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Franchise Tax Board Tribal Consultation Session Report July 14, 2015

The Franchise Tax Board (FTB) requested Tribal Leader comments in response to two proposed non mandatory methods for tribal members and leaders to utilize to streamline the audit process. One of those methods is a proposed declaration form specific to tribal members that would allow tribal leaders and individual tribal members filing the form to certify that the tribal member is an enrolled member and resides on the reservation: [Tribal Leaders' Consultation Session and Interested Parties Meeting](#).

Such a form had been specifically requested by the tribal community in a previous Tribal Consultation Session. The form could be filed in lieu of a return to indicate that all of a tribal member's income is nontaxable when the Tribal Member does not have a filing requirement or along with a tax return when a portion of the Tribal Member's income is nontaxable. The intent behind the proposed form is to help reduce potential audits and prevent unnecessary filing enforcement actions.

The other method would allow tribal governments to file an electronic list identifying which tribal members live on the reservation. The list would be used by FTB systems to identify tribal members who should not receive filing enforcement letters.

FTB received oral comments on the day of the consultation session and written comments during the 60-day period following the consultation session. Specific responses were received from thirteen separate tribes:

- Ewiiapaayp Band of Kumeyaay Indians
- Chemhuevi Indian Tribe
- Chicken Ranch Rancheria of Me-Wuk Indians of California
- Pechanga Band of Luiseno Indians
- Yurok Tribe
- Shingle Springs Band of Miwok Indians
- Sycuan Band of the Kumeyaay Nation
- San Manuel Band of Mission Indians
- Agua Caliente Band of Cahuilla Indians
- Cachil DeHe Band of Wintun Indians of the Colusa Indian Community
- Bear River Band of Rohnerville Rancheria
- Morongo Band of Mission Indians
- Soboda Band of Luiseno Indians

FTB also received in person comments on the day of the consultation session from two tribes who did not provide written comments:

- Rincon Band of Luiseno Indians
- Middletown Rancheria of Pomo Indians of California.

FTB provided a proposed list of informational items that could be requested on the form, as follows:

1. Tribal Member's first and last name
2. Social Security Number
3. Physical address
4. Mailing address (if different from physical address)
5. Tribe name and enrollment number
6. Name of reservation on which the Tribal Member resides, and dates of residency
7. Information regarding exempt income, such as source and income type
8. Residential properties owned that are located off the reservation
9. Tribal Member's signature under penalty of perjury
10. Tribal Administrator's signature under penalty of perjury, based upon personal knowledge.

Tribal leaders and their representatives provided input that can be grouped into the following three categories:

- Discussion of the underlying law regarding taxation of tribal members
- Discussion concerning Legal Ruling 2015-1
- Comments regarding the possible contents and use of a form specific to tribal members

Underlying Law

Some comments were received questioning the law underlying FTB's taxation of tribal members living off the reservation. FTB is an administrative agency. As such, its role is to administer the tax laws as written by the California Legislature and as interpreted by relevant courts of appellate jurisdiction. FTB is not authorized to establish new law or go outside the scope of its administrative function. The specific purpose of this Consultation Session was to elicit Tribal community feedback regarding FTB's attempt to develop a form specific to Tribal Members as was requested during the September 2013 Consultation Session. A discussion of the underlying law is outside the scope of this Consultation Session and will not be addressed herein.

Similarly, several commenters suggested FTB create a presumption assuming that tribal members live on the reservation based upon varying established facts. One suggestion was that FTB adopt a presumption that a Tribal Member be deemed to live on the reservation unless his or her tribe does not have housing. Another proposed presumption would provide that if a Tribal Member is receiving tribal income he or she is living on the reservation. A third suggested presumption was that if a tribal member owns or has the right to occupy land on the reservation, he or she should be presumed to live on the reservation.

However, the individual circumstances that each of these presumptions would necessarily have to rest upon are not facts readily available, nor verifiable from third party sources of information available, to FTB. Currently, FTB lacks the ability to distinguish reservation source income from any other type of income because it is all reported on either a federal Form W-2 or Form 1099 without any distinctive marker. FTB does not have the ability to determine who owns or has the right to occupy property on the reservation, because this information is not accessible via California public records. Lastly, public information is not available to FTB regarding which reservations lack housing for their members. FTB cannot base a presumption upon information that is not readily available to it. In the same regard, however, FTB would like to clarify that currently and on an ongoing basis, FTB **does not** presume tribal members live off the reservation.

Legal Ruling 2015-1

Comments were also received regarding Legal Ruling 2015-1 "Determining Whether a Tribal Member Is "Living On" or "Living Off" His or Her Tribe's Reservation for California Personal Income Tax Purposes." This ruling is final and questions regarding the ruling were not within the scope of this Tribal Consultation Session. A discussion of the Legal Ruling was provided merely for information purposes. Nevertheless, it is worth noting that this ruling attempts to provide some clarity regarding the closest connections test and the types of information that may be helpful to provide when a determination is necessary regarding a Tribal Member's primary residence when he or she has possession of property both on and off the reservation. Furthermore, this ruling sets forth a facts and circumstances analysis. As such, the ruling points out that the particular circumstances of each individual and his or her individual tribe and reservation will be taken into consideration in the analysis. The ruling specifically recognizes that the circumstances applicable to each tribe and each Tribal Member are unique to that tribe, and that no one factor will be determinative (or perhaps even applicable) in this analysis.

