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COPY

Date: 01.06.15

Case: 19980552238157620
Case Unit: 19980552238157653
In reply refer to 410:BW

TO: CHIEF, BOARD PROCEEDINGS DIVISION
STATE BOARD OF EQUALIZATION
450 N STREET, MIC: 81
SACRAMENTO, CA 95814

TAXPAYER EXHIBIT
B2
July 28, 2015
Clovus M. Sykes
817237

FROM: BRIAN WERKING

RE: Appeal of Clovus M. Sykes
Appeal Case ID No. 817237
Reply Brief

STATE BOARD OF EQUALIZATION



Appeal Name: Clovus M. Sykes
Case ID: 817237 ITEM #: B2
Date: 7/28/15 Exhibit No: 7.3

TP FTB DEPT PUBLIC COMMENT

MEMORANDUM

1 On November 14, 2014, your Board granted respondent's request to respond to
2 appellant's reply brief dated October 24, 2014. Respondent filed its opening brief on
3 September 23, 2014, and this reply brief addresses the new facts and arguments
4 raised by appellant on reply.

5 One of the income streams on which respondent based its assessment for the 2011
6 tax year at issue in this appeal is miscellaneous income of \$11,397 reported on
7 Form 1099-MISC by Juanita Woods, payor. (See Page 4 of Exhibit E attached to
8 respondent's opening brief.) In his reply brief, appellant submitted a "corrected"
9 1099 MISC, purportedly from Ms. Woods. (See appellant's Exhibit A, page 3.) The
10 "corrected" 1099-MISC purports to revise the reported amount of non-employee
11 compensation paid to appellant from \$11,397 to \$0.¹ Accompanying the "corrected"
12 1099-MISC, appellant provided an unsigned document that purports to be a letter from
13 Ms. Woods, explaining the reasoning for issuing the corrected 1099-MISC to appellant.
14 (See appellant's Exhibit A, pages 1 and 2.) The author of that document² explains that
15 the payor, Ms. Woods, recently became aware that she was not required to report
16 payments made to payees who are U.S. persons performing services under

¹ See Page 4 Exhibit E (attached to respondent's opening brief)

² Respondent does not concede that Ms. Woods either wrote or signed this document.

EXHIBIT A
1 OF 2

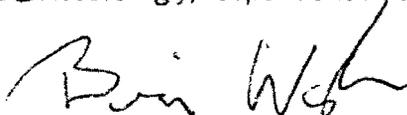
1 independent contract agreements, and therefore she was issuing a corrected
2 1099-MISC omitting the payments made to appellant for the 2011 tax year.

3 The author of the document bases his/her position on Treasury Decision 8734,
4 specifically on the regulations relating to withholding of tax of non-resident aliens
5 under Internal Revenue Code (IRC) section 1441. That decision does not support
6 appellant's position that payments received by appellant from Ms. Woods during the
7 2011 tax year should not have been reported. IRC section 1441 is not relevant as it
8 addresses requirements for withholding of tax on non-resident aliens and does not
9 address informational reporting requirements for payers that make payments to
10 payees who are U.S. persons performing services under independent contract
11 agreements. IRC section 6041 requires payers of over \$600 in the course of a trade
12 or business during a tax year to file information returns (generally IRS Forms in the
13 1099 series) reporting those payments in certain situations. Treasury Regulation
14 section 1.604-1 sets forth specific situations where information returns are required,
15 including the general rule that information returns are required for all salaries, wages,
16 fees, commissions and other forms of compensation for services (1099-MISC). The
17 payments made by Ms. Woods to appellant for services provided by appellant to Ms.
18 Woods were required to be reported under IRC section 6041.³

19 Furthermore, neither the author of the document nor appellant dispute that income was
20 paid to appellant from Ms. Woods during the 2011 tax year.

