State of California

Board of Equalization
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Memorandum

To: Honorable Jerome E. Horton, Chairman
Honorable Michelle Steel, Vice Chair
Honorable Betty T. Yee, First District
Senator George Runner (Ret.), Second District
Honorable John Chiang, State Controller

Date: December 4, 2012

From: Randy Ferris
Chief Counsel

Subject: **Enactment of AB 2323**

AB 2323 has been signed by the Governor and is effective January 1, 2013. It adds Section 40 to the Revenue and Taxation Code (R&TC), which requires the BOE to publish on its website full written decisions or opinions[1] for certain matters. This memorandum outlines the scope of AB 2323 and its anticipated impact on Board processes. In addition, it requests Board direction on various issues.

I. Scope of AB 2323

AB 2323 requires that covered opinions be adopted and published on the Board's website within 120 days of the date upon which the Board renders its decision. Each covered opinion must contain: (1) findings of fact; (2) the legal issue or issues presented; (3) applicable law; (4) analysis; (5) disposition; and (6) the names of adopting Board Members.

The bill requires the publication, on the Board's website, of a Summary Decision, Formal Opinion or Memorandum Opinion that includes the six required items listed above. The bill does not define these types of decision documents, but the terms are defined in Board regulations. (See California Code of Regulations, title 18, sections (Rules) 5451, 5452 and 5551 of the Rules for Tax Appeals (RTA).) In franchise and income tax (FIT) appeals, precedential opinions are referred to as Formal Opinions; in business tax appeals, precedential opinions are referred to as Memorandum Opinions. Under Rule 5451, a Summary Decision is a nonprecedential decision in an FIT appeal.[2]

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[1] This memorandum uses the word "decision" or "opinion" interchangeably when not referring to a specific type of decision document.

[2] In accordance with the RTA, this memorandum capitalizes these terms (namely, Summary Decision, Formal Opinion and Memorandum Opinion) and uses them as they are used in the RTA, subject to changes made by the bill. For example, the bill requires the use of one of these types of decision documents for each decision, without regard to the type of tax program. However, as noted above, the RTA only use the terms in the context of specific types of appeals. Thus, as a result of the bill, Summary Decisions will be issued in business tax cases, even though not currently contemplated by the RTA. In general, capitalized terms not otherwise defined herein shall have the meanings set forth in the RTA.

The bill covers decisions where the "amount in controversy" is $500,000 or more. The term "amount in controversy" is not defined by AB 2323 or elsewhere in the R&TC. As noted below, staff requests Board direction with regard to the scope and application of this term.

The bill excludes items on the Board's "consent" calendar. Thus, it excludes the nonappearance consent items that are typically listed as "G" calendar items on a given public agenda notice (PAN) for a Board meeting. The exclusion of "consent" items and the amount in controversy limitation are the only limitations on the scope of the bill. Subject to these two exceptions, the bill covers all decisions of the Board acting as a collective body in open session to resolve pending disputes, regardless of the type of tax or fee program involved.

For example, the bill will cover all adjudicatory items that are listed as "H" calendar items on the relevant PAN and for which the "amount in controversy" is $500,000 or more. This will include both Sales and Use Tax Department and Property and Special Taxes Department items that are presented to the Board for approval. As discussed further below, the bill will also cover all hearing items for which the "amount in controversy" is $500,000 or more, including business tax items and FIT items.

AB 2323 does not require that covered decisions be precedential as to other taxpayers. Instead, it provides that, as long as the above content requirements are met, impacted decisions may be adopted as a Summary Decision (which would not be precedential), or as a Formal Opinion or Memorandum Opinion (either of which would be precedential).

Other than mandating the publication of covered decisions on the Board's website, AB 2323 does not change the Board's existing disclosure practices, which include publishing on its website Board minutes and videos of all Board meetings, as well as precedential opinions, and distributing all FIT decisions to legal publishers, practitioners and other interested parties.

II. Impact on Board Processes

AB 2323 imposes a new requirement across all tax areas administered or reviewed by the Board. As a result, its impact is difficult to predict, and Board procedures with regard to impacted decisions may evolve over time as the Board and staff gain experience with its implementation. With those caveats, the following outlines AB 2323's anticipated effect on the two most heavily impacted program areas: business tax appeals and FIT appeals.[3] As will be seen below, the impact of AB 2323 is complicated by the fact that, due to differences in the relevant statutes, business tax appeals and FIT appeals have different processes by which a Board decision becomes final.

II.A. FIT Appeals

Current FIT Oral Hearing Process

For an oral hearing, all parties and the Board receive a Hearing Summary. (Rule 5444.) It is prepared by the Appeals Division, summarizes background, contentions, and applicable law, and provides the Appeals Division's comments on the relevant issues. However, it does not include factual findings, which will be made by the Board, or purport to represent the Board's decision.

[3] Other program areas will also be affected, to a lesser extent. For example, some Department items (special taxes and, as discussed below, sales and use tax adjudicatory nonappearance items on the Board's "H" calendar) will be covered by AB 2323, as will some state-assessed property tax appeals. In addition, local tax reallocation appeals are impacted. See Item III ("Board Action Requested"), below, which addresses coverage issues in local tax reallocation appeals and property tax appeals.

