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Question #1

Exclusion of service fees from one SMLLC to another SMLLC:

A husband and wife own two separate single member LLCs (both are disregarded for tax purposes) and report the income on their personal FTB 540 on two separate Schedule Cs. One of the LLCs pays service fees to the other LLC. Is there a way to exclude these service fees from the gross receipts fee calculation for the recipient SMLLC? It does not appear to meet the exception for the allocation of income to a member LLC from another LLC (such as from a K-1). Does the fact that they are both disregarded entities owned by the same couple result in them just paying income to themselves and therefore there is no gross receipt?

Answer #1

No. First, you are correct that the exception in California Revenue and Taxation Code section 17942(b)(1)(A) does not apply in this situation and there is no exception in section 17942 that would allow the service fees to be excluded from the gross receipts fee calculation for the recipient single member LLC (“SMLLC”) in this situation. Second, these two disregarded SMLLCs have gross receipts (for purposes of the LLC fee in California Revenue and Taxation Code section 17942) irrespective of the fact that they are disregarded entities owned by the same couple. By way of background, in the case of an LLC with only one member, unless the SMLLC checks the box to be taxed as a corporation, the default treatment is to disregard its status as an entity separate and distinct from its owner for tax purposes. Thus, for tax purposes, the activities of the SMLLC are treated as the activities of its sole owner. (For more information, see Legal Ruling 2011-01, Subject: Activities of a Disregarded Entity, January 11, 2011.) However, California Revenue and Taxation Code (RTC) section 23038(b)(2)(B)(iii) explicitly provides that the separate existence of the eligible business entity is not disregarded for purposes of the LLC tax (section 17941), **LLC fee (section 17942)**, and LLC return filing requirement (section 18633.5). Accordingly, the fact that the two SMLLCs are both disregarded entities owned by the same couple does not change the answer.

Question #2

Conformity to Federal tangible property regulations:

For taxpayers other than C corporations, California generally conforms to the IRC in all of the provisions and issues that are addressed by the tangible property regulations. In addition, for many years FTB has had a policy of adopting federal regulations and rulings as long as the statutes are identical for federal and state purposes. I anticipate that this practice will continue regarding the tangible property regulations and that any conformity activities going forward will be allowed for California as long as it is in compliance with the federal regulations. For C corporation taxpayers, there is a special problem in that California does not conform to Accelerated Cost Recovery System (ACRS) or Modified ACRS (MACRS). The methods allowed by California are the pre-ACRS and MACRS methods, such as Asset Depreciation

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Range (ADR). Presumably this would mean that the tangible property regulations as they apply to ACRS and MACRS are not applicable for California C corporations and that any refund claims would not be allowed for California.

Is there any specific guidance as to whether FTB will allow refunds on a retroactive basis if such refunds are allowed by these regulations?

Answer #2

As noted in your question, California does not conform to Internal Revenue Code (“IRC”) sections 167 and 168, regarding federal depreciation expense deductions, for the purposes of determining corporate franchise and income tax. Rather, corporations are required to use California Revenue and Taxation Code (“RTC”) section 24349 to determine their California depreciation expense deduction. Since California does not incorporate IRC sections 167 and 168 for corporation franchise and income tax purposes, California also does not adopt the federal regulations promulgated under IRC section 167 and 168. Therefore, to the extent a California corporate franchise or income taxpayer files an amended California return requesting a refund as a result of an adjustment pursuant to the federal regulations for IRC sections 167 and 168, California would not allow the refund.

Question #3

Trust filings and payments:

When will trust returns be allowed to file electronically and have payments viewable on My FTB Account files?

Answer #3

We are implementing e-file for fiduciaries filing form 541 in January 2014. Filers need to check with their software provider to see if they plan on supporting 541 e-file for CA.

As for viewing payments, this functionality is not currently available through My FTB Account. We are looking to add this functionality in the future, after the enhancements to My FTB Account through the EDR project are completed. Payment information is currently available by calling the Tax Practitioner Hotline.

Question #4

Practitioner Hotline - POAs:

I have contacted the Tax Practitioner Hotline to find out if a taxpayer was required to use web pay. The customer service representative asked for a Power of Attorney (POA). What situations require a POA, and what items will be disclosed without one, by providing certain taxpayer information?

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Answer #4

Generally, with a notice in hand, a return prepared by the CPA, or to the third party designee we can provide information regarding the tax years listed on the notice or the tax return without a POA. We can also provide estimated payment information to an authorized representative. Otherwise, a valid POA is required to acquire specific account information.

In addition, we will provide general tax law information and public information for business entities without a POA.

