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December 20, 2019

By Electronic Mail (to barry.frazier@boe.ca.gov)

Barry Frazier
State Board of Equalization
450 N Street
Sacramento, CA
94279-0064

RE: Comments in response to Letter To Assessors (LTA) No. 2019/035: “Active Solar Energy Systems New Construction Exclusion Phase One – Reporting Requirements”

Dear Mr. Frazier:

I am writing to you in response to November 13, 2019 Board of Equalization (“Board”) Letter To Assessors No. 2019/035 titled “Active Solar Energy Systems New Construction Exclusion Phase One – Reporting Requirements” (the “LTA”). In the LTA, Mr. David Yeung, Deputy Director of the Property Tax Department at the Board instructs that comments should be submitted to you by December 20, 2019. On behalf of one of our clients, we hereby timely submit the following comments addressing the LTA.

General Objection

The proposed Form BOE-571-X states that the form would be required under the authority of Revenue and Taxation Code (“Code”) section 441(a). Pursuant to Code section 441, certain taxpayers may be required to provide information to county assessors (or make such information available for examination) either through a signed property statement or in response to specific requests for information from an assessor. However, there are limits to the taxing authority’s right to secure such information from taxpayers. The California Supreme Court has held that the information sought must be *reasonably relevant* to the assessor’s assessment functions. *See Union Pacific R. Co. v. State Bd. of Equalization*, 49 Cal.3d 138, 147 (1989) (holding that the taxpayer need not hand over information relating to its speculative future acquisitions of property because such information is “not reasonably relevant to assessment of its taxable property”) This “reasonable relevance requirement” is “historically rooted in the Fourth Amendment guaranties against unreasonable searches and seizures.” *Id.* The Court also noted that a taxing authority “cannot demand information that is relevant only to a tax for which there is no conceivable basis.” *Id.* citing *Western Oil & Gas Assn. v. State Bd. of Equalization*, 44 Cal. 3d 208, 214 (1987) (“[I]f the Board has no conceivable basis in law or fact for assessing a tax on a given piece of property, then it cannot constitutionally demand information from a taxpayer that would be relevant only to such a tax.”).

The proposed property statement prepared by the Board and attached to the LTA, as drafted, would request information from taxpayers that is “relevant only to such a tax” that “has no conceivable basis in

law or fact” because it relates to active solar energy systems (“ASES”) that are currently excluded from taxation pursuant to Code section 73. *Id.* Until such property has been reassessed upon a Proposition 13 “change in ownership,” the information that would potentially be requested relating to excluded ASES is not “reasonably relevant” to the assessor’s assessment functions, and would be so overly broad and burdensome on taxpayers as to constitute an unreasonable search pursuant to the Fourth Amendment of the United States Constitution, under the California Supreme Court’s analyses in *Union Pacific*. Indeed, the information sought in the proposed property statement is more voluminous and excessively detailed than would be required of an ordinary business owner that *actually is* subject to tax. For these reasons, our client objects to the proposed property statement, as a whole, for making irrelevant information requests that are excessively burdensome on taxpayers that own non-taxable, excluded ASES.

Specific Objections

As background regarding these specific objections, it is important to keep in mind that the Code provides for a 100% property tax exclusion for the new construction of ASES. This exclusion covers substantially all the equipment in a typical solar power plant, and lasts indefinitely until there is a change in ownership of the property. This exclusion has been an immensely successful tool in helping the State incentivize the installation of tens of gigawatts of solar power throughout the State, and in driving down the cost of such power.

With that background, we make the following specific objections:

1. A 19-page annual reporting requirement is overly burdensome and represents a clear administrative overreach. This concern is particularly troubling when you consider the fact that substantially all of the components of a solar power plant are excluded from property taxation until a Proposition 13 change in ownership occurs after the property has been put into service. For example, the property statement, as drafted, would require 10 years of forward-looking projections for the full power plant. It is difficult to understand the relevance of such a request in determining the cost-based assessed value of the taxable portion of a substantially tax-excluded solar power plant.
2. Many of the terms embedded in the questions / information requests are undefined and ambiguous and, as a result, it will be difficult, if not impossible, for the county assessors to expect consistent answers to questions. For example, the property statement includes a question asking if the power plant has a “long term Power Purchase Agreement (PPA)”, but fails to define “long-term,” and there is no standard industry definition for that. The assessor might receive different answers from various taxpayers with PPAs of similar duration depending on what each subjectively believes is “long term.”
3. Much of the information requested in this draft proposed property statement is proprietary and highly confidential from a competitive standpoint. Given the lack of relevance of most of the information to assessing tax on the taxable portion of the equipment, requiring taxpayers to disclose such sensitive information is unjustified, unduly burdensome, and clearly exceeds the scope of the assessor’s authority to gather only relevant information for purposes of enrolling assessments.

More detailed comments are as follows:

PAGE 1:

1. Section A4 – this section asks the “name of the facility.” Such a name is presumably the name of the Assessee, so the question is confusing.
2. Section A5 – Please confirm this section is not asking about the leasing of land.

