

## Guidelines to Implement Resolution 2017-01

### **I. Introduction**

At the December 7, 2017 Franchise Tax Board ("FTB") Board meeting, the three-member Board unanimously adopted [Resolution 2017-01](#) regarding ex-parte communications between petitioners, their representatives, FTB staff, and Board members pending an appeal of a California Code of Regulations, title 18, ("CCR") section 25137 petition ("25137 petition appeal") with the FTB three-member Board. Specifically, the resolution provides in part:

Beginning January 1, 2018, while a petition is pending, there shall be no communication, direct or indirect, regarding any substantive issue related to the petition, to or from any Board member or his/her staff/Representatives, to or from

- (1) The petitioner or an employee/representative of the petitioner, or
- (2) Franchise Tax Board staff,

without notice and opportunity for all parties to participate in the communication. For the purposes of this section, a petition is pending from the date of the filing of the petition with the Franchise Tax Board pursuant to Revenue and Taxation Code section 25137.

### **II. What is the process for the consideration of a 25137 petition at the FTB staff level, and the appeal of a 25137 Committee determination to the three-member FTB Board?**

A CCR section 25137 written petition ("25137 petition") is initially brought forward by a taxpayer to FTB staff (either in Audit or Legal Division). In addition, FTB staff may propose a 25137 variance in the circumstances when application of the allocation and apportionment provisions of the Revenue and Taxation Code do not fairly reflect the extent of the taxpayer's business activity in California. Regardless of whether prompted by taxpayer petition or initiated by staff, the taxpayer is offered an opportunity to present a written and/or oral position to the staff hearing the matter (the "25137 Committee"). See Franchise Tax Board Notices [2017-05](#), [2018-02](#).

In an informal setting, and after considering each party's written position and/or oral presentation, the 25137 Committee determines whether Revenue and Taxation Code section 25137 relief is appropriate in that case and, if so, exactly what relief is indicated. If a taxpayer disagrees with the 25137 Committee's determination, the taxpayer may file a waiver of confidentiality and appeal to the FTB three-member Board for a full hearing on the matter in public open session. These guidelines for ex-parte communication apply if and when a taxpayer files the waiver of confidentiality and appeals a 25137 Committee determination.

### **III. When does Resolution 2017-01 apply?**

- A. Resolution 2017-01 does not apply during the pendency of the initial filing of the 25137 petition with FTB staff or the proposal by staff to impose a 25137 variance, but only applies once the waiver of confidentiality has been filed and an adverse 25137 determination has been appealed to the FTB three-member Board.
- B. On and after January 1, 2018, upon a 25137 petition appeal to the FTB three-member Board, Resolution 2017-01 is applicable. This resolution is designed to address any communications during the pendency of the 25137 petition appeal between any FTB Board member or his or her staff/representatives, to or from (1) the petitioner or an employee/representative of the petitioner, and (2) FTB staff.
- C. To assist Board members in determining when the resolution becomes applicable, the Executive Officer or her delegee will promptly notify Board members when an appeal of a 25137 petition and the waiver of confidentiality have been filed, as well as the name of the petitioner and its representatives.
- D. Application of Resolution 2017-01 ends when the FTB three-member Board makes a final determination on a 25137 petition appeal.

### **IV. What is an ex-parte communication?**

An ex-parte communication is a communication outside of a formal hearing, without notice and a reasonable opportunity given to all parties to participate in that communication. A 25137 petition appeal is deemed a "formal hearing" for this purpose. Resolution 2017-01 follows the spirit of the prohibition against ex-parte communications as set forth in Government Code section 11430.10, which requires all parties to be given notice and an opportunity to participate in such communications.

