

Memorandum

To : Ms. Cynthia Bridges
Executive Director (MIC 73)

Date: June 18, 2015

From : Mr. Jeffrey L. McGuire, Deputy Director
Sales and Use Tax Department (MIC 43) 

Subject : Board Meeting July 28-30, 2015
Item N: Administrative Agenda
Proposed Revision to Compliance Policy and Procedures Manual
Sections 764.010 – 764.080

I am requesting approval to forward the attached revision to CPPM Chapter 7, *Collections*, to the Board Proceedings Division to be placed as a consent item on the Administrative Agenda at the July 2015 meeting.

Sections 764.010 – 764.080 are being revised to incorporate existing policies regarding determinations. This revision has been reviewed and approved by SUTD management, provided to Board Members, and posted on the Board’s website at <http://www.boe.ca.gov/sutax/pmr.htm> to solicit comments from interested parties.

We received one comment from a member of the public. As a result, the first paragraph in section 764.010, *Deficiency Determinations*, was modified by changing the language to more concisely conform to the language in Revenue and Taxation Code 6511. Specifically, the language was changed from stating that if a person fails to file a return staff “may” issue a determination, to the BOE “shall” issue a determination. All other sections remain unchanged. No other comments were received from Board Members or other interested parties.

If you have any questions, please let me know, or contact Ms. Susanne Buehler at (916) 324-1825.

JLM:rs
Attachment

Approved

STATE BOARD OF EQUALIZATION

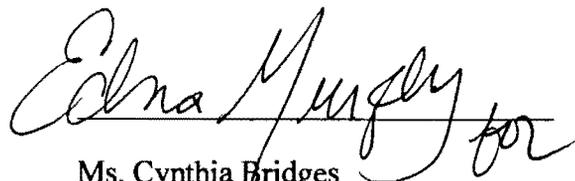


BOARD APPROVED

At the July 28, 2015 Board Meeting

Joann Richmond

Joann Richmond, Chief
Board Proceedings Division



Ms. Cynthia Bridges
Executive Director

cc: (all with attachment)

Mr. David Gau (MIC 73)
Mr. Wayne Mashihara (MIC 46)
Ms. Susanne Buehler (MIC 92)
Ms. Lynn Bartolo (MIC 57)
Mr. Richard Parrott (MIC 88)
Mr. Kevin Hanks (MIC 49)
Mr. John Thiella (MIC 73)
Mr. Marc Alviso (MIC 73)
Mr. Chris Lee (MIC 73)
Mr. Gary Lambert (MIC 43)

DEFICIENCY DETERMINATIONS

764.010

RTC sections 6511 and 6481 for sales and use tax, and similar sections ~~of other tax laws~~ for programs administered by the Special Taxes and Fees (STF) Department, provide that ~~“If a person fails to file a return the BOE shall make an estimate of the amount of tax due, or if the board~~ BOE ~~is not satisfied with the return(s) filed or returns of the tax or the amount of tax, or other amount, required to be paid to the state by any person,~~ it may compute and determine the amount that is required to be paid. ~~upon the basis of the facts contained in the return or returns or upon the basis of any information within its possession or that may come into its possession.~~ BOE may compute this amount based on the facts contained in the return(s), or any information in its possession or that may come into its possession. One or more deficiency determinations may be made for the amount due for one or for more than one period.”

~~The amount of the determination, exclusive of penalties, shall bear interest at the “modified adjusted rate per month.” The modified adjusted rate per month is calculated based on the modified adjusted rate per annum divided by 12. Therefore, the interest is not pro-rated for fractions of a month.~~

Deficiency determinations are subject to interest and penalties. ~~p~~Penalties are described in the Revenue and Taxation Code as follows:

- Section 6484* 10 percent penalty for negligence or intentional disregard of this part or authorized rules or regulations.
- Section 6485* 25 percent penalty for fraud or intent to evade this part or authorized rules and regulations.
- Section 6485.1 50 percent penalty for purchasing and registering a vehicle, vessel or aircraft outside the State of California for the purpose of evading the payment of taxes due under this part.
- Section 6511 10 percent penalty for failure to file a return.
- Section 6597 40 percent penalty for fraudulently collecting but not timely remitting sales tax reimbursement or use tax.
- Section 6565* 10 percent penalty if the determination is not paid when due and payable.

