OFFICE OF TAX APPEALS

400 R STREET

SACRAMENTO, CALIFORNIA

REPORTER'S TRANSCRIPT

JUNE 6, 2018

SECOND INFORMAL INTERESTED PARTIES MEETING

PROPOSED RULES FOR TAX APPEALS

REPORTED BY: Kathleen Skidgel

CSR NO. 9039

P R E S E N T

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MS. BOUAZIZ: Good afternoon, everyone. I wanted to welcome you to the Office of Tax Appeals' second informal interested parties meeting. My name Myriam Bouaziz. I'm the Leg. Director here at the Office of Tax Appeals. And with me is our Assistant Chief Counsel, Jaclyn Zumaeta and Administrative Law Judge, Andrew Kwee.

We look forward to your comments today. If you do speak in person, please fill out a comment card. There are comment cards here at the podium and in the back where you signed in.

Additionally, you may want to submit your questions or comments in writing. You have until June 27th to do so. We will take in-person comments first, and then check in to see if anyone on the phone has any comments.

When you do come up to the podium to speak, or on the phone, please state your name and organization before speaking. Also speak slowing because today with us we have a court reporter who is taking down everyone's comments.

And with that, if there is anyone who would like to make the first comment, please make your way up to the podium.

(Pause.)

MR. JOSEPH: I think we're all at a loss.

MS. BOUAZIZ: I can call on people.

I guess I'll check in to see, does anyone on the phone have any comments that they'd like to make?

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NIKKI DOBAY

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MS. DOBAY: Hello. This is Nikki Dobay from COST.

MS. BOUAZIZ: Nikki, could you repeat that a little louder?

MS. DOBAY: Yes. Nikki Dobay from Council on State Taxation.

And I do apologize, I just boarded an airplane, so I'm happy there was no one in the room with comments.

Can you hear me okay?

MS. BOUAZIZ: I think you need to speak up just a little bit more.

MS. DOBAY: Okay. Can you hear me at all now?

MS. BOUAZIZ: Yes.

MS. DOBAY: Okay. Perfect. I'm sorry. I just boarded an airplane, so I'm trying not to shout also.

So there was just one question that I had,

and I'm not sure if you can answer it. It relates to the petition for review -- a decision on a petition for a review, and the OTA has added a provision that says you can now issue a new decision. And I was just wondering if there was any comments you all could make on why that was added to the new gov. rule?

MS. ZUMAETA: Nikki, I know you can't see us, but we're looking at the regulations right now. I apologize.

MS. DOBAY: Okay, thank you. And I'm sorry, I don't have it in front of me either. It's later in the draft, and so I don't have it.

JUDGE KWEE: Are you referring to the section that says if OTA discovers a typographical or nonsubstantial error and the decision that has been issued, OTA may correct such errors in the published decision and include an addendum identifying its corrections?

MS. DOBAY: No, it was -- it was in --

MR. JOSEPH: It's in 30605.

MS. DOBAY: I'm not sure of the first two numbers but it's 606 --

MS. BOUAZIZ: 606.

MS. DOBAY: -- the last part of the number. And just the portion in yellow that references between a new decision.

JUDGE KWEE: Oh, I see, modifying the prior

decision.

My understanding is that we just added that in the event there was like a small and technical correction that might have been wanted to be made, but it's not something that would have warranted an oral hearing on the matter. And so that's why we just added this language, to give us more flexibility and leeway in how we handled petitions for rehearings and decisions and petitions for rehearings.

If you have any comments or concerns about that language, we'd be happy to accept any comments and concerns that would be relevant to our consideration of whether or not to modify this language further.

MS. DOBAY: Thank you. That's very helpful. And, again, I'm sorry for being on an airplane.

So I -- just to clarify, the intent is really just to provide some flexibility and not to -- so if there was going to be a significant change to the decision, for example change an entire ruling, a rehearing would be granted in that situation.

JUDGE KWEE: Yes.

MS. DOBAY: Okay, thank you.

And then the other concern I heard on this is that would the OTA issue a new decision in a

situation from the prior decision of the Board of Equalization decision? And I know that, you know, that's a short-term issue, not a long-term issue, but there are some situations where we have decisions that came out of the Board of Equalization, a taxpayer could or the State could ask for a rehearing and so it's not the intent of the OTA to issue a completely different decision from the Board's prior decision.

