

# Memorandum

**To** : Honorable Betty T. Yee, Chairwoman  
Honorable Judy Chu, Ph.D., Vice Chair  
Honorable Bill Leonard, Member, Second District  
Honorable Michelle Steel, Member, Third District  
Honorable John Chiang, State Controller

**Date** : May 15, 2007

**From** : Todd C. Gilman, Chief   
Taxpayers' Rights and Equal Employment Opportunity Division

**Subject** : **Follow-up to March 20, 2007 Taxpayers' Bill of Rights Hearings - Relief from Liability for Fees, Interest and Penalties Assessed under the Underground Storage Tank Maintenance Fee Law**

At the March 20, 2007 Business Taxpayers' Bill of Rights Hearing, Mr. Roy E. Crawford of HellerEhrman, LLP proposed that the Board of Equalization (BOE) consider comments (or a lack of comments) regarding the underground storage tank (UST) permit in any audit it conducts on a business that requires a UST permit, as a basis for relief under Special Tax Administrative Regulation 4902, *Relief from Liability*. At the Hearing, the Board Members asked that I work with BOE staff to research this proposal and provide the following information to the Board regarding Mr. Crawford's request:

- The number of UST appeals cases potentially affected by this issue; and
- An analysis of the proposal, including pros and cons, and a discussion of whether a regulatory change would be required to effect the result Mr. Crawford requests.

Attached for your consideration is an informal issue paper on this matter prepared by the Fuel Taxes Division. The paper provides information about discretionary relief presently available to the BOE and data concerning UST appeals cases that underwent sales and use tax audits. The Fuel Taxes Division, in concert with the Legal Department, recommends that Regulation 4902 not be interpreted to grant relief from the UST fee and related interest and penalties pursuant to an audit of another tax or fee program, when the audit report is silent regarding the UST fee, and that no legislative change be proposed to Revenue and Taxation Code section 50112.5.

This matter will be presented to the Board at its June 1, 2007 meeting. I hope the attached Informal Issue Paper is helpful and adequately responds to your request. If you wish additional information, please contact Mr. Edward King at 916-324-2379.

TCG:ls

Attachment

UST Memo to Members 5-15-07.doc

Approved:

  
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Ramon J. Hirsig  
Executive Director

cc: Mr. Alan LoFaso  
Mr. Steve Shea  
Ms. Barbara Alby  
Mr. Erik Caldwell  
Ms. Marcy Jo Mandel  
Mr. Ramon J. Hirsig (MIC 73)  
Ms. Kristine Cazadd (MIC 83)  
Mr. David Gau (MIC 69)  
Acting Deputy Director, Property and Special Taxes Department (MIC 63)  
Ms. Randie L. Henry (MIC 43)  
all w/attachment

- For Information  
 For Discussion  
 For Decision Making

BOARD OF EQUALIZATION  
**INFORMAL ISSUE PAPER**

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**Relief from Liability for Fees, Interest, and Penalties Assessed  
Under the Underground Storage Tank Maintenance Fee Law**

**Issue**

Should Special Tax Administrative Regulation 4902, *Relief of Liability*, be interpreted or amended to permit the State Board of Equalization (Board) to grant feepayers relief from the Underground Storage Tank Maintenance (UST) Fee and related interest and penalties pursuant to an audit of another tax or fee program, when the audit report is silent regarding the UST Fee?

**Background**

During the March 20, 2007 Business Taxpayers' Bill of Rights hearing and in a memorandum dated March 16, 2007 (Exhibit 1), Mr. Roy E. Crawford requested that the Board consider a policy change for relief from liability for the UST fee based on the completion of a Sales and Use Tax (SUT) audit report in which the auditor reviewed and verified records of fuel purchases. Mr. Crawford proposed that "where the Board conducts an audit of a retailer of motor vehicle fuel, and examines records of fuel introduced into underground storage tanks and the reported withdraw of the fuel, presentation of the person's books and records for examination by an auditor shall be deemed to be a written request for an audit report for the purposes of Regulation 4902(c)."

The Board requested an analysis of Mr. Crawford's proposal with respect to applying relief provided by Regulation 4902 as it relates to the UST fee and what the process would be if a policy change was desired.

