

Memorandum

455.0785

To: Mr. Lawrence A. Augusta

Date: September 29, 1992

From: Mary C. Armstrong

Subject: Right to Subpena Audit Records

You have asked for a legal opinion regarding the following question:

QUESTION PRESENTED:

If a taxpayer conditions the availability of its books and records on the auditor's agreement to allow the taxpayer to videotape all audit work discussions, has the taxpayer refused to make its books and records available?

FACTS:

Recently, a Board auditor went to a taxpayer's place of business to perform an audit. After some discussion regarding the taxpayer's questionable sales for resale, the taxpayer refused to cooperate further or to allow the audit to continue unless the auditor agreed to allow the taxpayer to videotape all of their discussions. The auditor refused. The taxpayer now refuses to continue the audit or to make its books and records available. If the taxpayer continues to refuse total and unconditional access to its books and records, the Sales and Use Tax Department plans to request the Executive Director to issue a subpoena for the books and records.

ANALYSIS:

Government Code sections 15612-15618 provide the statutory framework which allows the Board of Equalization to examine the books and records of any company required to report and pay taxes to the Board. Government Code section 15613 further provides that the board may issue subpoenas for the production of books, records, accounts and papers. Government Code section 15613 does not require, as a precondition to the issuance of a subpoena, that the taxpayer has refused to provide its books and records to the Board. As such, the Executive Director could issue a subpoena requesting the books and records of any taxpayer, whether or not the taxpayer has placed conditions on the availability of the books and records.

As a policy matter, Board auditors do not subpoena books and records unless there has been a refusal on the part of the taxpayer to cooperate with the audit staff. In the instant case, the taxpayer appears to be placing conditions or limitations on the right of the Board and its audit staff to perform its statutorily mandated function. There is no provision of law which would either allow a taxpayer to videotape any audit discussion, or which would allow a taxpayer to condition cooperation in an audit on the ability to videotape the discussion. As long as the taxpayer continues to insist on the right to videotaping as a precondition to the availability of its books and records, the taxpayer has in effect refused to cooperate with the audit staff and has not made its records available as required by law.

As we understand it, the Board has no current policy regarding videotaping of audit discussions. We note that the question of videotaping various proceedings arises frequently in civil litigation. With respect to depositions, the California courts did not allow a videotape of a deposition to serve as the record of the deposition until the Legislature added express language to that effect. (See Code Civ. Proc. § 2025). Even though videotaped depositions are not permitted under limited circumstances, there are certain restrictions placed on this type of record, including the fact that the videotape operator cannot be a party to the action but must be a neutral third party. In addition, guidelines must be in place to ensure that the tape has not been altered or edited. Finally, there must be agreement between the parties on whether a single camera will be used or whether two or more cameras will be utilized in order to tape both parties to the conversation simultaneously.

If you have further questions concerning this matter, we will be happy to discuss them with you.

MCA:wk

cc: Mr. Burton W. Oliver
Mr. E. L. Sorensen, Jr.
Mr. Robert Nunes
Mr. Ron Taussig
Mr. Donald J. Hennessy
Mr. Gary J. Jugum
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cc: Mr. Glenn Bystrom
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District Administrators