

From: [Sunset Advisory Commission](#)
To: [Janet Wood](#)
Subject: FW: Form submission from: Public Input Form for Agencies Under Review (Public/After Publication)
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From: sundrupal@capitol.local [<mailto:sundrupal@capitol.local>]
Sent: Tuesday, November 25, 2014 3:32 PM
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Subject: Form submission from: Public Input Form for Agencies Under Review (Public/After Publication)

Submitted on Tuesday, November 25, 2014 - 15:31

Agency: STATE OFFICE ADMINISTRATIVE HEARINGS TAX DIVISION

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Your Comments About the Staff Report, Including Recommendations Supported or Opposed: TTARA agrees with the staff report's assessment of the SOAH Tax Division and supports the recommendations made therein. However, as explained by the following comments, we believe that additional steps can be taken to further provide for greater independence of SOAH rulings.

Any Alternative or New Recommendations on This Agency:

The following comments regarding SOAH's Tax Division reflect information gathered from TTARA members concerning their experiences in resolving tax disputes. TTARA's membership includes major businesses in virtually every economic sector from heavy industry to professional services, including accounting and law firms that regularly represent clients in state and local tax disputes.

TTARA members voiced no complaints about the Tax Division. To the contrary, the consensus is that hearings are conducted in a timely and impartial manner and that the proposals for decision (PFD) issued by the Administrative Law Judges (ALJ) are thorough, well-reasoned and clearly explained. What happens to the PFDs, however, is of great concern.

What's Amiss?

As promised during her campaign, one of Comptroller Combs first official actions, taken on her second day in office in January 2007, was to move tax hearings to SOAH through an interagency contract. The transfer was subsequently codified shortly thereafter with the passage of SB 242. In the news release announcing the transfer, the Comptroller stated that the purpose was "to assure taxpayers that they will receive fair and impartial treatment in tax disputes." The Comptroller further stated: "It is imperative to move hearings out of the Comptroller's office, to remove any appearance of bias and ensure that the integrity of the hearing process is beyond question." She said

that having judges who rendered proposed decisions in tax disputes working for the Comptroller was “like having the police, the prosecutors and the judges working in the same office.”

However, the avowed purpose has yet to be fully achieved. In fact, the only apparent change seems to be that the ALJs moved southwest a couple of blocks to be housed at SOAH instead of in the Comptroller’s Office; the essential character of the hearing process has not changed.

There was never any real problem with the fairness of the conduct of hearings when the ALJs were in the Comptroller’s Office. Rather, the issue was that ALJs were Comptroller employees; thus, the Comptroller had carte blanche authority to change their findings before a final decision was issued. This situation made it appear that no truly independent, impartial rulings were ever issued since no hearing decision was approved that was not signed off on by the Comptroller.

The purpose of SB 242 was to dispel this perception by assigning to the Tax Division, instead of the Comptroller, the responsibility for hearing contested cases (§111.00455, Tax Code). This independent authority is different than SOAH’s responsibility when hearing matters for other state agencies. For example, in addition to the Tax Division, SOAH has two other statutorily created divisions – Natural Resource Conservation and Utility – that hear contested cases for the TCEQ and the PUC respectively. In each case, SOAH in essence is acting as an agent of the agency and performs its duties on behalf of the agency. (See §§2003.047 and 2003.049, Government Code) In contrast, the Tax Division is conducting hearings in place of, not on behalf of, the Comptroller.

In recognition of the possibly unsettling impact of adverse SOAH rulings on Comptroller tax policy, the following provisions were included in SB 242 to enable the Comptroller to retain hegemony over the setting of tax policy while at the same time protecting the independence of the ALJs findings as much as possible:

Government Code, §2003.101(e):

Notwithstanding Section 2001.058, the comptroller may change a finding of fact or conclusion of law made by the administrative law judge or vacate or modify an order issued by the administrative law judge only if the comptroller:

- (1) determines that the administrative law judge:
 - (A) did not properly apply or interpret applicable law, then existing comptroller rules or policies, or prior administrative decisions; or
 - (B) issued a finding of fact that is not supported by a preponderance of the evidence; or
- (2) determines that a comptroller policy or a prior administrative decision on which the administrative law judge relied is incorrect.