Where the Board Does Not Direct the Drafting of a Formal Opinion or Summary Decision. Following the hearing, unless the Board directs the drafting of a Summary Decision or a Formal Opinion (or requests additional briefing or other further development), a brief Letter Decision will be sent by staff within a day or two of the hearing. The Letter Decision notifies the parties of the Board's decision and provides a brief statement of the reason or reasons for the Board's decision. (Rules 5450, 5560, subd. (a)(2).) Letter Decisions are not subject to prior Board review and are necessarily brief to summarize only what is clearly reflected by the vote, so that the matter does not have to go back on calendar for approval of a lengthier decision document. The date the Board votes to resolve the appeal (not the date of the Letter Decision) is the date of its determination and starts the running of the 30-day period for filing a Petition for Rehearing (PFR). (Rev. & Tax. Code, §§ 19048, 19334; Rules 5450, subd. (c), 5460, subd. (a), 5461, subd. (b).)

If a PFR is filed within 30 days of the Board's vote to resolve the appeal, the Board's determination does not become final until 30 days following either the Board's vote to deny the PFR or, if a rehearing is granted, the date the Board votes to resolve the appeal on rehearing. (Rev. & Tax. Code, §§ 19048, 19334; Rules 5463, subd. (c), 5465, subd. (b).) If a rehearing is granted, the Board's prior determination is held in abeyance pending resolution of the rehearing, and its decision on rehearing is its decision on the appeal. (Rule 5465, subd. (b).)

Where the Board Directs the Drafting of a Formal Opinion or Summary Decision. Where the Board directs the drafting of a Summary Decision or Formal Opinion, staff drafts a proposed Summary Decision or Formal Opinion and submits it to the Board for consideration and a vote on a later Board calendar. Under the existing RTA provisions, such proposed decisions are confidential until adopted by the Board. (Rules 5451, subd. (c), 5452, subd. (d).) The later date on which the Board either votes to adopt the Summary Decision or Formal Opinion, or votes to resolve the appeal without adopting a Summary Decision or Formal Opinion, is the date of the Board's determination. (*Id.*)

The Board's determination becomes final 30 days following its vote to either adopt a Summary Decision or Formal Opinion or otherwise resolve the appeal without adopting a Summary Decision or Formal Opinion, unless, in either case, a PFR is filed during that 30-day period. (Rev. & Tax. Code, §§ 19048, 19334; Rules 5451, subd. (c), 5452, subd. (d), 5460, subd. (a), 5461, subd. (b).) If a PFR is filed within that 30-day period, the Board's determination does not become final until 30 days following either the Board's vote to deny the PFR or, if a rehearing is granted, the date the Board votes to resolve the appeal on rehearing. (Rev. & Tax. Code, §§ 19048, 19334; Rules 5463, subd. (c), 5465, subd. (b).) If a rehearing is granted, the Board's prior determination is held in abeyance pending resolution of the rehearing, and its decision on rehearing is its decision on the appeal. (Rule 5465, subd. (b).)

As noted previously, where the Board does not direct drafting of a Summary Decision or Formal Opinion and a Letter Decision is issued, the trigger for the 30-day period for the filing of a PFR is the Board's vote to resolve the appeal, which usually occurs on the same day as the hearing. In contrast, where a Summary Decision or Formal Opinion is directed, the trigger for the 30-day PFR period is the date on which the Summary Decision or Formal Opinion is adopted, which would occur at a later public Board meeting. As will be seen below, the trigger for the 30-day PFR period in a business tax appeal is the date the Notice of Redetermination, or Notice of Action on a refund claim, is mailed. (Rev. & Tax. Code, §§ 6564, 6906.)

Since the PFR-trigger-date for a Summary Decision or Formal Opinion is the date the Board votes to adopt the decision, rather than the Board's vote on the day of a hearing, the Board's vote to direct preparation of a Summary Decision or Formal Opinion is a step in the process of resolving the appeal, but it is not the date of the Board's determination. Similarly, the Board's vote in a business tax appeal following a hearing moves the appeal closer to resolution, but it is the later mailing of the Notice of Redetermination, or Notice of Action on a refund claim, that starts the clock running on the 30-day PFR period.

FIT Oral Hearing Process for Decisions Covered by AB 2323

Staff will still prepare a Hearing Summary, which will note, for covered decisions, that the appeal will be subject to AB 2323. Since AB 2323 does not permit Letter Decisions for covered decisions, and requires factual findings and a more detailed opinion, Letter Decisions can no longer be issued in covered appeals. Instead, prior to the Board's vote, staff will reiterate that the appeal is covered by AB 2323 and request that the Board indicate whether it wishes to resolve the matter by adopting a Summary Decision or a Formal Opinion.

