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May 26, 2023

Delivered via email to: regulations@ota.ca.gov

Office of Tax Appeals
P.O. BOX 989880
West Sacramento, CA 95798

RE: CalCPA Comments on Office of Tax Appeals May 2023 Notice of Proposed Regulatory Action

On behalf of the members of the California Society of CPAs (CalCPA), we are providing comments to the Office of Tax Appeals (OTA) May 11, 2023 Notice of Proposed Regulatory Action related to proposed amendments to OTA's Rules for Tax Appeals. We complement OTA for its careful consideration of comments previously submitted by CalCPA (the "Prior Comments") in connection with the Notice of March 20, 2023 Interested Parties Meeting (the "Notice"). We provide further input here in connection with certain changes to the proposed amendments, as set forth in the May 11, 2023 Update of Information in the Initial Statement of Reasons.

CalCPA represents the Certified Public Accountant profession and related professionals working in public accounting firms and businesses throughout California. We work closely with policymakers, tax agencies, standard setters, and other key stakeholders to develop and implement fair, effective and efficient tax policy that streamlines compliance for practitioners, taxpayers, and tax agencies. We also work to provide our members with up-to-date information and guidance on a variety of tax matters.

The Prior Comments provide context for and background around the Taxpayer Transparency and Fairness Act (AB 102, Chapter 16, Statues of 2017), which established OTA as an independent pre-payment forum to hear taxpayer appeals from administrative determinations made by the California Department of Tax and Fee Administration related to sales and use taxes and by the Franchise Tax Board relating to income taxes. The Prior Comments addressed several aspects of the proposed amendments to the OTA's Rules for Tax Appeals that we provide further comment on below, including (1) jurisdictional limitations on the types of refund claims that can be brought before OTA; (2) modifications to the rules of evidence applicable to tax appeals; and (3) OTA's authority to withdraw precedential status for prior opinions issued by the Board of Equalization ("BOE").[1]

[1] The May 11, 2023 Notice of Proposed Regulatory Action reserves on proposed changes to Section 30104 of the Rules for Tax Appeals (Limitations on Jurisdiction), noting that OTA will address the issue in a separate rulemaking.

Additional Comments

1. Proposed Changes to Section 30103: Jurisdiction Over Refund Claims

In connection with the Notice, OTA proposed modifying the rule governing its jurisdiction to hear and decide appeals involving refund claims, limiting that jurisdiction to "perfected" claims. The Prior Comments observed that the proposed regulations did not define what constitutes a "perfected" claim and expressed concern that the change could lead to the improper rejection of refund claims made through accepted informal channels rather than through formal amended returns. OTA responded by proposing to add the following language to section 30103(a)(4):

> For purposes of this subdivision, a perfected claim for refund does not include any claim which is considered a claim solely for purposes of tolling the statute of limitations within the meaning of subdivision (a) of Revenue and Taxation Code section 19322.1.

Section 19322.1(a) describes "otherwise valid" refund claims made prior to payment of the contested tax. These "protective" claims are treated as tolling the relevant claim limitations period and are deemed to be filed only when full payment of the disputed tax is made.

Under section 19322.1(a), a protective claim filed under section 19322.1 cannot be denied (or deemed denied) until payment of the disputed tax is made. It is therefore logical that OTA should not have jurisdiction to hear a premature appeal involving such a claim. We think that point can be better made, however, by simply noting that a protective claim submitted under section 19322.1 "is not a perfected claim." Such a targeted carve-out would provide more certainty than the open-ended "does not include" language, which begs the question of whether other types of refund claims (including, potentially, informal refund claims in general) might also not be considered "perfected," *i.e.,* might not meet the requirements of section 19322.

While we agree that OTA should not have jurisdiction to consider protective refund claims filed under section 19322.1, even if the added language is modified to provide for a targeted carve-out, we remain concerned that accepted methods of submitting informal claims may be improperly denied appeals consideration. Accordingly, beyond noting that claims filed under section 19322.1 are not "perfected" claims, we also recommend that the Rules for Tax Appeals affirmatively state that claims submitted through letters, reasonable cause statements and other accepted informal means—assuming all other requirements including payment of the disputed tax are met—are "perfected" claims within the jurisdiction of OTA to consider. In making this recommendation, we recognize that the Franchise Tax Board ("FTB") has not issued guidance defining what it considers to be a "perfected" claim and has been known to improperly reject refund claims simply because they are not made on amended returns.[2] Accordingly, the question of whether an informal claim meets the requirements of Cal. Rev. & Tax Code § 19322 may itself be a contested issue that OTA is called upon and should have jurisdiction to resolve.

