DocuSign Envelope ID: 8A887511-2D3A-4632-87B7-0176DB846662

2019 – OTA – 353
Nonprecedential

OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	) OTA Case No. 18011256
	)
JANELLE R. ROBERTS	) Date Issued: October 31, 2019
	)
	)
	)

OPINION ON PETITIONS FOR REHEARING

Representing the Parties:

For Appellant: Janelle R. Roberts (Appellant)
David Polk, Representative

For Respondent: Michael J. Cornez, Tax Counsel V

D. BRAMHALL, Administrative Law Judge: On May 13, 2019, the Office of Tax Appeals (OTA) issued a decision in which it sustained the Franchise Tax Board's (FTB's) proposed assessment of tax and delinquency penalties for tax years 2011 and 2013-2015.[1] In that decision, OTA also abated demand penalties for 2013 and 2014. Appellant then filed a petition for rehearing pursuant to section 19048 of the Revenue and Taxation Code (R&TC). Additionally, FTB filed a petition for rehearing on the demand penalty issue for 2013 only. Upon consideration of the respective petitions for rehearing, we conclude that the grounds set forth therein do not meet the requirements for a rehearing under California Code of Regulations, title 18, section (Regulation) 30604.

A rehearing may be granted where one of the following grounds exist and the rights of the complaining party (here, appellant) are materially affected: (a) an irregularity in the proceedings by which the party was prevented from having a fair consideration of its appeal; (b) accident or surprise which occurred during the appeal proceedings and prior to the issuance of the written opinion, which ordinary prudence could not have prevented; (c) newly discovered relevant evidence, which the party could not have reasonably discovered and provided prior to

[1] Subsequent to the issuance of the decision, FTB requested its determination for tax year 2015 be withdrawn. Therefore, the decision affirmed by this petition for rehearing is modified to reflect the affirmance only of FTB's proposed assessments and penalties for tax years 2011, 2013 and 2014.

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. (Cal. Code Regs., tit. 18, § 30604 (a)–(e).)

In the instant petition for rehearing, appellant argues that OTA's decision was against law and was based on misunderstandings of fact that created an irregularity in the proceedings that prevented a fair consideration of the appeal. FTB, on the other hand, contends that OTA made an error of law with respect to its interpretation of the demand penalty regulation. The following discussion addresses the specific contentions set forth by the parties in their respective petitions for rehearing.

DISCUSSION - APPELLANT'S PETITION FOR REHEARING

OTA's opinion decided that appellant's various arguments that her compensation was not a taxable wage were frivolous. Appellant now asserts that OTA's decision was arbitrary and contrary to the law and further argues error in sustaining delinquency penalties and imposing the frivolous appeal penalty. Appellant makes essentially the same arguments as were presented in her appeal and during the oral hearing on this matter. Admittedly, some nuances to the original positions are offered by way of criticism of the decision; however, nothing materially different or relevant has been offered to support the rehearing petition.[2]

The question of whether a decision is contrary to law is not one that involves a weighing of the evidence, but instead requires a finding that the decision is "unsupported by any substantial evidence." (*Sanchez-Corea v. Bank of America* (1985) 38 Cal.3d 892, 906.) In appellant's petition, appellant sets forth arguments and factual allegations that were previously made to the OTA. Appellant's arguments were already considered at length and resolved in a written decision. The decision gave appropriate consideration to the evidence and arguments presented by appellant in reaching its conclusion. Appellant's dissatisfaction with the outcome of the appeal and attempted re-argument of the same issues a second time is not grounds for a rehearing. As OTA found in its decision, appellant's contentions fail to show error in FTB's position, and they do not show that the decision created an "injustice based on a mistake of law." (*Appeal of NASSCO Holdings, Inc.* 2010-SBE-001 2010 WL 5626976 [discussing *In re Jessup*

---

[2] Appellant appears to believe that OTA was required to must address each assertion made as if it were legally supportable. To the extent the positions advanced are viewed as frivolous, no resources have been devoted to legitimizing the assertions.

DocuSign Envelope ID: 8A887511-2D3A-4632-87B7-0176DB846662

(1889) 81 Cal. 408, 471-472].) Appellant has not demonstrated that OTA's decision is contrary to law.

