

MAP 15 PROTEST

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15.1 INTRODUCTION

The Protest Section includes the Personal Income Tax Notice of Proposed Assessment Information FTB 7275 or a Business Entities – Notice of Proposed Assessment Information FTB 5830C with the Notice of Proposed Assessment (NPA). These forms provide information about the taxpayer's protest and appeal rights.

A protest gives the taxpayer the opportunity to have the proposed deficiency assessment reconsidered by FTB.

Protests are reviewed and categorized internally on a weekly basis. Cases assigned to the Legal Division are referred to as "docketed," while cases assigned to Hearing Officers in the Protest Section of the Audit Division are referred to as "undocketed."

If Audit receives post-NPA correspondence, route it to the Protest Section, Protest Control Desk, Mail Stop F-340. If the correspondence is related to a protest, or is a valid protest, the Protest Control Desk staff will record it and update the appropriate systems.

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15.1.1 Docketed Protests

Generally, protests involving interpretation of law, large dollar amounts, sensitive issues and sensitive cases, will be docketed. However, there is no bright-line test and the criteria are flexible.

When the Legal Division resolves a docketed protest, the taxpayer's file and a **green sheet** (Legal Division's Instructions) are routed for processing and issuance of the Notice of Action.

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15.1.2 Undocketed Protests

Protests not meeting the criteria for docketed protests are classified as undocketed protests. Undocketed protests are analyzed further to determine their dispositions. The Protest Section will generally handle the undocketed protests.

Undocketed protest cases can be returned to the respective audit program for different reasons depending on the circumstances:

- New issues
- Substantial additional development is still needed (e.g., underdeveloped)
- Provisional assessments
- Failure to Furnish Penalty

See MAP 15.12 Protests Returned for Further Development.

These cases are then processed following normal review guidelines when the audit is completed.

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15.1.3 Rules for Accessing PASS Protest Files

To access PASS Protest Files, the user must have a need and right to know. Refer to MAP 2.2.1 Need to Know/Right to Know. Otherwise, the act of accessing the PASS files is an unauthorized access. An unauthorized access occurs any time an employee accesses data and/or a system for reasons that are not necessary to perform their official job duties. An example of this is accessing a case that is no longer assigned to you without an FTB business need to know.

To obtain PASS Protest File information necessary to perform your official job duties, you must request access through your supervisor. Your supervisor will contact the Protest supervisor of the specific workload and case and make the request. Depending on the type of request, you may be provided access as a team member or the specific information may be provided as a PDF document.

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15.2 VALID PROTESTS

R&TC Section 19041 provides that a taxpayer may file a written protest with us against the proposed deficiency assessment within 60 days of the date of each notice of proposed deficiency assessment. A valid protest is a written statement by the taxpayer that a protest is being filed regarding a particular Notice of Proposed Assessment (NPA), Notice of Proposed Adjusted Carryover Amount (NPACA), or multiple NPAs and which provides specific grounds for the protest.

A valid protest must be timely filed and include the following (R&TC Sections 19041 - 19042):

- The taxpayer's name, address, and identification number
- The specific grounds (or issues) for filing the protest
- The proposed additional tax amount and taxable year(s) involved
- The signature (or e-signature) of the taxpayer or the taxpayer's authorized representative
- If the taxpayer wants someone else to represent them during the protest process, a completed and signed Power of Attorney Declaration, FTB 3520

In order for a taxpayer's protest to be timely, the protest must be successfully transmitted or postmarked by midnight on or before the 60th day after the NPA's mail date. FTB can receive valid protests through:

- U.S. Postal Service ("USPS")
- Express Mail (FedEx, UPS, USPS and other carriers)

- Fax (916.364.2754)
- Taxpayer's MyFTB account

Protests submitted by USPS are mailed to:

PROTEST SECTION, MS F340
FRANCHISE TAX BOARD
P. O. BOX 1286
RANCHO CORDOVA, CA 95741-1286

If it is determined that the protest was valid and timely filed, see MAP 15.2.1 When a Valid Protest is Filed.

