



STATE BOARD OF EQUALIZATION

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July 7, 2015

Mr. William Davenport Lewis  
Lewis & Associates Law Firm  
338 S. Fremont, Ste. 324  
San Mateo, CA 94401

Dear Mr. Lewis:

Thank you for participating in the May 22, 2014 Board of Equalization (BOE) Taxpayers' Bill of Rights Hearings, held in Sacramento. I appreciate you taking the time to express concerns and make suggestions in your e-mail message of May 15, 2014. In your message, a copy of which was provided to the Board Members and appropriate BOE management on May 16, 2014, you provided suggestions for changes to the BOE's Compliance Policy and Procedures Manual (CPPM) and an idea for amending Revenue and Taxation Code (RTC) section 7094.1 in the Sales and Use Tax Law and its counterparts in other laws administered by the BOE.

Specifically, your suggestions included:

1. Revising CPPM 753.257, *Release After Levy*, to stress that seized property must be refunded upon the taxpayer entering into an installment payment agreement.
2. Revising CPPM 770.020, *Accepting an Installment Payment Proposal*, to stress that all installment payment terms must be in writing.
3. Amending RTC section 7094.1, *Return of Property*, and its counterparts to reference RTC sections 6536-6539 to help define "jeopardy."

Thank you for your patience while the Taxpayers' Rights Advocate (TRA) Office worked with the appropriate areas of the BOE to analyze your suggestions. Following are summaries of our findings on these matters.

***CPPM 753.257, Release After Levy***

You explained your suggestion as follows:

When taxpayers are entering installment payment agreements following a BOE levy and seizure of funds from bank accounts, the BOE is not always returning the seized funds back to the taxpayer in accordance with the law. If a taxpayer is in a position to enter into a[n] installment payment agreement, then they often need the seized funds returned immediately in order to pay rent, meet payroll, and purchase inventory, among other necessary production of income expenses, as well as other necessary and conditional expenses. . . .

The statutory language of section 7094.1 is very clear that the BOE must return levied property to the taxpayer in the event that the taxpayer enters into an installment payment agreement, unless the collection of tax is in jeopardy or the agreement provides for the levy. I believe that CCPM [*sic*] section 753.257 could be easily amended to more forcefully state that the seized property, including bank accounts, money, etc., must be returned immediately.

RTC section 7094.1 in the Harris-Katz Taxpayers' Bill of Rights (Sales and Use Tax Law, Chapter 8, Article 3) provides:

**7094.1** (a) Except in any case where the board finds collection of the tax to be in jeopardy, if any property has been levied upon, the property or the proceeds from the sale of the property shall be returned to the taxpayer if the board determines any one of the following:

- (1) The levy on the property was not in accordance with the law.
  - (2) The taxpayer has entered into and is in compliance with an installment payment agreement pursuant to Section 6832 to satisfy the tax liability for which the levy was imposed, unless that or another agreement allows for the levy.
  - (3) The return of the property will facilitate the collection of the tax liability or will be in the best interest of the state and the taxpayer.
- (b) Property returned under paragraphs (1) and (2) of subdivision (a) is subject to the provisions of Section 7096.

I am not in agreement with your interpretation of subsection (a)(2) of RTC section 7094.1. You believe that the BOE must refund levy proceeds if the taxpayer enters into and is in compliance with an installment payment agreement *subsequent* to the date the BOE served the levy. However, the statute provides that the BOE must return levied property or its proceeds if the taxpayer had *already* entered into an installment payment agreement *prior* to the date that the levy was served and is in compliance with the agreement at the time of the levy service. Two aspects of the wording of RTC section 7094.1 lead me to this conclusion:

1. The taxpayer must be in compliance with the agreement; the taxpayer could not be in compliance with an agreement that is not yet in existence at the time of the levy.
2. Subsection (a)(2), along with subsection (a)(1), is subject to the provisions of RTC section 7096, which provides for the reimbursement of bank fees incurred as a result of an *erroneous levy* or notice to withhold, erroneous processing action, or erroneous collection action by the BOE. The BOE error described by RTC section 7094.1 (a)(2) is the issuance of a levy when the taxpayer has already entered into, and is in compliance with, an existing installment payment agreement.

I note that CPPM section 753.257 directs BOE staff to release the Notice of Levy once the liability has been paid in full or an acceptable payment plan is approved. It does not direct the return of the property seized as a result of the Notice of Levy. For this reason, it has no bearing as to the determination of whether property subject to the Notice of Levy should be returned under RTC section 7094.1.

Therefore, my office does not concur with your suggestion to revise CPPM section 753.257 to state that the seized property, including bank accounts, money, etc., must be returned immediately in the event that the taxpayer enters into an installment payment agreement.

### ***CPPM 770.020, Accepting an Installment Payment Proposal***

You stated:

Installment payment agreements and all of their terms are required to be in writing. (R&T Code, s. 6832(a); Civ. Code s. 1622.) It is my experience that sometimes the BOE is not allowing taxpayers to enter into installment payment agreements unless they agree to forfeit a portion of the levied property. It is also my experience that the BOE is not reducing those terms of the agreement to writing in form BOE-407 in violation of R&T Code section 6832(a) and Civil Code section 1622. I believe that section 777.020 *[sic]* of the CCPM *[sic]* could be easily amended to remind BOE employees that *all* terms of an installment payment plan must be reduced to writing.