The Board administers 28 tax and fee programs. Administration of these programs is divided between the Sales and Use Tax Department (SUTD) and the Property and Special Taxes Department (PSTD). Currently, audits for each tax and fee are conducted by the department responsible for the administration of the particular program and the reports are specific to the individual tax or fee being audited. Board staff is reviewing opportunities to enhance information sharing and cooperative audits among the tax and fee programs. For example, a more detailed questionnaire is currently being developed for use by audit staff to assist taxpayers in registering and reporting the various taxes and fees they may owe to the Board.

**Relief from Liability for Fees, Interest, and Penalties Assessed  
Under the Underground Storage Tank Maintenance Fee Law**

The Underground Storage Tank Maintenance Fee Law<sup>1</sup> was enacted by the Legislature and became effective October 2, 1989. The UST fee, as it is presently constituted, was implemented as of January 1, 1991. Under the current law, every owner of an underground storage tank containing petroleum for which a permit is required pursuant to Section 25284 of the Health and Safety Code shall register with the Board. Once registered, every owner shall submit periodic returns together with a fee measured by the total gallons of petroleum products placed into the underground storage tank during the reporting period.

The Board has made a conscientious effort to inform tank owners of their responsibility regarding the UST fee through the following:

- In June 1994 and November 1998, Important Notices were directly mailed to SUTD accounts registered to sell fuel products.
- Six news releases were issued between 1994 and 1996.
- Publication 88, *Underground Storage Tank Fee*, was initially distributed in 1994 and subsequently revised in 1999 and 2005.
- Numerous Feepayer Outreach programs have been provided at Small Business Fairs and through contacts and training of staff at the local permitting agencies.
- Twenty-one Fuel Tax Newsletters and twelve SUTD Tax Information Bulletins containing UST articles were distributed between 1994 and 2006.
- Starting in September 2001, BOE-5-TK4, *Underground Storage Tank Maintenance Fee Program Questionnaire*, has been directly mailed each quarter to new SUT Business Code 62 (gas stations, etc) accounts. The initial questionnaire was sent to accounts registered since January 2000.

On October 29, 2001, the SUTD and PSTD jointly issued Operations Memo No. 1096, *Cross Referencing Taxpayer Registration in Board Programs* (Operations Memo) and the provisions were recently incorporated into the Board's Audit Manual Chapter 2, *Preparation of Field Audit Reports*. The purpose of the Operations Memo was to establish a process by which sales and use tax permit holders who may need to be registered with the Board for the UST Fee, Cigarette and Tobacco Products Tax, Tire Recycling Fee, or Environmental Fees would be identified. SUTD auditors are directed to identify on the audit report whether, among other things, there is an underground storage tank at the premises of the sales and use tax permit holder and, if there is, provide additional information regarding the registration and/or ownership of the tank. If there are any discrepancies, particularly where no UST fee account number is provided by the SUTD auditor, Fuel Taxes Division staff takes steps to resolve the ownership/registration issues. Although the Operations Memo establishes a process to collect information and inform sales and use tax permit holders about their possible responsibilities regarding other tax and fee programs administered by the Board, it does not imply that the books and records have been audited for the other tax or fee programs.

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<sup>1</sup> Part 26 (commencing with section 50101) of Division 2 of the Revenue and Taxation Code. All future statutory references shall be to the Revenue and Taxation Code unless indicated otherwise.

**Relief from Liability for Fees, Interest, and Penalties Assessed  
Under the Underground Storage Tank Maintenance Fee Law**

**Discussion of Issue**

The UST Law currently provides three statutory provisions for providing relief to feepayers under specified conditions.

- 1) The Board is permitted to relieve a feepayer from liability for any penalties resulting from the late payment of amounts due or failure to file timely fee returns when the failure was due to reasonable cause and circumstances beyond the feepayer’s control, pursuant to Section 50112.2.
- 2) The Board may, at its discretion, relieve the feepayer from liability for some or all of the interest imposed on UST fees for which the feepayer became liable on or after January 1, 2000, where failure to pay the fees is due in whole or in part to an unreasonable error or delay by a Board employee, pursuant to Section 50112.4.
- 3) Section 50112.5 permits the Board to relieve a person of his or her UST fee liability, if the feepayer failed to report or pay the fee because of reliance on written advice from the Board, but only when certain conditions are met. See Analysis of Mr. Crawford’s Proposal below.

