



October 30, 2018

BY E-MAIL (angie.berry@boe.ca.gov)

David Yeung, Chief
Angie Berry
County-Assessed Properties Division
Property Tax Department
State Board of Equalization
450 N Street
Sacramento, CA 94279-0064

Re: Interested Parties Meeting
Confidentiality of Taxpayer Information in Assessment Appeals
450 N Street, Room 122, Sacramento
Wednesday, October 31, 2018, 9:30 a.m. to 4:00 p.m.

Dear Mr. Yeung and Ms. Berry:

I am writing on behalf of the California Alliance of Taxpayer Advocates (“CATA”) regarding the Interested Parties Meeting (IPM) referenced above.

The information below is submitted for the IPM scheduled on October 31, 2018. In addition to this information, several representatives of CATA will attend the meeting either in person or via teleconference.

Primary Issue: Assessors’ Use of De-Identified 3rd Party Confidential Information.

CATA believes that the primary issue for discussion at the October 31st meeting will be whether Assessors are permitted to use confidential 3rd party information in Assessment Appeals Board (AAB) hearings. Related to that topic is the question of what procedure(s) might be instituted to permit Assessors to use confidential 3rd party information while at the same time protecting the due rights of taxpayers to cross-examine such information and AABs to thoroughly evaluate the information.

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California Law Prohibits Assessors from Presenting Confidential 3rd Party Information in Equalization Proceedings before County Assessment Appeals Boards.

CATA has attached a summary of the law in this area to this letter for review and consideration. The attachment was provided to the SBE last August as part of the related property tax rulemaking process. As explained in the attachment, the California Court of Appeal's decision in *Chanslor-Western Oil Co. v. Cook* clearly prohibits the use of confidential 3rd party information in local equalization (AAB) proceedings. The concurring opinion in *Chanslor-Western* went so far as to say that redacting the confidential information from source documents does not overcome the Assessor's statutory obligation to maintain the secrecy of 3rd party taxpayer information. While Assessors contend that the Court of Appeal's decision in *Trailer Train Co. v. State Bd. of Equalization* permits use of "de-identified" confidential 3rd party information, that case only applies in the context of state-assessee matters. Moreover, there are several reasons why de-identifying confidential 3rd party information is not workable in AAB proceedings relating to locally-assessed properties.

Assessors' Use of "De-identified" Information in Local AAB Proceedings Is Not Feasible.

"De-identifying" information does not work in local equalization proceedings because the information in those proceedings nearly always hinges on the *location* of the property. Location is used to determine comparability and to make adjustments required for comparability. This is true both for the Sales Comparison Approach and also the Income Approach. Assessors remove location information to keep confidential 3rd party property information from being identified. But that location information is necessary for evaluating comparability, a key element in valuation and appraisal analysis. For that reason, "de-identifying" property information in the local assessment context nearly always frustrates a taxpayer's right to cross-examine the Assessor's evidence. It also keeps the AAB from being able to thoroughly evaluate the information presented by the Assessor.

SBE Should Fashion a Procedure that Allows Assessors to Maintain the Secrecy of 3rd Party Information but Gives Taxpayers the Ability to Cross-Examine such Information.

CATA believes the only workable solution for the difficulty created by Assessors' use of de-identified confidential 3rd party information in AAB proceedings is to develop a procedure which will allow for the disclosure of secret 3rd party information and, at the same time, allow taxpayers to cross-examine the information and AABs to fully evaluate the information.

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CATA is familiar with the procedures used by taxpayers in obtaining confidentiality orders from the Superior Court under *Revenue and Taxation Code* Section 408(e)(3). CATA believes it would be possible to develop a similar procedure for use by Assessors and taxpayers in AAB proceedings. Such procedure would require: (a) agreement by the Assessor and taxpayer to use a procedure for presentation of confidential 3rd party information; (b) closure of AAB hearings for the purpose of presenting such information; (c) exclusion of taxpayers (but not taxpayers' agents or attorneys) from AAB hearings; and (d) maintaining confidential and separate AAB hearing transcripts (audio-recordings) and exhibits during and after AAB hearings have concluded.

Conclusion.

CATA is prepared to work with SBE Staff and Assessors to fashion a procedure along the lines described above for handling of confidential 3rd party information in local AAB equalization proceedings. CATA suggests that the procedure the Staff develops be included as part of the "closed hearing" process set forth in SBE Property Tax Rule 313(g)(2) or presented in a new paragraph to Rule 313 denominated Rule (g)(3).

