OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	) OTA Case No. 18073409
R. HENSE AND	)
P. HENSE	)
	)
	)
	)

OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellants:	Jeffrey S. Jacobs, Attorney at Law
For Respondent:	Marguerite Mosnier, Tax Counsel V
For the Office of Tax Appeals:	Michelle Huh, Tax Counsel

S. HOSEY, Administrative Law Judge: On January 24, 2020, this panel issued an opinion reversing respondent Franchise Tax Board's (FTB) denial of a claim for refund for the 2014 tax year. FTB then filed a petition for rehearing pursuant to Revenue and Taxation Code (R&TC) section 19048. Upon consideration of the petition for rehearing, we conclude that the grounds discussed in the petition do not constitute grounds for a new hearing. (Cal. Code Regs., tit. 18, § 30604; *Appeal of Do*, 2018-OTA-002P; *Appeal of Wilson Development, Inc*. (94-SBE-007) 1994 WL 580654.)

A new hearing may be granted where one of the following grounds exists, and the substantial rights of the filing party are materially affected: "(a) an irregularity in the appeal proceedings which occurred prior to 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 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); *Appeal of Do, supra*.)

FTB asserts in its petition for rehearing that our opinion is contrary to law.[1] FTB maintains the position that the imposition of the penalty should be sustained, and argues 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 Regulation section 19133. FTB contends that we "erred by failing to give equal dignity to all language in the demand penalty regulation." FTB also contends that if we had done so, then we would have concluded that the language in Regulation section 19133(b)(2) and Regulation section 19133(d), Example 2, was internally inconsistent and ambiguous, and the panel should have therefore deferred to FTB's interpretation of the regulation.

However, FTB's petition for rehearing presents the same arguments FTB 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 opinion; or established that the evidence was insufficient to justify our opinion. Furthermore, our opinion thoroughly addressed the issue of Regulation section 19133 being internally inconsistent and ambiguous.

We held in our opinion that, although the language of subdivision (b)(2) and subdivision (d), Example 2, of Regulation section 19133 is internally inconsistent, Example 2 did not create an ambiguity in Regulation section 19133 because subdivision (d) expressly states that Example 2 is illustrative. Quoting from *Cook v. Commissioner* (7th Cir. 2001) 269 F.3d 854, 858, we stated that "examples set forth in regulations remain persuasive authority *so long as they do not conflict with the regulations themselves*." (Emphasis added.) We resolved the internal conflict in Regulation section 19133 by finding that FTB is bound by the ordinary and unambiguous meaning of the words used in the governing language set forth in the regulation. The operative language of Regulation section 19133 is unambiguously written and, therefore, our opinion was not contrary to law.

[1] FTB's supplemental brief asserts that the holding in our opinion is based on an error of law, citing California Code of Regulations, title 18, (Regulation) section 30604(e). However, since the alleged error does not relate to an event that occurred during the proceedings of this appeal, we understand FTB to be arguing the fourth ground for a rehearing (i.e., that our opinion is contrary to law) pursuant to Regulation section 30604(d). (See appeal of *Appeal of Swat-Fame, Inc.*, 2020-OTA-045P.)

Our opinion thoroughly addressed FTB's arguments for the imposition of the demand penalty and, for the reasons expressed therein, we continue to reject FTB's arguments. Accordingly, we deny FTB's petition for rehearing.

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Sara A. Hosey
Administrative Law Judge

I concur:

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Daniel Cho
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Daniel K. Cho
Administrative Law Judge

R. TAY, dissenting:

I respectfully dissent. FTB contends that the original opinion erred because there is no basis to support the finding that FTB should be bound to one part of an "internally inconsistent" regulation, Regulation 19133(b), while disregarding another part of the same regulation, Regulation 19133(d). I agree, and believe that we should grant FTB's petition for a rehearing because the original opinion is unsupported by law or evidence. (See *Sanchez–Corea v. Bank of America* (1985) 38 Cal.3d 892.) Furthermore, I find no legal or factual basis in the record to support the finding that the "internally inconsistent" regulation is also "unambiguous." I believe that the reliance on the dicta in *Cook v. Commissioner* (7th Cir. 2001) 269 F.3d 845, is misplaced[2] and contrary to well-established law regarding statutory construction and interpretation. (See *People v. Arias* (2008) 45 Cal.4th 169; *Curle v. Superior Court* (2001) 24 Cal.4th 1057.) Thus, I would grant FTB's petition for rehearing.

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Richard Tay
Administrative Law Judge

Date Issued: 8/26/2020

[2] It is noteworthy that in *Cook v. Commissioner*, the statutory examples did comport with the statutory language.