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March 7, 2016

David Sumner, Executive Director  
Independent Regulatory Review Commission  
333 Market Street  
Harrisburg, PA 17101

Re: Board of Finance and Revenue Proposed Regulation  
Regulation #64-5 (61 Pa. Code Chapters 702 and 703)

Dear Mr. Sumner:

The following are the Department of Revenue's comments to the Board of Finance and Revenue's proposed regulatory package referenced above. These comments are made in two parts. The first part contains comments that relate to issues previously raised by the Department during proposed rulemaking and are numbered the same as our prior comments. The second part is an additional issue related to a recent Commonwealth Court decision.

**General Comments (Previously Raised)**

Comment #2: The Department believes that section 702.31 requires additional clarification. The Department has concerns that taxpayers and practitioners are misinterpreting the ex parte communication rule and also confusing that rule with the rules related to providing copies of submissions to opposing parties in general. The statutory ex parte rule provides that a "communication" with the Board "regarding the merits of any tax appeal pending before the board" cannot be made without the knowledge of, notice to or participation of the opposing party. 72 P.S. § 9704. The Department has noticed that taxpayers and practitioners are interpreting the ex parte rule to mean that only communications regarding "substantive" issues or facts that need to be shared with the Department. As a consequence, the Department is not receiving many procedural requests sent to the Board, such as requests to remove appeals from pending litigation, requests to extend a deadline, or requests to deviate from the Board's rules. These types of procedural matters affect the Department's substantive rights. The Department, therefore, requests that the Board make clear in its regulation that communications regarding procedural matters affecting the substantive rights of the opposing party must be provided to the opposing party.

The Department does not object to either party discussing procedural matters with the Board, however, any request made by a party to the Board to take action must be served on the other party. For example, a petitioner, without the Department's participation, may discuss with the Board that the petitioner is having difficulty gathering evidence and ask the Board what the petitioner's options are. We have no objection if the Board informs the petitioner that one option

would be to ask for a six month extension. If the petitioner decides to pursue that course of action, then the petitioner's request to the Board for an extension must be served on the Department. Section 702.31 should be clarified to reflect this.

Comment #3: The Department requests that the Board clarify the service requirements for petitions and attached exhibits. The amended Sections 703.6(b) now states the petition and the first twenty pages of attachments to the petition are not required to be served on the Department. This must be clarified as it seems to indicate that the twenty-first page of attachments and all successive pages must be served on the Department. In addition, it is unknown what is meant by the Board will "docket onto the Department's appeal system."

In the Department's experience, taxpayers routinely fail to submit evidence that is attached to a petition to the Department (this is probably because the taxpayer considers the exhibits a part of the petition and follows the Board's instructions not to serve the Department). In addition, it is unclear if the Board imports all pages of a petition and attachments into the Department appeal systems. Therefore, evidence may be submitted to the Board and not provided to the Department. As today's technology easily allows petitions and attachments to be filed electronically the Department believes that a petitioner should be required to file the petition, attachments and all other submissions directly with the Department. The Board's entry of a document in the Department's appeal system does not notify the Department attorney assigned to a case of the filing of submissions. All submissions should be required to be served directly on the Department. Given the short time deadlines in many instances, quick and direct notice is essential.

Comment #5: Compromises are another area of concern for the Department. The proposed regulation requires that a taxpayer must submit a compromise request to the Board within 30 days of filing the petition. There is a two-fold problem with this rule. First, a compromise is made between the taxpayer and the Department. The Board only issues an order to approve a compromise upon agreement of the taxpayer and the Department. Consequently, it is unclear why a compromise request must be submitted to the Board unless a compromise is reached between the parties. It is quite possible that the parties may wish compromise negotiations and their terms to remain confidential until a compromise is reached. Second, the rule creates the impression that a compromise request cannot be made after 30 days. As a petitioner is given 60 days to submit evidence the parties must file a compromise request prior to the deadline for the submission of evidence. In practice, the Department entertains compromise requests throughout the appeal process. The Department would suggest that all compromise requests and negotiations be made strictly between the parties. If the Board, for purposes of efficiently administering its docket, would like to know if the parties contemplate a compromise of an appeal, the petition form could provide for a section where the taxpayer indicates whether or not the taxpayer intends to submit a compromise to the Department.

While the Department fully appreciates the Board's concern that the Board and its staff may have spent time on developing cases in which compromises are reached late in the Board proceedings, the Board must recognize that the very nature of compromises leads to agreements

being reached at the last moment and that Board should approve compromises reached at any time during the Board's proceedings. The Department will make every effort to finalize compromises as soon as possible.

Comment #6: The Department believes the regulation should address petitions that are filed with the Board lacking specificity as to the facts and legal issues on appeal. The Department sees boiler-plate petitions in which the taxpayer raises all possible claims and tax exemptions without any further development. This is especially troubling in regard to refund claims. Although the Department does not want to restrict a taxpayer's ability to raise all legitimate claims, the Department submits that the Board should not accept boiler-plate petitions which are devoid of specificity or the Department should be permitted to request that such petitions be dismissed for lack of specificity. For reasons of judicial efficiency alone, the regulation should provide a procedure for petitions to be dismissed for lack of specificity.