21 Appellant has not met his burden of proof by contradicting respondent's proposed
22 assessment for the 2011 year with any specific, credible, or relevant information. (See
23 the authorities cited in respondent's Exhibit D, section 4, from respondent's opening
24 brief.) Because appellant has failed to file a valid 2011 return and did not provide
25 respondent or your Board with any specific income information about his 2011 income,
26 he is not in a good position to criticize the Notice of Proposed Assessment issued by
27 respondent. (*Appeals of Fred R. Dauberger, et al.*, 82-SBE-082, Mar. 31, 1982.)

28 Accordingly, respondent's action must be sustained.



Tax Counsel

cc: Clovus M. Sykes

³ Revenue and Taxation Code section 18631(c)(4) incorporates IRC 6041 by reference.

Per Notice of Proposed Assessment—We received information that you claimed credit in another state for tax paid in California, received taxable income or gross proceeds during 2011 **reported** on IRS Form **1099-MISC, 1099-R, 1099-G, W-2 G** and/or on CA Forms 592 and/or 593. The name of each “**reporter**”, and amount **reported** is listed below.

HUNTER JOHNSON & ASSOCIATES	\$ 67,115.00
JUANITA WOODS	\$ 11,397.00
CALIFORNIA PUBLIC EMPLOYEES RETIREMENTS	\$ 6,265.00
DAVID CRAFT	\$ 1,132.00
HEALTH NET OF CALIFORNIA INC	\$ 1,050.00
JACK L HUNTER	\$ 710.00

Subtotal \$87,669.00

TOTAL USED FOR "YOUR INCOME (as estimated)": \$87,669

-----Principles of Reporting-----

Source: Treasury Decision 8734¹ [See Exhibit B for applicable portions] is the official explanation of 26 U.S.C. 1441 and the accompanying regulations. With 169 references to U.S. person payee/payor categories, TD 8734 provides the rules when a payor, U.S. or foreign, is making a U.S. sourced payment to a payee. TD 8734 outlines both the rules for withholding and reportability of the payments.

1. **Payor, of which a withholding agent is a subcategory, MUST ascertain payee status.**

Reference: TD 8734--- “As a general matter, a withholding agent (whether U.S. or foreign) must ascertain whether the payee is a U.S. or a foreign person”.

Point: It is incumbent upon the payor to determine the payee status of each payee.

2. **Payee MUST be a “foreign payee” as determined by the payor to apply any chapter 3 withholding procedures.**

---Reference is made to respondent’s letter dated 1/6/2015 (Supplement), **page 1 Ln. 16 and page 2, Ln. 10; and page 2, Ln. 10** where references are

¹ The provisions of Treasury Decision 8734 were established as the **final regulations by Treasury Decision 9658 as noted in Volume 79, No. 44, March 6, 2014** - Page 12724 and entitled: **79 FR 12726 Withholding of Tax on Certain U.S. Source Income Paid to Foreign Persons, Information Reporting and Backup Withholding on Payments Made to Certain U.S. Persons, and Portfolio Interest Treatment, March 6, 2014**

made to my payee status, U.S. person² without any argument or dispute.

Point: Respondent acknowledges “U.S. person” payee status and realizes that my payee status is NOT a “foreign person”.

3. **Payee must present “reliable documentation”³ to substantiate “payee status”.** **NOTE: Appellant’s** opening brief for calendar year 2011 references “reliable documentation” twelve (12) times. The respondent’s brief and the BOE’s so called “Hearing Summary” make no mention of the significance.

Reference--- TD 8734: “.....however, information reporting under chapter 61 of the Code may apply; further, if a TIN is **not** furnished in the manner required under section 3406⁴, backup withholding may also apply.....”

Other References: CCR Title 18, Sec. 18661⁵.

Reliable documentation was presented to the payors in the form of a W-9.

4. **Payee must be subject to “withholding” under Sec. 1441.**

- a. Source: TD 8734---“..... If the payee is a **foreign person**, however, the withholding provisions under chapter 3 of the Code apply instead”.

Please NOTE: Section 1441 is included in chapter 3.

