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STATE OF CALIFORNIA
OFFICE OF TAX APPEALS
Interested Parties Meeting
Proposed Rules for Tax Appeals

400 R Street, 1st Floor Hearing Room
Sacramento CA 95811

Transcript of Proceedings
Monday, April 16, 2018
1:06 p.m.

Brittany Flores, CSR 13460

APPEARANCES

Ms. Myriam, Bouaziz, Deputy Director of Legislation

Mr. Andrew Kwee, Administrative Law Judge

Ms. Jacklyn Zumaeta, Assistant Chief Counsel

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1 PROCEEDINGS:

2
3 MS. BOUAZIZ: Okay. Hi, everyone. I just
4 wanted to welcome you to the April 16th informal
5 interested parties meeting that the Office of Tax
6 Appeals is having today. I wanted to start by
7 introducing myself. My name is Myriam Bouaziz. I am
8 the deputy director of legislation here at the Office of
9 Tax Appeals, and with me I have Administrative Law Judge
10 Andrew Kwee and Jacklyn Zumaeta, who is our assistant
11 chief counsel.

12 I look forward to your comments and questions and
13 suggestions. The goal is to strengthen OTA's
14 regulations, which is why we plan on having a second
15 informal interested parties meeting in late May, early
16 June before starting the formal regulations process. We
17 will note all of the comments and questions provided
18 today, and anyone is able to submit comments in writing
19 until May 1st for this interested parties meeting. We
20 ask that each person fill out a comment card prior to
21 coming to the podium here and commenting. We do have
22 comment cards there at the podium, and there are some
23 next to the sign-up sheet as well with pens. We will
24 take in-person comments and questions first and then see
25 if anyone on the calling line has any questions or

1 comments. When making a comment, please I.D. yourself
2 and let us know if you're representing an organization
3 as well. Thank you. Let's begin.

4 MR. KWEE: So if anyone would like to come
5 up and make a comment, we'll start with members of the
6 public here and then move on to the telephone.

7 MS. MAY: Good afternoon. Teresa May
8 representing the California Taxpayers Association. I'll
9 fill out a comment card after I'm done.

10 MR. KWEE: Thank you.

11 MS. MAY: First of all, I'd like to thank
12 you very much for all of your hard work in revising the
13 emergency regulations. I think that the emergency
14 regulations were a good start, and these regulations
15 that are moving forward provide a lot more guidance to
16 both taxpayers and LGA regarding the contents of -- and
17 the proceedings of the appeals hearing. So we
18 appreciate that clarity. We will be submitting written
19 comments, but at this point, we'd like to address three
20 main areas. The first one is while we appreciate that
21 the intent of the appeals hearing will be conducted more
22 informally rather than formal, there are certain
23 instances where we would ask consideration for the
24 Taxpayer Act to request an election that the rules of
25 judicial proceedings apply. The rules of discovery that

1 you laid out are pretty much along the lines of a more
2 informal process, and there's certain instances in which
3 members of Cal Tax and those that represent more of the
4 legal community as opposed to the accounting firms would
5 like to see more but once again to provide both
6 flexibility through OTA consider that there be a process
7 for allowing certain representatives to request an
8 election for application of judicial rules regarding
9 judicial proceedings.

10 The second area that's more thematic is that we
11 request consideration of certain parameters in terms of
12 taxpayers confidentiality. It seems there is more
13 specificity in terms of what confidential information is
14 included in the written opinions. But once again, that
15 is still overly, in our opinion, overly broad and to
16 request OTA to, once again, consider whether or not the
17 information that is specifically discussed in a closed
18 hearing be considered with weight toward what is
19 included in a written opinion, for example, there would
20 be more weight to whether it's relevant or whether it's
21 more material or less material. We recognize and
22 appreciate the fact that you have established or are
23 looking to establish a process where the confidentiality
24 may be indicated via some kind of a closed -- partially
25 closed hearing process.

1 The third and last thematic area is as we
2 requested during the process of legislation as it was
3 being developed at AB 102 is a small claims process be
4 established at OTA. Whether that's done via legislation
5 or whether that's done via regulation, we believe it's
6 important for taxpayers, especially those who are
7 proposing cases. I think you will see, as we move
8 through the process, there's going to be a lot of
9 non-represented taxpayers.