MS. ZUMAETA: So for taxpayers who filed petition for rehearing or for the taxing agencies that filed a petition for rehearing from a Board of Equalization decision, those are being evaluated by our Administrative Law Judges using the Wilson Development Factors that we set forth in our precedential decision in the *Appeal of Doe*. So those would be granted in the event that they rose to the level of meeting the Wilson Development Factors. Only in that situation would we grant a rehearing from a decision that the Board of Equalization issued.

MS. DOBAY: Okay. But there would be a rehearing granted if the OTA thought that potentially a new decision should be issued.

MS. ZUMAETA: Correct. If it were to arise to the level of the Wilson Development Factors, yes.

MS. DOBAY: Okay. Thank you so much.

Those were the questions and concerns that I had. I appreciate it.

MS. ZUMAETA: Thank you.

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CARL JOSEPH

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MR. JOSEPH: I just want to add to that really quick.

Good afternoon. My name's Carl Joseph. I work for Ernst & Young. And I just wanted to follow up on what Nikki just asked.

And my question is, the first language that you were referring to on the nonsubstantive changes in 3505, I think it is, that talks about the typographical or nonsubstantial error, I would suggest that that language be added to the part that we were just talking about as far as in 3606. Because right now it just says "or modify the prior decision." And it would seem, when I was reading through it I wondered why if there wasn't -- if there wasn't going to be modifications on the substantive nature, why would the two wouldn't just mirror each other? That's the comment.

MS. BOUAZIZ: All right. Thank you.

MR. JOSEPH: Thanks.

MS. BOUAZIZ: Do we have anyone else who wants to comment who's on the phone?

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ONEIDA MORGAN-HAWLEY

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MS. MORGAN-HAWLEY: Yes. This is Oneida Morgan-Hawley with Tobacco Republic.

MS. BOUAZIZ: Can you repeat your name one more time, please?

MS. MORGAN-HAWLEY: Oneida Morgan-Hawley. Did you need me to spell that?

MS. BOUAZIZ: If you could spell that, please, that'd be great.

MS. MORGAN-HAWLEY: First name Oneida is spelled like one item O-n-e-i-d-a. Last name is hyphenated M-o-r-g-a-n hyphen H-a-w-l-e-y.

MS. BOUAZIZ: Thank you.

Do you want to start with your comment?

MS. MORGAN-HAWLEY: Okay. My comment is, as the others had stated, we know that the decisions from the BOE is kind of a short-term thing and that for the future leads with the CDTFA. But there needs to be some clarity on how these things are being handled and who's responsible for what, because I know in my case personally that --

MS. ZUMAETA: Ma'am, could we just ask you to not reveal any of the details of your personal case that you have pending.

MS. MORGAN-HAWLEY: Okay. That's fine.

When they use terminology for those who are

not attorneys -- and there are many of us, taxpayers who can't afford attorneys and try to represent ourselves -- when they use the terminology such as "Notice of Determination" and you're told that you'll get a separate notice on that and that turns out not to be the case, that it's simply a bill, this will cause confusion and delay for the average person who is not used to having to deal with, you know, legalese and government entities on a daily basis.

Our businesses and our lives are in other areas of expertise, other areas. And this shouldn't be so complicated that the average person of reasonable intelligence should be able to represent themselves if they so desire.

So the terminologies that are used need to be consistent between the agencies and the public so that when something says "Notice of Determination" is used, that everybody has the same understanding of it.

MS. ZUMAETA: I think what I'm hearing you say is that you want to make sure that the decisions that were issued by the Board of Equalization are still something that taxpayers can use as guidance for arranging their business affairs; is that what you're asking?

MS. MORGAN-HAWLEY: In one aspect, yes. All of these various departments, whether it's the

BOE, CDTFA, OTA, or whatever, there needs to be consistent applications of terminology.

MS. ZUMAETA: Okay, sure. So the Board of Equalization decisions that were precedential decisions prior to the enactment of the legislation that created OTA will still be precedential decisions. So those decisions will -- OTA will still rely upon that law until OTA actually takes any action on them. So those are something that you can -- that are still consistent, that you can rely upon.

In terms of the terminology that you were asking for consistency for, if you have any examples of terminology that we're using in the regulations that you feel is inconsistent with the way that the other agencies are using that terminology, we'd be certainly happy to take a look at that.

MS. MORGAN-HAWLEY: Okay. I don't know whether the new CDTFA is going to use the same terminology as the BOE has that people had been somewhat accustomed to for so many years now.

MS. ZUMAETA: Thank you very much for your comment.

MS. MORGAN-HAWLEY: Confusion on those terminologies ended up creating delays in people being able to file timely appeals.

