First, appellant's assertion that evidence provided establishes her as a non-US person and thus not taxable in California is not persuasive. The basis of that contention is that the IRS accepted the federal non-resident return forms she filed for each appeal year. However, we find no evidence that the IRS examined those returns. We also find no affirmative evidence of residency in any particular jurisdiction other than California. Thus, we find appellant's assertion unpersuasive as to residency, given the many years of filing and correspondence in which appellant used a California address.

Next, appellant relies on a misreading of the federal Internal Revenue Code (IRC) and California Revenue and Taxation Code in concluding that the wages of private sector employees are not income and that her remuneration was not a wage. R&TC section 17041(a) provides, in pertinent part, that tax shall be imposed upon the entire taxable income of every resident of California. R&TC sections 17071 and 17072 define "gross income" and "adjusted gross income" by referring to and incorporating into California law IRC sections 61 and 62, respectively. IRC section 61 states that, unless otherwise provided, "gross income means all income from whatever source derived," including compensation for services. Income includes any "accessions to wealth." (*Commissioner v. Glenshaw Glass Co*. (1955) 348 U.S. 426, 431.) Wages and compensation for services are gross income within the meaning of IRC section 61. (*United States v. Romero* (9th Cir. 1981) 640 F.2d 1014, 1016; *Appeals of Wesley, et al.*, 2005-SBE-002, Nov. 15, 2005.) Appellant's employer reported on federal Forms W-2 that appellant earned wages of $61,007.34 in 2011, $68,842.37 in 2013, $79,730.92 in 2014 and $89,477.48 in 2015. This evidence satisfies FTB's burden of establishing that its determination has a rational basis and is reasonable in amount. Employment Development Department records confirm this

[9] Additional positions advanced are typical positions that have been characterized by courts as "frivolous" and as a result are not further detailed.

reporting. And a WB employee further affirmed that WB had not changed its records from the amounts originally reported. While appellant argues that WB employees are not qualified to conclude that the payments to her were "wages," we conclude that appellant was an employee who received wages in each of the appeal years in the amounts reported by WB. Therefore, appellant must include her wages in her gross income for 2011 and 2013-2015 pursuant to IRC section 61.

Appellant's argument that her wages do not constitute income is a frivolous argument that the Board of Equalization, the IRS, and the courts have consistently and emphatically rejected. (See, e.g., *Briggs v. Commissioner*, T.C. Memo. 2016-86; *Sullivan v. United States* (1st Cir. 1986) 788 F.2d 813; *Waltner v. Commissioner*, T.C. Memo. 2014-35.) As stated in Revenue Ruling 2006-18, "[f]ederal income tax laws do not apply solely to federal employees . . . and any contrary contention is frivolous. The terms 'employee' and 'wages' as used by the Internal Revenue Code apply to all employees, unless specifically exempted by the Internal Revenue Code. The income tax withholding provisions do not affect whether an amount is gross income." (Rev. Rul. 2006-18, 2006-15 I.R.B. 743.) Therefore, appellant's arguments that her remuneration is not income have no merit. As such, appellant has not shown that she may exclude wages from her taxable income for the 2011 and 2013-2015 tax years.

Issue 2: Has appellant established any basis for abatement of delinquent-filing penalties for tax years 2011 and 2013-2015?

R&TC section 19131 requires imposition of a delinquent-filing penalty where a taxpayer has failed to timely file a return. In this case, FTB has imposed the delinquent-filing penalty for all of the years at issue. When FTB imposes such a penalty, the law presumes it is correct. (*Todd v. McColgan* (1949) 89 Cal.App.2d 509, 514.) The taxpayer then has the burden of proving reasonable cause exists to support abatement of the penalty. (*Appeal of Beadling*, (77-SBE-021) 1977 WL 3831; *Appeal of Walshe*, (75-SBE-073) 1975 WL 3557.) In that respect, the taxpayer's reason for failing to file the return by the due date must be such that an ordinarily intelligent and prudent businessperson would have acted similarly under the circumstances. (*Appeal of Tons*, (79-SBE-027) 1979 WL 4068.) Unsupported assertions are insufficient to satisfy a taxpayer's burden of proof. (*Appeal of Magidow* (82-SBE-274)1982 WL 11930.) Appellant has not specifically asserted any reasonable cause-based defense for her failure to timely file returns for the years at issue. The only argument advanced on appeal is that no

returns were required so reasonable cause exists for her non-filing. However, appellant's arguments that no returns were required are frivolous and as such, they do not provide her with reasonable cause for failing to timely file.

