

**M e m o r a n d u m**

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

**Date:** March 5, 2008

**From:** Kristine Cazadd  
Chief Counsel 

**Subject:** **Discussion of Rules and Procedures Relating to Timing and Requests for and Submission of Additional Briefing and Evidence in Franchise and Income Tax, Business Taxes and Property Tax Appeals Matters**  
**March 19, 2008 Board Meeting – Chief Counsel Matters – Item M1**

The attached two memoranda summarize the Rules for Tax Appeals applicable to requests for and submission of additional briefing and evidence. Each memorandum explains the timing and procedures for submitting and distributing briefs and additional evidence in franchise and income tax appeals and business tax and property tax appeals. Each memorandum also explains the timing and procedures for responding to Board Members' requests for additional briefing, additional evidence, or additional clarification from the parties.

If you have any questions please contact Louis Ambrose, Tax Counsel IV, Appeals Division, at (916) 445-5580 or Brad Heller, Tax Counsel III, Tax and Fee Programs Division at (916) 324-2657.

KC:srdw

cc: Mr. Ramon Hirsig MIC:73  
Mr. David Gau MIC:63  
Mr. Robert Lambert MIC:82  
Mr. Dean Kinnee MIC:64  
Mr. Todd Gilman MIC:70  
Ms. Amy Kelly MIC:85  
Mr. Richard Moon Santa Ana: EA

Approved

  
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**Ramon J. Hirsig**  
**Executive Director**

## Memorandum

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

Date: February 28, 2008

From: Kristine Cazaddy  
Chief Counsel 

Subject: **Discussion of Business Tax and Property Tax Appeals:  
Timing and Procedures for Briefing, Submitting Evidence, and Providing  
Additional Clarification  
March 19, 2008 Board Meeting – Chief Counsel Matters – Item M1**

On February 6, 2008, the Rules of Practice (former Cal. Code Regs., tit. 18, § 5010, et seq.) were repealed and replaced with the Rules for Tax Appeals (RTA) (Cal. Code Regs., tit. 18, § 5000, et seq.). There are certain differences between these two sets of rules regarding the submission of briefs. This memorandum explains the timing and procedures for submitting and distributing briefs and additional evidence in business tax and property tax appeals. This memorandum also explains the timing and procedures for responding to Board Member requests for additional briefing, additional evidence, or additional clarification from the parties.

### **Business Taxes Appeals**

Prior to a Board hearing in a business tax appeal, the Appeals Division will have conducted an appeals conference. As part of the appeals conference process, the Appeals Division accepts briefs and documentary evidence and hears the parties' oral presentations at the conference. It then reviews the written and oral arguments and the available evidence to reach its decision, reflected in its Decision and Recommendation (D&R). Where that decision is adverse to the taxpayer, in whole or in part, the matter is scheduled for a Board hearing if the taxpayer so requests (or if the taxpayer had already so requested, such as in its petition).

The Appeals Division prepares a Hearing Summary for each oral hearing based on the D&R and any additional information obtained since its issuance (e.g., information from a reaudit recommended in the D&R, and current information about what remains in dispute). The parties are not required to submit briefs for business tax hearings.<sup>1</sup> Generally, any briefs submitted in

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<sup>1</sup> Except when requested to do so, discussed below.

these appeals argue points already considered by the D&R and covered by the hearing summary. However, where the Appeals Division becomes aware that the briefing makes a new argument not previously considered by the Appeals Division, it usually revises the summary accordingly.

Although the optional briefing must be submitted within specified time limits,<sup>2</sup> submissions that constitute relevant documentary evidence, and not argument, are allowable up to, and at, the Board hearing.<sup>3</sup> Thus, once the time has passed for a party's submission of a brief, the admissibility of a submission from that party depends on whether the submission is a brief or simply documentary evidence. Accordingly, when a party makes a submission after the time for filing a brief by that party has passed, the Appeals Division determines whether the submission is a brief or additional evidence. Where it is determined that the submission constitutes a brief, the submission is not distributed. If, however, the submission constitutes evidence, the Board Proceedings Division (BPD) distributes the submission to all the parties and the Board Members.

The now repealed Rules of Practice allowed the Board or staff to request, after the briefing period had expired, additional briefing in "extraordinary situations." (Former Cal. Code Regs., tit. 18, § 5075, subd. (i).) This was very rarely done. The RTA repeats this rule in chapter 2. (Cal. Code Regs., tit. 18, § 5270, subd. (f)(3).) However, it also includes a rule in chapter 5 that sets forth a more lenient standard for requesting additional briefing. If insufficient briefing is provided under chapter 2, the Board, a Board Member, or the Appeals Division may request additional briefing under Regulation 5523.4, subdivision (a), after the hearing summary has been issued and before the hearing is held. A request for additional briefing under this provision must be made in writing addressed to the Chief of Board Proceedings. Upon receiving such a request, the Chief of Board Proceedings will notify the parties that additional briefing is required and the schedule for doing so. (Cal. Code Regs., tit. 18, § 5523.4, subd. (b).)

