

## **Summary of BBA Tax Section Membership Discussion of Proposed Updates to ATB Rules**

### **I. Standing Order 1-20 (Electronic Signatures), Remote Access and e-Filing**

#### Standing Order 1-20 (Electronic Signatures) Procedures

- Permanent Incorporation of General Post-COVID Procedures. Members appreciate the explicit procedures permitting electronic signature, and members expressed that it might eliminate confusion to codify these requirements in the Board's Rules as opposed to relying on a Standing Order from the beginning of the pandemic (or issue an updated Standing Order).
  - In particular, some members suggested that it would be simplest to adopt the SJC's Rule 13 on electronic signatures, so that it is clear what types of electronic signatures are accepted (including names preceded by "/s/").

#### Petition Filing

- Clarity on Post-COVID Filing Procedures. Members generally wished for clarity as to whether petitions must continue to be filed by mail or whether petitions may also now be filed in person. Rather than through the revised rules, this likely would require a statement on the current standing order.
- Concerns and Suggestions for Mail-Filed Petitions:
  - Clarifying Receipt of Petitions. Members expressed a general desire for greater assurance as to how and when mail-filed petitions are received by the Board. Processing can take a while, and currently a petitioner may not receive confirmation that their petition was received until after statute of limitations has passed. While Rule 1.11 generally will prevent situations from resulting in harm to client, it would be more efficient if practitioners received email notification that a petition was received within a certain number of days. This would allow practitioners to quickly act to remedy a situation where a petition was lost in the mail.
  - E-Filing of Petitions. Some members suggested moving to an online filing system (see below) or allowing filing of petitions via email to alleviate issues with mail filing. If the Board pursues the latter option, there should be a specialized procedure for email filing, as well as a formal procedure for confirming receipt of petitions filed via email.

#### Electronic Filing System

- Adoption of E-Filing System. Many members suggested adoption of an electronic filing system like the United States Tax Court's Dawson system. This may particularly streamline petition filings allowing for immediately confirmation that the petition was received and filed.
  - Practitioners that work more frequently in smaller cases and/or property tax issues noted that it might be more cumbersome with cities and localities, and thus it might be the case that individual assessors will need to opt in to receiving service via an e-filing system to ensure that taxpayers' obligations are met.
  - However, at least with the Department of Revenue, practitioners thought it would be easiest if petitions could be filed electronically.
- Potential Pros, Cons, and Considerations Raised:
  - Potential Pro—Transparency. Greater transparency to public of pending controversies. Easy access to sample filings and dockets could also aid pro se litigants.
  - Potential Con—Privacy Concerns. Petitioners may not want their controversies to be easily discoverable by the public.
  - Potential Consideration—Confidentiality. Thought should be given to taxpayer confidentiality. Should there be a redaction rule like Tax Court Rule 27?
  - Potential Consideration—Differing Case Types. Should different e-filing procedures pertain to different case types (i.e., property tax vs. personal income/corporate excise cases, large v. small assessment cases). It might be worth exploring alternatives for smaller cases and property tax matters.

#### Remote Trials and Proceedings

- Pros and Cons of Zoom. Members had a mixed view on this. Some members liked the flexibility that Zoom proceedings afford and think such proceedings are relatively smooth. Others felt that Zoom proceedings cannot duplicate the intangible benefits of in-person proceedings and that not all proceedings are as effective when performed remotely.
  - There was a suggestion that the Board offering Zoom and in-person trials and motion hearings, but make it clear to litigants that they have both options so that Zoom is not the assumed default.
  - Members also suggested that with the availability of Zoom, larger cases would benefit from more frequent status conferences in order to encourage all parties to move cases along.

- Some members expressed positive views of the proposed Rule 1.16(4) defaulting to motion hearings by video, but noted that if motions are dispositive, in-person arguments might be more appropriate or warranted, and expressed hope that the Board will be permissive in granting in-person hearings for dispositive arguments.

## **II. Pleadings / Parties**

### Identity of Taxpayer “Members”

- Limited Liability Company Members: It was noted that the reference in proposed Rule 1.01 to the definition of “Members” to refer to a member of a Board and proposed Rule 1.02 use of the term Member in reference to limited liability company members is confusing. Members of LLCs are typically the equity owners and “managers” or those appointed authority to act on behalf of the LLC, so the defined term “Members” could effectively preclude LLCs from satisfying this rule. Practitioners recommended clarifying to ensure that LLCs are able to submit petitions, and either define “Member” to refer to an owner of LLC units and/or permit an appointed Manager of an LLC to sign on behalf of the LLC.

