DRAFT

STATE BOARD OF EQUALIZATION
STAFF LEGISLATIVE BILL ANALYSIS

Date:	**05/15/12**	Bill No:	**AB 2323**
Tax Program:	**Administration**	Author:	**Perea**
Sponsor:	**Author**	Code Section:	**RTC 40**
Related Bills:		Effective Date:	**01/01/13**

BILL SUMMARY

This bill requires the Board of Equalization (BOE) to publish on its Internet website, a formal written opinion, a written memorandum opinion, or a written summary decision for each decision of the BOE in which the amount in controversy is $500,000 or more, within 90 days from date of the decision, and to include with that published opinion, specified information.

ANALYSIS

CURRENT LAW

The BOE administers the sales and use tax and various excise taxes; sets values for property for state-assessees; monitors the property tax assessment practices of county assessors; reviews, equalizes and adjusts assessments of certain land owned by local government entities; and hears appeals of personal income and corporation taxes administered by the Franchise Tax Board (FTB). The California Constitution establishes that the BOE consists of 5 voting members: the Controller and four members elected at gubernatorial elections from districts for 4-year terms.

Under Section 15606 of the Government Code, the BOE is required to keep a record of all its proceedings. Consistent with that provision, the BOE makes available the minutes of all BOE hearings and publishes the minutes on the BOE's website.

The BOE's Rules for Tax Appeals (California Code of Regulations, Title 18, § (Rule) 5000 et seq.), promulgated through the rulemaking process, provides rules for drafting and adopting written opinions. These rules are based on the California Rules of Court for publishing appellate court decisions.

Under the BOE's Rule 5573, the filing of an appeal with the BOE for income or corporation taxes constitutes a waiver of the taxpayer's right to confidentiality with regard to information provided to the BOE by the appellant or the FTB, including information contained in the Hearing Summary prepared to assist the BOE in its consideration and decision of an appeal at an oral hearing. Additionally, the filing of a written request for an oral hearing before the members of the BOE for BOE-administered taxes and fees constitutes a waiver of the taxpayer's right to confidentiality with regard to information provided to or obtained by the BOE that is actually disclosed on the transcript of the taxpayer's oral hearing before the BOE or included in the Hearing Summary prepared for the taxpayer's oral hearing before the BOE.

However, this waiver does not apply to any person's address, telephone number, social security number, federal identification number, or other account number, and such information is not made publicly available.

This staff analysis is provided to address various administrative, cost, revenue and policy issues; it is not to be construed to reflect or suggest the BOE's formal position.

PROPOSED LAW

This bill adds Section 40 to the Revenue and Taxation Code to require the BOE to publish on its Internet website, a formal written opinion, a written memorandum opinion, or a written summary decision for each decision of the BOE in which the amount in controversy is $500,000 or more, within 90 days of the date upon which the BOE rendered its decision.

The bill further requires that each published opinion include:

(1) Findings of Fact
(2) The legal issue or issues presented.
(3) Applicable law.
(4) Analysis.
(5) Disposition.
(6) Names of adopting BOE members.

The bill allows a Member of the BOE to submit a dissenting opinion setting forth his or her rationale for disagreeing with the memorandum opinion or formal opinion, and allows a BOE Member to submit a concurring opinion setting forth his or her rationale for agreeing with the result reached in the opinion, if different than the rationale set forth in the opinion.

The bill requires that a dissenting and concurring opinion shall be published in the same manner as the bill requires for a formal or memorandum opinion.

The bill also provides that a formal opinion or memorandum opinion adopted by the BOE may be cited as precedent in any matter or proceeding before the BOE, unless the opinion has been depublished, overruled, or superseded. The bill specifies, however, that a summary decision may not be cited as precedent in any matter or proceeding before the BOE.

The bill would become effective on January 1, 2013.

