

ANALYSIS OF ORIGINAL BILL

Franchise Tax Board

Author: Ma Analyst: Debora Barrett Bill Number: AB 129
Related Bills: See Legislative History Telephone: 845-4301 Introduced Date: January 16, 2009
Attorney: Patrick Kusiak Sponsor: _____

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 Employment Development Department that do not impact the department and are not discussed in this analysis.

PURPOSE OF THE 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, by its own terms, 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 facts constituting urgency are to ensure that certain communications between taxpayers and tax practitioners remain privileged.

POSITION

Pending.

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.

Board Position:

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Department Director

Date

Selvi Stanislaus

04/10/09

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. 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's provisions would only apply in any noncriminal tax matter before FTB or BOE or both 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. 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 federal or state income tax.

The bill also would provide definitions for 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.

IMPLEMENTATION CONSIDERATIONS

The provisions of the bill use a definition of "tax shelter" that is no longer applicable and makes reference to sections of the Revenue and Taxation Code that have been repealed. It is recommended that the bill be revised to refer to "potentially abusive tax avoidance transactions." Department staff is available to assist the author in drafting resolution to these issues and in drafting applicable definitions.

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.

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