

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:)	OTA Case No. 18010690
)	
W. HARRISON AND)	
A. HARRISON)	
)	

OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellants:	W. Harrison A. Harrison
For Respondent:	Marguerite Mosnier, Tax Counsel V

M. GEARY, Administrative Law Judge: On January 7, 2020, we issued an opinion (Opinion) in this appeal holding, as relevant here, that respondent Franchise Tax Board did not properly impose the demand penalty on W. Harrison for the 2012 taxable year and should, therefore, abate it.¹ Pursuant to the California Code of Regulations, title 18, (Regulation) section 30602, respondent filed a timely petition for rehearing (PFR). Upon consideration of the matters stated therein, we find that respondent has not established grounds for a new hearing. (Cal. Code Regs., tit. 18, § 30604; *Appeal of Do*, 2018-OTA-002P.)

Regulation section 30604 provides that a rehearing may be granted where any of the five stated grounds exist and the rights of the complaining party are materially affected. (See also *Appeal of Do*, *supra*.) As relevant here, one of those grounds is that there was insufficient evidence to justify the written opinion, or the opinion was contrary to law. (Cal. Code Regs., tit. 18, § 30604(d).)

Respondent argues here that our holdings regarding the demand penalty arose from our erroneous interpretation of Regulation section 19133, and it requests a rehearing pursuant to

¹ Because Judge Douglas Bramhall, who was a member of the panel that signed the Opinion, is not available to consider this PFR, Judge Sheriene Anne Ridenour will take Judge Bramhall's place.

Regulation section 30604.² Respondent argues that our analysis of Regulation section 19133 failed to follow the rules of regulatory construction, which required us to read the regulation as a whole, giving meaning to every word and phrase regardless of their location in illustrative examples or other parts of the regulation. It asserts that the inconsistency between the language of Regulation section 19133(b)(2) and Example 2 in Regulation section 19133(d) results in an ambiguity, which should have caused us to defer to respondent's interpretation, and that our failure to do so lead us to the absurd conclusion that the clear language of subsection (b)(2) controls.³

A PFR on the ground that our decision was contrary to law cannot be granted unless, after indulging in all legitimate and reasonable inferences to uphold our decision, we conclude that our decision was, as a matter of law, unsupported by substantial evidence. (*Sanchez-Corea v. Bank of America* (1985) 38 Cal.3d 892, 907 [interpreting California Code of Civil Procedure (CCP) section 657].⁴) We cannot so conclude. We view the illustrative examples contained in Regulation section 19133 to constitute respondent's interpretation of the language that precedes them. The language of Regulation section 19133(b)(2) is clear. Example 2 of subsection (d) is inconsistent, and we have concluded that respondent cannot rely on its illustrative example to create an ambiguity that would require us to look beyond the unambiguous language that precedes it. And while we recognize that there is a scarcity of authority on the resolution of direct conflicts between illustrative examples and the regulatory language they purport to interpret, we note that respondent has not cited any authority on that exact issue.

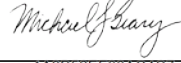
² Respondent cites to Regulation section 30604(e). However, because that ground, based on an "error in law," is used primarily to seek relief from procedural errors, we interpret the PFR as an argument that the relevant portion of our Opinion regarding the demand penalty was contrary to law, the ground set forth in Regulation section 30604(d).

³ Respondent explains that the absurdity is that a repeat non-filer would be able to avoid the demand penalty for several years.

⁴ Regulation 30604 is essentially based upon the provisions of CCP section 657. (See *Appeal of Wilson Development, Inc.* (94-SBE-007) 1994 WL 580654 [State Board of Equalization (SBE) utilizes CCP 657 in determining grounds for rehearing]; *Appeal of Do, supra* [OTA adopts SBE's grounds for rehearing].) Therefore, the language of CCP section 657 and case law pertaining to the operation of the statute are persuasive authority in interpreting the provisions contained in this regulation.

We find that respondent has not established grounds for a new hearing. The PFR is therefore denied.

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Michael F. Geary
Administrative Law Judge

We concur:

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Alberto T. Rosas
Administrative Law Judge

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Sheriene Anne Ridenour
Administrative Law Judge

Date Issued: 10/14/2020