

## **170.0000 COLLECTION OF TAX BY BOARD**

*See also Successor's Liability.*

### **(a) IN GENERAL**

**170.0000.400 Amounts Under Petition.** A notice of determination was issued against a taxpayer and the taxpayer filed a timely petition for redetermination. Later, the taxpayer filed Chapter 7 bankruptcy. Under 11 U.S.C sections 507(a)(7)(ii), 523(a)(1)(A), taxes measured by gross receipts that are “assessed” within 240 days of filing bankruptcy are nondischargeable. In California for purposes of section 507(a)(7)(A)(ii), a tax is “assessed” when it becomes “final.” Since taxpayer’s liability has not become final and, thus, has not been assessed for purposes of the federal bankruptcy action, it has not been discharged in the Chapter 7 bankruptcy action. 4/7/97.

**170.0000.500 Bankruptcy Action—Accrued Interest.** Although the Board is prevented from collecting any outstanding tax due from the debtor while a bankruptcy automatic stay is in effect, interest on the unpaid tax due continues to accrue during this period. 5/29/97.

**170.0001 Bankruptcy Effect on Ten-Year State Tax Lien.** The amount of any unpaid or underpaid tax, which has become due and payable as that term is defined in section 6757, becomes a perfected and enforceable state tax lien on the date it becomes due and payable. The lien remains in effect for ten years. Unless a Notice of State Lien is filed or recorded during that ten-year period, the Board loses its power to collect the tax upon expiration of the ten-year period. If the taxpayer declares bankruptcy during the period, time continues to run for expiration of the lien. If the ten year period has not expired when the taxpayer emerges from bankruptcy, the Board has the remainder of the period, or a 30-day period, whichever is longer, to file a Notice of State Tax Lien. If the ten year period has expired, the Board still has a 30-day period within which to file the Notice. 12/21/94.

**170.0001.150 Bankruptcy Automatic Stay.** A Notice of Determination was issued to a taxpayer (corporation) on February 14, 1991, with a timely petition for redetermination filed by the taxpayer for the periods covered by the Notice. On December 28, 1994, the taxpayer filed Chapter 11 bankruptcy. The taxpayer’s Third Plan of Liquidation was ordered confirmed by the bankruptcy court on February 16, 1996, with the order entered on February 20, 1996. The Third Amended Plan of Liquidation provides, in part:

“Upon confirmation of the Plan the automatic stay is lifted as to property of the estate. However, the stay continues to prohibit collection or enforcement of pre-petition claims against the debtor or the debtor’s property until the debtor receives a discharge, if any. Here, because the debtor is a corporation it does not seek and is not entitled to receive a discharge pursuant to section 1141(a). Therefore, a discharge of the debtor will be deemed denied, and the stay as to the debtor and the debtor’s property will terminate upon entry of the order conforming the plan.”

In this case the bankruptcy automatic stay was lifted on February 20, 1996, the date that the order confirming the Third Amended Plan of Liquidation was entered. At that time, the petition case could proceed and be scheduled for a hearing before the Board. 8/01/96.

170.0001.151 **Bankruptcy Automatic Stay.** In 1991, a person sold an aircraft to Corporation A. On June 30, 1995, the Board mailed a tax return to the Corporation A, but it was never filed. On October 31, 1995, Corporation B filed Chapter 11 bankruptcy. On November 22, 1995, the Board issued a Notice of Determination to Corporation A. On February 20, 1996, the Board requested that liens be filed in San Diego County and with the FAA. On April 22, 1996, an attorney for Corporation B's bankruptcy trustee advised the Board that Corporation B was the true owner of the aircraft and that Corporation A does not exist. On May 8, 1996, the FAA recorded the Board's lien against the aircraft. On June 8, 1996, the bankruptcy court found that Corporation A is an unfiled d.b.a. of Corporation B, that the aircraft, although FAA-registered in the name of Corporation A, was in fact property of Corporation B, and that upon commencement of Corporation A's bankruptcy case, the aircraft became property of the debtor's bankruptcy estate. The bankruptcy court authorized the trustee to sell the aircraft and authorized the payment of the Board's lien on the aircraft "with a full reservation of rights for refund of amounts paid." On or about June 14, 1996, the payment of the tax liability was made. The bankruptcy trustee filed a claim for refund on two grounds: (1) Corporation B purchased the aircraft for resale and (2) the lien that the Board filed violated the bankruptcy automatic stay.

When the Board requested that a lien be recorded with the FAA, the automatic stay was in effect. The bankruptcy court has found that at the time that Corporation B filed bankruptcy, the aircraft became the property of the bankruptcy estate. Therefore, the filing of the FAA lien by the Board violated the bankruptcy automatic stay even though the Board had no opportunity to discover that the true owner of the aircraft had filed for bankruptcy protection.

The bankruptcy trustee paid the tax due on the aircraft so that the lien on the aircraft would be released and the aircraft could be sold to a third party. Section 6901 provides that a refund be granted for any amount "illegally collected." Thus, the Board should grant the refund on that basis. Also, it should issue a Notice of Determination to Corporation B for the tax, interest, and penalty due on its purchase of the aircraft and file a proof of claim for that amount in the bankruptcy proceeding. 10/31/96.

170.0002 **Bankruptcy by One Partner.** A true partnership consists of two or more persons who join to engage in the business of the partnership. All the property of the partnership is held in the name of the partnership. The partnership has an existence separate from that of the partners. If the Board issued a permit to a partnership, the filing of bankruptcy by a partner will not affect the regulation of the partnership. There is no "automatic stay" on the partnership property. As such, the partnership property may be levied upon for the partnership's tax liability. In addition, the Board can file a claim in the bankruptcy proceeding of a partner, for the full amount of the partnership's debt. 10/16/92. (Am. M99-1).

**170.0002.050 Bankruptcy—Liability of Partnership and Individual Partners.** When the Board issues a permit to a partnership, it establishes only one account for the partnership, although both the partnership and the individual partners may become liable for the taxes due from the partnership's business. If the Board is unable to collect a tax liability from the partnership, it may attempt to collect the liability from the individual partners. There are situations when the Board has issued a Notice of Determination to a partnership while the partnership was protected by the bankruptcy "automatic stay." In those cases, the partnership entity should be considered to have no further liability and the Board should consider only the individual partners to be subsequently liable for the determined liability on the account. 4/7/98; 5/13/98. (M99-2).

