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OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	) OTA Case No. 19064857
E. KUAN	)
	)
	)
	)
	)

OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellant: E. Kuan

For Respondent: Marguerite Mosnier, Tax Counsel V

S. BROWN, Administrative Law Judge: On June 18, 2020, the Office of Tax Appeals (OTA) issued an Opinion in which the majority found, as relevant here, that appellant was not liable for the notice and demand penalty (the demand penalty) under Revenue and Taxation Code (R&TC) section 19133 and California Code of Regulations, title 18, section (Regulation) 19133(b)(2). Respondent Franchise Tax Board (FTB) filed a timely petition for rehearing under R&TC section 19048. Upon consideration of FTB's petition, we conclude that the grounds set forth therein do not establish a basis for granting a rehearing.

Regulation 30604(a)-(e) provides that a rehearing may be granted where one of the following grounds exists and the substantial rights of the complaining party are materially affected: (a) an irregularity in the proceedings by which the party was prevented from having a fair consideration of its case; (b) an accident or surprise that occurred during the proceedings and prior to the issuance of the written opinion, which ordinary prudence could not have guarded against; (c) newly discovered, relevant evidence, which the party could not, with reasonable diligence, have discovered and produced 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. (See also *Appeal of Do*, 2018-OTA-002P.)

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FTB contends that a rehearing should be granted on the ground that the majority opinion was contrary to law because its interpretation of Regulation 19133(b)(2) is erroneous. FTB asserts that the inconsistency between the language of Regulation 19133(b)(2) and Example 2 in Regulation 19133(d) results in an ambiguity, which should have caused OTA to defer to FTB's interpretation, and that the failure to do so led to an absurd conclusion. FTB's interpretation is that Regulation 19133(b)(2)'s use of the word "during" should be interpreted as meaning "for," and this application would have resulted in a finding that the demand penalty was properly imposed. FTB argues that any other interpretation is contrary to the legislative history of R&TC section 19133 and Regulation 19133.

However, FTB's petition for rehearing generally raises the same arguments FTB previously argued in this appeal, which the panel considered and discussed in the Opinion.[1] In the Opinion, the majority relied on case law holding that the wording in a regulation must be given its plain meaning, and only if the meaning cannot be determined from the plain language of the regulation do we rely on extrinsic aids to ascertain the wording's intent. The Opinion concluded that the plain meaning of the language in Regulation 19133(b)(2) is clear, and therefore that the plain language of the regulation controlled. This language specifies that a Notice of Proposed Assessment issued following an individual's failure in a prior year to timely respond to a Request or Demand must have occurred *during* the four-taxable-year period preceding the taxable year for which the demand penalty is imposed. Consequently, to the extent that Example 2 within Regulation 19133(d) was inconsistent with this language, the Opinion declined to follow the example. Accordingly, the Opinion found that the demand penalty in this case did not meet the requirements of Regulation 19133(b)(2) because FTB did not issue a prior notice of proposed assessment at any time during the 2010 through 2013 taxable years, which was the four-taxable-year period preceding the taxable year at issue.

Regulatory language from 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.) This supports a conclusion that conflicts between regulatory language and illustrative examples should be resolved in favor of the regulatory language. Hence, given that the language of Regulation 19133(b)(2) is clear, we are not persuaded that FTB's

[1] This and subsequent references to the "Opinion" are to the majority opinion.

interpretation is entitled to deference. (See *Kisor v. Wilkie* (2019) 588 U.S.___(139 S.Ct. 2400, 2415).)

For the foregoing reasons, we find that FTB has not established grounds for a rehearing. Consequently, the petition for rehearing is denied.

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Suzanne B. Brown
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Suzanne B. Brown
Administrative Law Judge

We concur:

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Cheryl Akin
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Cheryl L. Akin
Administrative Law Judge

DocuSigned by:
John O Johnson
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John O. Johnson
Administrative Law Judge

Date Issued: 1/14/2021