

CALIFORNIA LAW REVISION COMMISSION

4000 MIDDLEFIELD ROAD, SUITE D-2
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(415) 494-1335



03/27/91

DATE & TIME: • April 11 & 12	PLACE: • Sacramento
• April 11 (Thursday) 1:30 pm - 6:00 pm -- State Capitol, Room 437	
• April 12 (Friday) 9:00 am - 2:00 pm -- State Capitol, Room 3191 [no lunch break]	
<p>NOTE: Changes may be made in this agenda, or the meeting may be rescheduled, on short notice. IF YOU PLAN TO ATTEND THE MEETING, PLEASE CALL (415) 494-1335 AND YOU WILL BE NOTIFIED OF LATE CHANGES.</p>	

FINAL AGENDA*for meeting of***CALIFORNIA LAW REVISION COMMISSION**Thursday, April 11, 1991

1. MINUTES OF JANUARY 10, 1991, COMMISSION MEETING (sent 1/28/91)

2. ADMINISTRATIVE ADJUDICATION

STUDY N-100 - ADMINISTRATIVE ADJUDICATION GENERALLY
Procedure on Study
Memorandum 91-17 (NS) (sent 3/5/91)

STUDY N-105 - EFFECT OF ALJ DECISION
Revised Draft
Memorandum 91-4 (NS) (sent 3/5/91)

STUDY N-106 - FACT FINDER IMPARTIALITY
Consultant's Background Study
Memorandum 91-6 (NS) (enclosed)
Background Study (sent 1/17/91)
First Supplement to Memorandum 91-6 (to be sent)

3. ADMINISTRATIVE MATTERS

PERSONNEL MATTERS

Memorandum 91-26 (JHD) (to be sent)

PROCEDURE FOR CIRCULATION OF FAMILY CODE DRAFTS FOR COMMENT

Memorandum 91-27 (NS) (to be sent)

First Supplement to Memorandum 91-27 (JHD) (to be sent)

Staff Draft (attached to First Supplement to Memorandum 91-27)

PRIORITIES, SCHEDULE FOR WORK, AND NEW TOPICS

Memorandum 91-20 (NS) (sent 2/11/91)

First Supplement to Memorandum 91-20 (SU) (sent 3/25/91)

COMMUNICATIONS FROM INTERESTED PERSONS

Friday, April 12, 1991

4. 1991 LEGISLATIVE PROGRAM

STATUS OF COMMISSION BILLS

Handout at Meeting

STUDY L-3018 - LITIGATION INVOLVING DECEDENTS

Transitional Issue

Memorandum 91-24 (SU) (sent 3/14/91)

First Supplement to Memorandum 91-24 (SU) (enclosed)

STUDY L-3046 - RECOGNITION OF AGENT'S AUTHORITY

Clarification of Standard

Memorandum 91-25 (SU) (enclosed)

5. STUDY F-3050/L-3050 - DONATIVE TRANSFERS OF COMMUNITY PROPERTY

Consultant's Background Study

Memorandum 91-19 (NS) (sent 3/7/91)

Background Study (attached to Memorandum 91-19)

First Supplement to Memorandum 91-19 (to be sent)

6. STUDY L-3044 - COMPREHENSIVE POWERS OF ATTORNEY STATUTE

Procedure for Consideration of Bar Comments

Memorandum 91-28 (SU) (enclosed)

7. STUDY L-3002 - RELOCATION OF POWERS OF APPOINTMENT FROM CIVIL CODE TO PROBATE CODE

Draft Statute

Memorandum 91-9 (SU) (sent 12/20/90; another copy sent 2/11/91)

8. STUDY L-3041 - PROCEDURE FOR CREDITOR TO REACH NONPROBATE ASSETS

Memorandum 91-10 (NS) (sent 12/18/90; another copy sent 2/11/91)

9. STUDY L-3051 - POUR-OVER WILL FOR CONSERVATEE

Memorandum 91-11 (RJM) (sent 12/14/90; another copy sent 2/11/91)

10. STUDY L-812 - INDEPENDENT ADMINISTRATION OF ESTATES ACT

Drafts of Tentative Recommendations

Memorandum 91-21 (RJM) Court-Supervised Preliminary Distribution
(sent 2/15/91)

Memorandum 91-18 (RJM) Preliminary Distribution Without Court
Supervision (sent 2/15/91)

11. STUDY L-3052 - NONPROBATE TRANSFER TO TRUSTEE NAMED IN WILL

Draft of Tentative Recommendation

Memorandum 91-13 (RJM) (sent 3/5/91)

12. STUDY L-3053 - TRUSTS FOR INCAPACITATED PERSONS

Memorandum 91-16 (SU) (sent 3/5/91)

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MEETING SCHEDULE

April 1991

Apr. 11 (Thur.) 1:30 p.m. - 6:00 p.m. Sacramento
Apr. 12 (Fri.) 9:00 a.m. - 2:00 p.m.

May 1991

May 9 (Thur.) 1:30 p.m. - 6:00 p.m. Los Angeles
May 10 (Fri.) 9:00 a.m. - 2:00 p.m.

June 1991

June 13 (Thur.) 1:30 p.m. - 6:00 p.m. Sacramento
June 14 (Fri.) 9:00 a.m. - 2:00 p.m.

July 1991

July 18 (Thur.) 1:30 p.m. - 6:00 p.m. San Diego
July 19 (Fri.) 9:00 a.m. - 2:00 p.m.

August 1991

No Meeting

September 1991

Sep. 12 (Thur.) 1:30 p.m. - 6:00 p.m. San Francisco
Sep. 13 (Fri.) 9:00 a.m. - 2:00 p.m.

October 1991

Oct. 10 (Thur.) 1:30 p.m. - 6:00 p.m. Sacramento
Oct. 11 (Fri.) 9:00 a.m. - 2:00 p.m.

November 1991

Nov. 14 (Thur.) 1:30 p.m. - 6:00 p.m. Los Angeles
Nov. 15 (Fri.) 9:00 a.m. - 2:00 p.m.

December 1991

No Meeting

MINUTES OF MEETING
of
CALIFORNIA LAW REVISION COMMISSION
April 11-12, 1991
SACRAMENTO

A meeting of the California Law Revision Commission was held in Sacramento on April 11-12, 1991.

Commission:

Present:	Roger Arnebergh Chairperson	Arthur K. Marshall Forrest A. Plant
	Edwin K. Marzec Vice Chairperson	Sanford Skaggs Ann E. Stodden
Absent:	Bill Lockyer Senate Member	Bion M. Gregory Legislative Counsel
	Terry B. Friedman Assembly Member	

Staff:

Present:	John H. DeMouly Nathaniel Sterling	Stan Ulrich Robert J. Murphy III
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Consultants:

Michael Asimow, Administrative Law (April 11)
Edward G. Halbach, Jr., Probate Law (April 12)
Jerry Kasner, Community Property (April 12)
Preble Stolz, Administrative Law (April 11)
Robert J. Sullivan, Administrative Law (April 11)
Richard K. Turner, Administrative Law (April 11)

Other Persons:

Joni S. Ackerman, Legislative Committee, Probate, Trust and Estate Planning Section, Beverly Hills Bar Association, Los Angeles (April 12)
Larry Alamao, Department of Real Estate, Sacramento (April 11)
Seymour R. Appleby, California Probate Referees Association, Hayward (April 12)
Susan Buzynski, Public Employees' Retirement System, Sacramento (April 11)
Steve Cohn, Energy Commission, Sacramento (April 11)
Michael Day, Public Utilities Commission, San Francisco (April 11)
Michael D'Onofrio, Association of California State Attorneys and Administrative Law Judges, Sacramento (April 11)
Karl Engeman, Director, Office of Administrative Hearings, Sacramento (April 11)
Margaret Farrow, Office of Administrative Hearings, Sacramento (April 11)
Gary Gallery, Chief Administrative Law Judge, Public Employment Relations Board, Sacramento (April 11)

Don Green, Executive Committee, State Bar Estate Planning, Trust and Probate Law Section, Sacramento (April 12)
Bill Heath, California School Employees Association, San Jose (April 11)
Gary Jugum, Assistant Chief Counsel, State Board of Equalization, Sacramento (April 11)
Harry LeVine, Department of Insurance, San Francisco (April 11)
Daniel Louis, Department of Social Services, Sacramento (April 11)
Tim McArdle, Chief Counsel, California Unemployment Insurance Appeals Board, Sacramento (April 11)
Melanie McClure, State Teachers' Retirement System, Sacramento (April 11)
Robert A. Miller, Department of Consumer Affairs, Sacramento (April 11)
Prudence Poppink, Senior Counsel, Fair Employment and Housing Commission, San Francisco (April 11)
Carol A. Reichstetter, Probate and Trust Law Section, Los Angeles County Bar Association, Los Angeles (April 12)
Terry Ross, Executive Committee, State Bar Estate Planning, Trust and Probate Law Section, Mill Valley (April 12)
Steve Ryan, El Dorado Hills (April 11)
Marilyn Schaff, Department of Motor Vehicles, Sacramento (April 11)
Willard A. Shank, Member, Public Employment Relations Board, Sacramento (April 11)
John Sikora, Association of California State Attorneys and Administrative Law Judges, Sacramento (April 11)
Mikki Bako Sorensen, Assembly Judiciary Committee, Sacramento (April 12)
Bob Temmerman, Executive Committee, State Bar Estate Planning, Trust and Probate Law Section, Campbell (April 12)
John Wagner, Administrative Law Judge, Office of Administrative Hearings, Sacramento (April 11)
Stuart Wein, Occupational Safety and Health Appeals Board, Sacramento (April 11)
James Wolpman, Agricultural Labor Relations Board, Sacramento (April 11)
Shirley Yawitz, California Probate Referees Association, San Francisco
Richard Younkin, Secretary and Deputy Commissioner, Workers' Compensation Appeals Board, San Francisco (April 11)

ADMINISTRATIVE MATTERS

APPROVAL OF MINUTES OF JANUARY 10, 1991, MEETING

The Commission approved the Minutes of the January 10, 1991, Commission Meeting as submitted by the staff.

TIME AND PLACE OF MEETINGS

The Commission changed the location of the May 9-10 meeting from Los Angeles to Sacramento. The May 9 session should begin at 11:00 am.

APPOINTMENT OF COMMISSIONERS

Vice Chairperson Marzec reported that the Governor's office lacks records of individual Commissioners, and Commissioners should fill out and submit position application forms for their records. Mr. Marzec's conversations with the Governor's Office also indicate that they are aware of the vacancy on the Commission but are unable to get to it immediately. They will make an effort to fill the vacancy as soon as reasonably possible.

PROCEDURE FOR CIRCULATION OF FAMILY CODE DRAFTS FOR COMMENT

The Commission considered Memorandum 91-27 and the First Supplement to Memorandum 91-27, relating to the procedure for circulation of Family Code drafts for comment. After considerable discussion, the Commission decided that interested persons should receive notice of the availability of the Family Code draft for review at a charge of up to \$15 per copy, as appropriate. The notice should indicate the charge is imposed due to budget constraints. Copies should be made available free of charge to legislators, elected state officials, and Commission consultants. Interested bar associations should receive one or two free copies, in the discretion of the Executive Secretary. The staff should prepare a memorandum outlining a general policy relating to distribution of Commission materials on all subjects for the next fiscal year in light of the Commission's actual budget for the year.

PRIORITIES, SCHEDULE FOR WORK, AND NEW TOPICS

The Commission considered Memorandum 91-20 and the First Supplement to Memorandum 91-20, together with the Second Supplement to Memorandum 91-20, which was distributed at the meeting, relating to the Commission's priorities, schedule for work, and new topics for the coming year. The Commission decided to continue to press the administrative law study on a priority basis, along with the Family Code. Resolution of MacDonald case problems should also be expedited with a view to legislation for next session. The other issues suggested by the staff in the memorandum and supplements, including community property, real property, and creditors' remedies problems, were left to staff discretion to work into the Commission's agenda as

the subject merits and as staff and Commission time becomes available. Included on this list of issues should be transmutation and other matters raised by Professor Kasner in the MacDonald study, and the Commission's statutory mandate to review the exemptions from execution every ten years. With respect to the exemptions from execution, one possible way to handle it is to circulate a tentative recommendation indicating no Commission recommendations because of ongoing legislative involvement in the area, and seeing whether any of the comments on the tentative recommendation reveal any problems.