**170.0002.075 Bankruptcy—Pre-Petition Lien.** Generally, a self-assessed tax liability will be "dischargeable" in a taxpayer's bankruptcy if it had been "due and payable" more than three years prior to the filing of the taxpayer's bankruptcy petition. (11 U.S.C. sections 523(a)(1)(A); 507(a)(8)(A).) However, even if a tax liability becomes dischargeable, a tax lien filed pre-petition survives a taxpayer's discharge if the lien attaches pre-petition to the property owned by the taxpayer. (*In re Carlson* 292 F.Supp. 778 (1968).)

Also, if a tax liability has been discharged in a taxpayer's bankruptcy proceeding, the Board may extend a pre-petition lien pursuant to Government Code section 7172(c) only if (1) the original lien attached pre-petition to property owned by the taxpayer, (2) the taxpayer continues to own the pre-petition property at the time that the lien is to be extended, and (3) the extension of the lien is restricted to the pre-petition property owned by the taxpayer. A pre-petition lien does not attach to after-acquired property when the taxpayer has received a discharge of the tax liability. (*California State Board of Equalization v. Carlson* (1970) 423 F.2d 715). 8/29/95.

**170.0002.500 Cancellation of Determination—Refund of Payments.** On June 25, 1987 taxpayer filed a Chapter 11 bankruptcy. The Board issued a Notice of Determination on November 24, 1987 based on a deficiency disclosed by audit for the period January 1, 1984 to June 24, 1987. The taxpayer received a bankruptcy discharge on September 6, 1991. The Board received bankruptcy distribution and payments made by the taxpayer over the past three years.

The Notice of Determination was issued during a period when the bankruptcy "automatic stay" was in effect and, therefore, should be canceled pursuant to section 6981. However, with respect to payments made, the taxpayer is only entitled to file a claim for refund for any payments made within the period specified in section 6902. In this case, payments made within the previous six-month period may be refunded if a timely claim for such amounts is filed. 6/12/96.

**170.0002.750 Collection Activities Against Indian Tribes.** Indian tribes enjoy sovereign immunity from unconsented suits. While a withhold order issued under section 6702 is not technically a lawsuit, the fact that it levies or attaches property of the tribe would make it unenforceable as a violation of the tribes' sovereign immunity. A state may employ, however, indirect means to enforce its rights,

such as seizing untaxed merchandise off the reservation (assuming title has not yet passed to the tribe), attempting to assess wholesalers to the tribe, or perhaps, bringing a suit against individual officers or agents of the tribe.

These restrictions apply only in the cases of tribes or tribal-owned corporations. Withholds and levies may be employed by the Board against individual Indians, as they have no immunity, and if a corporation has some ownership by non-Indian individuals, based on the facts in each case, it may be possible to proceed against the corporation. 8/22/96.

**170.0003 Collection of Tax by Board.** A creditor of the taxpayer has executed a security agreement granting an interest in the taxpayer's assets, including inventory and the proceeds from the sale of that inventory and has perfected its interest pursuant to the California Commercial Code, section 9403 before the Board issued a lien. Any amount received by the Board resulting from a levy on the taxpayer's bank was improperly taken and was subject to refund, to the extent that the amounts could be shown to be proceeds from the sale of inventory subject to the perfected security interest. 8/2/94.

**170.0004 Conditional Endorsements on checks.** Conditional endorsements on checks from taxpayers, to the effect that by cashing the check the Board is agreeing to accept the amount of the check as payment for the liability in full, do not bind the Board to accept the amount of the check as full payment of the liability. The Board collects taxes under the sovereign power of the state and is not subject to defenses based on the law of contract. A tax liability may be settled only pursuant to statutory authority. 1/25/94.

**170.0005 Conditional Endorsements on Payment Checks.** A check is received by the Board from a taxpayer which has a conditional endorsement on the back and /or is accompanied by correspondence stating the check is tendered in full satisfaction of the tax obligation and the taxpayer considers the cashing of the check to be a settlement of the dispute. The amount of the check is less than the amount owed by the taxpayer and the taxpayer's compromised offer under sections 7093 and 7393.5 had not been accepted by the Board.

Under California law, the acceptance of a check made out for an amount less than that which is owed and which is endorsed as being for payment in full discharges the maker's liability only when there is accord and satisfaction. (Civil Code section 1521, 1523.) Accord is an agreement by a creditor to accept less than what is owed and a satisfaction is the payment of the lesser amount. Accord and satisfaction is a remedy to extinguish an obligation based on contract. *Sierra etc. P. Co. v. Universal Elect. Eng. Co.* ((1925) 197 Cal. 376,387 [241P. 76].) In this situation, accord was not present. In any event, the states power to tax is derived from its sovereign authority, not from agreement with the taxpayer. Thus, collection of a tax obligation is not subject to a defense based on the law of contracts.

Accordingly, such remedies as a taxpayer may have must be found in statutes. The Legislature provided for settlement of sales and use tax dispute in sections 7093 and 7093.5. These statutes do not permit settlement by conditional

endorsement on a check. Therefore, such attempts to settle a sales tax case is invalid as not being authorized by statute. 1/25/94.

**170.0006 Continuing Levy.** The Sales and Use Tax Law authorizes the Board to issue levies which continue in force for a period of time. However, for bank deposit accounts, a continuing levy applies only to funds on deposit at the same time that the bank receives the notice of levy. 12/27/85.

**170.0006.100 Corporation Chapter 7 No-Asset Bankruptcy.** A corporation filed Chapter 11 bankruptcy that was converted to a no-asset Chapter 7 bankruptcy case. 11 U.S.C. section 727(a) provides that the bankruptcy court shall grant the debtor a discharge unless the debtor is not an individual. A corporation cannot discharge its sales tax liability in a Chapter 7 no-asset case. The Board should proceed with normal collection and petition procedures after the automatic stay is lifted. 8/18/97. (M98-3).

**170.0006.250 Court Order for Restitution for Corporate Tax Liability.** A corporation's tax liability is not affected by the prosecution of its officers or shareholders for criminal violation of the Revenue and Taxation Code. The Board may continue the administrative review of the determinations issued against a corporation while criminal proceedings are pending against the corporation or its officers or shareholders. If any tax liability is final, the Board may collect that liability while criminal charges are proceeding against a corporation or its officers or shareholders.

If a corporation or its officers or shareholders have been convicted of a criminal offense and have been ordered to pay restitution, the restitution order is a court order directed to the convicted person or entity requiring the payment of restitution as a condition of probation in the criminal case. The restitution order has no effect on the liability imposed pursuant to the civil tax provisions of the Revenue and Taxation Code. The Board may continue to collect the full amount of the tax liability imposed on the taxpayer.

