



**California Society of CPAs
Committee on Taxation
and
Franchise Tax Board
Liaison Meeting**

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Sacramento, CA
October 28, 2009**

**California Society of CPAs
Committee on Taxation
2009 State Subcommittee**

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FTB/COT LIAISON MEETING

October 28, 2009

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California Society of CPAs: FTB Questions 2009

1. 540X

Question:

California Form 540X does not allow a tax overpayment resulting from the amended return to be applied to a succeeding tax year. Line 34 only allows an overpayment to be refunded to the taxpayer. Federal Form 1040X allows an overpayment to be applied to another tax year. Is there a reason California can't provide the same application?

For an item of income originally reported in the wrong (amended) year which correctly becomes taxable in the succeeding year, the application of the amended year's overpayment to the succeeding year's tax would help prevent underpayment penalties for that year. It also would make the tax payment administratively easier for the taxpayer.

Answer:

We currently have a team studying the issue allowing overpayment on amended California Form 540X and California Form 100X to be applied to a succeeding taxable year. We feel this is feasible, and can be implemented as a process not requiring legislation. We hope to implement the option to apply 540X and 100X overpayments as estimated tax payments beginning in 2011 for amended returns filed for any income year.

2. DELAYS IN PROCESSING RETURNS

Question:

A trustee filed a 2006 fiduciary return by April 15, 2007 via certified mail and received a return receipt. The trustee had requested the overpayment be applied to the 2007 year. In June 2008 the trustee received a notice of underpayment on the 2007 return because the 2006 overpayment hadn't been applied. The trustee contacted the FTB and was told that they didn't have the 2006 return. After a six-week delay, the FTB said they had found the return and would process it. This was sometime in September 2008. At the suggestion of the FTB, a duplicate copy of the 2006 return was provided. As of February 2009, the return hadn't been processed. Why would it take so long to process a return in this situation? In this case it becomes a little more complicated in that the overpayment on the 2007 return was applied to the 2008 tax year which could only compound the problem.

Answer:

While the FTB strives to ensure all returns received are processed within our published timeframes, there are times when this does not occur. In our research for the example given, we found that while a total of five fiduciary returns were received, only the return on top was processed. It is more than likely, that all five returns were mailed in the same envelope; with no identifying markers to separate each. As a result, only the return on top was processed. The top return and the other four returns, still underneath, were then sent to storage files. Upon contact from the CPA, we were able to locate the other four original returns, and they were processed. Unfortunately, this occurred during a time of year when FTB is at its filing peak season and therefore processing timeframes are extended. In the meantime to expedite the process and update the taxpayers' accounts, duplicates of the four returns were faxed to us and special processing was requested. While the CPA had to make several contacts with the FTB to resolve the matter, all five returns have been updated and corrected as timely filed.

To help avoid this type of delay in processing, we are currently reviewing procedures to look for efficient ways to identify multiple returns that may be mailed together. In addition, we recommend that each return be visibly identified when multiple returns are mailed in one package. This will help staff identify up front that there is more than one return to be sent through for processing.

4. CASHING OF CHECKS ON EXTENSIONS

Question:

Tax practitioners often get telephone calls from worried clients because the checks that they used to make payments around the April 15th filing deadline haven't been cashed by the FTB. Could you tell us what would be a reasonable time frame for waiting for the FTB to process tax payments? In particular those received close to a deadline date.

Answer:

Due to the volume of incoming mail to FTB in April, the post office is unable to send everything postmarked April 15th to us in one day. FTB receives April 15th post marked mail through the end of April. It is reasonable to assume that if a payment was sent to the correct FTB post office box the check will be cashed by early May.

5. E-FILING FORM 541

Question:

Could you update us on the projected time frame for e-filing of fiduciary returns?

Answer:

The e-filing of Form FTB 541, *California Fiduciary Income Tax Return*, is planned to be implemented in conjunction with the IRS implementation of Form 1041 in their modernized format. Most software providers have indicated they would not support it for California until IRS implementation. The latest date from the IRS was either 2013 or 2014 after they have completed implementing the modernized format for personal income tax.

6. STOP PAYMENT ON A CHECK

Question:

A taxpayer stopped payment on a check to the Franchise Tax Board and was assessed a penalty of 2% of the \$60,000 check. The R&TC already has penalties for not timely making payments of tax. Why would an additional assessment, \$1,200 in this case, be made? It seems somewhat excessive. Wouldn't a flat amount be more in line with normal business practices?

Answer:

Revenue and Taxation Code (R&TC) §19134 provides that Internal Revenue Code (IRC) §6657 applies whenever a taxpayer presents a payment of tax that is subsequently dishonored. Internal Revenue Code §6657 in turn provides that:

“If any check or money order in payment of any amount receivable under this title is not duly paid, in addition to any other penalties provided by law, there shall be paid as a penalty by the person who tendered such check,... an amount equal to 2 percent of the amount of such check,...”

As the statute states, the dishonored payment penalty is to be added on top of any other penalties proved by law. In Gregory v. United States (D.C. Mich. 1997) Lexis 15407; 97-2 U.S. Tax Cas. (CCH) P50, 741; 80 A.F.T.R2d (P-H) 6763, the court sustained both a dishonored check penalty and a late payment penalty when the late payment was the result of the refusal of the taxpayer's bank to honor his check.

The late payment penalty is intended to ensure that individuals pay their tax obligations in a timely manner. The dishonored payment penalty is intended to ensure that individuals pay their tax obligations with checks that will be honored by the bank.

The dishonored payment penalty can be abated for reasonable cause, where the taxpayer can show that the check was tendered (or electronic payment was initiated) in good faith and with reasonable expectation that it would be paid.

7. FORM 100 QUESTIONS

Question:

Form 100, Questions B3 and B4, shouldn't an N/A box be provided for each of these questions?

Answer:

We agree these questions are not applicable if the taxpayer response to question B1 is "No". Based on this suggestion, we are revising the 2009 Form 100 and 100W with instructions to skip questions B2-B4 if the answer to question B1 is "No".

8. LACK OF AGENCY CONTACT OR RESPONSE

Question:

Tax practitioners have been noticing a decline in FTB service over the past year or so. The fear that we as tax practitioners have is that in these times fiscal crisis and budget cuts service to practitioners and taxpayers will be reduced to the point as to inhibit efficient administration of the tax law. The Practitioner's Hotline is a service of particular concern to tax practitioners and an item of discussion at our last liaison meeting. Could you discuss any plans that are under consideration to deal with budget constraints and levels of services provided to taxpayers and tax practitioners? Also could you discuss any improvements under consideration with regard to the taxpayer's advocate's office?

Has the FTB given consideration to using fax or email technology to give practitioners other points of access to the practitioner's hot line?

