

Memorandum

To: Honorable John Chiang, Chair
Honorable Claude Parrish, Vice Chairman
Ms. Betty T. Yee, Acting Member
Honorable Bill Leonard
Honorable Steve Westly

Date : May 23, 2005

From: Joann Richmond *Joann Richmond*
Regulations Coordinator
Board Proceedings Division, MIC:80

Subject: Rules of Practice
Customer Services & Administrative Efficiency Committee

I am distributing written public comments made on the Rules of Practice for your consideration. The public comment is from Ms. Carley Roberts, State and Local Tax Committee. These comments will be incorporated into the rulemaking file.

The Customer Services & Administrative Efficiency Committee is scheduled on Tuesday, May 24, 2005, at 9:30 a.m.

JR
Attachment

cc: Ms. Marcy Jo Mandel, 300 Capitol Mall, 18th Floor
Mr. Ramon Hirsig, MIC:73
Ms. Jerri Dale, MIC:79
Ms. Kristine Cazadd, MIC:83
Ms. Selvi Stanislaus, MIC:82
Ms. Randie Henry, MIC:43
Mr. David Gau, MIC:63
Ms. Jean Ogrod, MIC:82
Ms. Ani Kindall, MIC:82
Mr. Randy Ferris, MIC:82
Ms. Sharon Jarvis, MIC:82
Ms. Sherrie Kinkle, MIC:64
Ms. Lisa Andrews, MIC:92
Ms. Debbie Pellegrini, MIC: 80
Mr. Gary Evans, MIC:80

Richmond, Joann

From: Roberts, Carley A. [CRoberts@mof.com]
Sent: Friday, May 20, 2005 6:14 PM
To: Richmond, Joann
Cc: Marty Dakessian
Subject: Comments for 5/24/05 Customer Services & Admin. Eff. Committee Meeting



CA State Bar SALT
Committee Co...

Dear Ms. Richmond:

Attached are comments being submitted on behalf of the State & Local Tax Committee of the Tax Section of the California State Bar to be considered by the SBE's Customer Services and Administrative Efficiency Committee at its May 24, 2005 meeting.

Please acknowledge receipt of this e-mail and the attached comments.

Sincerely,

Carley Roberts
Vice-Chair
State & Local Tax Committee
Tax Section of the California State Bar

<<CA State Bar SALT Committee Comments Re SBE Board Proceedings_v1.DOC>>

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Thank you very much.
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Memorandum

**To: Customer Services and Administrative Efficiency Committee
California State Board of Equalization**

**From: State & Local Tax Committee of the Tax Section of the California
State Bar**

Date: May 20, 2005

Re: Comments Regarding State Board of Equalization Proceedings

Provided below are comments submitted by the State & Local Tax Committee of the Tax Section of the California State Bar pertaining to the following three objectives identified by the California State Board of Equalization (SBE) Staff to be considered by the SBE's Customer Services and Administrative Efficiency Committee at its May 24, 2005 meeting:

- (1) Allow taxpayers to request additional presentation time in advance of the oral hearing for complex cases.
- (2) Schedule matters so that taxpayers and staff are not required to spend the entire Board meeting waiting for their matters to be heard.
- (3) Encourage publication of more Board decisions and provide legal guidance as to whether a Board decision warrants publication.

Objective 1: Additional Time for Complex Cases

The SBE's General Board Hearing Procedures provide for the allocation of hearing time with no actual specified time allocation. Specifically, Regulation 5077 states the "Chief, Board Proceedings Division shall allocate hearing time for each party..." The standard 35-minute time allocation – 15 minutes for the taxpayer (10 minutes for the taxpayer's case in chief and 5 minutes for rebuttal) and 10 minutes for the taxing agency – is based on Board policy. This standard 35-minute time allocation is not sufficient for many hearings that involve complex legal arguments and/or complex facts.

Moreover, under the Board's current practice, requests for additional time are not granted prior to the hearing. Therefore, the party making the request cannot effectively structure the presentation because there is no way to know ahead of time how much, if any, additional time will be granted.

Recommendation: SBE Staff has made essentially two recommendations pertaining to this objective in its May 2, 2005 Letter to Interested Parties: (1) with the approval of the Chair, allow the Chief of Board Proceedings to grant requests for additional time; and (2) such time will "generally not [be] more than an additional 10 minutes per party for complex cases."