Sincerely,



Sean Kelley
President

Attachment

cc: California Alliance of Taxpayer Advocates, Board of Directors

TOPIC: Use of confidential information obtained from 3rd parties by assessors via Section 441(d) requests (or otherwise) in local assessment appeals board equalization proceedings.

A. Assessors are prohibited from disclosing or using confidential 3rd party information to defend an assessment before an assessment appeals board.

The only ways an assessor is permitted to use confidential 3rd party information in a local equalization proceeding are:

1. By obtaining a court order expressly permitting disclosure of the confidential information (Rev. & Tax. Code section 408(e)(3)); or
2. By obtaining a waiver from each 3rd party taxpayer who supplied the confidential information (proposed Property Tax Rule 305.1(e)).

B. Controlling Statutory and Case Law and SBE Guidance

Rev. & Tax. Code section 451 says that all information obtained by assessors shall be “held secret.”

Rev. & Tax. Code section 408(a) removes the “held secret” requirement for certain types of information called “market data” (Section 408(d) and Section 408.1). However, subdivision (d) of Section 408 also says the “assessor shall not display any document relating to the business affairs ... of another.” (Also Section 408.1(b)(7).)

Government Code section 6254(i) from the California [Public] Records Act contains a similar provision: “nothing in this chapter shall be construed to require disclosure of records that are: ... (i) Information required from any taxpayer in connection with the collection of local taxes which is received in confidence and the disclosure of the information to other persons would result in unfair competitive disadvantage to the person supplying such information.”

Chanslor-Western Oil v. Cook (1980) 101 Cal.App.3d 407 says at pages 415: “[T]he assessor cannot on his own initiative disclose confidential information.” The Court of Appeal’s decision in this case, made with reference to Rev. & Tax. Code sections 451, 408 and 441 in the local property tax assessment context, also says:

Respondent argues that in defending his assessment of the Chevron property the assessor has the right to use any information in his possession, even if it relates to the business affairs of another taxpayer. Respondent relies upon section 1609.4, which sets forth certain procedures to be used in a hearing on an application for reduction of assessments, and which states in part: “The assessor may introduce new evidence of full cash value of a parcel of property at the hearing and may also introduce information obtained pursuant to Section 441.” However, the procedural rules for the conduct of such hearings are subject to the qualification that they shall not “be construed as permitting any violation of Section 408 or

451.” (§ 1609.6 (formerly § 1609.1).) In order to construe all sections harmoniously, which we are required to do (Code Civ.Proc., § 1858), we must conclude that the assessor’s use of “information obtained pursuant to Section 441” **is limited to either market data or information obtained from the taxpayer seeking the reduction.** (Ehrman and Flavin, *Taxing California Property* (1st ed. 1967) § 270, pp. 247-247 & fn. 9; Id. (2d ed. 1979), pp. 357-358.) (Bolding and underscoring added)

SBE Assessment Appeals Manual is consistent with the statutes and case law above:

Confidential documents, as described in sections 408 and 451, obtained by the assessor while discharging the duties of his or her office may not be disclosed to the public or competitors of the taxpayer unless a court so orders. If the confidential information relates to the applicant, it may be used in the course of the appeals hearing. (Id. at 102)

C. De-identifying confidential information obtained from 3rd parties does not free an assessor from complying with the confidentiality requirements under the law.

Assessors often present de-identified confidential information obtained from 3rd parties in assessment appeal proceedings. This practice does not relieve assessors of their obligations to maintain the privacy of such information. In addition, the practice has the following negative impacts:

1. It prevents taxpayers from being able to meaningfully exercise their right to cross-examine evidence presented by assessors during assessment appeal hearings;
2. It violates the confidentiality guarantees that 3rd party taxpayers rely upon when they provide information to assessors under Section 441(d) with the expectation of secrecy in Section 451;
3. It unfairly places the burden of producing evidence in support of the assessor’s case upon the taxpayer who must obtain a confidentiality order from a court in order to access the confidential information used by the assessor or obtain waivers from the 3rd parties whose confidential has been used by the assessor;
4. It keeps assessment appeals boards from being able to evaluate the reliability and credibility of evidence presented by assessors in making decisions; and
5. It prevents courts from engaging in meaningful judicial review of assessment appeals proceedings.