1991 LEGISLATIVE PROGRAM

The Assistant Executive Secretary made the following report on the Commission's 1991 legislative program.

PASSED FIRST HOUSE

SENATE CONCURRENT RESOLUTION 4 (SENATOR LOCKYER) - Continues Authority of California Law Revision Commission to Study Topics Previously Authorized for Study
Approved by Senate on March 21.

PASSED POLICY COMMITTEE IN FIRST HOUSE

ASSEMBLY BILL 793 (ASSEMBLY MEMBER POLANCO) - Elimination of Seven-Year Limit for Durable Power of Attorney for Health Care
Approved unanimously by Assembly Judiciary Committee on April 10.

SENATE BILL 256 (SENATOR BEVERLY) - Commercial Real Property Leases: Remedies for Breach of Assignment or Sublease Covenant; Use Restrictions
Approved by Senate Judiciary Committee on March 19, with clarifying language that the remedies provided in the bill are "subject to any applicable defense, whether legal or equitable, including, but not limited to, waiver and estoppel". On special consent calendar for Senate for April 11.

INTRODUCED

ASSEMBLY BILL 1577 (ASSEMBLY MEMBER SHER) - Uniform Statutory Rule Against Perpetuities

We will add to this bill the recommendation on Application of Marketable Title Statute to Executory Interests, approved at the January 1991 meeting. Set for hearing in Assembly Judiciary Committee, Subcommittee on Administration of Justice, on April 30.

SENATE BILL 271 (SENATOR KOPP) - TOD-Beneficiary Designation for Vehicles and Certain Other State-Registered Property

This bill will become an omnibus probate bill, including the State Bar's revised statutory will form, other State Bar Conference of Delegates proposals, and the Law Revision Commission's general probate recommendations. The staff understands that the Legislative Counsel has raised concern that some of the general probate recommendations may be beyond the subject of the bill; we will make an effort to include as much as can be included. If any of the general probate recommendations proves to be controversial and cannot be simply resolved, it will be dropped from the omnibus bill so as not to jeopardize enactment of the rest of the bill. Set for hearing in Senate Judiciary Committee on April 23.

The Executive Secretary reported opposition of the Departments of Motor Vehicles and Housing to the TOD provisions of the bill; DMV opposition is based on an estimated \$400,000 cost. The Commission's staff has met with representatives of DMV and Senator Kopp's office, and worked out language to limit the bill to one owner and one beneficiary, with a statutory fee and a deferred operative date to allow for reprogramming computers. It is not clear whether this will completely eliminate the opposition.

The staff should make clear to the legislative committees that the Commission's sponsorship of this bill only extends to matters on which the Commission has made recommendations, and does not extend to matters sponsored by the State Bar.

SENATE BILL 896 (SENATOR MELLO) - Urgency Probate Bill

This bill makes only technical, noncontroversial corrections in the new Probate Code. Set for hearing in Senate Judiciary Committee on May 14.

ARRANGEMENTS PENDING FOR INTRODUCTION

(1) General Probate Bill

This bill will contain the following recommendations:

- Debts That Are Contingent, Disputed, or Not Due
- Remedies of Creditor Where PR Fails to Give Notice
- Repeal of Civil Code Section 704 (U. S. Bonds)
- Disposition of Small Estate Without Probate
- Right of Surviving Spouse to Dispose of Community Property
- Litigation Involving Decedents
- Compensation in Guardianship and Conservatorship Proceedings
- Gifts in View of Impending Death
- Access to Decedent's Safe Deposit Box
- Technical and Minor Substantive Revisions

Senator Kopp has agreed to amend these recommendations into SB 271.

If an opportunity presents itself we will amend into this bill or another bill the Civil Code Section 2476 revision relating to the certificate of acknowledgment of a notary public in a statutory form power of attorney, approved at the January 1991 meeting.

(2) Powers of Fiduciaries

At present we do not have an author for this bill. It will contain the following recommendations:

- Recognition of Trustee's Powers
- Recognition of Agent's Authority Under Statutory Form Power of Attorney

If we can eliminate banking and title insurance industry opposition, it may be possible to add this to one of our other probate bills.

(3) Repeal of In-Law Inheritance

At present we do not have an author for this bill. It is now supported by the Estate Planning, Trust and Probate Law Section of the State Bar, the Probate and Trust Law Section of the Los Angeles County Bar Association, the Probate, Trust & Estate Planning Section of the Beverly Hills Bar Association, the California Association of Public Administrators, Public Guardians, and Public Conservators, and a number of individual lawyers.

STUDY F-3050 - DONATIVE TRANSFERS OF COMMUNITY PROPERTY

The Commission considered Memorandum 91-19 and the Consultant's Background Study relating to donative transfers of community property. The Commission's consultant, Professor Kasner, summarized the background study for the Commission.

Professor Halbach indicated his general agreement with the study, particularly the portions relating to transmutations. He also suggested, with respect to the issues relating to beneficiary designations, that the Commission consider the possibility of (1) allowing the consenting spouse to dispose of the spouse's share of the community property by an express provision in a will notwithstanding the prior consent, and (2) if the consenting spouse does not address the matter in the will, allowing the other spouse full authority to make beneficiary changes and otherwise deal with the community property after the death of the consenting spouse.

Representatives of the State Bar Association, Los Angeles County Bar Association, and Beverly Hills Bar Association estate planning and probate sections all indicated that they were actively studying these problems and were committed to give the Commission their input on the issues at forthcoming meetings.

The Commission discussed the immediate problems facing estate planners and the need for prompt attention to the problems created by the MacDonald case. The Commission decided to proceed with the objective of legislation for the 1992 legislative session directed to the problems surrounding consents to beneficiary designations. For this purpose, the staff should prepare for the next Commission meeting a memorandum that summarizes the various policy issues raised in the

consultant's background study and that presents approaches proposed by the consultant as well as by interested groups and persons and by the staff.

The beneficiary designation issues should take priority, but the Commission will also consider on a lower-priority basis collateral issues raised in the background study and by other persons. These issues include whether the transmutation statute should be modified, whether the law governing community rights in life insurance requires further clarification, whether the law relating to marital and premarital agreements should be harmonized, whether community property presumptions are still needed, whether the rules governing separate and community rights in the case of property improvement should be further adjusted, and whether the statute providing for unilateral severance of joint tenancy real property should be extended to personal property such as securities. The impact of the terminable interest rule, and whether it has been repealed for purposes of rights at death, may be considered as a collateral matter or may be considered in connection with beneficiary designation issues, depending on how the Commission's recommendations develop.

STUDY L-812 - INDEPENDENT ADMINISTRATION OF ESTATES ACT
(COURT-SUPERVISED PRELIMINARY DISTRIBUTION)

The Commission considered Memorandum 91-21 and attached staff draft of a *Tentative Recommendation relating to Court-Supervised Preliminary Distribution Under the Independent Administration of Estates Act*. Team 1 of the State Bar Estate Planning, Trust and Probate Law Section advised that Team 1 believes Section 11623 of the Probate Code is a useful section and should be kept. Team 1 and the Executive Committee of the Probate and Trust Section of the Los Angeles County Bar supported the amendment to Section 11623 proposed in the *Tentative Recommendation*.

The Commission approved the proposed amendment to Section 11623 to be amended into one of the Commission's probate bills at the current session without being further circulated for comment.

The Commission considered Memorandum 91-18 and attached staff draft of a *Tentative Recommendation relating to Preliminary Distribution Without Court Supervision Under the Independent Administration of Estates Act*. The State Bar Estate Planning, Trust and Probate Law Section requested the following revisions to proposed new Section 10520 of the Probate Code:

Prob. Code § 10520 (added). Preliminary distribution of specified personal property

10520. (a) If the time for filing claims has expired and it appears that the distribution may be made without loss to creditors or injury to the estate or any interested person, the personal representative has the power to do the following:

(1) (a) To make preliminary distribution of ~~interest and~~ income received during administration to the persons entitled under Chapter 8 (commencing with Section 12000) of Part 10.

(2) (b) To make preliminary distribution to ~~specifie the~~ devisees entitled to the property under the decedent's will of household furniture and furnishings, automobiles, clothing, jewelry, and personal effects tangible articles of a personal nature, not to exceed a total value of fifty thousand dollars (\$50,000) to all devisees in the aggregate .

(3) (c) To make preliminary distribution of cash to ~~the~~ general pecuniary devisees ~~entitled to it under the decedent's will~~ , not to exceed ten thousand dollars (\$10,000) to any one devisee.

~~(b) Notwithstanding subdivision (a), distribution may not be made under this section to the personal representative.~~

The Commission asked the staff to bring back for Commission consideration both versions of Section 10520 -- the version in the staff draft of the *Tentative Recommendation* and the revised version above. The Commission had reservations about deleting subdivision (b) from Section 10520 as suggested by the State Bar.

STUDY L-1048 - SHORTENING TIME FOR NOTICE
UNDER PROBATE CODE SECTION 1203

The Commission considered Memorandum 91-30 concerning a technical problem with the Probate Code provisions relating to shortening time for notice of hearing. The Commission approved the proposed amendment to make clear that the court may shorten time unless a specific section

governing notice of a hearing provides that the time may not be shortened. This amendment will be included in the urgency probate bill (SB 896).

STUDY L-3002 - POWERS OF APPOINTMENT

The Commission considered Memorandum 91-9 concerning the proposal to relocate the power of appointment statute from the Civil Code to the Probate Code. The Commission also considered a letter from the Probate and Trust Law Section of the Los Angeles County Bar Association distributed at the meeting. (See Exhibit 1.) The staff reported that research did not indicate any need to make a general substantive review of the power of appointment statute since there did not appear to be any major developments since the statute was enacted. The Commission decided that the necessary amendments to move the statute should be included in the general probate bill (SB 271) in the current legislative session, if it is feasible to do so. The staff was directed to prepare the necessary amendments. Any known substantive issues concerning the statute, such as the rules governing exercise of a power of appointment by a residuary clause in a will, should be outlined in a memorandum for the next meeting so that the Commission will have the positions of the various bar groups.

STUDY L-3010 - TRUSTEES' FEES

The Commission deferred consideration of Memorandum 91-29 concerning the California Bankers Association's proposal to make a number of amendments in the trustees' fees provisions and to include these amendments in the Commission's urgency probate bill. A letter from Irwin D. Goldring concerning the memorandum was distributed at the meeting. (See Exhibit 2.) Consideration was deferred because several Commissioners had not received the memorandum. The matter will be presented at the next meeting.

STUDY L-3018 - LITIGATION INVOLVING DECEDENTS

The Commission considered Memorandum 91-24 and the First Supplement thereto concerning transitional provisions needed in the *Recommendation Relating to Litigation Involving Decedents*, which is part of the Commission's 1991 legislative program. The Commission approved the suggested revisions.

STUDY L-3044 - COMPREHENSIVE POWERS OF ATTORNEY STATUTE

The Commission considered Memorandum 91-28 which suggested that the staff meet with bar groups and interested persons to work on the technical details of the draft comprehensive powers of attorney statute and then present a revised draft, outlining the policy issues and unresolved technical issues, at a future meeting. The Commission approved the suggested approach.

STUDY L-3046 - RECOGNITION OF AGENT'S AUTHORITY

The Commission considered Memorandum 91-25 concerning clarification of the standard for requiring third persons to recognize the authority of an agent. The Commission approved the revision proposed to satisfy objections from the California Land Title Association.

STUDY L-3050 - DONATIVE TRANSFERS OF COMMUNITY PROPERTY

See Study F-3050, above.

STUDY L-3051 - POUR-OVER WILL FOR CONSERVATEE

The Commission considered Memorandum 91-11 and the First Supplement concerning pour-over will for a conservatee. The Commission decided to amend Probate Code Section 2580 substantially as follows:

Probate Code § 2580 (amended). Petition to authorize proposed action

2580. (a) The conservator or other interested person may file a petition under this article for an order of the court authorizing or requiring the conservator to take a proposed action for any one or more of the following purposes:

(1) Benefiting the conservatee or the estate.

(2) Minimizing current or prospective taxes or expenses of administration of the conservatorship estate or of the estate upon the death of the conservatee.