- b. Reference: Supplement, page 2, Ln. 7. “.....IRC section 1441 is **not relevant** as it addresses requirements for withholding of tax on non-resident aliens

² TD 8734: If the payee is a U.S. person, the withholding provisions under chapter 3 of the Code do not apply;

³ Generally, the determination by a withholding agent of the U.S. or foreign status of a payee and of its other relevant characteristics (e.g., as a beneficial owner or intermediary, or as an individual, corporation, or flow-through entity) is made on the basis of a withholding certificate that is a Form W-8 or a Form 8233 (indicating foreign status of the payee or beneficial owner) or a Form W-9 (indicating U.S. status of the payee).

⁴ Requirements: Name, social security number, address, signature under penalty of perjury that the contents of the document are true and correct to the best of one’s knowledge.

⁵ When necessary to make effective the provisions of this article [**Regarding Withholding**] or Article 4 (commencing with Section 18631) [**Regarding reporting**], the name, address, social security number, or other taxpayer identification number of the recipient of income shall be furnished upon demand of the person paying the income. [Emphasis added---cms]

and does not address informational reporting requirements for payers that make payments to payees who are U.S. persons performing services under independent contract agreements”.

NOTE: Even though the assertion is an inaccurate statement when the implementing regulations are brought into play, regardless of the reasons, this is a MONUMENTAL admission. However, as explained later, “independent contractors” are merely a type of payee.

- c. Section 1441 MUST be relevant for payors to report; MUST be relevant to have jurisdiction; MUST be relevant to issue the calculation.
- d. This admission is very impactful because:

- It is vital in agreement with my contention that covers at least 10 pieces of correspondence advising the respondent of the exact same point. [REDACTED]

[REDACTED]

- iii. Eliminates any “presumptive” reasoning outlined in the regulations of 1441;

[REDACTED]

[REDACTED]

- vi. This issue has been brought before the U.S. Tax Courts on four (4) separate occasions. In each case, the tax court vacated subtitle A jurisdiction and asserted jurisdiction under subtitle C.

---Regarding “reporting” according to respondent---

Respondent has admitted that: (1) My pay status precludes reporting; (2) I am not subject to withholding; and albeit by silence, that (3) I have provided reliable documentation.

5. Per Supplement, Page 2, Ln. 5: *“The author of the document bases his/her position on Treasury Decision 8734, specifically on the regulations relating to withholding of tax of non-resident aliens under Internal Revenue Code (IRC) section 1441”.*

Response----*Treasury Decision 8734 is the Secretary of the Treasury’s official explanation of 26 U.S.C. 1441 and the implementing regulations.*

6. Per Supplement, Page 2, Ln. 5: *That decision does not support appellant’s position that payments received by appellant from Ms. Woods during the 2011 tax year should not have been reported.*

Appellant wishes to note that the respondent has already acknowledged that appellant is **NOT subject to withholding to any degree.**

Response----*Treasury Decision 8734: “.....**To the extent withholding is required under chapter 3 of the Code, or is excused based on documentation that must be provided, none of the information reporting provisions under chapter 61 of the Code apply,** nor do the provisions under section 3406”. [Emphasis added---cms]*

7. Per Supplement, Page 2, Ln. 7: *“IRC section 1441 is not relevant as it addresses requirements for withholding of tax on non-resident aliens and does not address informational reporting requirements for payers that make payments to payees who are U.S. persons performing services under independent contract agreements”.*

Response: Respondent appears not to understand that independent contractor is a **type of payee** specifically covered under chapter 61, Sec. 6041 along with approximately seventy-five other payee types.

8. Per Supplement, Page 2, Ln. 11: *“IRC section 6041 requires payers of over \$600 in the course of a trade or business during a tax year to file information returns (generally IRS Forms in the 1099 series) reporting those payments in certain situations”.*

Response: Please reference Exhibit C, Chapter 61-Information and Returns. Sec. 6041 and 6041A are located on page 2. Note: Sec. 6041 and 6041A are

located in chapter 61. Per Treasury Decision 8734: “.....*To the extent withholding is required under chapter 3 of the Code, or is excused based on documentation that must be provided, **none of the information reporting provisions under chapter 61 of the Code apply**, nor do the provisions under section 3406*”. [Emphasis added---cms]

Response: Respondent provides no authority to establish that “payments in certain situations” applies to me.