**Statistical Analysis**

The Board has almost 7,000 UST Fee registrants, representing approximately 13,000 locations. These locations include retail service stations, petroleum wholesalers and distributors, and other entities that store and use petroleum products.

There are presently 135 active UST Fee appeals cases, totaling \$3.6 million, working their way through the Board’s appeals process. This number includes 13 cases that have had previous SUTD audits conducted for a business location that had an underground storage tank.

The table below provides an analysis of these cases in relationship to the implementation of the Operations Memo and the relationship of the sales and use tax permit holder to the UST owner/registrant.

UST Appeals Cases with SUTD Audits

	Cases	Amount Protested	Same Ownership <sup>i</sup>	Related Ownership <sup>ii</sup>	Unrelated Ownership <sup>iii</sup>
SUTD Audit completed prior to October 2001	6	\$598,000	3	1	2
SUTD Audit completed after October 2001	7	\$746,000	4	2	1
Total	13	\$1,344,000	7	3	3

<sup>i</sup> SUTD permit holder is same legal entity as UST owner/registrant.

<sup>ii</sup> SUTD permit holder is a related legal entity to the UST owner/registrant. Examples are tanks owned by an individual or family trust, with the SUT permit held by a family partnership or corporation, or one or more trustees of the family trust.

<sup>iii</sup> SUTD permit holder is unrelated to the UST owner/registrant. Example is a third-party lessee who leases a service station from the property/UST owner.

**Relief from Liability for Fees, Interest, and Penalties Assessed  
Under the Underground Storage Tank Maintenance Fee Law**

In summary:

- The six audit reports completed prior to October 2001 did not have comments regarding the UST fee.
- Six of the audit reports completed after October 2001 had the UST box checked and included general comments and information regarding the UST fee.
- One of the audit reports completed after October 2001 did not include the required information.

**Analysis of Mr. Crawford's Proposal**

The Legal Department analyzed Mr. Crawford's proposal in the context of the current statutory and regulatory scheme. Regulation 4902 (Exhibit 2) is based on, among others, UST Fee Law Section 50112.5 (Exhibit 3), which allows the Board to grant relief for reliance on written advice. As summarized below, the Legal Department is of the opinion that a new policy interpretation or a regulatory change allowing relief based on the omission of a writing, would not be valid under the existing statutory language.

Although the Board has broad authority to adopt regulations, such regulations must be consistent with the terms and intent of the authorizing statute. Section 50112.5 sets out clearly defined criteria that must be met for a writing to constitute grounds for relief from liability due to reliance on written advice from the Board. Therefore, an amendment to Regulation 4902 that would permit the *omission* of a writing from an audit report to constitute written advice from the Board would not be valid.<sup>2</sup> In addition, "as a general rule . . . statutes granting exemption from taxation are strictly construed to the end that such concession will not be enlarged nor extended beyond the plain meaning of the language employed [citations omitted]."<sup>3</sup>

The language of Regulation 4902, subdivision (c), properly interprets Section 50112.5 and is clear: the audit report must contain an affirmative and specific writing, pertaining to the matter at issue, in order for it to be considered "written advice from the Board." Any writing by any Board employee, including a writing contained in audit workpapers that expressly states that the taxpayer or feepayer is in compliance in a particular tax or fee area, whether or not that tax or fee was the principal area examined by the auditor, may be determined by the Board to be "written advice from the Board" on which the taxpayer or feepayer may rely. However, where the auditor has merely checked a box indicating that an underground storage tank associated with the business exists and obtained information from the taxpayer or feepayer that will be passed on to other Board tax and fee programs, it does not appear that such "writings" could be reasonably construed to be a writing that expressly states that the taxpayer or feepayer is in compliance in a particular tax or fee area.

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<sup>2</sup> "Whenever . . . a state agency has authority to adopt regulations to . . . carry out the provisions of [a] statute, no regulation adopted is valid or effective unless consistent and not in conflict with the statute and reasonably necessary to effectuate the purpose of the statute." (Gov. Code, § 11342.2.)

<sup>3</sup> *Honeywell Information Systems, Inc. v. County of Sonoma* (1974) 44 Cal.App.3d 23, 27.

