

Memorandum

To : Honorable Judy Chu, Ph.D., Chair
Honorable Betty T. Yee, Vice Chairwoman
Honorable Bill Leonard
Honorable Michelle Steel
Honorable John Chiang

Date : June 10, 2008

From : Kristine Cazadd
Chief Counsel 

Subject : **Report on Administrative Settlement Program: Policies, Procedures and Recommendations
June 24, 2008 Board Meeting – Customer Services and Administrative Efficiency Committee**

I. Purpose

The purpose of this report is to provide current information on the Board of Equalization's Administrative Settlement Program policies and procedures. Additionally, staff recommends modifying the 45-day policy discussed on page five below.

II. General

The purpose of the Settlement Program is to provide an alternative process for finally resolving tax and fee disputes that is faster and less costly than continuing through the appeals process or litigation. A list of the tax and fee programs for which administrative settlement is authorized is attached as Exhibit A. A flowchart of the settlement process is attached as Exhibit B.

III. Eligible Disputes

By statute, disputed civil tax or fee liabilities involving petitions for redetermination or reconsideration, administrative protests, or claims for refund pending before the Board are eligible for the administrative settlement program. The Settlement Section may also consider jeopardy determinations when an administrative hearing has been requested. Audits in progress, matters in litigation, and final, collectable liabilities are not eligible. The statutes require that settlements be consistent with a reasonable evaluation of litigation risks and costs and in the State's best interest. (Rev. & Tax. Code § 7093.5(a) and (c).)¹ Accordingly, inability to pay is not a basis for settlement.²

¹ The statutory references in this memorandum are to the Sales and Use Tax Law. The statutes for special tax and fee matters are comparable. Those statutes are listed on Exhibit A.

² If a taxpayer or feepayer does not dispute the tax or fee but asserts that he or she is unable to pay the full liability, staff advises the taxpayer or feepayer of BOE's Offer in Compromise Program as well as the installment payment option available through the Sales and Use Tax and Property and Special Taxes Departments.

In addition to the above eligibility requirements, under current policy, generally cases in which the settlement offer was not submitted at least forty-five (45) days before the date of the first scheduled hearing by the five-member Board are not considered for settlement. (2007 Board Meeting Reference 4-4.)

IV. Notice of the Settlement Program

Taxpayers or fee payers who file petitions for redetermination or reconsideration receive notice of the Settlement Program in the Department's letter acknowledging the petition. Approximately two weeks later, the Settlement Section sends letters to petitioners that provide more detail on the program and explain how to submit a settlement offer.

Taxpayers or fee payers who file Claims for Refund under the Sales and Use Tax and Special Tax and Fee programs are notified of the Settlement Program at the time they request an appeals conference.

Additionally, information on the Settlement Program appears on the Internet at <http://www.boe.ca.gov/sutax/boe393htm> and in the following Board publications:

- Publication #17 - Appeals Procedures: Sales and Use Taxes and Special Taxes
- Publication #70 - Understanding Your Rights as a California Taxpayer
- Publication #76 - Audits
- Publication #142 - California State Board of Equalization Hearings: An Introduction

Taxpayers and fee payers receive Publications #17, #70 and #76 from audit staff at the beginning of the audit process. As indicated above, Publication #142, which Board Proceedings Division sends to acknowledge a taxpayer's or fee payer's request for an oral hearing before the five-member Board, also contains information on the Settlement Program. Also, staff is working with the Appeals Division to add notification of the Settlement Program to the cover letters to Decisions and Recommendations that are sent to taxpayers and fee payers after Appeals Conferences.

V. Initiating Settlement Offer and Acceptance into Settlement Program

A taxpayer or fee payer wishing to initiate settlement must submit a signed and dated written request for settlement offer to the Assistant Chief Counsel, Settlement Division. The request should include:

1. The taxpayer's or fee payer's name, phone number, and current address
2. If applicable, the name, address, and fax and phone number of the representative and a copy of the representative's power of attorney
3. The taxpayer's or fee payer's account number
4. The tax or fee period involved
5. A good faith settlement offer, including factual and legal grounds in support of the offer

After review of the settlement request, staff notifies the taxpayer or fee payer whether the case has been accepted into the settlement program. A taxpayer or fee payer who requests settlement must continue to meet applicable deadlines for their petition, administrative protest, or claim for refund. If a case is scheduled for an appeals conference when the taxpayer or fee payer requests settlement, generally the appeals conference will still be held so that the appeals process will not be unduly delayed.