(3) Providing gifts for such purposes, and to such charities, relatives (including the other spouse), friends, or other objects of bounty, as would be likely beneficiaries of gifts from the conservatee.

(b) The action proposed in the petition may include, but is not limited to, the following:

(1) Making gifts of principal or income, or both, of the estate, outright or in trust.

(2) Conveying or releasing the conservatee's contingent and expectant interests in property, including marital property rights and any right of survivorship incident to joint tenancy or tenancy by the entirety.

(3) Exercising or releasing the conservatee's powers as donee of a power of appointment.

(4) Entering into contracts.

(5) Creating for the benefit of the conservatee or others, revocable or irrevocable trusts of the property of the estate, which trusts may extend beyond the conservatee's disability or life. The court's order may authorize or require the conservator to transfer to the trust so created any property unintentionally omitted from the trust.

(6) Exercising options of the conservatee to purchase or exchange securities or other property.

(7) Exercising the rights of the conservatee to elect benefit or payment options, to terminate, to change beneficiaries or ownership, to assign rights, to borrow, or to receive cash value in return for a surrender of rights under any of the following:

(i) Life insurance policies, plans, or benefits.

(ii) Annuity policies, plans, or benefits.

(iii) Mutual fund and other dividend investment plans.

(iv) Retirement, profit sharing, and employee welfare plans and benefits.

(8) Exercising the right of the conservatee to elect to take under or against a will.

(9) Exercising the right of the conservatee to disclaim any interest that may be disclaimed under Part 8 (commencing with Section 260) of Division 2.

(10) Exercising the right of the conservatee (i) to revoke a revocable trust or (ii) to surrender the right to revoke a revocable trust, but the court shall not authorize or require the conservator to exercise the right to revoke a revocable trust if the instrument governing the trust (i) evidences an intent to reserve the right of revocation exclusively to the conservatee, (ii) provides expressly that a conservator may not revoke the trust, or (iii) otherwise evidences an intent that would be inconsistent with authorizing or requiring the conservator to exercise the right to revoke the trust.

(11) Making an election referred to in Section 13502 or an election and agreement referred to in Section 13503.

STUDY L-3052 - NONPROBATE TRANSFER TO A TRUSTEE
NAMED IN DECEDENT'S WILL

The Commission considered Memorandum 91-13 and attached staff draft of a *Tentative Recommendation relating to Nonprobate Transfer to a Trustee Named in Decedent's Will*. The proposal was supported by the Executive Committee of the State Bar Estate Planning, Trust and Probate Law Section.

The proposal was also supported by the Executive Committee of the Probate and Trust Section of the Los Angeles County Bar, with the caveat that it should not change existing law requiring the decedent's will to be admitted to probate before the transfer is made outside probate to a trustee named in the will. The Commission asked the staff to research this question, and to make clear in the *Tentative Recommendation* that the will must be admitted to probate.

The Commission asked the staff to bring the *Tentative Recommendation* back to the Commission after addressing the foregoing question.

STUDY L-3053 - TRUSTS FOR INCAPACITATED PERSONS

The Commission considered Memorandum 91-16 concerning a suggestion to consider studying the concept of a state-sanctioned family trust fund for disabled and incapacitated persons. The Commission also

considered a letter from the Probate and Trust Law Section of the Los Angeles County Bar Association distributed at the meeting. (See Exhibit 3.) The Commission decided not to study this subject. Many interest groups are active in the field and can be expected to promote legislation if there is a need. Representatives of the Executive Committee of the State Bar Estate Planning, Trust and Probate Law Section also suggested that private arrangements and regional organizations are coping with the problems of long-term care for the developmentally disabled.

STUDY N-100 - ADMINISTRATIVE ADJUDICATION GENERALLY

The Commission considered Memorandum 91-17, relating to the procedure being followed on the administrative adjudication study. The staff reviewed the material in the memorandum with the Commission. This item was informational only; no action was required or taken on it.

The Commission also greeted three of its new consultants, Richard Turner and Robert Sullivan of Sacramento and Professor Preble Stolz of Boalt Hall, who have been named consultants to provide the Commission with differing perspectives at meetings.

STUDY N-105 - EFFECT OF ALJ DECISION

The Commission began, but did not complete, consideration of Memorandum 91-4 and the First Supplement to Memorandum 91-4. The First Supplement contained letters from the Department of Consumer Affairs and the Board of Prison Term; copies were distributed at the meeting, and will be distributed in due course after the meeting. The memoranda relate to the effect of the administrative law judge's decision and appeals within the agency.

The Commission began its consideration by addressing the issue raised by the staff whether the effort to draft a single administrative procedure act that can be applied uniformly to all state agencies is creating in this area a statute that is unduly complex. Professor Asimow noted that such a scheme is workable, and has worked well in

other jurisdictions; the flexibility of agencies to adopt regulations that vary the act is desirable and will make the statute more usable. Consultants Turner and Sullivan felt it would be desirable for practitioners who appear before agencies to have a basic procedural act, with the opportunity for narrowly defined variation by regulation. Professor Stolz felt it would be worthwhile to cover local agency adjudication as well. Suggestions for agencies or agency functions that might be exempted from a uniform administrative adjudication act included ratemaking by the Public Utilities Commission and adjudications by the Coastal Commission and the Water Resources Control Board.

Michael Day of the Public Utilities Commission indicated that the ratemaking procedures of PUC would be a likely candidate for exemption from the standardized administrative adjudication rules because of the specialized nature of the practice and the legislative and policy aspects of ratemaking proceedings. Bill Heath of the California School Employees Association indicated that they appear before a number of different agencies, and that they do not have a problem finding the applicable procedures; their problem is with procedures that may not be fair, particularly in the Department of Motor Vehicles and at the local level; also, they believe the Public Employment Relations Board has excellent adjudicatory procedures adapted to its mission, and they would not like to see the procedures statutorily altered in a way that would hamper PERB proceedings. Steve Ryan, a hearing officer with the State Board of Equalization, appeared in a personal capacity to inform the Commission about adjudicatory procedures at SBE; he distributed to the Commission relevant excerpts from SBE publications (Exhibit 4); he noted that the hearing officer functions within SBE are involved with excise taxes, which have a statutory rather than a constitutional basis. Dan Louis of the Department of Social Services expressed concern that the statute could impose hearing requirements that do not now exist; the staff noted that the draft under consideration by the Commission is limited to hearings required by the constitution or statute. Marilyn Schaff of the Department of Motor Vehicles noted that drivers license revocation hearings are conducted by lay hearing officers who both present the department's case and make the decision; if separation of functions and other formalities of the administrative

procedure act were applied to these types of adjudicatory proceedings, the cost to DMV would be substantial; Professor Asimow suggested this type of procedure should be recognized in the statute.

The Commission felt it is premature in the study to exempt particular agencies or programs from the proposed uniform act. As the statute begins to develop, the need for exemptions may or may not become more apparent. But for now, the Commission will proceed with the goal of a uniform statute applicable to all state agencies.

The Commission made the following decisions with respect to the draft attached to Memorandum 91-4:

§ 610.310. Decision. The section should state that, "Nothing in this section limits the precedential effect of a decision." Also, to address concerns about the need to make policy in the context of an adjudicatory proceeding, the Commission will receive suggestions from its consultant for a "conference" type adjudicatory proceeding which may lend itself to policy-type decisions. The Comment should be expanded to clarify the meaning of the phrase "particular applicability", as used in the section. The Comment should also make clear that the statute is not intended to expand the types of cases in which an adjudicatory proceeding, whether formal or informal, is required.

§ 612.030. Application of division notwithstanding exemption. This section will be suppressed for the time being, until exemptions from the new administrative procedure act are considered. Meanwhile, the staff will try to improve the wording of the section for clarity.

§ 613.020. Mail. This section was approved as revised by the staff.

§ 640.010. When adjudicative proceeding required. The statute should make clear that the ability to settle cases is not impaired by the hearing requirement. Thought also should be given to making the least formal type of hearing procedure the basic procedure applicable in all cases unless a more formal hearing procedure is required by a court's due process finding, by statute, or by agency regulation. Or, an agency might be able to select any of the statutory hearing models without first adopting a regulation.

§ 640.210. Definitions. Thought should be given to structuring the definitions in such a way that they do not imply that only an OAH hearing officer is entitled to be called an "administrative law judge."

§ 640.260. Voluntary temporary assignment of hearing personnel. This section should be removed from the OAH article of the draft so as to avoid the implication that OAH ALJs are entitled to a transfer preference. The Commission asked the director of OAH to give the Commission his thoughts about the feasibility of this scheme, with the idea of developing separate legislation on it for next session.

§ 640.290. Study of administrative law and procedure. Language should be incorporated in this section protecting the confidentiality of confidential personal records.

§ 642.710. Proposed and final decisions. Subdivision (b) of this section allows the agency by regulation to vary the 30-day period within which the presiding officer must issue a proposed decision, unless the presiding officer is from OAH. The Commission deleted the OAH limitation, allowing any agency to vary the 30-day period. The staff should consider language to provide that a failure of the presiding officer to meet the time limit does not inure to the benefit of the party, or that the failure does not prejudice the right of the agency to take action against the party. Mr. Louis of DSS noted the problem of temporary suspension orders expiring before the agency has time to act on the presiding officer's proposed decision; he agreed to provide the Commission with suggested language addressed to this problem.

APPROVED AS SUBMITTED _____

APPROVED AS CORRECTED _____ (for
corrections, see Minutes of next
meeting)

Date

Chairperson

Executive Secretary

CAROL A. REICHSTETTER
ATTORNEY AT LAW
1163 WEST 27TH STREET
LOS ANGELES, CALIFORNIA 90007
(213) 747-6304

RECEIVED

APR 05 1991

RECEIVED

April 4, 1991

Nathaniel Sterling
Assistant Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

Re: Study L-3002 (Relocation of Powers of Appointment from
Civil Code to Probate Code)

Dear Mr. Sterling:

The Executive Committee of the Probate and Trust Section of the Los Angeles County Bar Association has reviewed the draft statute proposing a move of Civil Code Sections 1380.1 to 1392.1 into Division 2 of the Probate Code. As a member of the Executive Committee, I have been asked to convey to the Commission our observations.

We support the relocation but do not feel that there is any need to investigate making substantive changes in these sections.

Thank you for your consideration of these comments. I expect to attend the April meeting and will be glad to answer any questions that may arise.

Very truly yours,



Carol A. Reichstetter

cc: Members of the Executive Committee

Study L-3010

EXHIBIT 2

Minutes, April 11-12, 1991

VIA TELECOPIER

IRWIN D. GOLDRING
ATTORNEY AT LAW
1925 CENTURY PARK EAST, SUITE 960
LOS ANGELES, CALIFORNIA 90067
TELEPHONE (213) 201-0304
TELECOPIER (213) 277-7994

April 10, 1991

California Law Revision Commission
4000 Middlefield Road, #D-2
Palo Alto, California 94303-4739

Attention: Stan Ulrich
Re: Memorandum 91-29

Gentlemen:

I am writing to express my personal opinion in regard to Memorandum 91-29. Because of the short notice which we received in regard to this matter it was not possible to have a meeting of Team 2 to consider this memo, nor to have it reviewed by the Executive Committee of the Estate Planning, Trust and Probate Law Section.

I was present at the various Commission meetings during which the discussion took place which led up to the recommendation of Probate Code Section 15686. As the Commission will recall these discussions took place over several months and the bankers had ample opportunity to present, and did present, their position, particularly in regard to the matter of the definition of fees, which is the subject of the first change suggested by the CBA [Subsection (a)].

I believe that the Section was written as it is now because of the concern that were it more limited as the word "means" would limit the definition, it would give the trust institutions opportunity to add other fees and charges, such as outside contracted accounting services or investment advice, or the like, whereas the intention was that the banks not be able to circumvent the intent of this Section by designating new charges outside of a limited definition of "trustee's fees".

In regard to the second change [to Subsection (b)] although I personally have no objection to the limitation suggested by the bank, I know that at least the Los Angeles Superior Court in trust matters requires that "All petitions involving a testamentary trust or an inter vivos trust under Probate Code Section 17200 must set forth the names and last known addresses of all beneficiaries whether their interests are vested or contingent. This is all persons in being who shall or may participate in the income or corpus of the trust" [Los Angeles

California Law Revision Commission
April 10, 1991
Page Two

Superior Court Probate Policy Memorandum 20:2.01].

