

M e m o r a n d u m

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

Date: February 25, 2005

From: Jean Ograd
Acting Chief Counsel



Subject: **Petition to Amend the Board's Rules of Practice**
Chief Counsel Matters – Rulemaking – March 22, 2005

Pursuant to Government Code section 11340.6, on December 6, 2004 Board staff received the attached petition from Vice Chairman Claude Parrish to amend the Board's Rules of Practice (18 California Code of Regulations, section 5010 et seq.). Vice Chairman Parrish waived his right to have this petition decided by the Board within 30 days and requested that the petition be heard at the March 22, 2005 Board Meeting.

The petition requests that the following provisions be added to the Rules of Practice:

1. Grant of Additional Time for Oral Hearing in Complex or Significant Cases

At the request of a Board Member that is made at least 10 days in advance of the oral hearing, the parties shall be granted additional time to present argument or rebuttal in a complex or significant case.

2. Order of Oral Hearings on the Board's Agenda

When preparing the public agenda notice, the Board Proceedings Division shall, within each tax program,¹ schedule all cases involving liabilities of \$50,000 or more prior to cases involving tax liabilities of less than \$50,000. To the degree that time permits, cases involving liabilities of \$50,000 or more shall be scheduled for the morning session of each Board meeting.

3. Publishing Board Opinions

Require the Chief of Board Proceedings or other Board staff to inquire after each oral hearing on an appeal from an action of the Franchise Tax Board or a Business Taxes appeal whether the Board would like to publish an opinion.

The proposed regulatory changes and options for Board action are discussed further below.

¹ Tax programs, for purposes of oral hearings, are grouped as follows: Corporate Franchise and Personal Income Tax, Sales and Use Tax, Special Taxes, Homeowners and Renters Property Tax Assistance, and Property Taxes.

Proposed Regulatory Changes

1. Grant of Additional Time for Oral Hearing in Complex or Significant Cases

Current Regulation and Practice

Regulation 5077 provides as follows:

The Chief of Board Proceedings shall allocate hearing time for each party, including response time, and reserve time for questions by the Board. Before the hearing, the Chief of Board Proceedings shall inform the parties and the Board in writing of the allocations. At the hearing, the Chief of Board Proceedings shall announce the hearing time allocations and inform the Board Chair when each of the allocations has elapsed.

The Chief of Board Proceedings currently allocates 35 minutes for each hearing as follows: 10 minutes for the taxpayer, 10 minutes for the Department, 5 minutes for the taxpayer's rebuttal, and 10 minutes for the Board Members' questions.

During an oral hearing, a Board Member may ask the Chair for additional time for the presentation of the parties or for questions. Such requests have historically been honored.

Proposed Regulatory Change

Under this proposal, Regulation 5077 would be amended to provide that a Board Member may, prior to the Board meeting, obtain a grant of additional time on behalf of the parties for complex or significant cases, as follows:

The Chief of Board Proceedings shall allocate hearing time for each party, including response time, and reserve time for questions by the Board. Before the hearing, the Chief of Board Proceedings shall inform the parties and the Board in writing of the allocations. At the request of a Board Member made at least 10 days in advance of the oral hearing, the parties shall be granted additional time to present argument or rebuttal in a complex or significant case. At the hearing, the Chief of Board Proceedings shall announce the hearing time allocations and inform the Board Chair when each of the allocations has elapsed.

2. Order of Hearings on the Board's Agenda

Current Practice

As previously requested by Vice Chairman Parrish, oral hearings within each tax program are scheduled on the Board's agenda in order of decreasing liability.

Proposed Regulatory Change

This proposal would essentially make the current practice regarding the order of cases on the Board's agenda mandatory by placing it into the Rules of Practice. Cases within a tax program involving a liability of \$50,000 or more (hereafter "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. Large cases not heard during the morning session would be heard first during the afternoon session.

The current Rules of Practice do not address the order of oral hearings on the Board's agenda. To add such a provision, Regulation 5077 would be amended as follows:

(b) When preparing the Board's agenda, the Board Proceedings Division shall, within each tax program, schedule all cases involving liabilities of \$50,000 or more before cases involving tax liabilities of less than \$50,000. To the degree that time permits, cases involving liabilities of \$50,000 or more shall be scheduled for the morning session of each Board.

3. Publishing Board Opinions

Current Practice

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 Business Taxes appeal or a formal opinion on an appeal from an action of the Franchise Tax Board.