Question #5

Practitioner Hotline POA fax number:

When calling the FTB Practitioner Hotline you are asked to fax FTB Form 3520, Power of Attorney (POA), and then you have to call back after two hours. Apparently the data is recorded during those two hours so that when you call again you are able to talk with any representative. Could you please provide a fax number to the practitioners in advance, so that they don't have to wait on hold, for what seems like an interminable period of time, twice?

Answer #5

In order to answer phone calls and minimize customer wait times, the Practitioner Hotline does not process Power of Attorney (POA) requests. Instead, practitioners can fax the form to our POA Unit. We recommend you have your new client complete a POA, and immediately fax it to the POA Unit at (916) 843.5440 to help expedite service. The information is generally updated to our systems in 7 to 10 days. By doing so ahead of time, the information should be on your client's file, and the Practitioner Hotline representatives should be able to assist you during your first contact. In addition, we recommend that you utilize the self service options on our website using MyFTB Account. MyFTB Account provides practitioners immediate access to client information for both individuals and business entities.

Due to large volumes of incoming POA requests, we currently have a backlog that has grown where we have not been able to process POAs within our published timeframes; we have added additional staff to this workload and should be within timeframes within 30 days. To help us lower our backlog, we ask you to carefully review the POA before you send or fax it to us. Last year, we rejected almost 16,000 or 17% of the POAs we received because they were incorrect or incomplete. In order to help reduce the number of rejections, in the February 2011 edition of Tax News we had an article "Why We Send Your POA Back to you." In 2012, we expanded the instructions to the POA form. In addition, we have presented three POA webinars. Our most current POA webinar, "FTB 3520, Power of Attorney – What's New" is available on our website under News and Events.

Starting in the fall of 2014, taxpayers will be able to submit their POA online through their My FTB Account. In most cases, taxpayer submitted POAs will become active immediately after

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submission. In addition, tax representatives will also be able to submit their client's POA online. Once the taxpayer accepts the POA through their MyFTB Account, the POA becomes immediately active.

Question #6

Fiscal year fiduciary returns:

I have had difficulty with fiduciary returns with tax payments filed on a fiscal year. Is there a procedure to make this easier?

Answer #6

We understand it becomes more difficult to achieve a seamless process when a Fiduciary return also has a fiscal year accounting period. In the account example provided, it is clear the fiscal account period end dates entered on return and payment documents were missed during data capture and return processing.

Beginning in 2014 we are instituting major changes to improve the filing processes for Fiduciary returns. The most significant change is the expansion of our e-file services to include electronically filed Fiduciary returns. e-file is the most effective way to reduce taxpayer errors as well as processing errors made by FTB.

Another opportunity to improve return and payment processing will occur at the start of 2014 by including the Fiduciary returns in Enterprise Data to Revenue Project (EDR). With EDR the new data capture methods will reduce the number of errors made during data capture and will allow for more accurate processing of Fiduciary returns and payments. We appreciate your desire to improve the Fiduciary process.

Question #7

Mandatory Web Pay:

It was my understanding that taxpayers had to use Web Pay for the first payment after they met the required criteria. However, I have had clients receive penalty notices who had never before been required to pay electronically. What are the rules for penalty abatement in this situation?

Answer #7

In this situation, we suggest that you call the Tax Practitioner Hotline (916.845.7057) and we can review and correct the account.

In general, there are three types of waivers available for your clients who become subject to the mandatory e-pay requirement. They are:

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General Mandatory e-Pay Waiver: Taxpayers can request a general waiver from mandatory e-pay if one or more of the following is true:

- They have not made an estimate tax or extension payment in excess of \$20,000 during the previous income year.
- The tax liability they reported for the previous income year did not exceed \$80,000.
- The amount they paid is not representative of their total tax liability.
- They had a one-time event, such as lottery winnings or inheritance.

If we grant a waiver and the taxpayer subsequently meets the mandatory e-pay requirements, they must resume making electronic payments.

Permanent Physical or Mental Impairment Wavier

Taxpayers can request a permanent waiver from mandatory e-pay if they have a permanent physical or mental impairment that prevents them from using a computer.

Reasonable Cause: If your client is subject the mandatory e-pay requirements you can request a penalty waiver if your client has reasonable cause. To request a penalty waiver based on reasonable cause you need to:

- Send us a letter listing the **facts**
- And if needed, include your supporting documents that support your request.

Both the general and the permanent physical or mental impairment waivers can be requested using FTB Form 4107PC, *Mandatory e-pay Election to Discontinue or Waiver Request*.