Comment #9: It is unclear to the Department what binding authority will be given to the Board's rules and procedures and what sanctions or remedies exist if someone violates them. Section 702.2 specifically provides that the rules are to be liberally construed, and that they can be waived as long as the substantive rights of a party are not affected. And, there is no section discussing the consequences of failing to comply with the rules. It would be helpful to know which rules will be enforced and what the penalties are for violating the rules. The Department would like to see this issue clarified or further developed. Perhaps more importantly, if the rules are to be interpreted liberally they must be liberally construed for both the petitioners and the Department.

**Additional Comment concerning *Quest Diagnostics* and section 702.11 Date of filing**

Section 702.11 (relating to date of filing) requires additional review in light of the recent Commonwealth Court decision in *Quest Diagnostics v. Commonwealth*, 119 A.3d 406 (2015). Section 702.11(a)(2) adopts a rule for date of filing to include "the date deposited with an IRS-designated private delivery service." Regardless of the merits of such a rule, the proposed rule is not authorized by and is in conflict with current statutory law. Its adoption would result in virtually identical statutory provisions governing each administrative appeal level being interpreted in opposite ways. This varied application of virtually identical statutory provisions will create confusion and uncertainty with regard to filing of petitions and is not in the public interest.

There are two relevant statutory sections. The first governs petitions filed with the Board of Finance and Revenue. It provides:

72 P.S. § 1103.1.-- Timely mailing treated as timely filing. -- Notwithstanding the provisions of any state tax law to the contrary, whenever a petition pertaining to a state tax is required by law to be received by the Board of Finance and Revenue on or before a day certain, the taxpayer shall be deemed to have complied with such law if the letter transmitting the petition which has been received by the board is **postmarked by the**

**United States Postal Service** on or prior to the final day on which the petition is to be received.

For the purposes of this article, presentation of a receipt indicating that the petition was mailed by registered or certified mail on or before the due date shall be evidence of timely filing. (Emphasis added.)

The second section governs petitions received by the Department. It provides:

72 P.S. § 10003.6. --Timely filing. -- A taxpayer shall be deemed to have timely filed a petition for reassessment or any other protest relating to the assessment of tax or any other matter relating to any tax imposed by this act if the letter transmitting the petition is received by the Department of Revenue **or is postmarked by the United States Postal Service** on or prior to the final day on which the petition is required to be filed. (Emphasis added.)

Each of the above sections requires the use of actual receipt date to determine actual filing with one exception – letters containing petitions postmarked by the United States Postal Service. Accordingly, under the statute, the date of filing of petitions delivered by private delivery service is actual receipt date by the Board. The regulation violates this statute by providing that the date deposited with an IRS-designated private delivery service is the date of filing. Such petitions are late filed petitions under the express terms of the statute.

Furthermore, the issue of “date of filing” was recently addressed by Commonwealth Court in *Quest Diagnostics v. Commonwealth*, 119 A.3d 406 (2015). The *Quest* appeal raised the issue of whether the receipt date of an amended return qualified as the date of filing of a petition for refund and a unanimous Court held:

The time limitation in a tax statute must "be strictly enforced to prevent any uncertainty in the budgetary planning and fiscal affairs of the Commonwealth." *Phila. Gas Works*, 741 A.2d at 846. Compliance with the time limitation in the Tax Reform Code is "an absolute condition to obtaining a refund."

*Quest* at 119 A.3d at 410.

Equitable estoppel, laches or equitable tolling, however, cannot vary the statutory requirements in the Tax Reform Code. *Bethlehem Steel Co. v. Bd. Of Fin. & Revenue*, 244 A.2d 767, 772 (Pa. 1968); *Biro v. Commonwealth*, 707 A.2d 1205, 1206 (Pa. Cmwlth. 1998). **Neither the Board of Finance and Revenue nor this Court has the power to alter the explicit time limitations in the Tax Reform Code based on equitable principles.** (Emphasis added.)

*Quest* at 119 A.3d 413-414. Consistent with previous legislative proposals over the years, the merits of accepting receipt date by a private delivery service as the “filing date” is a question for

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the legislature and is not authorized by current statutory law. Accordingly, the Department believes section 702.11(a)(2) should be removed from the regulation.

The Department appreciates the opportunity to comment on the Board's regulations. The Department hopes the Board and the Commission find these comments helpful.

Sincerely,

A handwritten signature in blue ink, appearing to read "JS", is written over the word "Sincerely,".

Jeffery S. Snavelly  
Chief Counsel

cc: Jacqueline Cook, Chairperson  
Board of Finance and Revenue  
(via email: jacook@patreasury.gov)