For the foregoing reasons, appellant's petition is hereby denied.[3]

DISCUSSION – FTB'S PETITION FOR HEARING

FTB's petition for rehearing asserts an error of law in OTA's application of California Code of Regulations, title 18, section 19133 (the Regulation) to abate the demand penalty imposed by FTB on appellant for the 2013.[4]

FTB alleges that OTA issued a decision in this appeal that is based on an error of law. In support of that position, FTB asserts the use of an incorrect legal definition of "regulation," application of "erroneous rules of regulatory construction," and the improper rejection of FTB's "long-standing" interpretation and application of 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, in certain circumstances, produce an absurd result.

In our decision, we did not specifically hold that the Regulation and its example are ambiguous; however, we did decline to follow Example 2 on the grounds that it was inconsistent with the Regulation language. FTB points to language in footnote 2 of the decision and asserts that our decision must have concluded that Example 2 was not "regulatory." Example 2, FTB claims, constitutes its interpretation of the Regulation.[5] Based on that interpretation of the decision, FTB alleges a misinterpretation of the term "regulation,"[6] and then a misapplication of the law in construing the Regulation. In other words, FTB asserts that deference must be given to its interpretation of the Regulation, including the interpretation reflected in Example 2 as part of the Regulation.

---

[3] We note that FTB has, without stated grounds, withdrawn its determination for tax year 2015 and our original decision is modified only to reflect that concession.

[4] FTB has not contested the correctness of OTA's decision to abate the demand penalty for tax year 2014.

[5] We acknowledge that both the BOE and OTA have issued opinions at least implicitly approving FTB's interpretation of the Regulation. As noted by FTB in its brief, OTA has also issued opinions that disagree with FTB's interpretation of the Regulation. Nonetheless, given that we have no precedential opinion to guide us, we are free to consider the issue now unencumbered, except by law and reason.

[6] FTB's argument is that the term "regulation" legally includes all the provisions of the Regulation, including Example 2 and that OTA's decision thus included an error of law by construing the Regulation as excluding Example 2.

The United States Supreme Court recently examined the rules for the interpretation and construction of an agency's regulations, particularly the circumstances that warrant deference to an agency's interpretation of its own regulation in *Kisor v. Wilkie* (2019) 588 U.S.___[139 S.Ct. 2400] (*Kisor*). While the *Kisor* Court declined to overrule *Bowles v. Seminole Rock & Sand Co.* (1945) 325 U.S. 410 or *Auer v. Robbins* (1997) 519 U.S. 452, the seminal decisions that established the rules for deferring to an agency's interpretation, it recognized the limited scope of the doctrine. *Kisor* tells us that "the possibility of deference can arise only if a regulation is genuinely ambiguous . . . even after a court has resorted to all the standard tools of interpretation. (*Kisor*, *supra*, at p. 2414.)

FTB would have us find that the Regulation is ambiguous, which would then allow us to defer to its interpretation of the Regulation. Before we can determine whether the Regulation is ambiguous, we must determine whether the Example 2 is entitled to consideration and weight equal to that afforded to the language that precedes it. We are not persuaded by FTB's argument that we must defer to its interpretation of the ambiguity. The example is in the Regulation because, as stated in subdivision (d) of the Regulation, "The . . . examples are intended to illustrate the provisions of this regulation." Example 2 merely describes FTB's interpretation of the rule that precedes it. FTB cannot create an ambiguity by including in a regulation an illustrative example that conflicts with the clear regulatory language anymore that it can create an ambiguity by proposing a conflicting interpretation of one of its regulations in an argument before OTA. There is no question that the clear regulatory language of subdivision (b)(2) tells us how the Regulation is to be applied. On the other hand, it has been stated that "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.) This at least suggests that conflicts between regulatory language and illustrative examples should be resolved in favor of the regulatory language. We agree.

As stated in *Kisor*, "If uncertainty does not exist, there is no plausible reason for deference. The regulation then just means what it means – and the court must give it effect, as the court would any law. Otherwise said, the core theory of *Auer* deference is that sometimes the law runs out, and policy-laden choice is what is left over . . . . But if the law gives an answer—if there is only one reasonable construction of a regulation—then a court has no business deferring to any other reading, no matter how much the agency insists it would make more sense.