10 And that concludes, kind of, the three overall
11 thematic areas. We will be submitting comments by the
12 deadline to expand on, more specifically, these areas.
13 But we thank you very much for your work. We think that
14 the draft regulations are a very good product and look
15 forward to working with you on the second IPM in the
16 future regulations. Thank you.

17 MS. ZUMAETA: Thank you.

18 MR. KWEE: I would just comment, with
19 respect to the small claims process, that was something
20 that we did receive your comments from the prior
21 interested parties meeting to the specific regulations,
22 and one of the issues that we did have, though, was that
23 AB 102 did require a panel of three judges, and I think
24 what was contemplated by a small claims process was
25 something maybe with one ALJ that will make a decision

1 and that might be something that would require
2 legislative change. But if you have any further
3 research to provide on that issue, we'd be delighted to
4 take any information that you might have by written
5 comment.

6 MS. MAY: Thank you. We appreciate that
7 very much, and actually, we do work with the local
8 appeals and the local tax board, and there's some very
9 good models that we're happy to share with you. Thank
10 you.

11 MR. KWEE: Thank you.

12 MS. BOUAZIZ: And we are looking into that
13 for, perhaps, future legislation since it was something
14 we did talk about during the AB 102 process.

15 Anyone else have comments, questions,
16 suggestions?

17 MR. RAN: Hi there. Derrick Ran with Price
18 Water Cooper. Just a few comments and first, I'd like
19 to echo some of the thoughts from Cal Tax. The --
20 there's no doubt that the OTA has very challenging tasks
21 in front of it, and, you know, kind of, taking a half
22 step back, there seems to be a little bit of a dilemma
23 as there would be for any administrative board to make
24 decisions. Are we going to be more of a trial court
25 looking at evidence new or, as the name would apply, the

1 Office of Tax Appeals, being an appellate type agency.
2 And I think that that -- now is the time to resolve that
3 conflict. And I think if you look back at what the
4 legislature is asking OTA to do, clearly, the
5 legislative intent is "we don't want a tax court. We
6 don't want to run like a tax court," and they talk about
7 the rules of evidence in -- for presenting a case at a
8 hearing. They don't want to require specialized
9 knowledge on behalf of the participants. And I think
10 what's going on and while the proposed amendment is, is
11 exactly that, exactly what the legislature is asking the
12 OTA not to do and I think that's a problem here. While
13 the rules suggest that there's going to be an informal
14 proceeding, most of the rules, when you come to, you
15 know, the kind of pushing and the shoving that takes
16 place in the resolution of the dispute that, in most
17 cases, have been ongoing for three, four, five, six,
18 seven years, the informal processes are helpful because
19 they cut through it. They get to the issue. They get
20 to the relevant facts, and off you go. But when you
21 talk about the rules that require specialized knowledge,
22 you look at specifically the discovery provision -- the
23 discovery provisions. One, discovery provision is a
24 term of art with its own set of rules in any court in
25 the land. You talk about -- you talk about assertion of

1 privileges for documents that other -- that each party
2 wants. You talk about you can -- you can have access to
3 the information from the other side if they would be
4 admissible under the rules of evidence. Every one of
5 those standards requires specialized knowledge. And so
6 we're either going to be a court, which the legislature
7 has asked you not be, or we're going to be an informal,
8 kind of, appellate body. The other thing that happens
9 with all of the rules of discovery that are being
10 suggested by the proposed rules, I, I wonder what import
11 the original audit protest determination had on the
12 franchise tax -- determination on the business tax side
13 because if each party has full and open access to any
14 and all relevant information, it might be admissible
15 under the rules of evidence. You're basically saying,
16 "There are not limits to what they can ask for," and
17 that's supposed to be moderated by the OTA, because we
18 submit a discovery, and the OTA gets to sign off on
19 saying whether that's reasonable or not. Very important
20 procedural safeguard there. There's no opportunity that
21 I was able to see in the rules for the other side to
22 object to a discovery rule. Now here I am saying,
23 "There's too many rules. Now I want to add one," so I
24 appreciate the inconsistency there. But if we're going
25 to do it, we got to allow both sides to chime in on it