Question #8

Employment opportunities for recent graduates:

What are the employment opportunities for recent accounting graduates, and how do they apply?

Answer #8

Employment Opportunities for Recent Accounting Graduates

A Bachelor's Degree in Accounting will allow applicants to qualify for various entry level accounting positions such as Accounting Technician, Accountant Trainee, and Tax Auditor. This level of education is also a requirement for promotional classifications in those series; i.e. Accounting Specialist, Accounting Administrator, Associate Tax Auditor, and Program Specialist.

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Within FTB, the vast majority of hires (of individuals with Accounting Degrees) occur in the Tax Auditor classification. We generally hire by classes, once or twice a year. There is a limited Tax Auditor hiring planned for January (less than 10 positions and primarily in our field offices), but a larger hiring is planned for June of 2014.

A degree in Accounting will also allow applicants to qualify for other positions that are not traditionally considered by accounting majors; i.e. Compliance Representative, Tax Technician, Research Analyst, Staff Services Analyst, and Customer Service Specialist.

The positions mentioned above are just those used here at the Franchise Tax Board. There is a complete listing of jobs an individual may qualify for with a Bachelor's Degree, located on the CalHR website at: <http://www.calhr.ca.gov/employees/Pages/bachelor-degree.aspx>

How to Apply for Employment Opportunities

Applying for a job with the State of California is a two-step process. First, you need to take an Exam to establish list "eligibility" for the classification. Then, once you have established list eligibility, you can apply for job vacancies.

List Eligibility- Eligibility is a term used to describe a passing score received on an examination. List eligibility typically lasts for one year; however, for some examinations, list eligibility can be up to four years. When list eligibility expires, an applicant must reapply to re-establish eligibility. Examinations can be either "open" (to both State employees and individuals who are not employed by the State) or "promotional" (only for State employees and veterans). There are also several different types of examinations:

Written Test: Typically consists of multiple-choice questions.

Oral Interview, also known as a "Qualifications Appraisal Panel (QAP)": Facing a panel of two to three people, a candidate responds to questions regarding education and experience, possibly situational/hypothetical scenarios.

Internet/Automated Examination: On-line examination where a candidate responds to education and experience questions, or schedules to appear at a test site to take a computer-based test.

Performance Test: Primarily used for clerical and trades classifications, a candidate demonstrates knowledge of tools and materials or the ability to operate machines or equipment.

Supplemental Application/Achievement Rating Test: The examination consists of essay questions sent to a candidate completed and returned before the oral portion of the examination to provide supplemental information to assist the interview panel.

Education and Experience Evaluation: The examination consists of an evaluation of a candidate's application; no interview is conducted.

Agility/Physical Ability: For law enforcement and other jobs, physical ability tests are commonly given and are frequently combined with vision and hearing tests. These are usually given just prior to hiring.

Apply for Job Vacancies

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Once list eligibility has been established, the applicant can search and apply for a job vacancy. A job vacancy is an unfilled job opening for which departments/agencies are actively trying to recruit new employees. A list of current job vacancies, for all departments, can be found at: <http://jobs.spb.ca.gov/wvpos/>. The database of job vacancies can be searched based on job title, department, location, salary, or date the job vacancy listing was posted.

Once you've retrieved a listing of job vacancies in the classification you are interested in (and have list eligibility for), you can open the job bulletin for additional details about the job itself, the required and desirable qualifications for the job, and specific information on how to apply for that job. The job bulletin will also give specifics about where the job is located, the time base (full-time, part-time, etc), who to contact with questions about the job, and also salary information.

The application and interview process can vary depending on the department, and can even vary according to the particular job, so be sure to read the job bulletin carefully.

Additional information can be found at: <http://www.jobs.ca.gov/>

Question #9

CA registered LLCs not filing returns in CA:

I have seen two LLCs in the last year that were registered in CA; one was filing a CA Form 565 as a general partnership and not paying the \$800 fee, and the other was not filing at all. Where are you in the process of identifying LLCs that are registered in CA but not filing?

Answer #9

In addition to pursuing business entities with California sourced income, the Franchise Tax Board (FTB) also administers the Delinquency Control (DLC) Program. Beginning January 1, 2013 the FTB expanded its DLC Program to include limited liability companies (LLCs). This change benefits both the taxpayers and FTB by ensuring consistency in how the FTB pursues business entities that have a California filing requirement through the Nonfiler Program. The DLC Program identifies corporations, exempt organizations, limited partnerships and limited liability companies with an Active FTB Status that have failed to file required tax returns and pay. This process will assist registered LLCs with filing and paying with the correct tax form.