*Similar sections for STF programs

The ~~Board of Equalization (BOE) shall give~~ must provide written notice of a determination to the ~~retailer or tax or fee payer (taxpayer) or other responsible person storing, using or consuming tangible personal property written notice of its determination.~~ “Written notice” means that the Notice of Determination must fairly apprise the taxpayer of the nature of the liability covered. ~~The Notice of Determination,~~

is sent via U.S. mail to the person's address as it appears in the records of the BOE. Service of the notice is complete at the time of the deposit of the notice in the United States Post Office, or a mailbox, sub-post office, substation or mail chute or other facility regularly maintained or provided by the United States Postal Service, without extension of time for any reason.

In lieu of mailing, a *Notice of Determination* may be served personally by delivering it to the person to be served. Notice is complete at the time of delivery. Personal service to a corporation may be made by delivery of a *Notice of Determination* to any person designated in the Code of Civil Procedure to be served for the corporation with summons and complaint in a civil action.

Any person against whom a determination is made, ~~under RTC sections 6481 or 6511~~ or any person directly interested, may file a written petition for redetermination within 30 days ~~after the BOE notifies the person of the liability~~from the service of the notice. If a petition for redetermination is not filed within the 30-day period, the determination becomes final ~~at the expiration of that period~~. All determinations made under the above sections are due and payable at the time when they become final. ~~If they are not paid when due and payable~~If any amount of the determination is not paid when due and payable (final), a "finality" penalty of 10 percent ~~of the amount of the determination, exclusive of interest and penalties~~, shall be applied to the ~~determined amount~~remaining unpaid tax or fee portion of the determination.

Notices of Determination issued to corporations, LLCs, and LLPs will also include a note to educate and remind principals they may be personally liable and responsible for tax, interest, and penalties owed by the business under RTC section 6829 if the business terminates, dissolves or is abandoned.

JEOPARDY DETERMINATIONS

764.020

~~A notice of jeopardy determination looks identical to a deficiency determination notice except that printed on the face of the document is a statement that it is a jeopardy determination. — A jeopardy determination~~A Jeopardy Notice of Determination is issued when collection of the amount due is jeopardized by delay. The request for a jeopardy determination must receive approval and signature by an administrator or any person delegated this authority.

A jeopardy determination may be issued:

1. For either ~~self-declared or~~ self-assessed or BOE-assessed liabilities.
2. For the same liability included in a non-final determination, even if the non-final determination is in petition status.

The recommendation for a jeopardy determination must set forth the reason or reasons why delay will result in jeopardizing collection. ~~—, and should also include:~~

~~Information as to the county or counties where a Notice of State Tax Lien is to be filed.~~

1. ~~Whether or not a lien is to be recorded with the Secretary of State.~~

~~2. Whether or not a warrant is required at time of issuance of the jeopardy determination.~~

~~If a warrant is required, it must include:~~

~~a. The person or persons to whom the warrant is to be directed.~~

~~b. The asset or assets to be levied upon.~~

~~c. The amount of advance fees that may be required.~~

To request a jeopardy determination, staff must prepare a memo that includes the following:

1. The taxpayer's name and address,
2. The source and status of the underlying liability,
3. The taxpayer's overall financial condition, including a list of all known assets and liabilities,
4. The amount of equity available for a lien or levy,
5. The taxpayer's present and future income potential, including the taxpayer's ability to earn wages or pay the liability if there is no jeopardy determination,
6. Which county or counties in which a Notice of State Tax Lien is to be filed,
7. Whether or not a lien is to be recorded with Secretary of State,
8. Whether or not a warrant is being requested, which must include the name of the person to whom the warrant is to be sent, the asset(s) to be levied upon, and the amount of advance fees that may be required, and
9. Documentary evidence in support of a jeopardy determination.

A list of Resources for Jeopardy Determination Analysis is available on eBOE to assist staff in locating assets, providing support when estimating the amount of equity available in real property, disclosing the priority of liens and other encumbrances, and showing whether a taxpayer is becoming insolvent.

