

# BEWLEY LASSLEBEN & MILLER LLP

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June 6, 2013

Sent Via Email (Jerome.Horton@boe.ca.gov) and US Mail

Honorable Jerome Horton, Chairman  
State Board of Equalization  
400 Capitol Mall, Suite 2540  
Sacramento, California 95814

Re:    June 11, 2013 Board Hearing  
      Chief Counsel Matters – Proposed Amendments to the Rules for Tax Appeals  
      Regulation 5266(c) – Request for Reconsideration

Dear Jerome:

This letter is written to set forth our disagreement with the staff position regarding the specific situation where under Rule 5266(c)(1) (b)(1), the Department or taxpayer misses the 30-day deadline to request reconsideration. We previously provided our comments to staff (see attached letter to Brad Heller).

As this Board is aware, the Rules for Tax Appeals are a critical part of this Board's duty to fairly and consistently administer the various tax and fee programs that come before it. The undersigned was originally involved with Board Member Matt Fong and Assistant Chief Counsel Don Hennessy in the first writing of the Rules in the 1990s. Over a period of time, there were various amendments, all of which the undersigned was involved with. Accordingly, my comments hereafter are couched in the context of the history of the Rules, the fair administration of the Board's tax and fee programs and practical experience with many cases adjudicated under these Rules.

We represented several taxpayers where a D&R was wholly or partially in favor of the taxpayer and the Sales and Use Tax Department failed to file their request for reconsideration within 30-days of the date of the D&R. Under Regulation 5266(c), the D&R became final. Unfortunately under Regulation 5266(e) and notwithstanding the specific finality provision of 5266(c), the Appeals Division is given opportunity to nonetheless provide an SD&R notwithstanding the supposed finality provision. In one specific situation, we relied on the fact that no request for reconsideration was timely filed and therefore undertook certain action only to find out later that the staff, on its own accord, determined to do an SD&R which overturned the original D&R. Not only was this completely contrary to the finality provision of 5266(c) but was highly prejudicial to the taxpayer.

We recognize the argument made by staff that the Appeals Division is under mandate to ascertain all the facts, apply the law, and come to the right result. It is this basis that the Appeals Division argues that even if they are provided further information after the 30-day period, they nonetheless have an independent obligation to review the information, and if necessary, render a SD&R. Of course this “discretion” makes a mockery of the supposed finality found in 5266(c).

We agree with the mandate because the Appeals Division and the Board must make sure, to the extent possible, to “get it right.” However, in the zeal to “get it right” the Division and the Board must uphold the finality of the D&R, otherwise there is no point in having the 30-day time limit to timely file requests for reconsideration. As the Board is aware, there is an important policy objective here...cases need to be finalized, fairness must be recognized and the Appeals process must move forward. Furthermore, rules must be followed whether it be on the part of the taxpayer or on the part of the Department. Finality is an important public policy, but we also recognize that “getting it right” is also an important public policy. As such, we attempted, in our comments, to find a “balance” between these two important policies.

This “balance” is found in the undersigned’s comments on pages 14 & 15 of the Request for Authorization under Item “J”, Chief Counsel Matters, Rulemaking. There, the undersigned suggested that the Appeals Division’s discretion to issue a SD&R be proscribed unless there is a high probability that the new information untimely submitted, is so important or material that it would change the Division’s original D&R.

On pages 14 & 15 are several staff reasons why this “reasonable balance” is not amenable:

- RTC Section 7081 (the California Taxpayers’ Bill of Rights) is used as a reason for not striking this balance. Staff gives an example of information provided just prior to an actual Board hearing. Staff’s procedure takes that information to develop an SD&R. It is the undersigned’s experience that when this happens, typically the staff does an SD&R upholding the original D&R. In other words, the new information was not so important or material that it changed the original D&R. Additionally, as a matter of fairness, the undersigned’s proposal should apply equally for both the Department and taxpayers;
- The undersigned agrees with the Appeals Division core function to “get it right.” As part of its core function under our proposal, the Appeals Division would look at the untimely information and determine if there was a high probability that the information would actually change the outcome of the appeal. If there was not a high probability, then the “balance” would side with the public policy of finality;
- There would be no standard eliminating the Appeals Division’s discretion other than to determine whether there is a high probability that the belated information is so material to change the original D&R. Just as it is now, it would be completely within the Appeals Division’s discretion to make that call. Undoubtedly there will be times where the Department or the taxpayer will disagree with that discretion but at least there would be a balance between “getting it right” vs. the policy of finality.