For the scenarios in this question, the DLC Program will identify LLCs that have not filed a tax return (e.g., CA Form 568). The nonfiler is sent a Request for Past Due Return notice 60 days after the extended due date of the tax return. If the business entity doesn't file the requested tax return, an "Official Demand for Past Due Return" notice is sent and the business entity's account enters the collection cycle. Although the DLC Program doesn't establish a liability on the account, the FTB may suspend (domestic) or forfeit (foreign) the business entity organization's powers, rights, and privileges. The entity will be required to file all past due tax returns and pay all outstanding balances due in order to be put back into good standing with the FTB.

Question #10

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Tax credits on group nonresident returns:

Publication 1067 states that credits that are directly attributable to the business entity's activities such as the new jobs credit, low-income housing credit, and the manufacturer's investment credit, can be claimed on the group nonresident return. Individual credits, such as the personal, blind, senior, or dependent exemption credits, and the other state tax credit, are not allowed on the group nonresident return. Would FTB provide taxpayers and practitioners a more comprehensive list of what tax credits can and cannot be claimed on a group nonresident return?

Answer #10

FTB Publication 1067 is intended to provide guidance on how to complete and file a group nonresident return. Since credits allowed on the group nonresident return are only those directly attributable to the business entity's activities, information on available credits is included in the appropriate business tax booklet rather than the Publication 1067. Please see the lists of available credits in the tax booklets for the Form 100, 100S, 565, and 568. If anyone has questions regarding credits or any other group return topic, please contact us at 916.845.3465 (the phone number listed in Publication 1067).

Question #11

Group nonresident amended return:

Can a group nonresident tax return be amended? If so, what is the statute of limitations?

Answer #11

Yes a group nonresident tax return can be amended.

As explained in FTB Publication 1067, each nonresident individual must decide whether to be included in the group nonresident return prior to its filing. Once the group nonresident return is filed, the election to be included in the group nonresident return is irrevocable for the taxable year. Once filed, the group return cannot be amended to either include or exclude a nonresident individual. Similarly, once an electing nonresident individual is included in the group return, the individual may not subsequently file a separate individual return for the taxable year. See Revenue and Taxation Code section 18535.

Exception:

The individual may discover after the group return was filed that he or she did not qualify to be included in the group nonresident return. For example, the individual had income from other California sources that were not reported on any other group nonresident return. The individual must file a return on a separate basis reporting all his or her California source income. Having other sources of California losses will not disqualify the individual from being included in a group nonresident return.

Amended tax return:

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Amend your tax return using the Form 540X. Refund claims must be filed within the statute of limitation period (generally four years after the due date of the original tax return, one year after overpayment, or two years after a final federal determination; whichever is later). If you are filing your amended tax return after the normal statute of limitation period, attach a statement explaining why the normal statute of limitations does not apply.

Question #12

Refund issue during audit:

During an FTB audit, if a refund issue is identified for the same period that is being audited, does submitting a refund claim to the auditor satisfy “mailing and/or receipt” of the amended return by FTB? If so, what should the taxpayer receive or request from the FTB auditor as proof of receipt?

Answer #12

Yes, the amended return will be considered filed on the date postmarked or submitted to the auditor. If a taxpayer wants to verify that an amended return was received by FTB, the taxpayer can request confirmation from the auditor. In 2014, taxpayers and their authorized tax representatives will be able to view their processed original and amended returns online through MyFTB Account.

Question #13

Return adjustment during audit:

During an FTB audit, if an adjustment is proposed that results in additional tax for the years under exam and a favorable offset adjustment in another tax year after the exam, assuming the subsequent returns have been filed timely and the issue is the same, what steps does FTB take to consider the adjustments in all the years? What would the taxpayer receive as a notice?

Answer #13

Auditors use the Audit Issue Presentation Sheet (AIPS) to communicate proposed adjustments at the conclusion of an audit. The AIPS reflects adjustments for tax years in the current audit cycle, as well as any changes to carryover items in subsequent years. If the offsetting adjustment is a straightforward timing issue, and the tax effect can be readily determined with the available information, auditors will generally issue a Notice of Proposed Overpayment or Overassessment for the subsequent year(s), recognizing the later year is still subject to audit under the normal statute of limitations. If the issue requires a more complex or comprehensive analysis and requires additional information to determine the tax effect, we would notify the taxpayers or their representatives so they could adjust their schedules accordingly or file an amended return.

Question #14

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FTB procedure for interest abatement when IRS interest abatement due to managerial act:

If a taxpayer negotiates interest under settlement with the IRS due to undue delay on the part of the IRS, does FTB follow the terms of the IRS settlement agreement with respect to the interest abatement?