As I said, the Executive Committee of the Estate Planning, Trust and Probate Law Section has not had an opportunity to consider this matter but I would guess that its position would be as it was in the past in supporting the Section as it now reads, particularly Subsection (a). This matter certainly is not non-controversial as suggested by the CBA.

Very truly yours,



IRWIN D. GOLDRING

IDG:hs

cc: Bruce S. Ross, Esq.
William V. Schmidt, Esq.
Robert E. Temmerman, Jr., Esq.
Sterling L. Ross, Jr., Esq.
Valerie J. Merritt, Esq.

CAROL A. REICHSTETTER
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CA LAW REV COMMISSION

APR 05 1991

RECEIVED

April 4, 1991

Nathaniel Sterling
Assistant Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

Re: Study L-3053 (Trusts for Incapacitated Persons)

Dear Mr. Sterling:

The Executive Committee of the Probate and Trust Section of the Los Angeles County Bar Association has reviewed the proposal contained in Memorandum 91-16 regarding the possibility of a state-sanctioned family trust fund for disabled and incapacitated persons. As a member of the Executive Committee, I have been asked to convey to the Commission our observations.

The Executive Committee feels that an investigation should be undertaken as a project for Commission study, and that the staff be authorized to consult such experts as are available.

Thank you for your consideration of these comments. I expect to attend the April meeting and will be glad to answer any questions that may arise.

Very truly yours,



Carol A. Reichstetter

cc: Members of the Executive Committee

Study N-105

EXHIBIT 4

Minutes, April 11-12, 1991

**STATE BOARD
OF EQUALIZATION**

**Annual
Report
1988-89**

Highlights

The *Strategic Plan* underscores the Board's belief that the public interest is best served through sound administration of the tax laws.

This year is marked by several significant developments, the most noteworthy being the adoption of a *Strategic Plan* for program planning and passage of the Harris-Katz Taxpayers' Bill of Rights.

Other significant developments or achievements included: the creation of an independent Appeals Unit, taxpayer educational seminars, an extended office hours pilot project, a conference on tax issues for the entertainment industry, a pilot mail-order auditing project, progress in forms automation, and the creation of a simplified and less expensive pamphlet on New District Taxes.

Those and other developments are summarized below.

Strategic Planning

In 1988 the Board adopted a mission statement committing the agency to providing informative and responsive services to taxpayers and to providing fair, firm, and uniform enforcement of tax laws.

The goals developed by the Board state that the agency will

- Collect revenues effectively
- Be dedicated to leadership in the field of taxpayer services and information
- Be dedicated to leadership in the field of tax administration
- Improve services and productivity
- Maintain an effective communications system
- Maintain a professional and knowledgeable staff
- Promote a cohesive, unified organization.

Early in 1989 the Board finalized its first strategic plan for implementing its goals. The plan will enable the Board to respond aggressively to the many challenges and opportunities facing it.

The strategic planning process brought together managers from throughout the organization to define and articulate the organization's operating philosophy and vision for the future, to identify the significant issues which could impair or improve the Board's ability to attain its mission and goals, and to formulate strategies for dealing with those issues.

The *Strategic Plan* underscores the Board's belief that the public interest is best served through sound administration of the tax laws. It also emphasizes that this is best accomplished through programs which enable people to voluntarily comply with tax laws. As the plan states, "Providing quality services, products, and information to the public is essential, as is a firm enforcement program that ensures the public that everyone is paying their fair share."

The plan identifies seven strategic issues (i.e., challenges and opportunities) that must be addressed in order for the agency to achieve its mission and goals. Those issues are as follows: providing quality public service; ensuring compliance through education and enforcement; preparing for tax law change; ensuring an effective workforce; managing workload growth with limited resources; using advanced technology; and creating a quality workplace. Strategies have been adopted for dealing with each of those critical issues.

The *Strategic Plan* will provide continuing guidance to decision makers over the next several years and will be continually evaluated to determine whether new issues and strategies should be incorporated.

During 1988-89 the Board's business taxes audit program disclosed net deficiencies of \$418.6 million. Net tax deficiencies per audit hour for the fiscal year were \$359.98. Net tax deficiencies per dollar of cost were \$6.91 for the sales and use tax audit program.

Areas of Noncompliance

The Board is required by the Taxpayers' Bill of Rights bill to identify areas of the Sales and Use Tax Law with which taxpayers are not complying and to report its findings in the annual report. A permanent system for capturing needed data from the audit program was implemented September 1, 1989. Until this system was available for use, data was manually gathered on a sample basis through the audit program.

The sales and use taxes assessed or refunded as a result of the Board's audit program (for the period January 1, 1989 through June 30, 1989) are categorized in the tables on the left.

Of the taxpayers audited, 3 percent had failed to file tax returns for the audit period. In addition, 15 percent of the taxpayers used professional tax preparers.

Appeals Procedure (Petition Unit)

The Board provides an administrative appeals process for taxpayers who disagree with the results of an audit. This process normally begins with the taxpayer working directly with the auditor to resolve a dispute. If the dispute cannot be resolved, the taxpayer may meet with the auditor's supervisor, or from there, with a higher level Board representative.

The taxpayer may also petition for redetermination of audit findings through the Board's Petition Unit and, as part of their petition, may request a formal hearing from the newly formed Appeals Unit (please see "Year in Review" for a description of this unit).

Areas of Noncompliance	
Percentage	Areas of Noncompliance
20.6	Unreported ex-tax purchases from out-of-state vendors
17.7	Errors in claiming sales for resale
06.5	Property for own use purchased for resale in error
04.1	Taxable sales recorded but not reported
03.7	Errors involving leases of tangible personal property (excluding mobile transportation equipment)
03.4	Unreported sales of business assets
03.4	Unreported material costs by construction contractors
03.4	Errors involving leases of mobile transportation equipment
03.4	Tax on fuel oil not paid
18.8	Miscellaneous errors in a variety of areas

Type of Business Making Errors	
Percentage	Type of Business Making Errors
13.8	Distributors of heavy industrial equipment and machinery, such as factory or farming equipment
13.7	Transportation service companies, e.g., airlines or auto rental firms
09.6	Wholesalers of light industrial equipment and machinery, such as hospital or laundry equipment
09.6	Manufacturers of electronic equipment
05.8	Specialty stores, such as pet or toy stores
05.8	Construction contractors
05.8	Repair shops, such as auto repair
03.2	Manufacturers and wholesalers of household furniture and wearing apparel
03.2	Service businesses, such as advertising agencies
25.9	Various other types of businesses with small errors for each type

satisfied with the results—even those found to owe the state additional monies.

In another four-month project, districts provided questionnaires to a sampling of taxpayers, who were asked to evaluate the services of the Board related to the registration process. The results from this pilot project showed an overwhelming approval of those services.

In addition, in fiscal year 1989-90 District Offices will be distributing questionnaires that ask taxpayers to evaluate employee conduct and Board services.

Areas of Noncompliance

The Board is required by the bill to identify areas of the Sales and Use Tax Law with which taxpayers are not complying and to report its findings in the annual report. Findings for the period January 1, 1989, through June 30, 1989, are summarized under "Business Taxes" in the Operations section of this report.

Other Developments

New Appointment

John William Hagerty was appointed as Deputy Director, Property Taxes, in January of 1989. The Property Taxes Department is responsible for overseeing county assessment practices, recommending values for railroad and public utility companies, and administering the state's Timber Yield Tax program.

Hagerty brings a wealth of management experience to the job and has a long-time familiarity with state government, having served most notably as Executive Officer for the California Waste Management Board—part of an impressive 25 year

career. A graduate of California State University, Sacramento, Hagerty has held high-level positions with the Department of Health Services, the Department of Social Services, and the Employment Development Department.

New Appeals Unit

In February 1989 the Board created a new Appeals Unit. It reports directly to the Executive Director and is totally independent of audit staff. It is staffed by hearing officers whose role is to conduct a fresh and independent review of the facts. Taxpayers who do not agree with the findings of a hearing officer may request a hearing before the Members of the Board.

Extended Office Hours

A pilot project to evaluate the demand for extended office hours was implemented in January in the Fourth Equalization District's offices in Arcadia and Hollywood. Offices were kept open until 7 p.m. on Thursdays. The pilot project was scheduled to end in June 1989 but was extended until December.

In the first six months of operation, 672 taxpayers took advantage of the later office hours. Most participants learned of the new hours by telephoning prior to their visit. Attractive posters and flyers in the lobbies of Fourth Equalization District Offices also informed the public of the new program. In addition, news releases and inserts included in quarterly tax returns mailed to businesses in the Fourth Equalization District publicized the pilot project.

Taxpayers and staff were surveyed to assess their attitudes and perceptions about the extended office hours. For the most part, the program



John William Hagerty

TAXPAYERS'
BILL OF RIGHTS



a special edition

A Unit With Appeal

In Visalia: "The first thing that impressed me was that "This is a government agency who cares about the people."—excerpt from letter

Creation of a New Appeals Unit

The prospect of paying taxes is seldom met with enthusiasm, and one can well imagine the anxiety a taxpayer must feel when faced with the prospect of contesting or appealing a tax bill.

As stated in the introduction to the Taxpayers' Bill of Rights, "Taxes are the most sensitive point of contact between citizens and their government." Likewise, the process for dealing with disagreements between citizens and their government constitutes another sensitive point of contact. Citizens must feel they are treated fairly and impartially and that their concerns are taken seriously.

To help ensure a fair and impartial hearing process for taxpayer appeals, the Board has created an independent Appeals Unit, which began operations in February 1989. Reporting directly to the Executive Director the new unit is autonomous of the Board's Business Taxes Department and the Board's Legal Office.

Implementing A New Approach

If a taxpayer and the Board's audit staff cannot agree on the results of an audit, the taxpayer has the right to have his or her case reviewed at a hearing conducted by an Appeals Unit hearing officer. The officer takes a fresh and independent look at the facts and the law and recommends to the Board means for resolving the dispute.

Previously, the hearing officer's recommendations were reviewed by the Department of Business Taxes. Because this requirement tended to create the appearance of a lack of



objectivity and fairness in the hearing process the Board decided to remove the Department of Business Taxes from final review and to make the Appeals Unit an independent division within the agency.

Streamlining the Appeals Process

The Taxpayers' Bill of Rights required the Board, in cooperation with the State Bar, the California Society of Certified Public Accountants, other interested taxpayer groups, and the taxpayers' rights advocate, to develop a plan to reduce the time required to resolve appeals.

The unit identified several changes that enabled them to cut the time required for resolving petitions in half. Those changes included:

- **Increasing Production**

The first need was to increase production by changing the methods for presenting cases to the Board and by using overtime. Previously, hearing officers presented cases to the Board. Under the new procedure, only the chief of the Appeals Unit makes presenta-

tions to the Board. The time saved as a result of not having hearing officers appear before the Board is used to complete additional hearing reports. Since the unit was created (about ten months ago), production has increased substantially. Hearing officers have completed 698 decisions in that time—an average of nearly 70 per month. That rate compares with a four-year average of approximately 56 decisions per month under the previous system.

- **Developing New Procedures for Expediting Small Claims**

In a new procedure for hearing small claims, selected cases are heard and decided the same day. The decision is confirmed later in the form of a brief written decision (rather than the detailed formal decision and recommendation now used). Participation in this expedited procedure is voluntary.

- **Implementing Other Changes**

In addition, the Appeals Unit is working to automate manual processes and improve the monitoring of time frames.



STATE BOARD
OF EQUALIZATION

YOUR TAXPAYER



BILL OF RIGHTS



- The right to be free from harassment.
- The right to have the law administered uniformly.
- The right to have the audit completed within a reasonable time period.
- The right to an explanation of procedures used.

- The right to an explanation of the audit results.
- The right to disagree with the audit findings.

If your business records are audited, feel free to ask the auditor questions about the process and results, or talk with his/her supervisor.

YOUR RIGHT TO A HEARING

There are times when you, the taxpayer, may disagree with the conclusions of a Board audit.

When that happens, there are various informal processes available to you, to resolve those audit findings with which you disagree.

Some of the steps you have the right to take include the following:



- Consultation with the auditor and his/her supervisor.
- Discussion with a Board representative at your local district office.

- A hearing with a Hearing Officer from the Board's independent Appeals Unit.
- Board hearing before the five members of the State Board.