We appreciate your consideration of the foregoing. It is extremely important that the appeals process be fair and balanced. Taxpayers, and the Department, have expectations based upon the rules found in the Rules for Tax Appeals. To in essence, nullify a rule regarding finality leads to an inherent distrust of the appeals system and the "level playing field" which was at the heart of the above referenced California Taxpayers' Bill of Rights. We ask the Board to strike the "balance" in this situation.

Sincerely,

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JAV:dm

Enclosures

Cc: Honorable Michelle Steel, Vice Chair  
Honorable Betty Yee, First District  
Honorable George Runner, Second District  
Honorable John Chiang, State Controller  
Bradley Heller, Tax Counsel IV  
Cynthia Bridges, Executive Director  
Randy Ferris, Chief Counsel

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RICHARD L. DEWBERRY

May 22, 2013

Sent Via Email (bradley.heller@boe.ca.gov)

Bradley M. Heller, Tax Counsel IV  
Board of Equalization Legal Department  
Tax and Fee Programs Division

Re:    Rules for Tax Appeals  
      Regulation 5266 – Request for Reconsideration

Dear Brad:

Thanks so much for our discussion this morning and your comments regarding my proposals. I wanted to focus on the 30-day period for request for reconsideration.

In our discussion, you indicated that in talking with Appeals staff, there is a mindset of making sure that all the information is presented and staff and the Board get the full picture to make the right decision. In other words, Appeals wants to make sure they are as right as possible under all the facts as they know those facts. This is the case even if those facts come in after the 30-day cutoff to file a timely request for reconsideration. Just so I am clear, I am pleased that Appeals wants to get it right. This is a very important mindset. However, this mindset must be tempered with another mindset...a need for finality and the need to follow time deadlines as set forth in the regulation, which of course, has the effect and force of law.

As we discussed, time deadlines in a court of law are jurisdictional in nature. I understand that this of course is not litigation but administrative law and there can be some fluidity in the rules. However, time deadlines are the law and serve an important policy purpose, to wit: finality. What I am saying is that there needs to be a balance between the policy of "getting it right" and the policy of finality. It is my sense that this balance is not being maintained by Appeals.

Here is what I recommend. When Appeals receives a late RFR or otherwise receives new facts, they must ask themselves: "Is this late information so important that it will change the outcome of the D&R?" In other words, in order to take late information, there must be a high probability that the information is so material that it will change the original outcome of the case. This is a different standard than reviewing information that comes in a timely filed RFR.

May 22, 2013

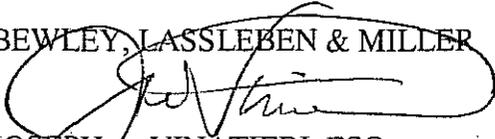
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It is not my intent to tie the hands of Appeals. However, the balance of finality must be part of Appeals' thinking. At this juncture I'm not quite sure what kind of language to put in 5266(b)(2)(A) but the foregoing is what I am pushing for.

After you've had an opportunity to look at this letter and think some more, perhaps you might have some thinking (perhaps I'll have some more thinking). Thanks.

Sincerely,

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transmitting documents to the Board Proceedings Division, including the Board Proceedings Division's email address, in its proposed amendments to Regulation 5262 and staff has included the omitted information in the current drafts of its proposed amendments.

Finally, staff realized that it had omitted provisions from its proposed amendments to Regulation 5266 to require the Appeals Division to acknowledge the receipt of requests for reconsideration, and explain that the Appeals Division may request additional information from the parties that may be relevant to the preparation of a Supplemental Decision and Recommendation. Staff also discussed the appeals conference process with Mr. Joseph Vinatieri, and agreed to address two housekeeping issues he identified by proposing to amend Regulation 5266 so that it requires the Appeals Division to notify the parties when the Appeals Division is required to or has decided to issue a Supplemental Decision and Recommendation, and requires the Appeals Division to issue Supplemental Decisions and Recommendations within 90 days after the submission of any additional information the Appeals Division needs to prepare the document. Therefore, staff added all of these provisions to its proposed amendments to subdivision (d) of Regulation 5266. In addition, staff noticed that its proposed amendments to Regulation 5266, subdivision (d) needed to be reformatted to accommodate the newly added provisions and that staff's previously proposed amendments to subdivision (d) should cross-reference subdivision (b) generally, rather than subdivisions (b)(1) and (b)(2) specifically. Therefore, staff also reorganized and renumbered some of the previously proposed amendments to subdivision (d) and corrected the cross-references to subdivision (b) in the current drafts of its proposed amendments.

