OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	) OTA Case No. 18032524
CHRISTOPHER HICKS	) Date Issued: November 18, 2019

OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellant: Christopher Hicks

For Respondent: Michael J. Cornez, Attorney V

D. CHO, Administrative Law Judge: On July 8, 2019, the Office of Tax Appeals issued an opinion in which the majority found, as relevant here, that respondent Franchise Tax Board (FTB) improperly imposed a notice and demand penalty pursuant to California Revenue and Taxation Code (R&TC) section 19133 and California Code of Regulations, title 18, (Regulation) section 19133(b)(2). Accordingly, we concluded that the notice and demand penalty be deleted from the proposed assessment for the 2015 taxable year. FTB filed a timely petition for rehearing (petition) under R&TC section 19048. Upon consideration of FTB's petition, we conclude that the ground set forth therein does not meet the requirements of Regulation section 30604.

A rehearing may be granted where one of the following five grounds exists, and the substantial rights of the complaining party are materially affected: (a) an irregularity in the appeal proceedings that occurred prior to the issuance of the written opinion and prevented fair consideration of the appeal; (b) an accident or surprise that 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 opinion, we concluded that the language of Regulation section 19133(b)(2) was unambiguous. As a result, to the extent that Example 2 within Regulation section 19133(d) was inconsistent, we declined to follow the example. We also noted that Example 2 was included in Regulation section 19133(d) only for illustrative purposes. Therefore, we concluded that the unambiguous language of the regulation controlled in this situation, and we determined that FTB did not meet the requirements of Regulation section 19133(b)(2) because FTB did not issue a prior notice of proposed assessment at any time during the 2011 through 2014 taxable years, which was the four-taxable-year period preceding the taxable year at issue.

In its petition, FTB argues that our opinion contains an error of law and requests a rehearing pursuant to Regulation section 30604(e). FTB contends that our interpretation of Regulation section 19133(b)(2) is erroneous because we did not consider Example 2 to be "regulatory." (Citing Gov. Code, § 11342.600.) FTB explains that had we concluded that Example 2 was "regulatory," then we would have also concluded that an ambiguity arose between that example and subdivision (b)(2) of the same regulation. As a result of this ambiguity, FTB asserts, we should have given it deference in interpreting its regulation, which would have resulted in a finding that the notice and demand penalty was properly imposed.

Although FTB believes that Example 2 is a rule of general application, Regulation section 19133(d) states, "The following examples are intended to *illustrate* the provisions of this regulation . . . ." (Emphasis added.) This introductory sentence states the purpose of the examples, including Example 2, in the regulation. Nowhere does it state or allude that the examples are to be considered the general rule of application as FTB argues. Instead, we interpret this introductory sentence to mean what it states, which is that the examples are intended to illustrate the provisions of the regulation. The rule of general application is the language contained in Regulation 19133(b)(2), not the examples. Therefore, we reject FTB's argument.

Furthermore, we note that 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), there is no dispute that Example 2 creates such a conflict with the language in the regulation. Accordingly, we will not give it persuasive authority. The words in Regulation section 19133(b)(2) are unambiguous, and FTB's

interpretation is not entitled to deference. (See *Kisor v. Wilkie* (2019) 588 U.S. ___ [139 S.Ct. 2400, 2415].)

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

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Daniel Cho
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Daniel K. Cho
Administrative Law Judge

I concur:

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Kenneth Gast
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Kenneth Gast
Administrative Law Judge

L. CHENG, dissenting:

I respectfully dissent and would grant FTB's petition on the ground that the majority opinion is based on an error in law with regard to its application of the notice and demand penalty regulation. The majority here finds no ambiguity in the regulatory language because the examples contained in Regulation section 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 that ambiguity exists and further inquiry, including consideration of FTB's own interpretation, is necessary to resolve the conflicting language in Regulation section 19133. In other words, I believe the majority opinion improperly decided the legal issue in the underlying opinion.

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

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Linda C. Cheng
Administrative Law Judge