

Comments of the Independent Regulatory Review Commission



Board of Finance and Revenue Regulation #64-5 (IRRC #3091)

General Provisions; Tax and Other Appeal Proceedings

July 15, 2015

We submit for your consideration the following comments on the proposed rulemaking published in the May 16, 2015 *Pennsylvania Bulletin*. Our comments are based on criteria in Section 5.2 of the Regulatory Review Act (RRA) (71 P.S. § 745.5b). Section 5.1(a) of the Regulatory Review Act (71 P.S. § 745.5a(a)) directs the Board of Finance and Revenue (Board) to respond to all comments received from us or any other source.

1. Implementation procedures; Clarity.

This proposed rulemaking deletes 61 Pa. Code Chapter 701, relating to special rules of administrative practice and procedure, and replaces it with Chapter 702, relating to general provisions, and Chapter 703, relating to tax and other appeal proceedings. Section 702.1 and 702.2 explain the scope of Chapter 702 and note that it shall be liberally construed. As written, these sections do not apply to Chapter 703. Is that the intent of the Board? We ask the Board to clarify this in the Preamble to the final-form rulemaking. If the scope and liberal construction provisions are meant to be applicable to Chapter 703 as well, the Board should amend the rulemaking to make that fact clear to the regulated community.

In addition, § 702.1(b) states that Chapter 702 supersedes the General Rules of Administrative Practice and Procedure (GRAPP) in 1 Pa. Code Part II. If so, then why is the supersession language in subsection (c) necessary? This same issue arises throughout numerous sections of Chapter 702 and 703. In the Preamble to the final-form rulemaking, we ask the Board to explain how these rules will be implemented in relationship to GRAPP, and if appropriate, to delete the suppression language found in the numerous sections of both chapters.

2. Consistency with statute; Implementation procedures; Clarity.

In order for a person to participate in appeal proceedings before the Board, that person must understand and comply with the regulations of the Board and Article XXVII of the Tax Reform Code of 1971. 72 P.S. §§ 9701 – 9901. The proposed rulemaking includes and expands upon certain provisions of Article XXVII, but is silent on other provisions. For example, the proposed rulemaking does not provide time frames for when petitions for reassessments must be filed or when a decision and order must be issued by the Board. This framework could be confusing to those not familiar with the nuances of the tax appeal environment in the Commonwealth. We

believe it would be beneficial to the regulated community if they could rely on one document, the Board's regulations, to understand how to effectively file an appeal and participate before the Board. To improve the overall clarity of the regulation and to assist the regulated community with participation and compliance with the Commonwealth's tax appeal process, we recommend that the Board amend this regulatory package to more accurately reflect all aspects of it.

3. Determining whether the regulation is in the public interest.

Section 5.2 of the RRA (71 P.S. § 745.5b) directs this Commission to determine whether a regulation is in the public interest. When making this determination, the Commission considers the information a promulgating agency is required to provide under §745.5(a) in the regulatory analysis form (RAF). As required by Item 12 of the RAF, we ask the Board to provide a comparison of this regulation to those of other states. We also ask the Board to update its response as to the expected delivery date of the final-form regulation in Item 29 of the RAF.

CHAPTER 702. GENERAL PROVISIONS

4. Section 702.3. Definitions. – Clarity.

The term "business day" is defined as a "day on which the Board's office is *scheduled* to be open . . ." (Emphasis added.) What if the office is scheduled to be open but then closes? We recommend that the phrase "scheduled to be" be deleted from the final-form rulemaking.

The terms "confidential proprietary information" and "trade secret" are taken from Section 102 of Pennsylvania's Right-to-Know Law and are defined as such by reference to that law. 65 P.S. § 67.102. The term "personal financial information" is a verbatim recitation of the same term from the Right-to-Know Law, but it does not include any reference to the Right-to-Know Law. We ask the Board to be consistent in the way it defines terms that come from the Right-to-Know Law and believe the proposed definitions of "confidential proprietary information" and "trade secret" are appropriate. Also, since there are several references throughout the rulemaking to the Pennsylvania Right-to-Know Law, some with citations and some without, we recommend the Board include a definition for that statute.

The term "party" is broadly defined as "a person who appears in a proceeding before the Board." Does the Board have persons who appear before it who are not parties? If so, the Board should amend this definition to provide a more accurate description of a party.