## **Alternative 1 (Staff Recommendation)**

Staff's review of Regulation 4902 concludes that the Board does not have the flexibility to grant relief from the UST fee and related interest and penalties pursuant to an audit of another tax or fee program, when the audit report is silent regarding the UST fee. Therefore, staff recommends that no legislative changes be proposed to Section 50112.5. Staff will, however, continue with their education of impacted tax and fee payers on the UST program and expand their efforts by distributing Publication 88, *Underground Storage Tank Fee*, during sales and use tax audits. Staff will also evaluate the distribution criteria for the Underground Storage Tank Maintenance Fee Program Questionnaire and consider new alternatives for tax and fee payer outreach programs.

### **Pros**

- Results in equal treatment of taxpayers and fee payers under the laws administered by the Board.
- Allows Board auditors to concentrate efforts in their program areas of expertise while proactively educating taxpayers of their responsibilities in the area of UST.
- Decreases potential for erroneous information being provided to fee payers as to the proper administration of the UST fee.

### **Cons**

- Would not allow relief for a small number of fee payers.

## **Alternative 2**

As an alternative to staff's recommendation, staff would develop proposed legislative language to amend Section 50112.5 to specifically allow for the omission of a writing to be considered reliance on written advice under specific circumstances.

### **Pros**

- Could allow relief from UST liability for a small number of fee payers depending on the effective date of the legislation.
- Avoids attempting to promulgate an amendment to Regulation 4902 that would be inconsistent with the current language of Section 50112.5.

### **Cons**

- An amendment solely to Section 50112.5 would result in unequal treatment of tax and fee payers under the laws administered by the Board.
- Board auditors are currently trained to perform audits of the programs in which they work. Depending on the legislative language adopted, all Board auditors would require training in the UST Law and potentially other tax and fee programs.
- Could result in erroneous information being provided to a fee payer as to the proper administration of the UST fee.

**Relief from Liability for Fees, Interest, and Penalties Assessed  
Under the Underground Storage Tank Maintenance Fee Law**

**Costs**

Staff's recommendation (Alternative 1) results in no additional costs or revenue impacts.

A costing has not been developed for the alternative to staff's recommendation (Alternative 2). Costs for Alternative 2 would be incurred to provide cross training to the Board's audit staff. In addition, if legislation were enacted and applied to the existing appeals case load for the UST program, the revenue loss resulting from potential granting of relief of liability would be at least \$598,000, to an amount in excess of \$1.3 million, depending on how the specific language was worded.

The revenue loss associated with expanding a legislative solution to other tax and fee programs has not been estimated; however, it could be significant.

Current as of May 15, 2007.

**Exhibits**

1. March 16, 2007 Memorandum from Mr. Roy Crawford
2. Regulation 4902
3. Section 50112.5

Heller Ehrman L.L.P.

## Memorandum

**To:** State Board of Equalization

**From:** Roy E. Crawford

**Date:** March 16, 2007

**Re:** Request for Adoption of Policy Guidance  
Reliance on SBE Audit: Underground Storage Tank Fee

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**The Problem**

For many years the State Board of Equalization ("Board") has administered the Sales & Use Tax Law on purchases and sales of gasoline and diesel by retailers. In 1989, the Legislature adopted the Underground Storage Tank Maintenance Fee Law ("UST Law") and assigned administration of the fee to the Board. Many of the administrative provisions of the Sales & Use Tax Law were duplicated in the UST Law. The Board commenced a program to inform sales and use tax permit holders of the new UST fee, generally consisting of mailings of printed notice and occasional mention in periodic Tax Information Bulletins that were enclosed with quarterly sales and use tax forms. Unfortunately, not all retailers of motor vehicle fuel got the message, and continued to file sales and use tax returns but did not pay the UST fee simply because they were unaware of it.

The Board has responded to situations where UST fee returns were not filed by issuing Notices of Determination for up to eight years for unpaid fee, penalty, and interest. The amounts involved for a small family run convenience store that sells motor vehicle fuel can be catastrophic.

**Rev. & Tax. Code 50112.5 and SBE Regulation 4902(c)**

Like the Sales & Use Tax Law, the UST law provides that a person may be relieved from the fee, penalty and interest where liability resulted from failure to file a return and the failure was due to reasonable reliance on written advice from the Board, including written advice by the Board in a prior audit where the issue in question was examined. See Regulation 4902 (a) and (c), a copy of which is attached.

