



STATE OF CALIFORNIA
TAXPAYERS' RIGHTS ADVOCATE'S OFFICE MS F280
FRANCHISE TAX BOARD
PO BOX 1468
SACRAMENTO CA 95812-1468

chair **Betty T. Yee** | member **Keely Bosler**

01.25.2019

CHRISTINE GRAB

Dear Ms. Grab:

Thank you for your proposals presented at the Taxpayers' Bill of Rights hearing last December. As the Taxpayers' Rights Advocate, your concerns are important to me. I am always interested in hearing your concerns and partnering with you to help resolve them. Please note the Department's response below to your proposals:

1. End Policy of Withholding Estimated Tax Payments Made Via Credit Elects Until the Taxpayer Files a Return

When a taxpayer makes an estimate tax payment to be applied against a future tax liability by having a current year refund carried over to the next tax year, that amount may only offset a tax liability if one has been established. A tax liability may be created when the taxpayer files a return and self-assesses tax or when FTB's filing enforcement system (INC) builds a nonfiler case. For a self-assessed liability, the taxpayer need only claim withholding and estimated tax payments on the return. For a filing enforcement liability, the department includes any withholding credits plus any estimate payments that are associated to that specific taxpayer in calculating the balance due unless:

- The tax year/account period of the payment does not match the tax year/account period of the assessment.
- The available payments were made jointly with a spouse but the assessment is issued to only one of the individuals.
- The payments were not made timely.
- The payment resides on a different account (example, a posting error).

If a tax liability ends up in collections, our staff are trained to review estimated and suspense payments and allocate them accordingly. Additionally, when phone contact is made with the taxpayer and a credit or payment has been found, the collector will discuss the credit with the taxpayer and how to apply it to the tax year in question. However, for jointly made estimate payments on a filing enforcement liability, a tax return must be filed for the year in question in order to have the payment applied to the balance due.

The U.S. Supreme Court in *Commissioner v. Lundy* (1996) 516 U.S. 235, 133 L.Ed.2d 611 held that where the taxpayer failed to file a return claiming prepayment credits before the statute of limitations expired, any refund or credit of those payments was barred. This is a very basic principle of tax law and codified in Revenue and Taxation Code (RTC) sections 19306 and 19307. The term "suspense" means prepayments that are waiting for a return to be filed, so that they can be credited against the tax shown on the return. FTB must hold payments in suspense until a return is filed claiming those

credits. See TAM 2005-5 and authority cited.

https://www.ftb.ca.gov/law/Technical_Advice_Memorandums/2005/20050005.pdf

2. End Policy of Withholding Estimated Tax Payments Made by Married Couples

Generally, when taxpayers make joint estimated payments or have an overpayment on a joint return, the estimated payment and/or overpayment are considered as being made by both taxpayers for the joint tax liability. Pursuant to RTC section 19301(a), the amount of the overpayment may be credited against the amount due from both taxpayers and the balance shall be refunded to both taxpayers. As stated above, in order for FTB to refund the overpayment and/or an estimated payment, a joint return would need to be filed for FTB to determine the entire tax amount due had been satisfied for that year.

In the situation where the taxpayers make joint estimated payments or have a joint overpayment and subsequently file separate returns, California law is similar to federal law. Under federal law, the taxpayers can apportion the joint estimated tax payments between them in any manner the taxpayers agree on. (Treas. Reg. § 1.6654-2(e)(5)(ii)(A).) If the spouses can't agree upon an allocation, there are rules in the Treasury Regulations on how to apply the joint estimated tax payments to the spouses' separate liabilities. (Treas. Reg. § 1.6654-2(e)(5)(ii)(B).) Similarly, when FTB issues separate assessments to married taxpayers that go final and are due and payable, FTB cannot allocate the joint estimated tax payments or overpayment to the taxpayers' separate liabilities without a return in which the taxpayers have apportioned their joint overpayment and/or estimated tax payment.

3. Disclose Taxpayers' Rights Hearing to General Public

RTC section 21006 provides for an annual hearing before the Board where industry representatives and individual taxpayers are allowed to present their proposals on law changes. This is a public meeting held annually in December at the Franchise Tax Board and subject to the Bagley-Keene Open Meeting Act. Taxpayers are not required to submit anything in advance of the meeting to access their rights, they only need appear and present their issues.

The Department would disagree with the statement that FTB goes to great lengths to hide the Taxpayer Bill of Rights hearing from the general public. In fact, our Education and Outreach program covers the Taxpayer Bill of Rights hearing at many of our tax professional events. Representing approximately 65% of returns filed, tax professionals often have a clear understanding of FTB policies and procedures from working with us on multiple accounts and issues and have a vested interest in seeing things change for the better. Tax professionals represent all segments of the populations, including those with lower incomes. Tax professionals in many cases are our partners in helping taxpayers file accurately, timely, and pay the correct amount of tax, reducing taxpayer burden.

To ensure the general public is aware of the Taxpayer Bill of Rights Hearing, FTB follows the Bagley Keene Open Meeting Act which requires that we publicly notice this meeting, prepare agendas, accept public testimony and conduct the meeting in public. The required 10-day public notice of the meeting and the agenda is on our website. As the result of your letter last year, we also placed a link to the meeting notice on our home page during the 10-day period preceding the hearing.