Untimely Protests

A protest is generally considered untimely if FTB received the written protest after expiration of the "Protest by" date on the Notice of Proposed Assessment (NPA). However, if the postmark on the correspondence sent through USPS mail or a delivery service shows a date on or before the 60th day after the NPA's mail date, the protest is timely. If the protest is determined to be untimely, the taxpayer is sent a FTB 1590, Untimely Protest letter. Important Note: A taxpayer with an untimely protest is not entitled to appeal rights.

If there is a delay by FTB that caused a timely protest to be considered untimely, FTB will put the NPA in a protest status. See MAP 15.7 Reinstatement of a Notice to Protest Status.

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15.2.1 When a Valid Protest is Filed

The Protest Control Desk staff will record the protest, update the appropriate systems, and send an acknowledgement letter to taxpayers or authorized representative.

A Protest Section manager, supervisor, or designee reviews all protests to decide if the Protest Section will handle the case or if it should be returned to the originating audit program. The Legal Division reviews a list of new protests, and if they request a protest be docketed, then that protest is transferred to Legal.

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15.2.2 Protest Notification

When the Protest Section gets the protest, the Protest Control Desk staff notifies the auditor who conducted the examination. This allows the auditor to provide information regarding discrepancies between the protest letter and the audit file.

Cases that are not fully developed because notices were issued due to a failure to furnish information or an impending statute of limitations may be returned to the originating audit program for further development or analysis. See MAP 15.12 Protests Returned for Further Development.

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15.2.3 Protests Pending Federal Adjustments

If the Notice of Proposed Assessment was based on a Revenue Agent's Report (RAR) and the protest states that the taxpayer is protesting the federal adjustments, and is pending a determination, the case is routed to the Protest Control Desk for processing.

The case will then be assigned to a Hearing Officer to act on the protest. If needed, the case will be referred to the originating audit program to consider the final federal determination. The Hearing Officer will provide guidance as needed.

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15.3 SUSPENDED OR FORFEITED CORPORATIONS

Domestic entities are "suspended" and foreign entities (incorporated outside of CA) are "forfeited." A suspended or forfeited corporation is one that has had its corporate rights, privileges, and powers suspended by FTB or the Office of the Secretary of State (SOS). Corporations may be suspended or forfeited for failing to: file tax returns, pay taxes, pay assessments, or file the necessary documents with the SOS.

A suspended or forfeited corporation has no corporate rights, privileges, or powers, so a corporation that files a timely protest or appeal while it is suspended or forfeited must obtain a certificate of revivor to maintain and proceed with its protest or appeal. (R&TC Section 23301)

Refer to MAP 7.13 Suspended or Forfeited Corporations.

Note: Dissolved, surrendered, or withdrawn corporations do have protest rights.

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15.3.1 Suspended or Forfeited at the Time Protest is Filed

If a corporation is suspended or forfeited at the time it files a protest, Protest Control Desk will inform the corporation that it must obtain a certificate of revivor before its protest can be accepted as valid. If the suspension or forfeiture is an FTB suspension or forfeiture, the Protest Control Desk must verify the reason

and the validity of an FTB suspension by contacting the "Suspended or Forfeiture Accounts" contact person.

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15.3.2 Suspended or Forfeited During Protest Process

If a taxpayer becomes suspended or forfeited during the protest process, the Hearing Officer stops the protest process. If the suspension or forfeiture is an FTB suspension or forfeiture, the Hearing Officer must verify the reason and the validity of an FTB suspension by contacting the "Suspended or Forfeiture Accounts" contact person. If the suspension was in error, the contact person will change the suspended status so the protest process can continue.

If the FTB suspension was valid, the Hearing Officer will send a "Revivor Letter" providing a time period (usually 30 days) in which to provide evidence of having revived. If the taxpayer has revived, then the protest process can continue. If the taxpayer does not provide evidence of being revived before the protest period expires, then the protest will be dismissed and closed by issuing a "Memo-Do Not Mail-NOA-A."

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15.4 HEARINGS

Pursuant to the Taxpayers' Bill of Rights (R&TC Section 21010), the Protest Section has established general periods in which they evaluate the merits of a protest and any included claims for refund, conduct a hearing if requested, and issue a Notice of Action.