IN GENERAL

The BOE strives to offer transparency to all taxpayers and stakeholders. In an effort to be a more transparent agency, the BOE uses a variety of means to make information more easily accessible to taxpayers and interested parties. In recent years, the BOE has made significant strides in these efforts and will continue to do so. Taxpayer information that is public is now more readily available. For example, since the updated Rules of Tax Appeals were adopted in 2008, the hearing summaries have been attached to the public agenda when it is posted to the website 10 days prior to the hearings. Also, in 2008, video streaming of all meetings of the BOE in Sacramento and Culver City began, allowing access through the Internet to live, real time broadcasts for any interested party to watch and review all presentations, discussions and decisions of the BOE. In addition, these meetings of the BOE are archived for anyone to watch afterward.

Corporate and individual taxpayers who dispute a final determination by the FTB may appeal that determination to the BOE. The BOE issues Formal Opinions as a means of resolving selected cases. Taxpayers may look to Formal Opinions for guidance as to the BOE's position on the legal issues discussed in those opinions. If a Formal Opinion presents facts and/or legal issues similar to those in a pending appeal, the BOE will generally rely on the Formal Opinion to make its determination in the pending appeal. These Formal Opinions are available on the BOE's website, and date as far back as 1930.

In addition, the BOE publishes franchise and income tax ("FIT") decisions by distributing them to legal publishers and other interested parties such as practitioners (except some decisions are required to be withheld to the extent they include federal tax information).

Taxpayers and feepayers who disagree with denials of claims for refund or determinations issued by the Sales and Use Tax Department or the Special Taxes Department of the BOE may appeal such actions to the elected members of the BOE. The BOE may issue Memorandum Opinions in connection with such an appeal. Taxpayers and feepayers may look to the Memorandum Opinions for guidance as to the BOE's position on the legal issues discussed in those opinions. If a Memorandum Opinion presents the same legal issue as those in a pending appeal in the same factual context, the BOE will generally resolve the legal issue in the same way as specified in the Memorandum Opinion. These opinions are available on the BOE's website, and date as far back as 1967.

In addition to the Formal Opinions and Memorandum Opinions, the BOE has for several years publicized on the BOE's website the minutes of every BOE hearing it holds.

COMMENTS

1. **Sponsor and Purpose.** This bill is sponsored by the author and is intended to promote taxpayer confidence by requiring the BOE to publish written opinions for each case in which the amount in controversy is $500,000 or more. The author believes these opinions would provide a formal record of the legal analysis applied to resolve significant cases for both the taxpayers involved and other interested parties. The author recognizes that the BOE does publish certain decisions, but notes that the number of published decisions has decreased dramatically in recent years. Thus, the author believes this bill is needed to restore a useful BOE practice that will, in turn, promote the twin goals of transparency and sound governance.

2. **Publishing all decisions could create confusion.** The BOE currently publishes its Formal Legal Opinions and Memorandum Opinions on its website, and those opinions are essentially the only opinions with precedential value. Publishing non-precedential opinions *on the BOE's website* could create significant confusion, since it would suggest that the opinions are authoritative guidance. The BOE does in fact distribute a substantial number of Summary Decisions, as well has Hearing Summaries, each year (on average, about 150) to interested practitioners and other parties, and also to legal publishers for publication and inclusion in online legal research service sites, such as Lexis and Westlaw.

3. **Bill would delay resolution of affected appeals.** For **FIT appeals** on the "non-appearance" calendar (meaning the taxpayer has waived his or her right to appear before the BOE Members at an oral hearing), the BOE distributes its Summary Decisions (written decisions that contain the findings of fact and conclusions of law that form the basis of the BOE's decision on an appeal) to legal publishers and other interested parties. Therefore, to the extent these decisions are already made publicly available, the bill is consistent with existing practice. However, the BOE generally does not include all the information the bill requires for "Letter Decisions" which are typically issued after an oral hearing in which the taxpayer appears in FIT cases. In the majority of these FIT appeals, the BOE makes its decision on the day of the hearing and, within days of the hearing, BOE staff notifies the parties of the BOE's determination through a brief Letter Decision. Because the Letter Decision is prepared by staff and sent immediately following the BOE's decision at the hearing, the Letter Decision does not provide a detailed legal analysis. Summary Decisions

and Letter Decisions are important because they allow the BOE and its staff to consider and decide FIT appeals as expeditiously as possible, a benefit for both the taxpayer and the FTB.