MS. BOUAZIZ: It would be great if you could send in some examples of some terminology that

you felt like was confusing or inconsistent. You have until June 27th to do so and we will look that over.

MS. MORGAN-HAWLEY: Okay. I can do that.

MS. BOUAZIZ: Thank you very much.

MS. MORGAN-HAWLEY: Thank you.

MS. BOUAZIZ: I see we have a new person comment.

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JIM GROSS

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MR. GROSS: Hello, my name is Jim Gross. And I am with the law firm Nielsen Merksamer. I represent the California Society of Certified Public Accountants.

As you probably are aware, we work closely with the Legislature in the development of the provisions regarding representation of individuals, of taxpayers, by those who are then attorneys. I will not recount the issues related to that, but I think that those at the OTA are very well aware that it's not just a question of representation but has also to do with the ability of CPAs who actually represent clients when it is not a legal proceeding.

We submitted a letter in May, and I think others have commented, about the concern with the provisions regarding discovery, the evidentiary process, etcetera.

Now, as an attorney I do have some understanding of why that might be in there relative to those who are participating as attorneys. Our concern of course is that are those provisions going to govern the process for those who are nonattorneys? And while CPAs are professionals, they are not trained as lawyers, they do not have the skills that are necessary or the experience necessary to deal with evidentiary standards and with the process of discovery.

So I don't know whether this was intended as in effect a parallel track for when lawyers were involved but would not necessarily apply and be required to be followed for Certified Public Accountants and others because, as the law says, any individual can represent a taxpayer.

So we're concerned about how this actually will work in practice and whether evidentiary standards, discovery, etcetera, which are legal processes that are found in judicial and quasi-judicial proceedings, would be required to be adhered to by those who are not attorneys.

JUDGE KWEE: Mr. Gross, I would like to make a brief comment on that. In our most recent draft of the regulations, we did try to address some of the concerns that were brought up by interested parties. For example, we added section 30214 which basically provides that the technical rules for

evidence and witnesses will not apply to OTA proceedings and that all relevant evidence is admissible subject only to exceptions for privilege or if the value of the evidence is outweighed by the consumption of time.

Now, I would note that we are also subject to the APA, and I would also note that the BOE did have a process for its discovery for the issue of its subpoenas. And what we did here, what we were trying to do is basically we just cited the provisions and the APA and made those applicable for the discovery provisions.

And, you know, we are trying to make this as accessible, while at the same time providing the parties with the same rights that they had at hearings before the BOE. But if you have any suggested changes or additional edits that you think would be helpful for us in this process of streamlining this and making this accessible, we'd be happy to consider specific edits or changes that you might have.

MR. GROSS: We appreciate that. I did see those changes. And I think your articulation with the intentions of those changes is very helpful, and we do have until June 27th if we have any additional comments. Thank you.

MS. BOUAZIZ: Thank you.

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KAI MICKEY

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MR. MICKEY: Good afternoon. My name's Kai Mickey. And I'm the president of a consulting company called Sales Tax Specialists. I'm here also to talk about a few concerns that we have regarding similar to what was just mentioned.

And to broaden on that a little bit, the three provision that have now been added to the currently revised regulations are more expansive than the first one. But, they still stop at the point of talking about protection for privilege based on CPAs and federally authorized representatives before the IRS.

They don't do anything that I can see, perhaps I'm not reading it correctly and I need to be -- understood or explained why and how this affects people who are not federally licensed to practice before the IRS, they're not attorneys, i.e. representatives, bookkeepers, and other people who are representing taxpayers through the CDTFA process and then coming before the OTA and being faced with these discoveries, the witness calling.

So one of our concerns is whether or not the provisions within the OTA's regulations is going to allow for nonattorneys to be called as witnesses by the State. I know there's a provision that talks

about the witnesses can be called by those who have the burden, but we would like to see some assurance that the representatives who have been working with the taxpayers through the CDTFA process coming to the OTA aren't at risk of being subpoenaed themselves to testify on the audit side, on the State side, or having our work product not being attorney-client privileged, exposed under discovery or subpoena because that will severely limit the effectiveness and the ability for nonattorneys who are not even CPAs, because it goes down even further than that, to represent taxpayers.

And because everyone is allowed to have anybody represent them, it seems inequitable and somewhat unfair and potentially very disadvantageous obviously to taxpayers to have them represented by anybody who's not an attorney and then face the discovery and the subpoenaing at the time of -- to the OTA.