In a situation where a corporate officer or shareholder was ordered to pay a portion of the corporate liability, any payment received from the corporate officer or shareholder pursuant to the restitution order should be applied to the corporate tax liability for that period. The Board may continue any collection action against the corporation during the period that the corporate officer or shareholder is ordered to make the restitution payments. If the corporate officer or shareholder fails to make the restitution payments ordered, the sole remedy against the corporate officer or shareholder is through the criminal court system since under these facts the corporate officer or shareholder had not incurred personal civil tax liability under the Revenue and Taxation Code or the Board's interpretation thereof. 10/31/96.

**170.0007 Discharge in Bankruptcy.** A taxpayer filed Chapter 7 Bankruptcy and was discharged of all dischargeable debts at that time. The taxpayer did not include the Board in the schedule of creditors and the Board did not receive notice of the bankruptcy case. Under these circumstances, the pre-petition liability is not subject to discharge. 10/21/93.

**170.0007.001 Discharge in Bankruptcy.** A taxpayer purchased a vessel in either June or July 1986 and a Sales and Use Tax return was not mailed to the taxpayer. Therefore, the use tax was due on or before the last day of the twelfth month following the month during which the vessel was purchased, either June 30 or July 31, 1987, depending on the month of purchase. The taxpayer filed for bankruptcy on November 4, 1991, and was subsequently discharged in bankruptcy on January 30, 1995.

Since the taxpayer did not file a return prior to his bankruptcy filing date of November 4, 1991, this use tax liability cannot be discharged pursuant to U.S.C. section 507(a)(7)(E) because of the exception to that discharge provided by 11 U.S.C. section 523(a)(1)(B)(i). Any post-petition return filed would have constituted a post-petition liability similarly excepted from discharge in a Chapter 7 bankruptcy.

Also, the taxpayer did not list or schedule the Board as a creditor in his bankruptcy petition. The failure of the taxpayer to list or schedule the Board as a creditor in his bankruptcy petition also excepts the liability from discharge pursuant to 11 U.S.C. section 523(a)(3). Therefore, the Board may issue a Notice of Determination against the taxpayer for the use tax on the purchase price of the vessel. 7/31/95.

**170.0007.002 Discharge in Bankruptcy.** Taxpayer filed a Chapter 7 “no asset” bankruptcy action on November 17, 1993 and was subsequently discharged on March 23, 1995. The taxpayer was issued a Notice of Successor Liability on January 27, 1995 as a result of the taxpayer’s purchase of assets from a corporation, the predecessor to the taxpayer, pursuant to an agreement dated August 28, 1992.

Even though the tax was not assessed against the taxpayer prior to the filing of his bankruptcy petition, liability is still entitled to priority since the “transaction” (i.e., the purchase of the corporate assets) had not occurred more than three years before the taxpayer filed his bankruptcy petition. (11 U.S.C. sections 507(a)(8)(E) and 523(a)(1)(A)). Therefore, the filing of the bankruptcy petition and subsequent discharge did not discharge the taxpayer’s successor liability whether or not a claim for such tax was filed or allowed. 8/01/96.

**170.0007.003 Discharge in Bankruptcy.** On December 7, 1993, a Jeopardy Notice of Determination was issued against the taxpayer (a corporation) for the period July 1, 1990 to September 30, 1993. The taxpayer filed a timely petition for redetermination and posted security equal to the determined liability. A protective claim for refund was later filed by the taxpayer in the amount of the security posted. On January 10, 1994, the taxpayer filed Chapter 11 bankruptcy. The taxpayer’s plan of reorganization was confirmed by order of the bankruptcy court on December 28, 1995.

Since there were no provisions in the taxpayer’s plan or in the order confirming the plan which modify the date that the “automatic stay” is lifted by statute, the taxpayer’s “automatic stay” was lifted when the order confirming the taxpayer’s plan was entered. The Board may now resolve the taxpayer’s determined liability and claim for refund. The taxpayer’s determined liability has not become “due

and payable” or “final” under California law and, therefore, has not been discharged in the taxpayer’s bankruptcy action. 8/28/96.

[170.0007.004](#) **Discharge in Bankruptcy.** A taxpayer filed a Chapter 11 bankruptcy. The taxpayer’s confirmed plan of reorganization included a provision that the debtor would be granted a discharge. It also called for the liquidation and dissolution of the taxpayer’s business. Under 11 U.S.C. section 1141(d)(3), the confirmation of a plan does not discharge a debtor when the plan provides for the liquidation of all or substantially all of the property of the estate, the debtor does not engage in business after consummation of the plan, and the debtor would be denied a discharge if the case were a Chapter 7 bankruptcy. Assuming that the taxpayer did not engage in business after the consummation of the plan, the tax liabilities were not discharged by the taxpayer’s bankruptcy action despite a provision in the plan that the debtor would be granted a discharge. 4/8/98. (M99–2).

[170.0007.030](#) **Discharge in Chapter 7 Bankruptcy.** The Board issued a Notice of Determination to the taxpayer on June 20, 1995 for the period January 1, 1984 to June 30, 1991. A timely petition for redetermination was filed on July 6, 1995. On September 6, 1996, the taxpayer filed Chapter 7 bankruptcy. The bankruptcy, a no asset case, was closed on November 27, 1996. No decision on the petition has been issued.

In *King v. Franchise Tax Board* (9th Cir. 1992), 961 F.2d 1423, the court stated that taxes measured by income or gross receipts that are assessed within 240 days of the filing of the bankruptcy petition are not dischargeable in bankruptcy. The court held that, under California law, a tax is “assessed” for bankruptcy purposes when assessment becomes “final.” Accordingly, since taxpayer filed a timely petition for redetermination and no decision on the petition has been issued, the liability is not “final” under California law. The tax had not been “assessed” at the time that the taxpayer filed its bankruptcy petition and the liability is not dischargeable. 6/24/97.

[170.0007.035](#) **Discharge in Chapter 7 Bankruptcy.** 11 U.S.C. section 523(a) denies discharge to tax claims entitled priority status whether or not a claim was filed. Thus, whether or not the Board had filed a claim, the discharge entered in the taxpayer’s bankruptcy does not discharge the Board’s priority status claim for taxes owed by the taxpayer. 4/18/96.

