

M e m o r a n d u m

To: Dean R. Kinnee, Chief
County-Assessed Properties Division (MIC:64)

Date: April 25, 2012

From: Matthew F. Burke
Tax Counsel III (Specialist) (MIC:82)

Subject: *Property Tax Forms – Affidavits and Perjury
Assignment No. 12-021*

You have asked us whether certain Board-prescribed forms are permitted to include "under penalty of perjury" certification language at the jurat line. You are concerned that the statutory authority for creating such forms do not specifically state that the making of a false statement on the form by the claimant could result in a conviction for perjury and are concerned that the Board is unwittingly subjecting claimants to potential felony charges where not supported by law.

As explained below, whenever a Revenue and Taxation Code section states that a claimant must make an affidavit, the claimant is subject to committing the offense of perjury under the Penal Code. Perjury is a crime separate and distinct from any crime committed pursuant to specific statute under the Revenue and Taxation Code, and may always be charged in addition to any offenses under the Revenue and Taxation Code. Therefore, in our opinion, no Board-prescribed forms created pursuant to statute requiring the making of an affidavit need be amended to remove the "under penalty of perjury" certification.

Perjury – In General

Perjury is considered an offense against governmental authority. (1 Witkin & Epstein, Cal. Criminal Law (3rd ed. 2010) Intro--Crimes, § 125.) In early common law, the offense of perjury consisted of making a false oath in a *judicial* proceeding. (2 Witkin & Epstein, *supra*, Crimes--Gov't, § 56.) Modern statutes cover making false statements upon oath in *non-judicial* proceedings as well. (*Ibid.*)

California Penal Code section 118, subdivision (a) codifies the common law offense of perjury. It provides, in relevant part, as follows:

Every person who, having taken an oath¹ that he or she will testify, declare, depose, or certify truly before any competent tribunal, officer, or person, in any of the cases in which the oath may by law of the State of California be administered,

¹ Penal Code section 119 provides that the term "oath" "includes an affirmation and every other mode authorized by law of attesting the trust of which is stated."

willfully and contrary to the oath, states as true any material matter which he or she knows to be false, and every person who testifies, declares, deposes, or certifies under penalty of perjury in any of the cases in which the testimony, declarations, depositions, or certification is permitted by law of the State of California under penalty of perjury and willfully states as true any material matter which he or she knows to be false, is guilty of perjury. ...²

As with most modern perjury statutes, Penal Code section 118 is not limited to the taking of an oath in a court proceeding; taking an oath before a public official and then making a false statement contrary to that oath constitutes perjury. (*People v. Torterice* (1924) 66 Cal.App. 115.) Penal Code section 118 talks specifically about taking an "oath," but does not specify whether the making of an *affidavit* is included. However, there is also a specific statute providing for a finding of perjury upon the making of a false affidavit. Penal Code section 118a provides:

Any person who, in *any affidavit* taken before any person authorized to administer oaths, swears, affirms, declares, deposes, or certifies that he will testify, declare, depose, or certify before any competent tribunal, officer, or person, in any case then pending or thereafter to be instituted, in any particular manner, or to any particular fact, and in *such affidavit* willfully and contrary to such oath states as true any material matter which he knows to be false, is guilty of perjury. ...

(Emphasis added.) Thus, it is clear under this statutory scheme that the making of a false affidavit may subject the affiant to a perjury prosecution.

Code of Civil Procedure section 2003 defines an "affidavit" as "a written declaration *under oath*, made without notice to the adverse party."³ (Emphasis added.) Therefore, to be an "affidavit," a written declaration must be made under oath. Code of Civil Procedure section 2015.5 states the following:

Whenever, under any law of this state or under any ... requirement made pursuant to the law of this state, any matter is required or permitted to be supported ... by the sworn statement, declaration, verification, certificate, oath, or affidavit, in writing of the person making the same ... such matter may with like force and effect be supported, evidenced, established or proved by the unsworn statement, declaration, verification, or certificate, in writing of such person which recites that it is certified or declared by him or her to be true *under penalty of perjury* (Emphasis added.)

² It is generally stated that the following elements must be established for perjury prosecution:

- (i) The defendant took an oath (or its equivalent) required or authorized and taken before a competent tribunal or officer;
- (ii) The defendant made a false statement;
- (iii) The defendant intended to swear falsely; and
- (iv) The statement was material.