During staff's discussion with Mr. Vinatieri, he also indicated that he felt that the 30-day deadline for the Department to submit a request for reconsideration in Regulation 5266, subdivision (c) is not being sufficiently enforced because the Appeals Division is inclined to exercise its discretion to issue a Supplemental Decision and Recommendation when an untimely request for reconsideration raises issues or provides evidence that the Appeals Division has determined that it needs to address. Mr. Vinatieri suggested that Regulation 5266 be amended to prohibit the Appeals Division from exercising such discretion when a Department files an untimely request for reconsideration, unless there is a high probability that the information in the request is so material to the appeal that it would change the Appeals Division's prior recommendation or recommendations. Board staff thoroughly considered Mr. Vinatieri's suggested standard, but did not agree to impose such a standard because:

- RTC section 7081 provides that "the purpose of any tax proceeding between the State Board of Equalization and a taxpayer is the determination of the taxpayer's correct amount of tax liability. It is the intent of the Legislature that, in furtherance of this purpose, the State Board of Equalization may inquire into and shall allow the taxpayer every opportunity to present, all relevant information pertaining to the taxpayer's liability." And, Board staff believes that RTC section 7081 often requires the Appeals Division to consider and prepare Supplemental Decisions and Recommendations to respond to information submitted by taxpayers in untimely requests for reconsideration that would not satisfy the standard suggested by Mr. Vinatieri. Therefore, staff does not believe that it would be consistent with RTC section 7081 to impose such a standard on information submitted by taxpayers, and staff does not agree that it would be consistent, appropriate, or fair to only impose the standard on the Departments;

- The Appeals Division's core function is to provide relevant, accurate, and up to date information, analysis, and conclusions to the Board. And staff believes that precluding the Appeals Division from addressing potentially relevant information, unless there is a high probability that the information would actually change the outcome of the appeal, would compromise the quality and integrity of the advice the Appeals Division provides to the Board; and
- A standard limiting the Appeals Division's discretion would be problematic to enforce in situations where the Appeals Division and a party disagree about the materiality of information.

Staff's proposed amendments to chapter 2 of the RTA are illustrated in ~~strikeout~~ and underline format in Attachment B. Since staff issued the Second Discussion Paper, staff's only changes to its proposed amendments to chapter 2 are the changes to Regulations 5216, 5218, 5220, 5230, 5235, 5237, 5241, 5262, 5264, 5266, and 5267 discussed above.

#### Additional Amendments to Chapter 3 of the RTA

During its review of Regulation 5311, Board staff determined that the provisions of subdivision (a) were duplicative of the introductory language in Regulation 5511. Staff also noticed that there are two separate definitions for the term "County-Assessed Properties Division" in Regulation 5311. Therefore, in the Second Discussion Paper, Board staff proposed to delete subdivision (a) from Regulation 5311, combine the definitions for the County-Assessed Properties Division in Regulation 5311, and make minor formatting changes to the regulation.

Regulation 5322, *Information Available to Assesseees; Assessment Factor Hearings*, provides that the Board generally holds Assessment Factor Hearings during its February meeting in Sacramento. However, Board staff understands that the Board conducts a Board meeting in Sacramento during January or February, but not both, during some years, and that, in years when the Board does not conduct a meeting in Sacramento during February, the Board will hold the Assessment Factor Hearings during its January meeting. Therefore, Board staff proposed to amend Regulation 5322 to provide that the Board generally conducts Assessment Factor Hearings at the Board's "January or February meeting in Sacramento."

Regulation 5323.6, *Submission of Petition*, currently requires taxpayers to submit 10 copies of petitions for reassessment of unitary or nonunitary values and correction of allocated values, and petitions for reassessment of private railroad car values, or, alternatively, to submit a compact disk containing an electronic copy. However, the State-Assessed Properties Division is now able to accept any electronic copy of a petition in lieu of 10 hard copies, not just an electronic copy on a compact disk. In addition, Regulation 5323.6 instructs taxpayers to file their petitions in accordance with Regulation 5335, *Submission of Petitions, Briefs, and Related Documents*, and then Regulation 5335 further cross-references the filing procedures in chapter 5 of the RTA. Therefore, Board staff proposed to amend Regulation 5323.6 so that it no longer requires 10 hard copies of a petition that is submitted electronically, and Board staff proposed to amend Regulations 5323.6 and 5335 so that they both similarly explain how to file documents electronically, by hand delivery, and by mail and both directly cross-reference the Board Proceedings Contact information in Regulation 5570 (as proposed to be amended below). Furthermore, Board staff also proposed amendments to Regulations 5324,