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Re: May 13 Agenda Item M – COVID-19 Property Tax Relief Task Force Report

Dear Honorable Chairman Vasquez and Members of the State Board of Equalization:

Thank you for the opportunity to comment on the State Board of Equalization's COVID-19 Task Force Report. I am counsel for the Assessment Appeals Board of Santa Clara County and have served as legal counsel in property tax matters for over 20 years. During those 20 years, I have served as advice counsel at the county level, participated over the years in the State Board's interested parties process, and successfully litigated numerous property cases in the appellate courts. Having participated in the State Board's meeting last month and in the COVID-19 Property Tax Relief Task Force, I appreciate the opportunity to comment on the Task Force's report to this Board.

Penalty Waivers for Late-Filed 571Ls

Given that the Governor has now issued an executive order extending time through May 31 for taxpayers to file 571Ls, this topic may be moot; however, the Task Force report inaccurately represents the position of AAB Counsel on this subject. The Assessors recommended that the SBE seek an Executive Order granting assessors the authority to waive penalties for 571Ls filed between May 8 and May 31 where the taxpayer's late-filing resulted from the COVID-19 emergency. AAB counsel and AAB clerks supported that proposal. As I explained during the task force conference call, an executive order granting assessors authority to waive penalties for 571Ls filed late due to the COVID-19 emergency would help prevent clogging the County Boards of Equalization and County Assessment Appeals Boards (County Boards) with penalty abatement hearings. But the Task Force report inaccurately lists AAB counsel and AAB clerks as opposing that proposal.

The Task Force report (Option 2) also erroneously suggests that the State Board could utilize Revenue and Taxation Code section 155 to further extend the deadline for taxpayers to file 571L property tax statements. But RTC Section 155 provides no such authority, and such an action would, therefore, be improperly taken in excess of the authority granted to the State Board by the Legislature. Filing a 571L is an action taken by the taxpayer. Section 155 does not provide authority for the SBE to extend deadlines for actions taken by taxpayers; Section 155 only provides the SBE authority to extend the deadline for actions taken by Assessors and County Boards.

Assessment Appeals – Section 1604 2-Year Deadline to Hear and Decide Assessment Appeals

Under Section 1604, timely filed assessment appeals must be heard within two years, otherwise the taxpayer's opinion of value as stated on the assessment appeal application must be entered as the roll value and becomes the basis upon which taxes are levied. Due to the COVID-19 emergency, County Boards have already lost 2 months of time this year due to their inability to hear and decide assessment appeals. Stated another way, they have already lost 1/6 of the total hearing time available this year and 1/12 of the total hearing time available under Section 1604. By the time that the current Bay Area shelter in place orders expire, the Bay Area counties will have lost 1/4 of the total hearing time available this year and 1/8 of the total 2-year time available under Section 1604. And there is no end yet in sight to the COVID-19 emergency.

I (along with other AAB Counsel and the AAB Clerks) strongly encourage the State Board of Equalization to urge that the Governor issue an Executive Order extending and tolling the 2-year statute for the duration of the COVID-19 emergency plus 120 days and/or to sponsor/support emergency legislation to the same effect. This will help provide the County Boards time to hear the many cases that have not been heard due to the Covid-19 emergency, to prioritize hearing those cases once the shelter-in-place orders are lifted, and to timely handle the additional resulting backlog created by the COVID-19 emergency. This will, naturally, also leave AABs better prepared to also timely hear the potential tsunami of additional assessment appeals that might be filed in the future due to the COVID-19 emergency.

In the alternative, the clerks and counsel for the County Boards urge the State Board of Equalization to broadly construe Revenue and Taxation Code section 155 and read it as permitting the State Board to grant multiple consecutive 40-day extensions that would last for the same duration as the requested executive order/proposed legislation.

