BEFORE THE CALIFORNIA STATE BOARD OF EQUALIZATION
450 N STREET
SACRAMENTO, CALIFORNIA

REPORTER'S TRANSCRIPT
MAY 17, 2006

J2 REQUEST FOR CONCEPT APPROVAL
RULES OF PRACTICE
CHAPTER 4, APPEALS FROM ACTIONS
OF THE FRANCHISE TAX BOARD

Reported by: Juli Price Jackson
No. CSR 5214
PRESENT

For the Board of Equalization:

John Chiang
Chairman

Claude Parrish
Vice-Chair

Bill Leonard
Member

Betty T. Yee
Acting Member

Marcy Jo Mandel
Appearing for Steve Westly, State Controller
(per Government Code Section 7.9)

Gary Evans
Acting Chief, Board Proceedings Division

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MR. EVANS: Next item is J2, request for concept approval for new Rules of Practice, Chapter 4, Appeals from actions of the Franchise Tax Board. Miss Cazadd will make the presentation. And we have FTB representatives to also make comments.

MS. CAZADD: Mr. Chairman, Members of the Board, also presented for your approval this afternoon is a concepts -- major concepts described in Chapter 4, the Appeals from the Actions of the Franchise Tax Board in the new Rules of Practice.

We have had several interested parties meeting. The major issues have all been resolved, however, there are -- this is concept approval again, and there are comments.

I understand we have two guests from the Franchise Tax Board so I'd certainly like to defer to them.

KENNETH DAVIS

MR. DAVIS: Good afternoon, Mr. Chairman and Board Members.

My name is Kenneth Davis. I'm Senior Tax
Counsel for the Franchise Tax Board.

With me today is Susan Boardman, who is Manager of our Administrative Proceedings Section.

We're here to answer any questions you might have, at least on behalf of the Franchise Tax Board, related to Chapter 4. And Franchise Tax Board staff recognizes and appreciates the extensive effort undertaken by Board of Equalization staff to develop the new regulations related to Chapter 4 dealing with the Appeals of the Franchise Tax Board matters.

Board staff received our input, as well as input from other interested parties, and worked on a collaborative basis to create regulations which would benefit efficient tax administration by this Board, addressed concerns raised by the Franchise Tax Board and also assists taxpayers.

We recognize that Board staff seeks in concept approval today of Chapter 4. Franchise Tax Board staff has no objection to the broad concepts that are raised in the Chief Counsel's memo.

We'll continue to work with Board staff on the language issues related to these concepts.

And, as I mentioned before, we're here today just to answer any questions you might have related to -- to Chapter 4.

Thank you.

MS. MANDEL: As long as you're there, I have a question for FTB because I did place a call,
unfortunately not to you, and perhaps I misunderstood what I was told since -- on the jurisdictional issues, my reading of this is that there would be no bifurcated proceedings, even where there is a genuine issue as to jurisdiction.

What I read staff that there would be no bifurcation, correct?

MR. FOSTER: Correct.

MS. MANDEL: Is that correct? Okay.

And I thought that yesterday -- and, of course, since I didn't talk to you, I talked to someone else, that my understanding was that there was concern from FTB about bifurcation, but now having -- that there be bifurcation.

And so I kind of thought before I read the staff memo that there would be bifurcation on those genuine issues, but there's not.

And you're okay with that, right?

MR. DAVIS: Yes, and I can speak to that for --

MS. MANDEL: Well, I just need you to say you're okay with it and then that washes out the answer I got yesterday because you're the man in charge on this, right?

MR. DAVIS: Yes.

MS. MANDEL: Okay.

MR. DAVIS: But I do want to explain, and that is, Franchise Tax Board staff did raise the bifurcation issue because we felt that raising a jurisdictional
issue first would be helpful to efficient tax
administration.

Board of Equalization staff heard our concerns
and they came up with a new proposal and a new concept
and that is that jurisdictional issues would be heard
first by the Chief Counsel.

And the Chief Counsel would hear those -- that
bifurcation issue and seek any additional information
from the parties to help determine whether a
jurisdictional issue actually is raised and, if
appropriate, would go before the Board.

So, we're satisfied with the concept.