Staff will then prepare a written Summary Decision or Formal Opinion containing proposed factual findings and legal analysis in light of the oral hearing discussion and testimony, and the other content required by AB 2323, and submit this proposed decision for review by the Board and discussion on a later public meeting calendar. (See Rules 5451, 5452.) Under the existing provisions of the RTA, these proposed decisions will continue to be confidential until adopted by the Board. (*Id.*)

Under AB 2323, the Summary Decision or Formal Opinion must be published on the Board's website within 120 days of the date the Board "rendered its decision."[4] Under the existing RTA provisions outlined above, the Board does not render its decision until the Summary Decision or Formal Opinion becomes final and effective. The initial vote to adopt the decision is the trigger that starts the running of the 30-day period for the filing of a PFR and therefore moves the appeal closer to resolution. However, the appeal is not resolved, and no decision is rendered, until the Board's decision becomes final and effective under the RTA. Any other interpretation would require the Board to publish on its website non-final decisions that could be reversed or modified through the rehearing process, which would cause confusion and could not have been intended by the Legislature. Moreover, Rule 5465 is clear that, when a PFR is granted, the Board renders only one decision, not two decisions, on an appeal.[5] Further, staff's interpretation is consistent with the R&TC, which starts the clock for the filing of an action in court following a Board determination on the date the determination becomes final.[6] Thus, under AB 2323, the decision is not rendered until it becomes final and effective, and the 120-day period for publishing the decision on the Board's website begins at that time.

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[4] In contrast, a California Court of Appeal is required to file a written opinion within 90 days after a case is "submitted for decision," rather than after it "rendered its decision." (Cal. Const., art. VI, § 19; Gov. Code, § 68210.) If the Legislature had wished to model AB 2323 on California Court of Appeal procedures, it presumably would have used similar terminology. With regard to publication on the Board's website, the Legal Department is working with the Board's Technology Services and External Affairs Departments to ensure that the Board's website is prepared to provide timely and easy access to covered decisions.

[5] Likewise, for business tax appeals, Rule 5562 makes it clear that, when a PFR is granted, the Board's prior decision is held in abeyance (i.e., held in a condition of being undetermined) pending the resolution of the rehearing.

[6] The date the Board's determination "becomes final" is also the date that triggers the 90-day period in which a taxpayer may file a refund suit following the Board's determination. (Rev. & Tax. Code, § 19384; see also Rev. & Tax. Code, § 19381 [providing a 60-day period following the date the action of the Board of Equalization on a residency assessment "becomes final"].)

In most cases a PFR is not filed, so the date the decision becomes final will be 30 days following the Board's vote to adopt the Summary Decision or Formal Opinion. Thus, in most cases, the Summary Decision or Formal Opinion will be required to be posted on the Board's website within 150 days of the date that the Board moves the appeal closer to resolution by voting to adopt the Summary Decision or Formal Opinion (30 days to become a final and effective rendered decision, plus 120 days).

If a PFR is filed, the Board's determination of the appeal will be deferred until resolution of the PFR process, as outlined above, and the 120-day period to publish the Board's decision will begin when that process concludes.

Current Process for FIT Nonappearance Adjudicatory Decisions

Decisions may be placed on the adjudicatory calendar for various reasons. If a Board Member's office has contact with a party or the Appeals Division, or simply wishes to discuss the decision with Appeals Division staff and/or other Board Members, a matter will be moved from the consent calendar (Item G.2) to the adjudicatory nonappearance portion of the Board's calendar (Item H.2) so it can be discussed at a public meeting. A matter will also be placed on the adjudicatory calendar if the appeal has previously been placed on or heard on the Board's oral hearing calendar. In addition, a proposed Formal Opinion would be placed on the adjudicatory calendar.

Staff prepares a Summary Decision or Formal Opinion for review and adoption by the Board. As noted above, under the existing provisions of the RTA, such proposed Summary Decisions or Formal Opinions are confidential until adopted by the Board. (Rules 5451, subd. (c), 5452, subd. (d).) As noted above, the Board votes to resolve the appeal when it votes to either adopt a Summary Decision or Formal Opinion, or otherwise resolve the appeal without adopting a Summary Decision or Formal Opinion. This vote starts the 30-day period for filing a PFR. (*Id.*) The rules regarding the finality of the Board's decision are set forth above (under the heading "Current FIT Oral Hearing Process" and the subheading "Where the Board Directs the Drafting of a Formal Opinion or Summary Decision").

FIT Process for Nonappearance Adjudicatory Decisions Covered by AB 2323

The new process for covered FIT nonappearance adjudicatory matters will follow the current general process outlined above, subject to the following changes. First, covered decisions will have to be published on the Board's website within 120 days of the date the Board renders its decision (i.e., as discussed above, the date its decision becomes final and effective). Second, the confidential draft may need to be revised before it is published to incorporate any direction provided by the Board with respect to AB 2323's requirements.

As noted above, matters appearing on the consent calendar (i.e., the G.2 calendar in the case of FIT appeals) are expressly excluded from AB 2323 by its terms, even if the amount in controversy equals or exceeds $500,000. Thus, an appeal with $500,000 or more in controversy that is initially not subject to AB 2323, because it is on the consent calendar, will become subject to AB 2323 if it moves to the adjudicatory calendar (i.e., the H.2 calendar in the case of FIT appeals).

II.B. Business Tax Appeals

Current Business Taxes Oral Hearing Process

For an oral hearing, all parties and the Board receive a Hearing Summary. It is prepared by the Appeals Division, summarizes background, contentions, and applicable law, and provides the Appeals Division's recommendation.