The Taxpayers' Bill of Rights (R&TC Section 21011) also provides for hearings before the Audit Protest staff or Legal staff. If the taxpayer requests a hearing, the hearing may be held at an FTB office, by telephone, or videoconference if the taxpayer agrees. Hearing procedures require that:

- Hearings are held at a reasonable time, at Central Office or an FTB public service office that is convenient to the taxpayer, when possible.
- Photographing an oral hearing is not allowed.
- Recording an oral hearing is allowed. The taxpayer must notify the Hearing Officer prior to the oral hearing, to allow the Hearing Officer to record the hearing, as well.
- The taxpayers must be inform before any hearing that they have the right to be represented by their designated agent at the hearing.

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15.5 ACTION ON PROTESTS

The Protest Section acts upon all protests by issuing a Notice of Action (NOA), which affirms, revises, or withdraws the Notice of Proposed Assessment (NPA). The NOA is issued after a hearing has been held (if requested) and all documentation available and the taxpayer's legal arguments have been considered. The protest period begins on the date the taxpayer files a protest to the NPA, and expires when the NOA is issued.

For more information, see MAP 15.1.1 Docketed Protests and [FTB Notice 2018-01](#).

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15.5.1 Notice of Action on Protests

The Protest Section must act on all valid and timely protests by affirming, revising, or withdrawing the Notice of Proposed Assessment (NPA) or Notice of Proposed Adjusted Carryover Amount (NPACA). Before any action on the protested NPA or NPACA, the Hearing Officer must send a determination letter to the taxpayer or authorized representative explaining why the Protest Section is taking the action. If the taxpayer does not respond to the determination letter, the Protest Section will issue a Notice of Action (NOA), which is a formal notice, to the taxpayer.

The Protest Section issues an NOA on every NPA or NPACA that the taxpayer has formally protested. An NOA may never increase the amount of tax or penalty on the NPA. An NOA affirms, revises, or withdraws the NPA or NPACA.

If the taxpayer disagrees with the protest determination, the taxpayer may appeal the NOA to the Office of Tax Appeals within 30 days of the date of the notice or pay the deficiency and file a claim for refund. See MAP 15.11 Appeals and MAP 8 Claims for more information.

If a taxpayer withdraws their protest, the taxpayer must provide a written statement. If the taxpayer provides a written withdrawal of protest, the Hearing Officer will issue a NOA-Affirmation (or NOA-Revision, as appropriate) with a paragraph stating:

This notice of action is being issued in accordance with your letter, dated Month DD, YYYY, which requested the withdrawal of your protest filed Month DD, YYYY.

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15.5.2 Reserved

15.5.3 Notice of Revision

The Protest Section may receive responses to Notices of Proposed Assessment (NPA) that do not qualify as protests. These responses include agreeing to an assessment, explaining an error in a calculation, or stating that the taxpayer is unable to pay. This type of correspondence may be redirected by the Protest Section to the originating audit program for resolution.

The Protest Section will handle responses that explain an error in a calculation to an NPA adjustment by issuing either a:

- Notice of Revision – Revision (NOR-R), or
- Notice of Revision – Withdrawal (NOR-W).

The NOR will provide a statement as follows:

This notice corrects the notice of proposed assessment dated Month DD, YYYY. The protest by period is not extended and remains Month DD, YYYY.

If a revision is needed, it finalizes at the expiration of the original 60-day period. However, the notice remains subject to protest within the 60-day period.

FTB must answer the letter even if no adjustment to the NPA is warranted. The reply should restate the audit position and explain the NPA will become final 60 days from the date of issuance, unless a protest is filed within that period.

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15.6 CORRECTION OF NOTICES

After a Notice of Proposed Assessment (NPA) or a Notice of Action (NOA) has been issued, the taxpayer occasionally submits supplemental information leading to further correction of the assessment.

Depending on the circumstances, the following may occur:

- The assessment may be corrected by a second NOA or a Notice of Revision.
- The NPA may be withdrawn and a new NPA issued if the statute of limitations is still open.
- In the case of a protested NPA, it may be restored to protest status.

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15.6.1 Correction of a Notice of Proposed Assessment Not Protested

If a Notice of Proposed Assessment (NPA) has not been protested and needs correction, a Notice of Revision (NOR) must be issued prior to the expiration of the 60-day protest by period. The issuance of the NOR does not extend the protest by period beyond the date provided on the original NPA. The corrected additional tax may not exceed the amount of additional tax originally proposed. The NOR will provide a statement as follows:

This notice corrects the notice of proposed assessment dated Month DD, YYYY. The protest by period is not extended and remains Month DD, YYYY.