[170.0007.050](#) **Discharge in Chapter 11 Bankruptcy.** A Notice of Determination was issued to the taxpayer for the period October 1, 1986 to December 31, 1989 on April 24, 1991. The taxpayer filed a timely petition for redetermination. On August 27, 1993, the taxpayer filed a Chapter 11 bankruptcy. The matter was referred to the Attorney General’s office when the taxpayer objected to the claim that the Board filed in bankruptcy. A plan of reorganization was confirmed by the bankruptcy court on April 5, 1994.

The Board had filed proofs of claim in the taxpayer’s bankruptcy action for audit liabilities for the period October 1, 1986 to December 31, 1989 and for January 1, 1990 to September 30, 1992. The taxpayer objected to these claims on the grounds that certain portions of the claim were barred by the statute of limitations and a substantial portion of the claim did not constitute a priority claim under

bankruptcy law. An agreement was reached between the Board and the taxpayer in which 50 percent of the taxes due for the period October 1, 1986 to December 31, 1989 were to be considered a priority claim in bankruptcy action (along with 50 percent of the interest due to the petition date) plus 100 percent of taxes due for the period January 1, 1990 to September 30, 1992 (plus interest on those taxes through the petition date). All other amounts, including post-petition interest through May 31, 1995, were allowed as a general (non-priority) unsecured claim. The Board was paid the full amount of the allowed priority claim plus interest in the bankruptcy distribution.

In the Order Confirming Amended Plan of Reorganization entered into on August 8, 1994, it stated:

“The entry of this Order shall constitute a finding that the Debtor is entitled to a discharge under section 1141 of the Bankruptcy Code and further, that no debts which exist are excepted from discharge.”

Accordingly, the petitioned liability has been discharged in the taxpayer's bankruptcy and the Board should take no further action on the taxpayer's petition for redetermination. 1/9/97.

**170.0007.055 Discharge in Chapter 13 Bankruptcy.** The owners of a retail store filed a Chapter 13 bankruptcy petition. The Board did not file a pre-petition claim because the amount the taxpayer owed on their sales tax account was under the Board's threshold for filing a claim. After the petition date, the taxpayer filed two quarters of sales and use tax returns without payment. The taxpayer then operated the business for an additional three quarters and did not file any tax returns for these periods, whereupon the taxpayer ceased business operations. The Board issued determinations for the delinquent tax returns and liens were issued. The attorney for the taxpayer protested the lien filings noting that the taxpayer filed a Chapter 13 bankruptcy petition. The Board released the liens and filed an Expense of Administration Claim with the court. Subsequently, the Board received a check for 10 percent of the amount of its claim and four months later the debtor received a discharge from bankruptcy.

Under 11 U.S.C. section 1328(a), when a discharge in a Chapter 13 case is granted it discharges the debtor from all debts provided for by the plan. This includes pre-petition debts and post-petition debts to the extent the plan provides for their payment. In the case above, the Board brought its claim within the plan provisions for payment as an administrative claim when it filed an Expense of Administration Claim with the court. An allowed expense of administration claim must be paid in full pursuant to 11 U.S.C. sections 507(a)(1) and 1322(a)(2). However, unless the bankruptcy court allows a claim as an expense of administration claim pursuant to a motion brought under 11 U.S.C. section 503(b), a bankruptcy trustee may unilaterally treat the Board's claim as a general unsecured claim. Since the Board did not refer the claim to the Attorney General for the filing of such a motion and the debtor received a discharge from the court after the trustee paid a portion of the Board's claim which he treated as a general unsecured claim, the Board cannot pursue further collection action on any remaining post-petition liability. 12/31/02. (2003-3).

[170.0007.075](#) **Dual Determination—Address of Records.** An individual was a principal stockholder of Corporation A which was suspended for a period of time. The individual was a stockholder only for a portion of the period during which Corporation A was suspended. The Board issued the dual determination for the period of time Corporation A was suspended and the individual was a stockholder. The individual's address was not listed on the Board's records for Corporation A.

In October 1984, the individual had severed his relationship with Corporation A and started a new corporation, B. He was the president of the Corporation B and as such, completed the application to obtain a seller's permit for the new corporation. The mailing address for the new corporation was listed on the application, as was the address of the individual as the person completing the application. These addresses were the same. In July 1995, the individual informed the Board of a change of mailing address for Corporation B. The Board properly changed the mailing address of the corporation in its records. The individual did not notify the Board of the change in his personal address.

Sometime in 1986, the individual was contacted at B by a Board auditor who was performing a sales and use tax audit of Corporation A.

The Board issued a Notice of Determination against the individual on February 25, 1987, and mailed the determination to address shown for the individual on the original application Corporation B. This address also was shown for this individual on the Report of Field Audit on Corporation A. The Notice of Determination was returned by the post office. Upon receipt of the envelope, the Board made no attempt to re-mail or forward the determination to the individual.

The individual listed his address as corporate officer on the application for the Corporation B seller's permit. The application was dated in October 1984. The individual did not request that the address listed for him as corporate officer in either the Corporation A or the Corporation B file be changed to a more current address. The Board cannot assume that a change of address submitted for a business should serve to change the listed address of a corporate officer of that business. Therefore, the dual determination mailed to the individual in February 1987 was mailed to the last known address for him "as it appears in the records of the Board" (section 6486) as listed in both the old corporation file and the new corporation file. 9/6/95.

[170.0007.085](#) **Dual Determination Against Partners Not Necessary.** A partner who signs an application for a seller's permit on behalf of a partnership will bind the partnership and the other partner for the partnership's liability as if the other partners had individually signed the application. If the Notice of Determination issued for a partnership liability clearly identified the partnership by name designation (or the listing of one or more partners) and the partnership account number in the Notice of Determination, it will create a liability against the partnership and the individual partners whether or not all of the partners were listed in the Notice of Determination. No dual determinations are necessary for any unlisted partner. 8/19/96.

170.0007.095 **Earning Withholding—Premarital Agreement.** A taxpayer and spouse enter into a premarital agreement stipulating that each party shall retain separate interest in all property acquired prior to and during their marriage. The taxpayer's spouse is not listed on the seller's permit issued by the Board. This premarital agreement prevents the Board from obtaining a Spousal Wage Garnishment to satisfy collection efforts on the account because the wages of the taxpayer's spouse are not community property. 10/30/97. (M99-1).