Issue 3: Has appellant established any basis to support abatement of the demand penalties for tax years 2013 and 2014?

When a taxpayer fails or refuses to make and file a return required after FTB issues a Demand, FTB has the discretion to add a penalty of 25 percent of the amount of tax determined pursuant to R&TC section 19087 or of any deficiency tax assessed by the FTB concerning the assessment of which the information or return was required. (R&TC, § 19133.) In the case of an individual taxpayer, the penalty will only be imposed if "(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 . . . 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 (emphasis added)." (Cal. Code Regs., tit. 18, § 19133(b).)[10] 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.) The demand penalty may be abated if a taxpayer shows there was reasonable cause (and not willful neglect) for failing to timely respond to a Demand. (R&TC, § 19133.)

Here, the taxable years for which FTB seeks to impose the demand penalty are 2013 and 2014. For tax year 2013, appellant failed to file a valid return in response to FTB's October 17, 2016 "Determination of Filing Requirement – Tax Return Demand." The only evidence that appellant failed to respond to a prior request or demand for tax return, as required by Regulation 19133, subdivision (b), is that she failed to file a 2011 return in response to the 2011 Request issued February 5, 2013 (as a result of which an NPA was issued on July 22, 2013). However, the issuance of the 2011 Request and NPA was not *during* one of four years preceding 2013, but

[10] Unless otherwise indicated, all references to "Regulation" or "regulation" are to sections of the California Code of Regulations, title 18.

instead was during 2013. Accordingly, the demand penalty for 2013 was not imposed in accordance with FTB's own regulation and must be abated.[11]

For tax year 2014, FTB sent appellant the 2014 Demand on May 25, 2016, requiring that appellant respond by June 29, 2016. According to the demand letter, an acceptable response would be either filing the return, providing a copy of an already filed return, or explaining, under penalty of perjury, why the taxpayer believed she was not liable for filing a 2014 return. Appellant timely responded to the demand on June 29, 2016, by writing to the FTB explaining why she believed she was not required to file a return. FTB did not send out a subsequent Determination of Filing Requirement – Tax Return Demand (as it did for the 2013 year), rejecting appellant's arguments and renewing its demand that she file a return. Instead, it just issued an NPA, one that proposed a demand penalty.

Under the definitions contained in Regulation 19133, subdivision (c)(3), appellant's response to the 2014 demand was timely, in that appellant responded "within the time period specified in the Demand for Tax Return or Request for Tax Return." Furthermore, appellant responded in the "manner prescribed" in the 2014 Demand, by setting forth her claim that she had no taxable income during 2014 and was therefore not required to file a return. Her response was signed under penalty of perjury. Nothing in the Demand itself or the Regulation requires that the taxpayer's explanation as to why the taxpayer contends no return is required be valid in order to constitute a sufficient response.[12] FTB could have, but failed to, issue a subsequent letter rejecting appellant's response and demanding she file a valid return (as it did with respect to appellant's 2013 year). Accordingly, we hold that appellant made a "timely response" to the 2014 Demand in the manner prescribed and, as a result, the demand penalty proposed for that year must be abated.

[11] We note that while the facts of this appeal comport with Example 2 of FTB's Regulation 19133, that example does not comport with the language of the regulation itself and, as a result, we follow the language of the regulation and not the example contained therein.

[12] Presumably, FTB would be free to amend the language of its notices and/or its regulation to impose such a requirement.

Issue 4: Should OTA impose frivolous appeal penalties pursuant to Revenue and Taxation Code section 19174, and if so, in what amount?

R&TC section 19714 provides that a penalty of up to $5,000 shall be imposed whenever it appears to OTA that proceedings before it have been instituted or maintained primarily for delay, or that an appellant's position is frivolous or groundless. (*Appeal of Myers*, *supra*; *Appeal of Castillo*, 92-SBE-020, July 30, 1992). Regulation 30502(a) provides that OTA may impose a frivolous appeal penalty pursuant to R&TC section 19714 "if a panel determines that an appeal is frivolous or is maintained for the purpose of delay." Subdivision (b) of the regulation lists the following factors to be considered in determining whether, and in what amount, to impose a frivolous appeal penalty under R&TC section 19714: (1) whether appellant is making arguments that OTA, in a precedential opinion, or the Board of Equalization (BOE), in a formal opinion, or courts have rejected; (2) whether appellant is making the same arguments that the same appellant made in prior appeals; (3) whether appellant filed the appeal with the intent of delaying legitimate tax proceedings or the legitimate collection of tax owed; and (4) whether appellant has a history of filing frivolous appeals or failing to comply with California's tax laws. OTA may consider other relevant factors in addition to the factors listed above. (Regulation § 30502(c).)

