

Changes to Proposed Regulation
March 27, 2000

Section 19044 is adopted to read:

§19044. Protest Hearing.

(a) General.

(1) A taxpayer has a right to have an oral hearing on a protest. There is no requirement that an oral hearing be held on a protest, except as requested by the taxpayer. This regulation describes the mechanics of requesting and scheduling an oral hearing, the nature and manner in which the oral hearing is conducted, and the rights and obligations of the taxpayer in regard to an oral hearing.

(2) The protest hearing process is intended to be informal. The protest hearing process is not subject to the requirements of the administrative adjudication provisions of the Administrative Procedures Act, sections 11400 et seq. of the California Government Code. Subsequent proceedings in the administrative and judicial review process are more formal. These subsequent proceedings involve adjudicative bodies other than the Franchise Tax Board. In such proceedings, evidence is submitted subject to the procedural requirements of that body and testimony is taken under oath. The evidence admitted and the testimony given become part of the formal record of the proceedings maintained by the adjudicative body. Evidence submitted at the protest level does not become part of any formal record and is not forwarded automatically to any other administrative or judicial body for purposes of that body making a determination on the merits of any case. Taxpayers must present all evidence directly to those adjudicative bodies in accordance with the rules of that body if they wish such evidence to be considered.

(3) The hearing officer of the Franchise Tax Board handling the protest is charged with the responsibility of making a determination of whether the amount of the proposed assessment proposed by the Notice of Proposed Assessment is correct based upon the facts of the case and a correct application of the law to those facts and in accordance with the Taxpayers' Bill of Rights and the Franchise Tax Board's Statement of Principles of Tax Administration. The protest hearing process is not a negotiation where disagreements are compromised. There is a separate Administrative Settlement process which allows for taxpayers and the Franchise Tax Board to reach an agreement as to the settlement of a dispute based upon the various risks that are involved. See Revenue and Taxation Code section 19442.

(4) The regulation sets forth specific rules that govern the protest hearing process based upon the language of the statute. The regulation provides a number of specific rules and time limits, with specific exceptions. It is the goal of the Franchise Tax Board to resolve disputes with taxpayers concerning their tax liability at the lowest

level possible in the administrative process, and the Franchise Tax Board will liberally exercise its discretion in all areas provided for in the regulation with this goal in mind.

(5) Time limits provided for in this regulation shall be used as guidelines for a quick and orderly processing of the protest; however, the Franchise Tax Board, at its discretion, may vary these time limits in order to address various circumstances which warrant such changes. The rules and time limits in the regulation are not intended to be used to foreclose or limit a taxpayer's access to the protest hearing process. They are intended to provide an orderly process that leads to a quick resolution of the disagreement. They will be invoked to limit the hearing process, only after notice has been given, when necessary for the timely and efficient completion of the protest hearing process. When the expiration of any time period provided for by statute or this regulation falls on a Saturday, Sunday or holiday, the time will be extended to the next business day. For purposes of this rule, "holiday" means any day on which the United States Post Office does not deliver regular mail.

(b) Request for Hearing.

(1) If the taxpayer wishes to have an oral hearing on a protest, a request for oral hearing must be included in the original protest. If a request for an oral hearing is not made in the original protest, the taxpayer's right to an oral hearing is waived. The failure to request an oral hearing will not be asserted by the Franchise Tax Board as a failure to exhaust administrative remedies in any subsequent administrative or judicial proceedings. The department may grant an oral hearing though not requested in the original protest. See subsection (b)(2) of this regulation and subsection (d)(3) of Regulation 19041. A taxpayer may not perfect, amend or supplement an original protest to request an oral hearing.

(2) The department may grant a taxpayer's request for an oral hearing that is made subsequent to the filing of the protest.

(A) The department shall be liberal in granting a taxpayer's request for an oral hearing that is made subsequent to the filing of the protest consistent with the timely and efficient completion of the protest process.

(B) The department shall grant a request for an oral hearing that was not contained in a protest whenever the department requests additional information (see Regulation 19041, subsection (g)) if the request for an oral hearing is made in conjunction with or prior to the date set for a timely response to the request for information.

(3) A taxpayer is entitled to only one oral hearing. Additional oral hearing(s) may be scheduled whenever the department determines that an additional hearing is appropriate. The department shall be liberal in granting additional hearings consistent with the timely and efficient completion of the protest process.

(4) A taxpayer may waive an oral hearing after a request has been made. A waiver of an oral hearing after a request has been made will not be asserted by the department as a failure to exhaust administrative remedies in subsequent administrative or judicial proceedings.

(c) Location.

(1) A taxpayer is entitled to request an oral hearing at an office of the department that is convenient to the taxpayer. (Section 21011(a), Revenue and Taxation Code.) When possible, the department shall grant such requests.