170.0007.100 **Earning Withholding—Taxpayer's Spouse.** A taxpayer is indebted to the Board for an amount which was determined by audit conducted on one account on December 14, 1992, and conducted on another account on September 17, 1993. The taxpayer is married to a television personality who has substantial earnings as well as property. The taxpayer and his wife entered into a prenuptial agreement on December 31, 1990. That agreement was acknowledged and incorporated into a marital agreement which they entered into on November 30, 1992. The agreement provided that neither spouse had or would obtain any interest in the other's property and that all property acquired by either spouse during the course of the marriage would be that spouse's separate property.

The Universal Prenuptial Agreement Act, Family Code section 16000 et seq., allows individuals who are entering, or intend to enter into, marriage to make a determination of the status of their property before, during, or after the course of a marriage. The agreements entered into by the taxpayer and the spouse satisfy the requirements of the Act. Civil Code section 3439.05 provides that a transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before transfer was made or the obligation incurred. The tax obligation was incurred by the taxpayer subsequent to the execution of the premarital and marital agreement. Hence, even assuming there was a transfer involved, that transfer could not be fraudulent as to the Board as a creditor of the taxpayer. Therefore, the Board cannot seek to reach the earnings of the taxpayer's spouse because there was no transfer of property at the time the parties entered into the premarital agreement and because the debt to the Board arose after the agreement was executed. 8/31/95. (Am. M99-1).

170.0007.110 **Earnings Withholding Order on Seaman's Wages.** Pursuant to 46 U.S.C. section 11108, wages due or accruing to a seaman on a vessel in the foreign, coastwise, intercoastal, interstate, or noncontiguous trade or an individual employed on a fishing vessel or any fish processing vessel, may not be withheld under the tax laws of a state or a political subdivision of a state. Therefore, an employer was required, under federal law, to refuse to honor the Board's Earnings Withholding Order.

However, 46 U.S.C. section 11108 does not prohibit withholding wages of a seaman on a vessel in the coastwise trade between ports in the same state if withholding is under voluntary agreement between the seaman and the employer of seaman. 7/31/95.

[170.0007.140](#) **Effect of Bankruptcy Court Decision on Petition.** A Notice of Determination was issued to the taxpayer, and the taxpayer filed a timely petition for redetermination. The taxpayer then filed Chapter 11 bankruptcy and the Board

filed a proof of claim for \$125,286 in the taxpayer's bankruptcy action. The taxpayer objected to the Board's claim. After hearing the taxpayer's objection, the bankruptcy court held that the taxpayer's liability should be reduced to \$50,997. The taxpayer's plan of reorganization incorporating the bankruptcy court's decision on the taxpayer's dispute has established the amount of the obligation owed by the taxpayer to the Board. The Board should take no further action on the taxpayer's petition. 8/4/97. (M98-3).

[170.0007.175](#) **Filing of Bankruptcy After Service Levy.** The Board levied upon the taxpayer's bank account. Two days later, the taxpayer filed for protection under Chapter 13 of the Bankruptcy Code. The taxpayer objected, contending that the levied funds were property of the estate as they had not yet been remitted to the Board. In a notice of levy, title passes to the creditor upon levy. Accordingly, the money is not part of the estate of the bankrupt. 5/20/96. (Am. M99-1).

[170.0007.185](#) **Filing of Bankruptcy While Petition for Redetermination Pending.** A Notice of Determination was issued to a taxpayer on October 9, 1991. A timely petition for redetermination was filed on October 28, 1991. While the petition was pending, the taxpayer filed Chapter 7 bankruptcy on March 17, 1992. The no asset case was closed on June 4, 1992.

Liabilities which do not become "due and payable" prior to a taxpayer's Chapter 7 bankruptcy filing because the taxpayer avails itself of its statutory right to an administrative review of the liability will not be subject to discharge. The bankruptcy code permits a tax agency a designated period of time to collect a tax liability before the tax liability will be subject to discharge in a taxpayer's Chapter 7 bankruptcy action. Since the tax liability did not become "final" (and thus collectible by the Board) prior to the taxpayer's bankruptcy filing, the liability was not discharged in the taxpayer's bankruptcy action. 8/4/97. (M98-3).

[170.0007.205](#) **Fraudulent Conveyance.** In order to consider a conveyance as fraudulent pursuant to Civil Code section 3439.04, two factors are required. The Board must be a creditor at the time of the conveyance and the conveyance must be made without fair consideration. 5/4/89.

170.0007.250 **Guaranties.** A contract between parties need not specify the location where the contract is signed or dated to be valid even though it is desirable that the contract contains such information as an aid to refresh the recollection of the signee. Thus, a taxpayer is liable for tax to the extent of his guaranty despite the fact that the guaranty form was not dated nor was the location of signing indicated. 10/2/95.

170.0007.665 **Interest on Recovery of Erroneous Refund.** It has been the policy of the State of California to pursue interest in an action filed pursuant to section 6961(a). Therefore, the State Board of Equalization should assess interest with respect to erroneous refunds sought to be collected pursuant to section 6961(b). In short, when the Board bills for tax, the Board should add interest even if the overpayment resulted from the Board's error. 2/19/97.

170.0007.750 **Keeper Fees.** A levying officer may charge the Board \$75.00 pursuant to Government Code section 26722 to install a keeper. The levying officer may

charge for each eight hour period or fraction thereof. If a separate keeper is installed for another eight hour shift, up to a maximum of three keepers per 24 hour period, the total charge should be \$225.00.

The fee for serving, executing or processing any writ or order where the levying officer is required to take immediate possession is \$75.00. Thus, on the first day, a keeper is installed. The maximum amount is \$300.00 (\$225.00 + \$75.00). For each subsequent day it is \$225.00.

The levying officer also may charge a fee of \$75.00 for the expense of persons other than the keepers who are installed at the debtor's premises to care for property levied upon. 9/14/95.

**170.0008 Trustee in Bankruptcy.** One of the duties of a trustee in bankruptcy, appointed to operate a debtor's business, is to pay collected amounts to appropriate governmental agencies at the time and in the manner prescribed by local law. If a trustee fails to pay taxes due to the Board in a timely manner, the Board should file an administrative claim in the bankruptcy action for the full post-petition liability. Until a Chapter 11 plan has been confirmed by the court, the "automatic stay" is in effect and the Board should take no administrative action to satisfy post-petition tax liability including revoking the seller's permit issued to the trustee. The Board should, however, consider referring actions in which a trustee is not fulfilling his duties for a motion to "convert or dismiss." 10/20/93. (Am. M99-1).

**170.0008.900 Levies Directed Toward Sales Tax Reimbursement.** A taxpayer sold and assigned its accounts receivable to a third party. Uniform Commercial Code filings were filed with the Secretary of State on April 8, 1993.