**V. What communications are permitted between the FTB three-member Board, its staff, FTB staff, petitioner and/or its employees and/or representatives during the pendency of a 25137 petition appeal?**

- A. Permitted contact between the Board and/or its staff and either the petitioner and/or FTB staff includes the receipt of briefs and the hearing of oral argument before the FTB three-member Board. Before the oral hearing, both parties may file briefs and exhibits with the FTB three-member Board. At the hearing, both parties may make oral arguments and introduce witnesses. (It should be noted that nothing in Resolution 2017-01 restricts FTB staff and the taxpayer/taxpayer representative(s) in their communications with each other during the pendency of the appeal.) None of the communications detailed in this paragraph are ex-parte communications within the meaning of Resolution 2017-01.
- B. As stated above, where one of the 25137 petition appeal parties and/or its representatives seeks to contact one of the Board members, or a Board member seeks to contact one of the 25137 petition appeal parties and/or its representatives, this contact is an ex-parte communication and Resolution 2017-01 applies. These ex-parte communications are not prohibited, however, provided that no matters pertaining to the 25137 appeal are discussed other than the possible scheduling availability for a future discussion pertaining to any aspect of the 25137 petition appeal between (1) the Board member and/or the Board member's staff with whom the communication is sought, (2) the taxpayer and/or its representatives, and (3) FTB staff. The Board member and/or the Board member's staff should invite all parties and/or their representatives to participate in the scheduled telephonic discussion or in-person meeting as soon as practicable. All parties and/or their representatives and the Board member should work together to find a mutually agreeable date and time to meet. It is anticipated that the specifics of making meeting arrangements in these circumstances will be addressed during the process of amending the underlying regulation, CCR section 25137, with full public input.
- C.
- 1) When a meeting is scheduled and all parties are given the opportunity to attend pursuant to paragraph B., above, the parties may attend the meeting or choose not to attend. Regardless of whether all parties are in actual attendance at the meeting, the Board member must (1) document in writing all matters discussed at the meeting, and (2) provide the documentation and copies of any materials shared by the parties, the Board member, and/or the Board member's staff attending the meeting to all parties to the 25137 appeal proceeding and their representatives within a reasonable amount of time. If any party is absent from the meeting, the Board member and/or the

Board member's staff must provide an opportunity for the absent party or parties to respond to the documentation and any materials supplied as provided above within a reasonable amount of time. The documentation of the specific matters discussed at the meeting should be in sufficient detail to allow the absent party or parties the opportunity to respond to any matters discussed at the meeting in writing and/or to submit any other materials for consideration it or they may wish to provide to the Board member and/or the Board member's staff. Any such writing by the absent party or parties and/or material submitted must also be supplied at the same time to the opposing party and/or its representatives. The actual specifics of this provision will be addressed during the process of amending the underlying regulation, with full public input.

- D. The Board member and/or the Board member's staff must make a record of the ex-parte communication and provide it to the Board members at the Board's formal hearing where the Board will consider the party's 25137 petition appeal. Under the Bagley-Keene Act, the Board member may not share any written or oral information received during these discussions with any Board member except at duly noticed open meetings of the Franchise Tax Board.

**VI. What are the procedures following an inadvertent ex-parte communication?**

In the event that a Board member and/or the Board member's staff have an inadvertent ex-parte communication with any party to the 25137 appeal proceeding, then the Board member and/or the Board member's staff must make a record of it pursuant to VII, below.

**VII. How does one make a record of an ex-parte communication?**

The record, memorialized in writing, must identify who initiated the inadvertent contact, which parties were present at the time of the contact, what efforts were made to terminate the inadvertent ex parte contact, and all parties to the proceeding who should have been entitled to participate. The record must reflect the general substance of what was discussed and the response of any Board member and/or the Board member's staff. If any documents are provided or exchanged, they must be identified, made part of the record, and copies provided to all parties and/or their representatives as soon as possible. The Bagley-Keene Act prohibits a Board member from sharing any written or oral information received during an ex-parte communication, even if the contact is inadvertent, with any other Board member except at a duly noticed open meeting of the Franchise Tax Board, the Board member

Date: 06.18.18

Guidelines to Implement Resolution 2017-01

Page: 5

involved in an ex-parte communication must report on that communication at the formal hearing where the 25137 petition appeal is to be heard. The Board member must disclose the ex-parte communication on the record to the public and other Board members and distribute the writing memorializing the communication as summarized above to the other Board members, as well as make available all documents exchanged or provided during the ex-parte communication. The Franchise Tax Board must include a short summary of the ex-parte communication in the minutes of the meeting at which the ex-parte communication is disclosed.