## HellerEhrman LLP

Re: Request for Adoption of Policy Guidance  
Reliance on SBE Audit: Underground Storage Tank Fee  
Date: March 16, 2007  
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### Request for Policy Guidance

We urge the Board to adopt the following policy: where the Board conducts an audit of a retailer of motor vehicle fuel, and examines records of fuel introduced into underground storage tanks and the reported withdraw of the fuel, presentation of the person's books and records for examination by an auditor shall be deemed to be a written request for an audit report for purposes of Regulation 4902(c). This will apply whether the Board's audit is a sales and use tax audit, a UST fee audit, or a combined sales and use tax and UST fee audit.

### Discussion

Regulation 4902 is derived from Sales and Use Tax Regulation 1705, a copy of which is attached. Regulation 1705 was adopted by the Board to relieve taxpayers from liability where the Board audited a taxpayer, examined the facts that gave rise to a tax, but failed to assert the tax. Where a taxpayer reasonably relies upon this action by the Board, the taxpayer, in the fair administration of the tax law, may be excused from tax, penalty, and interest.

The Board administers two taxes on retailers of motor vehicle fuel, the sales and use tax and the UST fee (called a tax in Regulation 4902.) Audit of these two levies principally consists of examination of records of all fuel purchases as compared to the records of reported sales or taxable use. The examinations are essentially identical. A taxpayer, particularly a small business taxpayer, would ordinarily expect that the Board would conduct a UST audit as part of a sales and use tax audit, because it would be a waste of Board resources to conduct duplicate audits of the same information. Stated another way, if the Board, unknown to the taxpayer, chooses to organize itself in an inefficient and wasteful matter, that is not within the control of the taxpayer, and the taxpayer should not be a catastrophic victim.

This policy should apply to all taxpayers for all open tax periods. Taxpayers will have to establish entitlement to relief under Regulation 4902. For example, taxpayers with actual knowledge of the UST fee would not be entitled to relief under Regulation 4902 as a consequence of adoption of this policy guidance.

## SALES AND USE TAX REGULATIONS

2067  
2004-1**Regulation 1705. RELIEF FROM LIABILITY.***Reference:* Section 6596, Revenue and Taxation Code.

(a) **IN GENERAL.** A person may be relieved from the liability for the payment of sales and use taxes, including any penalties and interest added to those taxes, when that liability resulted from the failure to make a timely return or a payment and such failure was found by the Board to be due to reasonable reliance on:

(1) Written advice given by the Board under the conditions set forth in subdivision (b) below, or

(2) Written advice in the form of an annotation or legal ruling of counsel under the conditions set forth in subdivision (d) below; or

(3) Written advice given by the Board in a prior audit of that person under the conditions set forth in subdivision (c) below. As used in this regulation, the term "prior audit" means any audit conducted prior to the current examination where the issue in question was examined.

Written advice from the Board may only be relied upon by the person to whom it was originally issued or a legal or statutory successor to that person. Written advice from the Board which was received during a prior audit of the person under the conditions set forth in subdivision (c) below, may be relied upon by the person audited or by a legal or statutory successor to that person.

The term "written advice" includes advice that was incorrect at the time it was issued as well as advice that was correct at the time it was issued, but, subsequent to issuance, was invalidated by a change in statutory or constitutional law, by a change in Board regulations, or by a final decision of a court of competent jurisdiction. Prior written advice may not be relied upon subsequent to: (1) the effective date of a change in statutory or constitutional law and Board regulations or the date of a final decision of a court of competent jurisdiction regardless that the Board did not provide notice of such action; or (2) the person receiving a subsequent writing notifying the person that the advice was not valid at the time it was issued or was subsequently rendered invalid. As generally used in this regulation, the term "written advice" includes both written advice provided in a written communication under subdivision (b) below and written advice provided in a prior audit of the person under subdivision (c) below.

**(b) ADVICE PROVIDED IN A WRITTEN COMMUNICATION.**

(1) Advice from the Board provided to the person in a written communication must have been in response to a specific written inquiry from the person seeking relief from liability, or from his or her representative. To be considered a specific written inquiry for purposes of this regulation, representatives must identify the specific person for whom the advice is requested. Such inquiry must have set forth and fully described the facts and circumstances of the activity or transactions for which the advice was requested.