Generally, an eligible case that presents a genuine factual or legal dispute and more than negligible risk to the State's position will be accepted for settlement. Occasionally, a case may not be considered appropriate for settlement. For example, if settlement staff determine that there are insufficient facts to allow a reasonable evaluation of the merits of the taxpayer's or feepayer's position or a case presents little or no litigation risk, the case may not be accepted.

VI. Processing Settlement Offers

The Settlement attorneys and auditors evaluate each case accepted into the program to assess the strengths and weaknesses of each party's position and the risks and costs of litigating the matter. If the difference between the liability and the taxpayer's or feepayer's offer exceeds five hundred thousand dollars (\$500,000), staff presents proposed settlement terms to the Chief Counsel and Executive Director. Staff then seeks to reach agreement with the taxpayer or feepayer on mutually acceptable settlement terms that are reasonable overall and in the best interests of the State or, if the case does not appear to be conducive to settlement, so advises the taxpayer or feepayer.

Settlement negotiations are conducted by telephone or face-to-face conference. If settlement staff and the taxpayer or feepayer agree on settlement terms, staff prepares a formal Settlement Agreement memorializing those terms. Generally, staff gives the taxpayer or feepayer twenty-one (21) days after the date of the cover letter to sign and return the Agreement.

If staff and the taxpayer or feepayer are unable to agree on settlement terms, staff sends a letter advising the taxpayer or feepayer that the case will be returned to the regular appeals process. A taxpayer or feepayer who disagrees with staff's action may seek reconsideration of the matter by appealing to the Settlement Division's Assistant Chief Counsel. The appeal must be in writing and state why the settlement terms proposed by the taxpayer or feepayer are reasonable and in the best interests of the State. The Assistant Chief Counsel considers the appeal, consults with staff, and advises staff to accept the taxpayer's or feepayer's terms, conduct additional negotiations, or, if it does not appear that agreement can be reached, advise the taxpayer or feepayer that the case will be returned to the regular appeals process.

Upon return of a timely signed and dated Settlement Agreement from a taxpayer or feepayer, staff prepares and signs a settlement memorandum. The memorandum describes the liability and issues in dispute, the terms of the negotiated settlement and discusses why, in light of litigation risks and costs, the settlement is reasonable overall and in the best interests of the State. Staff submits the memorandum to the Assistant Chief Counsel, Chief Counsel, and, if the settlement will result in a reduction of taxes, fees and/or penalties in excess of three hundred thousand dollars (\$300,000), to the Executive Director for approval.

If the reduction of taxes, fees, and/or penalties in settlement exceeds five thousand dollars (\$5,000), staff sends the signed memorandum to the Office of the State Attorney General who, by statute, has thirty (30) days to comment on whether the settlement appears reasonable from an overall perspective. (Rev. & Tax. Code § 7093.5(b)(2).) If the Attorney General's comment is unfavorable, at the discretion of the Assistant Chief Counsel, the case will either be renegotiated or returned to the regular appeals process.

Following comment from the Attorney General, staff submits the memorandum and a copy of the Attorney General's comment to the Board, which, by statute, has forty-five (45) days to approve or disapprove the settlement. If the Board fails to act within forty-five (45) days, the settlement is

deemed approved. If the Board disapproves, the matter may be renegotiated and at the discretion of the Executive Director or Chief Counsel, resubmitted. The statutes prohibit Board Members from participating in the settlement process except in the final approval phase. (Rev. & Tax. Code § 7093.5(d) and (e).)³

Upon approval or disapproval of a settlement, staff notifies the taxpayer or feepayer. The taxpayer or feepayer generally is expected to pay any settlement amount due to the State within thirty (30) days of notice that the settlement has been approved.

Upon timely payment of the settlement amount, staff sends the Agreement to the Executive Director or his or her designee for execution on behalf of the Board. The Settlement Agreement is considered effective when executed on behalf of the Board. Staff then sends a fully executed copy of the Agreement to the taxpayer or feepayer.