Taxpayers have a constitutional due process right to cross-examine assessor’s evidence. Due process rights of taxpayers must be upheld in assessment appeal hearings, including the right to cross-examine evidence presented by assessors. (Universal Consolidated Oil Co. v. Byram (1944) 25 Cal.2d 353, 360-363; People v. Nye (1969) 71 Cal.2d 356, 374-375.) Interstate

Commerce Comm'n v. Louisville & N. R. Co. (1913) 33 S.Ct. 185, 187-188.) The right to cross-examination is also guaranteed by SBE Property Tax Rule 313(e): “[t]here shall be reasonable opportunity ... for cross-examination of all witnesses and materials proffered as evidence” Universal Consolidated also makes a proceeding in which an opportunity for cross-examination is denied “void.”

3rd parties who submit information to assessors expect the information to be held in secret. When a 3rd party submits information to an assessor, he or she expects the information to be held in confidence. Use of a 3rd parties’ information by an assessor in a way that necessitates disclosure of that information during an equalization hearing of another taxpayer violates the trust that 3rd parties put in assessors. It also motivates 3rd parties not to disclose information to assessors. (See Gallagher v. Boller (1964) 231 Cal.App.2d 482, 491 [main purpose of confidentiality requirement in property tax statutes is to encourage full disclosure by the taxpayer supplying the information].)

It is unfair to make taxpayers substantiate confidential 3rd party evidence used by assessors. Only the assessor knows the nature of the confidential 3rd party information used in an assessment appeals board proceeding, including the identities of the 3rd parties who provided such information. Putting the burden on taxpayers to identify that information is unfair, inequitable, and unjust because it shifts the burden of proving the validity of an assessment from the assessor to the taxpayer. California Evidence Code sections 110 and 550 put the burden of proving a fact on the party with the burden of proving that fact. Assessors’ use of confidential 3rd party information also motivates taxpayers against whom such 3rd party information is used to use whatever means are available to obtain that information (i.e., it puts the taxpayer in an adversarial posture vis-à-vis the 3rd party who supplied the information to the assessor with an expectation that it would be kept confidential).

While assessors may contend that the evidentiary standard for local property tax proceedings is “evidence on which responsible persons are accustomed to rely in the conduct of serious affairs” (Rev. & Tax. Code section 1609; SBE Property Tax Rule 313(e)), this evidentiary standard would not encompass confidential information supplied by 3rd parties (i.e., persons in the “conduct of serious affairs” do not rely on confidential information which they cannot or do not know, and which they cannot investigate or verify). Investigation and verification of appraisal data is called for by the SBE’s Assessors’ Handbook (AH-501, “Basic Appraisal,” pp. 78, 80, 84, 96; AH-502, “Advanced Appraisal,” p. 34) and SBE Property Tax Rule 8(c).

In 2008, the SBE undertook a project to develop guidelines for the use of confidential information in local assessment appeals board proceedings. This project was ultimately cancelled by the SBE. The final draft of the proposed guidelines, which was issued before the confidential information guidelines project was cancelled, stated:

If an applicant has subpoenaed confidential information in a county assessor’s possession concerning the property or business affairs of third parties, the county assessor must invoke the confidentiality provisions of sections 408, 451, and 481 and refuse to offer evidence on that matter unless the applicant has first sought and obtained a judicial order for disclosure. Given the added burden and the

difficulties that may be associated with obtaining such a judicial order, *whenever possible county assessors should avoid the use of confidential information that can only be disclosed pursuant to a judicial order.* (Italics added)

Assessment appeals boards need reliable and credible evidence in order to decide appeals. Local assessment appeals boards must rely on “proper evidence presented at the hearing” and “proper evidence admitted into the record” in deciding cases presented to them. (SBE Property Tax Rules 302(c) and 313(e); also Property Tax Rule 324(a).) Property Tax Rule 324(a) charges local appeals boards to examine “the factual data, the presumptions, and the estimates relied upon,” in essence giving local appeals boards the authority and right to cross-examine the evidence presented to them.

Local assessment appeals boards must not only examine the evidence provided to them. They also must determine whether the evidence is reliable and credible. Unreliable evidence may receive little or no weight in which case it should be excluded. (SBE, Assessment Appeals Manual, p. 79.) Further, as explained in the SBE’s Assessment Appeals Manual at page 103:

In order to evaluate evidence and render a decision, the [local assessment appeals] board members must determine the weight each piece of evidence merits. Weight is not based on quantity, but rather depends on credibility, that is, the effect of the evidence in inducing belief. The presumption that the assessor has properly performed his or her duties is not evidence and will not be considered by the board in its deliberations. [SBE Property Tax Rule 321(b)] In order for the appeals board members to properly adjudicate any matter before them, they must be presented with sufficient information to render a decision. ... A decision should not be based on inconclusive evidence.

