OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Consolidated Appeals of: **RYAN MICHAEL DARLING, A PROFESSIONAL CORPORATION; AND R. DARLING**	) OTA Case Nos. 18073424 and 18093788)))))

OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellants: David F. Miles, EA

For Respondent: Marguerite Mosnier, Tax Counsel V

K. GAST, Administrative Law Judge: On April 3, 2020, the Office of Tax Appeals (OTA) issued an Opinion in which we found, as relevant here, that appellant R. Darling was not liable for the notice and demand penalty (the demand penalty) for the 2013 and 2014 tax years under Revenue and Taxation Code (R&TC) section 19133 and California Code of Regulations, title 18, (Regulation) section 19133(b)(2). Franchise Tax Board (FTB) filed a timely petition for rehearing (petition) under R&TC section 19048.[1] Upon consideration of FTB's petition, we conclude that the ground set forth therein does not establish a basis for granting a rehearing.

A rehearing may be granted where one of the following six grounds exists, and the substantial rights of the filing party (here, FTB) are materially affected: (1) an irregularity in the appeal proceedings which occurred prior to issuance of the opinion and prevented fair consideration of the appeal; (2) an accident or surprise which occurred during the appeal proceedings and prior to the issuance of the opinion, which ordinary caution could not have prevented; (3) newly discovered, relevant evidence, which the filing party could not have reasonably discovered and provided prior to issuance of the opinion; (4) insufficient evidence to justify the opinion; (5) the opinion is contrary to law; or (6) an error in law in the appeals hearing

[1] Our Opinion decided nine issues, eight of which we found in favor of FTB and one of which, the demand penalty issue, we found in favor of appellant R. Darling. FTB filed a petition solely on that latter issue. Appellants did not file a petition.

or proceeding. (Cal. Code Regs., tit. 18, § 30604(a)(1)-(6).)

FTB contends that a rehearing should be granted on the ground that our Opinion is contrary to law because our interpretation of Regulation section 19133(b)(2) is erroneous.[2] FTB 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 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 section 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 section 19133.

However, we disagree with FTB. The rules of statutory construction apply when interpreting regulations promulgated by administrative agencies, such as FTB. (*Butts v. Board of Trustees of The California State University* (2014) 225 Cal.App.4th 825, 835.) Here, because we find the language in Regulation section 19133(b)(2) to be clear and unambiguous, we simply apply the "plain language" rule and decline to look to extrinsic aids, such as legislative and regulatory history, that are used to interpret ambiguous language. (*Id.* at p. 836.) This language specifies that a Notice of Proposed Assessment (NPA) 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 section 19133(d) is inconsistent with this language, our Opinion declined to follow the example. Accordingly, our Opinion found that the demand penalties in this case did not meet the requirements of Regulation section 19133(b)(2) because FTB did not issue a prior NPA at any time during 2009 through 2012 (for the 2013 tax year) or at any time during 2010 through 2013 (for the 2014 tax year), which is the four-taxable-year period preceding the respective tax year at issue.

As we noted in our Opinion, regulatory language from examples set forth in regulations remain persuasive authority so long as they do not conflict with the regulations themselves.

[2] FTB's petition actually asserts that our Opinion "is based on an error in law." Regulation section 30604 was recently amended to clarify that "[a] procedural 'error in law' shall mean an error in the appeals hearing or proceeding, other than a legal error in the Opinion." (Cal. Code Regs., tit. 18, § 30604(b).) FTB does not argue that there was an error in law during the proceedings. Thus, we interpret FTB's "error in law" contention to be based solely on the fifth ground; namely, that our Opinion is contrary to law. (*Ibid.* ["the 'contrary to law' standard of review shall involve a review of the Opinion for consistency with the law"].)

(*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 section 19133(b)(2) is clear, we are not persuaded that FTB's 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 that our Opinion is contrary to law. Consequently, FTB's petition is denied.

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Kenneth Gast
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Kenneth Gast
Administrative Law Judge

We concur:

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John O Johnson
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John O. Johnson
Administrative Law Judge

DocuSigned by:
Teresa A Stanley
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Teresa A. Stanley
Administrative Law Judge

Date Issued: 4/21/2021