

**INTERESTED PARTY COMMENTS AND STAFF RESPONSES**

**1. Regulation 5023(a) - Scheduling Appeals Conferences and Regulation 5023 (d) - Submission of Additional Documents for Appeals Conferences**

Interested Party Comment:

Mr. Glenn Bystrom, Ernst & Young, commented in opposition to the timelines for submitting additional documents for appeals conferences. Mr. Bystrom suggests that if timelines are established for submitting additional documents, timelines should also be established for scheduling appeals conferences and issuing Decision and Recommendations (see discussion of Regulation 5023(e) below). To create timelines for scheduling appeals conferences, Mr. Bystrom suggests that subdivision (a) be amended by adding the following four new sentences after the second sentence:

If the taxpayer requests either an appeals conference in Sacramento headquarters or by telephone, the conference shall be held within 15 days of the request. If the taxpayer requests an appeals conference in a district office, the conference shall be held within 30 days of the request. If there is sufficient justification the Chief Counsel or his or her delegate may allow additional time to hold the conference. Both the request for additional time and the granting of additional time shall be in writing and copies provided to all parties to the conference.

Staff Response:

Mr. Bystrom's suggested timelines for scheduling appeals conferences are unworkable. Currently appeals conferences are scheduled in a manner that makes efficient use of staff resources. For example, in order to justify the expenditure of state resources, staff will only fly to a district office when a sufficient number of appeals conferences are scheduled for that office. Any arbitrary time limits would adversely impact the Appeals Section's ability to effectively allocate its resources. Both staffing levels and travel expenditures would have to be increased to meet shortened timelines. Shortened timelines would also result in additional requests for rescheduling by taxpayers who cannot be ready to attend conferences scheduled within the shorter period of time.

**2. Regulation 5023(b) - Rescheduling and Postponements**

Interested Party Comment:

Mr. Joseph Vinatieri, Bewley, Lassleben & Miller, asked why there is a need for proposed subdivision (b) on rescheduling and postponements of appeals conferences.

Staff Response:

This proposed amendment to the regulation provides the parties with notice of the rescheduling and postponement rules that are being applied by the Board Proceeding Division.

## EXHIBIT C

### Interested Party Comment:

Mr. Steve Ryan, PriceWaterhouseCoopers, commented that the 15-day limit to ask for a postponement with sufficient justification may be too short because, at times, mail is misaddressed and/or misdirected, taking a good part of 15 days just to reach the right person within a firm.

### Staff Response:

The standard for a postponement is strict because a matter that is postponed must be returned to inventory until there are a sufficient number of appeals conferences to justify another trip to the particular district office. However, when a postponement is not available, a conference may be rescheduled as provided in Regulation 5023(b)(1).

### **3. Regulation 5023(e) - Issuance of Decision and Recommendations**

#### Interested Party Comment:

Mr. Bystrom commented in opposition to the timelines for submitting additional documents for appeals conferences. If the timelines for submitting additional documents for appeals conferences are adopted, Mr. Bystrom suggests adoption of a regulation requiring that Decision and Recommendations (D&Rs) be issued within 30 days unless there is sufficient justification for the Chief Counsel or his or her designee to allow for additional time. Mr. Bystrom would require that the request for additional time and the response be made in writing with copies provided to all the parties to the conference. The resulting subdivision (e) of Regulation 5023 would read:

(e) Within 30 days of the appeals conference, the conference holder shall issue a written report of his or her findings, called a Decision and Recommendation, copies of which shall be sent to all parties. If a party did not appear at the appeals conference, the Decision and Recommendation will be based on the information in the file and the information obtained from the other party. If there is sufficient justification, the Chief Counsel or his or her designee may allow additional time to prepare the Decision and Recommendation. Both the request for additional time and the granting of additional time shall be in writing and copies provided to all parties to the conference.

#### Staff Response:

Currently, the Appeals Section issues the majority of D&Rs within 60 days and almost all D&Rs within 90 days of the conference date. For the few that take longer, there is almost always a reason for the delay that is outside of the control of the Appeals Section, such as: the parties, or one of them, has had difficulty producing or analyzing the documents, or there is a pending regulation change which might affect the decision. There does not appear to be a current problem that warrants the imposition of Mr. Bystrom's time limits for issuing D&Rs.

**4. Regulation 5063(b) - Welfare Exemption Hearing Petition**

Interested Party Comment:

Mr. Vinatieri expressed concern about the introduction of the Assessor into the welfare hearing process. Mr. Vinatieri wrote that there is no provision for inclusion of the Assessor in the Revenue and Taxation Code and that: “The purpose of the hearing is to allow the taxpayer simple due process for the exemption claim in that the local assessment appeals board has no jurisdiction to hear exemption claims. By opening this door, the Board potentially gives standing where none is granted in the law.”

Staff Response:

The proposed amendment is intended to place into regulatory law an improvement in the fact finding and issue identification process for the Board staff, and is authorized by Revenue and Taxation Code section 254.5. Pursuant to that section, the county assessors and the State Board of Equalization jointly administer the welfare exemption.

Initially, a claim for the welfare exemption is filed with the assessor in the county in which the property is located. The assessor forwards the claim and supporting documents to the Board with his or her recommendation for approval or denial. The Board is authorized to institute an independent audit or verification of the operations of the owner and operator to ascertain whether they qualify for exemption.