Answer #14

Generally, under R&TC section 19104(a)(3), FTB will follow a federal determination to abate interest based on IRS errors or delays in the performance of ministerial or managerial acts. There are four requirements that the taxpayer must meet:

- (a) The interest accrued and was abated by the IRS under Internal Revenue Code section 6404(e), which is the authority allowing the IRS to abate for its error or delay.
- (b) The error or delay must have occurred on or before the IRS issued a final determination of tax.
- (c) The deficiency upon which the federal interest abatement was allowed must be related to the state deficiency.
- (d) The interest can only be abated for the same time period that the IRS abated interest.

As long as the terms of the settlement agreement clearly indicate that interest was abated under IRC section 6404(e) and the period of abatement, FTB will follow if the other requirements indicated above are met.

However, under many circumstances, the terms of the federal settlement agreement do not clearly indicate the basis for the abatement of interest or the time period that interest was abated. Further, many settlement agreements have limitations on the disclosure of its terms. In cases that do not have a clear indication of the basis for the abatement of interest in the agreement or the court order, it would be necessary for FTB to review additional evidence. Additional evidence could include audit work papers, correspondence with the IRS agent or any evidence which reveals an admission of an error or delay by the IRS and the abatement period.

Question #15

Guidance on certifying 2013 qualified employees for 2013 Enterprise Zone:

Under AB 93 and SB 90, the EZ Act expires 1/1/2014. If the EZ coordinators are no longer authorized to certify qualified employees 1/1/2014 and after, how should taxpayers go about certifying qualified employees hired in 2013? Will FTB accept credits claimed on qualifying employees with substantiation for the qualification without having an actual certificate after 1/1/2014 (hired in 2013)? Does FTB or Housing and Community Development Department (HCD) have a transition plan for the employees hired in 2013 and still needing to get certified after end of the year?

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Answer #15

AB 106 was enacted on September 26th as a cleanup bill to AB 93. AB 106 allows local entities to continue to accept voucher applications for EZ, LAMBRA, TTA, and MEA hiring credits, for employees that first commence employment before January 1, 2014. The local entities may continue to issue vouchers up to and no later than January 1, 2015.

Question #16

Guidance and forms for the tentative credit reservations availability:

Under AB 93 and SB 90, there is a new hiring credit (Rev. & Tax Cd. §§ 17053.73, 23626) which requires taxpayers to apply for a tentative credit reservation within 30 days of their new hire reporting requirements for Employment Development Department (EDD). When will FTB issue guidance and forms for the tentative credit reservations?

Answer #16

The New Employment Credit (NEC) is available for qualified taxpayers who hire qualified employees, beginning January 1, 2014. The new law requires taxpayers to apply for and receive a tentative credit reservation. FTB is developing an online system to accept these reservations. We anticipate the online system will be ready January 1, 2014, the start of the NEC.

Information regarding the credit is available on our website at:

https://www.ftb.ca.gov/businesses/Economic_Development_Incentives/New_Employment_Credit.shtml

Instructions on how to get a tentative credit reservation will be posted when the online system is available.

Question #17

Qualified Small Business Stock legislation:

As of July 29, 2013, SB 209 was referred to committee with no further action. Some taxpayers paid the tax and filed protective refund claims in the event there was a legislative fix. Other taxpayers signed waivers of the statute of limitations so the FTB could defer issuing notices of proposed assessments (NPA). If there is no legislative relief for individuals who previously claimed benefit from Qualified Small Business Stock exclusion or deferral after *Cutler v. Franchise Tax Board* (208 Cal.App.4th 1247, 2012), what is the plan or timing for FTB to process claims for refunds or unissued NPAs which were deferred pending a possible legislative fix?

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Answer #17

AB 1412 (Stats. 2013, ch. 546), signed by the Governor on October 4, 2013, retroactively allows the Qualified Small Business Stock (QSBS) deferral and 50 percent gain exclusion for tax years 2008 to 2012.

Although AB 1412 is effective January 1, 2014, the FTB is providing the following information for taxpayers impacted by amendments made by AB 1412 to Revenue & Taxation Code Sections 18038.5, 18152.5, and 18153, *Frank Cutler v. Franchise Tax Board*, (2012) 208 Cal.App.4th 1247, or Franchise Tax Board Notice 2012-03:

Taxpayers who filed their 2008 – 2012 tax returns and were contacted by the FTB regarding their QSBS election:

FTB will notify taxpayers of the following:

- Pending Notices of Proposed Assessments based on the Cutler decision or FTB Notice 2012-3 will be withdrawn,
- Closing letters will be mailed to taxpayers who signed a limited QSBS waiver for 2008,
- Unpaid tax, interest, or penalty assessed as a result of the Cutler decision/FTB Notice 2012-3 will be abated,
- Refunds for payments received related to the Cutler decision/FTB Notice 2012-3 will be issued. No action is needed by taxpayers to request refunds, unless they do not hear from the FTB by November 30, 2013. In these circumstances, taxpayers may contact the FTB at 916.845.3030.