So I'm going to present more information. I thought for sure there'd be more discussion about this down here, so I didn't have an entire presentation planned for that. But we would just like to see some additional language added really that offers the same protection to anyone who has the power of attorney to represent a taxpayer before the CDTFA and the OTA given the same protection that an attorney or a CPA might have even at that lower

level which is currently in there. And some direct clarification in the area of the witnesses that's going to protect representatives from being called as witnesses.

Speaking a little bit on this to the person who called earlier, they made a very good comment that not every taxpayer can afford to hire attorneys. Not every taxpayer can afford to even hire a consultant. But, you know, consulting rates in firms like ours are much less than the attorneys and we provide a great service, as do other internal people within organizations that are handling who don't have that privilege. And it would just be a tragedy and a travesty really for those to have to worry about facing issues when they come before the OTA.

So, I do plan on providing some more written information, but I wanted to key in on what the gentleman before me just said because the biggest -- I think it's the biggest and most substantial change in the process between how it was and how it's going to be now when we talk about the appeal, going to the Board hearings versus going to the OTA. And we would like to see the process in going to the OTA have the same protections that we had going to the oral hearings.

So, thank you.

JUDGE KWEE: And, Mr. Mickey, if I may

briefly comment on that. And just to give, I guess, insight on what we were thinking when we added this most recent language and changes.

We looked at the BOE Rules for Tax Appeals and we used the language there where they allowed the language for attorneys or for CPAs. But when we authorize CPAs then we transfer that privilege over to our Rules for Tax Appeals. And you do bring up a good point that if we want to allow anyone to be a person over the age of 18 to represent any taxpayer, then that might be something that we would consider and we would be happy to review any additional documentation, even policy, that would be helpful for us in determining whether to extend this privilege to increase the scope of this privilege to additional persons.

MR. MICKEY: Great. I will definitely do that.

I don't know for sure because I'm not an attorney so I've never had to worry about it from the BOE. But those provisions that allow that additional protection to CPAs, it never really came up as a part of going to the Board of Equalization's appeals process. It would come up obviously if you went beyond and went to court.

But our difference now is BOE didn't have a discovery program. They asked for information, they required records, and so on. But this idea of

discovery where one party can demand, you know, to come in and -- and -- discovery under -- whatever discovery is. I'm not familiar with these. I'm not an attorney. I'm just fearful of what it can mean to what representatives and nonpeople have to provide. Not that we're not going to cooperate with the OTA and giving information, just not so broadly as in -- I guess a traditional court, because that's not quite what it was under the BOE.

So I appreciate that. Hopefully we'll get more language that may work well for this, me not being an attorney, to make this happen.

JUDGE KWEE: And I would like to say, though, that this process for issuing subpoenas, this isn't intended to be something that's going to be used in every case or even in a lot of cases. This is really something that's seen as maybe a last resort, so to speak.

We do attempt for the parties to work together to get everything that is needed, to decide the appeal, to us. And the discovery is something that is there but is not something that is considered to be a method that's going to be used in every case that comes before us.

MR. MICKEY: Along the same lines, the language in there talks about information and evidence. What is information? Are they working papers of a representative or a bookkeeper that the

State, the CDTFA, can then request under this informal discovery? Or is that stuff still not relevant and its just the stuff that was provided as part of the appeals process in the beginning?

Those are things, I think, that need to be clarified because it's kind of open-ended for someone like myself going in, wanting to effectively represent. And I'm not the only one. It's not even representatives that do this. It would be in-house staff that was developing worksheets and, you know, writings, trying to figure out what to do in their case. And next thing you know, that information would be, you know, quote, "discoverable." If it even is, I don't know, but it could be. And I think that's just what we need to try to protect from happening in the scope of the whole picture.

JUDGE KWEE: Thank you.

MR. MICKEY: Thank you.

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THERESE TWOMEY

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MS. TWOMEY: Good afternoon. Therese Twomey representing the California Taxpayers' Association.

I want to just quickly echo the comments made by some of the previous speakers that the Legislature intends, and it's written in explicit statutory language, that there should be maximum

options for the taxpayer with regard to representation. It could be representation by an accountant, representation by an attorney, or self-representation.

And as the language in the draft continually iterates that intent, there are still some remaining concerns, which I'm sure others have addressed and will continue to address, as to the specific aspects that may be prohibitive for either self-representation or accounting representation. And there are a couple -- two other broad thematic issues that we would like to talk about.

