



McDonough Holland & Allen PC
Attorneys at Law

Robert R. Rubin

Presented to the Commission on the 21st Century Economy

University of California, Berkeley (*Go Bears!*)

March 10, 2009

Sacramento

555 Capitol Mall
9th Floor
Sacramento CA
95814-4692
tel 916.444.3900
toll free 800.403.3900
fax 916.444.8334

Oakland

1901 Harrison Street
9th Floor
Oakland CA
94612-3501
tel 510.273.8780
toll free 800.339.3030
fax 510.839.9104

www.mhalaw.com



McDonough Holland & Allen PC
Attorneys at Law

Robert R. Rubin
Attorney at Law

Sacramento Office
916.444.3900 tel
916.325.4587 fax
brubin@mhalaw.com

March 10, 2009

Chairman Parsky and Members of the Commission:

Professor Pomp asked me to discuss with you the need for an independent tax dispute forum in California. As I have been a federal tax controversy lawyer for about 32 years and a California state and local tax controversy lawyer for about 23 years, I am happy to do so.

In California, for income taxes and sales and use taxes the only prepayment dispute resolution forum is essentially the same entity that administers those tax programs. Hence, the dispute resolution forum is not independent, which creates the appearance of impropriety. Creating an independent, prepayment tax dispute resolution forum will help bring California tax administration into the 21st Century. Going forward without an independent dispute resolution forum would be like putting a Prius drive system in a Ford Pinto.

Thank you for the opportunity to discuss this issue with you.

Very truly yours,

Robert R. Rubin

Sacramento

555 Capitol Mall
9th Floor
Sacramento CA
95814-4692
tel 916.444.3900
toll free 800.403.3900
fax 916.444.8334

Oakland

1901 Harrison Street
9th Floor
Oakland CA
94612-3501
tel 510.273.8780
toll free 800.339.3030
fax 510.839.9104

www.mhalaw.com

1171592v1 00003/0001

California Needs an Independent Tax Dispute Forum

1. Businesses perceive California as a difficult place to do business. The perceived aggressiveness of the Franchise Tax Board ("FTB") and the Board of Equalization ("BOE") and the lack of an independent tax dispute forum contribute to the negativity regarding doing business in California.
2. California taxes include income tax, sales and use tax, employment tax and property tax.
 - a. Income tax is administered by the FTB, which is composed of the Director of the Department of Finance, the Controller and the Chair of the BOE.
 - b. Sales and use tax is administered by the BOE, which is composed of four elected members and the Controller.
 - c. Employment taxes include personal income tax withholding, unemployment tax, state disability insurance contributions and the employment training tax, and are administered by the Employment Development Department.
 - d. Local property taxes are administered by the local Assessor in each county. Statewide or "unitary" property tax, which includes public utilities and railroads, is administered by the BOE.
3. The discussion today is limited to income tax and sales and use tax.
4. BOE and FTB administration of sales and use tax and income tax, respectively, includes:
 - a. Hiring, firing and evaluating employees.
 - b. Promulgating regulations and rules.
 - c. Publishing manuals.
 - d. Managing audit programs.
 - e. Sponsoring legislation.
 - f. Collecting tax.
5. A taxpayer dissatisfied with FTB action on her income tax protest may file an appeal with the BOE. Two members of the FTB sit on the five person BOE.
6. A taxpayer dissatisfied with the action on his BOE sales and use tax petition for redetermination may appeal to the five person BOE.
7. The same people who administer the tax programs act as judges to resolve tax disputes involving their programs. If the federal system were organized in this way, and if you had a problem with the Internal Revenue Service ("IRS"), the Commissioner of Internal Revenue would resolve your problem.
8. Federally, the independent United States Tax Court is the prepayment judicial forum to resolve tax disputes with the IRS.
 - a. Trials are to one judge.
 - b. Compared to the Federal Rules of Civil Procedure and the California Code of Civil Procedure, streamlined procedural rules exist because most cases follow an audit and many times there are no facts in dispute.

- c. Simplified procedures for "small tax cases," cases in which the amount in dispute is less than \$50,000, in which the petitioners almost always appear pro se.
9. About half the states have independent prepayment forums to resolve tax disputes.¹
10. BOE Hearings.
- a. Always before a full board.
 - b. Time allotment of 30 to 60 minutes regardless of the complexity of the case.
 - c. In order to be sure members understand the case, practitioners must meet with members or a staff member or both prior to the hearing. The BOE is not a "tribunal" for state bar ethical purposes and, thus, ex parte contact is not prohibited.
 - d. Paucity of published decisions.
 - e. In income tax cases, FTB cannot appeal an adverse decision.
11. Advantages of conforming to federal model:
- a. Independent, trained tribunal.
 - b. No ex parte contacts.
 - c. Trial to one judge instead of a five member board.
 - d. Full evidentiary hearings.
 - e. Precedential, written decisions will provide guidance to the government and taxpayers alike.
 - f. Simplified procedures for small tax cases.
 - g. Appeal rights for both sides.
12. Although in independent forum would be best, amending the "pay to play" rule would be an improvement over the current system.
- a. "Pay to play" refers to the fact that in order to get into court taxpayers must fully pay the tax at issue.
 - b. Requiring full payment before taxpayers can present their case to an independent tribunal is a denial of due process for many taxpayers who cannot afford to pay the tax first and then pay to litigate.
 - c. Allowing taxpayers an option of going to court on a prepayment basis would remedy this injustice.

¹ Lindholm, Douglas L. and Kranz, Stephen P., "The Best and Worst of State Tax Administration," (April 2007 Council on State Taxation).