Although the standard for requesting additional briefing is now expanded, based on the requestor's finding that there has been insufficient briefing rather than requiring an extraordinary situation, any requestor is encouraged to use the longstanding informal process for obtaining additional information or clarification by contacting the Tax Counsel IV Lead responsible for that Board meeting by telephone or email. (This will usually be David Levine.) Similarly, to discuss whether or not the briefing is adequate or to help you to decide whether to make a formal request to the Chief of Board Proceedings for additional briefing, please feel free to contact the Tax Counsel IV Lead for that meeting.

## **Property Tax Appeals**

### **Briefing and Evidence Under Prior Rules**

In 2005, the Board created a new Property Tax Appeals Section within the Appeals Division to review the evidence, arguments, and briefs submitted by the parties to property tax appeals in an

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<sup>2</sup> See former Regulation 5075 for the requirements for filing briefs under the now repealed Rules of Practice, and Regulations 5270 and 5271 for the requirements now in effect under the RTA.

<sup>3</sup> A submission of additional evidence *after* the hearing is allowable if the Board so orders, for example, by way of a "30/30/30" motion.

independent, fair, and impartial manner in order to prepare objective Hearing Summaries and Summary Decisions to facilitate the Board's hearing and decision-making process. If the Appeals Division determined that the briefing or evidence submitted by the parties to an appeal was incomplete, the Appeals Division would contact the parties to request additional briefing or evidence to ensure that the Board had as complete a record of each case as possible. Former Regulation 5075, subdivision (i), permitted the Board or Board staff to request additional briefing from the parties to property tax appeals in extraordinary situations. The September 14, 2007, letter to state assesses and other interested parties<sup>4</sup> specified that that Appeals Division would follow such a procedure. In addition, former Regulation 5075, subdivision (a), provided that the Board could order additional briefing when circumstances warranted. When additional briefing or evidence was requested from a party to an appeal, the Appeals Division's policy was to give all of the parties to the appeal notice of the request. In addition, when one of the parties to an appeal timely submitted additional briefing or evidence directly to the Appeals Division, the Appeals Division historically forwarded the information to the other party (if the submitting party had not already done so) and to BPD for distribution to the Board Members.

Although the Board's rules required the parties to submit their briefs within the applicable briefing schedule or pursuant to requests for additional briefing, submissions that constituted documentary evidence, and not argument, were generally allowable up to, and at, the Board hearing (and thereafter if the Board so orders). However, for state-assessed property and private railroad car tax appeals, Regulation 5041, subdivision (c), required that assesses submit their supporting appraisal reports, financial studies, and other materials relevant to value with their petitions, and those were the only documents accepted for filing and distribution by BPD. Therefore, when assesses submitted unsolicited briefs after the conclusion of the briefing process or submitted unsolicited appraisal reports, financial studies, or other evidence relevant to value that were not filed with their petitions, then, absent contrary direction from a Board Member or Board management, such briefs and appraisal and financial studies were not accepted for distribution, and were returned. We stated that timely submission of all briefing and evidence was required because the Board must hear and decide petitions appealing the value of state assessed property on a calendar-year basis.<sup>5</sup> (Rev. & Tax. Code, § 744.)

### **Timing, Briefing and Evidence Under the RTA**

The process for the assessment and appeal of state-assessed property under the RTA is as follows:

- The Board allows state assesses and their representatives to appear at Assessment Factor Hearings in February and provide testimony and other information regarding the capitalization rates and valuation factors the Board will use to value state-assessed property;

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<sup>4</sup> Available on our website at <http://www.boe.ca.gov/proptaxes/pdf/stateassesseepaellprocedures.pdf>.

<sup>5</sup> The Board is required to determine the value of private railroad cars on a 13-month basis beginning on January 1 of each calendar year and ending on January 31 of the following calendar year. (See Rev. & Tax. Code, § 11338.)