If you prevail or change your mind at any of the above steps, it would be unnecessary to proceed further. For more information on this process or your rights as they relate to a specific issue, contact your local Board office.

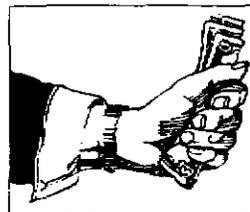
YOUR RIGHTS AT AN APPEALS UNIT HEARING

As part of the Appeals Unit hearing process, you have certain rights which you need to be aware of, including:

- The right to have the hearing at a Board Office, at a reasonable time.
- The right to have the hearing recorded, to know in advance that it will be recorded and to receive a copy of that recording, a fee for which may be required.
- The right to have an attorney, accountant or any other agent present at the hearing.
- The right to receive a written hearing report.

For more information about the Appeals process, contact your local Board office.

YOUR RIGHT TO REIMBURSEMENT OF FEES AND EXPENSES



You are entitled to be reimbursed for reasonable fees and expenses related to a hearing before the State Board of Equalization, if all of the following basic conditions are met:

- You must file a claim for the fees and expenses with the State Board of Control.



APPEALS

PROCEDURES

JUNE 1989

Pamphlet No. 17
LDA

b. After Completion of the Audit

After completion of the audit, discuss the audit thoroughly with the auditor. The auditor can at this time, correct any disputed items which you successfully convince him/her are erroneous.

Step 2. Consultation with Auditor's Field Supervisor

If you and the auditor are unable to agree on the auditor's recommendation, ask the auditor to arrange a meeting between you and his/her field supervisor. Explain your position to the field supervisor and what you think should be done to resolve any disagreement.

If any points of disagreement still exist after this conference, the audit will be specially marked to indicate that you do not concur with the results.

Step 3. Discussion at the Local Office—Notice of Determination

If the auditor submits your audit with the notation that you do not concur, you will ordinarily receive a letter from the local office giving you the opportunity to appear before a local Board representative for a discussion of your case before a billing is made.

This letter will give you ten (10) days within which to make an appointment for a discussion. The discussion will be informal and you may present any matter which you believe is pertinent. If, after the hearing the Board representative believes you have not paid the proper amount of tax, you will later be sent by mail from Sacramento Headquarters a Notice of Determination of the amount asserted to be underpaid.

You may not receive a notice for a discussion at the local office if a Statute of Limitation is involved or if the facts indicate a discussion would not be advisable. In such a case, a letter will be sent to you by the local office telling you that the audit has been forwarded to Sacramento Headquarters. Later you will be sent by mail a Notice of Determination from Sacramento without further communication from the local office.

Step 4. Petition for Redetermination

When you receive a Notice of Determination, you have 30 days from the date of mailing to file a Petition for Redetermination in all business tax cases except those pertaining to payment for Cigarette Tax stamps and meter register settings. In the latter case, Petitions for Redetermination must be filed within 10 days from the date of mailing the Notice of Determination, and the security may be adjusted by the Board as it may deem necessary.

Each petition must be in writing and filed with the Board. It should be sent to the State Board of Equalization, Petitions Unit, P.O. Box 942879, Sacramento, California 94279-0001.

Although your petition need not be in any particular form, it should identify the protested items and must contain a statement of the specific grounds or reasons why you believe the tax does not apply.

a. Presentation of Additional Records or Documents

Upon receipt of your petition, you may be asked to provide evidence to support your contention, or the district staff will be instructed to contact you to examine additional data.

b. Appeals Unit Hearings

If your petition cannot be resolved with the staff, you may request that the petition proceed to an Appeals Unit hearing. Appeals Unit hearings are presided over by Hearing Officers. Upon receipt of your request for a hearing, you will be notified of the time and place where you may present your case to a Hearing Officer.

NOTE: Appeals Unit hearings are not held for insurance tax cases. Insurance tax cases are heard directly by the members of the Board of Equalization.

The purpose of the Appeals Unit hearing is to establish the facts and to apply the law and regulations to these facts. If you have not yet submitted your arguments and supporting evidence and wish to do so, you should immediately submit them with your Response to Notice of Hearing.

At the hearing, the Hearing Officer will consider your arguments and any oral or written evidence that you present. A representative of the Board's Business Taxes Department will also be present to provide its position as to why the tax is due. After the hearing, the Hearing Officer will prepare a written Hearing Decision and Recommendation containing an analysis, conclusion, and recommendation on your case.

In the event you do not agree with the Hearing Officer's recommendation, you will have the option of requesting reconsideration of the case by the Hearing Officer and/or an oral hearing before the members of the State Board of Equalization. Information concerning the Request for Reconsideration procedure and the manner in which to request a Board hearing will accompany the Hearing Officer's Decision and Recommendation.

c. Board Hearings

This is a hearing before the members of the Board of Equalization. A Board hearing is available to any taxpayer who disagrees with the Hearing Officer's Recommendation. If you have requested such a hearing, you will be given notice of the time and place of the hearing. The Business Taxes Department may also request a hearing before the Board if it disagrees with the Hearing Officer's recommendation.

The Board Hearing Procedures Regulations are printed in this pamphlet beginning at Page 26. Sections 5001-5007 of the regulations are general provisions which apply to all hearings before the State Board of Equalization. Sections 5051-5059 cover petitions for redetermination of liability under the Sales and Use Tax, the Motor Vehicle Fuel License Tax, the Use Fuel Tax, the Alcoholic Beverage Tax, and the Cigarette Tax Laws. Petitions for reassessment and claims for refund of Insurance Tax and Energy Resources Surcharge are handled in a similar manner. Sections 5061-5067 of the regulations cover petitions for hearing in jeopardy determinations.

The Board hearing is not designed to accommodate the presentation of new arguments and/or evidence not previously considered by the Hearing Officer. As explained above, you should present your evidence and arguments prior to, or at the Appeals Unit hearing. If you discover new evidence and/or wish to make additional arguments after receiving the Hearing Officer's Decision and Recommendation, you should file a Request for Reconsideration with the Hearing Officer.

A number of Board hearings are scheduled for the same day. Experience has demonstrated that if new evidence and/or arguments are presented, the Board will generally order that the new evidence and/or arguments first be presented to the Hearing Officer for consideration. In order to avoid unnecessary delays in the consideration of your case and to assure an orderly and proper consideration of your case before the Board, both you and the Business Taxes Department should first submit all relevant evidence and arguments to the Hearing Officer.

Members of the Board, taxpayers, and representatives of the Business Taxes Department may question any witness. The Board will conclude the hearing by announcing its decision or, more frequently, by taking the matter under submission for later decision.

After the Board has heard your case and made the adjustments, if any, which it deems proper, a Notice of Redetermination will be issued. If the Board agrees that you owe no tax, the Redetermination will so indicate. If the Board decides that you owe tax, the Redetermination will show this. A Redetermination becomes final in 30 days from the date thereof, and if not paid by that time, a 10% penalty attaches. No further steps can be taken on the matter until the amount of the Redetermination has been paid.

Step 5. Claim for Refund

This step is available only for amounts which have been paid. After payment, if you still believe that the tax has been incorrectly determined, you may file a written claim for refund with the Board within:

- 6 months from the date the determination became final, or

5052. CONTENTS OF PETITION. Every petition for redetermination shall be in writing and shall state the specific grounds upon which the petition is founded. It shall be signed by the taxpayer, his authorized representative or any person directly interested. Any portion of the determination which the taxpayer concedes is owing by him should be indicated in the petition. The petition may be amended to state additional grounds at any time prior to the date the board issues its order or decision on the petition. (Amended February 6, 1968)

5053. STAFF HEARING. A petition for redetermination will be initially scheduled for a hearing before a hearing officer of the staff. It is expected that at the staff hearing a taxpayer will present all the evidence in his behalf to the extent that it is possible for him to do at that time. It is the primary purpose of the staff hearing to establish the facts in the case and the application thereto of the law and regulations. Statements of witnesses at the staff hearing need not be under oath or affirmation.

5054. BOARD HEARINGS — FUNCTION OF STAFF. Hearings before the board under the applicable statutory provisions are not in the nature of trials or contests between adverse parties. They are meetings of the board at which the taxpayer presents orally to the board his arguments for a reduction or cancellation of a liability previously determined against him or for a refund of tax previously paid. It is the duty of the staff of the board at hearings to assist the board in ascertaining the facts and in determining the correct application of the law and the regulations to the facts.

5055. CONSOLIDATION FOR HEARING. Where taxpayers so desire, two or more determinations or claims for refund may be consolidated for hearing when the facts and issues are similar and no substantial right of any party will be prejudiced.

5056. PRESENTATION OF MATTERS FOR CONSIDERATION. A member of the staff shall introduce the matter for consideration by an oral statement of the facts, the law applicable, the issues, and the tentative views of the staff. The taxpayer may then present his position to the board. He may appear in his own behalf or he may be represented by any person of his choice, such as an attorney, accountant, bookkeeper or business associate.

As hereinafter used, the word "taxpayer" includes his representative at the hearing. Taxpayer may present his case as he sees fit, subject to rulings of the chairman of the board. Ordinarily adherence to technical rules of evidence will not be required. Taxpayer may offer witnesses to testify under oath if taxpayer so requests, or if the chairman of the board so directs. Any member of the board or staff member participating in the hearing may upon recognition of the Chairman question the taxpayer and may cross-examine anyone called as a witness by taxpayer.

Participating staff members may upon recognition of the Chairman comment upon the taxpayer's argument and explain to the board and the taxpayer the staff's views as to the validity of any argument made, the value of evidence submitted and any other matters pertinent to the proceedings.

5057. CLAIMS FOR REFUND. Every claim shall be in writing and shall state the specific grounds upon which the claim is founded. It shall be signed by the taxpayer, his authorized representative or any person directly interested. Although not required by statute to do so, the board in its discretion may grant hearings on refund claims. The procedure on such hearings is the same as in the case of hearings on petitions for redetermination pursuant to statutory provisions. (Amended February 6, 1968)

5057.5. CLASS CLAIMS FOR REFUND.

(a) Foreword.

The California courts have recognized that class claims for refund of sales and use taxes can be valid. However, the courts have not given instructions as to how the board should handle such claims. This regulation is intended to provide an orderly procedure for handling such claims and to relieve the courts of unnecessary litigation.

(b) Procedures Required of Class Representative.

The representative claiming a refund on behalf of himself and other members of a class must establish:

- (1) That it is more beneficial to the class and to the state to proceed as a class rather than individually.
- (2) The existence and the composition of the class, including

ARTICLE 4. HEARINGS ON JEOPARDY DETERMINATIONS.

5061. PETITION FOR REDETERMINATION AND STAY OF COLLECTION ACTIVITIES. The person against whom a jeopardy determination is made may petition for redetermination thereof if the person, within 10 days after service of the notice of the jeopardy determination, files a petition for redetermination and within that period deposits with the Board such security as the Board deems necessary to secure compliance with the tax law or laws pursuant to which the determination is made. The petition shall be in writing and shall state the specific grounds upon which it is based. The filing of the petition and depositing of the required security will stay further collection activities until such time as the determination becomes final. Hearings on such petition shall be governed by the procedures set forth in Article 3 of these regulations. (Amended December 7, 1977)

5062. APPLICATION FOR ADMINISTRATIVE HEARING. Within 30 days after service of the notice of jeopardy determination, the person against whom a jeopardy determination has been made may, with or without complying with the requirements of Regulation 5061, apply for an administrative hearing for one or more of the following purposes:

- (a) to establish that the determination is excessive or
- (b) to establish that the sale of property that may have been seized after issuance of the jeopardy determination or any part thereof, should be delayed pending the administrative hearing because the sale would result in irreparable injury to him or
- (c) to request the release of all or a part of the property to him or
- (d) to request a stay of collection activities.