(2 Witkin & Epstein, Cal. Criminal Law (3rd ed. 2010) Crimes—Govt, § 60; *People v. Baranov* (1962) 201 Cal.App.2d 52.)

³ Code of Civil Procedure section 2009 provides that an affidavit may be used for various explicitly stated reasons, "and in any other case expressly permitted by statute."

Therefore, it is our opinion that an affidavit must be made under oath, and the inclusion of an "under penalty of perjury" certification makes clear that a written statement is being made under oath.

Property Tax Forms

Revenue and Taxation Code section 254 (hereafter Section 254) provides:

Any person claiming the church, cemetery, college, exhibition, welfare, veterans' organization, free public libraries, free museums, aircraft of historical significance, tribal housing, or public schools property tax exemption and anyone claiming the classification of a vessel as a documented vessel eligible for assessment under Section 227, shall submit to the assessor annually *an affidavit*, giving any information required by the board.

(Emphasis added.) Clearly, Section 254 mandates the submission of an affidavit by any person claiming any of the listed property tax exemptions.⁴ You ask whether the language in Section 254 requiring the submission of an affidavit allow the forms created pursuant to that section to have "under penalty of perjury" language. In our opinion, any language in the property tax laws requiring the submission of an affidavit should include "under penalty of perjury" language on the jurat because the making of an affidavit in such instance is, under Penal Code section 118, subdivision (a) and section 118a, by definition being made under penalty of perjury. Further, without the "under penalty of perjury" language, the filer of the form may be unclear as to whether the Section 254 submission is an "affidavit."

Conflicting Statutes

You ask about a potential conflict with Revenue and Taxation Code section 461 (hereafter Section 461), which provides:

Every person who willfully states anything which he knows to be false in any oral or written statement, not under oath, required or authorized to be made as the basis of imposing any tax or assessment, is guilty of a misdemeanor and upon conviction thereof may be punished by imprisonment in the county jail for a period not exceeding six months or by a fine not exceeding one thousand dollars (\$1,000), or by both.

Because Section 461 applies to statements made "not under oath," it applies to oral or written statements that a person makes that is "required or authorized to be made as the basis of imposing any tax or assessment" *other than* statements made in an affidavit since those statements are by definition made under oath. As such, a perjury charge and a misdemeanor charge under Section 461 apply to different types of statements.

⁴ Because it is not necessary to decide, we intentionally do not address the application of the perjury laws when the "person" claiming the exemption is a legal entity or other organization besides an individual.

You also ask about a potential conflict with Revenue and Taxation Code section 462 (herein, Section 462), which states:

Every person is guilty of a misdemeanor who, after written request by the assessor, does any of the following:

- (a) Refuses to make available to the assessor any information which is required by subdivision (d) of Section 441 of this code.
- (b) Gives a false name.
- (c) Willfully refuses to give his true name.

Upon conviction of any offense in this section, the defendant may be punished by imprisonment in the county jail for a period not exceeding six months or by a fine not exceeding one thousand dollars (\$1,000), or by both.

If the defendant is a corporation, it may be punished by an additional fine of two hundred dollars (\$200) for each day it refuses to comply with the provisions of this section, up to a maximum of twenty thousand dollars (\$20,000).

In our opinion, Section 462 covers situations other than those that could subject a taxpayer to a charge of perjury. Subdivision (b), giving a false name, could subject a claimant to a charge of perjury if made under oath and in an affidavit, but otherwise would subject the taxpayer to a misdemeanor charge under Section 462 if not made in a manner described in Penal Code section 118 and section 118a.

County-Developed Forms

You ask whether certain property tax forms that a county may develop may also contain "under penalty of perjury" language on the certification/jurat line. As with our answer above, if the form is created pursuant to statutory authority that requires the making of an affidavit, then in our opinion the form should contain such language because an affidavit by definition must be made under oath and subjects the taxpayer to a perjury charge. It would not matter that, as in the case with Section 254, the statute specifically says that the information is "required by the board." It is sufficient that Section 254 requires the making of an affidavit to the assessor.

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cc: Mr. David Gau MIC:63
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