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15.6.2 Correct a Notice of Action

In the case of a Notice of Proposed Assessment (NPA) that has been protested and a Notice of Action (NOA) issued, a corrected NOA must be mailed within the 30-day appeal period, or the NPA must be restored to protest status. Mailing the corrected notice will supersede the prior action and the taxpayer will have 30 days from the date of the corrected notice in which to file an appeal. The corrected additional tax may be increased over the amount shown in the NOA, but may not exceed the amount of the additional tax originally proposed to be assessed. Put a note in the corrected NOA:

This notice supersedes the Notice of Action dated Month DD, YYYY.

See MAP 15.7 Reinstatement of a Notice to Protest Status.

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15.6.3 Notice of Proposed Assessment (NPA) to Be Withdrawn and New NPA Issued

A Notice of Proposed Assessment (NPA) may be withdrawn and a new one issued only if the statute of limitations has not expired and will not expire prior to the mailing of a new NPA. See MAP 4.2 Statute of Limitations Charts.

In lieu of issuing a corrected Notice of Action (NOA) or a Notice of Revision (NOR), consideration should be given to withdrawing the assessment and issuing a corrected one when:

- The NPA contains a technical defect such as an error in the name, address, year, or transposition of numbers.
- The supplementary information received introduces new items of income or disallowance that may not be made a part of the corrected NOA or NOR.

- The corrected amount of additional tax will exceed the original NOA, NOR, or the original NPA. However, it may be better to let the NOA or NOR stand, and issue another NPA for any additional tax in excess of the NOA, NOR, or the original NPA.

Other circumstances may arise and they should be judged on their merits. Approval of the Protest and Audit supervisors should be obtained where doubt exists whether to withdraw and issue a new NPA or to issue a corrected NOA or NOR.

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15.7 REINSTATEMENT OF A NOTICE TO PROTEST STATUS

MAP 15.7.1 Notice of Proposed Assessment – Restored to Protest Status

MAP 15.7.2 Notice of Action – Restored to Protest Status

MAP 15.7.3 Follow-up on a Non-Final Notice of Proposed Assessment

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15.7.1 Notice of Proposed Assessment - Restored to Protest Status

Occasionally, a Notice of Proposed Assessment (NPA) becomes final in error. When this happens, it becomes necessary to reinstate the NPA to protest status. The following will be done:

1. The audit program that issued the NPA will route the audit file to the Protest Control Desk with instructions, including the identification of notices to be reinstated. The Protest Control Desk staff will correct the account on the appropriate systems.
2. The Protest Control Desk will transfer the electronic PASS file to the group work list Protest - Unassigned with a notation on the event log that the protest was received timely. To determine whether the protest is considered timely, refer to MAP 15.2 Valid Protests.

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15.7.2 Notice of Action - Restored to Protest Status

If information is received in the Audit Division or Legal Division that will not permit corrective action within the appeal period, the file will be routed promptly to the Protest Control Desk with a request to disregard the Notice of Action (NOA) and restore the case to protest status. The information must be received prior to the expiration of the appeal period to permit restoration to protest status.

If an NOA is restored to protest status, the taxpayer or representative must be advised. The communication with the taxpayer or representative can be via letter, personal contact, or telephone. The

Unit/Section or the auditor handling the case will make notification. Notifications should be worded substantially as follows:

In accordance with your (letter, telephone call, etc.) of Month DD, YYYY, Notice of Proposed Assessment No. _____ for the taxable/income year _____ has been restored to protest status and the Notice of Action issued Month DD, YYYY may be disregarded.

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15.7.3 Follow-up on a Non-Final Notice of Proposed Assessment

In some instances, it is necessary to prevent a Notice of Proposed Assessment (NPA) from becoming final due to an obvious error or possible re-determination. In this event, the Unit/Section will stop the NPA from becoming final by requesting that the Protest Control Desk staff place a hold on the NPA.