Following the hearing, if the Board votes to resolve a petition for redetermination, a Notice of Redetermination reflecting the Board's vote will generally be issued by the Department within 45 days of the date of the Board's vote. (Rule 5560, subd. (a)(1).) The notice provides the taxpayer with the amount due, including tax, penalties and interest, and also provides a brief statement of the reason or reasons for the Board's decision.[7] The notice does not contain any facts, contentions, applicable law or analysis. The Board's decision is final and effective 30 days after this notice is issued unless, within that 30-day period, a PFR is filed. (Rev. & Tax. Code, § 6564; Rule 5560, subd. (b).) Thus, as noted previously, the trigger for the 30-day period for the filing of a PFR (and the finality of the decision if a PFR is not filed) is the mailing of the notice, rather than the date the Board votes to resolve the appeal.

If the Board does not vote to resolve the petition for redetermination on the date of the hearing, such as where it allows additional time for the taxpayer to submit additional documentation or directs the Department to conduct further review, the appeal is brought back to the Board for resolution on a later adjudicatory calendar. When the Board does vote to resolve the petition for redetermination, the same rules outlined above apply (i.e., the 30-day period for the filing of a PFR begins to run on the date the notice of the Board's order is mailed, generally within 45 days of the Board's vote to resolve the appeal).

Where the Board votes to direct the Appeals Division to prepare a Memorandum Opinion, the Board has traditionally voted to resolve the business tax case that same day, and the Notice of Redetermination will generally be issued by the Department within 45 days of the Board's order, with a draft Memorandum Opinion submitted to the Board for consideration on a later adjudicatory calendar. Since the Board generally has not required that the draft be returned to it at the very next meeting (which would leave very little time to draft the opinion), when the draft Memorandum Opinion is considered by the Board, the Notice of Redetermination usually has already been issued. When the Board considers the draft, it may adopt the draft as written, adopt it with revisions, request that the Appeals Division return it for the Board's consideration with revisions at a later Board meeting, or decide that no Memorandum Opinion should be adopted.

Under the existing RTA provisions, however, the Board is not required to follow the approach it has traditionally followed when considering whether to adopt a Memorandum Opinion in a business tax appeal. The Board could, instead, hold off voting to resolve the appeal on the same day it directs the drafting of a Memorandum Opinion, and instead wait to consider the draft opinion before resolving the case. If the Board voted to adopt a Memorandum Opinion, that opinion would then serve as the Board's decision on the appeal, in which case the Notice of Redetermination would generally be issued within 45 days of the Board's vote to adopt the Memorandum Opinion. If the Board decided not to adopt a Memorandum Opinion, then the Board would still need to vote to resolve the appeal.

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[7] A Notice of Action denying a refund claim is mailed within 30 days of the Board's vote to resolve the appeal. (Rev. & Tax. Code, § 6906; Rule 5560, subd. (a)(1).)

Business Taxes Oral Hearing Process Under AB 2323

Where the amount in dispute for an oral hearing meets or exceeds the AB 2323 threshold, the Board will vote to determine the appeal and direct the Appeals Division to prepare either a Summary Decision or Memorandum Opinion, and the options discussed above would be applicable.

Under AB 2323, the Summary Decision or Memorandum Opinion must be published on the Board's website within 120 days of the date the Board's decision becomes final and effective (i.e., the date the Board renders its decision). When the Board votes to resolve a case, the Board makes a determination such that the matter begins moving towards finality, but the decision is not rendered until it is final. Following the Board's vote, a Notice of Redetermination would generally be issued within 45 days, and the Board's decision is final 30 days after the date of the Notice of Redetermination, unless a petition for rehearing is filed within that 30-day period. Therefore, under AB 2323, once the Board's vote is final, which occurs 30 days after the date of the Notice of Redetermination, the Summary Decision or Memorandum Opinion must be posted on the Board's website within 120 days.

As noted above, under the existing RTA provisions, the Board could change its traditional process for the adoption of Memorandum Opinions by deferring its vote to resolve the appeal until it has the opportunity to review and adopt the Memorandum Opinion. The advantage of a modified process would be that it would leave the Board free to refine or revise its initial determination after it reviewed staff's proposed Memorandum Opinion. In this respect, such a modified approach would be similar to the existing process for FIT Formal Opinions (and Summary Decisions). These advantages may be significant in the case of a Memorandum Opinion since it will be precedential and, therefore, must be carefully evaluated to determine if it provides the desired guidance. However, the disadvantage of this approach is that it would defer resolution of the matter and prevent the taxpayer from filing a PFR until after the Board adopts the Memorandum Opinion and then sends the Notice of Redetermination. As discussed below (under the heading "III.B. Board Action Items – Item 9. Revisions to the RTA"), staff believes that this modified approach may be appropriate in precedential matters. However, for nonprecedential matters, a more streamlined approach, which does not defer resolution of the appeal while staff is preparing, and the Board is reviewing, a proposed decision may be preferable.

It is also important to note that, unlike with FIT appeals, the current provisions of the RTA do not require that business tax opinions covered by AB 2323 remain confidential until adopted by the Board. (See Rules 5451, subd. (c), 5452, subd. (d) [which specifically address FIT appeals and which are not binding on Summary Decisions and Memorandum Opinions for business tax appeals].) In other words, under the existing RTA provisions, unlike with FIT appeals, staff anticipates that draft covered opinions for business tax appeals would be posted with the relevant PAN prior to adoption at a subsequent Board meeting.[8] Staff also notes that, to the extent taxpayers with a business tax matter covered by AB 2323 would prefer to have the resolution of their appeals deferred (i.e., the current FIT approach prescribed by rule) so that they could have the benefit of reading the covered decision before deciding whether to file a PFR, taxpayers could make such a request at or before their hearings. If such a request were made, staff assumes that the Board would typically grant the request because any concerns about additional interest accrual would have been taken into account by the taxpayer prior to making the request.

