



Requested By: Robert A. Affleck (Scott Sanders)
TAM Author: Bruce R. Langston
Phone Number: 3337
Fax Number: 0848

QUESTION PRESENTED:

Does the department need to retain copies of paper documents filed with the department if those documents contain two-dimensional barcodes that reflect all data included in those documents which can be accurately captured, stored and accessed by the department?

CONCLUSION

Yes. Although the law was recently amended to allow deficiencies to be assessed based on electronically captured return information, the specific statute requiring returns to be retained was not amended and still requires retention of returns for three years from the (original) due date.

ANALYSIS AND DISCUSSION

Revenue and Taxation Code (R&TC) section 19530 requires FTB to "preserve reports and tax returns for three years from the due dates thereof and thereafter until it orders them to be destroyed."

TAM 97-0288, July 28, 1997, explained that under R&TC §18621.5(b) documents which are required to be signed can be electronically imaged, and will be deemed to be valid original documents when that image is reproduced in paper form by the department. The TAM concluded without citation of authority that once the documents are imaged and can be reproduced, the original paper record can be destroyed.

In your memo, you describe "2-D barcode technology" as technology that allows all information contained on a return to be included on a 2-D barcode, then reproduced when needed. You contrast this to the current "Scan Band" technology which captures only selected data from the return (i.e. the same data that is routinely keyed from other paper returns.).

In *Wertin v. Franchise Tax Board* (1999) 68 Cal.App.4th 961, FTB had destroyed the taxpayers' original return, and later became aware of a federal adjustment. FTB asked the taxpayer for a copy of the original return, then before the taxpayer provided it, issued deficiency assessments based on the federal figures and electronically stored return data keyed from the original return. The taxpayer later provided copies of the return as filed,

which disclosed that the proper amount of the assessment should have been substantially reduced due to items on the return that are not keyed. The taxpayer paid the reduced assessment and sued for refund. The court allowed the refund, holding that FTB had a duty under the statute to review the actual return before issuing the assessment.

In response to this case, FTB staff drafted a legislative proposal (LP 99-50) that was ultimately incorporated into AB 2896 and enacted as Stats. 2000, Ch. 414. This bill amended R&TC §19033 to provide specific authority for FTB to use either the original return or return data to issue an assessment. In cases where both the original return and the return data have been destroyed, FTB must ask the taxpayer for a copy of the return, and if one is not provided within 30 days (or 60 days if the taxpayer requests an extension) FTB may issue an assessment based on electronic return data. These amendments apply to notices issued on or after 1/1/2001.

Wertin and AB 2896 address the issue of validity of assessments where the original return had been destroyed. At least for assessments issued on or after 1/1/2001, an assessment will be valid if it is based on *either* the paper return or electronically captured information from the return.

However, although assessments will now be valid if based on electronic information, AB 2896 did not change the requirement in R&TC §19530 that FTB "preserve" reports and tax returns for three years from the due dates. The question becomes whether saving the electronic information from the scanband, or an image of the scanband itself and / or the signature, constitutes "preserving" the return within the meaning of §19530.

In *Wertin*, the court effectively rejected FTB's argument that an assessment based on electronic information captured from the return during processing was equivalent to examining the paper return itself, where a paper return had been filed. In response, AB 2896 amended the deficiency statute to allow reference to electronically captured return information or the return for the narrow purpose of issuing deficiency assessments. It did not change the definition of "return" to include electronically captured information.

Therefore, since R&TC §19530 continues to require preservation of "tax returns" for three years from the due date, it is the paper return filed by the taxpayer (or the complete data filed electronically where an electronic return was filed) that must be preserved for that period.