Taxpayers who filed their 2008 – 2012 tax returns and did not claim the QSBS election may now do so:

AB 1412 modifies the current QSBS statutes (Revenue and Taxation Code Section 18035.5, 18152.5) and eliminates the previous requirement that 80 percent of business activity occur in California during the holding period. However, the QSBS must meet the 80% California payroll requirement at the time of acquisition to claim the 50 percent gain exclusion or deferral in order to file an amended return (claim for refund) if the statute of limitations is open. Generally, the statute of limitations is four years from the date the return was filed (if filed within the extension period), or one year from the date of the overpayment, whichever is later. In addition, newly enacted Revenue and Taxation Code section 18135 allows taxpayers until June 30, 2014, to file a QSBS claim for refund for tax year **2008**. See information entitled “Taxpayers who have not filed their 2012 return” above for instructions about how to claim the exclusion or deferral. Amended returns should state in red “QSBS CLAIM FOR REFUND” at the top of the return, include the computed refund amount, and be mailed to the following address:

US Mail:

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Cutler Claim for Refund 347 MS: F381
Franchise Tax Board
C/O FTB Notice 2012-03
P.O. Box 1779
Rancho Cordova, CA 95741-1779

For Courier Service Delivery or Private Courier Mail:

Franchise Tax Board
Sacramento, CA 95827

Question #18

Residency audit tests:

In a recent protest regarding residency, the hearing officer mentioned that FTB is not bound by the factors discussed in *Appeal of Stephen D. Bragg* (2003-SBE-002). If there are other factors which FTB has found helpful in its residency audits beyond the *Bragg's* tests, what are they?

Answer #18

The factors mentioned in *Bragg* comprise a wide array of factors the Board has looked to in past cases in order to resolve residency issues. While FTB is not bound by the “Bragg Factors,” these factors are important in that they often provide insight into a taxpayer's connections. However, in certain instances, these factors may not offer such insight, and therefore are not meaningful in determining domicile or residency in that particular case.

The FTB does not have a specific list of other factors used. The facts and circumstances of each case are evaluated to determine the connections a taxpayer has with California or another state. The factors used to determine domicile and residency will vary as some might be more relevant for one audit and not relevant to another audit.

Question #19

Administrative remedies for penalties

In a recent appeal matter, FTB relieved a taxpayer of demand penalty, amnesty penalty, and portions of interest due to notices not being sent to the taxpayer's last known. The taxpayer was unaware of their liability until they were notified of the withhold order resulting from FIRM. The taxpayer filed their returns for the applicable years and the amounts withdrawn from the bank covered the outstanding amounts due. The taxpayer filed a claim for refund. They were not provided with an oral hearing as requested. The matter was handled similar to a mathematical error. The taxpayer was required to resolve the issue in appeals. This was not a contentious matter. The FTB attorney corrected the matter and the appeal was withdrawn.

Who handles these types of penalty matters and claims for refunds related to penalties? Why was the taxpayer denied their right to an oral hearing? Is there something that can be done to ensure these matters are resolved earlier and at lower levels?

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Answer #19

Who handles these types of penalty matters and claims for refunds related to penalties?

Depending on the contents of the claim for refund, FTB's Taxpayer Services Correspondence Section or our Collection Advisory Team will typically review claims for refund of penalties, interest and fees.

Why was the taxpayer denied their right to an oral hearing?

In reviewing this matter, the taxpayer was entitled to a hearing if he had protested the NPA issued on February 21, 1994, within the 60-day protest period and he requested a hearing at protest. After the 60-day protest period lapsed, the liability on the NPA became final and collectible.

If a taxpayer pays a balance due, the taxpayer may claim a refund under Revenue and Taxation Code section 19322 et. seq. The taxpayer has 90 days to appeal any portion of a claim that FTB denied, and may have a hearing during the appeal process.

Although the law does not specifically provide for an oral hearing prior to the FTB taking action on a claim, California Regulation 19322(d) provides that the FTB may arrange for a hearing if requested by the taxpayer. We are looking into our procedures to see where we can improve in providing an oral hearing upon request.

