OTA Responses to Public Comments

Comment: Regulation 30211(c) Local Entity Representation.

> *The concern was twofold: (1) the requirement of obtaining a contract and resolution from the city authorizing a representative is burdensome on taxpayers and restricts their ability to choose a representative of their choice (which is a goal of OTA's authorizing statute, AB 131); (2) OTA could eliminate this requirement by simply asking for the taxpayer(s) impacted by a petition for reallocation of local tax to sign a waiver of confidentiality prior to distributing confidential information to the representative.*

Commenter: Marcy Jo Mandel, attorney with McDermott Will & Emery

OTA has made amendments that clarifies necessary documentation needed to proceed in a case where the parties are local entities. OTA requires proof of representation and a waiver. Examples of proof of representation are a resolution, contract, or power of attorney. To ease administrative burden on local entities, OTA will request CDTFA to administratively provide copies of previously submitted waivers.

Comment:

"General Fixes:

- *Awkward phrasing, such as 'notice of the action' referring to what appears to be a "Notice of Action" (defined term in Rev. & Tax Code) with no clear reason for the alternative wording.*
- *Inconsistent use of capitalization on defined terms.*
- *Other wording changes without explanation as to what difference is being made, or intended, with the change.*
- *No explanation as to why many changes are included.*
- *Grammatical errors and spelling errors.*

Burden on Taxpayer:

- *In many areas, the proposed regulations increase the burden on the Taxpayer (whom has the least ability to meet the burden in contrast to the Agencies) often without explanation or reason.*
- *Too many times OTA has revised 'shall' or 'may' language, generally in favor of the Taxpayer, to "must" language, against the Taxpayer, without explanation or apparent justification.*
- *Too many times where it is unclear how the Taxpayer should comply with the Regulations*
    - *How does an average Taxpayer notify either Agency of an appeal request or change in appeal request when they have never received anything from the*

Agency about whom to direct appeal correspondence to other than guidance to appeal to OTA?

Prior Comments Still Apply:

- *The issues identified in our prior comments continue to persist in this iteration of the proposed regulations.*
- *Several new additions in this iteration only highlight the issues identified previously as needing attention. "*

Commenter: Chris Parker, Moss Adams

OTA Response:

Flexibility in process allows OTA to respond to upcoming legislative changes. The commenter's prior comments were reviewed and given consideration along with the above comments. The commenter's critiques of the regulations have been addressed where a specific regulation is named, such as with regulation 30212.1 below. Some of commenter's more general critiques do not specify a regulation.

In regard to the phrasing "notice of the action," OTA has compiled into its regulations one set of procedures to handle appeals from actions arising from both Franchise Tax Board (FTB) and California Department of Tax and Fee Administration (CDTFA). The term "Notice of Action" refers only to a specific FTB notice. "Notice of the Action" refers to an appealable action by either FTB or CDTFA.

"Other wording changes" is vague, and OTA cannot provide a specific response to such a broad critique. OTA aimed to use clear language and strove for clarity in the revisions to the regulations. We have made consistent use of capitalization and corrected any grammatical and spelling errors in this revision.

OTA strives to provide an accessible process for appeals, for all parties. OTA revised certain regulations to provide more clarity and transparency in our procedures, per the guidelines issued by the Office of Administrative Law, while balancing the need for flexibility in handling each appeal. Therefore, in order to provide clear instructions both to the parties and to OTA, some words like "shall" or "may" were replaced by "must."

Comment: Regulation 30212.1

"Uncomfortably Vague:

- *Too many of the provisions governing OTA's authorities and behaviors are written so broadly it is uncomfortably vague as to how they would be applied, what the process*

would look like, how the process/procedure interacts with other processes, and what documentation, if any, would appear.

- *The new "Bifurcating" process in proposed Section 30212.1 is a perfect example of this uncomfortable vagueness.*
    - *When might this process be invoked?*
    - *Why would this process be invoked?*
    - *What will happen to the parties while this process is playing out – do they get to participate, provide briefing, have a hearing, object?*
    - *What if a bifurcated decision is objectionable to one of the parties who wants to seek redress in Court?*
- *In numerous other locations there are "may" statements with no clarity as to what the triggering event is and what happens if there are disputes on the application of the process."*

Commenter: Chris Parker, Moss Adams

OTA Response:

OTA has taken care to draft regulations that will be useful in providing guidance in any scenarios that might arise. Responses to commenter's questions about this regulation are provided below:

- *When might this process be invoked?*
  The revised regulation states that the process may be invoked if there is good cause and no adverse effect on the substantial right of any party.
- *Why would this process be invoked?*
  If there is good cause to bifurcate an issue or issues in an appeal for separate hearings, or to sever an issue or issues from an appeal for separate consideration, and there is no adverse effect on the substantial right of any party.
- *What will happen to the parties while this process is playing out – do they get to participate, provide briefing, have a hearing, object?*
  A party may make a motion to bifurcate or sever and may object to bifurcating or severing. A party may also make a motion to reverse an action bifurcating or severing, or to objection to such an action.
- *What if a bifurcated decision is objectionable to one of the parties who wants to seek redress in Court?*
  A determination by OTA on an appeal is not final on the severed issues until a determination by OTA that resolves the entire appeal is final. OTA will promptly notify the parties if an appeal is severed.