De-identified confidential 3rd party information is generally unreliable because it cannot be examined fully to determine whether it is reliable and credible, and such evidence is thus inconclusive. Use of confidential 3rd party information must not be permitted in local equalization proceedings for this reason.

Courts reviewing assessment appeal board decisions must evaluate the evidence presented. When a Superior Court reviews an assessment appeals board’s decision, it does so using a substantial evidence review standard. If the evidence upon which an assessor’s assessment is 3rd party taxpayer information that cannot be disclosed, the reviewing court has no ability to evaluate whether there is substantial evidence in the record to support an assessment appeals board’s decision.

D. *Trailer Train* does not support use of confidential information in local assessment appeals board hearings.

Assessors have relied upon Trailer Train Co. v. State Board of Equalization (1986) 180 Cal.App.3d 565, 589 to support the use of de-identified confidential 3rd party information in equalization proceedings. The Court of Appeal’s discussion in Trailer Train does not specifically support the assessors’ position. However, SBE Annotation No. 260.0095 (January

14, 1994) which discusses the details of the Trailer Train litigation, is sometimes referenced to support assessors' use of de-identified confidential 3rd party information in local equalization proceedings. Trailer Train and the related Annotation do not support the use of de-identified confidential 3rd party information in local assessment appeals board equalization proceedings for the reasons set forth below:

1. Trailer Train involved an SBE equalization proceeding and not a local equalization proceeding before an assessment appeals board. In SBE equalization proceedings, the SBE "is both the constitutionally assigned assessor and the statutorily designated appeals board." Because of that, the SBE as appeals board in Trailer Train was "already privy to the secret business records which were submitted to the [SBE] via the property statements of the various assessees." (See Annotation No. 260.0035, 2nd paragraph.) This differs from local assessment where the assessment appeals board is a separately constituted and independent trier of fact. The distinction is significant because in SBE proceedings the SBE has knowledge of confidential 3rd party information as both assessor and appeals board. In local equalization proceedings before assessment appeals board, the appeals board does have access to the confidential 3rd party information because the local appeals board is not also the assessor.
2. In Trailer Train, the SBE's staff de-identified information of eight taxpayers who were referred to as assessees A through H. When the taxpayer objected to use of the de-identified information, the SBE's "staff offered to produce copies of the eight property statements with the names of the submitters blanked out in order to meet the minimum requirements of Revenue and Taxation Code, subsection 11655(a)." (See Annotation No. 260.0035, 2nd paragraph.) Section 11655(a) is not applicable to local equalization proceedings. Instead, as discussed in Chanslor-Western Oil (see above), Sections 408, 451 and 1609.6 must be followed, and only "market data or information obtained from the taxpayer seeking the reduction" may be used in a local equalization hearing; moreover "the assessor cannot on his own initiative disclose confidential information."

In addition, in the concurring opinion in Chanslor-Western Court of Appeal Justice Kaus stated that "de-identifying" information for use in an assessment appeals board proceeding also violates the law:

Obviously this provision ["the assessor shall not display any document relating to the business affairs ... of another"] cannot be circumvented by withholding the document and displaying copies or summaries containing the same information. (Id. at 416-417.)

3. The information the SBE declined to disclosed in Trailer Train was only the identities of the 3rd parties who owned the confidential information. (See Annotation No. 260.0035, 2nd paragraph.) In addition, the property involved in Trailer Train was railcars and not real property land and improvements, as is typically the case in local assessment appeals board equalization proceedings. In local appeals board proceedings, assessors usually de-identify the owner of the information as well as the location of the property, the buyer and seller, the consideration paid, the actual or

projected income from the property, associated capitalization or discount rates, and other information. (The attachment from a recent assessment appeals board proceeding in Los Angeles County is representative: location, lessor/lessee, suite or unit number, and other information is not disclosed for comparable leases used by assessor's office.)

4. Trailer Train and Annotation No. 260.0095 are outdated and have been superseded by the SBE's Assessment Appeals Manual (2003) which states the SBE's latest position on this topic at page 81:

Should any such evidence include confidential information, it should only be admitted with the permission of the affected parties, or be deleted prior to introduction.

5. The taxpayer in Trailer Train did not have the right to cross-examine the evidence proffered by the SBE, but only the testimony of witnesses. SBE Property Tax Rule 313(e), which governs local assessment appeals board proceedings and was amended in 2000 (fourteen years after Trailer Train and six years after Annotation No. 260.0095), gives taxpayers the right to cross-examine "materials proffered as evidence." The parallel rule for handling of hearings before the SBE, Regulation 5523.7(e), does not give taxpayers the right to cross-examine "materials proffered as evidence."