The first is we'd ask for a clarification on Section 30606 of the draft language, and that relates to the petition for rehearings. And we'd like to ask for a clarification as to what is intended by allowing or authorizing the OTA to modify a prior decision based on the written record without any further hearing. Is it the intent of the OTA to allow for technical corrections when a petition has been submitted and both parties agree to waive an oral hearing?

I guess there can be a plain reading of the language in which folks could be subjected to a modification of a prior decision based on a written record where a petition for rehearing has been denied. And our premise on that is if the petition for rehearing does not provide substantiated

information in order to warrant a rehearing, then it absolutely should not warrant a modification of prior decision.

So we're not sure what is intended there. I think it's a little bit ambiguous and we'd ask for clarification on that point.

One other thematic point is throughout the regulation there are deadlines for when taxpayers have to submit certain documents to the OTA. And there are no other specific deadlines for when OTA will get back to the taxpayers with regards to when their petition for rehearing, for example, would be approved or denied, when their request for an extension of filing and certain other deadlines.

So there are certain deadlines we know when we have to submit documents, but if possible we'd also like consideration for OTA to spell out when the taxpayers would know of OTA decisions besides just the published decisions.

JUDGE KWEE: Thank you. And Ms. Twomey, I believe you might not have been here for the very first question that was asked, but this was also asked earlier and this is something that was intended really to be -- to make a change where there's maybe like a technical correction or something where the parties agree that an oral hearing isn't necessary like you said.

But we will be considering adding

additional language to clarify, like you said, so this could be interpreted maybe to be a substantive change where there is a real issue in dispute that would warrant an oral hearing and that is something that we will consider going into the next draft of the regulations.

MS. TWOMEY: Thank you. We submitted some proposed draft language the last go-around also to say whether it's upon the conditions could be a neutral consent to waive the oral hearing of both parties or it's a technical correction where both parties agree that there should be some modification. But to also request that it spell out that there not be a significant alteration of that decision or a reversal of that decision absent an oral hearing.

JUDGE KWEE: Thank you.

MS. TWOMEY: Thank you.

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DERICK BRANNAN

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MR. BRANNAN: Hi. I'm Derick Brannan with PricewaterhousCoopers.

Thank you all again. And I can't -- by fault I can't speak on behalf of everybody that's here, but we do appreciate the efforts that the OTA and certainly the folks on the panel here today are making to revise and consider the comments we made

throughout the process. And also appreciate --

I was here once before. Unfortunately, I'm going to have to go back and revisit some of those topics with respect to kind of, you know, what the OTA ought to be doing. I do recognize and appreciate there were some steps made to kind of decrease the emphasis on legal requirements, for example. But on the other hand I think there's still room for improvement. I think we can still do better, if you will. And I think this is the forum.

So I don't want to come up here and sit here and disagree with everything that the OTA is doing. I think there's some great stuff. And having looked at this way too many times at this point, it's really hard. It's complicated. So I get that.

But nonetheless, I think there's also room for some improvements. That's what we're trying to do without being too redundant with things that have already been spoken to.

The first point is, just kind of we're all in the same boat, we're all trying to get to the right answer from a tax standpoint. And unfortunately, the nature requires us to go through this process. I think the Legislature wants that, I think the OTA wants that, and certainly practitioners, both lawyers, nonlawyers, nonrepresented taxpayers, we all want the same

thing.

But I think the Legislature tells us what to do. And those are the rules we all have to follow when we start putting these regulations into play.

First one, OTA is not a court. We have to remember that. If we start acting too much like a court, we're probably making a mistake.

Two, specialized knowledge of rules or evidence, for example, should not be required to actively participate.

Three, taxpayers are entitled to be represented by whomever they want. So as soon as we start creating distinctions that hinge on who the representative is or who the forum is or what rules are going to be applied based on a representative or based on a forum, I think we have a problem, just by default you have a problem.

And the specialized knowledge is pretty easy. I mean I have chuckled to myself when I looked at 30410. We talked about the conduct of the hearing, and I mean every word in there is a term of art for a lawyer. We get to call, examine witnesses, cross-examine opposing witness, impeach, rebut, direct examination. Those are all terms of art.

How about, call a witness, get to ask questions? Great, right? That's essentially what

should be going on here. This is an administrative process, not a legal process. And you can't have an unrepresented taxpayer that's going to be expected to know what that means.

Further, you also still have possibility of depositions under certain circumstances. That's a legal concept. Subpoenas. Last resort. Great. BOE could always do that. I practiced over there for 20 or 25 years. Never saw it even once. But, maybe some terminology that limits when. Put in there "last resort." I think that would probably provide some comfort for everybody that is practicing in front of the OTA.