It appears the bill would require the BOE to replace these Letter Decisions in applicable FIT cases that are typically issued after hearings, and require the staff to (1) prepare a more detailed analysis similar to that provided in Summary Decisions, (2) schedule these decisions for a later public meeting for discussion, review, and adoption or modification by the BOE, and (3) post the decisions on its website. This would delay resolution of these appeals, since these longer decisions would require prior BOE review and approval to ensure that the BOE agrees with the reasoning and language set forth in the decision (i.e., to ensure that the reasoning and analysis actually reflects that of the adopting BOE Members). Consequently, the appeal item would need to be held open after a BOE hearing for the BOE Appeals staff to prepare a decision that reflects the hearing testimony and discussion as well as BOE direction. It would then have to be submitted for the BOE's approval on a later calendar. This would appear to require significant changes to current procedures for qualifying appeals (e.g., more staff time will be needed to prepare these decisions, more discussion and debate at meetings when these decisions are presented for a vote, and there would be a delay in resolution of these appeals by at least a few months).

For **business tax appeals** (appeals of determinations issued for tax and fees administered by the BOE and claims for refund), there would also be a delay in resolution of some of the appeals. Prior to a hearing before the BOE, Appeals staff of the BOE holds an appeals conference and issues a written report called a Decision and Recommendation (D&R) which contains the disputed issues, the facts relevant to those issues, and an analysis, leading to a recommended resolution of the appeal. Where the taxpayer does not agree, it may proceed to a hearing before the Members of the BOE. If the BOE must publish a decision for the appeal and the BOE completely agrees with the D&R, it might choose to simply adopt the D&R. However, even where the BOE agrees with the ultimate recommendation of a D&R, it may not agree with its content to the extent that it can adopt the D&R as its own decision. This is particularly true when new evidence is presented or new arguments made at the hearing which were not addressed in the D&R. Furthermore, there may have also been a Supplemental D&R issued before the matter is heard by the BOE, and for those cases, it would virtually never be appropriate for the BOE to adopt the D&R, or the Supplemental D&R, or both as its decision. Rather, we anticipate that if this bill were to become law, for the significant majority of BOE hearings coming within its provisions, the BOE would have to use the same process it does now for issuance of Memorandum Opinions. That is, after hearing and deciding the case, the BOE would generally direct Appeals staff to draft a decision specific to the matters heard and discussed by the Members of the BOE, and to bring that decision back to the BOE for adoption at a later BOE meeting. If the BOE was not satisfied with the draft and could not satisfactorily address the issues at that meeting, it would then have to give further directions to staff and consider the re-drafted decision at a later meeting.

Also, under the BOE's Rule 5461 for FIT, and Rule 5561 for sales and use tax matters, taxpayers may file a Petition for Rehearing within 30 days of the date on which notice of the BOE's decision is mailed to the taxpayer. As explained in the previous paragraph, since some of these longer decisions may need prior BOE

review and approval, the 30 day deadline with which to request a rehearing would put taxpayers at a disadvantage, since they would essentially be required to file a petition before knowing the particular facts and reasoning behind the BOE's decision.

Any delay in resolution of appeals would result in a corresponding delay in the collection of revenues.

4. **Bill would increase workload and delay the processing of cases awaiting a BOE hearing.** In FIT cases, because a detailed summary as described above would typically require significantly more time to prepare than the "Letter Decisions," the workload of the Appeals staff will certainly increase. Also, there will be an increased workload for business taxes cases for every appeal with over $500,000 in dispute, except in cases where the BOE adopts the D&R as the formal decision, which is something the BOE has not done in the past. And, the BOE typically does not include all the information the bill requires for the non-appearance items presented to the BOE on a consent basis in BOE-administered tax and fee issues (such as credits, cancellations and refunds in excess of $100,000). There are numerous items of this nature on each BOE calendar (see, for example, pages 2 through 12 of the January, 2012, BOE meeting), and the workload associated with preparing a detailed summary for these consent items would be significant.