Possible Contents and Use of a Form Specific to Tribal Members

This form is being developed in response to the numerous requests FTB received at the September 2013 Tribal Consultation Session. FTB seeks to work collaboratively with the tribal community and be responsive to the needs being expressed. Many of the comments offered in response to both the September 2013 and July 2015 consultation sessions referred to the Department of Motor Vehicles Form 256A Miscellaneous Certifications. FTB has looked to this form as a starting point, but also must take into consideration that FTB has different business needs and a primary responsibility to administer California tax laws that are quite different from those pertaining to the DMV.

FTB received a wide range of comments. FTB is grateful for all the thoughtful feedback and the tribal community's engagement in this process. The comments we have received demonstrate and emphasize the varying circumstances of each tribe. The most important message FTB received is the need for flexibility to be built into our processes, and that the needs of each tribe and Tribal Member are unique. As such, we want to be able to provide several options, as FTB understands that no one option will fit the needs of all tribes.

All commenters were pleased FTB is making an effort to work with the tribal community to understand their needs and find solutions together. Most commenters thought the general idea for a form certifying residence on the reservation was a good one, but there was not uniform agreement on the information that should be requested on the form. The one item all commenters agreed upon is that a requirement that a tribal official sign the form under penalty of perjury is both objectionable and will not work. A number of reasons were cited, including that other government officials are not required to sign comparable forms under penalty of perjury, that this is a burdensome requirement, that it is not practical, and that compliance with such a requirement would be very complicated for some tribes who do not control their own housing due to federal government control of allotted land. FTB agrees at the very least that requiring that the signature of a tribal official be made under penalty of perjury is unnecessary and undesirable for all the reasons cited by the commenters and, going forward, does not plan to include this proposed requirement in the form. One possible alternative proposed in the written comments received would be to allow tribal officials to certify that an individual is a tribal member and that a particular address is located on the reservation. This option would be less burdensome upon tribal governments and, based upon the comments received, is information that is fully within each tribe's knowledge.

There was also some agreement as to two other possible informational items being objectionable. The first item was requiring Tribal Members to list dates they are living on or off the reservation. To clarify, this item was not intended to be a strict and burdensome log keeping of days on and off the reservation. The intent was to provide an approximation of the amount of the year spent living on the reservation, for example 9 out of 12 months. Such a determination is necessary to determine the proper amount of tax a Tribal Member is required by California law to pay on his or her income, if any. The second item was a listing of real property owned off the reservation. The purpose of this requested informational item was to allow a Tribal Member to explain that a particular property, although owned by the Tribal Member and reflected on public records as being so owned, actually is being rented out or resided in by another individual so as to prevent a possible examination.

Finally, the contents and format of this possible form as requested by the tribal community will be the subject matter of the Working Group FTB will be hosting on December 14, 2015. This meeting will be an excellent venue to discuss any possible concerns or further thoughts the tribal community may have about particular items that may be included on the form. This meeting will provide for a dialogue so that FTB can continue to deepen its understanding of the tribal community's concerns while allowing FTB to explain our business needs and the capability of our systems.

Alternative Electronic List

Several commenters did not like the idea of the electronic list, indicating it would be burdensome, but others stated they would like for it to remain an option. In recognition of the differing needs of all tribes we are trying to build a level of flexibility into this process. As such, we want to provide more than one option to tribes and will keep this option available to those who would like to utilize it. As with the proposed form, the electronic list would not be required to be signed under penalty of perjury. Again, utilization of the electronic list would be a purely voluntary option available for the convenience of individual tribes should they wish to do so.

Use of the form or the list will not be required. Both items are optional ways to take a proactive measure to prevent possible unnecessary contact from FTB. Likewise, FTB will not be initiating audits based solely on information provided in the form or on an electronic list. The intent behind both items is to provide a shortcut of the system or proactive measures for Tribal Members to prevent possible unnecessary contacts from FTB. This could be considered a preliminary method of meeting the closest connections test discussed in Legal Ruling 2015-1. In the absence of conflicting information, the form and/or list should reduce filing enforcement and audit contacts. As pertains to contacts from FTB Filing Enforcement, it should be noted that due to the limits of our systems if no return is on record, our systems will contact a Tribal Member if it is determined he or she is receiving unreported income. We do not have a way to distinguish reservation source income from any other type of income. Thus, filing this form or the list could be a first step in preventing unnecessary contact from Filing Enforcement and a vehicle for responding to Filing Enforcement when an individual is contacted about filing a California tax return.