A tax liability was established against the taxpayer in 1991, but no liability was recorded in the Secretary of State's office until June 1995. The Board's staff wishes to levy against the taxpayer's customer for the portion of the receivables representing sales tax reimbursement.

Payment of sales tax reimbursement by a customer is governed solely by the terms of the sales contract. The rights of the purchaser of the receivables are the same for the sales tax reimbursement as it is for any other payment due under the contract of sale. Since the purchaser of accounts receivable has perfected its right prior to the state tax lien, no portion of the receivables is subject to a Board levy. 11/20/95.

**170.0008.925 Lien Against Documented Vessel.** Since a vessel is personal property, a lien against a vessel would normally be filed in the California Secretary of State's office or as a lien attaching to a title certificate issued by a state agency. However, the Federal Government has pre-empted any state law providing for the registration of title to, or liens against, documented vessels. Federal law directs California to record any liens against a documented vessel with the U.S. Coast Guard rather than the procedure provided in the California Government Code.

Under the federal registration system for documented vessels, the recording of a Notice of Claim with the U.S. Coast Guard is the sole method of providing record notice to potential purchasers of the Board's claim against the vessel. Any

purchaser of the vessel is deemed to have notice to the Board's lien by the recordation of the Notice of Claim with the U.S. Coast Guard. There is no requirement under California law that any personal property must be physically located in California at the time that a lien against that property is filed or recorded. If the vessel is returned to California and federal law permits, the vessel will be subject to the Board's collection procedures. 5/12/97.

**170.0008.950 Lien on Property Held as Community Property.** A husband borrowed \$100,000 from his wife's separate property and issued a note which required payment from his separate property or his one-half interest in community property. The note was to be secured by a trust deed on real property owned by the couple as community property. Later, a deed of trust was recorded on the property in which the husband and wife as trustees of a family trust were identified as trust or and the wife as a beneficiary. Apparently, this action was intended to hold the community property asset in a trust in such a manner that if the husband did not repay the loan, the wife would obtain the property as her sole property.

The deed of trust cannot be valid because even if the property was somehow deemed to have been transferred to the family trust, there was no record of such a transfer on which subsequent lienholders could have had actual or constructive notice of the transfer. The family trust did not borrow any funds and is not liable for paying any borrowed funds to the wife. Additionally, the deed of trust is also invalid because it seeks to grant a lien on real property to a person who is listed as a record owner of the property (the husband and wife). An owner of property cannot have a lien on it. (See *Lee v. Joseph* (1968) 267 Cal.App.2d 30.) Under California law, one spouse may mortgage his or her separate property to the other spouse but cannot create a lien on community property by mortgage. (*Freiermuth v. Steigleman* (1900) 130 Cal. 392.) 5/19/97.

**170.0009 Lien On Residence to be Sold.** Liens may properly be attached to realty which retains its status as community property after the dissolution of a marriage. The property was not awarded to either party in the dissolution agreement, and was ordered to be sold. The spouse against whom the determination was issued learned of the audit liability and transferred his interest in the property to the other spouse, via a grant nominee lien. The purpose of the transfer was solely to prevent the Board's lien from attaching. The property in question remained community property in spite of the grant deed because the court had not awarded the property to either party, and it had not been sold with the proceeds divided between the parties, as contemplated by the court. 10/20/93.

**170.0009.300 Liens—Sheriff's Sale of Realty.** The Board recorded a lien on real property which was subordinate to the mortgages. The real property was sold at a sheriff's sale. When property is sold at a sheriff's sale pursuant to a writ of sale or seizure and sale to satisfy a judgment, the Board's subordinate liens are extinguished. (See section 701.630 of Code of Civil Procedure.) 1/3/96.

**170.0009.550 Misaddress of Tax Payment.** A tax payment or assessment was due and payable at the Office of the Treasurer in Sacramento on August 15. Subsequent to that date, a check was received in the mail in an envelope postmarked August 17.

It appears that the check was originally mailed on August 14 in Los Angeles, but apparently the envelope was misaddressed to the treasurer in Los Angeles instead of Sacramento and was returned to the sender who remailed the check in the same envelope to the Sacramento treasurer which was subsequently postmarked the 17th.

Section 1034 of the Political Code reads as follows:

“If a remittance to cover a payment required by law to be made to the state or to a state agency is sent through the United States mail, the state or the state agency shall treat the remittance as if it had been received on the date shown by the post office cancellation mark stamped on the envelope containing the remittance.”

Under this statute only the second mailing, that is, the mailing where the envelope was properly addressed, can be considered. A mailing to an improper address does not meet the requirements of the statute. This is based on the premise that a mailing that never reaches the state cannot be considered as a payment of tax. 4/22/40.

(Note: The provisions in section 1034, as they existed at the time of this letter, are now part of sections 11002–11004 of the Government Code.)

**170.0010 Nominee Lien.** A nominee lien may be warranted in a situation where there is an apparent transmutation of community property to a spouse as his or her separate property. If a nominee lien was not filed in this type of situation, the community property lien would only reach the community property interest of the spouse in that particular piece of property. However, if upon the sale of that property the escrow company concluded that no community property interest existed, but rather that the interest was the spouse’s separate property, the Board’s lien would go unpaid.

A nominee lien is an instrument that is recorded against certain property to allege that the property is being held by another, the “nominee”, for the benefit and usage of the debtor taxpayer. The filing of the nominee lien is proper where title is held by a nominee third party as a result of a fraudulent conveyance by a delinquent tax debtor. (See Compliance Policy and Procedures Manual sections 742.155 and 742.158.)

A nominee lien is appropriate in a transmutation situation due to Civil Code section 5110.720 which states that transmutions are subject to the laws governing fraudulent transfers. Civil Code section 5110.710 states, in pertinent part, that subject to Civil Code section 5110.720, married persons may by agreement or transfer, with or without consideration, transmute community property to separate property of either spouse.

An example of a fraudulent conveyance is when a taxpayer who was the purchaser of an aircraft, is liable for the use tax, was the recipient of a Determination and a Demand and then quitclaimed his community property interest in the residence as a gift to his spouse. In quitclaiming his interest in the property, the taxpayer attempted to shield his assets and hinder collection of the use tax. Such actions indicate an intent to frustrate collection activities through

the divestiture of the property by fraudulent conveyance while still engaging the benefit of the property as his own. 5/25/90.