Further, you've got multiple tracks here. You've got Chapter 4.5 of the APA, you've got Chapter 5 of the APA. Under certain circumstances we're going to apply a 4.5, unless the OTA decides that it works, then we're going to apply Chapter 5, well unless the OTA decides otherwise. There's not much of a rule there. There's not much guidance.

If you request a hearing you're going to get 5, but we can still use 4.5 as OTA determines appropriate. And if you're not represented, we're going to try and use 4.5. The last one is really the trickiest one because essentially that means is you're going to have a different set of rules if you pay for a representative.

A lawyer, nonlawyer, it doesn't matter.

That's what we call a chilling effect on having a paid representative. If the rules are different, somebody's going to look at the rules and decide which ones are better and all of a sudden you're going to have choices made based on the forum. Bad.

Let's also look at privileges. For the gentleman who was up here earlier that was talking about different privileges, if there's no distinction or if the Legislature wants you to be represented by whomever you want at the OTA, the privileges really shouldn't matter. I get it. BOE had the rules, just to anticipate. And again, I appreciate it's difficult. Well, we can to this better.

If there's no limitation on who's going to represent, why impart any sort of qualitative distinction between rights of one representative versus the rights of the other? Just give everybody the attorney-client privilege. I don't care. It doesn't matter. Sounds silly you go to court, well, there's this privilege, there's that privilege. But it matters in court.

Lawyers are the only ones that represent people in court. They need to be able to listen, get a full unfettered discussion of the facts in order to best represent their client. Lawyers, nonlawyers need to have those same benefits in an administrative process. Need to be able to talk to

the client and not be at risk for being called as a witness, to say, "Hey, I want to know what you talked to your client about?"

And it goes beyond the accountant privilege that's out there. They're not co-extensive, we all know that. But you can't leave distinctions between who the representatives are. You get a bad answer, you get a bad outcome. You get behavior that's geared toward the process, not toward getting the right answer which is where we started.

Just a couple of final points. Petition for rehearing, that language in there about "modify the prior decision," please narrow that. As written -- I appreciate the intent, but as written it doesn't say that.

Requests for additional briefing, respondent that's going to be the tax -- or excuse me -- appellant is going to the taxpayer like 99.9 percent of the time, probably a hundred. When they file a reply brief they're responding to the arguments made by the agency, if the agency wants to request for the briefing, it can be addressed -- it could be in order to address any topic. Any new issue, any facts of the law. It's not tied to the briefs that are already on file.

I think that language needs to be changed and narrowed. And I think there needs to be a consequence. If the OTA grants permission to file a

brief and somebody goes off the deep end, send it back. Tell them to take the stuff out that is not consistent with the granted permission to file that brief. And if they don't do it, just ignore the brief. You need a consequence here because historically has been a huge problem over at the BOE.

The last point, it goes to the concept of an administrative forum. If you look at 30214, the idea going into the hearing is that one party can see, okay, what evidence are you going to provide, who are the witnesses you're going to call. That's great. I think that's fair. Hard for anybody to object to that.

And if you look at 30214, it allows the other party to ask for the identity of any witness you intend to call, but it's not limited that way. You can ask the identity of any witness who knows anything about anything. It's overbroad. There's too much latitude there.

I can ask for the production of any document or thing which may be relevant to the proceeding. I get it, we want to avoid surprises at the hearing itself. But that's starting the whole process all over again. This is an administrative appeal from a determination already made by the tax agency, either CDTFA or the Franchise Tax Board. What we're saying if we allow unfettered access, any

new documentation or any new witnesses that's in the audit, the protest, that three- to five-year window of time means absolutely nothing.

We're not appealing any determination at all. The taxpayer has no predictability of all of this, to what the record's going to look like, what the agency's legal argument is going to be. You've got to limit it. It's got to be an appeal from something. And as written, there's no limit at all.

So, I'm happy to respond to any questions. Sorry to go on, but I appreciate your time.

MS. BOUAZIZ: Thank you.

Was there anyone else on the phone who wanted to make a comment?

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VICKI MULAK

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MS. MULAK: This is Vicki Mulak -- can you hear me -- from the California Society of Enrolled Agents.

MS. ZUMAETA: Vicki, I'm so sorry to cut you off. Could we have you repeat your name and maybe spell it for us so that our court reporter can get that on the record.