MS. MANDEL: It's that last point, "if
appropriate, would go before the Board."

MR. DAVIS: Yes?

MS. MANDEL: My reading -- and, of course, we
don't have the language, but my reading of the memo was
that once the Chief Counsel does that preliminary
examination and says, "Aha, there is a real issue to go
before the Board," that it was not going to go before
the Board at that time just on jurisdiction, but would
go as a package with the substantive tax issues in the
case.

MR. DAVIS: And that is correct.

MS. MANDEL: Okay, you're okay with that.

MR. DAVIS: We're comfortable with that
concept.

MS. MANDEL: Cool. Thank you.
MR. CHIANG: Okay.

MS. MANDEL: I could go on with staff on the --

MR. PARRISH: Let me go on a little bit.

MS. MANDEL: Go ahead.

MR. CHIANG: Please.

MR. PARRISH: Okay. Here's the deal here, I have to be against this and I'm going to tell you why.

It says a simplified briefing schedule would limit the FTB to a single response, applicable primarily to personal income taxes -- tax cases for amounts less than $15,000.

What this translation is that people under $15,000, if they go through this, they won't be able to come to the elected representatives and those are exactly the people that should come before the elected representatives and have their day before the elected representatives.

So, the -- many times my colleague -- even cases for 2 or $300 on, you know, exemptions on the property tax, my colleague has found things that should be corrected and it's especially those people that don't have the money to hire an attorney that need to be able to come before elected representatives.

So, I'm against this based on that.

MS. MANDEL: If I could -- since it's just this one point, we have a similar point, so you can deal with it all at once.

The same point, but adding on to that, even if
this were to go through this way, where it's an
election, okay, one of the concerns would be whatever
the Board sends out to these people who have a 15,000
or less personal income tax issue, it -- you know, we've
had issues here and at FTB, I'm sure other agencies,
how -- how does that document that we send out look to
the taxpayer?

    It's going to look to them like we're forcing
them to waive their hearing. They might not understand
that and I realize you have a safety valve, but it may
look like we're forcing them to give up their hearing
right by however the letter is phrased.

    And it also has the potential -- now maybe
you'd put the words here about a pro bono program and
pro bono's available elsewhere, but for an unrepresented
taxpayer it might look like, oh, in order to get some
assistance that I can't afford to get it for free from a
law clinic, I have to give up my right to a hearing.

    And so, you know, even -- I have the same
question Mr. Parrish does -- but even if the Board were
to go forward with this elected provision, whatever gets
sent out could really turn problematic.

    And, you know, we -- we might all think that
the letter looks perfectly innocent and obvious, and
then we might start getting some phone calls from people
who say we are forcing to people to give up their right
to a hearing.

    So --
MS. CAZADD: Those are -- those are certainly valid concerns. And we really appreciate that.

We certainly -- that's the last thing we would want to do is to prevent people or discourage them in any way from coming to the Board for a remedy for their concerns.

But I'd like Senior Tax Counsel Ian Foster and Brad Heller to address those questions as we do have a program in place.

MR. FOSTER: Right. And we actually are -- you know, these have been the concerns all long with the simplified briefing schedule. And we are drafting the regulations so that they require that the notice that goes out be clear on these exact points.

The notice, under the regulations, has to be clear that this is an election; that if you make the election, you waive your right to an oral hearing, but that there is no requirement that you make the election at all.

And that there will -- it will still come up as a nonappearance matter where the Board can then order an oral hearing, where anybody is entitled to speak at any nonappearance matter that's noticed on the agenda.

MS. MANDEL: I -- should it ultimately go into place, you know, thinking ahead, I have a suggestion that whatever the -- you know, we don't normally approve every single letter that goes out or every single form, but I have been involved -- maybe it was at FTB -- where
letters had gone out and then we got a lot of phone
calls about the content of the letter and how people on
the outside perceived it.

And that content might be something that,
perhaps, you take to the Board so that the -- if this
all goes through this way, so that the Board doesn't get
blindsided by calls from people or their
representatives.

MS. CAZADD:  You're concerned that -- that
anything we send out needs to be in very plain English,
very clear to people so they understand --

MS. MANDEL: Yeah, I don't want any phone
calls --

MS. CAZADD: -- that something's happening to
their rights?