Appellant's arguments that she had not earned wages and is not a taxpayer because she works in the private sector are arguments that have been clearly and consistently rejected by the IRS, the federal courts, FTB, and the BOE. (See, e.g., *Appeal of Myers*, *supra*; *Appeal of Castillo*, *supra*; *Appeal of Bailey*, *supra*; *Appeal of Dauberger, et al.*, *supra*.) In the present appeal, the law summary FTB sent to appellant (with its opening brief) detailed how appellant's arguments have been consistently refuted by the courts and the BOE. The law summary also explained how California law, as well as federal law, define taxable income. As such, appellant had been informed on several occasions during protest proceedings and in this appeal proceeding that the arguments she was making in this appeal had been determined to be frivolous arguments. The law summary and the acknowledgement letter provided appellant with notice that the frivolous appeal penalty may be applied against taxpayers who maintain frivolous or groundless appeals. Nevertheless, appellant maintained this appeal, causing the state to incur unnecessary expense in processing her appeal. In light of these facts, we find that appellant has maintained a

frivolous and groundless position before this body primarily to delay the collection of appropriate taxes, and hereby impose a frivolous appeal penalty of $2,500.[13]

HOLDINGS

1. Appellant has failed to establish any error in the proposed assessment of additional tax for 2011 and 2013-2015.
2. Appellant has failed to establish that the late-filing penalty should be abated for 2011 and 2013-2015.
3. Appellant has established that the demand penalty was improperly imposed and should be abated for 2013 and 2014.
4. A frivolous appeal penalty in the amount of $2,500 is imposed against appellant pursuant to R&TC section 19714.

DISPOSITION

The actions of the FTB are sustained except as to the imposition of the demand penalty for tax years 2013 and 2014, which action is reversed. We further note that FTB has agreed to abate the demand penalty for tax year 2015. A frivolous appeal penalty of $2,500 is imposed against appellant.

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Douglas Bramhall
Administrative Law Judge

I concur:

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Jeffrey I. Margolis
Administrative Law Judge

[13] In determining the amount of the frivolous appeal penalty to impose in this case, we consider fairness to the appellant, as well as to the public, which is impacted by the cost of adjudicating frivolous and groundless appeals. In this case, appellant originally submitted four frivolous appeals which were consolidated into the present appeal. Each of the tax years at issue in this appeal would qualify for its own frivolous appeal penalty, which would tend to increase the penalty amount in this case. On the other hand, we have no indication that appellant has submitted frivolous appeals in the past and take that mitigating factor into consideration. However, offsetting that is the fact that appellant has not filed a valid California return for any of the years at issue. We determine that a $2,500 penalty, which is the mid-range of the potential penalty amount, is fair. We believe this amount is appropriate as a deterrent for future frivolous appeals.

DISSENTING OPINION

L. CHENG, concurring in part and dissenting in part:

I concur with the majority's holding with respect to issues 1, 2, 4, and partially 3 above. I respectfully dissent, however, from the majority's holding in issue 3 regarding the application of the demand penalty for the 2013 tax year. The majority holds that the demand penalty was improperly imposed for the 2013 because "the issuance of the 2011 Request and [Notice of Proposed Assessment] was not *during* one of four years preceding 2013, but instead was during 2013." In arriving at this conclusion, the majority construes the regulatory language (i.e., "during") literally, which leads to an absurd result directly contrary to Franchise Tax Board's (FTB) expressly stated purpose for promulgating this regulation.

The California Supreme Court has held that, in examining statutory language, courts will first give it a plain and commonsense meaning. However,

> [w]e do not examine that language in isolation, but in the context of the statutory framework as a whole in order to determine its scope and purpose and to harmonize the various parts of the enactment. If the language is clear, courts must generally follow its plain meaning unless a literal interpretation would result in absurd consequences the Legislature did not intend. If statutory language permits more than one reasonable interpretation, courts may consider other aids, such as the statute's purpose, legislative history, and public policy. Furthermore, we consider portions of a statute in context of the entire statute and the statutory scheme of which it is a part, giving significance to every word, phrase, sentence, and part of an act in pursuance of the legislative purpose.