[8] Staff recommends that any future revisions of the RTA provide for a consistent approach between FIT and business tax appeals with regard to whether proposed decisions are confidential or not when submitted for the Board's consideration.

Business Taxes Process for the Legal Appeals Matters Adjudicatory Calendar

For the H.1 adjudicatory calendar (i.e., Legal Appeals Matters), all parties and the Board receive a final action summary. It is prepared by the Appeals Division, summarizes background, contentions and applicable law, and provides the Appeals Division's recommendation.

If the Board votes to resolve a petition for redetermination, a Notice of Redetermination reflecting the Board's vote will generally be issued by the Department within 45 days of the date of the Board's vote. (Rule 5560.) The Board's decision is final 30 days after this notice is issued unless, within that 30-day period, a PFR is filed. (Rule 5560, subd. (b).)

Business Taxes Process for Other Adjudicatory Decisions Covered by AB 2323

For affected adjudicatory calendars other than the Legal Appeals Matters calendar (typically the H.4 through H.10 adjudicatory calendars), when the amount in controversy meets or exceeds the AB 2323 threshold, the Board will vote to direct the Appeals Division to prepare a Summary Decision or Memorandum Opinion, and the same procedures discussed above would also be applicable here.

III. Board Action Requested

III.A. Background

Staff's objective is to administer AB 2323 with existing resources in a manner that ensures both compliance across program areas and consistent application of interpretations and procedures. Staff believes that consistent interpretations and procedures are necessary to ensure the fair and efficient administration of AB 2323 and to minimize any adverse impact on the time required for noncovered decisions to be resolved.

In light of the foregoing, staff requests Board direction as to how it wishes staff to administer AB 2323. Staff has identified the following Board Action Items and provides staff recommendations, alternatives and comments below. Of course, the Board may wish to consider other alternatives not presented below. Staff requests that the Board pass a motion adopting staff's recommendations, subject to such modifications as the Board determines are appropriate.

III.B. Board Action Items

Background Regarding "Amount in Controversy."

Several of the items for Board action below deal with defining the term "amount in controversy" for purposes of implementing AB 2323. As noted above, AB 2323 does not define the term "amount in controversy," and the term must be defined in order to identify impacted appeals.

The term "amount in controversy" is not used anywhere in the R&TC. Although there are other legal provisions involving similar concepts, they involve different contexts than that presented here and offer varying interpretations. For example, in determining diversity jurisdiction for purposes of federal court jurisdiction involving an underlying tax dispute, the calculation of the amount in

controversy focuses on the tax amount in dispute, but excludes interest and penalties.[9] In contrast, for purposes of determining whether a taxpayer is a prevailing party entitled to attorneys' fees from the Internal Revenue Service under IRC section 7430, courts have interpreted amount in controversy (which is not defined in the IRC) to include tax, interest and penalties.[10] In light of the absence of any controlling statutory definition in the R&TC and the differing standards used under federal law with respect to matters involving tax disputes, the task is to provide a reasonable administrative interpretation of "amount in controversy." Any reasonable administrative interpretation must: (1) be responsive to the overall intent of AB 2323; (2) foster compliance with all deadlines and requirements; and (3) mitigate the potential for unintended delays in the disposition of appeals not covered by AB 2323.

As noted below, staff believes the term should be interpreted as the amount actually and directly contested by the parties. Thus, any amounts conceded, by either party, would not be included in the calculation of the "amount in controversy" for purposes of AB 2323. Similarly, if the taxpayer requests abatement of interest and penalties, but does not contest the underlying tax, only the contested interest and penalties would be included. Conversely, if the taxpayer contests imposition of the tax, but does not request abatement of interest or penalties, the only amount in controversy would be the contested tax. Staff's recommendations are consistent with current Board practices, which are reflected in Hearing Summaries that focus on the amount of tax in dispute and any contentions related to interest and penalty abatement.

Item 1. Amount in Controversy – Tax

Staff Recommendation: Where less than the total amount of tax is contested, only include the contested amount of tax in the amount in controversy, and do not include any amount of tax where the tax is not contested (i.e., where only interest or penalties are contested).

Alternative: Include the total amount of tax that could potentially be changed by the Board's decision, even if the amount of tax or portions of it are not contested.

Item 2 . Amount in Controversy – Interest

Staff Recommendation: Only include interest in the amount in controversy where interest is expressly at issue, and only include the contested amount of interest. Do not include interest when tax is contested, but no direct dispute exists with regard to interest.

Alternative: Always include interest, even if not specifically at issue.

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[9] 28 U.S.C. section 1332 provides that a federal district court currently has diversity jurisdiction where, among other requirements, the amount in controversy for the matter is greater than $75,000. The statute specifically excludes interest and costs in calculating the amount in controversy. Moreover, when diversity jurisdiction involves an underlying tax dispute, courts have interpreted the "value of the matter in controversy" (i.e., the amount in controversy) to exclude penalties. (See, e.g., *Royalty Service Corp. v. Los Angeles* (9th Cir. 1938) 98 F.2d 551, 554 [considering the amount of tax, but excluding amounts related to penalties or loss of business that payment of the tax would have avoided, for purposes of determining whether the amount-in-controversy-threshold, which was $3,000 at that time, had been exceeded].)