MS. MANDEL: -- saying we're threatening senior
citizens.

MS. CAZADD: Yes.

MS. MANDEL: -- or anything, you know.

MS. CAZADD: Absolutely and that there should
be a taxpayer education program that goes along with
this so that we adequately communicate to people what is
happening and what their options are.

I certainly agree with that wholeheartedly.

MR. Heller: Miss Mandel, I think that staff --
I mean, assuming that this procedure in concept was
approved today, so that staff was directed to prepare
actual regulatory language and present it to the Board
containing this type of procedure, we could also prepare sample language for the Board Proceedings Division and submit that to Board Members along with the proposed regulation, so you can see exactly what a taxpayer would receive in the mail and get your own feeling for really how they would view it and whether they would feel like they're being deprived of something or feel the need to call one of the Board Members and complain.

I think in addition to that, you know, we also, as our memo indicates, we wanted -- we do want to incorporate a procedure that would allow the Chief Counsel to revoke one of these elections where a taxpayer could establish that it was made in mistake.

So, if they can come forward and explain why they didn't understand it, the Chief Counsel would be able to go ahead and revoke that election and get them a hearing.

In addition, it's completely elective. And I think this goes to Mr. Parrish's concern, that there is no taxpayer who would be forced to use this procedure at all. It would only be a taxpayer who was contacted by Board Proceedings, informed that they could use it, if they so chose, and then went ahead and chose to use that procedure.

In addition, it does provide a small benefit in that, you know, it does cut down the cost associated with the appeal. And then it also does limit the responses by the Franchise Tax Board and. I am sure
there may be a few taxpayers who would feel like that was a pretty good benefit and worthy of a small exchange.

But I think beyond that too there is one additional issue is staff definitely does feel that it would be very beneficial to institute appeals conferences in cases that are going to the Board for an oral hearing.

And part of our overall concern in drafting Chapter 4 was to make sure that we took into account our current staffing, our current staff levels and, you know, our projections for additional staff in the future. And we were looking for a way to shift the -- our staff's, you know, workload so that they would be available to do those additional appeals conferences for cases that are going to the Board for an oral hearing.

And this was one mechanism that we found to, at least, in some way not deprive a taxpayer of the same sore of reviews the staff always gives appeals, but to streamline that so there is less overall work, both at the FTB and the Board of Equalization so that we can free up the resources for those appeals conferences.

MR. FOSTER: And the ultimate benefit to the taxpayer too is this is a much simpler, less intimidating process for those who are not represented whether by necessity or by choice.

MS. MANDEL: Right, as long as the letter is not intimidating itself.
MR. FOSTER: Correct. Yeah, and that's certainly something that we want to work on and make sure that the letter is acceptable.

And also ultimately because this process would be much faster than the normal process, there's going to be a lot less interest owed if the assessment is upheld.

If it's a refund, the State is going to owe a lot less interest on paying out the refund.

MS. MANDEL: Okay. Just -- I have a couple of other things on this one.

Just from reading some of the text, and, of course, it will depend on what the actual language is that comes forward in the regulatory process, I would again be concerned about whether there is too much dumped into the regulations that isn't really appropriate for the regulation, but again that sort of struck me in the last part in particular, talking about the process for rehearing. That was just where it sort of struck my brain. But that really depends on what your actual language turns out to be.

Under -- and again the same thing with the frivolous appeals penalty, it's going to really depend what the actual language is.

On the bit about the -- what's this, the preparation of concurring or dissenting opinions, again depending what your -- what your language is, of course, Board Members have legal staff and there's nothing to preclude, presumably, a Board Member from, you know,
drafting their own rather than telling Appeals to draft it, I assume that.

The major other substantive item that I have is on page 7 with respect to a hearing on a claim for refund where -- where the refund claim has to do with something for which there was a hearing on an underlying Notice of Proposed Assessment and you used the phrase, "res judicata."

And you cite the Code -- the Tax Code section about bringing a second claim. And I feel very strongly about this, we've had this in cases before the Board, this is not an issue of res judicata.