(*Sierra Club v. Superior Court* (2013) 57 Cal.4th 157, 165-166.)

Here, the language of Regulation 19133 is unclear as to the proper application of the demand penalty. Specifically, Example 2 of the regulation, as provided in subdivision (d), indicates that FTB will impose the demand penalty where the requisite NPA was issued *for* one of the prior four taxable years, whereas the regulation itself states that FTB will impose it where the NPA was issued *during* one of the prior four taxable years. Because the example was enacted as part of the text of the regulation itself, it should be given significant consideration in determining the intent of the drafter. And because the application of the example would potentially conflict with the plain meaning of the regulation, as in the instant appeal, we should look to extrinsic sources for guidance. (*Sierra Club v. Superior Court*, *supra* at 645.)

The Initial Statement of Reasons contained in FTB's rulemaking file for Regulation 19133 states that:

> It has been the practice of the Franchise Tax Board 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. Many of these nonfilers are first-time nonfilers . . . . Their failure to file their tax return was an isolated incident.
>
> Because of the manner in which the penalty is calculated . . . . and because of its application to all nonfilers (irrespective of prior filing history), some have viewed the Franchise Tax Board's policy of assessing a notice and demand penalty as unduly harsh . . . .
>
> Under this proposed regulation, the Franchise Tax Board defines a repeat nonfiler as an individual who has received a proposed assessment of tax after receiving and failing to respond to either a request for tax return or a demand for tax return within the previous four years. The Franchise Tax Board has also determined that four years is a reasonable period of time to look back in making a determination as to whether a taxpayer is a repeat nonfiler.
>
> Therefore, the Franchise Tax Board will issue a demand for tax return to those taxpayers who are repeat nonfilers. The failure by the repeat nonfiler to respond to a demand for tax return in the manner and within the time period specified in the demand for tax return will trigger the assessment of the notice and demand penalty on a proposed assessment of tax. On the other hand, the Franchise Tax Board will not assess the notice and demand penalty against those individual taxpayers who are not identified as repeat nonfilers.

(Cal. Reg. Notice Register 2004, No. 17-Z, p. 504.)

Given the purpose of Regulation 19133 is to mitigate the perceived harshness of the demand penalty by imposing it only upon repeat nonfilers, applying a literal reading of Regulation 19133(b)(2) to the facts would frustrate that intent. In other words, it would prevent FTB from imposing the demand penalty upon a repeat nonfiler where the failure to occur occurs in two consecutive years, as here. If appellant had failed to respond to a demand notice and NPA for, say, the 2012 tax year, a literal application of the regulation would require FTB to do the impossible by issuing the NPA for the 2012 tax year during one of the four taxable years prior to 2013 (i.e., 2012, 2011, 2010, or 2009). This impossibility stems from the fact that the 2012 tax return would not have been due until April 2013, and hence, no demand notice and corresponding NPA would have issued prior to 2013. This result clearly runs contrary to the intent of the regulation.

Moreover, a literal application of Regulation 19133(b)(2) fails to properly account for the taxpayer's prior four-year filing history. That is, the NPA issued *during* the prior four years could conceivably be for *any* tax year open to assessment, beyond the immediate four years prior to the current tax year at issue. For instance, where no return is filed, FTB could potentially reach back 20 or more years, as there would be no time limit to issue the requisite NPA, as long as the NPA is issued *during* one of the four prior taxable years. (R&TC section 19057.) This result would run contrary to the originally contemplated four-year lookback period for evaluating whether a taxpayer was a repeat nonfiler for purposes of imposing the demand penalty. For instance, taxpayers who have been compliant in filing returns for the past four or more years may find themselves subject to the demand penalty for one lone tax year decades ago.

Based on the above language from FTB's Initial Statement of Reasons, Example 2 of the regulation, and the absurd results that would follow from a literal interpretation of Regulation 19133(b)(2), it is clear that the use of the word "during" was a drafter's error, because the word "for" was intended to effectuate the stated purpose of the regulation. It has been held that "when it appears clear that a word has been erroneously used, and a judicial correction will best carry out the intent of the adopting body," the general rule of not rewriting the plain and unambiguous language of a statute shall not apply. (*People v. Skinner* (1985) 39 Cal.3d 765, 775.) Here, relevant extrinsic sources support substituting "for" in place of "during" in Regulation 19133(b)(2) for the proper imposition of the demand penalty. Therefore, I would sustain FTB's imposition of the demand penalty for the 2013 tax year.

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Linda C. Cheng
Administrative Law Judge