If the taxpayer or feepayer fails to timely pay the settlement amount due, the Board does not execute the Agreement, the Agreement does not become effective, and the case is returned to the regular appeals process.

VII. Public Record Statement, Finality of Settlements

By statute, if a settlement results in a reduction of taxes and/or fees in excess of five hundred dollars (\$500), a Public Record Statement is placed on file in the office of the Executive Director. The Public Record Statement includes:

1. The name or names of the taxpayers or feepayers who are parties to the settlement
2. The total amount in dispute
3. The amount agreed to pursuant to the settlement
4. A summary of the reasons why the settlement is in the best interests of the State
5. The Attorney General's conclusion as to whether the settlement is reasonable from an overall perspective

The Public Record Statement does not include information that relates to any trade secret, patent, process, style of work, apparatus, business secret, or organizational structure that, if disclosed, would adversely affect the taxpayer or feepayer or the national defense. Except for the Public Record Statement, any settlement considered or entered into constitutes confidential tax information. (Rev. & Tax. Code § 7093.5(c).)

By statute, settlements entered into under the Board's administrative settlement authority are final and may not be appealed unless fraud or misrepresentation of a material fact is shown. (Rev. & Tax. Code § 7093.5(f) and (g).)

³ For cases in which the reduction of taxes, fees, and/or penalties in settlement does not exceed five thousand dollars (\$5,000), staff submits the settlement memorandum to the Assistant Chief Counsel, Chief Counsel, and Executive Director for signature. In such cases, the memorandum will not be forwarded to the Attorney General or five-member Board. As required by statute, the Executive Director or Chief Counsel will notify the Board of settlements in which the reduction of taxes, fees, and/or penalties does not exceed five thousand dollars (\$5,000). (Rev. & Tax. Code § 7093.5(b)(1) and (3).)

VIII. Recommendation to Modify the 45-day Policy

In order to expand taxpayer and feepayer access to the Settlement Program, staff recommends that the Board modify current policy which generally requires settlement offers to be submitted at least forty-five (45) days before the date of the first scheduled Board hearing on the matter. The policy was implemented in 1995, as a 30-day policy, and in 2001 changed to a 45-day policy, to avoid cases being pulled from the Board meeting agenda. With a more efficient electronic calendaring system now in place, staff recommends that the Board modify the 45-day policy. Two possible alternatives to the 45-day policy are presented below.

Alternative Policy # 1: Eliminate the 45-day deadline and allow a taxpayer or feepayer to submit a settlement offer up to the date their case is scheduled to be considered by the Board. If this alternative is adopted, suggested language, to be included in Board publications and notices that describe the Settlement Program, is as follows:

A taxpayer or feepayer may submit a request to settle disputed amounts up to the date the matter is scheduled to be considered at a Board Meeting.

Alternative Policy # 2: Establish a 15-day deadline to allow a taxpayer or feepayer to submit a settlement offer up to 15 days before their case is scheduled to be considered by the Board and allow the Board Chair, who approves the Board meeting calendar, to waive the deadline. If the Board adopts this alternative, suggested language, to be included in Board publications and notices that describe the Settlement Program, is as follows:

A taxpayer or feepayer may submit a request to settle disputed amounts up to 15 days before the matter is scheduled to be considered at a Board Meeting. The 15-day deadline may be waived at the discretion of the Board Chair. When a waiver of the 15-day deadline is requested, the Chief, Board Proceedings Division, in consultation with the Assistant Chief Counsel, Settlement Division, will recommend to the Chair whether to grant the waiver.

If you have any questions on the above, please contact me at (916) 445-4380 or Assistant Chief Counsel, Ms. Jean Ograd, at (916) 324-2614.

cc: Mr. Ramon Hirsig
Ms. Diane Olson
Mr. Todd Gilman
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Ms. Elizabeth Abreu
Mr. Tim Treichelt
Mr. Cornell Yip

Approved:


Ramon J. Hirsig
Executive Director

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Tax and Fee Programs Administered by the Board of Equalization**RTC Section(s)****Sales and Use Tax Programs**

Sales and Use Tax	7093.5
Bradley-Burns Uniform Local Sales and Use Tax	7093.5
District Transactions (Sales) and Use Tax	7093.5