### Intervention/Impleading

- Members noted that it would be helpful to add rules governing the process for intervening and impleading. Although rare, intervention does arise, particularly with disputes over manufacturing classification.
- Members weren’t sure if impleading is needed or possible, but there could be situations involving third party liability (i.e., if a taxpayer corporation has been sold and prior owners could be liable through transferee liability principles or responsible person statutory provisions), where it would be more efficient to have those potential third parties pulled in directly.

## **III. Trial Scheduling and Case Timelines**

### General Reflection

- Desirable Informality v. Need for Greater Oversight. General feeling among members is that the Board’s relative informality is a boon, particularly for pro se litigants, but there was also an expressed desire for more oversight to prevent case languishment. Other members expressed a wish to cut down the time from petition filing to resolution.

### Specific Suggestions/Concerns

- Property Tax Cases. One member reflected that the practice of permitting only three years to be heard at a time in property tax cases can prove burdensome to taxpayers with more years at stake.

- Answers. Several members expressed desire for the 30-day rule of 831 CMR 1.12(1) to be more strongly enforced. Answers are often filed significantly late and sometimes not at all, delaying case progress and settlement discussions. We note that proposed Rule 1.13 has rephrased the provision contemplating that the Board may permit additional time; many practitioner members expressed a hope that this means that extensions might be granted less often and/or subjected to a higher standard.
- Documents/Exhibits. Members noted that both stipulations/agreed facts (and accompanying agreed exhibits) (Rule 22) as well as documents that parties intend to introduce as evidence (Rule 27) are required to be provided to the court seven days out.
  - Members note that requiring these be done simultaneously could be difficult in the context of larger cases, and it might be better to require stipulated exhibits be finalized a week prior to party exhibits, to allow parties to complete the stipulation process prior to evaluating what additional documents they will need.
  - For smaller cases, members noted that it would be better to still permit taxpayers to bring documents to a hearing, particularly for taxpayers without representation.
  - Given the varied views on this subject, members suggested that the Board be given flexibility in the rules to order alternative schedules to satisfy the needs of specific cases.
- Pre-Trial Briefs. Members noted that pre-trial briefs are permitted (Rule 1.31) to be filed at the time of the hearing. Members viewed it as better, particularly for large cases, for pre-trial briefs to be submitted prior to the hearing to enable the opposing party to tailor their evidence, testimony and arguments.
- Post-Trial Briefing. Members generally agreed it would be good to be explicit about whether reply briefs would be permitted (and preferred to be explicit that reply briefs would be allowed as of right).
- Suggested Approaches for Case Management/Scheduling Oversight:
  - Use of Status Conferences:
    - Proposed Rule 1.19: In general, members supported the explicit contemplation of telephonic or video status conferences and the explicit requirement that parties confer on issues in advance of any status conference.
      - Members suggested that in addition to the current requirements of proposed Rule 1.19(4) that parties also be required to submit a joint report on the items listed in advance of the status conference, even if it's stating out their respective positions on disagreement.

- Mandatory Initial Telephonic Status Conference. Some members suggested the Board set mandatory telephonic status conferences within a certain amount of days from the filing of a Petition or Answer. The same concerns regarding rigidity and forced timing as summarized above for a standing scheduling requirement were raised.
- Encouraged Initial Telephonic Status Conference. Some members suggested that instead of requiring an initial telephonic conference, the Board's Rules can strongly encourage parties to pursue that option, for example by stating that the Board will hold an initial telephonic status conference to set a discovery and trial schedule if either party so requests.
- Scheduling Orders.
  - Members were generally supportive of the explicit recognition of the potential need for scheduling orders in proposed Rule 1.19(4).
  - Some members suggested that the Board require parties to submit a discovery and trial timeline within a certain amount of days from the filing of the Petition or the Answer, for example within 60 or 90 days.
  - Other members felt that such an approach might be unworkably rigid and place unrealistic timing expectations on certain cases, such as in property tax disputes.
  - Still others worried that such a requirement could prompt a flood of requests for exceptions.
  - However, there was a general thought amongst members that parties comply more with case management schedules that they set themselves.
  - Members thought that this could be appropriate for larger cases as a default rule, and leave smaller cases more permissive/as needed consistent with the current proposed rules.
- Other Means of Managing Case Schedule:
  - One member suggested including in proposed Rule 1.02 that attorneys practicing before the Board may only file petitions and other documents with "good grounds" and that are not interposed for delay, in order to reduce the number of frivolous petitions before the Board. The member expressed that this might assist the Board in utilizing its discretion under proposed Rule 1.02(8). See written comments at end that were received by email.

