OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	) OTA Case No. 18010925
P. APPLEBY AND	)
J. APPLEBY	)
	)
	)

OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellants: P. Appleby

For Respondent: Marguerite Mosnier, Tax Counsel V

D. CHO, Administrative Law Judge: On March 25, 2020, the Office of Tax Appeals (OTA) issued an Opinion reversing in part and sustaining in part respondent Franchise Tax Board's (FTB) denial of a claim for refund for the 2013 taxable year.[1] Specifically, OTA reversed FTB's conclusion that P. Appleby and J. Appleby (appellants) were liable for the notice and demand penalty but sustained FTB's determination that appellants were liable for the late-filing penalty. FTB filed a timely petition for rehearing pursuant to Revenue and Taxation Code (R&TC) section 19048, disputing only OTA's conclusion as to the notice and demand penalty. Upon consideration of the petition for rehearing, we conclude that the reasons set forth therein do not constitute grounds for a rehearing. (See Cal. Code Regs., tit. 18, § 30604; see also *Appeal of Do*, 2018-OTA-002P.)

A rehearing 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

[1] The panel for the Opinion consisted of Administrative Law Judges Sara A. Hosey, Teresa A. Stanley, and Amanda Vassigh.

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); see also *Appeal of Do, supra*.)

FTB asserts in its petition for rehearing that OTA's Opinion is contrary to law.[2] FTB maintains that the imposition of the notice and demand penalty should be sustained, and argues that OTA should give deference to FTB's position that the word "during" should be interpreted as meaning "for," and that any other interpretation is contrary to the legislative history and intent of R&TC section 19133 and Regulation section 19133. FTB states that OTA "erred by failing to give equal dignity to all language in the demand penalty regulation." FTB also contends that had OTA followed proper rules of statutory construction, OTA would have concluded that the language in Regulation section 19133(b)(2) and Regulation section 19133(d), Example 2, was internally inconsistent. Based on this inconsistency, FTB asserts that the regulation was ambiguous, and OTA should have therefore deferred to FTB's interpretation of the regulation.

To find that the Opinion is contrary to law, we must determine whether the Opinion is "unsupported by any substantial evidence." (*Appeal of Graham and Smith*, 2018-OTA-154P, citing *Sanchez-Corea v. Bank of America* (1985) 38 Cal.3d 892, 906 (*Sanchez-Corea*).) This requires a review of the Opinion to indulge "in all legitimate and reasonable inferences" to uphold the Opinion. (*Sanchez-Corea, supra*, 38 Cal.3d at p. 907.) The relevant question is not over the quality or nature of the reasoning behind the Opinion, but whether the Opinion can or cannot be valid according to the law. (*Appeal of NASSCO Holdings, Inc.* (2010-SBE-001) 2010 WL 5626976.) In our review, we consider the evidence in the light most favorable to the prevailing party. (*See Sanchez-Corea, supra*, 38 Cal.3d at. P. 907.)

With respect to FTB's argument, the Opinion already addressed and rejected this argument. Specifically, the Opinion concluded 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. According to *Cook v. Commissioner* (7th Cir. 2001) 269 F.3d 854, 858, "examples set forth in regulations remain persuasive authority *so long as they do*

[2] FTB's petition for rehearing actually asserts that the holding in OTA's 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 the Opinion is contrary to law) pursuant to Regulation section 30604(d). (See *Appeals of Swat-Fame, Inc.*, 2020-OTA-045P.)

not conflict with the regulations themselves." (Italics added.) This language suggests that conflicts between regulatory language and illustrative examples in the same regulation should be resolved in favor of the regulatory language. We agree. Thus, we resolve 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(b)(2) is unambiguously written and, therefore, the Opinion was not contrary to law.

Based on the foregoing, we deny FTB's petition for rehearing.

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Daniel Cho
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Daniel K. Cho
Administrative Law Judge

I concur:

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Teresa A. Stanley
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Teresa A. Stanley
Administrative Law Judge

Date Issued: 12/14/2020

A. VASSIGH, concurring:

I agree with my co-Panelists that OTA's Opinion in the underlying appeal was not contrary to law, but I am writing this concurrence to stress that the relevant question is not over the quality or nature of the reasoning behind the Opinion. Instead, the focus is whether the Opinion can or cannot be valid according to the law. (*Appeal of NASSCO Holdings, Inc.* (2010-SBE-001) 2010 WL 5626976.) The majority holds there is no ground for a rehearing based on the conclusion that the Panel came to in the underlying Opinion. However, the law in this particular area is indeterminate and analysis of the correct application of the demand penalty and interpretation of R&TC section 19133 has resulted in different conclusions in OTA Opinions. Since the Opinion provided a cogent analysis of the application of the demand penalty, it is valid according to the law.

This is a gray area of law in which a valid legal argument can be constructed on either side of the application of law to facts. Reasonable minds may differ with the conclusion of the Panel, but the Opinion was based on legally sound analysis and thus was not contrary to law.

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Amanda Vassigh
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Amanda Vassigh
Administrative Law Judge