Also what is the FTB's policy with regard to communicating with the taxpayer or tax practitioner when a matter has been resolved? Many times information to resolve an issue will be submitted to the Practitioner's Hotline or the Taxpayer Advocate's Office and no acknowledgment of receipt or resolution is received back from the FTB.

Answer:

The Tax Practitioner Hotline currently accepts faxed correspondence or documentation through our Electronic Correspondence number at 916-845-6377. This point of access can be used for any account resolution type questions and transcript requests. Transcript requests must be requested in writing on business letter head with clear instructions on what is being requested. A copy of the Power of Attorney form should also be provided if one is not already on file with us.

The FTB is always working to maintain the balance between the taxpayer's right to privacy and our responsibility to continually improving the quality of our products and services. Our Secure Electronic Communication (secure email application) service is currently used for taxpayers and

representatives that are involved in established, ongoing communication exchanges with FTB staff, where documents are shared back and forth. This application is primarily used in our Audit program. It is currently not designed to accommodate immediate communication needs that might exist outside of an ongoing FTB employee-to-taxpayer relationship. Our future plans include a secure email system where routine, quick contact and exchange of information will be enabled.

Customer service is a high priority for FTB, and we strive to provide the best service possible. The Tax Practitioner Hotline's objective is to address and resolve all customer calls at the first point of contact by practicing the department's "one and done" approach to deliver our services quickly and efficiently. If additional information is needed by the Hotline agent to resolve the issue immediately, they will request to fax the information directly to them for further analysis. In many instances, the issue can be resolved on that same day and would be communicated via phone or fax.

Customer contacts received through the electronic correspondence number is also serviced as quickly and efficiently possible. Regrettably, our current process for this point of access does not include an automated system or any manual resources to immediately "acknowledge" the receipt of any correspondence received in the Hotline. The Hotline staff will only provide acknowledgment of receipt if the received date has gone past our processing timeframe. If this is the case, we will research the status of the correspondence and follow up with a phone call.

Fax Correspondence Response Timeframes:

- 7 – 10 days for Estimated tax payment verification requests.
- 45 days from the date received by FTB for general fax, mailed correspondence and transcript requests.

9. CRT – GRANTOR/TRUSTEE/BENEFICIARY MOVE OUT OF STATE

Question:

A taxpayer, while a California resident, creates a CRT in June 2006 and funds it with publicly traded marketable securities. The trust sells the securities in 2006 which results in an undistributed capital gain. The taxpayer who created the CRT is the grantor, trustee and beneficiary.

In 2008, the trustee/beneficiary moves out of California and does not intend to return. The Trust files 2008 Forms 541-A & 541-B.

The trustee/beneficiary was a non-resident of California for the entire 2009 calendar year. During 2009 the trustee makes distributions to the current interest holder (beneficiary) out the income pool and partially out of capital gains pool which contains the gains from the sale of securities while the trustee/beneficiary was a California resident. Is it true that the gains realized

during the period of California residency will be continued to be sourced to California? What are the California filing requirements of this trust in 2009? Would the answer be any different if there were no distributions from the capital gains pool? When allocating distributions from the capital gain pool is there an ordering between California and non-California gains? Is there any California reporting requirement once the California sourced gains have been fully distributed?

Answer:

Part 1: Is it true that the gains realized during the period of California residency will be continued to be sourced to California?

Part 1 Response:

The general rule in California is that non-resident taxpayers will be subject to the California income tax to the extent the non-resident taxpayers have gross income from California sources. This rule applies to non-resident beneficiaries who derive income and deductions from an estate or trust and the income or deduction of the estate or trust is derived from sources within this state.

California Regulation Section 17952(d) provides that gains and losses from the sale or other disposition of intangible personal property are sourced to the state of residency at the time of the sale or disposition of that property.

CR&TC Section 18003 states a trust is a resident of the state which taxes the income of such trust, irrespective of where the income is derived.

Under Regulation Section 17952(d), if intangible personal property was sold and the trust determines the income is from the sale of intangible personal property then the transaction proceeds would be sourced to California.

Because Income in the trust retains its character upon distribution to the beneficiary, the California sourced transaction remains California source income until completely distributed.

Part 2: What are the California filing requirements of this trust in 2009?

Part 3: Would the answer be any different if there were no distributions from the capital gains pool?

Part 4: When allocating distributions from the capital gains pool is there an ordering between California and non-California gains?

Part 5: Is there any California reporting requirement once the sourced gains have been fully distributed?

Response Parts 2-5:

Every trust that pays out or permanently sets aside an amount from current or prior year income for charitable, religious, scientific, literary, or educational purposes and is allowed a deduction under IRC Section 642(c) is required to file form 541A and form 541B. If the trust is not allowed a deduction under IRC Section 642(c), but still pays out current or prior year income the trust is required to file form 541B.

There is no clear guidance governing the allocation of distributions between California and non-California source gains. However, IRC Section 644 does provide an ordering rule for distributions as follows:

1. First, current year income, until fully distributed and undistributed prior year income.
2. Second, current year capital gain and undistributed prior year capital gain.
3. Third, other trust income, until fully distributed and prior year undistributed other income.
4. Fourth, trust corpus.

Generally, California requires a reasonable ordering method for distributions. Reasonable may include things like LIFO, FIFO, or other clear traceable methodology.

Upon providing returns indicating the entirety of California source income is distributed there would no longer be a California filing requirement for the trust until such time as either California source income or other metrics subjecting the trust to California taxation exist.

10. TAX RETURNS & ATTACHMENTS THERETO

Question:

Can paper filed tax forms be filed duplex (using two sides)?

Can paper filed attachments to tax returns be filed duplex?

Answer:

Yes.

11. WEBSITE AND CSN

Question:

It appears that information for a deceased taxpayer is not available on the FTB website. Is there a reason for this? The information contained on the website is useful when trying to verify payments and income when preparing post-death tax returns.

Answer:

To minimize the possibility for fraudulent or inappropriate access to the information of a deceased taxpayer, who may not have given explicit permission for someone to access that information, FTB has decided not to make that information readily available online without a Customer Service Number. Authorized representatives who have the legal authority to receive that information, must contact FTB and provide proof they have a right to the information. Once the representative is approved, a CSN is assigned and payment and income information is available.

12. WEBSITE AND CSN

Question:

Could you update us on what information is currently available on the FTB website through My Account? Is the information fairly complete or is the FTB still working to perfect what information appears?

One tax practitioner had the following experience recently. The interest from an amended return was shown in My Account as a 1099-INT item although the client didn't receive that form. The refund from the amended return even though it is received in the same year as the original refund was not included under My Account. The website did show the refund from the original return. Also the same client had 6 Forms W-2, the only one listed in My Account as CA state wages was the one for services. The W-2s for deferred compensation from the same employer were not shown under My Account, but the CA state withholding shown on these W-2s was included. Given this one practitioner's experience, it would appear that the FTB is still working to perfect the information provided.