1 before the OTA makes a decision. And again, what's
2 happening here is that it's a slippery slope. So, kind
3 of, the, the big picture objection and -- that we would
4 raise is there's too much -- there's too much law.
5 There's too many specialized rules. This stuff is
6 supposed to be taken care of during the audit, during
7 the course of the protest and the franchise tax side and
8 again on the appeals side. And once you get to an
9 appeals proceeding in front of the OTA, taxpayer's
10 already got the burden of proof, and what's happening
11 here is the tax agency, be it CTFA or BTFTD, you're
12 giving basically unfettered access to yet another round
13 of IRDs through discovery -- cloaked in the discovery
14 process. And that's just not the way it's supposed to
15 work. It's supposed to be an appeal from something, and
16 the rule says that, and we will provide written comments
17 with a lot of details, kind of, supporting what I'm
18 saying here, but I think, fundamentally, there's a
19 problem, and that's that the OTA is becoming a trial
20 court all over again. You're making the audit and the
21 protest process, itself, basically irrelevant because
22 both sides get to just -- let's duke it out in discovery
23 all over again. The time, the expense, the complexity
24 of that proceeding is not what the legislature is
25 attempting.

1 So I'll leave it at that for now. We will
2 provide written comments. I'm happy to engage in any
3 discussion that you would like to have but I think -- on
4 a fundamental basis, I think that's what -- we're
5 heading in the wrong decision. Thank you.

6 MR. KWEE: Derrick, this is Andrew.

7 MR. RAN: Yes, sir.

8 MR. KWEE: I would just like to briefly
9 comment on that, and I understand the concern when
10 you're trying to have a process, one of those
11 transitions from DOE over to OTA, and here, we are
12 bringing in the rules for discovery and subpoenas and
13 orders, but I, I would clarify, though, that AB 102 did
14 specify that we would follow the Administrative
15 Procedures Act, and to the extent possible, we do have
16 to incorporate some provisions of the APA. But we did,
17 in our rules, where it's talking about discovery and
18 orders and subpoenas, that's not the first resort. We
19 did specify that we expect the parties to engage in the
20 informal discovery process before we engage in the more
21 formal process. So this is there because that's
22 provided for in the APA because that's the right
23 provided by -- to the parties in the APA. But that is a
24 last resort. That's not intended to be something that's
25 used in every appeal that will we hear.

1 MR. RAN: I, I think that's a fair
2 point, and I think when there is a rule, though, what,
3 what -- I tend to look at all rules and say, "Okay.
4 Where are the abuses." And I think once it's there, you
5 have created a disincentive for the parties to act
6 reasonably under the circumstances because what -- where
7 you end up is with a dispute in front of -- I don't
8 know -- a staff lawyer or one of the ALJs or one of the
9 arbitrators trying to resolve that. So that's, kind of,
10 point one.

11 Two, I think there's a couple of things that the
12 rules, if I read them correctly, allow the OTA to do.
13 They allow the OTA to go to the APA and look at rules.
14 They also check that idea by saying the rules should be,
15 whenever possible, consistent with the preexisting
16 rules. And I think you get to the point where, there's
17 things -- there are things that we can do versus things
18 that we should do, again, consistent with the larger
19 picture. APA has got a whole lot of rules, and the way
20 it's set up is administrative boards are allowed to pick
21 and choose what they want to suit their agency and to
22 suit the issue. And I think what's going on here is
23 we're going with what the legislature wanted to set up,
24 and I think we're going too far in one direction. It's
25 going to make it complicated for everybody. It's going

1 to make it more expensive. It's going to take more
2 time. It's going to -- I think it's just not really
3 what the legislature wanted everybody to -- go here.
4 Thank you, though. Fair point. I mean, I understand.
5 You get to -- you get to go to the APA. I get that. I
6 mean, it's right there in the rules.

7 MR. KWEE: Thank you for your comments.

8 MR. RAN: You bet. Thank you.

9 MR. PARKER: Good afternoon. Thank you for
10 holding this interested parties meeting. We look
11 forward to working with you as we go through the process
12 of additional interested parties meetings and regulation
13 hearings. My name is Chris Parker. I'm with Moss
14 Adams. I have a few questions regarding some of the
15 statements in the proposed regulations.