The application must be in writing and must state the specific factual and legal grounds upon which it is founded. No security need be posted to obtain this hearing. Unless the person complies with the provisions of Regulation 5061 relating to the deposit of security, the filing of the petition shall not operate as a stay of collection activities except sale of the property seized. Upon a showing of good cause for failure to file a timely petition for administrative hearing, the Board may allow a late filing of the petition and grant petitioner an administrative hearing. (Amended December 7, 1977)

5063. EFFECT OF FILING APPLICATION. The seized property shall not be sold without the consent of the owner during the first 30 days after service of the notice of jeopardy determination nor while a timely application for an administrative hearing is pending. The storing of the property during the period the application is pending shall be at the applicant's expense. (Amended December 15, 1976)

5064. ADMINISTRATIVE HEARING. An administrative hearing shall be scheduled promptly after the filing of the application. The decision of the administrative officer holding the hearing shall become final 30 days after the notice of the decision is mailed to the applicant unless within that time the applicant makes a written request for an oral hearing before the Board. When an oral hearing before the Board is requested, the hearing shall be scheduled as soon as practicable. The Board shall give the applicant at least 10 days' notice of the time and place of the hearing. The Board may continue the hearing from time to time as may be necessary. (Amended December 15, 1976)

5065. ORDER OF HEARING OFFICER. The administrative officer or the Board may find that the applicant is not entitled to the relief requested or may order that one or more of the following types of relief be granted: that the sale of the property will irreparably damage the applicant and that the property shall not be sold; that the property, or a portion thereof, be released to the applicant or to the person from whom it was seized; that the tax as determined is excessive and that the amount of the determination be reduced. The order of the Board shall become final 30 days after mailing notice thereof to the applicant. (Amended December 15, 1976)

5066. CERTIFICATION TO STATE BOARD OF CONTROL. If, under the terms of the tax law involved, the jeopardy determination has become final, any reduction of the determination in an amount in excess of five thousand dollars (\$5,000), one thousand dollars (\$1,000) for use fuel tax, may be made only if the Board sets forth in its records that the amount has been illegally determined and certifies to the State Board of Control the amount determined in excess of the amount legally due and the person against whom the determination was made. If the State Board of Control approves and so authorizes, the amount of the determination shall be reduced. (Amended December 1, 1983)

5067. NOTICES. Any notice given pursuant to this article shall be served personally or by mail in the manner prescribed for service of notice of a deficiency determination. (Amended December 15, 1976)



STATE BOARD OF EQUALIZATION

1020 N STREET, SACRAMENTO, CALIFORNIA
(P.O. BOX 942879, SACRAMENTO, CALIFORNIA 94279-0001)
Telephone (916) 445-4110

WILLIAM M. BENNETT
First District, Kentfield

CONWAY H. COLLIS
Second District, Los Angeles

ERNEST J. DRONENBURG, JR.
Third District, San Diego

PAUL CARPENTER
Fourth District, Los Angeles

GRAY DAVIS
Controller, Sacramento

CINDY RAMBO
Executive Director

In reply refer to:

Your file has been reviewed, and it has been decided that the issues presented can best be resolved by referring your case to the Appeals Unit for a hearing before a Hearing Officer.

Appeals Unit Hearing Officers are located in Sacramento, but travel to Board offices to conduct hearings. The hearing will normally be held in the Board office which prepared the audit and, as such, is convenient to your business location. However, the hearing may be held at a different Board office if you choose. See the list of Board offices on the enclosed information sheet.

If you wish to have the hearing at a different Board office, please write to: State Board of Equalization, P.O. Box 942879, Sacramento, CA 94279-0001, Attn: Mr. Wayne Philpot, Supervisor, Appeals Unit.

A notice of the time and place scheduled for the hearing will be mailed to you approximately two weeks in advance of the hearing date. Please read carefully the enclosed information sheet on Appeals Unit hearings.

Sincerely,

J. W. Cornelius
Supervisor, Petition Unit

Enclosure

cc:

INFORMATION — APPEALS UNIT HEARINGS**1. GENERAL**

The purpose of the Appeals Unit hearing is to acquire a complete record of the evidence and arguments relied upon by the parties to the hearing, i.e., the taxpayer and the Business Taxes Department, and to resolve any factual disputes and/or disputes as to the proper application of the law. The Hearing Officer assigned to your case will review the file prior to the hearing. If you have not yet submitted your arguments and supporting evidence, and wish to do so, you should do so immediately. Send to: State Board of Equalization P.O. Box 942879, Sacramento, CA 94279-0001, Attn: Mr. Wayne Philpot, Supervisor, Appeals Unit; (916) 445-5677.

At the hearing, the Hearing Officer will consider your arguments and any oral or written evidence that you present. A representative of the Business Taxes Department will also be present to present its position. After the hearing, the Hearing Officer will prepare a written Hearing Decision and Recommendation containing his analysis, conclusions, and recommendation on your case. In the event you do not agree with the Hearing Officer's recommendation, you will have the option of requesting reconsideration of the case by the Hearing Officer and/or an oral hearing before the Members of the State Board of Equalization. If the Business Taxes Department disagrees with the Hearing Officer's Recommendation, it will have the same options.

2. SETTING

The Appeals Unit hearing is presided over by the Hearing Officer. You have the right to be represented by an attorney, accountant, or any other person you choose. There is no requirement that you have representation other than yourself. You may bring witnesses to the hearing.

3. INTEREST AND PENALTIES

Interest will continue to accrue on any unpaid amount, if any, which may ultimately be found to be due. If there is a reduction in the tax, the interest (and penalty if any) will be correspondingly reduced. It is recommended that you pay the amount of any uncontested tax liability promptly since interest on the unpaid liabilities accrues on a monthly basis.

4. NOTIFICATION

There is a large backlog of cases awaiting hearing, and it may be some time before your case can be heard. However, if time is of the essence, you may contact the Appeals Unit and request that an expedited hearing be conducted. Direct any such requests to the address given above, and specify the reasons for which an expedited hearing is requested.

5. RECORDING OF APPEALS UNIT HEARINGS

Revenue and Taxation Code Section 7090 provides that Appeals Unit hearings may be recorded. The decision to record the hearing may be made by you, the Business Taxes Department, or the Hearing Officer. The law requires that if the Business Taxes Department or the Hearing Officer wish to record the hearing that there be prior notice to you. If such recording is requested, you will be notified in the Notice of Hearing. If you wish to record the hearing, specify on the Response to Notice of Hearing. The party electing to record the hearing, whether by electronic means or court reporter, is then responsible for providing a copy of the recording or transcript of the hearing to the other parties to the hearing.

STATE OF CALIFORNIA
BOARD OF EQUALIZATION

APPEALS UNIT

In the Matter of of Account Number:

for of

NOTICE OF HEARING

You are hereby notified that the above-entitled matter has been scheduled for hearing before an Appeals Unit Hearing Officer on the date and at the hour and place set forth below. Be prepared to discuss the facts and issues and bring with you all supporting documentary evidence and witnesses, if any.

DATE:

PLACE:

HOUR:

TELEPHONE:

Dated at Sacramento, California

STATE BOARD OF EQUALIZATION

.....
HEARING OFFICER

- This box, if checked, indicates that the hearing will be recorded at the request of the Department of Business Taxes and/or the Hearing Officer. You will be provided a copy of the recording.

IMPORTANT

Complete this form and return a copy to the State Board of Equalization, P.O. Box 942879, Sacramento, 94279-0001, Attn: Appeals Unit, in the enclosed self-addressed envelope within five (5) days of receipt. A postponement will be granted only for good cause. In order to ensure prompt disposition of this matter, it may be necessary to reschedule any postponed hearing at another office of the Board.



The hearing location is accessible to the disabled. If you require special assistance, please contact the place of hearing to make specific arrangements.

RESPONSE TO NOTICE OF HEARING

- Appearance will be made at the time and place designated.
- Appearance at the hearing is waived. The Appeals Unit Hearing Officer is requested to consider the information and contentions previously submitted. (Additional documentation for consideration may be enclosed.) I understand that the Business Taxes Department retains the right to make a presentation at the hearing.
- I have elected to record the hearing. I understand that I am responsible for arranging for this recording, and providing a copy to the Hearing Officer and the Business Taxes Department.

Date

Signed

cc: Mailed to:

See reverse for further information.

INFORMATION CONCERNING HEARINGS AND APPEALS

Board hearing procedures regulations are published in the Code Of Regulations, Title 18, Chapter 2, Subchapter 10 and are included in Pamphlet 17, Appeals Procedures, which is available at any Board office.

Sections 5001—5007 of the regulations are general provisions which apply to all hearings before the State Board of Equalization. Sections 5051—5059 cover petitions for redetermination of liability and claims for refund under the Sales and Use Tax, the Motor Vehicle Fuel License Tax, the Use Fuel Tax, the Motor Vehicle Transportation License Tax, the Alcoholic Beverage Tax, the Cigarette Tax, and the Energy Resources Surcharge Laws. Petitions for reassessment and claims for refund of Insurance Tax are handled in a similar manner.

APPEALS UNIT HEARINGS

Appeals Unit hearings are presided over by Hearing Officers. Experience has shown that most cases are resolved at this level. It is the purpose of the Appeals Unit hearing to establish the facts and the application thereto of the law and regulations. If you have not yet submitted your arguments and supporting evidence and wish to do so, you should immediately submit them with your Response to Notice of Hearing.

At the hearing, the Hearing Officer will consider your arguments and any oral or written evidence that you present. A representative of the Business Taxes Department will also be present to provide its position as to why the tax is due. After the hearing, the Hearing Officer will prepare a written Hearing Decision and Recommendation containing his analysis, conclusions, and recommendations on your case. In the event you do not agree with the Hearing Officer's recommendation, you will have the option of requesting reconsideration of the case by the Hearing Officer and/or an oral hearing before the members of the State Board of Equalization. Information concerning the Request for Reconsideration procedure and the manner in which to request a Board hearing will accompany the Hearing Officer's Decision and Recommendation.

BOARD HEARINGS

This is a hearing before the members of the Board of Equalization. A Board hearing is available to any taxpayer who disagrees with the Hearing Officer's Recommendation. The Business Taxes Department may also request a hearing before the Board if it disagrees with the Hearing Officer's recommendation.

The Board hearing is not designed to accommodate the presentation of new arguments and/or evidence not previously considered by the Hearing Officer. As explained above, you should present your evidence and arguments prior to, or at, the Appeals Unit hearing. If you discover new evidence and/or wish to make additional arguments after receiving the Hearing Officer's Decision and Recommendation, you should file a Request for Reconsideration.

A number of Board hearings are scheduled for the same day. Experience has demonstrated that if new evidence and/or arguments are presented, the Board will generally order that the new evidence and/or arguments first be presented to the Hearing Officer for his consideration. It is for the purpose of avoiding unnecessary delay in the consideration of your case and also to enhance orderly and proper consideration of your case before the Board, that both you and the Business Taxes Department should first submit all relevant evidence and arguments to the Hearing Officer.

When a case is properly before the Board, the Board will consider arguments based upon the pertinent law before rendering its decision. The Board's rules and regulations are designed to facilitate the orderly and effective performance of this vital Board function while allowing taxpayers and the Business Taxes Department to present their positions.

Members of the Board, taxpayers, and representatives of the Business Taxes Department may question any witnesses. The Board will conclude the hearing by announcing its decision or, more frequently, by taking the matter under submission for later decision.

After the Board has heard your case and made the adjustments, if any, which it deems proper, a Notice of Redetermination will be issued. If the Board agrees that you owe no tax, the Redetermination will so indicate. If the Board decides that you owe tax, the Redetermination will show this. A Redetermination becomes final in thirty (30) days from the date thereof, and if not paid by that time, a 10% penalty attaches. No further steps can be taken on the matter until the amount of the Redetermination has been paid.

After payment, if you still feel that the tax has been incorrectly determined, you may file a written claim for refund with the Board within six (6) months from the date the determination became final, or within three (3) years from the due date of the return for the period for which the overpayment was made (or within three (3) years from the due date of the payment for Cigarette Tax stamps or meter register settings) or within six (6) months from the date of overpayment whichever date expires the later. This claim must set forth all the grounds or reasons which you believe render the items not subject to tax.