[10] See, e.g., *Don Johnson Motors, Inc. v. United States* (S.D. Tex. 2008) 2008 U.S. Dist. Lexis 36594, at pp. 7-8 [total amount in controversy included a claim for refund of tax, interest and penalties, a lien-related claim and an unauthorized collection action claim]. Also, in the context of determining whether a case is eligible for the U.S. Tax Court's small tax case procedures, IRC section 7463(a) provides in part that the "the amount of the deficiency placed in dispute" includes tax, additions to tax and penalties. (26 U.S.C. § 7463(e).)

Item 3. Amount in Controversy – Penalties

Staff Recommendation: Only include penalties in the amount in controversy where the penalty in question is expressly at issue, and only include the contested amount of penalty. Do not include when tax is contested, but no dispute exists with regard to the penalty in question.

Alternative: Always include penalties, even if not specifically at issue.

Item 4. Amount in Controversy – When Determined

Staff Recommendation: Staff will identify potentially covered appeals and other covered decisions as early as practicable in the administrative process so that the matter can be fully developed with AB 2323 in mind. When a potentially covered appeal is scheduled to come before the Board for a decision, staff recommends that the matter be reviewed again to evaluate whether, perhaps due to concessions of the parties, the recommendations of the Appeals Division or other changes, the amount-in-controversy-threshold is still likely to be met or exceeded as of the date the Board is likely to render its decision (i.e., when the decision becomes final and effective). Thus, for example, if the amount in controversy was reduced due to concessions made during an appeals conference, a covered decision might drop below the $500,000 threshold. Likewise, concessions made during an oral hearing before the Board could also affect whether the threshold is ultimately met or exceeded. Conversely, if interest was actually contested or viewed as part of the amount in controversy regardless of whether interest abatement was at issue (see Item 2 above), a decision could meet or exceed the $500,000 threshold due to interest accrual.

Advantages of Staff Recommendation. The amount in controversy would reflect later concessions or new arguments by the parties, as well as the accrual of interest, if relevant. It might be viewed as a more accurate reflection of the amount at issue for purposes of the Board's decision.

Disadvantages of Staff Recommendation. It would require the amount in controversy to be re-evaluated to reflect, if relevant, the accrual of interest and any changes in the parties' positions.

Alternative: Determine the amount in controversy as of the beginning of the administrative process. In the case of an appeal, the amount in controversy would be determined as of the date when the appeal is filed. In the case of an item on a Department adjudicatory calendar, the amount in controversy would be determined as of the date of the Petition for Redetermination or similar notice. Thus, the amount in controversy would not change based on subsequent changes in the positions of the parties or due to the accrual of interest.

Advantages of Alternative. It arguably would promote administrative efficiency by conclusively identifying impacted appeals early in the process. It would avoid any potential uncertainty and the need for repeated evaluations, which could be caused by having a single matter being covered by AB 2323 at some times (e.g., based on the continued accrual of interest, if relevant) and not covered at other times (e.g., when the parties have reached concessions).

Disadvantages of Alternative. The amount in controversy as of the date the Board renders its decision could differ materially from the amount in controversy at the beginning of proceedings before the Board, whether due to concessions that reduce the amount at issue, new arguments that increase the amount at issue or the accrual of interest, if relevant. It could also be argued that the statute implicitly refers to the amount in controversy as of the date the Board renders its decision.

Item 5. Amount in Controversy – Property Tax

Staff Recommendation: Determine the amount in controversy by estimating the annual change in tax based on contested valuation. Thus, based on a one-percent property tax, a decision would be covered when the difference between valuations equals or exceeds $50,000,000 (so that the change in tax would equal or exceed $500,000).

Alternative: Determine the amount in controversy by reference to the contested valuation amount. Thus, where the taxpayer asserts the valuation should be lowered by $500,000 or more, such a decision would be covered, even though the annual change in tax would only be approximately one percent of the changed valuation.

Staff Comments. The staff recommendation is consistent with the treatment of other appeals that focus on evaluating the amount of tax (and potentially interest and penalties) at issue, rather than whether the measure of the tax (i.e., value) involves $500,000 or more. For example, in an FIT appeal, there may be a question of whether $500,000 or more of income is taxable, but it would not be considered a covered appeal unless the resulting change in tax (and/or contested penalties or interest) equaled or exceeded $500,000.

Item 6. Amount in Controversy – Local Tax Reallocation

Staff Recommendation: Determine the amount in controversy for local tax reallocation matters based on the total amount of reallocation that is at issue.

Alternative: None, but subject to Board direction.

Staff Comments. Staff believes that local tax reallocation disputes are covered under the plain language of AB 2323.

Item 7. General Business Tax and FIT Appeals Process

Staff Recommendation: Staff requests that the Board confirm its agreement with, or note any modification of, the anticipated procedures for handling AB 2323 appeals, as discussed in Section II above, including, but not limited to, staff's opinion that the date the Board renders its decision for purposes of AB 2323 is the date the Board's determination of the matter becomes final and effective.

Alternative: None, but subject to Board direction.

Item 8. Scope of Covered Decisions

Staff Recommendation: Covered decisions generally would be narrowly drafted, with only the analysis and findings necessary to support the Board's determination, unless the Board provides additional direction with respect to a specific decision.