16 As an initial matter, with regards to
17 jurisdiction, one of the issues that became a question
18 in front of both the Board of Equalization and it still
19 remains a question is if the Franchise Tax Board revokes
20 a charitable entity under 23701, is that appealable or
21 not. There is not technically a protest opportunity
22 from a revocation at audit of a charitable entity's
23 exempt status, and the Board did undertake some of those
24 questions. So it would be helpful to us to know whether
25 we have the opportunity to appeal that, or whether it

1 would have to go through a different procedure under
2 that scenario.

3 I want to echo Mr. Brandon's comments regarding
4 the discovery rules and some of the introduction of
5 evidence. There are some very broad statements in the
6 proposed regulations that while practitioners that are
7 in this room and practitioners that are well versed in
8 the law may understand the limits and what is reasonable
9 for purposes of evidence, my understanding of AB 102 is
10 that this agency is supposed to be accessible to any
11 taxpayer, be they an artist to a zoo keeper, and not
12 necessarily a tax professional. And keeping the limits
13 of what is available as a discovery tool, to not
14 overburden those taxpayers, who are not tax
15 professionals, should be foremost in determining what is
16 allowed and not allowed and those taxpayers who are
17 unsuccessful in their appeal before the agency do have
18 the opportunity to go to court and recognizing that in
19 so going, they are exposing themselves to all of the
20 rules of evidence, all of the exposure that comes with
21 going in front of that body, but this agency, again
22 under my understanding of AB 102, is supposed to be a
23 more acceptable agency. And some of the rules -- for
24 instance, you have as one of the proposed standards,
25 "All writing or things which are relevant and which

1 would be admissible in evidence." That could be pretty
2 much anything. So trying to find language that limits
3 the scope of discovery to taxpayers -- or taxpayers that
4 are not tax professionals would be something we would
5 appreciate and would look forward to working with you
6 on.

7 In regards to the briefings under 030 -- excuse
8 me. 30304, there's a statement that generally, the
9 submission of the appellant's reply brief will be in the
10 briefing process. What we would look for from you as
11 far as direction when we get to request for additional
12 briefing is what standard is the Board going -- or
13 excuse me -- is an agency going to consider in
14 determining whether to grant or not grant an additional
15 brief. And that is both for the benefit of the tax
16 agency as well as the practitioner community so that we
17 can either successfully request additional briefing in
18 the event that we need additional briefing or rebut a
19 request for additional briefing because we feel that or
20 we think based on the evidence submitted, the
21 documentation submitted and the prior briefs that it has
22 been adequately briefed and is ready to move to the next
23 level. We would also request the opportunity to have a
24 conference in the -- in the event that there is a
25 request for additional briefing to discuss whether it is

1 appropriate to have an additional briefing or whether it
2 would be appropriate to just move forward into the
3 actual appeal hearing.

4 My final comment for today was with regards to
5 witness declarations. It is common for those of us from
6 the accounting firms to use declarations as a means to
7 provide testimony to either -- previously, the Board of
8 Equalization and now the Office of Tax Appeals. There
9 is a request in -- or there is language in the proposed
10 regulations which would allow the agency to request to
11 interview that witness. Those of us in the accounting
12 firms really don't have witness preparation experience.
13 Moreover, I think that would push into the practice of
14 law, which is what we are actually prohibited from
15 doing. So we would ask that you limit the exposure to
16 witnesses who want to submit a declaration because they
17 are unavailable to testify in person and that the
18 agency -- we would recognize, of course, the agency
19 would then have authority to review that declaration
20 from a witness who is unable to testify and provide
21 whatever strength or lack thereof to that declaration as
22 they see fit based on the other testimony that they
23 receive.

24 Thank you very much, and I will fill out a
25 comment card in the back.

1 MS. ZUMAETA: Thank you.

2 MR. KWEE: Thank you. And, Chris, I -- your
3 first question, you know, I'm not familiar with that
4 area. So I'm not here to give you an answer but that
5 you did mention that there was an issue with our
6 jurisdictional grounds and you mentioned something about
7 the FTB revoking the charitable entity status and, you
8 know, that's a very specific issue, but if there is some
9 information that you could provide, that might help us
10 in determining if that's something that should be
11 listed --

12 MR. PARKER: Sure.

13 MR. KWEE: -- under that section --

14 MR. PARKER: I'd be happy to.

15 MR. KWEE: -- it would help. Very good.

16 MR. PARKER: Okay. Thank you.

17 MR. KWEE: If we don't have anyone else in
18 the audience who would like to make a, a comment here
19 today, we're going to move on to the phone lines. So --
20 oh, yes. In the back.