Special Tax and Fee Programs - Excise, Fuel, and Environmental**Excise**

Alcoholic Beverage Tax	32471
California Tire Fee	55332
Cigarette and Tobacco Products Tax	30459.1
Cigarette and Tobacco Products Licensing Program	55332
Emergency Telephone Users Surcharge	41171
Energy Resources Surcharge	40211
Integrated Waste Management Fee	45867
Natural Gas Surcharge	55332

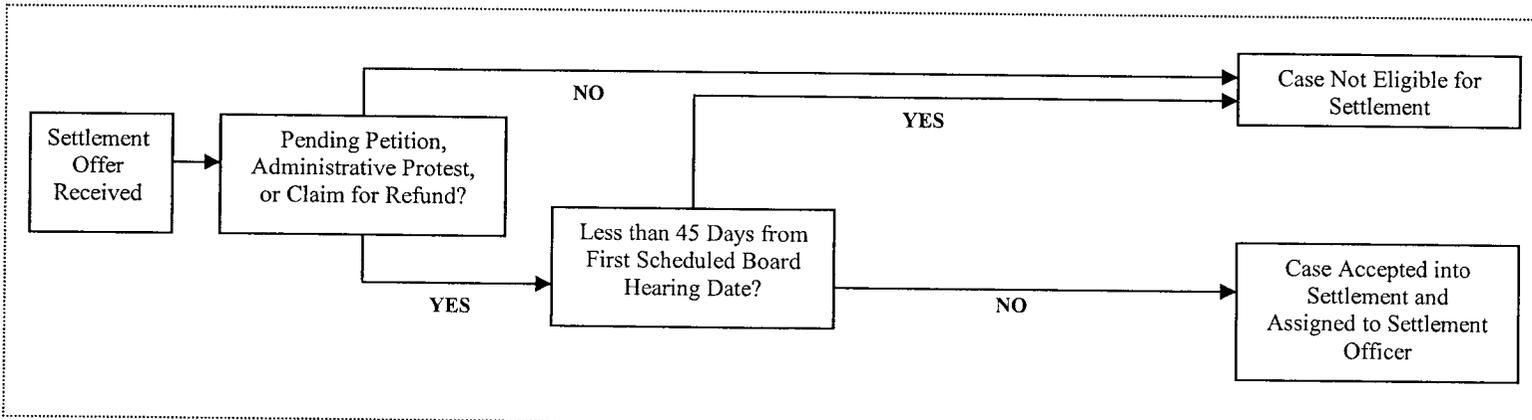
Fuel

Childhood Lead Poisoning Prevention Fee	43522 & 43057
Diesel Fuel Tax	60636
Oil Spill Response, Prevention, and Administration Fees	46622
Underground Storage Tank Maintenance Fee	50156.11
Use Fuel Tax	9271
Water Rights Fee	55332