In addition, it is FTB's practice to consider a taxpayer's request for further review after FTB has denied a taxpayer's claim. The taxpayer or the representative may typically contact FTB by phone and request that they be given the opportunity to provide additional information and/or documentation to prove their claim. FTB will consider the additional information provided and possibly make adjustments to its original determination and issue a revised letter. If the information does not warrant a change in FTB's original determination, we advise them to follow the appeal procedures provided to them.

Is there something that can be done to ensure these matters are resolved earlier and at lower levels?

We have looked into this case and are addressing how these issues are handled. FTB continually works to improve its employees' understanding and analysis of issues for consistency in its determinations, and more recently the analysis of cases involving the proper mailing to a taxpayer's last known address.

Question #20

CalCPA/FTB Liaison Meeting – October 22, 2013

Procedures for electing out of Research & Development (R&D) alternative incremental credit:

IRS has an election for simplified credit under IRC §41(c)(5). The IRS allows taxpayers to revoke the election by simply changing the election on the R&D form attached to the return (Treas. Reg. § 1.41-9(b)(3)). It is our understanding that FTB requires a CA only IRS Form 3115 change in method of accounting to be filed.

What are the procedures for electing out of the alternative incremental credit?

If a taxpayer does file a CA only Form 3115, is the method change deemed to be approved after a certain time? If so, what is it? Shouldn't taxpayers be made aware of this process since it would be a departure from federal?

If a taxpayer did not file the IRS Form 3115, what is FTB's position on the changed method of determining the credit?

Given that the IRS approach for automatic consent provides taxpayers with the greatest amount of certainty, is there a policy reason for the departure from the federal approach?

Has FTB published anything on this or considered mentioning it in the form instructions?

Answer #20

The California Revenue and Taxation Code specifically require that an alternative incremental credit election may not be revoked except with the consent of FTB.

To revoke the election to use the alternative incremental credit, California law requires permission be obtained from the FTB prior to filing the tax return using the regular credit method. The requirement for taxpayers to obtain permission from FTB is provided in California Revenue & Taxation Code sections 17052.12(g)(2) and 23609(h)(2). FTB published a September 2006 Tax News article on this subject and our instructions for the Research Credit Form, FTB 3523, refer to this requirement.

FTB notice 2000-8 provides instructions for requesting a Change in Accounting Method such as this by filing IRS Form 3115 with FTB. After review, FTB will send the taxpayer a written response to the request. These are usually processed quickly but may take up to 60 days. There is no deemed approval; the taxpayer must receive a response from FTB specifically approving the revocation in order for their election to use the alternative incremental credit to be revoked.

If the taxpayer did not file an IRS Form 3115 with FTB and receive permission to revoke their alternative incremental credit method election, they are not allowed to change to the regular method for computing the California research credit.

Question #21

Unnecessary notices:

The following scenario is not an isolated incident, it happens quite often. Following FTB instructions, we round to the nearest dollar on tax documents. As an example, in one case we

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reported an underpayment penalty of \$9. In processing the return, FTB recalculated the penalty to be \$8.58 and made a ‘miscellaneous adjustment’ of 42 cents.

FTB does not send the refund of 42 cents, but they send a Return Information Notice (FTB 5818A) to the taxpayer telling them of the adjustment. These types of notices are confusing to the taxpayer and always create unnecessary contact. This also seems to be a huge waste of the state’s resources. Is it necessary to send these types of notices?

Answer #21

We agree that this type of Return Information Notice is confusing and should not have been generated simply due to a rounding adjustment. We are currently assessing the feasibility of making system enhancements to prevent these types of notices from being issued in the future. While our hope is that such changes can be implemented during 2014 for tax year 2013, the specific timeframe for implementation is still unknown until further analysis is complete.

Question #22

Exempt organization filing requirement:

Exempt organizations under R&TC Section 23701d (exclusively religious or charity organization) with more than 50% support by public contributions, check box for no filing fee required.

It is unclear what ‘primarily supported’ exactly means. In 2012 it appears to be calculated on Form 199 by dividing Part 1, Line 3 (Gross contributions, gifts, grants, and similar amounts received) by Line 8 (Total gross income). This results in clients being required to pay a fee on a year by year basis. Phone calls to FTB have resulted in inconsistent answers. Can you provide specific guidance?

Answer #22

The filing fee exception under R&TC §23772(a)(4)(C) would apply to charitable organizations exempt under 23701d that are government supported or are classified as Public Charities. Since the language for Public Charity classification states that organizations must ‘normally’ be publicly supported, it is not necessary for the entity to re-determine their filing fee exception on a year-to-year basis. We will revise question L and instructions on the 2014 Form 199.