**170.0011 Nominee Lien.** A taxpayer was issued a seller's permit in 1987 to operate a service station. In December 1992, the Board issued a Notice of Determination to this taxpayer in the total sum of \$90,983.66. In 1987, the taxpayer and his wife were deeded property as joint tenants. At the time of this transfer, \$260.70 documentary transfer tax was paid when the deed was recorded. On June 29, 1994, this property was deeded by the taxpayer and his wife as joint tenants to the wife, as her sole and separate property. The deed transferring this property shows no documentary tax was paid.

In this case, the transfer to the wife as her separate property was fraudulent as to the State Board of Equalization within the meaning of Civil Code section 3439.04 as the transfer was made with actual intent to hinder, delay or defraud the Board. Thus, it is appropriate to file a nominee lien. 7/18/95.

**170.0012 Nominee Lien.** A taxpayer obtained a seller's permit in 1989 to operate a retail business. The taxpayer failed to file a return and pay tax for the fourth quarter of 1993. In an audit of the taxpayer's business dated December 22, 1994, the Board estimated the tax owing for the fourth quarter 1993.

On March 18, 1994, the taxpayer recorded a grant deed transferring real property owned by him in California to his brother. The deed indicated that no documentary transfer tax was paid citing, "inter-family transfer, no consideration."

The Board issued a Notice of Determination to the taxpayer on January 27, 1995, based on audit results.

In this situation, the taxpayer transferred the property to his brother for no consideration with actual intent to hinder or defraud the Board within the meaning of Civil Code section 3439.04. Thus, a nominee lien should be issued against the property. 7/20/95.

**170.0013 Nominee Lien.** A taxpayer owes the Board tax liability as a result of a dual determination issued on September 11, 1995 for the period from January 1, 1993 to September 30, 1993. On July 25, 1995, a trust deeded certain real property located in California to the taxpayer. On September 5, 1995 the deed was recorded in County Recorder's Office. On September 12, (one day after the determination was issued), the taxpayer granted an undivided one half (1/2) interest in this property to a husband and wife, as joint tenants. This deed was recorded on September 21, 1995. The deed indicates that no documentary transfer tax was paid on the transfer. The transfer of interest in this property to the husband and wife for no consideration was made with the intent to hinder, delay, or defraud the Board in the collection of the liability due from the taxpayer. Therefore, pursuant to Civil Code section 3439.04, it would be appropriate to file a nominee lien against the property. 6/12/96.

**170.0014 Nominee Lien.** A taxpayer owes the Board \$47,032 which consists of a determined liability for the period 10/1/90 to 12/31/93 and nonremittance returns filed in 1992 and 1993. The audit for the determined liability indicates that the

audit findings were discussed with the taxpayer on May 20, 1994, that the taxpayer had not filed a return for the fourth quarter 1993, and that the taxpayer was allowed several weeks to obtain additional information on questionable sales for resale. On April 25 and May 31, the taxpayer deeded real property at two separate locations to his son by quitclaim deed. The deeds stated that no consideration was paid for the transfer of the properties. The quitclaim deeds were recorded on April 28 and June 9 respectively. Based on the facts, the transfers of these two properties by the taxpayer to his son were made with actual intent to hinder, delay, or defraud the Board in the collection of the outstanding liability. Therefore, nominee liens should be recorded against these properties. (Civil Code section 3439.04.) 11/18/96.

[170.0015](#) **Nominee Lien.** A taxpayer, who is deceased, owes the Board delinquent taxes. The taxpayer's business property is encumbered by two Board liens recorded on April 10, 1996 and on June 6, 1996. Thereafter, a deed conveying the property was recorded on July 5, 1996. Since the Board's liens had attached to the property prior to the transfer of the property on July 25, 1996, the Board's interest in the property is protected without the need to record. 2/27/97.

170.0016 **Nominee Lien—30-Day Preliminary Notice to Third Party.** When a Board records a nominee lien against real property, the lien attaches only to the real property transferred. The lien does not attach to other real or personal property owned by the third-party grantee and the nominee lien does not indicate that the third party is delinquent in any taxes required to be paid. Since section 7097 only requires that the Board mail the preliminary notice "to the taxpayer" and not a third-party grantee, there is no legal requirement that the Board give prior notice to a third-party grantee before a nominee lien is recorded against real property previously transferred to him or her by the taxpayer. 6/12/96.

170.0020 **Notice of Delinquency** does not under any circumstances constitute a demand for payment owed to the Board of the amount required to be withheld by the notice. If payment is voluntarily made, it may be accepted however. 8/15/52.

[170.0030](#) **Notice of Determination-Taxpayer Incorrectly Named.** A determination issued to the correct business entity is a valid determination. If, during any Appeals conference, the Appeals attorney discovers that the entity has been incorrectly named, the officer can substitute the correct name for the incorrect designation. The attorney is authorized the power to correct clerical errors in his/her decision and recommendation and designate the responsible entity pursuant to *Russ v. Smith* (1968) 264 Cal.App.2d 385. 7/21/93.

[170.0033](#) **Notice of Levy—Interstate.** A Notice of Levy served on an insurance company "doing business" in this state but headquartered in another state to obtain interest income payable on an insurance policy held by the taxpayer/debtor (also living in another state) is valid. The insurance company must comply with the terms of the levy. Such levies should be served on the agent within this state designated by the foreign corporation to the Secretary of State at the time the corporation obtained its certificate of qualification to conduct intrastate business within this state. 1/15/93.

170.0036 **Notice of Levy Served on Auctioneer.** The Board served a levy on an auctioneer to execute on the proceeds of sale of a taxpayer's abandoned personal property. The auctioneer refused to honor the Board's levy, claiming all the funds except for its sales commissions and costs were deposited in the auctioneer's trust account which is not subject to enforcement of a levy pursuant to Financial Code section 17410 and the State of California is not entitled to its levy under the equitable principles of laches.

In this case, Financial Code section 17410 has no relevance to the Board's levy since the Board is not enforcing a money judgment arising out of any claim against the auctioneer. Financial Code section 17410 only applies if the money judgment is against the person who is acting as escrow agent and deposits the money in its trust accounts.

The Board's lien properly attaches to the sale proceeds and the auctioneer has the legal duty to turn over those sale proceeds to the Board. 5/30/95.

[170.0038](#) **Notice of Redetermination.** In making the original determination against a taxpayer, the Board included some transactions in the measure of tax and omitted others. The full process of administrative appeals resulted in the Board's eventual determination that some of the transactions originally thought to be taxable were not, and one transaction thought not to be taxable was taxable. The Board's final determination (i.e., Notice of Redetermination to taxpayer) therefore reflected these conclusions, except that the total tax determined was limited to the amount of the original determination because the statute of limitations for increasing the assessment had passed.