A commentator has noted that the terms "submission," "document," and "evidence" are used interchangeably throughout the rulemaking, but are not defined. We believe the clarity of the rulemaking would be improved if these terms are defined and used consistently.

5. Section 702.4. Filing generally. – Implementation procedures; Reasonableness; Clarity.

Subsection (b) states that when the Board "is of the opinion" that a filing is not sufficient, the filing may be accepted and the person submitting the filing will be required to correct the deficiency. The phrase "is of the opinion" is not regulatory language and should be replaced with a more definitive word or phrase.

Subsection (c) provides that the petitioner will accept the risk that a document filed electronically will not be properly filed. What if there is a delay in transmission because of a problem at the Board and through no fault of the petitioner? We agree with commentators that suggest this provision penalizes petitioners for circumstances that may be beyond their control and question the need for it.

6. Section 702.5. Board office hours. – Clarity.

Subsection (a) lists the Board’s office hours “[u]nless otherwise directed by the Chairperson.” We have two questions. First, what is the need for including Board office hours in a regulation? Second, how will a party be notified if the hours change?

7. Section 702.6. Oaths. – Implementation procedures; Clarity.

This provision allows a “Board member or the secretary” to administer oaths or affirmations with respect to a proceeding. Since the Secretary is a Board member, the reference to “the secretary” is not needed and should be deleted. In addition, will staff of the Board be permitted to administer oaths or affirmations? If so, the Board should make reference to that fact in this section of the rulemaking.

8. Section 702.8. Subpoenas and depositions. – Need; Clarity.

Subsection (a) states that the “Board does not possess the power to issue subpoenas or take depositions.” Since the Board does not possess that power, we question the need for including this provision in the rulemaking.

9. Section 702.21. Representation. – Need; Clarity.

This section addresses who may appear before the Board in proceedings. Subsection (a) includes language taken directly from Section 2704 (d.1) of the Tax Reform Code of 1971 and reads as follows: “Appearances in proceedings before the Board may be by the petitioner or by an attorney, accountant or other representative provided the representation does not constitute the unauthorized practice of law as administered by the Pennsylvania Supreme Court.”

72 P.S. § 9704 (d.1)(a). Commentators have suggested the rulemaking be amended to include examples of the types of arguments that non-attorneys can make before the Board and to specifically address the matter of negotiating compromises. Has the Board experienced problems with non-attorneys attempting to make arguments that only attorneys can make before the Board? What currently happens in situations where this occurs? Based on the Board’s experience, is there a need to include clarifying language in the regulation? We ask the Board to answer these questions in the Preamble to the final-form rulemaking and to amend the regulation accordingly, if needed.

Subsections (e) and (f) require the prompt reporting of a change in representation or address. How should the report be made? The Board should specify the reporting method in the final-form rulemaking.

10. Section 702.22. Limited practice before the Board. – Clarity.

Under Subsection (a)(1), the Board may deny a representative the privilege of representing a party if that representative “lacked the requisite qualifications” to represent others. We ask the Board to clarify what qualifications are required to represent a party before the Board.

11. Section 702.31. Definitions. – Clarity.

This section of the proposed regulation provides definitions for the Board’s rules on ex parte communication. The term “ex parte communication” is defined as, “A communication, regarding the merits of a petition, outside of a public hearing, by one party with the Board or staff not in the presence of the other party.” A commentator has suggested that both procedural and substantive issues be covered by this definition. Would the “merits” of a petition include both procedural and substantive issues? We ask the Board to clarify this in the final-form rulemaking.

12. Section 702.32. General rules. – Whether the regulation is consistent with the intent of the General Assembly.

Subsection (b) prohibits Board staff from participating in an ex parte communication and lists two exceptions to that rule. We note that Section 2704 (d.3) of the Tax Reform Code of 1971 provides the statutory basis for ex parte communication and it does not provide any exceptions for Board members or staff. 72 P.S. § 9704 (d.3). How is this subsection consistent with the intent of the General Assembly? Is there another statutory provision that would allow for this exception? If not, we ask the Board to delete this provision from the final-form rulemaking.

