



STATE OF CALIFORNIA
TAXPAYERS' RIGHTS ADVOCATE'S OFFICE MS F280
FRANCHISE TAX BOARD
PO BOX 1468
SACRAMENTO CA 95812-1468

01.30.2018

CHRISTINE GRAB

Dear Ms. Grab:

Thank you for your proposals presented at the Taxpayers' Bill of Rights hearing last December. As the Taxpayers' Rights Advocate, your concerns are important to me. I am always interested to hear your concerns and to partner with you to help resolve them. Please note the Department's response below to your proposals:

Funds Applied/carried over to Subsequent Tax Year

The Franchise Tax Board receives more than 60 different types of income and income indicator information. This includes wages, interest and dividend income, pension distributions, non-employee compensation and federal tax return information. With the exception of federal tax return information, every other type of income record FTB receives reports income and credits for a single individual. For this reason, the vast majority of nonfiler cases are for individual taxpayers. However, if FTB receives information from the IRS about a jointly filed federal tax return, FTB will build a joint nonfiler case.

When FTB's filing enforcement system (INC) builds a nonfiler case, it calculates tax due based on the amounts of income reported to each nonfiler. It also applies any withholding credits plus any estimate payments that are associated to that specific taxpayer. However, when INC encounters a joint estimate payment, it can only apply that joint estimate payment to a joint nonfiler case. This means when a taxpayer fails to file a return for a tax year and we have federal tax return information showing a joint return for that year, FTB cannot apply joint estimated tax payments to individual final liabilities absent the taxpayers filing a return(s) and instructing FTB how to apply the joint estimated tax payments.

This treatment is consistent with federal law in an analogous situation. Under federal law when taxpayers make joint estimated tax payments but they subsequently file separate returns, the taxpayers can apportion the joint estimated tax payments between them in any manner they agree on. (Treas. Reg. § 1.6654-2(e)(5)(ii)(A).) If the spouses can't agree upon an allocation, there are rules in the Treasury Regulations on how to apply the joint estimated tax payments to the spouses' separate liabilities. (Treas. Reg. § 1.6654-2(e)(5)(ii)(B).) However, the Internal Revenue Service cannot make this allocation without the taxpayers filing returns. (See Chief Counsel Advice 201727007 (July 7, 2017), "As the credit elect came from a joint return . . . the [\$Redacted Text] amount is considered on its face to be a payment for a joint account. . . . As the [taxpayer] has not filed for [Redacted Text (tax year)], the Service cannot yet determine the taxpayers' proportionate shares.") Similarly, when FTB issues separate assessments to married taxpayers that go final and are due and payable, FTB cannot allocate the joint estimated tax payments to the taxpayers' separate liabilities absent a return(s).

FTB does not want to collect more than the proper amount of tax owed and it is the taxpayer's right that we only collect the proper amount. However, the taxpayer is required to file a tax return which informs us of the correct amount they believe they owe. In cases where a joint return is filed with a credit due, the credit only becomes available when the return has finished processing. Then, that joint credit can only be applied towards another joint tax liability. FTB cannot apply joint estimated tax payments to individual final liabilities absent the taxpayers filing a return(s) and instructing FTB how to apply the joint estimated tax payments. When an account is in collections, our staff are trained to review estimated payments and allocate them accordingly, provided a tax return has been filed for the year in question.

FTB will continue to work to improve communication to taxpayers on filing requirements and potential unclaimed credits.

Inform Taxpayers about the Taxpayers' Bill of Rights Hearing

As a Department, we understand the importance of keeping taxpayers informed about their rights and we both encourage and welcome comments and suggestions as part of this annual process, which includes the hearing and our subsequently providing responses to suggestions and concerns that are raised at that meeting. Comments and suggestions may be presented at the hearing in person or submitted by mail or electronically prior to the hearing.

The Taxpayers' Bill of Rights hearing is held pursuant to Revenue and Taxation Code section 21006(b)(2). This section requires an annual hearing before the three-member Franchise Tax Board where industry representatives and individual taxpayers are allowed to present their proposals on changes to the personal income tax laws or the corporation tax laws.

Government Code sections 11120 - 11132, known as the Bagley-Keene Open Meeting Act, covers all state boards and commissions and generally requires these bodies to publicly notice their meetings, prepare agendas, accept public testimony and conduct their meetings in public, unless specifically authorized by the Act to meet in closed session. FTB typically holds its Taxpayers' Bill of Rights hearing in December and provides the Bagley-Keene required 10-day public notice of the meeting and the agenda on its webpage.

In addition to meeting the legal noticing requirements, all year long the Advocate's education and outreach staff meet with groups of tax professionals, including the California Societies of Enrolled Agents, Certified Public Accountants, and State Bar attorneys presenting a variety of information including details about the Bill of Rights hearing and its importance. Meeting with a representative cross-section of industry and tax professionals allows us to hear the concerns of taxpayers, the majority of which now engage tax professionals. Additionally, we contact our Trade Media partners and others prior to the annual meeting to also gauge their concerns and those of the individuals and businesses they represent.