- The Board allows state assesses and their representatives to appear at the April Board meeting and provide testimony and other information regarding the value indicators the Board will use to value the state assesses' property;
- The Board uses the capitalization rate study and valuation factors developed by the State Assessed Properties Division (SAPD), after taking into account the state assesses' input, to value the state assesses' unitary and non-unitary property;
- The Board sets the unitary values before May 31 and sets the non-unitary values before June 30 and mails the state assesses notice of the adopted values for their unitary property by June 1 and notice of the adopted values for their non-unitary property by July 31;
- State assesses are required to file petitions to appeal the value of their unitary property by July 20 and are required to file petitions to appeal the value of their non-unitary property by September 20;<sup>6</sup>
- SAPD's appraisers, with legal support from the Tax & Fee Programs Division (TFPD), are required to use their expertise to promptly review, respond to, and, in some cases, attempt to find mutually agreeable recommendations to resolve all of the appeals, which will be scheduled for Board hearings in October, November, and December;
- TFPD attorneys provide legal support for SAPD appraisers and represent SAPD before the Board at oral hearings; and
- The Appeals Division is required to review each petition, SAPD's analysis of each petition, and each state assessee's reply to the SAPD's analysis, to conduct appeals conference when requested or needed, and to prepare Hearing Summaries and Summary Decisions for each of the state assessee's oral Board hearings.

Under the RTA, the Appeals Division, the Board Members, and the Board may request additional briefing or evidence from the parties, as follows:

- The Appeals Division can make requests for further briefing or evidence from either party to a property tax appeal, including the County Assessed Properties Division and SAPD, *at any time* (RTA 5325.6, subd. (c), 5326.6, subd. (d), 5338, subd. (a), and 5341.)
- The Board may request further briefing *or* evidence from either party to a property tax appeal *at any time*;
- An individual Board Member can request additional briefing or evidence from either party to a property tax appeal *at any time* by contacting the Appeals Division (Cal. Code Regs., tit. 18, § 5341, subd. (b)); and
- The Board, a Board Member, or the Appeals Division may request additional briefing and evidence from either party to a property tax appeal, except a state-assessed property appeal or private railroad car tax appeal, after the submission of the hearing summary, but prior to the Board hearing, if the Board, a Board Member, or the Appeals Division

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<sup>6</sup> Private Railroad Car Tax appeals are generally due by September 20.

determines that insufficient briefing has been provided under chapter 3. (Cal. Code Regs., tit. 18, § 5523.4, subd. (a).)<sup>7</sup>

BPD will continue to give all of the parties to an appeal notice of requests for additional briefing or evidence from the other parties to the appeal and, when additional briefing, including post-hearing briefing, or evidence is submitted directly to the Appeals Division, the Appeals Division will continue to forward the additional briefing or evidence to the other party (if the submitting party has not already done so) and to BPD for distribution to the Board Members.

Parties to property tax appeals must submit their briefs within the applicable briefing schedule or pursuant to requests for additional briefing or post-hearing briefing. (Cal. Code Regs., tit. 18, §§ 5326, 5326.2, 5326.6, 5337.6, 5337.4, 5341, and 5523.4.) However, the parties to property tax appeals, other than state-assessed property appeals and private railroad car tax appeals, may present additional, unsolicited relevant evidence up to and at their Board hearings (and thereafter if the Board so orders), though parties are encouraged to submit their evidence to the Board and the other parties at least 14 days before their Board hearing to facilitate orderly consideration of the issues at the hearing. (Cal. Code Regs., tit. 18, § 5523.6, subd. (b).)<sup>8</sup>

State assessees must submit their supporting appraisal reports, financial studies, and other evidence relevant to value with their appeal petitions or in response to requests for additional evidence from SAPD, the Appeals Division, the Board Members, or the Board and unsolicited evidence will be returned, unless the Board Members exercise their discretion to allow a late submission. (Cal. Code Regs., tit. 18, § 5324.6, subd. (a).)

When BPD receives unsolicited documents from either party to a property tax appeal that are submitted outside the briefing schedule, it will continue to request that the Appeals Division determine whether the documents are briefs or additional relevant evidence.<sup>9</sup> In accordance with the RTA, if a document is determined to be a brief, BPD will not distribute the material. Except for a state-assessed property appeal, if the document is determined to be evidence, BPD will distribute the material to all the parties and Board Members. If a state assessee submits unsolicited appraisal reports, financial studies, or other evidence relevant to value that was not submitted with the state assessee's petition and the evidence is not being submitted pursuant to a request from SAPD, the Appeals Division, a Board Member, or the Board, or with the permission of a Board Member, then, absent contrary direction from a Board Member or Board executive, the evidence will not be accepted for distribution and will be returned to the state assessee.<sup>10</sup> (Cal. Code Regs., tit. 18, § 5324.6, subd. (d).)