Answer:

The following information is available in the MyFTB Account application:

- Up to 25 estimated tax payments, estimate transfers, and extension payments waiting to be applied to a tax return.
- Up to 60 of the most recent payments applied to your balance due.
- A summary of up to 10 tax years with a balance and the total amount due.
- A summary of each tax year with a balance due.
- Up to 4 years of California wage and withholding information
- Up to 3 years of FTB-issued Form 1099-G and Form 1099-INT information.

The information in MyFTB Account is fairly complete. However, there are items that FTB will expand upon in the future. For example, some types of payments are "rolled up" into one

generic payment line. As resources and time permits, FTB plans to display each payment type separately so more detailed information will be available.

Without knowing the specific account, it is difficult to determine why certain Forms 1099 and W-2 information may or may not have been viewable in MyFTB Account. It could be related to the timing of when information was available, or possibly been a case where the information may have been manually calculated and therefore not on the taxpayer's account. Form W-2 information is from the Employment Development Department (EDD) and reported by the employer.

13. USE TAX PAID THROUGH THE FTB ON AN S CORPORATION TAX RETURN

Question:

A tax practitioner recently had a frustrating experience in having her client pay use tax on a 2008 Form 100S. One week after filing the 100S, the BOE opened a consumer use tax account for the S Corporation. BOE insisted that the taxpayer file a use tax return for 2008 and pay the tax due. The tax practitioner called the BOE. They indicated they had no record of the use tax payment and the Van Nuys District Office was apparently unaware that you could even pay use tax thru the Form 100S. The tax practitioner then sent the BOE district office a copy of Form 100S showing the tax paid, but they still required a use tax return be filed and the tax paid. The BOE position was that they had no record of any use tax payment to the FTB and that the taxpayer needed to pay the tax and request a refund of the duplicate payment from the FTB.

Could you elaborate on what type of communication there is between the FTB and the BOE when use tax is reported and paid through an FTB filing? When or how often is the information from the FTB provided to the BOE? Does the FTB have any administrative procedures in place to deal with the situation described above?

Hopefully this is an isolated instance because experiences such as these work against the California effort to close the tax gap.

Answer:

FTB sends the Board of Equalization (BOE) a report, on the first business day of each month that contains detailed self-assessed use tax data for each taxpayer for the previous month. If the information reported on a return is incorrect, the taxpayer works directly with BOE to settle the issue.

The scenario described above appears to be an exception. It is unclear as to whether there was an existing assessment at BOE. If one existed, then was it based on information FTB sent to BOE or an existing account issue? If the BOE contacted them for tax year 2008, then it may have been based on their requirements to BOE.

FTB and BOE have designated representatives that work closely with each other to resolve issues that may arise. There are administrative procedures in place to address each case based on what transpired. Both Central and District Office staff have procedures in place to identify who to contact for assistance with these types of situations. We strive to make this process as seamless to the citizens of California to the extent possible.

The data included in the report sent to BOE includes:

- Begin and end dates of the report
- Original due date of the income tax return
- Type of identification number
- Entity identification number
- Business name and address
- Account period end of the income tax return filed
- Income tax return filed date
- Income reported on the income tax return
- Amount of use tax previously reported
- Amount of use tax currently reported
- Amount of credit previously applied to use tax
- Amount of credit currently applied to use tax
- Total amount of credit applied to use tax
- Total amount of credit reported to use tax

14. FORMS 5805 AND 5806

Question:

Taxpayers are still having problems with the FTB assessing underpayment of estimated tax penalties and ignoring the Forms 5805 and 5806 submitted with the return. A phone call to the FTB in most cases quickly resolves the problem but takes unnecessary time and effort on the part of the taxpayer and the FTB to get the matter resolved. Could you explain how returns that have Form 5805 or 5806 attached are processed? Are there any procedures when submitting these forms that will alert the FTB as to the form's presence so it can be properly processed?

Answer:

Form 5805, *Underpayment of Estimated Tax by Individuals and Fiduciaries*, is used with Personal Income Tax returns, and Form 5806, *Underpayment of Estimated Tax by Corporation*, is used with Corporation returns. As there are some differences in processing and procedures for the two programs, each will be described separately.

On a Personal Income Tax return, to help ensure proper processing of Form 5805, the form should be placed at the **back** of the return, per the form instructions. The amount of penalty should be entered on the *Underpayment of Estimated Tax line* on Form 540/540A and the correct circle should be filled in. This indicates a Form 5805 is attached and the system will capture this

information. If there is a difference between the amount reported on Form 5805 and what is computed by FTB, then the return will fall out for manual validation. Processing staff utilize the information provided on Form 5805 to insure the proper calculation of estimate penalties. If there are any revisions, FTB will notify the taxpayer via a *Return Information Notice*.

FTB has taken steps in the last several years to help improve processing of Form 5805. The annual 5805 training is now given earlier as our e-file inventory is arriving earlier. We have also added a classroom component, in addition to the Computer Based Training (CBT) modules that staff receives, as well as frequent reminders to staff who process these returns.

On a Corporate Tax Return, to help ensure proper processing of Form 5806, the form should be placed on the **front** of the return, per the form instructions. The amount of the penalty should be entered on the *Penalty Line* of Form 100 and the box should be checked if exception B or C has been used. The box instructs the accounting system to verify and modify, if necessary, the estimated tax penalty. If taxpayers do not check that box, then the accounting system cannot account for the exceptions and the taxpayer may receive a notice with a penalty assessment. We are currently examining our tax forms instructions to make sure the check-box requirement is clear to taxpayers.

15. THANK GOODNESS FOR THE TAXPAYER ADVOCATE’S OFFICE

Question:

A corporation changed from “S” status to “C” status mid year because it had been sold. Consequently, two returns were filed as an S Corporation for the 1st 6 months and a C Corporation for the last 6 months. The FTB took the position that the S Corporation return was late for the year pre-printed on the return, and it wasn’t until the matter got to the Taxpayer Advocate’s Office that someone took the trouble to read the explanation that had been sent in response to the first assertion of the penalty. Then the problem was solved on the spot.

R&TC Section 18601(c) indicates that where a short period return is required to be filed under Section 23634 the due date for filing the California return will be the same as the federal return. In this particular case under federal law the S Corporation return is due on the same date as the C Corporation and thus the original position of the FTB was incorrect. What would be the best way to file these two returns in order for the FTB to be able to process them correctly?

Answer:

We recognize how frustrating this can be for you and your client. Unfortunately, the accounting system currently does not recognize short period returns filed under these provisions. We are proposing future system enhancements that meet these requirements and not assess a delinquent penalty.