I agree with you that, to avoid misunderstandings, collection staff should document all terms of installment payment agreements in writing whenever a BOE-407, *Installment Payment*

*Agreement*, is prepared. The Sales and Use Tax Department is currently in the process of revising CPPM section 770.000, including subsection 770.020. My staff has asked that the Compliance Manual Coordinator consider incorporating unambiguous instructions to staff to document all terms of the agreement whenever they prepare a BOE-407, in conjunction with the revisions being planned for this subsection.<sup>1</sup>

The BOE's business taxes audit and compliance manuals are available to the public and can be accessed from the BOE website at [www.boe.ca.gov/sutax/staxmanuals.htm](http://www.boe.ca.gov/sutax/staxmanuals.htm). After all proposed revisions to CPPM section 770.000 have been approved by the Deputy Director, Sales and Use Tax Department, the draft will be placed on the BOE website at the above location for the convenience of interested parties who may wish to submit comments or suggestions. Instructions for submitting comments or suggestions on the proposed revisions will be available by selecting "Pending Revisions" under the CPPM Chapter 7 listing.

### ***RTC section 7094.1, Return of Property***

You explained your suggestion as follows:

It is my experience that when property seized pursuant to levy is not returned immediately following the taxpayer entering into an installment payment agreement that does not contain any terms allowing the levy, that BOE employees are justifying not returning the funds by simply stating for the first time that collection of the tax was in jeopardy so they did not have to return the funds. Section 7094.1(a) and its counterparts, state in relevant part: "Except in any case where the board finds collection of the tax to be in jeopardy." There is no corresponding definition in the R&T Code or in the CCPM [*sic*], or in any other guidance what "jeopardy" for purposes of section 7094.1 means. Other R&T Code sections refer specifically to the jeopardy statutes; for example, section 7097(b) refers to code sections 6536-6539. The guidance that the CCPM [*sic*] gives to BOE employees in section 764.020 on making a jeopardy determination reads as if it would be very applicable to deciding whether to release property under Code section 7094.1. In order to decrease statute ambiguity, and to better protect the rights of taxpayers, I think that R&T Code section 7094.1(a) and its counterparts could be amended to read:

Except in any case where the board finds collection of the tax to be in jeopardy *as determined under Article 4 (commencing with Section 6536) of Chapter 5*, if any property has been . . .

I appreciate your thoughts on amending RTC section 7094.1 in the Sales and Use Tax Law to increase clarity by defining the term "jeopardy." Your suggestion also includes amendments to the counterparts of RTC section 7094.1 in the special taxes laws administered by the BOE: RTC sections 9272.1, 32472.1, 40212.5, 41172.5, 43523.5, 45868.5, 46623.5, 50156.17, 55333.5, and 60632.1.<sup>2</sup> As you probably know, the Board regularly provides proposals to the California Legislature for statutory amendments to laws administered by the BOE, and often the proposals are for the purpose of enhancing clarity or resolving ambiguity.

You are suggesting that the use of the term "jeopardy" in RTC section 7094.1, in the context of the collection of tax, be defined by reference to RTC sections 6536-6539 (Sales and Use Tax Law; Chapter 5, *Determinations*, Article 4, *Jeopardy Determinations*), in a manner similar to

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<sup>1</sup> Revisions to CPPM section 770.000 will contain new procedures and terminology to reflect the recent initiation of an online service enabling taxpayers to make payment plan requests online via the BOE website. When a payment plan is requested online and meets certain criteria, it may be approved automatically without any action by staff and the taxpayer is notified immediately, followed by an automated confirmation of the payment terms. If the taxpayer submits a payment plan proposal to collection staff rather than online, the collector is required to complete a BOE-407 and provide it to the taxpayer.

<sup>2</sup> Two property tax laws administered by the BOE also include counterparts of RTC section 7094.1: the Private Railroad Car Tax (RTC section 11254) and the Timber Yield Tax (RTC section 38505).

subsection (b) of RTC section 7097. RTC section 7097 requires issuing a preliminary notice to taxpayers prior to lien, and subsection (b) provides an exception to the requirement to provide the preliminary notice:

**7097(b).** The preliminary notice provided by this section shall not apply to *jeopardy determinations* issued under Article 4 (commencing with Section 6536) of Chapter 5. [Emphasis added.]

As my staff and I analyzed your suggestion, it became clear that defining the term “jeopardy” in section RTC 7094.1 by referencing the jeopardy determination statutes would not be helpful. In the first place, nowhere in RTC sections 6536-6539 is “jeopardy” defined. I also note that the reference in RTC section 7097(b) to Article 4 statutes is for the purpose of providing that no preliminary notice shall apply to “jeopardy determinations” issued under Article 4, not for the purpose of defining “jeopardy.” Referencing the *jeopardy determination* statutes within RTC section 7094.1 would not add clarity; it would give the false impression that BOE staff could only find collection of tax to be in jeopardy if a jeopardy determination had been issued.

I hope you find this information helpful. Please let me know if you have any additional questions or suggestions regarding these matters. Thank you again for sharing your suggestions regarding BOE policy and California statutory language.

Sincerely,

Todd C. Gilman, Chief  
Taxpayers’ Rights and Equal Employment  
Opportunity Division

TCG: ls

Lewis response 070715.docx

cc: Honorable Jerome E. Horton, Chairman  
Senator George Runner (Ret.), Vice Chair  
Honorable Fiona Ma, CPA, Member, Second District  
Honorable Diane L. Harkey, Member, Fourth District  
Honorable Betty T. Yee, State Controller  
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