(2) If it is not possible to schedule an oral hearing at an office of the department that is convenient to the taxpayer, the location of the hearing shall be determined by the department. If an office of the department is not convenient to the taxpayer, oral hearings may be held by telephone, videoconferencing or similar means at the taxpayer's request.

(3) An oral hearing may be conducted by telephone, videoconferencing, or similar means if the taxpayer, or the taxpayer's representative, requests or consents.

(4) If a taxpayer or a taxpayer's representative does not provide sufficient notice (see subsections (d)(5) and (6) of this regulation) of inability to attend an oral hearing, or does not attend an oral hearing, the department, at its discretion, may schedule any other oral hearing to be held in a location convenient for the department.

(d) Time.

(1) Hearings will be scheduled as soon as possible after the filing of the protest. Factors to be taken into consideration in the scheduling of an oral hearing include the workload of the department, the schedule of the hearing officer and the schedule of the taxpayer or the taxpayer's representative. Time limits provided in subsection (d) of this regulation shall be used as guidelines for a quick and orderly processing of the protest; however, the Franchise Tax Board, at its discretion, may vary these time limits in order to address various circumstances which warrant such changes.

(2) The time and date of an oral hearing on a protest shall, when possible, be established by mutual agreement of the taxpayer, or the taxpayer's representative, and the hearing officer. The oral hearing shall be held within 18 months of the filing of the protest or the date the protest is perfected under subsection (f) of Regulation section 19041, except that any time for which a protest was tolled pursuant to subdivision (h)(2)(D) of Regulation 19041 shall not be taken into account in determining the period of 18 months. Once an oral hearing is scheduled, the Franchise Tax Board shall issue a notice of hearing to the taxpayer, or the taxpayer's representative. In no event shall the date of an oral hearing be less than 30 days from the date that a notice of hearing is mailed, unless the taxpayer, or the taxpayer's representative, agrees to an earlier date.

If a mutual agreement cannot be reached as to the time and date of an oral hearing, the hearing officer will determine the time and date of the hearing.

(3) Hearings shall be scheduled Monday through Friday during normal business hours for the office where the hearing is to be held (generally between 8:00 a.m. and 4:30 p.m.). The length of time available for an oral hearing is limited and the taxpayer, or the taxpayer's representative, shall advise the hearing officer of the length of time the hearing is expected to take.

(4) An oral hearing may be rescheduled if requested by the taxpayer or the taxpayer's representative. A request to reschedule an oral hearing should be made in writing and mailed or sent to the department at least ten days prior to the date of the requested hearing and must show sufficient justification for requesting the reschedule. Only one rescheduling of an oral hearing shall be allowed, except as provided in subsection (d)(7) of this regulation.

(5) In the event the taxpayer, or the taxpayer's representative, does not mail or send written notice of an inability to attend the hearing to the hearing officer at least one week prior to the date of an oral hearing, then the hearing may, at the department's discretion, be rescheduled. The hearing shall be rescheduled whenever, in the department's opinion, the taxpayer has demonstrated that it would be an extreme hardship to attend the hearing. Such rescheduled hearing shall be held as provided in subsection (d)(7) of this regulation.

(6) A taxpayer, or a taxpayer's representative, who does not appear at the scheduled hearing shall be deemed to have waived an oral hearing unless the taxpayer has demonstrated that it would be an extreme hardship to attend the hearing. Such rescheduled hearing shall be held as provided in subsection (d)(7) of this regulation.

(7) In the case where an oral hearing has been rescheduled more than once, or the taxpayer, or the taxpayer's representative, does not mail or send a written notice as provided in subdivisions (d)(4) and (d)(5) of this regulation, or does not appear as provided in subdivision (d)(6) of this regulation, the Franchise Tax Board, at its discretion, may schedule an oral hearing by telephone, video conferencing, or at a location convenient for the Franchise Tax Board.

(e) Notice. The department shall mail a written notice of the time, date and location of the hearing to the taxpayer, or the taxpayer's representative, at the address provided by the taxpayer or the taxpayer's representative. The address provided in the original protest shall be presumed to be the correct address unless the taxpayer, or the taxpayer's representative, submits a timely written notification to the department of a change of address.

(f) Hearing Officer.

(1) The department shall designate a member of its staff as the hearing officer for the protest. The department may change the designation of the hearing officer at its sole discretion at any time.

(2) The hearing officer shall have the authority to conduct the oral hearing.

(g) Representation.

(1) A taxpayer shall be informed prior to any hearing of the right to have a designated agent (representative) at an oral hearing.

(2) A designated agent may be any person of the taxpayer's choosing, including, but not limited to, an attorney, accountant, bookkeeper, employee, consultant or business associate.