In the meantime, the FTB has procedures in place to address returns that meet this criterion. If a short period return requires user intervention during the validation process, then our processing procedures requires the due date of the return to be modified on the system to conform to federal law and abate any erroneous penalty and associated interest. If the short period return is not identified and the entity receives a bill because the provision was not allowed, then our public contact procedures instructs staff to confirm federal conformity and abate any erroneous penalty and associated interest.

16. COMPLETENESS OF FTB NOTICES

Question:

On April 2, 2009 a taxpayer received a Notice of State Income Tax Due. The Tax Year(s) at the upper right hand corner of the notice was blank. The Summary of Balance was blank. Looking at the notice, there was no way to tell tax year(s) covered by the notice or if the balance due was tax, interest, penalties or other charges. The taxpayer promptly paid the amount shown on the notice and it looked as if the check was negotiated around April 7, 2009. On April 29, 2009 the taxpayer received an Income Tax Due Notice with the Tax Year(s) and the Balance Summary For Account blank. The balance due had increased slightly.

During this period was the FTB experiencing problems with its billing system? Does the FTB have a system of review of notices before they are sent out to taxpayers to look for obvious errors in the notices?

Answer:

FTB did not experience any billing system issues during this period. FTB does issue *Notices of State Income Tax Due* without tax years or balance summary information. These notices are issued for taxpayer liability penalties and are assessed on a individual taxpayer, not a specific tax year. The taxpayer liability penalty is assessed for such items as dishonored checks, filing frivolous returns, failure to withhold, understatement of tax by tax preparer. In addition, there are codes listed on the notices that will identify the type of penalty being assessed, as well as, an explanation for the code listed.

We would need specific taxpayer account information to understand why the balance due had increased. Without knowing the specific account, it is difficult to determine why the balance due amount had increased. It could be related to additional interest if the payment was not applied to the account correctly or possibly because it was a new item unrelated to the first.

While it would be impossible to review every notice issued, FTB does have a process in place to review notices issued at the beginning of each filing season, and under certain circumstances, there are processes in place to review billing notices throughout the year.

17. CANCELLATION OF DEBT-RECOURSE VS. NONRECOURSE

Question:

In California, a mortgagor who owns a recourse loan on property is required to go to court to formalize the ability to go after the mortgagee's other assets in settlement of the loan. In many, if not most cases, the mortgagor decides to simply go after the property to save time and court and additional collection costs rather than exercise the right to go after the mortgagee's other assets. Does this convert what is a contractual recourse loan with the result of having cancellation of debt income to a nonrecourse loan treated as simply the sale of the underlying property?

Answer:

In California, a lender must proceed with a judicial foreclosure on the underlying property in order to obtain a deficiency judgment against a debtor. A judicial foreclosure is considered a civil lawsuit under the jurisdiction of a specific court. Lenders often prefer a non-judicial foreclosure due to its relative ease and lower cost. When a lender chooses the non-judicial foreclosure route, they give up the opportunity to obtain a deficiency judgment against the debtor. This is because California is a "one action" state. If a lender proceeds with a non-judicial foreclosure, the lender has chosen their "one action" and may not sue the debtor to recover a deficiency, which would be a second action. An exception exists where the property is subject to a junior recourse loan. In this case, the junior lender may pursue a deficiency judgment after the senior lender forecloses on the security.

In either case, a lender's decision not to pursue a deficiency judgment will not change the underlying nature of debt from recourse to non-recourse. The recourse characterization is determined by the lender's rights and the debtor's personal liability, as governed by the loan terms.

When a recourse debt is forgiven by the lender, or when factors otherwise indicate the debt will never be repaid, a debtor has cancellation of debt income under IRC §61 to the extent the debt exceeds the fair market value of the underlying property. This income may be excludable under some circumstances (IRC §108). Federal and California law have similar exclusion provisions with some differences. One notable difference is the relief provided under Mortgage Debt Relief Act of 2007, to which California partially conforms. Refer to FTB's website for a discussion of the differences, which mainly relate to the applicable years and dollar limitations (search term: **mortgage forgiveness**).

18. GROSS RECEIPTS FEES

Question:

Under the calculation of "gross receipts" for the LLC, one can exclude allocations, distributions, or gains from another LLC that was already subject to the gross receipts fee. If one LLC pays a

consulting or management fee to another related LLC, can the second LLC exclude this income from its gross receipts since the first LLC paid a gross receipts fee?

Answer:

California Revenue and Taxation Code Section 17942(b)(1)(A) provides, in relevant part:

For purposes of this section, “total income from all sources derived from or attributable to this state” means gross income, as defined in Section 24271, plus the cost of goods sold that are paid or incurred in connection with the trade or business of the taxpayer. *However, “total income from all sources derived from or attributable to this state” shall **not** include allocation or attribution of income or gain or distributions made to a limited liability company in its capacity as a member of, or holder of an economic interest in, another limited liability company if the allocation or attribution of income or gain or distributions are directly or indirectly attributable to income that is subject to the payment of the fee described in this section.*

The consulting or management fee paid to the second limited liability company by the first limited liability company, as posed in the question, is clearly not within the meaning of “allocation or attribution of income or gain.” However, the facts of the question are not clear as to the capacity in which the second limited liability company has provided services to the first limited liability company. Therefore, at least a potential issue exists as to whether the consulting or management fee payment may be a “distribution” described in 17942(b)(1)(A), and may be excludable to the extent it is attributable to income subject to the payment of the fee by another limited liability company, e.g. the first limited liability company.

Regardless of whether the second limited liability company is directly a member of, or holder of an economic interest in, the first limited liability company, if -

- (1) the payment of a consulting or management fee by one limited liability company to a second limited liability company is a payment to the second limited liability company in the second limited liability company’s capacity as other than a member of, or holder of an economic interest in, the first limited liability company, (such as in the second limited liability company’s capacity as operating a separate trade or business), or
- (2) the payment is treated under a provision of the Revenue and Taxation Code, (such as Section 17851, incorporating by reference Internal Revenue Code Section 707(c)), as a payment to the second limited liability company other than in its capacity as a member of, or holder of an economic interest in, the first limited liability company for purposes of determining the gross income of the second limited liability company,

then the fee payment is not a “distribution” described in Section 17942(b)(1)(A), and is not excluded from the total income of the second limited liability company under 17942(b)(1)(A) for purposes of computing its annual fee. The determination of whether a member is acting in a non-member capacity (e.g., conducting a separate trade or business) when providing services to another limited liability company depends on the particular facts and circumstances. Similarly, whether a payment for services made to a member acting in its member capacity must be treated as made to a member acting in a non-member capacity also depends on the particular facts and circumstances.

19. UNITARY EXAM IN CLOSED TAX YEAR

Question:

A California corporate taxpayer that conducts business wholly within California was initially contacted for a unitary examination for years open under the four year statute of limitations. In addition to taxpayer’s separate tax filing for California, two other brother/sister corporations also conducted business wholly within California and filed separate tax returns. All of these entities are owned by a foreign parent that also owns other foreign subsidiaries.