Subsection (d) requires Board staff to notify a party of an ex parte communication. How must the notification be made? The Board should specify the notification method in the final-form rulemaking.

CHAPTER 703. TAX AND OTHER APPEAL PROCEEDINGS

13. Section 703.2. Petition content. – Consistency with statute.

This section lists the items that must be included with a petition. Section 2704(d) of the Tax Reform Code also requires that a petition be supported by an affidavit of the petitioner or the petitioner’s authorized representative. 71 P.S. § 9704(d). The Board should include this requirement in the final-form regulation.

Subsection (b) requires the petitioner to notify the Board when there is a change in address. The Board should specify the reporting method in the final-form rulemaking.

14. Section 703.5. Service. – Clarity.

Subsection (b) states that the Board will publish service instructions on its website. Regulations have the full force and effect of law and establish binding norms. We recommend that any

service requirements that parties must abide by, including timelines, be promulgated as a regulation.

15. Section 703.6. Consolidation. – Implementation procedures; Clarity.

This section provides that the Board may consolidate “petitions, issues or proceedings” for the same petitioner, and “may structure a proceeding to avoid unnecessary costs or delay.” What happens if one or both parties object to a consolidation? What does it mean to structure a proceeding? Would this be a process outside of this rulemaking? We ask the Board to clarify how this provision will be implemented in the final-form rulemaking.

16. Section 703.8. Withdrawal or termination of appeal. – Implementation procedures; Clarity.

Under this provision, a petitioner that wishes to terminate an appeal before a final decision is issued by the Board must submit a written request to withdraw the appeal. If a petitioner submits a request to terminate or withdraw an appeal, does the termination or withdrawal become effective only after the Board rules on the request or immediately upon submission of the request by the petitioner? We ask the Board to explain how this provision will be implemented.

17. Section 703.11. Compromise generally. – Clarity.

Subsection (b) references the Board’s website but does not provide the address. This reference also appears in § 703.51(b) (Publication of orders). The Board should either provide the address in those sections or add a definition for the Board’s website.

Subsection (d) requires the “timely submission” of a completed Board Request for Compromise Form. What constitutes a timely submission? We recommend that the final-form regulation specify what is considered a timely submission.

18. Section 703.21. Prehearing conference. – Implementation procedures; Clarity.

Subsection (b) provides that Board staff will provide notice of a prehearing conference by telephone or electronic method. Would notice ever be made by a mail delivery service? Notice requirements should be consistently specified throughout the final-form rulemaking.

19. Section 703.31. Disposition of petitions. – Implementation procedures; Clarity.

Subsection (a) states that the petitions filed with the Board will be resolved by a written order of the majority of the Board. The proposed regulation does not specify time frames for when an order must be issued by the Board. If the Board decides to not adopt our second comment relating to providing a more detailed and complete regulatory package, we suggest that, at a minimum, the final regulation include time frames associated with the disposition of petitions.

Subsection (b) provides that a petitioner may request a hearing on the petition form “or subsequently, in writing.” Is there a deadline for when a petitioner must submit a subsequent

request for a hearing? If there is a deadline, we recommend that it be included in the final-form regulation.

20. Section 703.35. Failure to appear at hearing. – Clarity.

Under Subsection (a), if a party requests a hearing and fails to appear at the scheduled hearing, the opposing party may present its case to the Board at the scheduled hearing. It is unclear what procedures will be followed by the Board after such a hearing takes place. Would the Board issue an order in absence of hearing from the other party? We recommend that the Board include more detail on how petitions will be administered if a hearing takes place under the conditions of Subsection (a).

21. Section 703.43. Filing a request for reconsideration. – Implementation procedures; Clarity.

Subsection (b) provides that requests for reconsideration must be submitted electronically or by facsimile. Can a request be filed in person or by any form of mail delivery service as is permitted for other documents referenced in Section 702.4? The Board should make filing and submission methods consistent throughout the final-form rulemaking.

22. Section 703.45. Appeal Rights. – Clarity.

When a request for reconsideration is made, is the time period for filing an appeal stayed? How is the time period calculated when a request for reconsideration is denied?

23. Miscellaneous clarity.

There is a typographical error in the first sentence of § 703.52 (a)(3): “Information identified by the petitioner as and that meets” This should be corrected in the final-form regulation.