STATE OF WASHINGTON
DEPARTMENT OF REVENUE

December 30, 2021

Sent via email: bta@bta.wa.gov

Washington State Board of Tax Appeals
Attn: Keri Lamb, Clerk of the Board
1110 Capitol Way S, Suite 307
Olympia, WA 98504

Re: Comments to Proposed Rulemaking to Amend WAC 456-09
WSBTA Notice of Proposed Rules, WSR 21-24-067

Dear Board Members,

We are writing to address the Board of Tax Appeals' proposed rules amending WAC 456-09 with a hearing scheduled for January 7th. We want to bring to your attention proposed changes that we believe will impact representation of the Department of Revenue before the Board. We will also comment on proposed changes that may create ambiguity or issues. The following proposed changes to the rules give us the most concern: 010, 300, 310, 335, 551, 555, 557, and 955.

456-09-010(3) Though chapter 456-09 WAC explains the practice and procedure for appeals conducted as formal proceedings, the proposed change to WAC 456-09-010 may be misinterpreted as providing the only method for converting a proceeding. We suggest the proposed change be modified to encompass rights to convert for both informal and formal proceedings. For something as important as whether an appeal will be conducted as an informal or formal proceeding, we recommend the rule reference RCW 82.03.130, RCW 82.03.140, RCW 82.03.190 and WAC 456-10-010, for converting an informal proceeding to a formal. Such a specific reference would be more helpful than the general reference in WAC 456-09-001 that the rules add to but de not replace the provisions in chapter 82.03 RCW.

456-09-300 We recommend that the Board retain the second sentence in WAC 456-09-300(1), requiring the Board to send a copy of the notice of appeal to the respondent within 30 days of the Board's receipt. The proposed amendment to WAC 456-09-300(2) does not contain the same specificity as required by RCW 82.03.190(1): "The board must transmit a copy of the notice of appeal to the department and all other named parties within thirty days of its receipt by the board." The proposed change also creates an ambiguity in stating that the Board will "acknowledge receipt of a notice of appeal in writing to all parties in a timely fashion." What does "timely fashion" mean? How is that measured? Keeping the statutory 30-day notice requirement within the rule preserves RCW 82.03.190's defined window of time for the

Department to decide whether an appeal filed as an informal should be converted to a formal appeal.

In addition, before the Board's acknowledgement, the appellant is the only party aware that an appeal has been filed which could put the Department at a disadvantage. If the Board were to adopt this same practice for informal appeals, the Appellant would continue to believe the appeal was to be conducted as an informal proceeding for an unknown period of time until the Board acknowledges the appeal, extending the time between filing an appeal and the Department filing notice to convert to a formal. This would result in uncertainty and confusion. Retaining the second sentence in WAC 456-09-300(1) would be consistent with RCW 82.03.190(1) and alleviate confusion. Part of the confusion could be eliminated by requiring an appellant to serve the Department or an appropriate government entity its notice of appeal and requiring proof of service on the Department and Attorney General's Office be filed with the Board. Timing on when the Department may request a conversion would be calculated from the date of proper service.

456-09-335 Under 335, the Board proposes mandating the respondent submit a response to a notice of appeal. We request the Board not adopt this change. In the excise tax appeals, the proceedings are de novo, so this would be a futile act to require the Department to provide an answer to a notice of appeal. The Department is not required to file an answer in excise tax appeals before the Superior Court. *See* RCW 82.32.180. Additionally, the proposed change imposes a requirement in the Department's response that it state the "type of tax" and "[i]n excise tax cases, the amount of the tax in controversy and the period at issue." This directly conflicts with RCW 82.03.190(1) which requires the taxpayer to set forth the amount of tax in dispute. This impermissibly shifts a burden to the Department.

The proposal would also require that the respondent include "a notice of intent that the hearing be formal and held pursuant to the Administrative Procedure Act." Does this automatically convert an appeal that was marked as an informal appeal? This further creates an ambiguity and conflicts with the Board's proposed changes in 010. In conjunction with this rule, under 310, the Board proposes to eliminate the requirement that the appellant specify the issues to be decided by the Board and the assignment of errors. If the Board eliminates this requirement, it does not provide the respondent or the Board the precise legal issues that will be presented or the issues that need to be developed in discovery and later a possible summary judgment motion. We would recommend the Board maintain the requirement to specify the issues to be presented before the Board.