Alternative: The Board could instruct staff generally to draft decisions broadly, with an effort to elaborate on related legal principles, with the goal of providing broader guidance, unless the Board provides contrary direction with respect to a specific decision.

Staff Comments. Staff requests that, subject to the Board's general direction, staff retain discretion in determining the breadth and scope of proposed decisions based on staff's analysis of the specific legal issues and any related Board discussion. Staff may expressly solicit the Board's direction and input

on this issue when a covered appeal is discussed at a Board meeting. Although staff anticipates that the breadth of decisions will frequently be determined on a case-by-case basis, staff requests that the Board provide general direction regarding whether covered decisions typically would be drafted narrowly or broadly, in order to facilitate efficient drafting and subsequent adoption of proposed covered decisions.

Narrowly drafting decisions has several advantages: it facilitates agreement and adoption by Board Members, it avoids or limits any unintended consequences in differing factual scenarios that may arise in later appeals, it conserves limited administrative resources, and it reflects the likelihood that most covered decisions will be nonprecedential Summary Decisions (rather than Formal Opinions or Memorandum Opinions).

Item 9. Revisions to the RTA

Staff Recommendation: Staff requests authorization to begin a rulemaking process to address various issues raised by AB 2323.

Staff Comments. Staff contemplates revisions to the RTA to interpret and give effect to AB 2323 and set forth relevant procedures. In addition to codifying the direction provided by the Board with respect to Action Items 1 through 8 above, various other issues should also be addressed. For example, the RTA currently provides for Summary Decisions only in the context of FIT appeals, while under AB 2323 any nonprecedential decision, in any tax or fee area, would be described as a Summary Decision.[11]

In addition, staff believes it may be advisable to revise the RTA to make the rules regarding business tax decisions and FIT decisions more similar to one another. The goal of such revisions would be to provide consistent and more easily administrable rules regarding the "trigger" date that would start the running of the 30-day period during which a PFR may be filed. Staff recommends that, instead of varying these rules depending on whether an appeal is a business tax appeal or an FIT appeal, the applicable default rule should depend on whether or not the Board directs preparation of a precedential decision. Any such new rules should set forth default procedures that would apply in the absence of other Board direction, but would expressly permit the Board to direct a different procedure when appropriate in a specific appeal.

In conformity with existing business tax procedures and recognizing the nonprecedential nature of Summary Decisions, new rules could provide a default rule that, where the Board votes to determine the appeal and directs preparation of a Summary Decision, the date of the Board's vote to determine the appeal will trigger the running of the 30-day period for the filing of a PFR. Thus, unless a PFR is filed within 30 days of this vote, this determination will become final, and the later adoption of the Summary Decision will serve only to memorialize the basis of the Board's decision as applied to the specific facts of the appeal.[12] By contrast, under the existing RTA provisions, the Board's vote to determine an FIT appeal and direct preparation of a Summary Decision moves the appeal closer to resolution, but the date of the Board's determination for purposes of the 30-day PFR period is deferred until the Board adopts the proposed Summary Decision. Applying this current rule to matters where the Board is only issuing a Summary Decision because the arbitrary $500,000

[11] See also footnote 8, above.

[12] It may be objected that this will require a party to file a PFR before it has the opportunity to review the Board's Summary Decision. However, staff would also recommend that the Board adopt a rule that would give taxpayers the right to request that the Board not vote to determine a matter subject to AB 2323 until the Board adopts the covered decision. Under such a rule, any additional interest that accrues during the drafting and adopting of the Summary Decision would be due to the taxpayer's request.

threshold specified by AB 2323 is met or exceeded unnecessarily defers the resolution of these matter for several months and adds to the accrual of interest. While the current approach has advantages when a significant or novel legal question is at issue, and would be retained where the Board so directs in a specific appeal, a more streamlined default approach seems appropriate in the context of nonprecedential decisions that are only being published because of the $500,000 threshold.

Conversely, where the Board votes to determine the appeal and directs preparation of a precedential decision (i.e., a Formal Opinion or Memorandum Opinion), the current RTA provisions applicable to FIT decisions may provide the better default rule. Under these provisions, the Board's initial vote to resolve the appeal and direct preparation of a Formal Opinion consistent therewith does not constitute the date of the Board's determination of the appeal. Instead, the date of the determination, and the date on which the 30-day period for filing a PFR begins to run, is deferred until the date on which the Board votes to adopt the Formal Opinion. These provisions effectively slow the final resolution of the appeal by extending the deliberative process, and prevent the filing of a PFR until the Formal Opinion is ultimately adopted. However, this lengthier deliberative process seems appropriate where the ultimate result will be a precedential opinion affecting other taxpayers. In contrast, as noted above, this process may be unduly cumbersome where the Board is simply directing preparation of a routine and nonprecedential Summary Decision, especially one required by the $500,000 threshold. As is the case with the proposed default rule for nonprecedential decisions, any revised regulations would only provide this approach as a default rule for precedential opinions; the Board would be free to direct in a specific appeal that its vote to resolve the appeal and direct preparation of a Formal Opinion or Memorandum Opinion would represent its determination of the appeal, unless a PFR is filed.