PAGE 2 – SECTION A6:

3. QUESTION 1 – This section asks the name and address of the assessee. This information is already provided in Section A1, so why is it being requested again?
4. QUESTION 2 – This section asks if “you have a parent company,” but there is no definition of “parent company.” Presumably, this question intends to inquire whether any one owner (that is a legal entity) owns more than a threshold percentage of the assessee, but that threshold percentage is not defined. Moreover, this information would not have any relevance to the assessor’s duty to enroll the annual assessment for the subject property.
5. QUESTION 3 – This section asks if “you have a long term Power Purchase Agreement (PPA).” However, as previously noted, “long term” is not defined and can have dramatically different interpretations.
6. Generally – Many questions include a requirement to attach contracts. Is this requirement only for the first year that a taxpayer submits a response, or does the Board expect the taxpayer to resubmit all contracts each and every year? In addition, this would be information that again would have little or no relevance to the assessment of an ASES that received the Code section 73 exclusion and has not undergone a subsequent change in ownership.
7. QUESTION 6 – The Production Tax Credit is not applicable to solar properties, and should be deleted.
8. QUESTION 7 – The section asks if a taxpayer has a facility management / operations / maintenance (O&M) contract. While the question presumably is referring to a project-wide omnibus O&M contract, the question could erroneously include numerous small contracts relating to each project, including, for example, mere maintenance contracts for portable bathrooms. The requirement to provide copies of all such O&M contracts is clearly excessive, as there is almost no way this information is relevant to assessing property tax on a solar facility, when substantially all of the ASES is excluded from property taxation.
9. QUESTION 8 – This section asks broadly if there was any “change in your company’s structure, ownership, or control within the assessment year.” Again, none of these terms are defined, nor is there any minimum threshold to the question. For example, is the reference to “company’s structure” in terms of ownership structure, operational structure, management structure, or all three? Conceivably, if the taxpayer hires a general manager for the project it would need to disclose this under this section, as currently drafted. Again, the requirement to provide such information is clearly excessive, as this information would not appear to be relevant to assessing the annual property tax on a solar facility, when substantially all of its property is excluded from property taxation under Code section 73.

10. QUESTION 9 – This section requires submittal of land leases. Is this requirement only for the first year that the taxpayer submits a response, or does the Board expect the taxpayer to resubmit all contracts each and every year?
11. QUESTION 12/13 – These questions require the taxpayer to attach tax forms previously submitted to the assessor, and to re-attach them each and every year. The referenced tax forms include specific filing requirements, and this new property statement should not be adding separate and additional filing requirements to other tax forms.
12. QUESTION 15 – This question about capitalization is very ambiguous and confusing. Presumably it is inquiring about the taxpayer's de minimis capitalization policy, but it is unclear. Moreover, it is unclear if it is asking in the context of tax accounting or book / GAAP accounting. Lastly, it's unclear if the question asked is in the context of (i) constructing the solar power plant or (ii) post-construction operations, which have two very different capitalization / expense practices.
13. QUESTION 16 – This question asks about the generating capacity of the solar power plant. There are a number of ways one can measure such capacity, so the question would need to clarify how generating capacity should be measured – *e.g.*, by reference to total / cumulative module size or interconnection size. Moreover, this same question seems to be asked in Section A7, section B.

PAGE 3 – SECTION A7

14. A2 asks for the "Facility Name." This is an ambiguous question in that the facility usually has no legal name. Presumably this is asking for the assessee's name, which is previously provided in the form. Alternatively, this question could be inquiring whether the assessee operates the facility under some type of d/b/a. As written, it is ambiguous and unclear what the form is asking.
15. A3 requests detailed facility maps, apparently each and every year. The requirement to provide such information is clearly excessive, as there is no relevance to assessing property tax on a solar facility substantially all of which is excluded from property taxation.
16. B-I requires the disclosure of a massive amount of information relating to the exact number, type, model, and manufacturer of almost every conceivable part making up the solar power plant. The requirement to provide such information is clearly excessive and unduly burdensome, and again, it is not relevant to assessing property tax on a solar facility substantially all of which is excluded from property taxation.

PAGE 10 – SECTION C1

17. This sections requires the taxpayer to disclose its operating results in a specific format and manner. The requirement to provide such information is again excessive and unduly burdensome, and not relevant to assessing property tax on a solar facility substantially all of which is excluded from property taxation.

PAGE 11/12 – SECTION C2

18. This section requires the taxpayer to produce and disclose 10 years of future projected operating results. This information is highly sensitive proprietary information. The requirement to provide

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such information is excessive, unduly burdensome, and not relevant to assessing property tax on a solar facility substantially all of which is excluded from tax.

For the reasons explained in this letter, we believe that the proposed Form BOE-571-X makes requests for information that far exceed the limits on the assessor's lawful authority to demand information from taxpayers, as explained by the California Supreme Court in the seminal cases of *Western Oil* and *Union Pacific*, and contains several vague and ambiguous requests that will cause confusion, inconsistent reporting, and will provide information that has little or no relevance to the assessor's duties to accurately assess the taxable property within their counties.

Respectfully submitted,



Peter B. Kanter
Reed Smith LLP