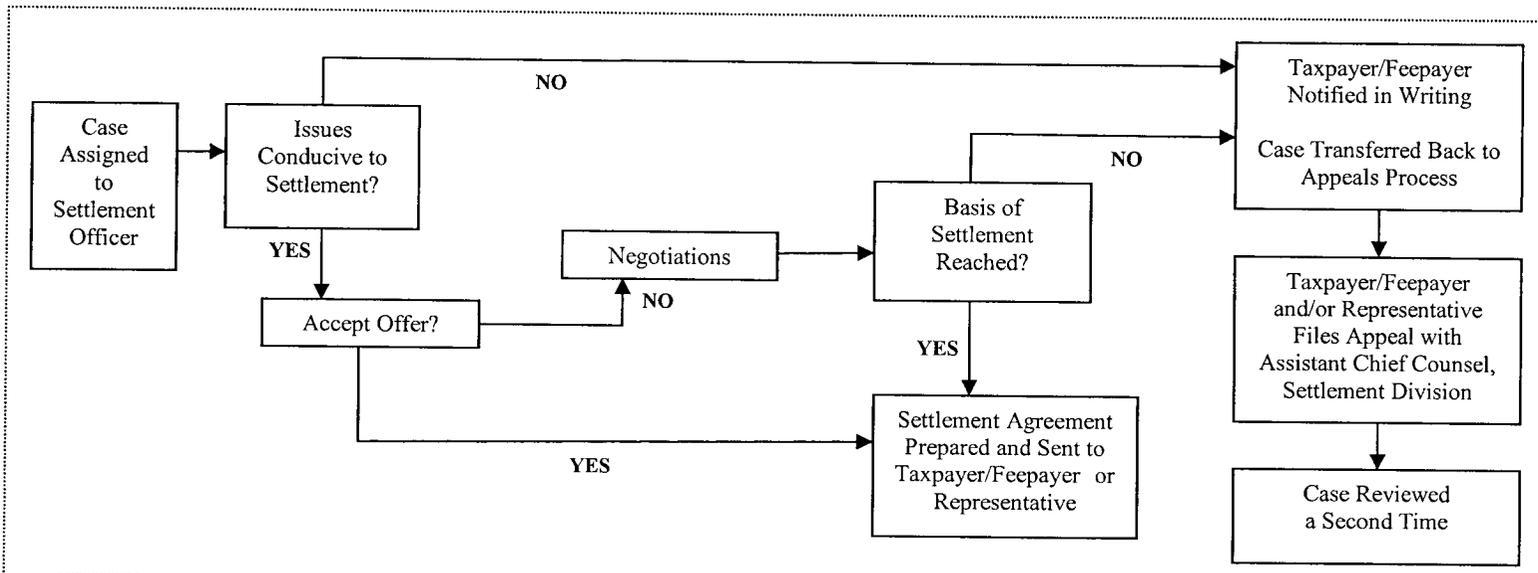
Environmental

Electronic Waste Recycling Fee	55332
Marine Invasive Species Fee (formerly Ballast Water Management Fee)	55332 & 44003
Occupational Lead Poisoning Prevention Fee	43522 & 43056

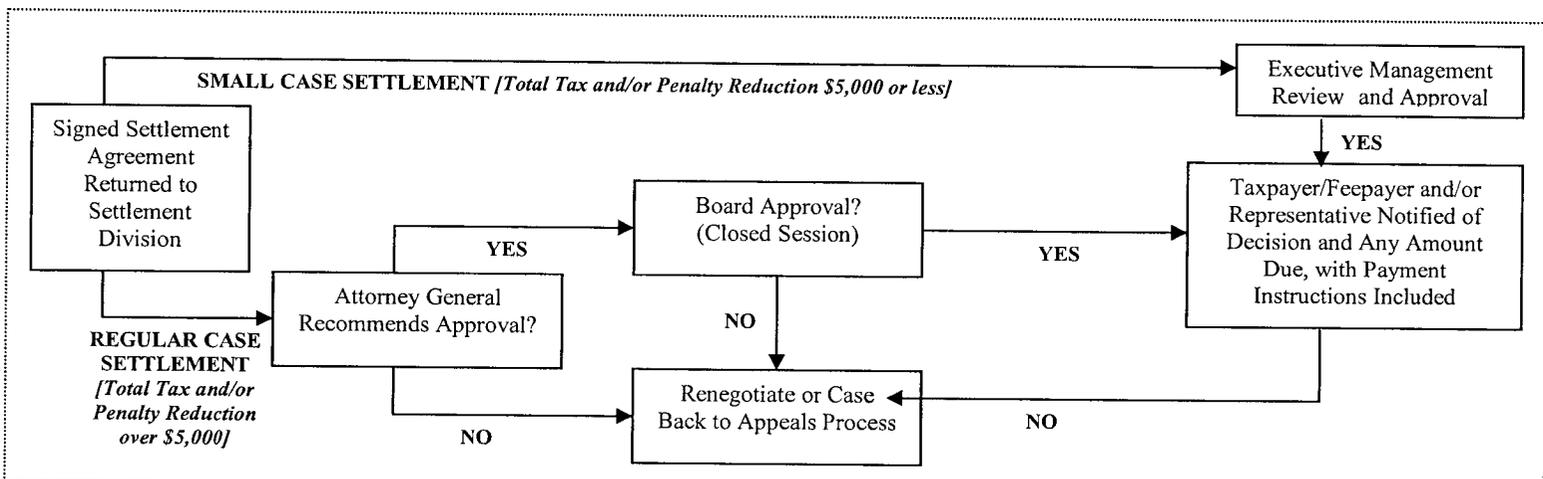
Initiating Settlement



Settlement Negotiations



Approval Process



Public Notice