Per Supplement, Page 2, Ln. 16: “*The payments made by Ms. Woods to appellant for services provided by appellant to Ms. Woods were required to be reported under IRC section 6041.*”

Response: Given the fact that respondent has not challenged my payee status, has acknowledged via silence that I’ve provided reliable documentation, and has established that “withholding” is irrelevant, TD 8734 establishes that the payments were not reportable.

9. Per Supplement, Page 2, Ln. 24: “*Because appellant has failed to file a valid 2011 return.....*”

Response: Respondent has not shown that appellant is a nonresident. CCR 18: 18662-4(f) **Requirement to File a California Return. Withholding does not relieve the payee of the obligation to file a California income tax return. For individuals, a California return is required if the nonresident individual has any income from California sources and has a California tax liability. (See Revenue and Taxation Code section 18501.)**

Exhibit B

1. As a general matter, a withholding agent (whether U.S. or foreign) must ascertain
2. whether the payee is a U.S. or a foreign person. If the payee is a U.S. person, the
3. withholding provisions under chapter 3 of the Code do not apply; however,
4. information reporting under chapter 61 of the Code may apply; further, if a TIN is
5. not furnished in the manner required under section 3406, backup withholding
6. may also apply. If the payee is a foreign person, however, the withholding
7. provisions under chapter 3 of the Code apply instead. To the extent withholding
8. is required under chapter 3 of the Code, or is excused based on documentation
9. that must be provided, none of the information reporting provisions under
10. chapter 61 of the Code apply, nor do the provisions under section 3406.

Comment [C1]:

Please Note: Section 1441 and accompanying regulations are found in chapter 3.

Comment [C2]: Respondent states on page 2, lines 7-11 that IRC section 1441 is not relevant.

Comment [C3]: Because withholding does not apply, none of the reporting procedures apply.

Request for Taxpayer Identification Number and Certification

**Give Form to the
 requester. Do not
 send to the IRS.**

Print or type See Specific Instructions on page 2.	Name (as shown on your income tax return) Clovis M. Sykes	
	Business name/disregarded entity name, if different from above	
	Check appropriate box for federal tax classification (required): <input type="checkbox"/> Individual/sole proprietor <input type="checkbox"/> C Corporation <input type="checkbox"/> S Corporation <input type="checkbox"/> Partnership <input type="checkbox"/> Trust/estate <input type="checkbox"/> Limited liability company. Enter the tax classification (C=C corporation, S=S corporation, P=partnership) ▶	
	<input type="checkbox"/> Other (see instructions) ▶	
	Address (number, street, and apt. or suite no.) [REDACTED]	Requester's name and address (optional)
City, state, and ZIP code Sacramento, CA 95831		
List account number(s) here (optional)		

Part I Taxpayer Identification Number (TIN)

Enter your TIN in the appropriate box. The TIN provided must match the name given on the "Name" line to avoid backup withholding. For individuals, this is your social security number (SSN). However, for a resident alien, sole proprietor, or disregarded entity, see the Part I instructions on page 3. For other entities, it is your employer identification number (EIN). If you do not have a number, see *How to get a TIN* on page 3.

Social security number		
[REDACTED]	-	[REDACTED]
Employer identification number		
[REDACTED]	-	[REDACTED]

Note. If the account is in more than one name, see the chart on page 4 for guidelines on whose number to enter.

Part II Certification

Under penalties of perjury, I certify that:

1. The number shown on this form is my correct taxpayer identification number (or I am waiting for a number to be issued to me), and
2. I am not subject to backup withholding because: (a) I am exempt from backup withholding, or (b) I have not been notified by the Internal Revenue Service (IRS) that I am subject to backup withholding as a result of a failure to report all interest or dividends, or (c) the IRS has notified me that I am no longer subject to backup withholding, and
3. I am a U.S. citizen or other U.S. person (defined below).