DocuSign Envelope ID: 8A887511-2D3A-4632-87B7-0176DB846662

Deference in that circumstance would 'permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation.'" (*Kisor*, *supra*, 139 S.Ct. at p. 2415.) We find that there is only one reasonable construction of the Regulation, one based on the clear language of subdivision (b)(2) and that Example 2 in effect creates a new regulation.

In the appeal, we declined to give deference to an interpretation reflected in an illustrative example that is plainly erroneous and inconsistent with the unambiguous language in subdivision (b)(2) of the Regulation[7] and we now find no error in law in that decision.

FTB also asserts that we should apply what it claims was 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." (26 Cal.App.5th 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, citing *Yamaha Corp. of America v. State Bd. Of Equalization* (1998) 19 Cal.4th 1.) 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 our decision, we did not find Example 2 to create an ambiguity in the Regulation. We found it inapplicable because it conflicted with – did not accurately illustrate – the plain meaning of subdivision (b)(2) of the Regulation. Example 2 of the Regulation expressly states that it is illustrative. It does not correctly apply the plain meaning of the rule set forth in subdivision (b)(2) of the Regulation. 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

[7] Our decision effectively declares Example 2 an invalid illustration of the Regulation's language and thus should be viewed as void.

DocuSign Envelope ID: 8A887511-2D3A-4632-87B7-0176DB846662

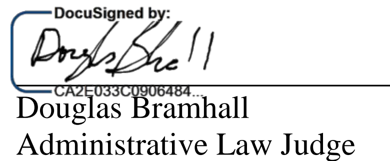
"must accord meaning to every word and phrase in the regulation." (*Butts v. Bd. of Trustees of Cal. State University* (2014) 225 Cal.App.4th 825, 835.) Furthermore, only if the plain meaning of a regulation is unclear, do we need to proceed to the second step in construing a regulation by looking to 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. To the extent a limitation on the imposition of the demand penalty results from our interpretation of the Regulation, the policy of leniency intended by the Regulation is advanced. Any resulting limitation is not absurd, it may be merely unintended.

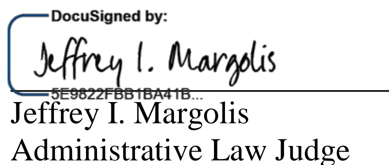
In summary, the application of the demand penalty regulation in our decision was not contrary to law nor did it include an error in law.

For the reasons set forth above, FTB's petition for rehearing is hereby denied.



Douglas Bramhall
Administrative Law Judge

I concur:



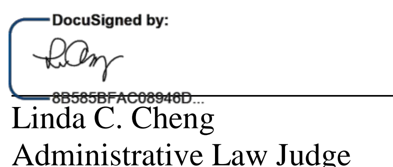
Jeffrey I. Margolis
Administrative Law Judge

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

I concur with the majority's holding denying appellant's petition for rehearing. I would, however, grant FTB's petition for rehearing on the ground that the majority opinion is based on an error in law with regard to its application of the demand penalty regulation. It is first important to note that FTB does *not* contend that there was insufficient evidence to justify the majority opinion or that the opinion is *contrary to law*. (Cal. Code Regs., tit. 18, § 30604(d).) Rather, FTB contends that a rehearing is warranted because the majority opinion made an *error in law*. (Cal Code Regs., tit. 18, § 30604(e).) Whereas the standard of review for the former is that a rehearing should only be granted where the decision is "unsupported by any substantial evidence" (*Sanchez-Corea v. Bank of Am*. (1985) 38 Cal. 3d 892, 906), a rehearing based on the latter may be granted where there is "doubt that [the panel] properly decided the legal issue" (*Arenstein v. California State Bd. of Pharmacy* (1968) 265 Cal.App.2d 179, 187-188).

The majority here finds no ambiguity in the regulatory language because the examples contained in Regulation 19133, in their view, are not part of the regulatory language per se but merely describe FTB's interpretation thereof. 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, emphasis added.) "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, ambiguity exists and that further inquiry, including consideration of FTB's own interpretation, is necessary to resolve the conflicting language in Regulation 19133. In other words, I believe the majority opinion improperly decided the legal issue in the instant matter.

Accordingly, I find that the majority opinion made an error in law and a rehearing should be granted on that basis.



Linda C. Cheng
Administrative Law Judge