In response to commenter's questions, OTA has revised this regulation to provide more clear guidance. The draft revised regulations read as follows:

30212.1 **BIFURCATING OR SEVERING APPEALS**

(a) **Bifurcating**. On the Motion of a party or upon its own initiative, OTA may bifurcate an issue or issues in an appeal for separate hearings if OTA determines there is good cause and no adverse effect on the substantial right of any party. OTA will issue one Opinion on the bifurcated issues. OTA will promptly notify the parties if an appeal is bifurcated.

(b) **Severing**. On the Motion of a party or upon its own initiative, OTA may sever an issue or issues from an appeal for separate consideration if OTA determines there is good cause and no adverse effect on the substantial right of any party. OTA will issue a separate Opinion for a severed issue or issues. A determination by OTA on an appeal is not final on the severed issues until a determination by OTA that resolves the entire appeal is final. OTA will promptly notify the parties if an appeal is severed.

(c) **Reverse Bifurcation or Sever**. On the Motion of a party or upon its own initiative, OTA may reverse an action to bifurcate or sever if it determines that bifurcating or severing would have an adverse effect on a substantial right of any party or for other good cause. OTA will promptly notify the parties if an action to bifurcate or sever is reversed.

(d) **Objections**. Any party may submit a written objection to bifurcate or sever or to reverse bifurcate or sever. Any such objection must be submitted within 15 days from the date on the notice bifurcating or severing the appeal. The objection should provide information to establish that bifurcation or severing would have an adverse effect on a substantial right of the objecting party or other good cause.

Comment: Regulation 30214(b) Witness Declarations and Affidavits.

1) *It appears that OTA is providing in paragraphs (1) and (2) of subd. (b) two different deadlines for submitting declarations in non-appearance matters and oral hearing matters*
2) *If that is the case, can OTA revise the language to make it more explicit, following the same structure as in section 30216?*
3) *If that is not the case, can OTA clarify it a bit more?*
4) *How does OTA intend to handle questions to declarations in oral hearing matters?*
5) *Also, as of now, OTA's FAQ page (#37) provides a different deadline for oral hearing matters (10 days before hearing, 7 days to object). Does OTA intend to have that as a different instruction?*

Commenter: Mengjun He, on behalf of the State Income Taxpayer Appeals Assistance Program

OTA Response:

1) OTA proposes to modify the procedures for submitting written declarations. The current Rules for Tax Appeals, section 30420(c) address written declarations made under penalty of perjury. The rule applies only to oral hearings matters. The provision was moved in the regulations to section 30214, which applies to both appearance and

nonappearance matters. It lays out a process and timelines for submitting sworn, written declarations, when the declarant is not available for an oral hearing or whether there will be no oral hearing. The section provides a non-burdensome way for the parties to question the contents of the declaration.

OTA does intend to provide different deadlines for submitting declarations in nonappearance and oral hearing matters.

The timeline for submitting declarations for nonappearance matters (see proposed regulation section 30214(b)(2)) expires at the close of briefing. In nonappearance cases, all witnesses or declarants and all evidence is submitted as of that time, and the record is closed. (See proposed regulation section 30303(d).) Thus, this deadline occurs coincident with the closing of the record.

The timeline for submitting declarations in oral hearing matters (see proposed regulation section 30214(b)(3) expires 15 days prior to the oral hearing, or later if good cause is shown for the late submission of a sworn declaration. In most cases the end of the oral hearing is when the record closes. The deadline helps to avoid undue surprise to any party at the oral hearing.

2) With respect to the suggestion that OTA change the same structure as in section 30216, that section applies to use of the Administrative Procedures Act, and it is unclear how matching that structure would be more helpful to the public. Proposed section 30214(a) lists timelines that apply to both nonappearance and to oral hearing matters. Proposed section 30214(b) expressly relates to nonappearance matters. Proposed section 30214(c) expressly relates to oral hearing matters.

3) Not applicable.

4) As noted, since proposed section 30214(a) applies to both nonappearance and oral hearing matters, the timelines for asking questions are the same. In the event that declarations are not submitted far enough in advance of an oral hearing to allow the time for questions and answers, the lead ALJ may, upon request, leave the record open until the question and answer periods are completed.

5) When the proposed regulations are final on or about January 1, 2021, OTA will update several of the Frequently Asked Questions (FAQs) to conform to the regulations.

Comment: Regulation 30214.5 – Non-compliance with Discovery Request

As is now, the RTA only specifies a requesting party's right to involve OTA to compel discovery, but does not address whether a responding party can file a

motion with OTA to quash overly burdensome or otherwise objectionable discovery requests.