Certification instructions. You must cross out item 2 above if you have been notified by the IRS that you are currently subject to backup withholding because you have failed to report all interest and dividends on your tax return. For real estate transactions, item 2 does not apply. For mortgage interest paid, acquisition or abandonment of secured property, cancellation of debt, contributions to an individual retirement arrangement (IRA), and generally, payments other than interest and dividends, you are not required to sign the certification, but you must provide your correct TIN. See the instructions on page 4.

Sign Here Signature of U.S. person ▶

Date ▶ **8/27/11**

General Instructions

Section references are to the Internal Revenue Code unless otherwise noted.

Purpose of Form

A person who is required to file an information return with the IRS must obtain your correct taxpayer identification number (TIN) to report, for example, income paid to you, real estate transactions, mortgage interest you paid, acquisition or abandonment of secured property, cancellation of debt, or contributions you made to an IRA.

Use Form W-9 only if you are a U.S. person (including a resident alien), to provide your correct TIN to the person requesting it (the requester) and, when applicable, to:

1. Certify that the TIN you are giving is correct (or you are waiting for a number to be issued),
2. Certify that you are not subject to backup withholding, or
3. Claim exemption from backup withholding if you are a U.S. exempt payee. If applicable, you are also certifying that as a U.S. person, your allocable share of any partnership income from a U.S. trade or business is not subject to the withholding tax on foreign partners' share of effectively connected income.

Note. If a requester gives you a form other than Form W-9 to request your TIN, you must use the requester's form if it is substantially similar to this Form W-9.

Definition of a U.S. person. For federal tax purposes, you are considered a U.S. person if you are:

- An individual who is a U.S. citizen or U.S. resident alien,
- A partnership, corporation, company, or association created or organized in the United States or under the laws of the United States,
- An estate (other than a foreign estate), or
- A domestic trust (as defined in Regulations section 301.7701-7).

Special rules for partnerships. Partnerships that conduct a trade or business in the United States are generally required to pay a withholding tax on any foreign partners' share of income from such business. Further, in certain cases where a Form W-9 has not been received, a partnership is required to presume that a partner is a foreign person, and pay the withholding tax. Therefore, if you are a U.S. person that is a partner in a partnership conducting a trade or business in the United States, provide Form W-9 to the partnership to establish your U.S. status and avoid withholding on your share of partnership income.

EXHIBIT C

CHAPTER 61 - INFORMATION AND RETURNS

Subchapter A - Returns and Records

PART I - RECORDS, STATEMENTS, AND SPECIAL RETURNS

Sec. 6001. Notice or regulations requiring records, statements, and special returns

PART II - TAX RETURNS OR STATEMENTS

Subpart A - General Requirement

Sec. 6011. General requirement of return, statement, or list

Subpart B - Income Tax Returns

Sec. 6012. Persons required to make returns of income

Sec. 6013. Joint returns of income tax by husband and wife

Sec. 6014. Income tax return - tax not computed by taxpayer

Sec. 6015. Relief from joint and several liability on joint return

(Sec. 6016. Repealed. Pub. L. 90-364, title I, Sec. 103(a), June 28, 1968, 82 Stat. 260)

Sec. 6017. Self-employment tax returns

(Sec. 6017A. Repealed. Pub. L. 101-239, title VII, Sec. 7711(b)(1), Dec. 19, 1989, 103 Stat. 2393)

Subpart C - Estate and Gift Tax Returns

Sec. 6018. Estate tax returns

Sec. 6019. Gift tax returns

Subpart D - Miscellaneous Provisions

Sec. 6020. Returns prepared for or executed by Secretary

Sec. 6021. Listing by Secretary of taxable objects owned by nonresidents of internal revenue districts