Res judicata would mean that the claim was completely barred and that the taxpayer would not -- see, they're nodding -- that the taxpayer -- nodding up and down for yes -- that the taxpayer would not even be able to file the claim in the first place with the Franchise Tax Board.

We have had cases come back here on claims for refund where there are new facts and evidence and slightly different legal arguments, sometimes, even perhaps, the claim for refund in the tax process is a continuation of the same action as the original NPA. That's your basic process -- you got to do the NPA, you got to do a claim for refund if you want to get to court.

The Board could, in its discretion, if there is absolutely nothing new, say, "We hear you, but
there's absolutely nothing new."

But it's not -- it's not a -- res judicata is not a basis on which to deny them a claim -- a hearing on a claim for refund where they had a hearing on the underlying NPA if this is -- you know, if they keep trying to file a claim for refund for the same year on the same issue and the prior claim was denied and they lost their right to go to court and the statute has run, you can't file a second claim.

But it's not -- it's not an issue of res judicata. The cases that somebody had cited some years ago when we had this, when they said that res judicata barred a claim, that was because they were trying to rely on some federal tax cases where a taxpayer had lost in Tax Court and that Tax Court decision went final and the taxpayer then filed a claim for refund and tried to go to the federal District Court and the federal system is a different system. They had already been through the system for the entire year by going to Tax Court.

They could have taken that up and they did not and the Tax Court also now has the power to grant an overpayment. So, it's a different system.

And here the res judicata statute in the R & T Code has to do when the year is all said and done, it is over.

So, anyway --

MR. FOSTER: I could --

MS. MANDEL: -- that's my impassioned speech
for the day.

MR. FOSTER: -- address that to a certain degree.

The regulatory language that we're drafting does not use the phrase "res judicata" and does not cite the code section.

And the theory behind the language we're drafting is that we're talking about either refund claims or interest abatement claims, where everything is exactly the same as the prior thing. We're talking about the efficient use of administrative resources and whether the Board -- and this is what the Board will have to determine when the language comes up -- whether the Board wants to continually hear the same case over and over when nothing has changed, particularly in the interest abatement section and, perhaps, there needs to be legislative change, there is nothing to prevent someone from making the same interest abatement claim over and over and over without end -- without anything changing.

MS. MANDEL: Then I look forward to the actual language.

But at this point, I am a no on the way the thing's written up.

MR. PARRISH: Mr. Chairman, could we call the question?

MR. LEONARD: Mr. Chairman?

MR. PARRISH: Mr. Leonard has --
MR. CHIANG: Do you want me to call the question or not?

MR. PARRISH: Well, no, I -- out of respect for my fine colleague --

MR. LEONARD: Two and a half minutes.

MR. CHIANG: I just had to -- I just wanted to be --

MR. LEONARD: I wanted to associate myself with Miss Mandel's comments on the last two items.

I think we should make the amendment today. I understand the risk of a taxpayer repeating the same claim, but I don't think it should be automatically barred.

There -- there may be a new issue in there and I don't want it thrown out at the entry level because it looks the same.

And I don't -- I've seen this Board when they see the same taxpayer back again on a rehearing with no new stuff, there's not a lot of wasted time and effort, they're out. There is no rehearing.

So, I don't know what we're losing or gaining in efficiency.

I'll also associate with revoking a right to oral hearing. You guys don't have enough confidence in yourselves. If this thing works, we'll have less full Board hearings because taxpayers will be satisfied at the appeals level that a fair job was done -- whether they win or lose, the job was fair and the result of
that appeals conference reflects the Board's feelings.

But that -- but that -- take confidence in that
and allow that taxpayer -- I mean, my problem is the
election is made to revoke my right to a hearing when I
file the petition of appeal. There could be something
happening at the appeals conference that so dissatisfies
me that I want to say it again in public to the Board of
Equalization as my elected representatives. It may have
something totally on point to the claim it may be
something to the process itself, but I want to get that
out. And you've have had me revoke my right months and
months before for the -- for an advantage that I have,
simplified briefing, less paperwork involved.

The same on the other side. And I recognize
that and I do support that part, but I -- I have
confidence yourselves, if this thing works, there won't
be as many appeals that come to the Board.

And if it doesn't work, then there is no need
to do the process at all. We're back to where we were
before.

