

CALIFORNIA OFFICE OF ADMINISTRATIVE LAW
SACRAMENTO, CALIFORNIA

In re:)
Request for Regulatory) Supplemental Information
Determination filed by)
the California Taxpayers') Concerning 1986 OAL Deter-
Association, concerning) mination No. 3
County Assessors Letter)
No. 85/128 ("Sale and) [Docket No. 85- 004]
Leaseback Transactions"))
issued by the State Board) August 14, 1986
of Equalization)

DECISION by: LINDA HURDLE STOCKDALE BREWER, Director

Herbert F. Bolz
Coordinating Attorney,
Rulemaking and Regulatory
Determinations Division

In a letter dated June 19, 1986, the Board of Equalization ("the Board") requested that we (1) reconsider our above-noted Determination and (2) schedule a meeting with representatives of the Board and the California Taxpayers' Association ("Cal-Tax") to discuss alleged factual misconceptions reflected in the Determination.

In response to these requests, we have reviewed the Determination and the other documents in the file in light of the expressed concerns. As indicated over the telephone to the Board and to Cal-Tax on June 27, we conclude that none of the matters discussed in the above-noted letter requires us to reach a different legal conclusion. Similar contentions were fully analyzed in the Determination.

Government Code section 11347.5 forbids state agencies not only from "enforcing" but also from "issuing" bulletins, etc. We agree that Letter to Assessors No. 85/128 is not legally binding; we specifically found it to be "invalid and unenforceable" (Determination, p.1). All agency "bulletins" that are regulatory in content are legally unenforceable. Government Code §11347.5;

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Armistead v. State Personnel Board (1978) 22 Cal.3d 198. In order to be legally binding, pronouncements of a regulatory nature must appear in a constitutional, statutory, regulatory, or decisional law provision.

We will next discuss two particular points raised in the letter.

The fourth point of the letter read as follows:

"In the first paragraph on page 13, the determination states that 'the Board may now be attempting to enforce the Letter's interpretation of the statute in administrative assessment appeal proceedings.'

While we have reason to believe that change in ownership issues involving sale and leaseback transactions will be the subject of local assessment appeal board proceedings, the Board does not participate in these activities. These are solely local proceedings involving the taxpayer, the assessor and the local board of equalization or appeals board. The Board has no authority intervene in these proceedings and it does not, in fact, participate in them. (In order to make the record complete, we note that individual Board employees have, on occasion, been called as witnesses in local equalization hearings. In such cases, these individuals appear as expert witnesses and not as representatives of the State Board of Equalization.)"

The role played by Letters to Assessors in local appeal proceedings was clarified by admissions made by the Board on p.5 of its reply to Request for Determination No. 85-005. In this reply, the Board stated that Letter to Assessors No. 82/89 ("Easements of Intercounty Pipelines") was

"a means of informing county assessors of the fact [sic] that the Board had determined that pipelines and rights-of-way should be state assessed. Presumably, assessors complied with the law [i.e., the Board's expansive reinterpretation of the statutory term "state assessed property"] and, where necessary, made the appropriate adjustments to the local roll required by [Revenue and Taxation Code] section 405. If they failed to do so [i.e., failed to comply with Letter 82/89's interpretation of the Revenue and Taxation Code], the taxpayer was provided an adequate remedy through the local equalization process." [Emphasis added.] [See 1986 OAL Determination No. 4 (State Board of Equalization, June 25, 1986, Docket No. 85-005), California Administrative Notice

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Register 86, No. 28-z, July 11, 1986. p. B-17; Looseleaf typewritten version p. 15.]

We infer from the above-quoted language that Letters to Assessors are on occasion used in local appeal proceedings as evidence of how the Board interprets "the law". Further, our research has disclosed some evidence that tax practitioners perceive Letters to Assessors as authoritative statements of law. We note citations to Letters to Assessors in both Ehrman and Flavin, Taxing California Property 2d ed. and California Taxation (Matthew-Bender).

Ehrman and Flavin note specifically that the Board "periodically issues letters to assessors further interpreting the [Board's regulations]" (1984 Supplement, §2, p. 23). (Emphasis added.)

In any event, if Letters to Assessors are given weight in local appeal proceedings as official Board interpretations of "the law" administered by it, this would appear violative of the Armistead principle that invalid informal rules merit no weight as agency interpretations. In discussing a provision of the informally issued Personnel Transactions Manual, Armistead stated:

"Should section 525.11 be given weight as an administrative interpretation?"

The board argues that, even if section 525.11 is invalid because of APA requirements, it still merits deference as an interpretation by the administrators of a rule that needs interpretation.

A major aim of the APA was to provide a procedure whereby people to be affected may be heard on the merits of proposed rules. Yet we are here requested to give weight to section 525.11 in a controversy that pits the board against an individual member of exactly that class the APA sought to protect before rules like this are made effective. That, we think, would permit an agency to flout the APA by penalizing those who were entitled to notice and opportunity to be heard but received neither.