One of the three California taxpayers incurred a Net Operating Loss (NOL) prior to the years under examination and claimed the NOL carryover on their separate return in an open exam year. After commencing the unitary examination, the FTB notified the California taxpayer that they expanded the unitary exam to include years closed by statute. Upon inquiry, the FTB’s purpose of this expanded examination was not to examine the NOL carryover claimed, but instead to change the method of filing in order to accelerate the use of the NOL in a closed tax year and disallow the NOL carryover claimed in an open tax year. Taxpayer retains its records for seven years. The inquiry regarding method of filing and records spanned nine years or more.

- What is FTB’s authority for conducting an examination in a closed tax year solely for changing the method of filing?
- According to FTB’s regulations and applicable tax law, a combined report consists of separate tax filings allowed to be combined into one report. It is not a consolidated return. As such, each entity retains their own tax liability and tax attributes. In this example, what is FTB’s authority for examining the other two California taxpayers in closed tax years that do not have an NOL in order to include them in a combined report in a closed tax year?
- One or more of the other California taxpayers reported and paid franchise tax in excess of the minimum tax in the closed tax years. If the FTB determines them to be unitary in a closed tax year and a refund is due, will the FTB issue the tax refund for a closed tax year?
- From a policy perspective, if taxpayers file timely separate tax returns for California purposes and are owned more than 50 percent by a common parent, assuming they do not meet the other unitary requirements and file separate returns, are they required to retain records pertaining to method of filing beyond the four year statute of limitations? If so, for how long?

- NOL's incurred after 2008 are now afforded a 20 year carryover. If an NOL is incurred on a separate tax return and carried forward and used twenty years later on a separate tax return, assuming method of filing could be an exam issue, how long after the normal four year period of examination must the California taxpayers maintain records to support a nonunitary filing if the NOL is carried over for the maximum period? If twenty years, what is FTB's authority for such a mandate?

Answer:

A January meeting has been scheduled to further discuss with COT representatives.

20. PASS-THRU BUSINESS CREDIT LIMITATIONS FOR 2008 AND 2009

Question:

Assume the following facts:

- S Corporation has two shareholders who each own a 50% interest
- S Corporation conducts business wholly within an Enterprise Zone
- S Corporation income is \$900,000 before state adjustments
- S Corporation has \$2 million of available Enterprise Zone Hiring Credits
- Shareholders received compensation of \$120,000 each during the year

S Corporation level

1. S Corporation pays year end bonus of \$215,000 to each shareholder.
2. S Corporation income after state adjustments is reduced to \$470,000.
3. S Corporation meets the business tax credit limitation exception per R&TC section 23036.2(e) and is allowed to claim Enterprise Zone Credits to offset the tax on the S Corporation income.

Individual taxpayer level

4. Shareholders each report \$335,000 (\$120,000+\$225,000) W-2 income
5. Shareholders each receive an S Corporation K-1 reflecting distributive share of S Corporation income of \$235,000 and applicable share of Enterprise Zone Credits.
6. Shareholders each have \$1 million in Enterprise Zone Credits allocated to them.
7. This is the only income derived by each shareholder.

Questions:

1. In determining "income subject to tax" for the purpose of applying the exception to the under R&TC Section 23036.2(f), does it include only the income for subject to tax at the entity level or would it include income paid to shareholders via compensation? Using the example above in computing the \$500,000 threshold amount would the S Corporation use the \$470,000 in adjusted S Corporation income or the \$1,140,000 in income which includes the pass through income plus total compensation paid to the shareholders?

2. In determining “net business income” under R&TC Section 17039.2(g) does the shareholder only include the pass thru income for the S Corporation or is S Corporation W-2 income also included in determining the threshold for the limitation? From our example above would “net business income” include only \$234,000 which each shareholder received in pass-through income or does it also include the \$335,000 in compensation each shareholder received?

Answer:

Part 1: In determining “income subject to tax” for the purpose of applying the exception to the under R&TC Section 23036.2(f), does it include only the income for subject to tax at the entity level or would it include income paid to shareholders via compensation? Using the example above in computing the \$500,000 threshold amount would the S Corporation use the \$470,000 in adjusted S Corporation income or the \$1,140,000 in income which includes the pass through income plus total compensation paid to the shareholders?

Response Part 1:

“Income subject to tax” means net income for state purposes, post-apportionment and before application of net operating losses. The purpose of this limitation is to determine which taxpayers would be subject to suspension of their NOLs and credits for taxable years beginning on or after January 1, 2008, and before January 1, 2010. As a result, any interpretation of “income subject to tax” as allowing NOLs to first be offset before making a determination of whether the limitation applies would render that limitation meaningless.

The amount above is reflected on line 19 of the FTB Form 100, on line 19 of the FTB Form 100W, and on line 16 (net of any adjustments on line 17 only) of FTB Form 100S.

In the above example, the income subject to tax at the S-Corp level under R&TC Section 23036.2(f) should be \$470,000 net income after state adjustments, which is less than the \$500,000 threshold, so that the S Corporation is not subject to the credit limitation.

The two shareholders who received a total of \$1,140,000 (\$470,000 flow-thru income and the \$670,000 in total wages) will determine their own limitation at their individual income tax return level. See answer to part 2.

Part 2: In determining “net business income” under R&TC Section 17039.2(g) does the shareholder only include the pass thru income for the S Corporation or is S Corporation W-2 income also included in determining the threshold for the limitation? From our example above would “net business income” include only \$234,000 which each shareholder received in pass-through income or does it also include the \$335,000 in compensation each shareholder received?

Response Part 2:

For the purpose of determining the limitation under R&TC Section 17039.2(g), the “net business income” for each shareholder should only include the pro-rata pass-through income from the S corporation of \$235,000; therefore, it is under the \$500,000 threshold, and the shareholders are not subject to the credit limitation under R&TC Section 17039.2(g). Wages and bonus are not included as “business income” for this purpose. However, for purposes of R&TC Section 17053.74(j), which limits the enterprise zone credit to the “net tax” attributable to the “business income” from the enterprise zone, the computation of that “business income” from the enterprise zone will include wages and bonus from the S corporation.

