

BILL ANALYSIS

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Department, Board, Or Commission	Author	Bill Number
Franchise Tax Board	Ma	AB 129

SUBJECT

Confidentiality/Taxpayer Communications

SUMMARY

This bill would provide a taxpayer the same protections of confidentiality with respect to the tax advice given by any “federally authorized tax practitioner” as the taxpayer would have if the advising individual were an attorney for any noncriminal matter before the Franchise Tax Board (FTB) or the State Board of Equalization (BOE).

This bill would also provide similar protections for a taxpayer before the BOE and the Employment Development Department that do not impact the department and are not discussed in this analysis.

PURPOSE OF BILL

According to the author’s office, the purpose of this bill is to provide consistency with the federal statutes that provide confidentiality protections for the communications of a taxpayer and their tax practitioner which would encourage frank and open discussions in the preparation of both their federal and state tax returns

EFFECTIVE/OPERATIVE DATE

Because this bill is an urgency statute, the bill’s provisions would be effective immediately and specifically operative for communications between a taxpayer and the tax practitioner that occur on or after the date of enactment. The bill also provides that if SB 401 (Wolk, 2009) and this bill are enacted and become effective on or before January 1, 2010, then the provisions of this bill would remain operative until the operative date of SB 401, at which time the definition as provided in SB 401 of an abusive tax avoidance transaction would become operative.

ANALYSIS

FEDERAL/STATE LAW

Federal law authorizes the Secretary of the Treasury to regulate the practice of representatives of persons before the Treasury. Individuals may be “authorized to practice” before the IRS. Generally, those authorized include attorneys, certified public accountants, enrolled agents, and enrolled actuaries. The IRS has a program that oversees the activities of persons authorized to practice before it and can suspend or revoke that authority if the activities of the practitioner so warrant.

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The IRS Reform Act of 1998 extended the attorney-client privilege of confidentiality to tax advice, as defined, that is furnished to a client-taxpayer by any individual who is authorized to practice before the IRS and may be asserted in any noncriminal tax proceeding before the IRS as well as any federal court if the IRS is a party to the proceeding. The privilege applies only to the extent that communications would be privileged if they were between a taxpayer and an attorney and the privilege is not applicable to tax shelters, as defined¹.

From January 1, 2001, through January 1, 2009, state law provided similar confidentiality privileges between the taxpayer and a federally authorized tax practitioner for any noncriminal tax matter before the FTB and BOE. The privilege expressly excluded advice pertaining to a tax shelter. The provision was repealed by its own terms on January 1, 2009.

THIS BILL

This bill would reinstate the provisions protecting the confidentiality of communications between a taxpayer and a federally authorized tax practitioner that were repealed January 1, 2009, and would make those provisions permanent. Specifically, this bill would provide that the privileged communications afforded between a client and an attorney would apply to communications regarding tax advice, with certain limits discussed below, between a taxpayer and any federally authorized tax practitioner to the extent that the communication would be considered a privileged communication if it were between a client and an attorney.

The bill would provide that a federally authorized practitioner has the legal obligation and duty to maintain confidentiality with respect to communications with the taxpayer.

The bill's provisions would only apply in any noncriminal tax matter before FTB and would not be applicable to written communications between the tax practitioner and person in connection with promotion of the direct or indirect participation in any tax shelter as defined. The bill would define tax shelters to mean a partnership or other entity, any investment plan or arrangement, or any other plan or arrangement if a significant purpose of that partnership, entity, plan, or arrangement is the avoidance or evasion of state income or franchise tax.

The bill specifies that if this bill and SB 401 are both enacted and effective on or before January 1, 2010, the definition for abusive tax avoidance transaction amended into the Revenue and Taxation Code by SB 401 would apply to those communications that are excluded from the privilege provided in this bill.

The bill also would provide definitions for the terms "federally authorized tax practitioner" and "tax advice".

The bill is specifically operative for communications made on or after the effective date of the act adding the bill's provisions.

¹ IRC 7525

LEGISLATIVE HISTORY

AB 1416 (Vargas, Ch. 412, Stats. 2004) extended the repeal date of the statute pertaining to privileged taxpayer communications.

AB 1016 (Briggs, Ch.438, Stats 2000) provided a taxpayer with the same protections of confidentiality for communications with respect to the tax advice given by any federally authorized tax practitioner as the taxpayer would have for communications if the advising individual were an attorney.

FISCAL IMPACT

This bill would not significantly impact the department's costs.

ECONOMIC IMPACT

The provisions of this bill would not impact state income tax revenues.

Appointments

None.

Support/Opposition

Support: According to the Senate Judiciary Committee analysis of June 15, 2009, the following support was noted:

California Society of Enrolled Agents
California Society of CPAs
California Taxpayers Association
California Chamber of Commerce

Opposition: No opposition on file

VOTES

Assembly Floor – Ayes: 76 , Noes: 0
Senate Floor – Ayes: 39, Noes: 0
Concurrence – Ayes: 79, Noes: 0

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