Government Code, §2003.101(f):

The comptroller shall state in writing the specific reason and legal basis for a determination under Subsection (e).

Government Code, §2003.101(j):

The comptroller may not attempt to influence the findings of fact or the administrative law judge's application of the law except by evidence and legal argument.

Thusly, the independence of SOAH ALJ proposals for decision is statutorily safeguarded and can only be modified by the Comptroller pursuant to a thorough documentation of a set of prescribed conditions. In practice, however, PFDs on occasion have been altered with little, if any elucidation.

Additionally, the authority given the Comptroller to change a PFD by declaring that an existing policy or prior administrative decision that supports the ALJ’s ruling is no longer valid is problematic. This has happened and it allows the Comptroller to declare invalid agency policy that was relied on to guide taxpayer compliance actions. Maintaining the integrity of the tax administration system requires that taxpayers be able to rely on the validity of existing policy and that policy changes be made in an orderly fashion, not just by changing a PFD. That’s the very *raison d’être* for having the Administrative Procedure Act, Chapter 2001, Government Code, on the books.

In recognition of the benefit of resolving tax disputes in a timely fashion, Government Code §2003.103 directs the Tax Division to conduct all hearings in a timely manner and to expedite a case when requested to do so by the Comptroller. The Tax Division has done just that but PFDs frequently languish in the Comptroller’s Office while

being reviewed before a final decision is issued. Administrative Rule §1.28 concerning the Comptroller's final decision just states that a final decision will be issued upon receipt of the PFD. A seemingly inordinate amount of time often passes between PFD receipt and the emergence of a final decision.

After redaction to preserve taxpayer confidentiality, final decisions are made public and posted on the Comptroller's State Tax Automated Research (STAR) System. PFDs, however, are not publicly available and the portions thereof that are changed in the final decision frequently are not included therein. As a result, valuable tax compliance guidance is not revealed.

In our view, the experiences of TTARA members in resolving tax disputes indicates that the transfer of tax hearings to the Tax Division has not fully succeeded in ensuring taxpayers that they will receive fair and impartial results in administrative hearings on their tax disputes.

What Should Be Done

Full independence of the Tax Division's findings could be achieved by removing the Comptroller's authority to alter PFDs. The Comptroller, thereby, would be treated the same as the taxpayer and could file exceptions to a PFD and further appeal an adverse final decision to District Court. If, for whatever reason, complete independence is deemed not acceptable or not doable, significant alterations of the current construct should be made.

The Comptroller should not be allowed to change a PFD without first filing exceptions thereto, just like a taxpayer can, in accordance with SOAH's Administrative Rule §155.507. Each party is then allowed to file a reply to the exceptions for the ALJ to consider when deciding whether to make any accommodating changes to the PFD. The final PFD then will be based on an assessment of all relevant arguments and, therefore, more responsive on the matters at issue. The best resolution is more apt to be reached when each party places all their cards on the table.

Government Code §203.101(e)(2) should be repealed to remove the Comptroller's ability to change a PFD because a current policy or prior administrative decision is now deemed incorrect. Rewriting a PFD is not the proper way to change agency policy. Rather, it should be done pursuant to an open, deliberative and collaborative process.

The text of any altered portions of a PFD should be included in the Comptroller's final decision along with the rationale for any changes.

Doing so will enhance the precedential value of final decisions and provide clearer guidance for taxpayer compliance.

Lastly, the Comptroller should be required to issue a final decision in a timely fashion by specifying that it be released within a reasonable period of time after receipt of a final PFD. The deadline and any extension permitted should be established in consultation with the Comptroller and SOAH. Similarly, the Comptroller should be required to promptly post final decisions on the STAR System.

In our view, the above recommendations will serve to further the goal of providing for an independent administrative resolution of tax disputes and will enhance the efficacy and efficiency of the process,

My Comment Will Be Made Public: I agree