Staff's first recommendation is generally a good solution. However, we provide two additional comments. First, it should be clarified that either party may make the request. Second, there should be a deadline for the Chief of Board Proceeding's action on the request. For example, the Chief of Boarding Proceedings must deny or grant the request within 20 days of the date the party submits the request for additional hearing time. This will allow the party making the request to effectively structure their hearing presentation.

Staff's second recommendation is not sufficient and does not resolve the problem. An "additional 10 minutes" for complex factual and/or legal cases is not nearly enough time to conduct a complete hearing. Some cases require witnesses, including expert witnesses, by either or both parties. Some cases have extensive facts that require a detailed presentation. Some cases involve complex legal theories that take additional time to present. These types of complex cases, which likely represent a small number of cases brought before the Board, require additional hearing time – could be 30 minutes, 3 hours or an entire day. In some cases, due process requires this type of hearing time. The party making the request for additional time should identify the amount of additional time needed and then justify the reasons for the amount of time requested based on the particular circumstances of each case.

Objective 2: Case Scheduling at Board Meetings

Currently, there are no regulations which address the order of oral hearings on the Board's agenda during the Board's meetings. According to a February 25, 2005 Memorandum from Jean Ograd, Acting Chief Counsel, to the Board Members, the Board's current practice regarding the order of cases on the Board's agenda is to schedule oral hearings within each tax program in order of decreasing liability. For example, cases within a tax program involving a liability of \$50,000 or more ("large cases") would be scheduled before cases with a liability of less than \$50,000. In addition, to the degree that time permits, "large cases" would be scheduled during the morning session of each Board meeting.

Recommendation: We agree with the recommendation made by Acting Chief Counsel Jean Ograd to add the Board's current practice regarding the order of cases on the Board's agenda to the SBE's Rules of Practice, which would essentially make the current practice mandatory.

Objective 3: Publication of More Board Opinions

The role the SBE plays as an administrative appellate body is critical – it is the administrative taxing agency responsible for interpretation of California's tax laws. Given this role, it is vital for the SBE to provide the material factual and legal basis for its opinions and to publish decisions on a regular basis that will guide California taxpayers.

Currently, there is no regulation that addresses when the Board should issue a published decision. Under current practice, at the request of a Board Member, Board Staff, or a party, the Board votes whether to publish a Memorandum Opinion for a sales and use tax/property tax/special tax appeal or a formal opinion on an appeal from an action of the Franchise Tax Board. Without published opinions, California's taxpayers, and their representatives, are deprived of critical guidance in multiple areas of the ever-changing tax laws in this State.

Recommendation: An optimal resolution to this problem would be for the Board to adopt the criteria used by the California appellate courts for publication and citation of opinions. These publication standards provide a well-established framework that can easily be followed by the Board. With respect to income tax appeals in particular, the Board has often stated that it acts as a quasi-judicial body. (See *Appeal of Huff Corporation*, Cal. St. Bd. of Equal., Sept. 1, 1999; *Appeal of Vortex Manufacturing Company*, Cal. St. Bd. of Equal., Aug. 4, 1930; *Appeals of Wilfred and Gertrude Winkenbach, et al.*, Cal. St. Bd. of Equal., Dec. 16, 1975.) In such a capacity, it is fitting for the Board to adopt the same standards for publication and citation of opinions as those set forth in the California Rules of Court. With regard to publication, Rule 976, establishes that an opinion will be published if it:

- (1) establishes a new rule of law, applies an existing rule to a set of facts significantly different from those stated in published opinions, or modifies, or criticizes with reasons given, an existing rule;
- (2) resolves or creates an apparent conflict in the law;
- (3) involves a legal issue of continuing public interest; or
- (4) makes a significant contribution to legal literature by reviewing either the development of a common law rule or the legislative or judicial history of a provision of a constitution, statute, or other written law.

With regard to citation of opinions, Rule 977 provides, in pertinent part:

- (a) An opinion of a Court of Appeal or an appellate department of the superior court that is not certified for publication or ordered published shall not be cited or relied on by a court or a party in any other action or proceeding except as provided in subdivision (b).
- (b) Such an opinion may be cited or relied on:
 - (1) when the opinion is relevant under the doctrines of law of the case, res judicata, or collateral estoppel; or
 - (2) when the opinion is relevant to a criminal or disciplinary action or proceeding because it states reasons for a decision affecting the same defendant or respondent in another such action or proceeding.

These publication and citation standards have existed for decades and have been consistently relied upon by the California appellate courts. Because this Board acts in a quasi-judicial capacity, there is no reason to believe the exact same standards would not provide a solid framework for the publication and citation of the Board's opinions.

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