



August 5, 1999

Ms. Colleen Berwick, Legal Branch
Franchise Tax Board
P.O. Box 1720
Rancho Cordova, CA 95741-1720

Subject: Proposed Regulations Amending Sections 19041 and 19044 of Title 18.

Dear Ms Berwick:

The California Taxpayers' Association is strongly opposed to the Franchise Tax Board's proposed adoption of Regulations 19041 and 19044 relating to protest procedures. Frankly, we are surprised that the FTB has departed from its normal practice of conducting preliminary hearings or symposiums to discuss proposed regulations prior to the formal regulatory process being initiated. Given the sensitive nature of the regulations being proposed, taxpayer protest procedures, and the litany of issues raised by the proposal, the symposium would have offered an opportunity to address what our membership believes are significant problems with the regulations as drafted. We would request that the final regulation be sent to the Board for approval pursuant to Government Code Section 15702.

In general, we find that the regulations unfairly tilt the administrative appeals process in favor of the FTB. Specific restraints are placed on taxpayers ability to protest proposed assessments while virtually no restrictions or burdens are placed on the FTB to substantiate a proposed assessment or process and determine a protest once filed. Instead, the FTB grants itself, in excess of its statutory authority, unprecedented powers to demand information of the taxpayer protesting a proposed assessment. Failure of the taxpayer to respond to even unreasonable or unwarranted requests for information results not necessarily in the denial of the protest (or determination against the taxpayer) but the internment of the taxpayers' protest to the bureaucratic dungeon never to be resolved. What's more, the regulations propose to give the FTB a new authority to decide on its own whether a taxpayer has exhausted their administrative remedies, thereby denying taxpayer any forum within which to seek redress of their grievances.

To satisfy the Administrative Procedure Act, regulations must comply with six distinct requirements: Necessity, Authority, Clarity, Consistency, Reference and Nonduplication. Gov't Code Section 11349.1. Perhaps most at issue with respect to these two regulations are Authority, Clarity and Consistency.

"Authority" is defined as "the provision of law which permits or obligates and agency to adopt, amend or repeal a regulation." Gov't Code Section 11349(b). It is basic administrative

law that the agency is limited in powers to what is conferred by statute. “Clarity” means “written or displayed so that the meaning of regulations will be easily understood by those persons directly affected by them.” Gov’t Code Section 11349(c). “Consistency” means “being in harmony with, and not in conflict with or contradictory to, existing statutes, court decisions, or other provisions of law.”

Rev & Tax Code Section 19041 identifies the scope of requirements for a taxpayer to protest a proposed deficiency assessment. Any additional requirements are outside the scope of the FTB’s authority to require. Section 19041 provides:

Within 60 days after the mailing of each notice of proposed deficiency assessment the taxpayer may file with the Franchise Tax Board a written protest against the proposed deficiency assessment, specifying in the protest the grounds upon which it is based.

Section 19044 provides:

- (a) If a protest is filed, the Franchise Tax Board shall reconsider the assessment of the deficiency and, if the taxpayer has so requested in his or her protest, shall grant the taxpayer or his or her authorized representatives an oral hearing. Chapter 4.5 (commencing with Section 11400) of Part 1 of Division 3 of Title 2 of the Government Code does not apply to a hearing under this subdivision.*
- (b) The Franchise Tax Board may act on the protest in whole or in part. In the event the Franchise Tax Board acts on the protest in part only, the remaining part of the protest shall continue to be under protest until the Franchise Tax Board acts on that part*

Section 19041(b) Time for Filing Protest: Our central concern with this section is that the date placed on the Notice of Proposed Assessment (NPA) is not an adequate basis for presuming as a matter of law what the actual date of mailing is. Section 19041 of the Rev & Tax Code provides for 60 days “after the mailing of each notice.” As drafted, the regulation places an impermissible limitation on taxpayers in contravention of the statute.

Subsections (1) & (2) lack clarity, as the first relates to a protest being “timely” while the other relates to a protest being “timely filed”. These sections also appear to create differing standards for filing a protest whether in person or via the mail without apparent reason. Perhaps the solution is to provide that the statute of limitations runs 60 days after the later of the date appearing on the NPA or the actual mailing of the protest as evidenced by the postmark on the envelope or other competent evidence.