At page 11, the Task Force report erroneously states that Los Angeles AAB counsel opposes extension of the 2-year statute on the basis that this would create a backlog further delaying taxpayers' rights to a timely appeal. In fact, during the Task Force Zoom meeting, Los Angeles AAB Counsel Tom Parker, myself and CACEO, speaking for AAB counsel and AAB clerks, all strongly urged the State Board to promptly request that the Governor issue an Executive Order extending and tolling the 2-year statute for the duration of the COVID-1 emergency + 120 days.

Waivers of the 2-Year Statute

I, along with other AAB Counsel and the AAB Clerks, strongly urge the State Board of Equalization to reject the proposal put forth by tax agents and the Task Force (Option 2) of creating a new system of time-limited waivers. Current law already provides protections that ensure taxpayers can enter into

waivers of the 2-year statute without fear that their cases might languish on the assessment appeals docket. Under current law, taxpayers may revoke their time-waivers at any time by providing 120-days written notice to the County Board. (See Property Tax Rule 323.) This protects taxpayers by providing them means to ensure that their cases will not languish on the docket if they agree to a waiver of the 2-year statute. And it adequately ensures that if a taxpayer revokes their time-waiver, then the County Board will have sufficient time to schedule a hearing (the law requires that the AAB provide 45 days' notice of hearing); the taxpayer and assessor will both have time to prepare for the hearing; and the County Board will have time to hear the assessment appeal – even if it is a complex multi-day appeal - and thereafter render a considered decision.

Furthermore, if, at the urging of tax agents, the State Board creates a new-system of time-limited waivers, this would sow administrative confusion and increase the risk of cases running the 2-year statute due to inadvertence, tracking difficulties, time problems, and even gamesmanship by savvy agents and taxpayers. As a result, if the State Board creates a new system of time-limited waivers, County Boards will most likely find themselves in the position of having to be less flexible and deny more taxpayers' postponement requests. The effects of this would be felt, most especially, by those taxpayers represented by agents who over-extend themselves by filing appeals across the state and therefore frequently seek belated and/or multiple postponement requests, or even seek to reinstate cases where they simply failed to appear for their clients due to their simultaneous commitments elsewhere. And it would also adversely impact self-represented taxpayers. Self-represented taxpayers often first realize shortly before the hearing, or even on the hearing date before their case is called, that they need more time to assemble the type of evidence that might assist them in persuading the County Board to lower their property value. County Boards have been very flexible in granting belated and even multiple postponement requests to such self-represented taxpayers. But a new system of time-limited waivers would leave County Boards feeling less flexibility to do so because of the risk that assessment appeals with time limited waivers would run statute.

Rule 1605 Deadline to File Assessment Appeals re Supplemental/Escape Assessments:

In Santa Clara County, and many counties around the state, taxpayers must file assessment appeal applications within 60 days after receiving notice of supplemental assessments and escape assessments. (Rev. & Tax. Code §1605.) To the extent, if any, that a taxpayer cannot meet that deadline due to the COVID-19 emergency, the law already provides the taxpayer with the appropriate remedy. (Rev. & Tax. Code §1605(b)(1).) Section 1605(b)(1) provides that if the taxpayer does not receive the assessment notice within 15 days before the 60-day filing deadline expires, then the taxpayer may file their assessment appeal application based on the subsequently issued tax bill (which often does not issue until many months later) by filing their assessment appeal application based on the tax bill together with a declaration under penalty of perjury that they did not timely receive the assessment notice. Property Tax Rule 305(B)(7) incorporates that Section 1605 relief by reference.

Option 1 presented in the Task Force report improperly suggests that the State Board of Equalization may utilize Revenue and Taxation Code section 155 to extend the 60-day deadline for taxpayers to file on Supplemental/Escape Assessments. But Section 155 does not authorize the State Board to take such action. The 60-day deadline under Revenue and Taxation Code section 1605 is a statute of limitations that places a deadline on when the applicant can act by filing their application. Section 155 does not grant the State Board authority to extend the time for an Applicant to file their assessment appeal application; Section 155 only grants the State Board authority to extend time for "an act taken by the assessor or

county board." Nor can the State Board semantically circumvent that statutory limitation by stating it is "extending the deadline for the AAB to accept appeals". The statute of limitations is based upon the Applicant's act of filing the application; not on the date that the AAB act to decide whether to accept the application filed by the applicant or reject it as invalid/untimely. Therefore, such an action would be improperly taken in excess of the authority granted to the State Board by the Legislature.