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15.8 CONVERSION OF AN ASSESSMENT INTO AN OVERASSESSMENT

Sometimes a Notice of Proposed Assessment (NPA) contains the netting of positive and negative adjustments. When the Protest Section only affirms the negative adjustments, the NPA is subsequently withdrawn and the result is an overassessment.

The Protest Section cannot introduce new issues into the computation that causes an increase to the overassessment, unless the statute of limitations is open for filing a claim for refund or issuing an additional Notice of Proposed Overassessment (BE) or Computation of Proposed Overpayment (PIT).

See MAP 13.4.8 and MAP 13.4.9 for additional information.

Taxpayers do not have appeal rights to a final action on an overassessment that was initiated by FTB. Taxpayers can appeal a claim for refund denial to the Office of Tax Appeals.

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15.9 PAID PROTESTS

R&TC Section 19335 provides that FTB shall treat the protest or appeal as a claim for refund or an appeal from the denial of a claim for refund, respectively, if the taxpayer pays the tax protested with or after the filing of a protest or appeal. R&TC Section 19322.1, allows perfection of a converted claim only upon full payment of all amounts due for the year, and R&TC Section 19041.5, provides that tax deposits become payments of tax for R&TC Section 19335 purposes only when specifically designated in writing.

Fujitsu IT Holdings v. FTB (2004)120 Cal.App.4th 459, held that R&TC Section 19335 does not operate automatically, but that the protest or appeal converts to a claim or appeal from a claim denial only after FTB applies the payment in question to the balance due.

If a taxpayer has a tax deposit amount on account and wishes to convert a protest or appeal to a claim for refund or appeal from the denial of a claim for refund, the taxpayer must provide a statement in writing asking that the administrative deficiency dispute be converted to an administrative claim dispute (preferably on the form FTB 3581, when available). Upon receipt of the form, FTB will finalize the deficiency by issuing a Memo-NOA-AFF (Do Not Mail,) allowing the tax deposit amount to apply to the now-final deficiency, including interest and any amnesty penalty (if applicable). If there is an overpayment after all amounts due for the year have been paid, the balance will be refunded unless the taxpayer has designated on the form FTB 3581 that excess amounts be retained or applied differently. The protest converts to a perfected claim. FTB will continue to consider the issues presented in the protest, and may take action on the claim at any time.

If the tax deposit amount is insufficient to pay the final deficiency amount, including penalties, fees and interest, the claim becomes an informal claim. The taxpayer will receive a bill for the remaining amount due and FTB cannot act on the claim until it is perfected by full payment. (R&TC Section 19322.1.) The six-month deemed denial period does not start to run until the claim is perfected by full payment.

If a protested Notice of Proposed Assessment is converted to a claim for refund, and it is part of an offset case, the Notice of Proposed Overassessment (BE) and Computation of Proposed Overpayment (PIT) is not finalized, and the taxpayer loses the benefit of interest netting. (R&TC Section 19108(a) and R&TC Section 19113.)

In PASS, the case unit is changed to a Paid Protest Claim Filed status from a Protest-Work in Progress status. This will enable the responsible person to continue to record time in the Protest Tab and use the working papers in the Protest Workpaper file.

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15.10 SUITS FOR REFUND - SUPERIOR COURT

Taxpayers can appeal to the Office of Tax Appeals (OTA) or file suit in Superior Court after a claim or appeal of a protest is denied or partially denied. However, with the exception for an issue of residency, before they can file suit in California Superior Court, they must pay the tax, penalty, and interest. Pursuant to R&TC Section 19384, the action must be filed within one of the following time periods, whichever is later:

- Within 90 days after the date of the OTA determination on an appeal from the action of the Franchise Tax Board becomes final.
- Within 90 days after the date we mail our Notice of Action on the claim for refund.
- Within four years from the last date for filing the return.

- Within one year of the overpayment.

Either the taxpayer or FTB can appeal a Superior Court decision to the California Appellate Court or the California Supreme Court, and ultimately to the U.S. Supreme Court.