MS. MULAK: Yes. My name is Vicki V-i-c-k-i, last name is Mulak M-u-l-a-k. I'm an Enrolled Agent and a Certified Financial Planner,

and I'm representing the California Society of Enrolled Agents.

MS. ZUMAETA: Okay. Thank you so much, Vicki. I apologize for cutting you off.

MS. MULAK: No. No problem.

Mine are kind of in the same vein as what's been shared. It's an administrative hearing and you want it to work for high level cases as well as regular taxpayers, like the woman who shared about, you know, the language and everything being so legal-techy.

And I was thinking about what she was saying, and under Section 30217, which is on page 15 of the PDF document, it talks about the frivolous penalties. And I think that this one might be kind of hard for the common man because -- it's on the bottom of page 15, factors considered 30217(b) -- it talks about a frivolous penalty might be involved if the appellant was making arguments that had already been decided in a precedential opinion. And see, a lawyer would know that, but a common man may not know that, if they're making the same arguments, because they're not watching the cases every day, that's not what the regular taxpayer is doing.

Now that's on Numbers 1 and 2.

Numbers 3 and 4 make sense if they're trying to delay the legitimate tax proceeding or the profits of collecting tax or if they have a history

of the many frivolous appeals. I definitely think, you know, it bears mention. But, I think if a regular taxpayer did not know that someone else has already argued this point successfully or unsuccessfully, I don't think that should be part of the frivolous penalty.

And then the last one that I noticed, too, was on page 25, and it's Section 30420 little (a) under "Exhibits." It talks about how you would put your exhibits together with an index. That's definitely the way a legal secretary might put things together, but I think the real taxpayer might just have copies of things or whatever. And so I think, again, it speaks to what's already been said, that you want to make sure it's an administrative hearing and that it serves every type of taxpayer. You know, the privilege part has already been mentioned, but I already notice that, too, as an enrolled agents we're happy to see ourselves mentioned in there. But we really don't want those that are not CPAs, EAs or attorneys not to have privilege either. So I concur with what's already been shared on that

MS. BOUAZIZ: Thank you for your comment, Vicki.

Was there anyone else that had any comments they'd like to share?

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JESSE MCCLELLAN

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MR. MCCLELLAN: Yes. This is Jesse McClellan with McClellan Davis. My name is spelled J-e-s-s-e, last name is M-c-C-l-e-l-l-a-n.

And we have made a couple of submissions up to this point. And we'd first like to thank the OTA for their willingness to be flexible and work through these rules. There's been several changes to the Rules for Tax Appeals that have been made that certainly help to clarify things.

At this point our most recent submission addressed Sections 30502, 30503 and 30504. And all of those deal with precedential opinions of one type or another.

As it pertains to 30502, which is titled Citation of Opinions and Precedential Effect, under subdivision (c)(1), it states the determining factors with respect to whether or not an opinion will be established as precedential is whether or not you were to establish a new interpretation of law.

And the written submission that we gave asks that, to the extent there's a new interpretation of the law and if that interpretation was detrimental to taxpayers, for example if there's a product that was previously considered to be

exempt, as a medicine or some other exemption under the law, was now to be subject to tax that it would be given a prospective effect, such that reliance on the existing law would not have a damaging effect for taxpayers that reasonably relied on that law.

There wasn't a change that was made in this version of the rules and I was curious to know what the OTA's intention is in that regard?

JUDGE KWEE: Hi, Jesse. This is Andrew.

And so, as I understand it, you're asking that we include a provision in (c)(1) that specifies that newly established precedential opinion, when based on a new interpretation of the law, will not have retroactive effect or will only have prospective effect? Am I correctly understanding?

MR. MCCLELLAN: Generally. You don't have to put that in (c)(1). (c)(1) is where it addresses interpretation of the law. But I would say somewhere within the regulation it would clarify that if there is a new interpretation of the law, that it would be applied prospectively. A precedential opinion would state as much.

JUDGE KWEE: Okay. And I see what you're saying, and we'll take that into consideration. I think generally what we had contemplated was that our opinions were clarifying existing law. I don't think that we were contemplating changing law. But this is a point that we will consider for our next

submission.

MR. MCCLELLAN: Okay. Thank you.

JUDGE KWEE: Thank you.

MR. MCCLELLAN: Moving on to 30503. And I believe this -- well, it's in the title, "Withdraw of Precedential Opinions." So this pertains to a scenario where the OTA issues a precedential opinion and then subsequently in a case before it withdraws, in whole or in part, the status of the previous opinion. And I've got a similar issue with 30504 that we had concern with, and that has to do with a precedential opinion being changed for matters that are not directly related to the appeal.