[2] By its terms, Cal. Rev. & Tax Code § 19322 does not require that a claim be submitted on an amended return. Rather, the statute requires only that "[e]very claim for refund shall be in writing, shall be signed by the taxpayer or the taxpayer's authorized representative, and shall state the specific grounds upon which it is founded."

Regardless of how a perfected claim is defined, we reiterate the point made in the Prior Comments that the proposed regulations should clarify that OTA retains jurisdiction to consider whether, in fact, a claim was perfected if it was rejected by the FTB on the basis that it was not perfected. If, for example, the parties disagree on whether the disputed tax was paid, OTA should be able to consider that threshold jurisdictional issue.

2. Proposed Changes to Section 30214: Rules of Evidence

In connection with the Notice, OTA proposed modifying the regulations governing evidence to provide that the OTA Panel hearing a case may not make factual findings on a "material disputed fact" based solely on a party's unsworn statements. The Prior Comments expressed a concern that uncertainty around what qualifies as a "material disputed fact," and the prospect of a fact being characterized as "material" only late in the OTA proceedings, could prejudice taxpayers who may not have otherwise had notice of the need to present sworn testimony or other formal evidence on a point of fact. The Prior Comments also noted that sufficient rules were already in place to guard against false statements being the basis for an OTA decision. In response to this concern, OTA proposed adding a new subdivision (s) to California Revenue and Tax Code of Regulations, title 18 section 30102 to define "material" as follows:

> "Material," unless the context provides otherwise, means and includes something which has the potential to change the holding or disposition of an appeal before OTA. Any determinations regarding materiality, such as whether a disputed item could materially affect the disposition of an appeal, will be made by the Panel or Lead Panel Member, as applicable.

Although not explained, OTA also modified the operative language in section 30214(f)(5) of the Rules of Tax Appeals to mandate that, "[a]fter weighing the evidence, the Panel *will* make any necessary factual findings in any Opinion issued by OTA." The prior version of the proposed regulations made factual findings in any OTA Opinion permissive, using the word "may," rather than "will."

The change from "may" to "will," in combination with the new definition of "material," suggests a new mandatory standard for taxpayers to produce formal evidence on every fact of *potential* consequence in a case, even if the taxpayer had no reason to believe that there is any basis for contesting the fact. This would be an impossible standard for taxpayers to meet and is contrary to the general directive in section 30214(f)(5) of the Rules for Tax Appeals that the rules relating to evidence and witnesses contained in the California Evidence Code and the California Code of Civil Procedure do not apply to proceedings before the OTA. Imposing that mandatory evidentiary standard is also in conflict with the notion that the OTA is not a court but a less formal forum for resolving disputes short of litigation. Imposing mandatory evidentiary standards for every fact of consequence detracts from the streamlined purpose of the OTA and imposes unnecessary burdens and costs that may only encourage taxpayers to bypass OTA and move straight to litigation, where formal rules of evidence (and the burdens they impose) do apply.

A preferred alternative to requiring sworn testimony or other formal evidence would be to bind all parties to the facts presented in the briefs unless there is an objection to a fact or document set forth

in a written submission and the opposing party has an adequate opportunity to respond. That would include providing sufficient time for the party to support the purportedly material facts with sworn testimony, affidavits or other support. This approach would help to alleviate our concern with characterization of a previously uncontested assertion of fact being characterized as material only late in the OTA proceedings. As noted in the Prior Comments, to the extent that the OTA panel itself, rather than either party, identifies a fact as a "material" one on which no sworn testimony or other formal evidence is presented, the OTA always retains the ability to unilaterally require that a taxpayer or witness be put under oath in order to ensure the veracity of statements supporting that fact.

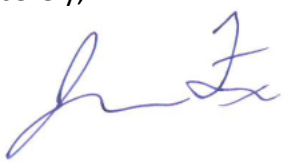
3. Proposed Changes to Section 30503: Withdrawal of Precedential Status of Opinions

In connection with the Notice, the OTA proposed expanding the scope of section 30503 of the Rules for Tax Appeals to permit the withdrawal of precedential status of both its prior opinions and prior opinions of the BOE. While the rules require OTA to provide an explanation for withdrawing precedential status, the Prior Comments recommended that an opportunity for public comment be provided before precedential status is withdrawn in order to evaluate existing taxpayer reliance considerations. No change was made to the proposed expansion in response to this comment. Rather, OTA simply explained that the change was intended to conform treatment of precedential opinions of the BOE with opinions of the OTA by requiring an explanation for the withdraw for both.