(2) A person may write to the Board and propose a use tax reporting methodology for qualified purchases subject to use tax. If the Board concludes that the reporting method reflects the person's use tax liability for the defined population,

2068  
2004-1

SALES AND USE TAX REGULATIONS

**Regulation 1705. (Contd.)**

then the Board may write to the person approving the use of the reporting method. The approval shall be subject to certain conditions. The following conditions shall be included in the approval:

- (A) The defined population of the purchases that will be included in the reporting method;
- (B) The percentage of purchases of the defined population that is subject to tax;
- (C) The length of time the writing shall remain in effect;
- (D) The definition of a significant or material change that will require rescinding the approved reporting method; and
- (E) Other conditions as required.

The written approval of the use tax reporting methodology is void and shall not be relied upon for the purposes of Revenue and Taxation Code section 6596 if the taxpayer files a claim for refund for tax that had been reported based upon this reporting method.

**(c) WRITTEN ADVICE PROVIDED IN A PRIOR AUDIT.** Presentation of the person's books and records for examination by an auditor shall be deemed to be a written request for the audit report. If a prior audit report of the person requesting relief contains written evidence which demonstrates that the issue in question was examined, either in a sample or census (actual) review, such evidence will be considered "written advice from the Board" for purposes of this regulation. A census (actual) review, as opposed to a sample review, involves examination of 100% of the person's transactions pertaining to the issue in question. For written advice contained in a prior audit of the person to apply to the person's activity or transaction in question, the facts and conditions relating to the activity or transaction must not have changed from those which occurred during the period of operation in the prior audit. Audit comments, schedules, and other writings prepared by the Board that become part of the audit work papers which reflect that the activity or transaction in question was properly reported and no amount was due are sufficient for a finding for relief from liability, unless it can be shown that the person seeking relief knew such advice was erroneous.

**(d) ANNOTATIONS AND LEGAL RULINGS OF COUNSEL.** Advice from the Board provided to the person in the form of an annotation or legal ruling of counsel shall constitute written advice only if:

- (1) The underlying legal ruling of counsel involving the fact pattern at issue is addressed to the person or to his or her representative under the conditions set forth in subdivision (b) above; or
- (2) The annotation or legal ruling of counsel is provided to the person or his or her representative by the Board within the body of a written communication and involves the same fact pattern as that presented in the subject annotation or legal ruling of counsel.

**(e) TRADE OR INDUSTRY ASSOCIATIONS.** A trade or industry association requesting advice on behalf of its member(s) must identify and include the specific member name(s) for whom the advice is requested for relief from liability under this regulation.

9686 SPECIAL TAXES ADMINISTRATION—MISCELLANEOUS  
2004—1

**Regulation 4902. RELIEF FROM LIABILITY.**

*Reference:* Sections 7657.1, 8879, 30284, 32257, 40104, 41098, 43159, 45157, 46158, 50112.5, 55045, and 60210, Revenue and Taxation Code.

(a) **GENERAL.** A person may be relieved from the liability for the payment of tax, defined in section 4901(a)(7), imposed pursuant to applicable tax laws, defined in section 4901(a)(1), including any penalties and interest added to the tax, when that liability resulted from the failure to make a timely return or a payment and such failure was found by the board to be due to reasonable reliance on:

(1) Written advice given by the board under the conditions set forth in subdivision (b) below, or

(2) Written advice in the form of an annotation or legal ruling of counsel under the conditions set forth in subdivision (d) below; or

(3) Written advice given by the board in a prior audit of that person under the conditions set forth in subdivision (c) below. As used in this regulation, the term "prior audit" means any audit conducted prior to the current examination where the issue in question was examined.

Written advice from the board may only be relied upon by the person to whom it was originally issued or a legal or statutory successor to that person. Written advice from the board which was received during a prior audit of the person under the conditions set forth in subdivision (c) below, may be relied upon by the person audited or by a legal or statutory successor to that person.

The term "written advice" includes advice that was incorrect at the time it was issued as well as advice that was correct at the time it was issued, but, subsequent to issuance, was invalidated by a change in statutory or constitutional law, by a change in board regulations, or by a final decision of a court of competent jurisdiction. Prior written advice may not be relied upon subsequent to: (1) the effective date of a change in statutory or constitutional law and board regulations or the date of a final decision of a court of competent jurisdiction regardless that the board did not provide notice of such action; or (2) the person receiving a subsequent writing notifying the person that the advice was not valid at the time it was issued or was subsequently rendered invalid. As generally used in this regulation, the term "written advice" includes both written advice provided in a written communication under subdivision (b) below and written advice provided in a prior audit of the person under subdivision (c) below.