21. NONRESIDENT GROUP RETURN FILING FOR 2009

Question:

2009 nonresident group return filing for individuals deriving more than \$1 million in California source income

Effective for tax years beginning on or after January 1, 2009, Assembly Bill 1389 amended group nonresident return elections (per CA R&TC section 18535 and 18536) to allow such elections for one or more nonresident individuals and to include nonresident individuals deriving more than \$1 million in California source taxable income. According to the Legislative Counsel digest included in the chaptered bill signed by the Governor on September 30, 2008, it states:

(28) Existing income tax laws authorize the FTB to provide for the filing of a group return for electing nonresident partners and electing nonresident directors of a corporation, and to adjust the income of those taxpayers to properly reflect income, as provided. Existing law provides that the tax rate or rates applicable to each partner’s distributive share or each director’s compensation for services is the highest marginal rate or rates provided by the Personal Income Tax Law. The Personal Income Tax Law also imposes an additional tax at the rate of 1% on that portion of a taxpayer’s taxable income in excess of \$1,000,000. This bill would also impose this additional tax of 1% on taxable income in excess of \$1,000,000 of any electing nonresident partner or nonresident director of a corporation included on the group return.

Furthermore, Section 18535 of the Revenue and Taxation Code is amended to read:

18535.(a) In lieu of electing nonresident partners filing a return pursuant to Section 18501, the FTB may, pursuant to requirements and conditions set forth in forms and instructions, provide for the filing of a group return for one or more electing nonresident partners by a partnership doing business in, or deriving income from, sources in California. The tax rate or rates applicable to each electing partner’s distributive share shall consist of the highest marginal rate or rates provided by Part 10 (commencing with Section 17001) plus, in the case of any electing nonresident partner included on the group return who would be subject to Section 17043 when filing individually, an additional tax rate of 1 percent. Except as provided in subdivision (b), no deductions shall be allowed except those necessary to determine each partner’s distributive share, and no credits shall be allowed except those directly attributable to the partnership. As required by the FTB, the partnership as agent for the electing partners shall make the payments of tax, additions to tax, interest, and penalties otherwise required to be paid by the electing partners.

FTB's Publication 1067 issued for tax year 2008 under the section "WHAT'S NEW" explains the new provisions for 2009 as follows:

Group Nonresident Returns (also known as Composite Returns)-For taxable years beginning on or after January 1, 2009:

- Group nonresident returns may include less than two nonresident individuals.
- Nonresident individuals with more than \$1,000,000 of California taxable income are eligible to be included in group nonresident returns.
- An additional one percent tax will be assessed on nonresident individuals who have California taxable income over \$1,000,000. See Section J, for more information.

However, Section J of this same publication regarding 2009 "Estimated Tax Requirements" states:

New for Tax Year 2009-Additional 1% Tax on individuals with Incomes Over \$1 Million. Beginning in tax year 2009, individuals with more than \$1 million of California taxable income can be included in the group return. However, these individuals are subject to an additional 1% tax on their entire California taxable income when included in the group return. This differs from when individuals file their own return and only the taxable income in excess of \$1 million is subject to the additional 1% tax. Individuals should be aware of this difference when making their irrevocable election to be included in the group return.

Questions:

1. What is FTB's authority for requiring a nonresident individual deriving more than \$1 million of California taxable income that elects to file a group return be subject to the 1% add-on tax on their entire income?
2. The publication instructions states nonresident individuals with taxable income in excess of \$1 million who file a California nonresident tax return instead of a group return will not be subject to the 1% add-on tax for amounts below \$1 million. However, if the nonresident individual with taxable income in excess of \$1 million elects to file a nonresident group return instead of filing a California nonresident return, they would pay \$10,000 more in tax (\$1 million * one percent tax rate).
3. Based on AB 1389's stated intent for the amendment of CA R&TC sections 18535 and 18536 to "impose this additional tax of 1% on taxable income in excess of \$1,000,000 of any electing nonresident partner of nonresident director of a corporation included on the group return," what is the FTB's authority for requiring an additional \$10,000 in tax be paid for electing a group nonresident return instead of an individual California nonresident return?

Answer:

§18535 reads:

*The tax rate applicable to each electing partner's **distributive share** shall consist of the highest marginal rate provided by Part 10 (Commencing with § 17001) **plus**, in the case*

*of any electing nonresident partner included on the group return who would be subject to §17043 when filing individually, **an additional 1%**.*

§17043 states:

In addition to any other taxes imposed by this part, an additional tax shall be imposed at the rate of 1% on that portion of a taxpayer's taxable income in excess of \$1 million dollars.

This means if an individual's California taxable income is more than \$1 million, then this individual is subject to §17043.

Under §18535, there are two scenarios where an individual who is subject to §17043 should report the income:

- Scenario 1: this individual elects to **file individually and therefore** the additional 1% tax is imposed only on the amount in excess of \$1 million dollars, §17043.
- Scenario 2: The same individual is a partner in a partnership AND elects to be included in a group return, §18535. Therefore, the partner's entire **distributive share** is taxed at the highest marginal rate plus 1%.

A nonresident individual who files an individual return will only pay the 1% add-on tax on the amount over \$1 million. If the nonresident individual elects to be included in the group return, the highest marginal rate plus 1% applies to their entire amount.

The amendments under AB 1389 were proposed through FTB Legislative Proposal 08-09. Under this proposal, the electing individuals with more than \$1,000,000 in taxable income would be taxed at highest marginal rate plus the additional 1% (10.3%) on their entire income, not just the amount over \$1,000,000.

It is apparent the language included in the legislative counsel digest is inconsistent with the language included in Legislative Proposal 08-09 and the chaptered amendments to §18535 and §18536.

22. UNDERPAYMENT ESTIMATED TAX PENALTY IN YEAR OF RETIREMENT

Question:

Internal Revenue Code Section 6654(e)(3)(B) allows the waiver of the underpayment of estimated tax penalty for the year of retirement for a taxpayer age 62 or older. Does the state of California, under Rev. & Taxation Section 19136 follow this same provision?

Answer:

Yes. California conforms to IRC Section 6654 under R&TC Section 19136 regarding the underpayment of estimated tax penalty. R&TC Section 19136(a) provides that IRC Section 6654 of the Internal Revenue Code, relating to failure by an individual to pay estimated income tax, shall apply, except as otherwise provided.

IRC Section 6654(e) provides certain exceptions in which the waiver of the penalty would apply. IRC Section 6654(e) (3)(B) provides that a waiver of the underpayment of estimated tax penalty would apply for a taxpayer after attained age 62 or became disabled in the underpayment year or in the preceding year and such underpayment was due to reasonable cause and not to willful neglect.

R&TC Section 19136 doesn't make any modifications to IRC Section 6654(e)(3)(B) as such CA fully conforms to IRC Section 6654(e)(3)(B).

23. FORM 5806

The conclusion of the computations for Exception B read as follows:

<u>Line</u>	
40	Installment due. Multiply line 38 by line 39
41	Amount paid by the installment due (cumulative)
42	Exception met? If the exception has been met for any of the installment periods, circle "yes" or "no" and check applicable boxes on line 9.

