



Requested By: Cathy Cleek
Director, Filing Compliance Bureau
Request Date: July 6, 2000
TAM Author: Jozel L. Brunett
Supervising Tax Counsel
Tax Admin and Procedure Bureau

Phone Number (916) 845-6467
Fax Number (916) 845-3648

QUESTION PRESENTED:

Under what circumstances may the nonfiler program delay the assessment of tax and penalties (specifically the notice and demand penalty), where a taxpayer does not file a return, provide a copy of a previously filed return, or proof of no filing requirement, but otherwise timely responds to a demand letter to file a return?

CONCLUSION

Our opinion is that the nonfiler program may delay the assessment of tax and penalties (including the notice and demand penalty),¹ where a taxpayer timely² responds to the demand letter with an explanation of why the taxpayer believes that there is no filing requirement (whether the taxpayer is correct in this belief or not). The issuance of the proposed assessment in these cases may be delayed by providing the taxpayer with an additional time period with which to file the return, before the notice and demand penalty will be imposed.

ANALYSIS AND DISCUSSION

Introduction

When the Franchise Tax Board (FTB) receives information that a taxpayer has a filing requirement, and the FTB's records show that no return has been filed, the FTB will send the taxpayer a notice and demand letter (FTB Form 4600 or demand letter). The demand

¹ This delay in the issuance of the assessment would also include a delay in the imposition of the filing enforcement cost recovery fee (Revenue and Taxation Code section 19254). The notice and demand penalty and the filing enforcement cost recovery fee are always imposed together.

² A timely response would be a response made within 30 days of the date the demand letter was mailed.

letter requests that within thirty days the taxpayer file a return, provide an explanation as to why a return need not be filed, or if a return has already been filed, provide a copy of the return. Specifically, the demand letter states in pertinent part:

"You must respond to this Request for a Tax Return on or before <date>³ by filing a <tax year> California state tax return, or providing a copy of your previously filed <tax year> tax return, or **explaining why you are not required to file.**"
(Emphasis added.)

Under current nonfiler program policy, if a return is not filed (or a copy of a previously filed return or proof of no filing requirement provided) within 30 days in response to the demand letter, a Notice of Proposed Assessment (NPA) of tax⁴ is issued. The NPA includes a notice and demand penalty for failing to respond to the demand letter. The notice and demand penalty is currently imposed even if the taxpayer responds timely to the demand letter and explains why the taxpayer believes there is no filing requirement.

The nonfiler program would like to delay issuance of the NPA (including imposition of the notice and demand penalty) for those taxpayers who timely respond to the demand letter in writing or by telephone, and provide an explanation of why the taxpayer believes that there is no filing requirement. This would be accomplished by a second letter which provides the taxpayer with an additional time period with which to file the return. If the return is not filed by the "new" date, a notice and demand penalty will then be imposed.⁵

Applicable Law

Revenue and Taxation Code section 19087(a) provides that, "If any taxpayer fails to file a return, ... for any taxable year, the Franchise Tax Board, at any time, may require a return or an amended return under penalties of perjury or may make an estimate of the net income, from any available information, and may propose to assess the amount of tax, interest, and penalties due."

Revenue and Taxation Code section 19133 provides that the FTB may impose a notice and demand penalty if a taxpayer fails to file a return in response to a demand for a return.

³ The variable date inserted here is 30 days from the date of the demand letter.

⁴ The proposed tax is based on available income information.

⁵ The second letter to the taxpayer providing the additional time will advise the taxpayer that if the return is not filed by the date indicated, then a notice and demand penalty will be imposed.

Analysis

There is no provision in the law which would prohibit the nonfiler program from delaying the issuance of the NPA for those taxpayers who timely respond to the demand letter with an explanation of why the taxpayer believes there is no filing requirement. In fact, as a result of using the term "may," Revenue and Taxation Code section 19133 specifically delegates to the FTB the discretion to decide whether to impose a notice and demand penalty, and under what circumstances.

Further, as the demand letter currently reads, one of the prescribed responses to the demand for a return is an explanation of why the taxpayer is not required to file a return. Consequently, it would be appropriate to delay issuance of the NPA (with its attendant notice and demand penalty) where the taxpayer has timely provided such an explanation.

After the taxpayer has been given another opportunity to file the required return pursuant to the second letter, then if the taxpayer fails to timely file the return by the new (delayed) date, the NPA should be issued with a notice and demand penalty included.⁶

The delay in the assessment of the notice and demand penalty should only be made in those circumstances where the taxpayer responds to the demand letter with an explanation of why the taxpayer believes there is no filing requirement. There should be no delay in the issuance of the NPA (or the imposition of the notice and demand penalty) where the taxpayer acknowledges a filing requirement, but for whatever reason does not timely file the return in response to the demand letter.

Supervising Tax Counsel

⁶ The FTB must notify the taxpayer that a notice and demand penalty will be imposed if the taxpayer does not file the return by the new (delayed) date, if the notice and demand penalty is intended to be imposed on the NPA. It is our understanding that the draft letter attached to your request for Technical Advice Memorandum will serve this function.