



STATE OF CALIFORNIA  
**FRANCHISE TAX BOARD**  
PO Box 1720  
Rancho Cordova, CA 95741-1720  
Telephone (916) 845-6467  
FAX (916) 845-3648

STEVE WESTLY  
Chair

JOHN CHIANG  
Member

TOM CAMPBELL  
Member

Date: August 3, 2005

Technical Advice Memorandum: 2005-0005

Requested By: Suspense Credits Team  
Dominick Yazzi  
Requested Date: 08/01/2005  
TAM Author: Jozel Brunett and Craig Scott  
Phone Number: 845-6467  
Fax Number: 845-3648

SUBJECT: Refund of Estimated Payments

### **QUESTION(S) PRESENTED**

Can the Franchise Tax Board (FTB) refund estimated tax payments in the absence of a return being filed by the taxpayer?

### **PROBLEM**

The Franchise Tax Board (FTB) receives estimated payments from taxpayers that are placed in suspense awaiting a return from the taxpayer.

The department currently sends a letter (ESR letter) to those taxpayers who have estimated tax suspense credits with no record of a return being on file and invites them to file a return in order to receive a refund of the credits. The letter is sent, prior to the statute of limitations expiring, to allow the taxpayer time to file a return and obtain a refund of their payments. There is a current plan in development to provide more information to the taxpayer in these letters, to advise them of the time limit in the statute of limitations for claiming a refund, and to send the letter two years earlier than they are currently being sent.

A question has arisen as to whether the ESR letter can provide an alternative to filing a return for the taxpayer to obtain a refund of estimated tax payments. The proposed alternative is for the taxpayer to sign the ESR letter indicating no tax liability and requesting a refund of the payments.

## **CONCLUSION(S)**

The law does not provide the FTB with the authority to refund estimated tax payments in the absence of a valid return being filed.

## **ANALYSIS AND DISCUSSION**

### **Applicable Law**

Revenue and Taxation Code section 19307 states that the FTB may not allow a refund of estimated tax payments in the absence of a return being filed:

For purposes of Section 19306, a return filed within four years from the last day prescribed for filing the return showing a credit allowable by Section 19002 or estimated tax paid pursuant to Section 19023, 19024, or 19136 in excess of the tax due, shall be considered a claim for refund of the excess if the amount thereof is more than one dollar (\$1). No refund of tax withheld or estimated tax paid shall be allowed to an employee or taxpayer who fails to file a return for the taxable year in respect of which the tax withheld or estimated tax was allowable as a credit. (Emphasis added.)

Revenue and Taxation Code section 18501(a) provides that a return must state "specifically the items of the individual's gross income from all sources and the deductions and credits allowable ...."

Revenue and Taxation Code section 18621 provides:

any return, declaration, statement, or other document required to be made under any provision of Part 10 (commencing with Section 17001), Part 11 (commencing with Section 23001), this part, or any applicable regulation shall contain, or be verified by, a written declaration that it is made under the penalties of perjury. Those returns, and all other returns, declarations, statements, or other documents or copies thereof required, shall be in any form as the Franchise Tax Board may from time to time prescribe....

In *United States v. Porth* (10<sup>th</sup> Cir. 1970) 426 F.2d 519, the court determined that in order to be a return, the document must contain information relating to the taxpayer's income from which the tax can be computed.

In *Florsheim Brothers Drygoods Co., Ltd. v. United States* (1930) 280 U.S. 453, 462, the Supreme Court stated that a purported return "must honestly and reasonably be intended" to contain "a specific statement of the items of income, deductions, and credits" to be a valid return.

The decision in *United States v. Hatton* (9<sup>th</sup> Cir. 2000) 220 F.3d 1057, 1060 and 1061 states:

Although the I.R.C. does not provide a statutory definition of 'return,' the Tax Court developed a widely-accepted interpretation of that term in *Beard v. Commissioner*, 82 T.C. 766 (1984), *aff'd*, 793 F.2d 139 (6th Cir. 1986). In order for a document to qualify as a return: '(1) it must purport to be a return; (2) it must be executed under penalty of perjury; (3) it must contain sufficient data to allow calculation of tax; and (4) it must represent an honest and reasonable attempt to satisfy the requirements of the tax law.' *Hindenlang*, 164 F.3d at 1033 (citing definition of 'return' in *Beard*); *Beard*, 82 T.C. at 767. The *Beard* definition was derived from two Supreme Court cases, *Germantown Trust Co. v. Commissioner*, 309 U.S. 304, 84 L. Ed. 770, 60 S. Ct. 566 (1940) and *Zellerbach Paper Co. v. Helvering*, 293 U.S. 172, 79 L. Ed. 264, 55 S. Ct. 127 (1934), and provides a sound approach under both the Bankruptcy Code and the I.R.C. Furthermore, the *Beard* definition is consistent with the purpose of a return, which is not only to get tax information in some form, but 'to get it with such uniformity, completeness, and arrangement that the physical task of handling and verifying returns may be readily accomplished. *Commissioner v. Lane-Wells Co.*, 321 U.S. 219, 223, 88 L. Ed. 684, 64 S. Ct. 511 (1944).

The IRS has authority under Internal Revenue Code section 6020 to prepare a return for a taxpayer based on available information. Under section 6020(a), if the taxpayer then signs the return, it is considered a valid return. In addition, IRS has a procedure whereby they will sign and prepare a return for the taxpayer which will constitute a valid return if certain requirements are met.<sup>1</sup>

We have not conformed to IRC section 6020 which would allow FTB to utilize this "substitute for return" process. Legal is informed that past attempts have been made to incorporate IRC section 6020, but they have been considered and rejected as part of general conformity proposals. In any event, this process would not appear to be of assistance in these cases, as the FTB does not have the necessary information to prepare all of the types of documents the IRS requires for its process (i.e., income information, etc.).

---

<sup>1</sup> The package of documents which must be submitted in order for there to be a valid return under IRC section 6020(b) includes: a Form 13496 (signed Certification by IRS employee); Form 1040 which the IRS used to estimate the taxpayer's account or a transcript with this same information; a Form 4549 Income Tax Examination Changes; and a Form 886-A Explanation of Items.

### **Analysis**

The Revenue and Taxation Code clearly provides that a timely "return" must be filed in order for the FTB to be able to refund estimated tax payments. What will constitute a "return" is also well-defined by state and federal law.

The current proposal to allow taxpayers to receive a refund of estimated tax payments as part of a letter process does not comport with these requirements.

In addition, there are serious concerns with construing a letter as a "return," which could have an impact in other areas that are triggered by the filing of a return, i.e., statute of limitations issues, non filer (formerly "protestor") issues, etc.

An alternative to consider which should increase compliance would be to provide a 540 return form with the ESR letter pertinent to the year(s) at issue, and offer telephone assistance in filling out the return.

Tax Counsels