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15.11 APPEALS

The taxpayer has 30 days after the mailing date of the Notice of Action to appeal our action upon protest to the Office of Tax Appeals (OTA). The appeal must be in writing. (R&TC Section 19045) If no appeal is filed within the 30 day period, the assessment becomes final and the deficiency assessed is due and payable within 10 days (for taxable years through December 31, 1997), or within 15 days (for taxable years beginning on or after January 1, 1998), from the date of the notice and demand (R&TC Section 19049). If full payment is received within the 10 or 15 days, interest is waived for that 10 or 15 day period.

When an appeal is filed with the OTA, the Appeals Section in the Legal Division is notified. The Appeals Section Technician obtains the taxpayer's file. After verifying the appeal information, the appeals are logged into the appropriate systems by the Appeals Section Technician. If an appeal is filed, both the taxpayer and FTB have the chance to provide more information.

Once OTA has evaluated the facts and rendered a decision, the law allows for either the taxpayer or FTB to file a petition for rehearing. If no rehearing petition is filed, the OTA's decision becomes final 30 days after it is rendered. If a rehearing petition is filed, the OTA's decision on the petition becomes final 30 days from the time the OTA issues its opinion on the petition (R&TC Section 19048).

After OTA has resolved an appeal by either a formal published opinion or unpublished summary decision, the Legal Division will refer the file to Technical Resource Section for disposition. The cases will come with a cover sheet form FTB 7023 (Appeals Protest Transmittal) for issuance of the Notices of Determination. This includes cases resulting from appeals against the additional assessments as well as denials of claims. Appeals on jeopardy assessments involving illegal activities, (e.g., narcotics, bookmaking, pinball machines), are also referred to the Appeals Section Technician. Once the OTA renders a decision, it is final and binding on FTB, but not on the taxpayer. However, we can petition for a rehearing.

The taxpayer may file suit in California Superior Court after an unfavorable decision by OTA, by paying the tax and filing a claim for refund. After the California Superior Court has rendered its decision either the FTB or the taxpayer may file an appeal on the decision to the California Appellate Court and/or the California Supreme Court, and ultimately the U.S. Supreme Court. See MAP 8.5.1 Appeal of Denied Claim.

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15.11.1 Reserved

15.12 PROTESTS RETURNED FOR FURTHER DEVELOPMENT

Protested cases can be returned to their respective Audit Program for further development in different situations:

- MAP 15.12.1 New Issues
- MAP 15.12.2 Substantial Additional Development is Still Needed
- MAP 15.12.3 Provisional Assessments
- MAP 15.12.4 Failure to Furnish Penalty was Assessed

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15.12.1 New Issues

Keeping in mind that the taxpayer is protesting Audit's proposed assessment, the issues identified in the protest letter generally constitute the scope of the protest. However, taxpayers can always raise new issues at protest and, in rare circumstances, the Hearing Officer can raise new issues.

Taxpayer raises new issues:

The Hearing Officer must determine whether the issue is statutory, transactionally "related," or transactionally "unrelated" to the underlying issues at Audit. A related issue is one for which the facts either are, or should have been, part of the initial determination.

- **Statutory/Related** – Generally, if the facts are sufficiently developed, or if the adjustment is statutory, the Hearing Officer will consider the new issues in the context of the Protest.

Related Issue Example: Audit disallowed a 1031 exchange, but failed to consider passive activity losses, capital loss carry forwards, investment interest expenses, or deductions limited as a percentage of income. All factual evidence is either included in the audit file, or it should have been included in the audit file.

- **Unrelated** – The taxpayer can raise unrelated issues in the Protest Letter to reduce the proposed additional tax. However, the new issue cannot result in a refund unless the taxpayer filed a timely claim for refund. The Hearing Officer generally considers the new issues with the Protest. If the new issue requires significant factual development, the case should be returned to Audit.

Unrelated Issue Example: Audit disallowed a 1031 exchange, and the taxpayer is claiming a previously unreported loss from the sale of qualified small business stock (QSBS). The loss from that unreported sale offsets Audit's adjustment. There was no reason for the audit file to include the QSBS information, and the taxpayer did not raise the QSBS issue at Audit.

NOTE: If the new issue is unrelated to the protested issue(s), then the Hearing Officer and Management must determine the best course of action. Considerations include the nature of the issue, materiality, the location of records, the expertise of Hearing Officer, etc. If Protest Management deems it appropriate, and if Audit Management agrees, Protest Management will refer the new issue to audit for

development. Ideally, if the Hearing Officer can efficiently resolve the new issue, then the assigned Hearing Officer will consider the new issue together with the protested issues.