Additionally, I would like to clarify that FTB does not send out the 4058 or 4058C. Instead they are referenced in our bills and collection notices as publications on our website which contain information about taxpayer rights. We will consider your recommended changes to the 4058 and 4058C during the annual review of all publications.

4. Move the Taxpayers' Rights Advocate's Office to Government Operations

The job of the Taxpayers' Rights Advocate is a complex one. The position by law reports directly to the Executive Officer to ensure independence from the other divisions of the department. It is important that the Advocate is an expert in the needs of the taxpayer and the tax practitioner community, and the clear voice of reason in resolving disputes between taxpayers and the Franchise Tax Board. Having the position at FTB ensures that conversations are had, collaboration occurs, and that the rights and concerns of taxpayers are considered along with revenue and resource constraints when developing FTB policy or tax administration decisions.

Each of the tax agencies, BOE, CDTFA and FTB have Taxpayer Advocates established by statute. Your proposal would not only require an amendment to RTC section 21001 but also changes to provide the authority and/or resources to each of the agencies involved. Should your State Representatives introduce legislation, we will work with them.

5. Tax Appeals Assistance Program

Although the Office of Tax Appeals was established to hear appeals from California taxpayers regarding various taxes and fees administered by the CDTFA and the FTB, the Office of Tax Appeals was not provided the authority or resources to administer the TAAP program. In addition, the OTA has determined that running a TAAP program would constitute a conflict of interest for that agency.

When the BOE was restructured into the CDTFA and the OTA, FTB felt that it was important that this vital program for taxpayers be continued. If FTB had not taken it, this would have ended the program for franchise and income tax appeals. The TAAP program at FTB will be under the Taxpayers' Rights Advocate Office, independent of other areas of the department. Under TAAP, law students assist taxpayers during the appeal process and do not answer to FTB's Executive Officer or Governance Council.

6. Acknowledgement of Abatement Request and Disclosure of Taxpayers' Rights in the Abatement Process

Forms and correspondence including FTB 2917 and FTB 2924 (reasonable cause-claim for refund) submitted by taxpayers or their representative's as a MyFTB Message through the taxpayer's account are viewable as received by FTB on the taxpayer's MyFTB account. Requests received through general correspondence are generally viewable in MyFTB within 30 days of receipt. FTB does not send an acknowledgement through the mail for incoming correspondence received by FTB.

Correspondence, including claims for refund, is typically processed within 30 calendar days of receipt by FTB. Approximately 90% of the reasonable cause requests are fully resolved within the 30 calendar day timeframe. The remaining requests are referred to either Audit or Accounts Receivable

Management for analysis and determination. Timeframe for resolution may vary depending on the circumstances of each case.

Where FTB fails to respond to the claim within six months, RTC 19331 allows the taxpayer to consider the claim disallowed and file an appeal of the "deemed denial" with the Office of Tax Appeals. In reviewing our publications and our claim for refund webpage, there wasn't information addressing a "deemed denial". As a result, we can look into adding this language on the website and in a subsequent edit of the publication.

As for TAAP representation, those offers are extended after the taxpayer has filed an appeal and we've determined the taxpayer doesn't have a representative, the issue and dollar amount of the appeal meet our criteria, and that we have enough student resources to assign the case.

7. Provide Legal Codes that Justify Assessing Tax Liability to People who Hold Licenses.

RTC section 19087 provides the FTB with the authority to propose an assessment from any available information which indicates that the taxpayer, who fails to file a tax return, has a filing requirement for a particular tax year. Furthermore, the Board of Equalization has held that the FTB has great latitude in estimating income when a return has not been filed by a taxpayer, including using third-party information to estimate income. (*Appeal of Walter R. Bailey*, 92-SBE-001, Feb. 20, 1992; *Appeal of R. and Sonja J. Tonsberg*, 85-SBE-034, Apr 9, 1985) As such, RTC section 19087 allows the FTB to use third party information, such as occupational licenses, to estimate a taxpayer's income.

8. Establish Clear Guidelines as to what Constitutes an Abatement Request

Based on your question, we are inferring that your reference to "Abatement Requests" refers to the Claim for Refund procedures and process pursuant to RTC sections 19301 through 19368.

On the FTB's website, the FTB has a webpage entitled "Claim for Refund" which provides information to taxpayer regarding their rights and responsibilities in submitting a claim for refund.

Furthermore, when a claim for refund is denied, the FTB provides a publication (FTB 1084 – Individuals and FTB 1087 – Business Entities) which explains a taxpayer's right to appeal the denial of the claim for refund and the required timeline to file the appeal. In both publications, FTB 1084 and FTB 1087, taxpayers are invited to provide any new information or additional information to the FTB within ninety (90) days for the FTB to reconsider the denial of the claim for refund. Therefore, a taxpayer is always welcome to submit additional information within the 90 day appeal window after a denial and the FTB will review and consider the additional information in its review.

Sincerely,

Susan Maples
Taxpayers' Rights Advocate

cc: Yvette M. Stowers
Jacqueline Wong-Hernandez
Irena Asmundson
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