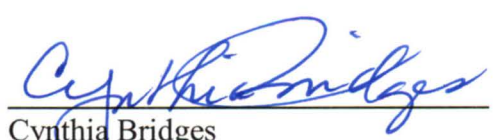
Staff requests the Board's direction and input with regard to potential revisions to the RTA. Of course, the implementation of any such revisions would be subject to the normal rulemaking process, including an interested parties process for all issues for which the Board does not provide specific guidance pursuant to the Action Items presented herein. For open issues, the final form of any revisions would depend on input received during the interested parties process, subject to further review by and direction from the Board.

IV. Conclusion

The implementation of AB 2323 will undoubtedly generate unanticipated questions, and the Board's practices in the area may evolve over time. Staff appreciates the Board's assistance in providing guidance with regard to the implementation of AB 2323. A matrix that summarizes the various Action Items for which staff is seeking guidance is attached for ease of reference and discussion.

If you have any questions about this memorandum, please contact me at (916) 445-4380, Grant Thompson at (916) 206-1644 or Cindy Chiu at (916) 323-3119.

Approved:



Cynthia Bridges
Executive Director

RF:ek

Attachments: Matrix for Action Items 1-9
Text of AB 2323

cc: (All with attachment)

Ms. Cynthia Bridges	MIC: 73
Mr. Jeff Vest	MIC: 85
Mr. Grant Thompson	MIC: 85
Ms. Cindy Chiu	MIC: 85

Matrix for Action Items 1-9

Action Item	Staff Recommendation	Alternative	Notes/Action Taken
1. Amount in Controversy – Tax	Only include disputed tax.	Include all tax that is subject to Board's decision.	☐ Adopt Staff Recommendation ☐ Adopt Alternative ☐ Other:
2. Amount in Controversy – Interest	Only include interest that is expressly contested.	Always include interest, even if not specifically at issue.	☐ Adopt Staff Recommendation ☐ Adopt Alternative ☐ Other:
3. Amount in Controversy – Penalties	Only include penalties that are expressly contested.	Always include penalties, even if not specifically at issue.	☐ Adopt Staff Recommendation ☐ Adopt Alternative ☐ Other:
4. Amount in Controversy – When Determined	Identify potentially covered appeals as early as practicable and make final determination of amount in controversy as of the date the Board's decision will become final.	Determine as of the beginning of the process (e.g., when an appeal is filed).	☐ Adopt Staff Recommendation ☐ Adopt Alternative ☐ Other:
5. Amount in Controversy – Property Tax	Determine based on change in annual tax with respect to valuation at issue (i.e., 1% of contested valuation amount).	Determine based on amount of valuation that is in controversy.	☐ Adopt Staff Recommendation ☐ Adopt Alternative ☐ Other:
6. Amount in Controversy – Local Tax Reallocation	Determine based on total reallocation amount that is at issue.	None, but subject to Board direction.	☐ Adopt Staff Recommendation ☐ Other:

Action Item	Staff Recommendation	Alternative	Notes/Action Taken (check applicable box)
7. General Business Tax and FIT Appeals Process	Follow general procedures outlined in Section II of this memorandum, including, but not limited to, staff's opinion that the date the Board renders its decision for purposes of AB 2323 is the date the Board's determination of the matter becomes final and effective.	None, but subject to Board direction.	☐ Adopt Staff Recommendation ☐ Other:
8. Scope of Covered Decisions	Generally draft decisions *narrowly*, with discretion to draft more broadly based on Board discussion and/or specific issues.	Generally draft decisions *broadly*, with discretion to draft more narrowly based on Board discussion and/or specific issues.	☐ Adopt Staff Recommendation ☐ Adopt Alternative ☐ Other:
9. Revisions to the RTA	Begin rulemaking process, including an interested parties process as to any Action Items for which the Board does not provide present guidance.	None, but subject to Board direction.	☐ Adopt Staff Recommendation ☐ Adopt Alternative ☐ Other:

Exhibit A

Text of AB 2323

SECTION 1. Section 40 is added to the Revenue and Taxation Code, to read:

40. (a) (1) The board shall publish on its Internet Web site a written formal opinion, a written memorandum opinion, or a written summary decision for each decision of the board in which the amount in controversy is five hundred thousand dollars ($500,000) or more, within 120 days of the date upon which the board rendered its decision.

(2) A decision of the board shall not include consent calendar actions taken by the board.

(b) Each formal opinion, memorandum opinion, and summary decision as described in subdivision (a) shall include all of the following:

(1) Findings of fact.

(2) The legal issue or issues presented.

(3) Applicable law.

(4) Analysis.

(5) Disposition.

(6) Names of adopting board members.

(c) (1) A board member may submit a dissenting opinion setting forth his or her rationale for disagreeing with the memorandum opinion or formal opinion.

(2) A board member may submit a concurring opinion setting forth the board member's rationale for agreeing with the result reached in the memorandum opinion or formal opinion, if different than the rationale set forth in the memorandum opinion or formal opinion.

(3) A dissenting opinion and a concurring opinion shall be published in the same manner as prescribed in subdivision (a) for a formal opinion or memorandum opinion.

(d) A formal opinion or memorandum opinion adopted by the board may be cited as precedent in any matter or proceeding before the board, unless the opinion has been depublished, overruled, or superseded. A summary decision may not be cited as precedent in any matter or proceeding before the board.