The Hearing Officer raises a new issue:

Based on the *Appeal of David G. and Helen Mendelsohn* (85-SBE-141, Nov. 6, 1985) hearing officers have the authority to raise new issues. Whether to use that authority is generally limited to four categories:

- i. New issues directly related to the Notice of Proposed Assessment (NPA) adjustments that are based on new information.

- ii. New issues attributable to the NPA adjustment, e.g. AMT, Itemized Deductions, Limitations, etc. (Statutory or Related)

- iii. Statutory adjustments that are not related to the NPA adjustment and were not addressed on the NPA.

- iv. Issues that are unrelated to any of the issues listed in the NPA and that require factual development based on evidence other than what was obtained at audit. (Unrelated)

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15.12.2 Substantial Additional Development Still Needed

When a Notice of Proposed Assessment is issued and substantial factual development is still needed, the Hearing Officer will inform their Protest Manager. The Protest Manager will contact the Audit Program Supervisor to discuss the case. If it is agreed that the case be returned for development, a letter is sent to the taxpayer/representative explaining that their protest is being returned to Audit. The case is then returned to the issuing Audit Program for further development. Upon completion of the factual development, the case will be returned to the Hearing Officer assigned to the case.

Also, if the TRS Review Notes state that the case should be returned to Audit if protested, the case will be assigned to a Hearing Officer prior to sending it back to Audit.

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15.12.3 Provisional Assessments

Provisional assessments mailed due to the pending statute of limitations or due to the taxpayer's failure to provide information are returned to the issuing Audit Program for further development. Upon completion of the factual development, the case will be returned to the Hearing Officer assigned to the case.

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15.12.4 Failure to Furnish Penalty was Assessed

Cases on which the Failure to Furnish Penalty was assessed are reviewed by a Hearing Officer to determine the issue(s) at Protest and what relevant information was requested and not provided. The Hearing Officer will also consider what relevant information was not requested that should have been requested to properly resolve the issue(s) in dispute.

The Hearing Officer will send an Initial Contact Letter with an Information Document Request for those items needed for factual development of the issue(s) at protest.

- **If the taxpayer or representative responds** with a substantive reply, the Hearing Officer will notify their Manager, who will notify the Auditor's Supervisor and/or the Auditor that substantive information has been provided, and the case will be transferred back to Audit for factual development.

The Hearing Officer then notifies the taxpayer or representative that the case will be returned to Audit for complete factual development prior to the Hearing Officer being able to reach a determination. Upon completion of the factual development, the case will be returned to the Hearing Officer assigned to the case.

- **If the taxpayer or representative does not respond** with a complete and substantive reply, the Hearing Officer will provide a final opportunity for the taxpayer/representative to provide a substantive response within a reasonable timeframe. The Hearing Officer will then proceed with the case according to standard operating procedures based on the available information.

In summary, as in any audit, the auditor should continue to develop the facts of the protest case to the best of their ability.

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15.12.5 Working the Undocketed Protest Returned to Audit

The auditor will need to follow these steps in accordance with normal audit procedures, or as directed by auditor's supervisor.

- Complete factual development for each protested issue.
- Record your work in the Audit issue workpaper folders in PASS.

- Issue an Audit Issue Presentation Sheet (AIPS) for each protested issue. (In the AIPS, indicate that if no response is received, the protest case file will be returned to the Hearing Officer or finalization of the protest case.)
- Address any taxpayer rebuttal(s) to the AIPS, etc. (In the final closing rebuttal letter, indicate that the case will be returned to the Hearing Officer for closing.)
- Let the Hearing Officer know when you are ready to return the physical file(s) for resolution of the protest. **(Do NOT submit the case directly to TRS or Audit Business Support.)**

If the auditor recommends that the Notice of Proposed Assessment (NPA) be withdrawn and review is complete, notify the taxpayer that a Notice of Action (NOA) officially withdrawing the NPA will be issued. The Protest Section will issue the NOA – Withdrawal.