Proposed Regulatory Change

In order to encourage the publication of more opinions, Regulation 5081 would be amended with a new subdivision (d), as follows:

(d) Published Decisions.

(1) After each oral hearing on a Business Taxes appeal, the Chief of Board Proceedings or Board Staff shall inquire whether the Board wants to publish a Memorandum Opinion.

(2) After each oral hearing on an appeal from an action of the Franchise Tax Board, the Chief of Board Proceedings or Board Staff shall inquire whether the Board wants to publish a Formal Decision.

Options for Board Action

Pursuant to Government Code section 11340.7, the Board may:

1. Grant the entire petition and initiate the rulemaking process.
2. Grant the petition in part and initiate the rulemaking process and deny the remainder of the petition.
3. Deny the entire petition.
4. Take other action that may be warranted by the petition.

The decision of the Board regarding the petition is required to be in writing and to include the reasons supporting the decision. The decision must be transmitted to the Office of Administrative Law for publication in the California Regulatory Notice Register.

Staff Recommendation

Staff is presenting a Board Member petition to amend the Board's Rules of Practice. Staff has taken a neutral position with regard to this petition.

Approved: _____


Ramon J. Hirsig

Date: _____

2.25-05

Memorandum

To: Ms. Deborah Pellegrini
Chief, Board Proceedings Division

Date: December 6, 2004

From: Honorable Claude Parrish 
Vice Chairman
Board of Equalization Member, Third District

Subject **Request for Amendments to the Board's Rules of Practice**

In response to continuing requests from my constituents, I renew my request for the following three amendments to the Board's Rules of Practice.

Subdivision (a) of Government Code section 15606 provides the Board with the authority to prescribe rules for its own government and for the transaction of its business. Amendments to the Board's Rules of Practice are considered an exercise of that authority. Furthermore, Government Code section 11340.6 permits any interested person to petition a state agency to request the adoption, amendment, or repeal of a regulation. Please consider this memorandum a petition for rulemaking pursuant to Government Code section 11340.6.

1. Grant Additional Time for Complex or Otherwise Significant Cases

The current 10-minute time limit on taxpayer's presentations is a relatively recent phenomenon. For decades, practitioners were allowed as much time as required to present their cases. It is my belief that the current 10-minute limit may expose the Board's decisions to constitutional challenges by failing to respect taxpayers' due process rights.

I propose, **upon the request of any Board Member**, that taxpayers be given additional time (time expanded from 15 to 30 minutes **total**) for factually involved or complex cases, cases that require the testimony of expert witness, or cases that involve significant tax liabilities. In the interest of fairness, I also propose that the Board grant the Department the same amount of time as the taxpayer. Lastly, upon the request of any Board Member, I recommend extending the taxpayer's rebuttal time from 5 minutes to 10 minutes.

To allow the Board Proceedings Division sufficient time to prepare the meeting agenda, all requests for additional time should be made to the Chair—via the Chief of the Board Proceedings Division—at least 10 days in advance of the Board meeting.

2. Order of Hearings on the Board's Meeting Agenda

At present the hearings on the Board's meeting agenda are in an order set by the Chair. However, it is my opinion that such an order fails to meet the needs of the taxpayers appearing before the Board, the Board's staff, and the Board itself.

I propose that cases involving a tax liability of \$50,000 or more (Large Cases) be scheduled first on the agenda for the morning session of any Board Hearing. For any Large Cases not heard during the morning session, I recommend that those cases be heard first during the afternoon session. Cases with tax liability of less than \$50,000 (Small Cases) should be heard during the afternoon session or after all the Large Cases have been heard. This order will permit the Board to decide cases of significance during the morning, so that the affected staff members can return to work.

3. Encourage the Board to Publish More Decisions to Build a Body of Law

The Board does not currently publish the vast majority of its opinions, a trend started within the last decade. This is partially because it was the Board's view that most of its decisions were nonprecedential.

In order to give good guidance and counsel to taxpayers, my constituents have asked that the Board place more emphasis on the development of a coherent body of law. Such an emphasis would require the Board to publish more of its decisions. After the Board rules on a case following a full Board hearing, **I propose that the Chief of the Board Proceedings Division ask the Board whether or not it wants to publish that decision.** Making such an inquiry after every case will remind the Board of the importance providing taxpayers throughout California with valuable case law that will reduce future disputes.

cc: Mr. Timothy W. Boyer
Mr. Ramon Hirsig