(b) **ADVICE PROVIDED IN A WRITTEN COMMUNICATION.** Advice from the board provided to the person in a written communication must have been in response to a specific written inquiry from the person seeking relief from liability, or from his or her representative. To be considered a specific written inquiry for purposes of this regulation, representatives must identify the specific person for whom the advice is requested. Such inquiry must have set forth and fully described the facts and circumstances of the activity or transactions for which the advice was requested.

## SPECIAL TAXES ADMINISTRATION—MISCELLANEOUS

9687  
2004-1**Regulation 4902. (Contd.)**

(c) **WRITTEN ADVICE PROVIDED IN A PRIOR AUDIT.** Presentation of the person's books and records for examination by an auditor shall be deemed to be a written request for the audit report. If a prior audit report of the person requesting relief contains written evidence which demonstrates that the issue in question was examined, either in a sample or census (actual) review, such evidence will be considered "written advice from the board" for purposes of this regulation. A census, (actual) review, as opposed to a sample review, involves examination of 100% of the person's transactions pertaining to the issue in question. For written advice contained in a prior audit of the person to apply to the person's activity or transaction in question, the facts and conditions relating to the activity or transaction must not have changed from those which occurred during the period of operation in the prior audit. Audit comments, schedules, and other writings prepared by the board that become part of the audit work papers which reflect that the activity or transaction in question was properly reported and no amount was due are sufficient for a finding for relief from liability, unless it can be shown that the person seeking relief knew such advice was erroneous.

(d) **ANNOTATIONS AND LEGAL RULINGS OF COUNSEL.** Advice from the board provided to the person in the form of an annotation or legal ruling of counsel shall constitute written advice only if:

(1) The underlying legal ruling of counsel involving the fact pattern at issue is addressed to the person or to his or her representative under the conditions set forth in subdivision (b) above.

(2) The annotation or legal ruling of counsel is provided to the person or his or her representative by the board within the body of a written communication and involves the same fact pattern as that presented in the subject annotation or legal ruling of counsel.

(e) **TRADE OR INDUSTRY ASSOCIATIONS.** A trade or industry association requesting advice on behalf of its member(s) must identify and include the specific member name(s) for whom the advice is requested for relief from liability under this regulation.

*History:* Adopted February 5, 2003, effective May 28, 2003. The underscored citation indicates an electronic hyperlink to the cite.

State of California  
BOARD OF EQUALIZATION

SPECIAL TAXES ADMINISTRATION—MISCELLANEOUS REGULATIONS

**Regulation 4902. RELIEF FROM LIABILITY.**

*Reference:* Sections 7657.1, 8879, 30284, 32257, 40104, 41098, 43159, 45157, 46158, 50112.5, 55045, and 60210, Revenue and Taxation Code.

(a) **GENERAL.** A person may be relieved from the liability for the payment of tax, defined in section 4901(a)(7), imposed pursuant to applicable tax laws, defined in section 4901(a)(1), including any penalties and interest added to the tax, when that liability resulted from the failure to make a timely return or a payment and such failure was found by the board to be due to reasonable reliance on:

(1) Written advice given by the board under the conditions set forth in subdivision (b) below, or

(2) Written advice in the form of an annotation or legal ruling of counsel under the conditions set forth in subdivision (d) below; or

(3) Written advice given by the board in a prior audit of that person under the conditions set forth in subdivision (c) below. As used in this regulation, the term "prior audit" means any audit conducted prior to the current examination where the issue in question was examined.

Written advice from the board may only be relied upon by the person to whom it was originally issued or a legal or statutory successor to that person. Written advice from the board which was received during a prior audit of the person under the conditions set forth in subdivision (c) below, may be relied upon by the person audited or by a legal or statutory successor to that person.