But to revoke that at that early stage is -- I
don't know if we have the statutory authority to do
that, to deny the taxpayer a right to an appeal.

MR. FOSTER: If I could clarify a few things
here?

There are some relevant differences between the
income tax appeals process and the business tax appeals
process.
In business taxes the Appeals Division hears the case and issues a decision. If a party is unhappy, they can then go to the Board.

In the income tax appeals process you choose either to go nonappearance and have a written decision of the Appeals Division or go to the Board.

So, the --

MR. LEONARD: You don't want to push me there. I am not real satisfied with our nonappearance process.

I think it's the same kind of letter Miss Mandel cited with the taxpayers being said, "If you do a nonappearance, the Board will give you full and -- full weighted consideration as if you here making a personal plea and you have saved yourself the time and energy to go to Sacramento."

It's -- and I understand that the letter doesn't read that way to anybody else, but I think it does to a lot of taxpayers. And they give up their right to a hearing and find out later, as every one of these Board Members has pulled something off a nonappearance calendar for a full hearing because they caught something that they think the taxpayer should have stood up and said in public.

It's a -- don't push me on nonappearance. I want to go further in the other direction.

MS. YEE: Mr. Chairman.

MR. CHIANG: Have you concluded, Bill?

MR. LEONARD: I have concluded.
Thank you, Mr. Chairman.

MR. CHIANG: Thank you. Betty?

MS. YEE: I guess, given the concerns that have been articulated just now -- and I appreciate the work that's gone into this process up until this point -- I think my confidence level is now sufficiently not there to where I think I'd like to see some specific language before even doing a concept approval.

So, I am not prepared to do the concept approval today.

MS. CAZADD: We can certainly provide the Board with that and timewise, the end of June or July?

Whatever is the pleasure of the Board, we'll be happy to present that to you.

MR. FOSTER: It can be provided as soon as the Board wants it.

MS. YEE: Maybe at the next June Sacramento meeting?

MS. CAZADD: Certainly, absolutely, we'll do that.

MR. LEONARD: Thank you.

MR. DAVIS: Mr. Chairman, just to clarify, an issue raised by Miss Mandel and that was the -- we recognize the concern raised by Miss Mandel on the issue of res judicata. And that was raised in the interested parties meeting.

We took that in the memo as a short form place holder, if you will, and acknowledging it was
probably -- it was -- it was a short form incorrect place holder, but, nonetheless, to express a concept.

So -- but we understood what Board staff was trying to accomplish with it.

MS. MANDEL: So --

MR. DAVIS: But I think this raised a greater issue, which is also important.

MS. MANDEL: Yeah, but it's part of why on some things, concept; on some things, actual language.

MR. DAVIS: Yes.

MR. HELLER: Could I just ask a question, Mr. Chair?

MR. CHIANG: Certainly.

MR. HELLER: I just wanted to clarify as we prepare actual language to come back to the Board next month, we are being directed, essentially, to, I think -- I am not totally sure what we're directed to, but I think we do want to provide specific language for people if they were going to make this particular election so that we could see what that actually works like, and then we want to -- I think there seems to be no support and we do want to probably review something that would give staff some discretion to deny oral hearing to someone based on something that we might call res judicata or some other term essentially that that's probably not a procedure that we want to pursue going forward.

MR. CHIANG: Is anybody interested in that?
MR. LEONARD: No.
MR. HELLER: We'll go ahead do that as I was suggesting.
MR. CHIANG: Any other requests?
Okay, is there a motion?
MR. LEONARD: Move the matter over to June.
MR. PARRISH: Second.
MR. CHIANG: Okay, motion by Leonard, second by Parrish.
Any objection?
Without objection, motion passes.
Thank you very much.
MS. CAZADD: Thank you.
MR. FOSTER: Then to clarify, the motion is to come back with regulatory language.
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REPORTER'S CERTIFICATE

State of California  
    )
    ) ss
County of Sacramento  )

I, JULI PRICE JACKSON Hearing Reporter for the California State Board of Equalization certify that on MAY 17, 2006 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 23 constitute a complete and accurate transcription of the shorthand writing.

Dated: June 2, 2006

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JULI PRICE JACKSON
Hearing Reporter