Questions:

1. If the exception has been met, why should there be any direction to circle "no"?
2. To avoid possible misinterpretation and confusion and to provide greater clarity, could the above lines be revised as follows:

<u>Line</u>	
40	Multiply 38 by line 39
41	Amounts paid for prior installments
42	Required installment. Subtract line 41 from line 40. If zero or less, enter -0-.
43	Estimated tax paid or credited for this period.
44	Exception is met if line 43 equals or exceeds line 42. Check applicable box on line 9.

This suggested revision corresponds to the computations set forth on IRS Form 2220.

Answer:

It is necessary to respond to this question because it is used to complete Part II. If the exceptions are not met in Part II, then Part III penalty computation applies. Based on this suggestion for clarity, we are revising Line 42 to state: If Line 41 is equal to or greater than Line 40, the exception was met. Circle "Yes" here and check the applicable "Yes" box in Part II, Line 9. If Line 40 is greater than Line 41, then the exception was not met. Circle "No" here and check the applicable "No" box in Part II, Line 9.

The IRS Forms 2220, *Underpayment of Estimated Tax by Corporations*, and 1120W, *Estimated Tax for Corporations*, follow a similar format for computing both penalty and estimated payments. For next year, we will consider additional revisions to the Forms 5806, *Underpayment of Estimated Tax by Corporations*, and 100ES, *Corporation Estimated Tax*, to use a similar format.

24. ALLOCATION OF WITHHOLDING ON MFS RETURNS

Question:

Tax practitioners are having difficulty in having the FTB allocate state income tax withholding on community income between two married individuals filing separately. The FTB normally allocates all of the withholding to the individual earning the income and sends the non-earning individual a notice of balance due. We assume that when the withholding is reported to the FTB, it is allocated to the account of the earning individual and thus some positive action on the part of the taxpayers has to take place in order to have part of it allocated to another account. Could you explain this process and what taxpayers need to do in order to have the FTB allocate the withholding between the two MFS returns so as eliminate correspondence after the returns have been filed?

Answer:

In order to have withholding allocated between spouses filing separate returns, a copy of the Form W-2 along with an allocation statement should be attached to the return of both spouses. The statement should reflect the appropriate allocation of wages and withholding between spouses. In addition, the names and social security numbers of both spouses should be included on the statement to ensure proper handling. Attaching the allocation statement will allow our processing staff to allocate the withholding in the manner requested by the taxpayer. Contact the Tax Practitioner Hotline (916) 845-7057 if allocations of income or withholdings are misapplied.

The FTB has several other efforts underway which will help improve the processing of this workload. In an ongoing effort to clarify forms and instructions, the FTB will review Form 540/540A during our next annual change process, and will look for ways to clarify instructions on how to report the allocation on Married Filing Separate returns. Any changes that result from this effort will be incorporated into the tax year 2010 booklets.

In addition, our procedures will be revised for returns that fall out for manual verification of withholding.

25. NPA RESULTING FROM IRS ADJUSTMENTS

Question:

The IRS's matching program at times will come up with proposed adjustments to a taxpayer's account. If the taxpayer is not timely in his response to the proposed adjustment the tax is assessed and the FTB is notified of the adjustment through your inter-agency reporting program. The FTB then will send the taxpayer a Notice of Proposed Assessment (NPA) for the California tax due on the adjustment. Sometimes when the NPA is received the taxpayer has or is in the process of resolving his issue with the IRS and is unsure as to how best respond to the NPA. Can you tell us if the IRS would normally report the reversal of an under reporter adjustment to the FTB? If so what would be the normal time frame after the IRS resolution and reversal for the FTB to receive notification? If the taxpayer has received an NPA from the FTB and is anticipating successful resolution and reversal with the IRS, what options are available to the taxpayer other than paying the tax and filing an amended return?

Answer:

Part 1: Can you tell if the IRS would normally report the reversal of an under reporter adjustment to the FTB? If so what would be the normal time frame after the IRS resolution and reversal for the FTB to receive notification?

Response Part 1:

Yes, the IRS notifies FTB on a monthly basis of any reversal of under reporter adjustments. This notification would normally take approximately 3 months. This is due to the fact that it normally takes the IRS about 30 days to post the reversal to the taxpayers account and 30 to 60 days to notify FTB.

Part 2: If the taxpayer **has not** received an NPA from the FTB and is anticipating successful resolution and reversal with the IRS, what options are available to the taxpayer so that an NPA is not issued to the taxpayer prior to the resolution with the IRS of the "unagreed" RAR?

Response Part 2:

The taxpayer can fax or mail a copy of the RAR and a statement to FTB indicating the RAR is "unagreed" and the taxpayer is continuing to work with the IRS to resolve the "unagreed" issues. Supporting IRS documentation (e.g., IRS reconsideration letter confirming reopening of the tax year) should accompany the taxpayer notification. Upon receiving the faxed RAR and statement, we will make a note in our system, and in most cases this will help prevent an NPA from being issued on the "unagreed" issues.

The fax number and mail address for RARs are:

RAR Faxination#: (916) 843-2269
Mail Address: RAR/VOL M.S. F310
Franchise Tax Board
P.O. Box 1998
Rancho Cordova, CA 95741-1998

The phone number for assistance with voluntary RARs is (916) 845-4028.

Part 3: If the taxpayer **has** received an NPA from the FTB and is anticipating successful resolution and reversal with the IRS, what options are available to the taxpayer other than paying the tax and filing an amended return?

Response Part 3:

The taxpayer may also file a formal protest within 60 days of the NPA date or send a letter informing FTB that they are working with IRS to correct the assessment. Under either option, the taxpayer will not be billed until a resolution is reached with IRS.

Part 4: If the taxpayer chooses to make a payment on the unagreed RAR, will payment be properly applied if there is no balance due yet on the taxpayer's account?

Response Part 4:

When there is no balance due on our systems, payments (check, money order, etc.) should be mailed to the RAR/VOL address provided above. The payment is placed into suspense and held until a notice is mailed. Once the IRS and the taxpayer have reached an agreement, the taxpayer should mail the complete final IRS determination to us. The taxpayer's prepayment will be applied to any additional tax. Any overpayments will be refunded.

In addition to check or money order, the FTB website provides additional payment options (search term: **payment options**).

However, we do not recommend payments be made by credit card when there is no balance due on our system. Since there is nothing to match the credit card payment to, the credit card account is automatically erroneously refunded back the money.

26. 2009 CALIFORNIA ESTIMATED TAX WORKSHEET

Question:

Line 4 reads, in pertinent part, as follows: “Figure your tax on the amount on Line 3 using the 2008 **tax table**...” (Emphasis added.) Should this instruction read the same as that for the computation of tax on Form 540 which instructs taxpayers whose income exceeds \$100,000 to use the 2009 tax rate schedule?