I know that the OTA had said that it does not intend to address matters sua sponte. So, in other words, if the issue is not part of the case before it, it will not address that particular issue. And I think it would be useful to clarify that -- to the extent a precedential opinion is going to be withdrawn, that it would pertain only to an opinion that was directly related to the matter before it.

JUDGE KWEE: Hi, Jesse. This is Andrew again.

And I would just clarify that that is the intent that we would -- a new precedential -- our new opinion would only intend to cover issues that were raised in that appeal. We wouldn't basically

issue an opinion and make it precedential solely for the purpose of addressing an issue if it's not an appeal to rescind a prior decision of either the BOE or OTA.

So, if there is a concern that this language could be interpreted to allow us to do otherwise, that is something that we will consider for potentially revising this language. Thank you.

MR. MCCLELLAN: Yeah, that would be great. And really 30504, same thing. I mean it's a precedential decision of the Board, once again clarifying that to the extent the precedential opinion would be -- the status of the precedential be withdrawn, that it be directly related to the matter before it.

And that if there is -- in that case I think it would be fair to say there would be a change in the law to the extent they have a precedential opinion, unless in fact that's going to end up forcing an effect on law that a change to it should be clarified in the new opinion that the change would be prospective.

Because, you know, part of the concern would be that we would then have, presumably, if it wasn't clarified, the agency going to taxpayers in the affected industry and applying the opinion potentially on a retroactive basis, and you would

end up in a situation in all likelihood where the matter would once again be before you. Now at that point you have a precedential opinion but here it would be again the taxpayer --

(Coughing coming from telephone.)

UNIDENTIFIED VOICE: Really? You had to do that right into the phone?

MR. MCCLELLAN: So for administrative efficiency I think that clarification in the regulation that specifies that any intent that there won't be matters raised sua sponte can significantly help out.

MS. BOUAZIZ: Thank you for your comments, Jesse. We are going to look at that language. And feel free to also provide additional written comments so that we may look at that, and we will definitely look at that language soon.

MR. MCCLELLAN: All right. Thank you.

MS. BOUAZIZ: Thank you.

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SABA SHATARA

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MR. SHATARA: Hello. My name is Saba Shatara from Deloitte.

Just a quick clarification question, two part. Under the Section 30420 essentially allows for an opposing party to have 15 calendar days after the presentation of the witness declaration to

essentially request that they may question that witness.

The first part of the question is, one, how that party can comply with that request? For instance, should they provide name, address, location of that witness, phone number, some sort of contact information?

And the second part of the question is having to do with the language that says if an opportunity to question a witness is not given after a timely request, the declaration being introduced into evidence but may only be given limited weight. In the instance where a taxpayer, or a party rather, provides information that's responsive to the request and for some reason that witness is unavailable, does that still provide only limited weight?

JUDGE KWEE: So this is Andrew. And I would just briefly comment that this language that we pulled was from the Administrative Procedures Act, and we did try and edit it a little to make it more applicable to the Office of Tax Appeals. We had -- this was just added in the most recent draft and we hadn't really considered all the details that you're bringing up.

If you're able to put those in writing, especially, for example, the type of information that would be needed for a witness and the fact if

the witness is unable to show up or testify, that would be helpful. And we can take those into consideration in adding additional language or revising this as necessary.

Again, this was just something that we just added about two or three weeks ago, so we haven't really thought through all these issues that you brought up. If we can clarify this in a regulation, that would be great.

MR. SHATARA: Sure. Thank you.

MS. BOUAZIZ: Thank you.

Do we have anyone else on the phone who wanted to make a comment?

Anyone else present here today who would like to make a comment?

Well then, thank you everyone for attending or calling in to our second informal IPM. Again, you have until June 27th to submit any written comments that you may have. Have a great afternoon. Thank you.

(The proceedings concluded at 2:00 p.m.)

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REPORTER'S CERTIFICATE

State of California)
) ss
County of Sacramento)

I, Kathleen Skidgel, Hearing Reporter for the California State Office of Tax Appeals certify that on June 6, 2018 I recorded verbatim, in shorthand, to the best of my ability, the proceedings in the above-entitled hearing; that I transcribed the shorthand writing into typewriting; and that the preceding pages 1 through 40 constitute a complete and accurate transcription of the shorthand writing.

Dated: June 28, 2018

_____
KATHLEEN SKIDGEL, CSR #9039
Hearing Reporter