



10.12.2009

FTB NOTICE 2009-09

Subject: Reliance Upon Written Advice – Relief Under Taxpayers' Bill of Rights

PURPOSE

The purpose of this notice is to update and supersede FTB Notice 89-277 with respect to relief under the Taxpayers' Bill of Rights when taxpayers rely upon written advice of the Franchise Tax Board. FTB Notice 2009-08 updates and supersedes FTB Notice 89-277 with respect to guidelines relating to the issuance of written advice by the Franchise Tax Board, including Chief Counsel Rulings.

SUMMARY

Revenue and Taxation Code (R&TC) section 21012, subdivision (a), authorizes relief from assessed taxes, interest and penalties in certain situations where taxpayers relied upon written advice of the Franchise Tax Board.

A. Relief From Taxes, Interest, Additions To Tax, And Penalties Pursuant To Paragraph (1) Of Subdivision (a) Of R&TC Section 21012.

Paragraph (1) of subdivision (a) of R&TC section 21012 provides that taxes, interest, additions to tax, and penalties may be relieved if a taxpayer's failure to make a timely return or payment is based on the taxpayer's, or the taxpayer's representative's, reasonable reliance on the written advice of a Chief Counsel Ruling, and all the conditions set forth in subdivision (b) of R&TC section 21012 are met.

1. A Chief Counsel Ruling, which is issued by the Legal Division and signed by the Chief Counsel or his or her designee, is considered written advice to which paragraph (1) of subdivision (a) of R&TC section 21012 will apply.
2. Requests for written advice to which paragraph (1) of subdivision (a) of R&TC section 21012 will apply must meet all of the requirements set forth in this Notice and FTB Notice 2009-08.
3. Every Chief Counsel Ruling contains an advisory declaration, pursuant to subdivision (e) of R&TC section 21012, explaining that the tax consequences may be subject to change for any of the reasons specified in this Notice, in FTB Notice 2009-08, or in paragraph (5) of subdivision (c) of R&TC section 21012. A copy of a Chief Counsel Ruling received by a taxpayer should be attached to the return or returns that reflect the transaction(s) to which it pertains.

4. Under no circumstances may a taxpayer rely upon a Chief Counsel Ruling issued to another taxpayer.

B. Relief From Interest, Additions To Tax, And Penalties Pursuant To Paragraph (2) Of Subdivision (a) Of R&TC Section 21012.

Paragraph (2) of subdivision (a) of R&TC section 21012 provides that interest, additions to tax, and penalties may be waived if a person's failure to make a timely return or payment was due to reliance on written advice other than a Chief Counsel Ruling.

Paragraph (2) of subdivision (a) of R&TC section 21012 will be applied to FTB determinations issued under the authority of subdivision (c) of R&TC section 23701, related to determinations of exemption from tax. The taxpayer is entitled to rely on such a determination, and can be relieved, in certain circumstances, of penalties, interest and additions to tax, provided certain conditions are met. These conditions are set forth below and in subdivision (b) of R&TC section 21012.

All determination letters issued under the authority of subdivision (c) of R&TC section 23701 contain advisory declarations, pursuant to subdivision (e) of R&TC section 21012, explaining that the tax consequences may be subject to change for any of the reasons specified in this Notice, in FTB Notice 2009-08, or in paragraph (5) of subdivision (c) of R&TC section 21012.

Under FTB Notice 2008-03, Exempt Acknowledgment Letters issued to confirm FTB's receipt of an exempt organization's submission under paragraph (1) of subdivision (c) of R&TC section 23701d are not treated as determination letters within the meaning of paragraph (2) of subdivision (a) of R&TC section 21012 and this Notice.

C. Conditions That Must Be Satisfied Before Relief Under R&TC Section 21012 Will Be Granted.

Subdivision (b) of R&TC section 21012 provides that, for purposes of receiving relief under subdivision (a) of R&TC section 21012, the following conditions must be met:

1. The person or representative requested in writing that FTB advise him or her whether a particular prospective activity or transaction is subject to tax, and fully described the facts and circumstances of the transaction or activity in the request. A request for a Chief Counsel Ruling shall specifically so state.
2. FTB responded in writing, stating whether the described activity is subject to tax, or stating the conditions under which the activity or transaction is subject to tax.
3. The person reasonably relied upon the advice and did not remit the tax due.
4. The ruling has not been rescinded or revoked before the taxpayer relied upon it or before the occurrence of the transaction or activity.

5. There has not been a change in the applicable state or federal law or in the taxpayer's facts and circumstances.

D. Procedure For Requesting Relief From A Subsequent Action Against The Taxpayer That The Taxpayer Feels Is Inconsistent With Written Advice From FTB.

If a taxpayer has requested and received a Chief Counsel Ruling or a determination letter from FTB, and FTB subsequently takes action against the taxpayer (such as a proposed assessment or denial of a claim for refund) that the taxpayer feels is inconsistent with the Chief Counsel Ruling or determination letter, the following procedures apply:

1. If the written advice is a determination issued under the authority of subdivision (c) of R&TC section 23701, the taxpayer should request relief in a letter addressed to:

Exempt Organization Unit MS F120
Franchise Tax Board
PO Box 1286
Rancho Cordova, CA 95741-1286

2. The request must include:
 - a. A copy of the application for exemption and a copy of the determination letter issued in response to that application.
 - b. A copy of the adverse action, such as a Notice of Proposed Assessment, Notice of Action, Notice of Tax Due or a written denial of a Claim for Refund.
 - c. A statement made under penalty of perjury describing the particular activity or transaction which did in fact occur and stating that the taxpayer did not remit the tax due in reliance upon the determination letter.
3. If the FTB Chief Counsel or his or her designee issued the written advice in the form of a Chief Counsel Ruling, the taxpayer should request relief in a letter addressed to the Chief Counsel. The request must include:
 - a. A copy of the written request for the Chief Counsel Ruling and a copy of the Chief Counsel Ruling issued in response to that request.
 - b. A copy of the adverse action, such as a Notice of Proposed Assessment, Notice of Action, Notice of Tax Due or a written denial of a Claim for Refund.
 - c. A statement made under penalty of perjury describing the particular activity or transaction which did in fact occur and stating that the taxpayer did not remit the tax due in reliance upon the Chief Counsel Ruling.

4. A request for relief under either paragraph 1. or 3. should be made separately and in addition to any other administrative relief (e.g., protest, appeal, or appeal from denial of a claim for refund) filed by the taxpayer.
5. FTB will then consider the taxpayer's request for relief to determine:
 - a. whether the original request or application for exemption contained any misrepresentation of material facts;
 - b. what portion (if any) of the penalties, interest, additions to tax, or, in the case of a Chief Counsel Ruling, the tax, is attributable to the actions taken by the taxpayer after receipt of the written advice from FTB which were in reasonable reliance upon that written advice; and
 - c. whether the tax consequences expressed in the Chief Counsel Ruling or determination letter were subsequently changed by a change in statutory law or judicial or administrative case law, a change in federal interpretations in circumstances where FTB's written advice was predicated on federal interpretations, or a change in material facts or circumstances relating to the taxpayer.
6. FTB may request additional information or documentation from the taxpayer in order to make this determination.
7. FTB will provide the taxpayer with a written response regarding the taxpayer's request for relief.

The principal author of this Notice is Douglas K. Powers of the Franchise Tax Board, Legal Division. For further information regarding this Notice, contact Mr. Powers at the Franchise Tax Board, Legal Division, PO Box 1720, Rancho Cordova, CA 95741-1720.