Under sections 11371(b), 11420 and 11440 of the APA, rules that interpret and implement other rules have no legal effect unless they have been promulgated in substantial compliance with the APA. Therefore, section 525.11 merits no weight as an agency interpretation. To hold otherwise might help perpetuate the problem that more than 20 years ago was identified in the First Report of the Senate Interim Committee on Administrative Regulations, supra as follows (at pp. 8-9):

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'The committee is compelled to report to the Legislature that it has found many agencies which avoid the mandatory requirements of the Administrative Procedure Act of public notice, opportunity to be heard by the public, filing with the Secretary of State, and publication in the Administrative Code.

'The committee has found that some agencies did not follow the act's requirements because they were not aware of them; some agencies do not follow the act's requirements because they believe they are exempt; at least one agency did not follow the act because it was too busy; some agencies feel the act's requirements prevent them from administering the laws required to be administered by them; and many agencies . . . believe the function being performed was not in the realm of quasi-legislative powers. . . .

'The manner of avoidance takes many forms, depending on the size of the agency and the type of law being administered, but they can all be briefly described as "house rules of the agency."

'They consist of rules of the agency, denominated variedly as "policies" "interpretations," "instructions," "guides," "standards," or the like, and are contained in internal organs of the agency such as manuals, memoranda, bulletins, or are directed to the public in the form of circulars or bulletins.'" (22 Cal. 3d at 204, 205; 149 Calif. Rptr. at 4) [Emphasis added.]

The Board's final point concerned two recent OAL statements on the "legal ruling of counsel" exception to APA requirements. The Board stated:

"...The first full paragraph on page 17 of the determination discusses the interrelationship of legal rulings of counsel and Government Code section 11347.5. It states that if in the preparation of a tax counsel ruling it is recognized that a new rule of general application is necessary in order to properly interpret a statute, the Board may release the legal counsel ruling to the person requesting it but must begin a rulemaking action. We understand this to mean, then, that we are being advised that legal counsel rulings should be converted to regulations, adopted in accordance with the APA, when a rule of general statewide application is desired.

In a recent disapproval of one of the Board's sales tax regulations, however, we were advised by the Office of

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Administrative Law that certain language appeared to be in the nature of a legal ruling of counsel and that, by definition, the language could not be included in a regulation. Please see your letter dated April 14, 1986 (File No. 86-0307-1) relating to the amendment of section 1525 of Title 18 of the California Administrative Code. On page 4, the Disapproval Opinion, discussing subsection (c) of section 1525, states in part:

'It should also be noted that the above-described example appears to be in the nature of a legal ruling of counsel issued by the State Board of Equalization. Government Code section 11342(b) specifically excludes these rulings from what is properly a "regulation."'

If legal rulings of counsel cannot be included in a formally adopted regulation, as suggested by the above-quoted language, then we believe your statements on page 17 of the determination should be clarified further since it is unclear how the Board should proceed in the circumstances described."

OAL's position on the question of when legal rulings of counsel must be formally adopted as regulations is stated in the Determination under discussion. Clearly, however, the full text of the ruling should not be proposed for inclusion in the California Administrative Code. Many details are not necessary in order to articulate the new standard of general application. For instance, the Board's ruling of counsel dated December 4, 1985 (Exhibit "C" to the Board's reply to Request 85-004) is seven pages long.

However, when the Board's Chief Counsel sought to reduce the policy reflected in the ruling to a concise statement of law, he was able to incorporate it in a suggested regulatory amendment which deleted eight words and added eight words to Title 18 CAC, section 462(k)(4). See Exhibit B to Cal-Tax's Request--J.J. Delaney's memo of October 24, 1985.

Thus, if the Board seeks to adopt a regulation stemming from a ruling of counsel, it would be appropriate to omit unnecessary details of the transaction or situation outlined in the request for ruling. OAL aims to work toward including all genuinely regulatory material in the CAC--while at the same time minimizing the amount of background or merely informational matter.

The above-quoted Disapproval Opinion disapproved adoption of the example given in proposed 18 CAC §1525(c) on necessity grounds. The proposed language was not disapproved on grounds it was a

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legal ruling of counsel. OAL's comment was intended solely as a suggestion that when reviewing the regulation proposal, the Board consider whether all the details in the example were necessary to effectively articulate the intended standard of general application.

In light of our conclusion that none of the matters raised in the Board's letter of June 19, 1986, warrant changing our legal conclusion, we feel it would not be productive to schedule a meeting involving OAL, the Board, and Cal-Tax.

Persons with questions concerning this matter are invited to direct them to John D. Smith, Deputy Director/General Counsel or to Herbert F. Bolz at (916) 322-3761, ATSS 492-3761.

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