You may be given a hearing on a claim for refund if you have not had a hearing on a petition for redetermination involving the same issues. The Board will in any event reconsider the case in light of your formal claim for refund. If you are not successful, you may then take your case to court. You must start such legal action by filing a complaint in a court of appropriate jurisdiction within ninety (90) days after the mailing of notice that your claim is denied. If the Board fails to mail a notice of action on your claim within six (6) months after you file the claim, you may, prior to the mailing of notice by the Board of its action on the claim, consider the claim disallowed and commence a suit for refund. In case of denial by the Board, unless court action is commenced within ninety (90) days, the matter will be completely closed. *You are limited in any court action to the grounds for refund which were stated to the Board in your claim for refund.*



STATE BOARD OF EQUALIZATION

1020 N STREET, SACRAMENTO, CALIFORNIA
(P.O. BOX 942879, SACRAMENTO, CALIFORNIA 94279-0001)

WILLIAM M. BENNETT
First District, Konrad

BRAD SHERMAN
Second District, Los Angeles

ERNEST Z. DRONENBURG, JR.
Third District, San Diego

MEMBER
Fourth District, Los Angeles

GRAY DAVIS
Controller, Sacramento

CINDY RAMBO
Executive Director

MEMORANDUM TO SET HEARING

PETITIONER

ACCOUNT NUMBER

To assist us in scheduling the Board hearing of the above-captioned petitions, please write in below your best estimate of the time necessary to present your arguments to the Board. Because all evidence and arguments have been considered at the Appeals Unit hearing, Board hearings typically take approximately 10 to 20 minutes.

The Board will have a copy of the decision and recommendation you received from the hearing officer and a summary of your petition prepared by the staff. The Appeals Unit chief will summarize the facts of the case, the applicable law, and the issues still in dispute.

If the petitioner has new evidence and/or arguments after the Appeals Unit hearing, the Board will generally refer them back to the hearing officer. Your oral presentation should summarize the important points of your argument.

This case will be set for hearing in Torrance. You will receive a notice of hearing approximately six weeks in advance of the scheduled hearing date.

If you plan to submit any written evidence or documents, eight copies are requested.

Mary Ann Stumpf
Associate Analyst, for

Janice Masterton
Assistant to Executive Director

TIME ESTIMATE _____ MINUTES

Date

Signature (Name & Title)

Phone Number

STATE OF CALIFORNIA
BOARD OF EQUALIZATION

In the Matter of the Claim)
for Refund Under the)
Sales and Use Tax Law of:)

CORPORATION)

Claimant)

APPEALS DIVISION SUMMARY FOR
BOARD HEARING

SR GH

San Jose

Hearing Officer:

For Claimant: Consultant

Business: Manufacturer of frames

A timely claim for refund was filed on 1988 for \$41,139.80 representing the 10% penalty of \$39,000.00 asserted for failure to pay the tax due timely (delinquency penalty) plus interest of \$2,139.80 included in a notice of successor's liability for the period to 12-31-84.

Statement of Unresolved Issue

Whether relief from the penalty for failure to pay the tax due timely is warranted.

Claimant's Contentions

Claimant's reliance on the predecessor's accountant is reasonable cause to justify relief from the penalty.

Appeals Division Summary

Background

Claimant is the successor to . While the claim for refund had been filed by Claimant, the real party in interest is president, Mr. who has reimbursed claimant for the penalty.

The sale of business and assets to claimant was consummated on 1984 for \$6,000,000. The contract of sale provided that was responsible for \$200,000 sales tax due for the sale and claimant was responsible for the remaining \$190,000 sales tax due.

At the Appeals Division hearing, Mr. stated that he was aware that was responsible for paying the entire \$390,000 to the Board by the due date for the fourth quarter 1984 sales and use tax return. Mr. also stated that he contacted the national CPA firm responsible for sales and use tax matters around December 1984 and was advised not to pay the tax until so informed by his accountant.

Claimant timely filed a fourth quarter 1984 sales and use tax return which included gross receipts from fourth quarter 1984 operations, but did not include the sale by to claimant. After receiving the \$190,000 tax reimbursement from claimant, which occurred after the due date of the appropriate sales and use tax return, was informed by its accountant (see Exhibit A attached to the Decision and Recommendation) to pay the total \$390,000 sales tax, due from the sale, to the Board which it did with an amnesty return on March 11, 1985.

On April 26, 1985, the Department of Business Taxes (DBT) issued a demand for immediate payment to assessing interest and penalty for the late payment since the amnesty program did not apply to periods subsequent to June 30, 1984. On May 7, 1985, a request for relief from penalty was filed by citing that late payment of tax was a result of the late reimbursement received from claimant. The Board denied the request on September 12, 1985 and denied a second request on April 9, 1986.

DBT subsequently collected the \$39,000 penalty from claimant pursuant to a notice of successor liability followed by the filing of this claim for refund and a third request for relief of the penalty.

Hearing Officer's Decision and Recommendation

The hearing officer concluded that relief from the delinquency penalty was not warranted and recommended that the claim for refund be denied.

Hearing Officer's Analysis

Revenue and Taxation Code Section 6591 provides that any person who fails

to pay any tax to the state or any amount of tax required to be collected and paid to the state within the time required shall pay a penalty of 10% of the tax. Revenue and Taxation Code Section 6592 provides that if the Board finds that a person's failure to make a timely return or payment is due to reasonable cause and circumstances beyond the person's control, and occurred notwithstanding the exercise of ordinary care, the person may be relieved of the penalty provided by various sections including Section 6591.

The claimant's arguments did not satisfy each of the three requirements specified by Section 6592. While claimant exercised prudent conduct by retaining professional advice, a professional's failure to properly pay the tax does not constitute circumstances beyond the claimant's control. It is clear that the principals of this case were conscious of the need to make a timely payment and there is no question that Mr. acted in good faith. However, the failure to make a timely payment was not due to circumstances beyond control. The State is not the guarantor of last resort for negligent professionals.

Summary prepared by

-91

Priority

JANUARY 30, 1984

CALIFORNIA STATE BOARD OF EQUALIZATION
P. O. BOX 1799
SACRAMENTO, CA 95808-1799

RECEIVED

FEB 01 1984

ADMINISTRATIVE SERVICES

ATTENTION: ROBERT PIERONI
SUPERVISOR, REFUND UNIT

NAME: CORPORATION

ACCOUNT NUMBERS: SR GH

Dear Mr. Pieroni:

This letter constitutes the Claim for Refund (Claim) of Corporation, corporation (Claimant) with respect to amounts paid pursuant to a Notice of Successor Liability for the period to December 31, 1984. It also constitutes a request for relief from penalty pursuant to section 6592 and section 6596 of the Revenue and Taxation Code. The Claimant requests a ten day office discussion with the Board's District staff and, if required, an informal hearing with one of the Board's Hearing Officers and, if required, a formal Board Hearing.

The amounts paid represent interest and penalty added to tax paid with an amnesty return by Inc., a California corporation (predecessor), account number SN GH Claimant's predecessor on the sale of certain assets to Claimant. The tax was paid on amnesty return account number SN GH

The events leading to the payment of the amounts being claimed are:

1. A sale of the assets was signed during the fourth quarter 1984.
2. The Claimant and predecessor had disagreements with respect to compliance with certain terms and conditions of the sales agreement. It was contemplated that the sale would be rescinded.
3. These differences were not resolved until February 1985. It was at this time that the parties felt the sale was completed.
4. The predecessor was informed by the Board's staff that the tax could be paid on an amnesty return and no penalty would be due.

5. Tax of \$390,000.00 was paid by the predecessor during 1985.
6. Request was made by the predecessor for relief from the penalty pursuant to section 6592 of the Revenue and Taxation code.
7. Request for relief was denied by the Board.
8. The Board's compliance staff in San Jose requested the issuance of Notice of Successor Liability on December 1985.
9. The Board's compliance staff in San Jose processed a refund of a certificate of deposit (security) to the predecessor on January 1986.
10. A Notice of Successor Liability was issued to Claimant on January 1986.
11. The Board attached the Claimant's bank account and received payment of the interest and penalty in September, 1986.

All documents and letters submitted to the Board which relate to the request for relief from penalty referred to in 6 above are included in this claim for refund by reference.

It is requested that the Board rescind the denials of the request for relief from penalty referred to in 7 above.

Claimant claims a refund of:

1. Interest and penalty relating to the refund of tax refunded on the separate claim for refund of the predecessor. That claim is also dated January 30, 1986 and is included in this claim for refund by reference.
2. All of the penalty paid by Claimant plus applicable interest.

The grounds upon which this Claim is based are:

1. An overpayment of tax was made by the predecessor for reasons stated in the referenced claim. Any refund of tax should also result in a refund of interest and penalty which relates to that overpayment of tax.

2. Payment of the tax was made late because of reasonable cause and circumstances beyond the control of the parties involved. Specifically, the parties believed the sale occurred in first quarter 1985 because that is when they agreed not to rescind the sale and they reached final agreement on the terms of the sale.
3. The parties received misinformation from the Board's staff when told the tax could be paid on an amnesty return.
4. Well established Board procedures were not followed when the staff collected the interest and penalty from the Claimant rather than from the predecessor. The procedures that are to be used by the staff dictate that the interest and penalty should have been collected from the Claimant only after staff had exhausted its efforts to collect the amounts from the predecessor. This was not done, in fact the predecessor's security deposit was refunded after collection activities had been started against the Claimant.

If this claim and the referenced claim of the predecessor can not be granted without hearings, it is requested that both claims be scheduled for joint hearings.

The above statements are made under penalty of perjury.

If you have any questions, please feel free to contact me.

Respectfully,

:ckj

STATE OF CALIFORNIA
BOARD OF EQUALIZATION
APPEALS UNIT

In the Matter of the Claim)	HEARING
for Refund Under the Sales)	DECISION AND RECOMMENDATION
and Use Tax Law of:)	
CORPORATION)	No. SR GH
))	
))	
<u>Claimant</u>)	

The above-referenced matter came on regularly for hearing before Hearing Officer _____ on _____ 1990, in San Diego, California.

Appearing for Claimant: _____
President,

Appearing for the Department
of Business Taxes: _____
Senior Tax Auditor

Protested Item

Claimant filed a claim for refund dated January 1988. At the hearing conducted on this matter, confirmed by letter of April 27, 1990, claimant's representatives specified that the claim for refund is in the amount of \$39,000, and relates exclusively to the amount paid for the Section 6591 penalty assessed against claimant's predecessor, _____, SY GH _____, and paid by claimant. The penalty was assessed against claimant's predecessor for the period _____ through December 31, 1984.

Contention of Claimant

Claimant, the successor to Inc., contends that relief of the penalty assessed against its predecessor is warranted because the predecessor's failure to pay timely was due to reasonable cause.

Summary

Claimant is the successor to SY GH a corporation which was engaged in the business of manufacturing and selling frames for personal computers. While the claim for refund in this instance has been filed by its successor, the real party in interest is its president, Mr. who has reimbursed claimant for the subject \$39,000 penalty assessed against, and paid by, claimant as the successor to

At the hearing conducted on this matter, Mr. and his representative set forth the relevant sequence of events as follows: In late 1984, commenced negotiations with claimant (hereinafter referred to as) with respect to the latter's purchase of business and assets. The negotiations were complex, and involved the sale of a substantial business enterprise. retained legal counsel to represent its interests, and was also represented by the CPA firm which had been responsible for the filing of its returns. s agreement with the CPA firm provided that the latter was to be responsible for filing final sales and use tax return.

The sale from to was consummated on November 28, 1984, at which time transferred title and possession to its assets to in exchange for \$6,000,000. There is no dispute that sales tax was due measured by \$6,000,000. The contract of sale provided that the sales tax of \$390,000 was to be paid as follows: \$200,000 by and \$190,000 by

At the hearing conducted on this matter, Mr. stated that he was aware that it was responsibility to pay the entire \$390,000 to the Board by the due date for the fourth quarter 1984 return. He stated that he contacted the CPA firm in or about December 1984 to inquire about the filing of the return, and was advised not to pay the tax until so informed by his accountant.

Mr. stated that he did not further contact the CPA firm regarding the payment of the tax.

On or about January 31, 1985, filed a timely return for the fourth quarter of 1984. Gross receipts for operations in November 1984 were included, as well as sales in December. The return did not, however, report the gross receipts of \$6,000,000 from the sale by to

On or about February 21, 1985, paid to the \$190,000 in sales tax reimbursement due under the sales contract. On March 4, 1985, CPA firm advised its client to pay the \$390,000 sales tax liability resulting from the sale. (See Exhibit A.) Payment of the \$390,000 was made to the Board on March 11, 1985.