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<sup>7</sup> Note that even in the case of state-assessed property and private railroad car tax appeals, the Board may elect to request such additional evidence or briefing.

<sup>8</sup> Note: The Board is not required to delay or postpone a hearing in order to consider evidence submitted at that hearing.

<sup>9</sup> Oral Board hearings are on the grounds stated in the petition. Evidence is relevant when it is probative as to a proffered ground for relief set forth in the petition. Evidence that is beyond the scope of the petition is not relevant.

<sup>10</sup> Historically, this rule has been most stringently applied to exclude appraisal reports and financial studies from evidence, or disregard them, when they have been submitted too late for the Board's appraisers to have reasonable time either to digest or verify them, particularly when the volume of paper is massive.

The RTA also authorizes the Appeals Division to conduct appeals conferences for state-assessed property appeals at its discretion and the Appeals Division will promptly review all petitions that have not requested an appeals conference to determine whether a conference is necessary. (Cal. Code Regs., tit. 18, § 5326.4, subd. (a)(3).) When an appeals conference is deemed necessary, the Appeals Division will inform BPD as to the time and location for holding the conference and BPD will notify the parties in writing. (Cal. Code Regs., tit. 18, § 5326.4, subd. (e).) Conducting an appeals conference will not prevent the Appeals Division, Board Members, or the Board from requesting additional briefing or evidence. The same procedures for requesting additional briefing and evidence from the parties to appeals discussed above will apply to requests made by the Appeals Division in the context of appeals conferences.

To request additional briefing, evidence, or information after the applicable briefing schedule for property tax appeals, please submit your request to the Tax Counsel IV Lead Lou Ambrose. If Mr. Ambrose determines the request is one that seeks further information or clarification only and does not necessitate further briefing or additional evidence from any of the parties to the appeal, Mr. Ambrose will prepare a written response, including an explanation of the information requested, where it is found, and why it is sufficient, which will be distributed by BPD to all the parties and Board Members. (This does not apply to a request for legal advice by a Board Member’s office.) If, however, Mr. Ambrose determines that further briefing or evidence is necessary or would help clarify one or more facts or issues, he will then determine to whom the inquiry will be posed and direct the request to that party including a deadline for response. BPD will distribute any additional briefing or evidence provided by the responding party to all the parties to the appeal and to all the Board Members.

The Appeals Division will also continue to administer the Board’s requests for post-hearing briefing.

If you have any questions regarding this memorandum, for business tax appeals please feel free to contact Mr. Levine at (916) 324-2192 and for property tax appeals please contact Mr. Ambrose at (916) 445-5580.

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**M e m o r a n d u m**

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

**Date:** March 5, 2008

**From:** Kristine Cazadd  
Chief Counsel 

**Subject:** **Discussion of Appeals from Actions of the Franchise Tax Board:  
Timing and Procedures for Obtaining & Distributing Additional Briefs and  
Evidence from the Franchise Tax Board and Appellants  
March 19, 2008 Board Meeting – Chief Counsel Matters – Item M1**

Historical Procedures of the Appeals Division and the Board Proceedings Division

The Appeals Division has historically reviewed the evidence, arguments, and briefs submitted by the parties to appeals from actions of the FTB in an independent, fair, and impartial manner in order to prepare objective Hearing Summaries and Summary Decisions that would facilitate the Board's hearing and decision-making process. When the Appeals Division determined that the briefing or evidence submitted by the parties to an appeal was incomplete, the Appeals attorney historically contacted the parties to request additional briefing or evidence to ensure that the Board had as complete a record of each case as possible. (Cal. Code Regs., tit 18, § 5075.1, subd. (e), provided for additional briefing prior to its repeal.) When additional briefing or evidence was requested from a party to an appeal, the Appeals Division's long-standing policy was to give all of the parties to the appeal notice of the request. In addition, when one of the parties to an appeal submitted additional briefing or evidence directly to the Appeals Division, the Appeals Division historically forwarded the information to the other party (if the submitting party has not already done so) and to the BPD for distribution to the Board Members.

The Board's procedures for appeals from actions of the FTB historically required the parties to submit all of their briefs within the applicable briefing schedule or pursuant to requests for additional briefing, but permitted the parties to submit additional evidence to the Board up to the date of the Board's action on their appeals. (Cal. Code Regs., tit. 18, §§ 5075, subd. (b), 5079, subd. (d), repealed effective February 6, 2008.) Therefore, when the BPD received unsolicited briefs or additional evidence from either party, it requested that the Appeals Division determine whether the unsolicited

documents were briefs or additional evidence. If the unsolicited documents were determined to be briefs, the BPD did not distribute the material. If the documents were determined to be evidence, the BPD distributed the material to all the parties and the Board Members.