Option 3 of the Task Force Report also suggests that the State Board of Equalization encourage actions that would not be in conformance with the law. Inaccurately, citing Property Tax Rule 305(d)(4), Option 3 suggests that the State Board issue an LTA encouraging AABs to allow a "Safe Harbor" period (e.g. through July 1, 2020) for taxpayers to late-file appeals.

- First, Section 1605(b)(1) already establishes what the statutory safe harbor period is for late-filed appeals. Under Section 1605(b)(1), if the taxpayer does not receive the notice of assessment within 15-days before the Section 1605 60-day deadline, then the Applicant can file an assessment appeal application within 60-days after receiving the tax bill together with a declaration under of perjury that they did not receive the notice of assessment.
- Second, Rule 305(d)(4)—referenced in the Option 3 recommendation – has no bearing on the filing period for supplemental/escape assessments. Rule 305(d)(4) expressly governs only assessment appeals based on regular roll assessments pursuant to Revenue and Taxation Code section 619 that are appealed during the annual regular roll filing period; it does not govern assessment appeals based on supplemental/escape assessments. Instead, Rule 305(d)(7) addresses filing on supplemental/escape assessments and does so by citing Section 1605.
- Neither the Revenue and Taxation Code nor the Property Tax Rules promulgated thereunder provide the State Board with authority to create, authorize or recommend a "safe-harbor" for late-filed appeals different than that already provided by RTC Section 1605(b)(1). However, Section 1605(b)(1) already provides taxpayer relief by providing that taxpayers who do not receive their notices of supplemental/escape assessments at least 60 days before the filing deadline may instead file within 60-days of receiving the tax bill by filing an assessment appeal application together with a declaration under penalty of perjury explaining that they did not timely receive their assessment notice.

RTC 170 Disaster Relief/Slocum

The California Constitution requires physical damage or destruction. (Art. XIII Section 15.) Any reading of or amendment to Section 170 that would provide relief for economic damages due to restricted access or try to define physical damage to include restricted access without actual physical damage would be unconstitutional and render Section 170 void. And, as is clear from the *Slocum* decision, the resulting litigation would cause the California courts to declare those portions of Section 170 to be void and invalid.

After the terrorist attacks of September 11, 2001, I was one of the primary attorneys who opposed promulgation of Property Tax Rule 139 as unconstitutional and litigated the case that invalidated Rule 139: *Slocum v. State Board of Equalization,* 134 Cal.App.4th 969 (2005).

In *Slocum*, the counties pointed out that the SBE's efforts to provide tax relief for economic damages due to restricted access both violated the State Constitution and exceeded the statutory authority under Revenue and Taxation Code Section 170. *Slocum*, 134 Cal.App.4th 969, 972.

The *Slocum* trial court invalidated Rule 139 as promulgated in excess of this board's statutory authority, and having made that decision did not go further to address the over-arching Constitutional violation. (*Id.* At 972.) The *Slocum* appellate court affirmed that Rule 139 was invalid, explaining that not only was Rule 139 promulgated in excess of the State Board's Section 170 authority, but it also violated the constitution because the constitution requires actual physical damage or destruction. (*Id.* at 976.) The *Slocum* court explained:

Assessors are charged with assessing all property subject to its full cash value on January 1. (*Id.* At 972.) And Article 13 Section 15 of the California Constitution empowers the Legislature to authorize local taxing entities to provide for the reassessment of "taxable property physically damaged or destroyed after the lien date to which the assessment relates." (*Id.*) As the *Slocum* Court emphasized, not only was Property Tax Rule 139 promulgated in excess of the State Board's statutory authority, it was also "not consistent with . . .the constitutional provision that Section 170 implements." (*Id.* At 976.)