For sales and use tax, the original request for a jeopardy determination is routed to the Tax Policy Division (TPD) Chief, with a copy sent to the Special ~~Procedures Section~~ Operations Branch (SPSSOB). If the request for a jeopardy determination is approved, the TPD Chief will notify ~~SPS-SOB~~ to proceed. For the Investigations Division (ID), the original request for a jeopardy determination is routed to the Investigation and Special Operations Division (ISOD) chief. If the request for a jeopardy determination is approved, the ISOD chief will notify SOB to proceed. Audit Determination and Refund Section (ADRS) is responsible for billing jeopardy determinations. Routing for special taxes accounts is ~~made~~ handled in accordance with Special Taxes ~~Department~~ Policy and Compliance Division's policy.

As a guide in determining whether to request a jeopardy determination, the following are some examples of instances where a jeopardy determination is warranted:

1. Taxpayer is obviously dissipating his/her assets.

2. Taxpayer is placing assets in the names of other persons for purposes of concealment.
3. Taxpayer's assets are being attached by creditors, or are in imminent danger of attachment.
4. There is a pending sale of property which represents the last remaining assets and, without the funds from such sale, collection is doubtful.
5. There is evidence the taxpayer intends to file a petition in bankruptcy or make an assignment for benefit of creditors.
6. There is evidence creditors intend to file an involuntary petition in bankruptcy against the taxpayer.

Determinations of this type are:

1. Due and payable immediately.
2. Exempt from the following provisions of the Taxpayers' Bill of Rights:
 - a. RTC section 7094 [\(or similar STF section\)](#), *Release of Levy*.
 - b. RTC section 7097(a) [\(or similar STF section\)](#), *Prior Notice of Liens*.
3. Subject to the use of all collection remedies as of the date they are served, either personally or by mail.

Similar to deficiency determinations, any person against whom a jeopardy determination is issued has the right to petition for redetermination. However, in the case of a jeopardy determination the petition for redetermination must be filed within 10 days following the issuance of the *Notice of Jeopardy Determination*. Within the same 10-day period, the person must post such security as may be deemed necessary by the BOE (see CPPM 445.000 et seq.). If the jeopardy determination remains unpaid 10 days from the date of issuance and a petition for redetermination has not been filed, an additional 10 percent penalty ~~must~~will be added, except when a jeopardy determination is made against an existing self-assessed or BOE-assessed final liability that has already been assessed the 10% penalty.

A jeopardy determination is, in itself, an indication that collection will be jeopardized by delay. Therefore, district offices must give priority to their collection efforts, making full and prompt use of appropriate collection remedies, which may include the seizure of a taxpayer's personal property. If personal property is seized, the sale of the property must be delayed until an administrative hearing is either granted or denied. If the taxpayer does not request an administrative hearing, a 30-day period must elapse between the date of service of the jeopardy determination and the date of sale of seized assets.

A dual determination is a determination made against a person for a tax liability that is ~~already~~ also the obligation of another person. Dual determinations may be based upon the full amount of tax owed by the other person or for a portion thereof, depending on the specific circumstances. The liability may be based upon either self-assessed or BOE-assessed tax.

Some examples of circumstances where a dual determination may be issued include the following:

- ~~Dual~~ More than one determinations ~~are~~ may be issued when there is doubt as to the true ownership of a business or when the true ownership cannot be established. Determinations for the same liability are made against each of the entities that investigation discloses could have operated the business and incurred the liability.
- Dual determinations are also used whenever a person holding a permit or license sells the business or otherwise changes the ownership without notification to the BOE, allowing the succeeding entity to continue the business using the permit or license issued to the original operator (see CPPM section 734.000).
- Dual determinations may be issued when a purchaser of a business or stock of goods fails to withhold a sufficient amount of the purchase price to cover the tax liability of the seller (see CPPM section 732.000).
- Dual determinations may be issued against corporate officers who incur a debt after the corporation has been suspended (SUTD only, see CPPM section 764.060).
- In certain circumstances, a dual determination ~~may be issued against a responsible person or persons who controlled, or supervised, the filing and/or paying of corporate or Limited Liability Company (LLC) taxes~~ for personal liability may be issued against a corporate officer, or shareholder, or any responsible person under RTC section 6829 (SUTD only, see CPPM section 764.0980)

Regardless of how many additional ~~individuals~~ entities have been issued a dual determination for the original liability, the liability is posted to the accounts receivable only one time.