   In addition, there would be a workload increase attributable to redacting confidential information in both FIT and business tax cases (see comment below). And, without additional staff to handle this workload, there would be a delay in preparing existing cases that are awaiting BOE hearings. Any delay would unfairly cause the accrual of additional interest on the unpaid tax in dispute, resulting in additional liability against taxpayers through no fault of their own.

5. **The bill raises concerns with confidentiality issues in many cases.** This bill does not address the potential privacy infringement that could occur if it becomes law.

   For **FIT cases**, when the BOE or the FTB obtains federal tax information from the Internal Revenue Service (IRS), the BOE does not publish that information, as that data is proprietary to the IRS. The confidentiality requirement cannot be waived by the taxpayer pursuant to federal income tax law. Under this bill, the information about these cases would be required to be posted to the BOE's website. Should this bill become law, it appears there would be a potential conflict with the rules regarding the confidentiality of federal tax information.

   For **business tax cases**, the items on the D&R prepared by BOE staff are, on average, ten pages long, and often contain very personal information not only about the taxpayer appealing the determination, but also about customers, family members, and other parties that may be directly or indirectly associated with the taxpayer. Personal information such as medical conditions, financial difficulties, marital issues, family conflicts, and a variety of private matters concerning the taxpayer or related parties are discussed in these D&Rs. Also, for the consent items, minimal information regarding the credit, cancellation or refund is publicly provided currently.

   Under the BOE's rules, the filing of a written request for an oral hearing before the members of the BOE on an appeal of a BOE-administered tax or fee, constitutes a waiver of the taxpayer's right to confidentiality with regard to information provided to or obtained by the BOE that is actually disclosed on the transcript of the taxpayer's

oral hearing before the BOE or included in the Hearing Summary prepared for the taxpayer's oral hearing before the BOE.

Since the information disclosed on the transcript of a BOE hearing, or in the Hearing Summary, may not necessarily be duplicative in all respects with the D&R prepared by BOE staff subsequent to the appeals conference with the taxpayer or his or her representative, enactment of this bill would have the potential of divulging information about a taxpayer that he or she may not necessarily want disclosed. This could have the unintended consequence of discouraging taxpayers from requesting oral hearings before the BOE in situations where they do not want such personal information published on the Internet.

6. **The 90-day publishing requirement would be very difficult to meet.** For preparation of the summary decision for FIT cases and a memorandum opinion for business tax cases, a 90-day deadline would be very difficult to meet given the need for preparation of the decision, internal legal review, review and consideration by BOE Member offices, subsequent revisions, and then scheduling the opinion for the next monthly BOE meeting for adoption. Unlike in the judicial system, Members of the BOE can only meet and vote in public, and their meetings must be calendared with sufficient advance notice to the public. A 90-day timeline would present the risk that the Members of the BOE would have to approve an unsatisfactory drafted opinion or violate the 90-day deadline.

7. **The $500,000 threshold is arbitrary.** The amount at issue in an appeal does not determine the precedential importance of the issues considered, and limiting the bill to $500,000 cases only seems arbitrary and capricious. Also, the bill should clarify whether the $500,000 amount represents only the tax in dispute, or whether it includes tax, interest and/or penalty amounts.

COST ESTIMATE

Enactment of this measure would result in administrative costs attributable to the additional staff time for preparing a vast number of additional written decisions. Our initial analysis is that approximately 180 cases per year would be directly covered by the new mandate in this bill, including property tax, business tax appeals, franchise and income tax matters and sales and use and special tax and fee items. We anticipate that many of these cases will involve concurrences, or the provision of alternative opinions, due to the need to comply with the 90-day requirement. Additional costs in reviewing and redacting confidential information prior to publishing the matter on the BOE website would also be incurred. While staff is continuing its review of the impact of this bill, staff has preliminarily estimated these costs to be between $1 million to $1.3 million per year.

REVENUE ESTIMATE

As explained in comments 3 and 4, without additional staff to handle the additional workload, the bill would result in a delay in collection of revenues, since the final resolution on the largest tax and fee appeals in this state would be delayed, as would those appeal cases waiting to be scheduled for resolution by the BOE.

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