### New Rules for Tax Appeals

The new Rules for Tax Appeals (RTA) were effective February 6, 2008.<sup>1</sup> The new RTA continues to permit the Appeals Division, the Board Members, and the Board to request additional briefing from the parties. Under the new RTA, the Appeals Division can make requests for further briefing *or* evidence from either party at any time; the Board Members can request additional briefing *or* evidence from either party *at any time* by contacting the Appeals Division; and the Board may also request additional briefing *or* evidence from either party. (Cal. Code Regs., tit. 18, § 5435.) The Appeals Division and the Board Proceedings Division will continue to give all of the parties to an appeal notice of requests for additional information or evidence from the other parties to the appeal and, when additional briefing or evidence is submitted directly to the Appeals Division, the Appeals Division will continue to forward the additional briefing or evidence to the other party (if the submitting party has not already done so) and to the BPD for distribution to the Board Members.

The new RTA continue to require the parties to appeals from actions of the FTB to submit their briefs within the applicable briefing schedule or pursuant to requests for additional briefing, but also continue to allow the parties to present additional evidence up to the date of the Board's action on their appeals. (Cal. Code Regs., tit. 18, §§ 5430, subd. (a), 5523.6, subd. (b).) Therefore, when the BPD receives unsolicited briefs or additional evidence from either party, it will continue to request that the Appeals Division determine whether the unsolicited documents are briefs or additional evidence. If the unsolicited documents are determined to be briefs, the BPD will not distribute the material in accordance with historical practice. If the documents are determined to be evidence, the BPD will distribute the material to all parties and Board Members.

The new RTA also authorize the Appeals Division to conduct pre-hearing conferences at its discretion and the Appeals Division will now be reviewing incoming appeals to determine whether a pre-hearing conference is appropriate. (Cal. Code Regs., tit. 18, § 5443, subd. (b)(1).) When a pre-hearing conference is deemed appropriate, the Appeals Division will inform the BPD as to the time and location for holding the conference and the BPD will notify the parties in writing. (Cal. Code Regs., tit. 18, § 5443, subds. (c) and (d).) Conducting a pre-hearing conference will not prevent the Appeals Division, Board Members, or the Board from requesting additional briefing or evidence. (Cal. Code Regs., tit. 18, 5443, subd. (g).) The same procedures for requesting additional briefing and evidence from the parties will apply to requests made by the Appeals Division in the context of pre-hearing appeals conferences.

Publication 81, which explains the process for franchise and income tax appeals, is currently being revised to reflect the implementation of the new RTA.

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<sup>1</sup> The former Rules of Practice (ROP) were repealed effective February 6, 2008. The former ROP were found in division 2 of title 18 of the California Code of Regulations. The new RTA are located in division 2.1 of title 18 of the California Code of Regulations.

New Procedures Beginning with the February 26-29, 2008 Culver City Board Meeting

Consistent with the provisions and in further clarification of the new RTA, which specify the Board Members can request additional briefing *or* evidence from either party *at any time* by contacting the Appeals Division, the Appeals Division will implement the following procedures for addressing inquiries from Board Members' offices for additional briefing, evidence, and/or information --- when such inquiries occur: after the applicable briefing schedule and Board Members' offices have received briefs and other evidence submitted by the parties to the appeal pursuant to the distribution of such materials from the Appeals Division through the BPD, and prior to the Board's action on the appeal:

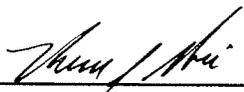
1. The Board Member may submit the inquiry to the Supervising Tax Counsel for corporate franchise and personal income taxes in the Appeals Division.
2. If the Supervising Tax Counsel for corporate franchise and income taxes in the Appeals Division determines the inquiry is one that seeks further information or clarification only and does not necessitate further briefing or additional evidence from any of the parties to the appeal, the Supervising Tax Counsel shall respond to such inquiry in writing. Such response shall be distributed by the Appeals Division through the BPD to all parties to the appeal and to all Board Members' offices. This does not apply to requests for legal advice by a Board Member's office.
3. If the Supervising Tax Counsel for corporate franchise and income taxes in the Appeals Division determines that further briefing or evidence is necessary to respond to the request, the Supervising Tax Counsel shall determine to whom the inquiry will be posed and direct such inquiry to that party. Any additional briefing or evidence provided by the responding party shall be distributed by the Appeals Division through the BPD to all parties to the appeal and to all Board Members' offices.

If you have any questions please contact Amy Kelly, Supervising Tax Counsel, Appeals Division, at (916) 323-2029.

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