For sales and use tax accounts, the ~~Special Procedures Section (SPS)~~ Special Operations Branch (SOB) or Audit Determinations and Refunds Section (ADRS) will review the information provided by staff and determine whether a dual determination should be issued. Each district office, or Special Taxes ~~d~~ Division, or the Centralized Collection Section, however, has the responsibility for fully substantiating such cases and bringing them to the attention of the appropriate section so dual determinations may be issued.

When ~~issuing a~~ dual determinations is issued against a dualees (secondary accounts), ~~all applicable amounts are~~ all penalties assessed to the primary account included in the periods of liability subject to the dual determination will be included in the determination assessed against the dualee ~~as are assessed against the primary account, i.e., the amount assessed against the dualee includes the finality penalty assessed against the primary account, if any, including any finality penalty assessed to the primary account.~~ ~~Therefore~~ However, if the dualed liability is not paid after ~~before~~ the ~~its~~ finality date, ~~the dual determination~~ it does not accrue an additional finality penalty. Additionally, if relief of penalty is granted under the primary account for periods that have been assessed to a dualee, the liability assessed to the dualee will be reduced by the same amount.

DUAL DETERMINATIONS UNDER RTC SECTION 6829 STATUTORY PROVISIONS

764.080

Revenue and Taxation Code (RTC) section 6829 and Regulation 1702.5 set forth the requirements for holding a responsible person personally liable for unpaid tax, interest, and penalties owed by a corporation, partnership, limited partnership, limited liability partnership or limited liability company (entity). In order to issue a Notice of Determination (NOD) for personal liability under RTC section 6829, each of the following four elements must be satisfied:

1. **Termination** (see CPPM 764.120) - Personal liability can only be imposed if there is a termination, dissolution, or abandonment of the business of an entity (RTC section 6829(a), Regulation 1702.5(a)). Termination of an entity's business includes discontinuance or cessation of business activities (Regulation 1702.5(b)(3)).
2. **Sales Tax Reimbursement and Use Tax** (see CPPM 764.130) - Personal liability can only be imposed if the BOE establishes that, while the person was a responsible person, the entity:
 - a. Sold tangible personal property in the conduct of its business and collected sales tax reimbursement on the selling price (whether separately itemized or included in the selling price) and failed to remit such tax when due; or
 - b. Consumed tangible personal property and failed to pay the applicable tax to the seller or the BOE; or
 - c. Included use tax on the billing and collected the use tax or issued a receipt for use tax and failed to report and pay the tax (RTC section 6829(c), Regulation 1702.5(a)).
3. **Responsible Person(s)** (see CPPM 764.140) - Personal liability can be imposed only on a responsible person (RTC section 6829(a)). "Responsible person" means any officer, member, manager, employee, director, shareholder, partner, or other person having control or supervision of, or who is charged with the responsibility for, the filing of returns or the payment of tax or who has a duty to act for the entity in complying with any provision of the SUT Law (RTC section 6829(a), Regulation 1702.5(b)(1)).

Additionally, the responsible person shall be liable only for transactions where the taxes became due during the periods he or she had the control, supervision, responsibility, or duty to act for the entity, plus the interest and penalties on those taxes (RTC section 6829(b)). ~~For example, someone that first became a responsible person for an entity in 1Q12 is not a responsible person for reporting periods prior to 1Q12.~~

4. **Willfulness** (see CPPM 764.150) - Personal liability can be imposed on a responsible person only if the person willfully failed to pay or to cause to be paid taxes due from the entity (RTC section 6829(a), Regulation 1702.5(a)). “Willfully fails to pay or to cause to be paid” means that the failure was the result of an intentional, conscious, and voluntary course of action (RTC section 6829(d), Regulation 1702.5(b)(2)), and this failure may be willful even though such failure was not done with a bad purpose or evil motive (Regulation 1702.5(b)(2)).

Accordingly, if each of these four elements is not established, then an NOD for personal liability under RTC section 6829 cannot be issued.