Subsection (3) limits the type of evidence which may be used to establish a timely filed protest. The statutory authorization, however, does not place such a limitation on establishing the date of mailing. If the department doesn’t retain the envelope, is it incumbent upon the taxpayer to affirmatively establish that the statute of limitations has been met in every case in which a protest is filed? For example, if taxpayer files protest 30 days after the mailing but has no record of that fact, is their protest barred 19041(f)(1) even if the FTB does not contest the date of filing the protest?

Section 19041(c) Manner of Filing: A valid protest should not be limited in manner of delivery to “mailings.” There is no rational reason to suggest such a limitation. Rev & Tax Code Section 19041 does not authorize such a restriction. Taxpayers should continue to be

permitted to file in person at any branch office of the FTB as well as receive proof of filing if filed in person.

Section 19041(d) Form: Whether a written protest is dated is irrelevant. The only relevant date is that of filing the protest, which may or may not have any correlation to the date of the writing of the protest. Nothing in the authorizing statute requires the protest to be dated.

Subsection (2) through (6) suggest a litany of requirements for content of a valid protest. The only criteria for a valid protest under the statute is a timely filed written protest against a specific NPA setting forth grounds upon which it is based. As simply a drafting issue, subsections (c)(2)(A)-(H) are repeated in subsections (4) to (6). *Suggesting* that such additional information be provided would be acceptable, but allowing the FTB to deny protest based on the lack of these requirements is inconsistent with the statutory authorization and substantially limits taxpayers' rights to challenge an NPA.

Subsection (3) requires a request for oral hearing be expressly stated and included in the original protest. The authorizing statute is not a limitation on taxpayers but an affirmative requirement that the FTB grant an oral hearing if requested in the original protest. What is the justification for such a limitation? As a practical matter, taxpayer may not have grounds to believe that a hearing is necessary until after the protest is originally filed.

Subsection (4) requires the protest be signed. The statute has no such restriction.

Subsection (5) requires a protest to specify the grounds upon which it is based, the facts involved and the reasons the proposed assessment is in error. This subsection also references the requirements for grounds in Section 19041(e). The statutory authorization only requires a protest to specify the grounds on which it is based. There is no requirement that the facts involved be reiterated nor that the taxpayer is in anyway bound by or limited to arguments submitted in the original protest.

Section 19041(e)(2) Grounds for Filing Protest: Taxpayers should be allowed to introduce new, additional or alternative grounds even after an original protest has been filed any time prior to the issuance of a determination. In conjunction with the over reaching of the requirements for form, these provisions work to substantially limit taxpayers' ability to protest NPAs. The FTB has literally months and months to prepare a case supporting the NPA, yet the NPA does not provide an exhaustive or authoritative justification for the proposed assessment. Here, the FTB suggests taxpayers be given a mere 60 days, not just to decide whether to protest, but to also set forth all of the grounds and legal authority supporting such a protest through the entire dispute.

It is unclear what is what is meant by the terms "new ground" or "alters an objection" in subsection (3). Does altering an objection mean any alteration of the original protest?

Section (f) Perfecting a Protest: This section grants the FTB the right to request taxpayers to "perfect" their appeals. Not only will this substantially slow the appeals process it lacks certainty for taxpayers and is susceptible to abuse. In conjunction with the myriad of unnecessary requirements of form and content, this section could result in an endless maze of

bureaucratic red tape for taxpayers and no demonstrative reason has been established to support it. All that is required by Section 19041 is that a protest be in writing, protest a particular NPA, and set for the grounds on which the protest is made.

It is unclear by the regulation what consequence occurs if the perfection of an “invalid protest” occurs more than 60 days after the mailing of the notice of proposed assessment. Does that perfection “relate back” to the original filing?