Explicitly addressing Revenue and Taxation Code section 170(a)(1)-(3), the *Slocum,* court explained that article XIII section 15 of the California Constitution only permits reassessment where taxable property is "physically damaged or destroyed. Statutes inconsistent with our Constitution are void." *Id.* at 977. (Emphasis added.) *Slocum* held: "The SBE's effort to expand calamity reassessment relief beyond the requirement of direct physicality embedded in the constitution . . . is invalid." (*Id.* at 981.)(Emphasis added.)

In footnote six, the *Slocum* court of appeal chastised the trial court for "ignoring the pyramid of authority that sandwiches section 170 between the constitutional base and the regulatory tip" and emphasized that the physical damage requirement of article 13 section 15 calls into question the very constitutionality and validity of RTC 170(a)(1) and (a)(3) themselves. (*Id.* at fn 6.) Thus, as is clear from *Slocum*, to the extent that RTC 170(a)(1) and (a)(3) are either utilized as is or amended for the purpose of permitting property tax relief for economic damages due to restricted access absent actual physical damage or destruction, the California courts will strike down Section 170 as void because they violate the State Constitution.

Prop 8 Relief:

Option 1 – Propose/support legislation to change the lien date/valuation date for 2020: I together with other AAB counsel and the AAB clerks, urge the State Board of Equalization to reject Option 1. First, the system should be allowed to work the way it was designed to work without setting a precedent for changing the lien date willy-nilly based on events that take place subsequent to the lien date. Second, changing the 2020 valuation date after-the-fact would only sow confusion at AAB proceedings. This is especially true with respect to self-represented taxpayers who find assessment appeals confusing enough without having the lien/value date (and therefore the legally acceptable dates for comparable sales) subsequently changed for the 2020 tax year.

Option 2 – Propose/support amendments to RTC 402.5 and PTR 324(a).

- On Page 7, the Task Force report proposes amending RTC 402.5 and PTR 324(a) to allow comparable sales up to 90 days after the lien date. Notably, Section 402.5 and Rule 324

already provide that comparable sales up to 90 days after the lien date may be used in determining fair market value for the property at issue.

- The Task Force likely meant to make reference the tax agents' proposal to amend these provisions to artificially reduce property values by permitting the use of comparable sales for up to nine months after the lien date/valuation date and to do so without using time adjustments. I urge the State Board to reject that proposal as it would be inconsistent with proper appraisal practice and proper valuation procedures. Such a change would undermine the credibility of the entire property tax system. Further, if the market rises later on during such time period, then such a change would permanently saddle taxpayers who have purchased property or completed new construction in 2020 with base year values that are inappropriately higher than proper appraisal practice warrants.

Option 3- Uniform Capitalization Rates:

In Option 3, the Task Force report puts forth the tax agents' proposal that the State Board of Equalization develop uniform capitalization rates for 2020/2021 in order to (artificially) reduce value of business properties across the State. I urge the State Board to reject that suggestion. Proper capitalization rates will vary by business type and area. The local County Boards have a constitutional duty to determine the correct value based on evidence presented before them. The best and most accurate evidence will be the local evidence presented by the taxpayer and the assessor, and that evidence will be most consistent with proper appraisal practice. For the State Board to artificially set uniform capitalization rates would subvert that process and undermine the credibility of the entire property tax system.

Moreover, different counties and different businesses within those counties will be impacted differently by the COVID-19 emergency. For example, as of this date at least three counties have allowed their businesses to re-open despite the Governor's Order (Yuba, Sutter and Modoc); in San Francisco Bay Area counties, Bay Area carwashes and certain other outdoor businesses re-opened on May 4; but in Los Angeles County, carwashes still remain closed, even after Los Angeles County's most recent May 8 order. Meanwhile, for example, some bakery shipping businesses now find themselves with far more business due to the COVID-19 shelter in place orders than they ever had prior to the COVID-19 emergency.

Very truly yours,

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