Answer:

Computation of estimated tax using Form 540ES is by use of tax tables for taxpayers whose income does not exceed \$100,000, and use of the tax rate schedule by taxpayers whose income exceeds \$100,000. The tax tables currently end at \$100,000 and then instruct the taxpayer to use the tax rate schedules if income exceeds \$100,000. Taxpayers who use the estimated tax worksheet will arrive at the correct tax computation by following these instructions. Many taxpayers and preparers use software programs which also correctly compute tax and estimated tax payments based on these rules.

2009 CPA FOLLOW-UP QUESTIONS AND RESPONSES:

1. Why has FTB declared private annuities to be abusive transactions when the IRS recognizes them?

FOLLOW-UP RESPONSE 1:

We recognize the use of trusts, including private annuity trusts, as legitimate investment vehicles for estate and tax planning. While many trusts are valid, we have identified some trusts that lack economic substance or are otherwise potentially abusive. These cases were identified through our regular audit programs. We look at the facts and circumstances of each case to determine if a particular transaction is in compliance with the law.

The IRS recently cautioned taxpayers about the use of improper private annuity trust arrangements (IR-2009-41, 4/13/09).

2. What information do we share with IRS on audits?

FOLLOW-UP RESPONSE 2:

FTB has a long-standing information sharing agreement with the IRS. We cooperate with IRS requests and provide information they are authorized to receive, including tax return and audit information. Additionally, FTB collaborates with the IRS to curtail abusive tax shelters and shares information in this process.

3. How soon do we get CP2000 information from the IRS?

FOLLOW-UP RESPONSE 3:

We receive CP2000 information from the IRS on a periodic basis. We typically receive information as early as 6 months after the close of the IRS examination.

4. Does FTB prefer to receive IRS RAR or amended return?

FOLLOW-UP RESPONSE 4:

While taxpayers may report changes made by the IRS by either filing amended returns or by providing a copy of the RAR, FTB prefers that taxpayers file an amended return with a copy of the RAR and all supporting schedules and documentation detailing applicable income adjustments and penalties. For more information about reporting federal changes, refer to Publication 1008.

5. When mailing several tax returns in the same envelope, what can practitioners do to make sure FTB processes all the returns?

FOLLOW-UP RESPONSE 5:

FTB asks that tax practitioners not use the same envelope to submit payment returns with refund returns since our instructions indicate different mailing addresses. If a tax practitioner submits several refund returns in one envelope FTB will process each return separately as long as each return is clearly independent.

6. If several returns are being sent in separately, how can the practitioner ensure that FTB processes the return in the order of receipt?

FOLLOW-UP RESPONSE 6:

During calendar year 2008, FTB processed 19 million tax returns with the majority being processed between February and May. Unfortunately, due to the large volume of returns and staffing constraints it is not possible to ensure that FTB processes tax returns in order of receipt.

7. If taxpayer inadvertently sends IRS check to FTB, is this reasonable cause to avoid the late payment penalty?

FOLLOW-UP RESPONSE 7:

FTB regularly sends the IRS both returns and payments sent to FTB in error. These returns and payments are forwarded to the IRS with the envelope used by the taxpayer. If a taxpayer inadvertently sends an IRS check to FTB, the taxpayer will need to discuss avoidance of the IRS late penalty with the IRS. Upon request, FTB will provide the taxpayer with a copy of the check, the date the check was received and any documentation that came in with the check.

8. After a contact has been made to the Practitioner Hotline, can FTB provide the practitioner with a letter or card advising that problem has been resolved?

FOLLOW-UP RESPONSE 8:

The Tax Practitioner Hotline strives to address and “resolve” all customers calls at the first point of contact. Our agents follow the department’s “one and done” approach by providing fast, efficient and accurate responses. In addition, our agents are instructed to provide their name and station number to each caller for their records.

If the contact is made through a fax communication, once the issue is resolved the agent has the option to send a written response or to call the representative back and communicate the results. If the representative is not there but has voice mail, a message is left regarding the outcome along with the agent’s name and phone number.

The preferred method of resolution for FTB at this time is to make a phone call. This is much more efficient than sending a letter or card.

9. If no W-2 information is available to the taxpayer, practitioners may need to reply on MyFTB account information. How does FTB get the information to put on the website?

FOLLOW-UP RESPONSE 9:

The W-2 (wage and withholding information) FTB provides on its website is information received from the Employment Development Department (EDD).

10. When are estimated tax payments posted on the system?

FOLLOW-UP RESPONSE 10:

Estimated tax payments are posted once they are processed and validated. Most electronic estimate tax payments will be received, processed, validated and posted to MyFTB within one week. Estimate tax payments sent via the United States Postal Service will take longer to post to MyFTB due to the time required to process paper estimates. Occasionally, there is insufficient information on the estimate payment for it to be posted quickly. These payments require FTB staff to analyze the estimate coupon, the check and our various systems thereby delaying the posting of the payment.

11. Will all taxpayer notices be available to the practitioner with the EDR project?

FOLLOW-UP RESPONSE 11:

Providing notice copies to Power of Attorneys (POAs) or the taxpayer’s designee is included in the documented requirements for EDR. Final specifications will not be determined until the solution provider is determined and contract awarded.

12. How long does taxpayer have to maintain records? What is our record retention policy for NOL?

FOLLOW-UP RESPONSE 12:

You should maintain records in a sufficiently usable form and detail to substantiate income, deductions, adjustments, credits or carryover items reported on your return. Under Audit Regulation 19032, our requests for information should be both relevant and reasonable. We adhere to this regulation and encourage staff to work cooperatively with taxpayers and their representatives during the examination process. Additionally, we consider alternative sources of information to substantiate the issue under audit.

Based on additional dialogue at the liaison meeting regarding a similar question, a January meeting was scheduled to further discuss with COT representatives.

13. Where do we draw the line in using NOL and credits to limit the loophole?

FOLLOW-UP RESPONSE 13:

We hope most taxpayers will voluntarily comply with the tax laws. When we do identify areas of noncompliance, we use a combination of education and outreach, legislative proposals, and enforcement activities to promote compliance.

14. How do we process MFS withholding and estimated payments when one party is wage earner and the other party has a Schedule C?

FOLLOW-UP RESPONSE 14:

FTB processes MFS returns based on what is claimed on the tax return. To ensure proper handling of withholding and estimated tax payments, an allocation statement should be attached to the return of both spouses. The statement should reflect the proper allocation of income, credits, and deductions between the spouses. In addition, the names and social security numbers of both spouses should be included on both returns. This will allow processing staff to process the allocations in the manner requested by the taxpayers.

15. What is the Offer in Compromise acceptance rate?

FOLLOW-UP RESPONSE 15:

The Offer in Compromise (OIC) acceptance rate for last fiscal year was 23%. This rate was based on all OIC applications received regardless of their final resolution.

However, the OIC acceptance rate was 59.5% for last fiscal year if the accounts that were voluntary withdrawn were not factored in. These cases that were voluntary withdrawn were generally resolved through other payment resolution options.