While we agree with consistent treatment for withdrawal of precedential status for both OTA and BOE opinions, we reiterate the concern expressed in the Prior Comments over such withdrawal disrupting settled taxpayer expectations, perhaps inadvertently. Accordingly, we think that—beyond providing a reason for withdrawing precedential status—the regulations should provide an opportunity for advance public comment before OTA decides to withdraw the precedential status of an existing BOE or OTA precedential opinion.

We reiterate our appreciation for the careful consideration OTA has given to our comments and welcome the opportunity to discuss these issues further.

Sincerely,



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Re: **Comments regarding Amended Proposed Final Text to OTA's Regulations per Notice of Proposed Regulatory Action dated May 11, 2023**

Dear Sir or Madam:

This letter is in response to proposed amendments to California Code of Regulations, title 18, division 4.1, the Office of Tax Appeals' Rules for Tax Appeals (Regulation).

1. **Proposed Regulation 30104(i) (Advisory Opinions)**

Proposed Regulation 30104(i) would declare that OTA does not have the authority to issue an order for declaratory relief, issue an advisory opinion, or to otherwise include in any opinion a holding or disposition that is advisory in nature.

Your Initial Statement of Reasons indicates the "[t]his amendment is not intended to change the jurisdiction of OTA, but only to provide clarity and guidance of OTA's existing jurisdiction, as provided in *Appeal of Body Wise International, LLC* 2022-OTA-340P."

OTA's jurisdiction is set forth in Government Code section 15672 and gives the OTA jurisdiction over appeals previously conducted by the State Board of Equalization. An "appeal" for the purposes of the OTA is defined in section 15671(a).

Body Wise held the OTA could not provide an advisory opinion on an "appeal" from an action by the California Department of Tax and Fee Administration as defined by Government Code section 15671(a)(1)-(3). *Body Wise* does not apply to appeals from

actions by the Franchise Tax Board under Government Code section 15671(a)(4), or requests for tax, fee, interest or penalty relief under Government Code section 15671(a)(6). To prevent a substantive change to the OTA's jurisdiction and recognize the limited scope of *Body Wise*, proposed Regulation 30104(i) should be revised to read:

> **Except as otherwise allowed by paragraphs (4)-(6) of subdivision (a) of Government Code section 15671,** the authority to issue an order for declaratory relief, to issue an advisory Opinion, or to otherwise include in any Opinion a holding or disposition that is advisory or hypothetical in nature.

2. Proposed Regulation 30214(f)(5) (Evidence)

Proposed Regulation 30214(f)(5) reads in relevant part, "a factual finding on any material disputed fact shall not be based solely on unsworn statements made by a party during the appeals proceeding before the OTA, such as statements contained in a party's brief, or arguments made by an unsworn representative during an OTA oral hearing."

Your Initial Statement of Reasons indicates, "[t]his amendment is not intended to change OTA's existing evidentiary rules, but to provide written guidance clarifying the rules. For example, the current Regulation states that declarations must be signed under penalty of perjury, and this amendment would additionally provide the specific language for declarants to include to effect signing under penalty of perjury. This amendment also provides that opinions issued by panels will include factual findings that form the basis for their opinion."

This proposed amendment in fact makes substantive changes that are harmful to taxpayers, particularly individual taxpayers and small businesses. It is common in OTA oral hearings for Panel Members to not ask questions or otherwise identify any potential issues with substantiation of material disputed facts. As a result, taxpayers may not discover which facts the Panel Members have determined to be material to the determination until after the opinion is published. Before the Panel makes factual findings on any material disputed fact, Taxpayers should be given notice and opportunity to cure any unsupported fact the Panel determines is material to the outcome of the case.

3. Proposed Regulation 30502(e) (Pending Precedential Comment Period)

Proposed Regulation 30502(e) would establish a deadline for public comments on pending precedential cases. The public would be required to submit comments, or notice of intent to submit comments, within 30 days of the opinion being posted on OTA's website as "Pending Precedential."

The current OTA website provides the month, but not the day an opinion is posted. To promote transparency and fairness, the OTA website should provide the exact date a Pending Precedential opinion was posted.

Very truly yours,

Carley A. Roberts

Carley Roberts