The assessor of the county in which the property is located is in a unique position to have information about the property and the claimant. In the Board staff’s experience, it is critical to the hearing process to have agreement between the assessor and the claimant as to the facts relating to the use of the property, and the activities of the claimant. There have been situations in the past in which the claimant has introduced factual information at the hearing before the Board, and Board staff has had no independent means by which to ascertain the accuracy of the facts as stated by the claimant. The Board has found this situation untenable.

The proposed amendment is intended to validate an improvement in the fact finding and issue identification process. In pursuing their independent audit or verification, the Board staff has found the assessor to be a critical source of information about the property, the claimant and the claim. Far from being unauthorized by statute, the statute contemplates the assessor’s involvement. The assessor, however, is not given standing to challenge the Board’s finding or to appear at or participate in the hearing. Board staff could call the assessor or his or her staff as a witness. Further, the Open Meetings Act confirms the right of any person to appear and comment on any item on the Board’s agenda.

The amendment also establishes a time deadline for action by the staff, which will improve the process.

**5. Regulation 5075.1 - Appeals from Actions of the Franchise Tax Board (FTB):  
What constitutes “extraordinary?”**

Interested Party Comment:

Mr. Bystrom commented that, with regard to Regulation 5075.1, subdivision (c)(2), there should either be a definition of “extraordinary” or examples of what is meant by that term, since it has been his experience “that anytime the FTB requests a supplemental briefing, the request is granted.”

Staff Response:

Staff currently construes the term "extraordinary" to mean "something out of the ordinary." In the context of this regulation, any new case authority, new evidence or substantively new arguments are, in staff's opinion, out of the ordinary. Keeping in mind that, pursuant to Regulation 5075.1(c)(1), the taxpayer's supplemental brief is supposed to be limited to a response to the FTB's arguments, substantively new material contained in the taxpayer's supplemental brief constitutes “extraordinary circumstances.” For that reason, if the FTB requests permission to file a supplemental brief to address newly presented information, staff will often grant the request. Moreover, what has occurred recently is that the taxpayer has withheld evidence until the last brief and then argued that the FTB should not be given an opportunity to respond. Staff needs to avoid this situation so that the Board has a complete factual and legal record upon which to base its decision. If staff's approach appears broader than the term “extraordinary” suggests, staff recommends the following amendment to 5075.1(c):

(c) Appeals From Actions Of The Franchise Tax Board: Supplemental Briefs.

(1) The taxpayer may file a supplemental brief, addressing only the points of disagreement the taxpayer has with the Franchise Tax Board's reply brief, within 30 days from the date of the Board's letter acknowledging receipt of the Franchise Tax Board's reply brief. The taxpayer shall mail a copy of the supplemental brief to the Franchise Tax Board. This brief shall ordinarily complete the briefing.

~~(2) In extraordinary circumstances, If the taxpayer's supplemental brief contains new arguments, new evidence, or new facts, the Franchise Tax Board, pursuant to written permission from Board Staff, may be permitted to file a supplemental brief, addressing only the points of disagreement the Franchise Tax Board has with the taxpayer's supplemental brief, but only pursuant to previous written permission from Board Staff. Any such permissive supplemental briefs shall be filed within 30 days after receipt of permission to file. If the Franchise Tax Board is allowed to file a supplemental brief, the taxpayer shall have 30 days after receipt of the brief is acknowledged by the Board to file a Response. This Response shall then complete the briefing.~~

(3) If the Franchise Tax Board is allowed to file a supplemental brief, the taxpayer shall have 30 days after receipt of the brief is acknowledged by the Board to file a Response. This response shall then complete the briefing.

**6. Regulation 5075.1(e) Appeals from Actions of the Franchise Tax Board - Briefing Schedule**

Interested Party Comment:

With regard to subdivision (e), Mr. Bystrom writes: “[W]hile it is wholly appropriate for the Board to request additional evidence at any time in the proceeding (before, during or after a hearing), Board staff should not be allowed to request evidence because Board staff is not the adjudicator.” Mr. Bystrom also writes that “if the Board or Board Staff requests additional briefing, the taxpayer must get the last word” because “it is the taxpayer that carries the burden.”

Staff Response:

Mr. Bystrom’s suggested restriction on Board staff’s ability to obtain information from the parties would cause unnecessary delays in reaching decisions in FTB matters. In appeals from actions of FTB, Appeals attorneys act as counsel for the Board Members. Recently, Appeals attorneys have had to request additional briefing when the taxpayer has failed to provide sufficient information with which to prepare a summary for the Board Members. This lack of briefing by the taxpayer has also made it impossible for the FTB to adequately brief the matter since the FTB is not told the facts or legal arguments in support of the taxpayer’s position. If a request for additional briefing is not made by staff prior to the Board meeting, the resolution of the matter will likely be delayed because the Board Members will not have sufficient information in advance of the hearing to be ready to decide the case.

Staff agrees that if Appeals staff, rather than the Board, requests additional FTB briefing, the taxpayer shall have the opportunity to submit the final response. This is consistent with current staff practice. However, if the Board Members require additional briefing, the opportunity for a final response has always been at the Board’s discretion. Mr. Bystrom’s proposed amendment of subdivision (e) would limit that discretion.

**7. Regulation 5081(c)(2) Voting**

Interested Party Comment:

Mr. Vinatieri writes: “Under the language proposed it is conceivable that the Board Member who did not hear the case could end up voting on the matter. If my understanding is correct, there are obvious due process concerns.”

Staff Response:

The Board Members requested this amendment. The Board Members are aware of the rule that if a Member who was not at a hearing wants to vote on a case, the Member must make a reasonable effort to achieve a substantial understanding of the record before voting on the case.