PART III - INFORMATION RETURNS

Subpart A - Information Concerning Persons Subject to Special Provisions

Sec. 6031. Return of partnership income

Sec. 6032. Returns of banks with respect to common trust funds

Sec. 6033. Returns by exempt organizations

Sec. 6034. Returns by certain trusts

Sec. 6034A. Information to beneficiaries of estates and trusts

Sec. 6035. Returns of officers, directors, and shareholders of foreign personal holding companies- REPEALED effective with tax years after 12/31/2004

Sec. 6036. Notice of qualification as executor or receiver

Sec. 6037. Return of S corporation

Sec. 6038. Information reporting with respect to certain foreign corporations and partnerships

Sec. 6038A. Information with respect to certain foreign-owned corporations

Sec. 6038B. Notice of certain transfers to foreign persons

Sec. 6038C. Information with respect to foreign corporations engaged in U.S. business

Sec. 6039. Returns required in connection with certain options

(Sec. 6039A. Repealed. Pub. L. 96-223, title IV, Sec. 401(a), Apr. 2, 1980, 94 Stat. 299)

(Sec. 6039B. Repealed. Pub. L. 99-514, title XIII, Sec. 1303(b)(5), Oct. 22, 1986, 100 Stat. 2658)

Sec. 6039C. Returns with respect to foreign persons holding direct investments in United States real property interests

Sec. 6039D. Returns and records with respect to certain fringe benefit plans

EXHIBIT D
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Sec. 6039E. Information concerning resident status
Sec. 6039F. Notice of large gifts received from foreign persons
Sec. 6039G. Information on individuals losing United States citizenship
Sec. 6039H. Information with respect to Alaska Native Settlement Trusts and sponsoring Native Corporations
Sec. 6039I. Returns and records with respect to employer-owned life insurance contracts
Sec. 6040. Cross references
Subpart B - Information Concerning Transactions With Other Persons
Sec. 6041. Information at source
Sec. 6041A. Returns regarding payments of remuneration for services and direct sales
Sec. 6042. Returns regarding payments of dividends and corporate earnings and profits
Sec. 6043. Liquidating, etc., transactions
Sec. 6043A. Returns relating to taxable mergers and acquisitions.
Sec. 6044. Returns regarding payments of patronage dividends
Sec. 6045. Returns of brokers
Sec. 6046. Returns as to organization or reorganization of foreign corporations and as to acquisitions of their stock
Sec. 6046A. Returns as to interests in foreign partnerships
Sec. 6047. Information relating to certain trusts and annuity plans
Sec. 6048. Information with respect to certain foreign trusts
Sec. 6049. Returns regarding payments of interest
(Sec. 6050. Repealed. Pub. L. 96-167, Sec. 5(a), Dec. 29, 1979, 93 Stat. 1276)
Sec. 6050A. Reporting requirements of certain fishing boat operators
Sec. 6050B. Returns relating to unemployment compensation
(Sec. 6050C. Repealed. Pub. L. 100-418, title I, Sec. 1941(b)(1), Aug. 23, 1988, 102 Stat. 1323)
Sec. 6050D. Returns relating to energy grants and financing
Sec. 6050E. State and local income tax refunds
Sec. 6050F. Returns relating to social security benefits
Sec. 6050G. Returns relating to certain railroad retirement benefits
Sec. 6050H. Returns relating to mortgage interest received in trade or business from individuals
Sec. 6050I. Returns relating to cash received in trade or business, etc
Sec. 6050J. Returns relating to foreclosures and abandonments of security
Sec. 6050K. Returns relating to exchanges of certain partnership interests
Sec. 6050L. Returns relating to certain donated property
Sec. 6050M. Returns relating to persons receiving contracts from Federal executive agencies
Sec. 6050N. Returns regarding payments of royalties
Sec. 6050P. Returns relating to the cancellation of indebtedness by certain entities
Sec. 6050Q. Certain long-term care benefits
Sec. 6050R. Returns relating to certain purchases of fish
Sec. 6050S. Returns relating to higher education tuition and related expenses
Sec. 6050T. Returns relating to credit for health insurance costs of eligible individuals
Sec. 6050U. Charges or payments for qualified long-term care insurance contracts under combined arrangements

EXHIBIT D
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