## IV. Discovery and Depositions

### Discovery in General

- Electronically Stored Materials. Some members expressed a desire for the Board to adopt specific rules regarding the discovery of electronically stored materials, perhaps akin to Mass. R. Civ. Pro. 34(b)(2).

### Depositions

- Proposed Rule 1.21: Members noted the change in term from “desired” to “necessary” as the standard for requesting a deposition, as well as the change from “may be granted in the sole discretion of” to “is within the discretion of”. Many members thought it would be helpful if the Board expressed its views on whether depositions will be favored by the Board or if these word changes are meant to reflect a standard that is higher than in the past. That said, per the below, views amongst membership were mixed on whether depositions should be permitted and under what circumstances.
- General Reflections:
  - Desire for Flexibility v. Depositions as of Right. General desire for flexibility expressed, and feeling that Board’s flexibility in allowing and overseeing depositions works well. However, one member expressed a desire for depositions to be allowed as of right (suggesting perhaps to refer back to MRCP 30).
  - Zoom Depositions. Several members felt that the option for Zoom depositions allows greater flexibility in terms of time and costs, and easier access to out of state deponents. Others expressed the concern that such flexibility could lead to onerous requests or gamesmanship.
  - Discovery Standard. Some members expressed a desire that the standard for discovery should be not merely admissible evidence, but instead facts that may lead to admissible evidence. However, other members expressed the view that this might be too burdensome on taxpayers who will have, in many cases, already been through a lengthy examination of the tax at issue before the Board.
    - Some practitioner members noted that there has been an uptick in depositions in recent years, and that at times the imposition of depositions has lead to a sense of harassment by the tax authorities of taxpayers.
  - Taxpayer Witnesses. One member expressed frustration over a practice amongst practitioners to not fully prepare witnesses being deposed under Mass. R. Civ. Pro. 30(b)(6) and noted that it would be helpful if the Board reminded practitioners of their obligations to prepare party witnesses to be able to speak to the relevant topics that are the subject of a Mass. R. Civ. Pro. 30(b)(6) deposition.

- Other members noted that it would be helpful to require that the party asking for a 30(b)(6) deposition should be required to articulate the topics a certain period of time in advance of the deposition to better enable the party to serve up the appropriate witnesses.

## **V. Rulings Process**

### Timing Concerns

- Speedier Findings of Fact and Reports. There was a general desire for Findings of Fact and Report to be issued more quickly to speed ultimate case resolution, with the recognition that many of the timing parameters regarding Board decisions are controlled by G.L. c. 58A, § 13.
  - There was a suggestion that Findings of Fact and Report be issued at the same time as the one-line decision, with the rebuttal that doing so may: (1) increase the time before parties receive an initial determination, and (2) be impracticable considering G.L. c. 58A, § 13's timing requirements.
  - One possibility might be for parties to jointly agree in advance that they would both request findings (in theory, prior to a decision is still "within" 10 days of a decision.)
  - One member also suggested instituting a timing rule for when the Board must issue orders and findings of law and fact.

### Transparency Concerns

- Decisions with Findings v. Findings of Fact and Reports. Some members expressed a desire for greater transparency around the Board's standards for issuing a Decision with Findings versus Findings of Fact and Report.

## **VI. Other Suggestions Submitted From Members Via Email**

- Amend rule 1.02(2) to provide that filing an answer or motion to dismiss is sufficient to appear in a case (so that a separate notice of appearance is not required).
- Suggest that all orders of the Board (including allowances of requests for continuance) be provided in writing to the parties.
- Recommendation from a member for additions to proposed Rule 1.02 to allay the filing of frivolous petitions:

### 1.02: APPEARANCE AND PRACTICE BEFORE THE BOARD

(1) In any proceeding before the Board, persons may appear and act for: themselves; partnerships of which they are partners; corporations of which they are officers; limited liability companies of which they are members; or for a municipal or other board of which they are members. Any person so appearing shall file pleadings that to the best of their knowledge have good grounds and are not interposed for delay.

...

(4) Attorneys, including attorneys admitted pro hac vice, shall conduct themselves in a manner conforming to the Massachusetts Rules of Professional Conduct and disciplinary rules of the Massachusetts Supreme Judicial, including Rule 3:07.

...

(8) The Board may, for cause, deny or suspend the right of any person to practice before it, and if it determines that a pleading is not signed or is signed with an intent to defeat the purpose of this Rule, the pleading may be stricken and the action may proceed as though the pleading had not been filed.

...

(9) Except as provided in Rule 2(1) and Rule 10(14), a non-attorney is not permitted to appear before the Board or to sign any pleading, motion, or similar document.