21 MS. MORGAN-HAWLEY: Sorry. I'm not familiar
22 with the process. My name is -- my name is Oneida
23 Morgan-Hawley, and I represent Tobacco Republic
24 Incorporated in Loomis, California. I'm here because I
25 am currently involved with a procedure that has gone

1 over to the OTA from the DOE, and so as long as we keep
2 in business, there's the possibility that I may end up
3 before you guys again some day, and so I don't want to
4 have to say, "What's going on?"

5 MS. ZUMAETA: Can I just ask you to make
6 sure that you don't bring up anything in particular
7 about your individual case that will be coming in front
8 of the Office of Tax Appeals.

9 MS. MORGAN-HAWLEY: Okay.

10 MS. ZUMAETA: Thank you.

11 MS. MORGAN-HAWLEY: I would like to see a
12 lot of this stuff, and it sounds as if several of the
13 other people have mentioned it also. The rising cost of
14 professionals can make it impossible, if not improbable,
15 for an individual or small business to be able to get
16 the voice that they need to be heard with if there's a
17 lot of legalese involved in this, because as individuals
18 and small business owners, we're not trained in the law.
19 And that -- and so the more these keep going towards all
20 of these legal regulations, it makes it difficult, if
21 not impossible, for us to be able to represent ourselves
22 because that's the only representation we can afford
23 without putting us out of business. And I think it's
24 unfair that so much has become so involved that a simple
25 straightforward question will end up getting answers

1 from people even within your -- the department that
2 every person will have a different interpretation and
3 trying to get someone to narrow down to -- exactly what
4 is the process, what do I need to do is extremely
5 frustrating that -- so we need to make sure that with
6 whatever you guys are doing that you remember that there
7 are thousands of us out there, probably hundreds of
8 thousands of us, that don't have the financial means to
9 hire a professional. Yet, we -- our rights should not
10 be trampled on because we don't speak legalese. We need
11 to have a way that is going to allow us to represent
12 ourselves to the best of our abilities that -- what the
13 procedure is should be clear to anyone and everyone as a
14 citizen and a taxpayer. That's their right.

15 The other thing that I hope that you guys will
16 address -- and I'm sorry I didn't put in -- is that when
17 anyone is going through these processes of, you know,
18 audits and appeals and that -- that there is something
19 that will address in there the -- again, the right of
20 the individual or business to have their question
21 answered timely, you know, and accurately. That has
22 also been -- not just from mine but from others that I
23 have talked to -- a, a problem that -- so I don't know
24 how much any of this is going to make any difference,
25 but at least I know now I've said my part, asking you

1 guys to please remember us. Thank you.

2 MS. ZUMAETA: Thank you.

3 MR. KWEE: Thank you.

4 MS. BOUAZIZ: So if there are no other
5 questions in the room, we can move to see if there are
6 any questions, comments on the phone line.

7 Giving one more opportunity to anyone wanting to
8 come up to the podium and make a comment. Otherwise,
9 I'd like to thank everyone for coming and calling in,
10 and this ends our first interested parties meeting.
11 Feel free to send us an email and mail in written
12 comments by May 1st. Thank you.

13

14 (Whereupon the proceedings adjourned at 1:29 p.m.)

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1 I, Brittany Flores, a Certified Shorthand Reporter of
2 the State of California, duly authorized to administer
3 oaths, do hereby certify:

4 That the foregoing proceedings were taken before
5 me at the time and place herein set forth; that a record
6 of the proceedings was made by me using machine
7 shorthand which was thereafter transcribed under my
8 direction; that the foregoing transcript is a true
9 record of the testimony given.

10 I further certify I am neither financially
11 interested in the action nor a relative or employee of
12 any attorney of party to this action.

13 IN WITNESS WHEREOF, I have this date subscribed
14 my name.

15
16 Dated:

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18 _____
19 Brittany Flores CSR 13460
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