Finally, to better inform the public at large about the annual Taxpayers' Bill of Rights Hearing, beginning with the 2018 meeting, we will place a notice or link to the meeting notice on our home page during the 10-day period leading up to the meeting.

Make Filing Policies more closely aligned with IRS

The Franchise Tax Board (FTB) cannot determine if a refund is due on a particular tax year in the absence of a filed tax return for that year. FTB does apply payments and credits on a tax year to the tax, penalties, and interest on that year once a tax return is filed. If a credit balance remains on the tax year after the return is filed, and there are no other outstanding liabilities for other tax years or

with other external agencies, FTB can then determine if a refund is actually due to the taxpayer and what the amount of that refund is.

Additionally, FTB notifies taxpayers on a yearly basis when an estimated tax payment is received and a tax return for the corresponding tax year is not located on file. Prior to the 2015 tax year, Form FTB 4410 MEO was used to notify taxpayers. After 2015, Form 4410 ENS is used to notify taxpayers when a payment is received but a return has not been received by FTB. Examples of both letters are attached.

FTB Notices must be sent with Correct Department Phone Number

FTB provides a phone number on all FTB notices which corresponds with the call center that can best resolve the issue or provide the needed information associated with that notice. FTB strives to provide the appropriate service at your first point of contact, and to ensure that service is swift and efficient. When specialized account review is needed, it is sometimes necessary to transfer customers.

We utilize an interactive voice and data technology to provide maximum access to our services. We recognize that there are times where call demands are greater than our service capacity. We continually seek opportunities to improve the customer experience by updating business processes and implementation of information technology solutions (that will route the call based on where the account is in the collection process). In addition to the traditional hold functionality, we also offer real-time customer support via Live Chat as well as Virtual Hold service, which allows you to reserve your place in line and receive a call back when an FTB representative is available.

Penalty Relief for Caregivers

FTB imposes demand penalties under Revenue and Taxation Code section 19133 when a taxpayer fails to respond to a formal legal demand to file a return. Section 19133 provides if any taxpayer fails or refuses to make and file a return upon notice and demand by the FTB, then, unless the failure is due to reasonable cause and not willful neglect, the FTB may impose a penalty of 25% of the amount of tax. Under the law, the penalty is calculated without taking into consideration any timely payments or credits.

The burden of proof is on the taxpayer to show reasonable cause exists to support an abatement of the penalty. To establish reasonable cause, a taxpayer must show the failure to reply to the formal legal demand occurred despite the exercise of ordinary business care and prudence. (*Appeal of Stephen C. Bieneman*, 82-SBE-148, July 26, 1982.) A taxpayer's reasons for failing to respond to the formal legal demand must be such that an ordinarily-intelligent and prudent businessperson would have acted similarly under the circumstances. (*Appeal of Eugene C. Findley*, 86-SBE-091, May 6, 1986.)


Illness or other personal difficulties which prevent a taxpayer from filing a timely return or from responding to a formal legal demand to file a return may be considered reasonable cause in some cases. However, if the illness or personal difficulties simply cause the taxpayer to sacrifice the timeliness of one aspect of the taxpayer's affairs to pursue other aspects, the taxpayer must bear the consequences of that choice. (*Appeal of W.L. Bryant*, 83-SBE-180, Aug. 17, 1983; *Appeal of William T. and Joy P. Orr*, 68-SBE-010, Feb. 5, 1968.)

The law is not applied differently when one spouse has a qualifying illness or other personal difficulties but the other spouse is able to handle his or her affairs. The courts routinely reject claims of reasonable cause when a taxpayer has selective inability to file tax returns while attending to other responsibilities. (See *Carlson v. U.S.* (7th Cir. 1997) 126 F.3d 915 ["But the best indication that

the son's illness did not create an undue mental or emotional hardship is how the Carlson's were able to exercise ordinary care and prudence in regard to many other matters despite their son's illness – Mr. Carlson continued to run a profitable law firm"]; see also *Schroer v. U.S.* (D. Colo. 2009) 594 F.Supp.2d 1257; *Appeal of W.L. Bryant*, 83-SBE-180, August 17, 1983; *Appeal of William T. and Joy P. Orr*, 68-SBE-010, February 5, 1968.)

Unfortunately, there is no provision in federal or state law to allow extensions or forgive penalties for caregivers who care for an ill spouse, child or parent, other than establishing reasonable cause.

Sincerely,



Susan Maples
Taxpayers' Rights Advocate

cc: Hon. Betty T. Yee
Hon. Diane L. Harkey
Hon. Michael Cohen
Yvette Stowers
Lisa Renati
Sue Blake
Gabrielle Magana
Jacqueline Wong-Hernandez
Irena Asmundson
Val Davidson