The term "written advice" includes advice that was incorrect at the time it was issued as well as advice that was correct at the time it was issued, but, subsequent to issuance, was invalidated by a change in statutory or constitutional law, by a change in board regulations, or by a final decision of a court of competent jurisdiction. Prior written advice may not be relied upon subsequent to: (1) the effective date of a change in statutory or constitutional law and board regulations or the date of a final decision of a court of competent jurisdiction regardless that the board did not provide notice of such action; or (2) the person receiving a subsequent writing notifying the person that the advice was not valid at the time it was issued or was subsequently rendered invalid. As generally used in this regulation, the term "written advice" includes both written advice provided in a written communication under subdivision (b) below and written advice provided in a prior audit of the person under subdivision (c) below.

(b) **ADVICE PROVIDED IN A WRITTEN COMMUNICATION.** Advice from the board provided to the person in a written communication must have been in response to a specific written inquiry from the person seeking relief from liability, or from his or her representative. To be considered a specific written inquiry for purposes of this regulation, representatives must identify the specific person for whom the advice is requested. Such inquiry must have set forth and fully described the facts and circumstances of the activity or transactions for which the advice was requested.

(c) **WRITTEN ADVICE PROVIDED IN A PRIOR AUDIT.** Presentation of the person's books and records for examination by an auditor shall be deemed to be a written request for the audit report. If a prior audit report of the person requesting relief contains written evidence which demonstrates that the issue in question was examined, either in a sample or census (actual) review, such evidence will be considered "written advice from the board" for purposes of this regulation. A census, (actual) review, as opposed to a sample review, involves examination of 100% of the person's transactions pertaining to the issue in question. For written advice contained in a prior audit of the person to apply to the person's activity or transaction in question, the facts and conditions relating to the activity or transaction must not have changed from those which occurred during the period of operation in the prior audit. Audit comments, schedules, and other writings prepared by the board that become part of the audit work papers which reflect that the activity or transaction in question was properly reported and no amount was due are sufficient for a finding for relief from liability, unless it can be shown that the person seeking relief knew such advice was erroneous.

**Regulation 4902. (Continued)**

**(d) ANNOTATIONS AND LEGAL RULINGS OF COUNSEL.** Advice from the board provided to the person in the form of an annotation or legal ruling of counsel shall constitute written advice only if:

(1) The underlying legal ruling of counsel involving the fact pattern at issue is addressed to the person or to his or her representative under the conditions set forth in subdivision (b) above.

(2) The annotation or legal ruling of counsel is provided to the person or his or her representative by the board within the body of a written communication and involves the same fact pattern as that presented in the subject annotation or legal ruling of counsel.

**(e) TRADE OR INDUSTRY ASSOCIATIONS.** A trade or industry association requesting advice on behalf of its member(s) must identify and include the specific member name(s) for whom the advice is requested for relief from liability under this regulation.

*History:* Adopted February 5, 2003, effective May 28, 2003. The underscored citation indicates an electronic hyperlink to the cite.

## **Underground Storage Tank Maintenance Fee Law**

### **Section 50112.5. Reasonable reliance on written advice: relief of tax, penalty, and interest.**

(a) If the board finds that a person's failure to make a timely report or payment is due to the person's reasonable reliance on written advice from the board, the person may be relieved of the fees imposed or administered under this part and any penalty or interest added thereto.

(b) For purposes of this section, a person's failure to make a timely report or payment shall be considered to be due to reasonable reliance on written advice from the board, only if the board finds that all of the following conditions are satisfied:

(1) The person requested in writing that the board advise him or her whether a particular activity or transaction is subject to the fee under this part. The specific facts and circumstances of the activity or transaction shall be fully described in the request.

(2) The board responded in writing to the person regarding the written request for advice, stating whether or not the described activity or transaction is subject to the fee, or stating the conditions under which the activity or transaction is subject to the fee.

(3) The liability for fees applied to a particular activity or transaction which occurred before either of the following:

(A) Before the board rescinded or modified the advice so given, by sending written notice to the person of the rescinded or modified advice.

(B) Before a change in statutory or constitutional law, a change in the board's regulations, or a final decision of a court, which renders the board's earlier written advice no longer valid.

(c) Any person seeking relief under this section shall file with the board all of the following:

(1) A copy of the person's written request to the board and a copy of the board's written advice.

(2) A statement under penalty of perjury setting forth the facts on which the claim for relief is based.

(3) Any other information which the board may require.

(d) Only the person making the written request shall be entitled to rely on the board's written advice to that person.