On April 26, 1985, the Department of Business Taxes ("DBT") issued a notice of determination to assessing interest of \$6,188.19 on the late payment of \$390,000; the subject penalty of \$39,000 was also assessed. By letter of May 7, 1985, CPA firm requested relief from the penalty, citing as the reason for late payment failure to pay to the \$190,000 in sales tax reimbursement until February 21, 1985, i.e., after the due date of the return. had sufficient funds to timely pay the \$390,000, and was not dependent upon the \$190,000 reimbursement payment from in order to make timely payment. The reason for the late payment, as disclosed by the aforementioned letter of May 7, 1985, was that the CPA firm was utilizing the \$190,000 payment due from as the "trigger" to file the fourth quarter 1984 return. Since did not make the \$190,000 payment until after the due date, the payment was accordingly late. The DBT denied the request for relief from the penalty. The DBT subsequently collected the \$39,000 penalty from.

Mr. subsequently brought suit against the CPA firm, asserting that the latter's alleged negligence in timely filing the fourth quarter 1984 return had resulted in the assessment of the penalty. At the hearing, Mr. stated that he later decided not to pursue this action because of the cost involved.

Mr. and his representative argue that the claim for refund should be granted because relief from the penalty assessed against is proper under the circumstances. Specifically, they contend that Mr. acted as a prudent businessman in retaining the services of

professional accountants. He relied upon those professionals to timely file the required return, and should not be penalized for their negligence.

Analysis and Conclusions

Revenue and Taxation Code Sections 6591, 6592, and 6593 provide, respectively, as follows:

"6591. Any person who fails to pay any tax to the state or any amount of tax required to be collected and paid to the state, except amounts of determinations made by the board under Article 2 (commencing with Section 6481) or Article 3 (commencing with Section 6511) of this chapter, within the time required shall pay a penalty of 10 percent of the tax or amount of the tax, in addition to the tax or amount of tax, plus interest at the modified adjusted rate per month, or fraction thereof, established pursuant to Section 6591.5, from the date on which the tax or the amount of tax required to be collected became due and payable to the state until the date of payment."

"6592. If the board finds that a person's failure to make a timely return or payment is due to reasonable cause and circumstances beyond the person's control, and occurred notwithstanding the exercise of ordinary care and the absence of willful neglect, the person may be relieved of the penalty provided by Sections 6476, 6477, 6480.4, 6480.8, 6511, 6565, 6591, and 7051.2.

"Any person seeking to be relieved of the penalty shall file with the board a statement under penalty of perjury setting forth the facts upon which he or she bases his or her claim for relief." (Emphasis added.)

"6593. If the board finds that a person's failure to make a timely return or payment was due to a disaster, and occurred notwithstanding the exercise of ordinary care and the absence of willful neglect, the person may be relieved of the interest

provided by Sections 6459, 6480.4, 6480.8, 6513, and 6591.

"Any person seeking to be relieved of the interest shall file with the board a statement under penalty of perjury setting forth the facts upon which he bases his claim for relief."

The statement under penalty of perjury required under Section 6592 has been filed.

It is our conclusion that relief from the penalty is not warranted, and that the claim for refund should be denied.

Claimant's argument is that the failure to make timely payment was due to reasonable cause and occurred notwithstanding the exercise of ordinary care because Mr. [redacted] relied upon professionals. Section 6592 provides, insofar as relevant here, that the Section 6591 penalty may be relieved if the failure to make timely payment was due to: (1) reasonable cause; (2) circumstances beyond the person's control; and (3) occurred notwithstanding the exercise of ordinary care. The present request for relief does not satisfy each of these three elements. While it may be prudent conduct to retain professional advice, a professional's failure to timely make payment on behalf of his or her client does not generally constitute circumstances beyond the client's control. In this particular case, Mr. [redacted] was conscious of the need to make a timely payment, as evidenced by the fact that he contacted his CPA regarding the matter. Thus, while there is no question that Mr. [redacted] acted in good faith, the failure to make timely payment was not due to circumstances beyond [redacted] control. In this context, we note that the phrase "circumstances beyond the person's control" as used in Section 6592 refers to other than catastrophic events. (Cf. Revenue and Taxation Section 6593.)

The essence of claimant's argument is that relief from the penalty should be granted because [redacted] CPA firm negligently failed to advise its client to make the payment. This is not a persuasive argument for the reasons already noted. The appropriate remedy in such a case is to bring a cause of action against the allegedly negligent party. The State is not the guarantor of last resort for negligent professionals.

SR GH CORPORATION dba

-6-

Recommendation

Deny the claim for refund.

Hearing Officer

Date 19

Memorandum to _____

March 4, 1985

PAYROLL AND SALES TAX RETURN TRANSMITTAL
FOR THE QUARTER ENDED DECEMBER 31, 1984

Form 941, Employer's Quarterly Federal Tax Return

Pay the amount of \$ _____ to your local Federal Reserve Bank with a coupon from your Federal Tax Deposit Coupon Book, Form 8109, on or before _____, 19__.

Pay the amount of \$ _____ to the IRS with this return on or before _____, 19__.

No payment is required. File the return on or before _____, 19__.

Form DE-3, Quarterly Contribution Return and Report.

Pay the amount of \$ _____ shown on line J to the Employment Development Department on or before _____, 19__.

No payment is required. File the return on or before _____, 19__.

*paid 3-11-85
check # 10*

Sales Tax Return

Pay the amount of \$ 390,000.00 to the State Board of Equalization on or before _____, 19__.

No payment is required. File the return on or before _____, 19__.

Federal Unemployment Taxes

Pay the amount of \$ _____ to your local Federal Reserve Bank with a coupon from your Federal Tax Deposit Coupon Book, Form 8109, on or before _____, 19__.

No payment is required.

Remarks: YOU WILL BE BILLED FOR INTEREST ON
THE ABOVE AMOUNT AT A LATER DATE.

(59)

COPY

Exhibit A

§ 6561

SALES AND USE TAXES Div. 2

Cross References

Cancellation procedure for illegal determinations, see § 6981.
Computation of time,
 In general, see Code of Civil Procedure § 12.
 Holidays, see Code of Civil Procedure §§ 12a to 13a.
Investigation and hearings, see Government Code § 11180 et seq.
Mailing, time of filing, see Government Code § 11003.
Notice of deficiency, limitation, see § 6487.
Penalty for failure to make return, see § 7153.
Service by mail, time, Code of Civil Procedure § 1005.

Library References

State and Local Taxation, Lane, §§ 295, 298.

WESTLAW Electronic Research

See WESTLAW guide following the Foreword of this volume.

Notes of Decisions

1. Due process

As a general rule, due process clause of federal constitution is satisfied in matters of taxation if, at some stage before tax becomes irrevocably fixed, taxpayer is given right, of which

he shall have notice, to contest validity or amount of tax before board or tribunal provided for that purpose. *People v. Sonleitner* (1960) 8 Cal.Rptr. 528, 185 C.A.2d 350.

§ 6561.5. Form of petition; amendment

Every petition for redetermination shall be in writing and shall state the specific grounds upon which the petition is founded. The petition may be amended to state additional grounds at any time prior to the date on which the board issues its order or decision upon the petition for redetermination.

(Added by Stats.1967, c. 881, p. 2328, § 1.)

Library References

State and Local Taxation, Lane, §§ 295, 298.

§ 6562. Reconsideration; hearing; notice; continuances

If a petition for redetermination is filed within the 30-day period, the board shall reconsider the determination and, if the person has so requested in his petition, shall grant the person an oral hearing and shall give him 10 days' notice of the time and place of the hearing. The board may continue the hearing from time to time as may be necessary.

(Added by Stats.1941, c. 36, p. 547, § 1, eff. July 1, 1943.)

Historical Note

Derivation: See Derivation under § 6561.

Forms

See West's California Code Forms, Revenue and Taxation.

Cross References

Investigations and hearings, see Government Code § 11180 et seq.

ADMINISTRATION
Pt. 1

§ 7052
Note 1

by that retailer, then the direct payment permitholder shall be liable to the state for a penalty of 10 percent of the amount of that retailer's tax liability not properly allocated by the direct payment permitholder for improper allocation due to negligence or intentional disregard of the law.

(Added by Stats.1985, c. 1343, § 4.)

Library References

State and Local Taxation, Lane, § 292.

§ 7051.5. Rules and regulations; retail grocers; report of sales tax liabilities

The board shall prescribe rules and regulations respecting retail grocers who sell both taxable items and exempt food items to provide one or more methods whereby they may report their sales tax liabilities in as simplified a manner as is consistent with law. Such rules and regulations shall be applied equally to all grocers who report their sales tax liabilities thereunder.

(Added by Stats.1972, c. 1351, p. 2684, § 2.)

Historical Note

Section 3 of Stats.1972, c. 1351, p. 2684, provides:

"The Legislature by adding Section 7051.5 to the Revenue and Taxation Code intends to direct the State Board of Equalization to make more specific the provisions of its regulation contained in subdivision (c) of Regulation 1602, Title 18, Chapter 2, Subchapter 4, California Administrative Code, relating to the methods authorized for the use by grocers in report-

ing their sales tax liabilities. The Legislature desires that the relevant regulation be simple, clear, and precise, so as to substantially restrict any area of staff interpretation at the time of audit. In the event of change in the regulation there should be adequate notice and opportunity to be heard afforded to grocers and, in the event of any substantial change in an established interpretation it should be applied prospectively only."

§ 7052. Employees; representatives

The board may employ accountants, auditors, investigators, assistants, and clerks necessary for the efficient administration of this part and may designate representatives to conduct hearings, prescribe regulations, or perform any other duties imposed by this part or other laws of this State upon the board.

(Added by Stats.1941, c. 36, p. 556, § 1, eff. July 1, 1943.)

Historical Note

Derivation: See Derivation under § 7051.

WESTLAW Electronic Research

See WESTLAW guide following the Foreword of this volume.

Notes of Decisions

1. Validity

Section 7051 and this section authorizing board of equalization to adopt rules and regulations to enforce sales and use taxes do not

violate federal constitutional standards. *L. A. J., Inc. v. State Bd. of Equalization* (1974) 113 Cal.Rptr. 319, 38 C.A.3d 549.

§ 7087

REVENUE AND TAXATION CODE

§ 7087. Limit on use of revenue collected; certification of compliance

(a) The amount of revenue collected or assessed pursuant to this part shall not be used for any of the following:

- (1) To evaluate individual officers or employees.
- (2) To impose or suggest production quotas or goals.

(b) The board shall certify in its annual report submitted pursuant to Section 15616 of the Government Code that revenue collected or assessed is not used in a manner prohibited by subdivision (a).

(Added by Stats.1988, c. 1574, § 1.)

Historical Note

1988 Legislation

Operative effect of Stats.1988, c. 1574, see Historical Note under § 7080.

§ 7088. Program to evaluate employee's or officer's contact with taxpayers; coordination with taxpayers' rights advocate; report to legislature

(a) The board shall develop and implement a program which will evaluate an individual employee's or officer's performance with respect to his or her contact with taxpayers. The development and implementation of the program shall be coordinated with the Taxpayers' Rights Advocate.

(b) The board shall report to the Legislature on the implementation of this program in its annual report.

(Added by Stats.1988, c. 1574, § 1.)

Historical Note

1988 Legislation

Operative effect of Stats.1988, c. 1574 see Historical Note under § 7080.

§ 7089. Plan to reduce time required to resolve petitions

No later than July 1, 1989, the board shall, in cooperation with the State Bar of California, the California Society of Certified Public Accountants, the Taxpayers' Rights Advocate, and other interested taxpayer-oriented groups, develop a plan to reduce the time required to resolve petitions for redetermination and claims for refunds. The plan shall include determination of standard time frames and special review of cases which take more time than the appropriate standard time frame.

(Added by Stats.1988, c. 1574, § 1.)

Historical Note

1988 Legislation

Operative effect of Stats.1988, c. 1574, see Historical Note under § 7080.

§ 7090. Protest hearings; procedures

Procedures of the board relating to protest hearings before board hearing officers, shall include all of the following:

(a) Any hearing shall be held at a reasonable time at a board office which is convenient to the taxpayer.

(b) The hearing may be recorded only if prior notice is given to the taxpayer and the taxpayer is entitled to receive a copy of the recording.

(c) The taxpayer shall be informed prior to any hearing that he or she has a right to have present at the hearing his or her attorney, accountant, or other designated agent.

(Added by Stats.1988, c. 1574, § 1.)

Underline indicates changes or additions by amendment.