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Will representatives be able to set up payments for their BE clients?

The following response assumes the question is asking if representatives (while logged in as a representative in MyFTB Account) will be able to use Web Pay to submit a payment request on behalf of their clients.

There is no plan to give representatives access to PIT or BE Web Pay while logged in as a representative. To authorize a Web Pay transaction, the person needs to be a signatory on the bank account (i.e., they should have the right to sign a check for that account). It would be an extremely rare occurrence that a representative would have rights over a client's bank account (a signed POA form would not give that authority).

Today, FTB has a version of Web Pay for Individuals that can be used by taxpayers without creating a MyFTB Account. Taxpayers can use this application by entering the social security number and last name. If representatives are using this application to submit payment requests on behalf of their clients, technically they shouldn't unless they are signers on the bank account.

What software format will FTB accept in the future for correspondence? Also, will it save it in that format or will it convert it to PDF or other software?

The final list of document/file types that we will allow to be uploaded as correspondence has not been finalized. However, we will accept the most common types such as Excel, Word, and PDF documents. The file types will be saved in the format they are uploaded.

Question #3: Will we accept fiscal years beginning before 1/1/13 for 541's?

No. We will accept 541 returns for taxable years beginning on or after January 1, 2013. This includes calendar year, fiscal year, and short period returns.

Additionally, like we do for PIT and BE e-file, we will eventually support the current year plus two previous years in 541 (Fiduciary) e-file.

Question #4 Will POA's be notified of expiration of super box POA and 4 year expiration?

FTB will not be notifying tax representatives that their POA(s) has expired. However, they will be able to manage their POA clients through the Power of Attorney Client List page in their MyFTB Account.

The Client List page is comprised of three tables: Active, Pending and Revoked/Rejected/Expired. The "Active" table clearly displays the POA expiration date (if applicable) for each client in the table. The tax representative will be able to sort the table by

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expiration date. Once a POA has expired it will move from the “Active” table to the “Revoked/Rejected/Expired” table.

Will POA’s be allowed to set up MyFTB Account for their client?

A tax representative cannot set up their client’s MyFTB Account (EDR). A tax representative setting up a client’s MyFTB Account would be attesting that they are the taxpayer, which they are not. However, we do encourage you to help your clients set up their own MyFTB Account.

Question #9 Since out-of-state LLC’s with CA resident members do not file returns or a K1 in CA, how are we identifying that the LLC has a filing requirement when there is a CA resident managing member?

Although the LLC is not filing a California return with FTB, there are a number of resources available to us to suggest that an out-of-state LLC has a California filing income tax return filing requirement, including a federal return filed using a California address, employment tax information filed with the Employment Development Department, sales tax information filed with the State Board of Equalization, and other federal, state and local government records suggesting a presence in California.

Question #18 Fiduciary Returns – Four beneficiaries were all California residents, but now trustee (and beneficiary?) has moved to Virginia. The only assets in the account now are a Chase checking account and a few mineral rights (other states). Do we need to still file a California fiduciary return or begin filing a VA return?

Law:

California Revenue and Taxation Code (R&TC) §17742(a) provides that the California income tax may be assessed on the entire taxable income or a trust if the fiduciary or non contingent beneficiary is a resident of California, regardless of the settler.

R&TC §17744(a) states when the taxability of the trust depends on the resident status of the beneficiary, and there are two or more beneficiaries of the trust, the income taxable under §17742 shall be apportioned according to the number and interest of beneficiaries resident in this state.

California Code of Regulations §17744 provides that when one or more non contingent beneficiaries are residents and at least one beneficiary and the fiduciary are nonresidents, the trust is taxable upon (a) all income from real and tangible property located in this state, from business carried on within this state, and from intangible personal property having a business situs in this state, and (b) that proportion of all other income which eventually is to be distributed the noncontingent beneficiaries who are residents of this state.

Analysis:

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It would appear from the information provided that a fiduciary return would be required for California, *if* the trust income meets the minimum income thresholds. I'm assuming that there were four total beneficiaries, one also being the trustee. I'm also assuming the beneficiaries are all noncontingent.

In this instance the trust would fall under §17742(a) because at least one beneficiary is a California resident (three in this case). Therefore the trust would be subject to California income tax on any net income it has.

However, because not all the beneficiaries are California residents (one beneficiary/trustee is now a VA resident), the income taxable by California to the trust will be apportioned under the rules of §17744. Therefore, all California source income as well as all other income distributable to the three California resident beneficiaries would be included in the California taxable income of the trust.