(3) The department shall recognize any representative who is identified by the taxpayer in writing or personally at the hearing.

(4) If the taxpayer is not present at the hearing, the representative may be required to submit proof that the representative is legally authorized to represent the taxpayer. Evidence may be in the form of a power of attorney, a copy of correspondence from the taxpayer relating to the protest that designates the individual as a representative, or the protest filed by the representative.

(h) Conduct of the Hearing.

(1) Hearings will be Conducted in an Informal Manner. The purpose of a hearing is to allow the hearing officer and the taxpayer, or the taxpayer's representative, to explore the issues raised by the protest, develop the factual basis of the protest, and to consider authorities relevant to the determination of the protest. An oral hearing should enable the hearing officer to have an understanding of the taxpayer's position so that an informed determination can be made with respect to the protest.

(2) Reasonable Accommodations. The department shall provide reasonable accommodations to any taxpayer, or the taxpayer's representative, who is physically disabled and requires such accommodations to facilitate the hearing process. A taxpayer, or the taxpayer's representative, should notify the department a minimum of 15 days prior to the hearing date of the need for reasonable accommodations to allow the department a reasonable time to arrange for such accommodations.

(3) Language Assistance. A taxpayer may receive language assistance at an oral hearing. The assistance may be provided by:

(A) an interpreter supplied by the taxpayer, or the taxpayer's representative,

(B) a member of the Franchise Tax Board staff, other than the hearing officer, if available at the location of the hearing; or

(C) a certified language interpreter.

(D) A taxpayer requesting the department to supply language assistance services under subsections (B) or (C) above, shall submit the request at least 15 days prior to the hearing.

(E) If the taxpayer requests a certified language interpreter pursuant to subsection (C) above, one will be supplied if possible. It is the taxpayer's responsibility to pay for the service either before or at the time it is provided. If the services of a certified language interpreter are requested and the taxpayer fails to appear at the hearing, or notifies the hearing officer less than one complete business working day prior to the hearing that the services of the certified language interpreter are not required, the taxpayer will be responsible for the minimum service charge of such certified language interpreter.

(F) A person providing language assistance shall not be considered a representative for purposes of subsection (h)(4) of this regulation unless so designated.

(4) Representation. A taxpayer may designate a person or persons, as the case may be, to represent the taxpayer at the hearing. The hearing officer may not limit the number of representatives for the taxpayer at a protest hearing except that the hearing officer may terminate the hearing as provided for under subsection (h)(10) of this regulation.

(5) Confidentiality. Hearings are part of the administrative process of the department and are covered by the confidentiality provisions of the Revenue and Taxation Code and other provisions of law.

(A) No one other than the taxpayer, persons authorized by the taxpayer, and staff assigned to handling protests within the department is permitted to attend an oral hearing.

(B) Observers, other than staff assigned to handling protests within the department, are not allowed at hearings unless the taxpayer expressly consents to their presence and there is sufficient space in the room in which the hearing is being held to accommodate them. Written confirmation of consent may be required.

(6) Official Record or Transcript. Except as otherwise provided in subsection (h)(7) of this regulation, the department does not record or prepare a transcript of hearings. The taxpayer, however, may arrange for a transcript to be created of the hearing, but shall bear the costs thereof. An official record of documents submitted or statements made during the course of an oral hearing is not maintained by the department. Any subsequent proceedings, whether before the Board of Equalization or

in the courts, proceed on the basis of the record made in those proceedings. Information and other materials supplied during the protest process are not part of the record of those proceedings unless submitted by one of the parties in the course of such proceedings.

(7) Recording an Oral Hearing.

(A) If the department determines that an oral hearing should be recorded by any means, it will provide written notice to the taxpayer, or the taxpayer's representative, at least one week prior to the hearing. The taxpayer, or the taxpayer's representative, is entitled to receive a copy of the recording of the hearing upon request, which request may be made at any time prior to or within one week after the hearing.

(B) A taxpayer, or the taxpayer's representative, may make an audio recording of an oral hearing, if the hearing officer is informed of that fact at least one week prior to the hearing. The department shall have the right to obtain a copy of the recording upon request, which request may be made at any time prior to or within one week after the hearing.

(C) If the hearing officer determines that a recording of an oral hearing is disruptive, the recording shall be terminated immediately.

(8) Witnesses and Documentary Evidence. At an oral hearing, a taxpayer, or the taxpayer's representative, may present witnesses and/or offer documentary evidence.

(A) Witnesses.

1. Oral testimony will be evaluated by the hearing officer in making a determination on the protest. Oral testimony will be used for no purpose other than a determination of the protest. Oral testimony does not need to be under oath. No official transcript of the hearing is prepared. The hearing will usually proceed more efficiently if the taxpayer, or the taxpayer's representative, informs the hearing officer of the names and identities of witnesses who will be present at the hearing at least one week prior to the hearing.