Does a responding party have a right to file such a motion where necessary under either this section or under section 30421 – Motions? As you can see from section 30214(b)(1), there are situations where a responding party will suffer harm by not responding.

Commenter: Mengjun He, on behalf of the State Income Taxpayer Appeals Assistance Program

OTA Response:

In response to this comment, OTA considered revising Regulation 30214.5(b) to clarify that a responding party may file a motion in response to a discovery request. However, in order to provide clear procedures for every aspect of an appeal, OTA decided instead to add to Regulation 30302 the new subdivision (h), which outlines the right to file and respond to motions. This change should address commenter's concern.

Comment: Regulation 30312(h) Separate oral hearings.

If OTA grants separate hearings to either spouse, will the other spouse have an opportunity to review the transcript for the separate hearing and then have the right to provide a rebuttal in order to have proper due process in the appeal?

Commenter: Marcy Jo Mandel

OTA Response:

Regulation 30312 allows a spouse participating in an innocent appeal to request a separate oral hearing or to appear remotely. Based on past experience at OTA and historically at BOE, we do not expect many requests for separate oral hearings. In general, our hearings are open to the public and transcripts of oral hearings are available to the public. Under Regulation 30304, OTA may request additional briefing, and any party to an appeal may request an opportunity to file an additional brief. If a separate oral hearing was requested in an innocent spouse appeal, the other participating spouse would receive notice of the request for a separate oral hearing. If the spouse requested an opportunity to reply to statements made at the oral hearing, such a request would be considered by OTA under Regulation 30304 based on the facts and circumstances of the particular case.

Comment: Regulation 30432 Closing Hearings, Sealing the Record, and Redacting Information

"The written record and oral hearing record must be sealed consistent with a closed hearing in order to represent attest clients or the affiliates of these attest clients at the OTA as authorized by California Government Code section 15676 and 15676.5 to avoid impairing auditor independent in appearance or in fact."

Commenter: Aprea & Micheli, on behalf of PricewaterhouseCoopers LLP

OTA Response:

Regulation 30431(b) explains the procedure for requesting that the written record and oral hearing record, in whole or in part, be sealed. In addition, Regulation 30432(c) addresses a request to seal the written record and oral hearing record by stating that such request "will be applied to as narrow a set of records as required under the circumstances." These provisions are sufficiently broad to address any request to close the written record and oral hearing record for purposes of representing attest clients or the affiliates of these clients at the OTA.

Comment: Regulation 30433 Ruling Upon a Request to Close an Oral Hearing, Seal Records, or Redact Information

"To ensure that CPA firms can represent attest clients or the affiliates of these attest clients at the OTA as authorized by California Government Code sections 15676 and 15676.5, any determination as to a closed hearing and sealing the record related to the closed hearing should be made as soon as possible and before any substantive briefing commence in order to avoid any potential auditor independence issues. Therefore, we recommend setting a deadline to issue a written notice and make it clear in the regulation that all substantive hearing proceedings are deferred until the OTA issues a written notice regarding the request."

Commenter: Aprea & Micheli, on behalf of PricewaterhouseCoopers LLP

OTA Response:

OTA proposed adding subdivision (a)(6)(A) to regulation 30432 to address the specific concerns of CPA firms. The addition is intended to ensure that CPA firms can represent attest clients or the affiliates of attest clients in appeal matters before OTA. The proposed amendment generally allows for a closed hearing when a taxpayer provides a statement signed by the CPA firm and the taxpayer affirming the CPA firm cannot represent the client unless the oral hearing is closed.

The commenter asked that OTA include a deadline in Regulation 30433 requiring OTA to respond granting or denying the request within 30 days and deferring all proceeding until the

request has been decided. As relevant, Regulation 30431 allows a request for a closed hearing to be submitted at the time an appeal is filed, and no later than the due date to respond to a notice of oral hearing (such a notice is mailed after briefing is completed). Generally, OTA will promptly respond to a request for a close hearing on this basis. Nevertheless, there may be circumstances where OTA is not able to respond to such a request within 30 days. For example, a taxpayer might submit a request, and fail to include the required statement signed under penalty of perjury. In such circumstances, it would be better for OTA to allow the taxpayer additional time to support the request for a close hearing, than it would be to deny the request for failure to meet a strict 30-day deadline. As such, OTA believes it is more beneficial for the public and taxpayers if OTA continues responding to requests as promptly as circumstances allow, with discretion to adjust for extenuating circumstances on a case-by-case basis.

With respect to deferring proceedings pending resolution of a request, OTA has authority under Regulation 30220 to defer proceedings for good cause To the extent a party's request for a closed hearing is pending and would impact the ability of the taxpayer to be represented, this would generally constitute good cause for a deferral. As such, we believe the Rules for Tax Appeals, as amended, provide avenues to address the concerns which have been raised.