If the auditor has done the necessary additional work at protest, developed all the facts, and communicated the legal analysis to the taxpayer and the taxpayer still does not agree with the auditor, the case must be referred back to the Protest Section. If the audit was not previously reviewed in accordance with normal processing procedures or additional notices need to be issued as an unagreed case, the case must first go through TRS before being referred to Protest. The Hearing Officer assigned to the case will determine if a hearing is still required and will continue to work the protest case.

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15.12.6 Returning the Undocketed Protest

Once the auditor has completed the fieldwork and analysis, the auditor's findings and final recommendation on the case should be attached to a memo referring the case back to the Protest Section. If the audit was not previously reviewed according to normal processing procedures, or additional notices need to be issued, route the case to Technical Resource Section instead of the Protest Section.

If the taxpayer is in agreement with the auditor's recommendation, a Hearing Officer will issue the Notice of Action pursuant to the auditor's recommendation. If the taxpayer and representative are not in agreement with the auditor's recommendation, and they still request an oral hearing, the protest will be assigned to a Hearing Officer to conduct the oral hearing and resolve the case.

The case should be assembled with all protest correspondence on top. Auditor notes and/or a Narrative Report clearly outlining the recommended action to be taken at protest should be included. The revised Narrative Report should be in the Audit - Reports Folder on PASS.

Note: A Notice of Action may never be made to increase the amount of tax and/or penalty on a Notice of Proposed Assessment (NPA). If an increase in tax and/or penalty is necessary, recommend affirming the previous NPA and prepare a new form FTB 6830 for the additional amount (if not barred by the statute of limitations) starting with the taxable income or net income as revised by the previous NPA as if it had become final. Withdrawal of the previous NPA and issuance of a new one is generally not in order unless the revised tax is on completely different grounds (and is not barred by the statute of limitations). See MAP 15.6 Correction on Notices.

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15.13 INNOCENT JOINT FILER

When filing a joint tax return, each spouse or registered domestic partner is jointly and severally responsible for paying the entire liability. However, if certain criteria are met, one spouse or registered domestic partner may qualify for relief from having to pay all or a part of the liability. This is referred to as innocent joint filer (IJF), or innocent spouse, relief.

Protest Section works the IJF request when the request is made during the Notice of Proposed Assessment Protest period.

Under certain circumstances, a joint filer can seek relief from a joint tax liability. See:

1. R&TC Section 18533 - Relief from additional tax.
2. R&TC Section 19006(b) - Relief by court order and tax clearance revision certificate.
3. R&TC Section 19006(c) - Relief from return tax.

In general, the Audit Division will only deal with number one above. There are three subsections of R&TC Section 18533:

- R&TC Section 18533(b) – Traditional Relief
- R&TC Section 18533(c) - Separate Allocation of Tax Liability
- R&TC Section 18533(f) – Equitable Relief

If a taxpayer inquires about Innocent Joint Filer Relief during audit or protest, contact an Innocent Joint Filer Specialist.

Taxpayers inquiring about Innocent Joint Filer Relief during the audit process should be made aware that relief from additional tax (R&TC Section 18533) will not be considered until a proposed assessment has been issued. Once a proposed assessment is issued, the taxpayer can file a protest and request relief at that time.

FTB must notify the other joint filer (or non-requesting filer) that the other taxpayer has requested relief of liability. FTB must give them the opportunity to offer evidence.

If a joint filer demonstrates entitlement to relief, then that joint filer is relieved of liability for that portion of the tax. It is possible for the requesting joint filer to be partially non-liable.

If the innocent joint filer issue emerges after the assessment has become final, refer the case to the Collection Bureau Innocent Joint Filer Unit.

If relief of liability is denied, the hearing officer will include reasons for the denial in the Notice of Action.

15.14 LEGAL SUPPORT REQUESTS

Legal support requests are generally routed to the Protest Section. The resolution of docketed protest, settlement, and appeal cases may involve either the gathering of additional information from the taxpayer's records or the verification of information submitted by the representative. In either situation, the Protest Section may contact the originating audit program for field audit activity when necessary.

The scope of an assignment to assist the Legal Division is generally determined by Legal's memo. Additional information developed in the course of the assignment may indicate that the scope should be either limited or expanded. These recommendations should be discussed with your supervisor and Protest.

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