2. The hearing officer may limit testimony of witnesses if and when the hearing officer determines the testimony to be repetitious, redundant, or irrelevant.

3. The department is not required to issue subpoenas on behalf of a taxpayer to compel witnesses to appear at an oral hearing except that the department shall, at the request of the taxpayer, have the auditor or auditors of the taxpayers' return available to answer questions or provide testimony that may be relevant to the protest. Such a request by the taxpayer for the presence and testimony of department personnel shall be made at least 30 days in advance of the oral hearing.

(B) Documentary Evidence.

1. Except as otherwise provided in subsection (h)(9) of this regulation, with respect to testimony contained in a recording, a copy of any documentary evidence offered in support of the taxpayer's position shall be supplied to the hearing officer at, or prior to, the hearing. The department is required to retain such documentary evidence for its files.

2. Documents or recorded testimony submitted during the consideration of the protest may be offered by the department or the taxpayer in subsequent proceedings subject to the rules of evidence applicable to the body conducting such proceedings.

(9) Submission of Additional Information. At the conclusion of, or during, the hearing, the hearing officer may request that additional information relevant for the determination of the protest be submitted. Requests for information are limited to information or documents related to issues raised during the audit that are reflected in the reasons for, and/or the computations supporting, the Notice of Proposed Assessment and information or documents related to a new issue raised by the taxpayer in the protest or during the protest. Within 30 days after the hearing, the department shall provide a letter to the taxpayer, or the taxpayer's representative, that details the additional information requested by the hearing officer and the relevancy of the information requested to the resolution of the protest. However, it is not necessary that the taxpayer create documents that never existed in its records. The taxpayer, or the taxpayer's representative, shall be given 30 days from the date of the letter, or such other reasonable time as the taxpayer, or the taxpayer's representative, and the hearing officer may agree to, for submission of such information upon request. The taxpayer shall receive one extension of 15 days to submit any requested information. Additional or longer extensions may be granted with the approval of the Chief Counsel or the Assistant Executive Officer, Audit Branch. Failure to submit requested information could result in the protest being decided by resolving questions of fact to which the requests relate against the taxpayer. For purposes of this subsection, a written statement by the taxpayer that information requested does or did not exist will be considered a complete response.

(10) Termination of Hearing. The hearing officer shall have the authority to terminate an oral hearing. An oral hearing shall be terminated only after the hearing officer has provided a notice to the taxpayer, or the taxpayer's representative, including the reasons for termination of the hearing. An oral hearing may be terminated only as a last resort.

(11) Report of Hearing. A report of hearing may be prepared for internal use. The department normally will not provide the taxpayer, or the taxpayer's representative, with a copy of the report prepared by the hearing officer.

(12) Recommendation of the Hearing Officer. Unless expressly waived by the taxpayer, or the taxpayer's representative, the department shall, within the later of 90 days after the submission of any requested information or other materials as permitted herein or the hearing, mail to the taxpayer, or the taxpayer's representative, the recommendation of the hearing officer with respect to the protest. The taxpayer, or the taxpayer's representative, shall be given 30 days to respond to the recommendation of the hearing officer. Thereafter, the department shall make a determination on the protest. The recommendation of the hearing officer may be treated as the letter of determination and shall be issued in accordance with subsection (h)(2) of Regulation section 19041. See Regulation section 19041(h).

(i) Failure to Attend Hearing.

(1) If a taxpayer, or a taxpayer's representative, fails to attend a scheduled hearing, the taxpayer shall be deemed to have waived the right to an oral hearing unless the Franchise Tax Board determines that it would have been an extreme hardship to attend the hearing and the failure to attend was not within the taxpayer's, or the taxpayer's representative's, control. If the hearing officer determines that the taxpayer has demonstrated that there was such an extreme hardship, the oral hearing shall be rescheduled as soon as practical as provided in subsection (d)(7) of this regulation.

(2) Absence of Extreme Hardship. The department may, in its discretion, grant an oral hearing even in the absence of the taxpayer having demonstrated that attending the hearing would have created an extreme hardship. Hearings will be rescheduled unless to do so interferes with the timely and efficient completion of the protest hearing process as provided in subsection (d)(7) of this regulation. See subsection (i)(3) of this regulation.

(3) The department, at its discretion, may require that an oral hearing granted or rescheduled pursuant to subsections (d)(5) and (d)(6) shall be held in a location convenient for the department.

Note: Authority Cited: Section 19503, Revenue and Taxation Code. Reference: Section 19044, Revenue and Taxation Code