Section (g) Request of Department for Additional Information or Authorities: It is in the interest of the taxpayer to support their arguments against the NPA with proper authority. It is not acceptable that the FTB be given broad discretion to initiate a fishing expedition for “additional information” or “authorities” for arguments made by the taxpayer or worse, assert that taxpayer has failed to exhaust their administrative remedies, thereby holding their protest hostage for the information requested. There is no limitation on the reasonableness of the request for information. Such a request can even be made during a hearing. Even should a taxpayer respond, the FTB is granted the authority to simply determine the taxpayers protest as “not complete”. The practical consequence is that the FTB can commit the taxpayers’ protest to administrative limbo, denying taxpayer any forum in which to pursue their claim. Such process is directly contrary to the dictates of the Taxpayer Bill of Rights (see Section 21010 of the Revenue and Taxation Code). Such requirements that taxpayers provide or even respond to such information requests is beyond the scope of the authorizing statutes.

Section 19041(h) Determination on Protest: Subsection (2) asserts that the “date of mailing” is presumed to be the date on the Notice of Action. This section suffers from all the infirmities that plague section 19041(b).

Regulation section 19044(b) Request for Hearing: As previously noted, it is unclear what rationale exists for denying taxpayers an oral hearing unless requested in the original protest. The circumstances necessitating such a hearing may not arise until after the initial protest is filed.

Subsection (3). Taxpayers should be entitled to two (2) hearings. In most circumstances a single hearing will be all that is necessary, however, in those instances in which the first hearing raises additional issues for consideration that the taxpayer wishes to address, the taxpayer should be allowed the second hearing without needing the FTB’s acquiescence. Any subsequent hearing can be at the FTB’s discretion.

Section 19044(c)(2) should be revised to provide that a hearing at the taxpayer's option may be held via telephone, video conferencing, etc. In its current form, the regulation merely provides that the taxpayer give "consent" to such a hearing. Thus, in its current form, it is the FTB that determines whether a teleconference takes place. With our modern means of communicating, there is no reason for the regulation to give such discretion to the FTB. Taxpayers should control how the hearing will take place, in person, via teleconferencing, etc.

Section 19044(c)(4) The term “sufficient notice” lacks clarity.

Section 19044(d) Time: The potential for abuse of this section should be apparent. The lack of meaningful requirement that the FTB take action on a protest can result in taxpayer being at the mercy of the FTB's willingness to resolve their dispute. The Taxpayer Bill of Rights requires that hearings be held at a reasonable time which "is convenient to the taxpayer when possible." (See R&T Code Section 21011) Nothing in this section attempts to accommodate taxpayers. For example, in subsection (3): Why should taxpayers be required to take a day off work simply to be afforded basic due process? Hearings should be scheduled to accommodate the taxpayer, including allowing for evenings and Saturdays

Sub-sections (4) & (5) since unforeseen events can take place (outside of "good cause") a taxpayer should be allowed, at his or her option and not at the FTB's discretion, to reschedule a hearing with less than a one week notice. Subsequent rescheduling can be at the discretion of the FTB.

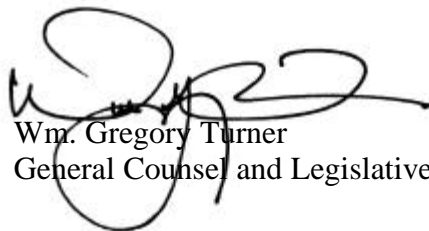
Section 19044 (h)(4) Conduct of Hearing: The hearing officer should not be vested with the authority to limit the number of representatives a taxpayer desires to have present at a hearing. So long as the representatives handle themselves in a manner in which the hearing officer controls the hearing, a taxpayer should have the ability to determine the number of representatives he or she desires.

Subsection (8)(3) Provides that the department shall not issue subpoenas on behalf of taxpayer to compel witnesses to appear, which is fine, except that the taxpayer should be entitled to have the auditor or such other FTB personnel available for testimony as may be relevant to their protest.

Subsection (9) has the same fundamental flaws as section 19041(g). It essentially allows the FTB staff to go on a fishing expedition for information the hearing officer deems "necessary". There is no germaneness, relevance, or reasonableness requirements on the FTB. Taxpayer's refusal to provide such "deemed necessary" information or to file a "complete response" can result in immediate determination of the case and possible denial of exhaustion of administrative remedies if taxpayer sues for refund. There is no authority in the authorizing statute to permit any of these restrictions on taxpayer protests.

Subsection (11) Taxpayers should have the right to any hearing report or recommendation by a hearing officer whether prepared for internal use or otherwise.

Thank you for your consideration.



Wm. Gregory Turner
General Counsel and Legislative Director