456-09-551 This is a new section that proposes limits on the amount of pages to be used as evidence. Although it is understandable the Board wants to reduce the amount of paper, we are concerned about the Due Process implications of limiting a party in presenting evidence. Additionally, the rule creates an inconsistency in excise tax cases. In subsection (2) it provides, "Each party may submit evidence and/or exhibits in support of its appeal; however, submissions are limited to the page limitations below. These page limitations <u>exclude the findings or determination of the body from which the decision or finding is appealed, audit documents</u>, property tax assessments, and formal appraisals from a licensed appraiser." However, in the excise tax subsection (d) it limits the Department to submitting a total of 500 pages, "including

any evidence from the record of the department of revenue that the party intends to rely on, if any." The "record of the department of revenue" would include the determination and the audit. Hence, the one section indicates that would be excluded from the page limit count, while the specific subsection (d) includes it as part of the page limit. We recommend a revision.

456-09-555 The changes do not include providing a moving party the opportunity to submit a reply brief. We would request the Board consider adding the option of a moving party to submit a reply brief in support of its motion. It remains unclear if all of this section's requirements, e.g., (c), (d), and (f) apply to dispositive motions, including motions for summary judgment.

456-09-557 This new section provides page limits to briefs, motions, responses, and replies. We are only concerned about the page limit to the trial briefs. The proposal limits a trial brief to 5,000 words, approximately 10 pages. If a matter proceeds to a hearing, this is the most important legal memorandum to the Board and should be at least the same word limit as proposed for dispositive motions, not to exceed 12,000 words, approximately 24 pages. The Thurston County Superior Court Local Civil Rule 10 is consistent with our proposal as it provides a limit for the length of trial briefs to 25 pages.

456-09-955 The Board proposes to expand the deadline for petitions for reconsideration of final orders to 14 days, when the Administrative Procedure Act (APA), RCW 34.05.470(1), provides for 10 days: "Within ten days of the service of a final order, any party may file a petition for reconsideration . . . ." We understand the Board has the authority to change this deadline, if it complies with the provisions under RCW 34.05.080(3). Currently, the proposed changes to the rule do not provide the Board's justification for making this change. Additionally, the Board provides a different deadline of "accept[ing] or deny[ing] a petition within 30 calendar days from the date a petition is served on the opposing party. If the board does not act within this time period, the petition is deemed to be denied." Again, this is inconsistent with the APA RCW 34.05.470(3) which deems the petition denied if the agency does not act within twenty days: "The agency is deemed to have denied the petition for reconsideration if, within twenty days from the date the petition is filed . . . ." We would recommend that the Board follow the time limits as outlined in the APA, RCW 34.05.470.

We also want to provide comments on proposed changes to various rules for your consideration. In Section 110, in defining an "Appellant" it proposes to change it to "a person or entity who appeals any order or decision." It deletes the phrase "to the board of tax appeals." However, the person or entity is appealing a decision to the board of tax appeals and not any other entity.

Section 315, subsection (2) states that a filing is timely if filed by "5:00 p.m. Pacific Standard Time." This does not account for the time change to Pacific Daylight Time, which the State has proposed to be the permanent time change, if approved by Congress. Section 325 appears to correct this by providing "by 5:00 p.m. Pacific Time." Section 345 proposes to include service of papers electronically. Although we support such a change, we want to point out that parties must

consent to electronic service. *See* CR 5(b)(7). The Board may want to encourage parties to consent to electronic service in the proposed changes.

Section 550, subsection (f) provides for the filing of a trial brief. Subsection (g) provides that "[r]eplies to any motion or brief are optional." The more common term used to describe the trial brief of the opposing party is a response brief, while a reply brief more commonly refers to the third brief, where the trial brief author rebuts arguments found in the other party's response brief. This appears to make a party able to file a reply as opposed to a response to a trial brief. If this provision is also intended to allow a party to file a reply in a motion, it makes more sense putting this provision under the motion subsection.

Section 750 provides the procedure for dismissals of an appeal by a party. Subsection (b) and section (2) could be combined into one sentence instead of a separate subsection stating, "the appellant can dismiss or withdraw the appeal any time before the scheduled hearing or before the respondent presents his or her case."

Finally, we are wondering why the Board wants to repeal Section 330 allowing a party to amend its notice of appeal and the limits surrounding if an appellant wants to amend its appeal. By repeal, is the Board indicating that a party cannot amend its appeal?

Thank you for the opportunity to comment on the Board's proposed amendments to chapter 456-09 WAC. If you have any questions, please do not hesitate to contact me at (206) 727-5417 or sharone@dor.wa.gov.

Sincerely,

Sharon S. Eckholm
Policy & Operations Manager
Administrative Review and Hearings Division

cc: Dan Jensen, Assistant Director, Department of Revenue, Administrative Review and Hearings Division
Cameron Comfort, Senior Assistant Attorney General and David Hankins, Senior Counsel, Washington Attorney General's Office, Revenue and Finance Division