A determination issued to a taxpayer indicates the amount the Board believes that the taxpayer owes for a particular period, as opposed to a determination that particular transactions are taxable to the exclusion of others. If a taxpayer files a timely petition for redetermination, the Board reviews its original determination to ascertain whether the *amount of tax* is correctly assessed. If the amount is correct, the matter will be redetermined without adjustment. If the amount is too low, the amount will be redetermined without adjustment unless the statute of limitations permits increasing the assessment. If the amount originally determined is too high, the tax will be redetermined to reflect the correct amount due. 6/5/97.

170.0039 **Notice of Withdrawal of Partner.** Partner B's Chapter 13 bankruptcy filing does not constitute notice to the Board that Partner A no longer had an interest in the business. One partner in a business may file a bankruptcy action while another partner has not filed bankruptcy. The fact that Partner A's name is not on the ABC license is also irrelevant if the Board has not received notice that he has withdrawn as a partner. 12/26/97. (M99-2).

170.0041 **Offset.** Amounts of tax and interest owed to the Board may be collected by means of offset pursuant to Government Code section 12419.4 against amounts owed to the tax debtor by the state even though collection is barred by the limitations of sections 6701, 6702, 6711, 6757, or 6796 of the Revenue and Taxation code. 4/1/80.

170.0043 **Offset of Underpayments Barred by Statute of Limitation.** Overpayments that are not barred by the statute of limitations may be offset by underpayments which are barred by such statute. 2/27/92.

170.0045 **Operations After Partnership Dissolution.** Three individuals form a partnership to operate a service station. However, the seller's permit is issued only in the name of the managing partner. All of the other aspects of the operation also are solely in the name of the managing partner. The operations are not profitable, and the partners meet in March 1986 to discuss closing. The managing partner refuses to close the business, but does agree to buy out the others' interests. In May 1986, the managing partner repudiates the March agreement. In June 1986, the other partners file suit to rescind the operation. In December 1986, the Board learns of the existence of the partnership.

In general, a partner cannot bind co-partners to new obligations after dissolution except for any act appropriate to wind up operations. On May 2, 1986, after the repudiation of the March agreement by the managing partner, the other partners insisted that the managing partner live up to the March agreement. The Board concluded that at this point the partnership was dissolved. Further operations were not necessary to wind up the business. Thus, the other partners are not liable for tax for periods after May 3, 1986. 1/29/88.

170.0055 **Effect of Lien.** In July 1990, the Board recorded a lien on property owned by a tax debtor. In September 1990, the debtor recorded a quit claim transferring the property to a third party.

A lien is an encumbrance upon real property. It was properly filed and remains in effect despite the subsequent transfer. It does not imply that a purchaser of the property has an outstanding personal tax liability. Upon request, the Board will provide information to creditors of the transferee as to whether he/she owes any tax to the Board. 4/11/95.

170.0060 **Employee of Business, Liability of.** Where a veteran's organization contracted with the manager to run a second hand salvage business for three years at a fixed salary and the organization retained ultimate control and was entitled to the profits of the business, the manager was an employee not personally liable for sales tax incurred by the business, even though he personally guaranteed the veteran's organization the business would not incur debts. 4/29/65.

170.0064 **Parent's Liability for Subsidiary's Tax.** A parent corporation is not liable for the taxes due from its subsidiary unless the companies are so clearly related that they share a single identity. To determine whether the parent and its subsidiary share a single identity, the following factors were considered by the court in the case of *In re Prezant & Co*, 24 AFTR 2d 69-5623 (DCND Ill. 1969):

- (1) The parent owned all of the stock of the subsidiary.
- (2) They shared the same officers and facilities.
- (3) They function as a single unit.
- (4) The subsidiary only dealt with the parent company.

(5) There were minimum amounts of paid-in capital. (For example, intercompany transfers were frequently used to meet obligations.)

Other factors which may be considered are found in Witkin, Summary of California Law 11 (8th ed 1974).

(6) The parent owns the building and the furniture.

(7) Both employ the same attorney. 9/8/77.

[170.0064.335](#) **Post Petition Bar Date—Chapter 11 Case.** A taxpayer filed Chapter 11 bankruptcy on November 16, 1993. It now claims that the Board is precluded from making an audit for the period April 1, 1992 to December 31, 1995 by reason of the Board's failure to file an "administrative claim" within 45 days after the effective date established in the plan of reorganization.

Bankruptcy Code 503(b) excludes California Sales and Use Taxes from the definition of "administrative expense claims." Thus, the Board has no obligation to file a claim for post petition taxes. 3/5/96.

[170.0064.400](#) **Post Petition Liability.** A taxpayer filed Chapter 13 bankruptcy on May 3, 1984. Subsequently, the action was converted to Chapter 11 and then was converted to Chapter 7. The case was discharged on February 24, 1986. The taxpayer maintains that determinations issued on January 4, 1985 for the period May 4, 1984 to June 30, 1984 and a determination issued on October 18, 1985 for the period January 1, 1985 to June 26, 1985 were violations of the "automatic stay" and not valid.

The "automatic stay" applies to tax liabilities prior to the commencement of the case. The conversion of a bankruptcy action from one chapter to another does not affect a claim's status as pre-petition or post petition. The determinations are valid. 9/29/95.

[170.0065](#) **Priority of Notice of Levy.** A Notice of Levy served by the Board to a bank pursuant to section 6703 has priority over the bank's own lien or right to set off, unless the bank has a prior security interest in the funds of the debtor on deposit with the bank. Pursuant to Code of Civil Procedure section 701.040, if the bank can show that the debtor/taxpayer has signed a security agreement prior to the levy, the bank has a security interest in the funds in the account levied upon. In this case, the bank has a right to retain amounts due it on defaulted loans. If the bank does not have such a security agreement, the funds in the levied account must be surrendered. 4/23/93.

[170.0065.200](#) **Private Sale of Seized Property.** The Board does not have authority to sell seized property at a private sale, despite the fact that the offer to buy is substantially higher than an offer received and rejected at a public auction. Section 6796 requires a public auction and section 6797 requires a notice of the sale, time and place to the delinquent person. 4/11/89.

[170.0066](#) **Quitclaim.** The Board filed a lien on property on August 30, 1994. On September 23, 1994, the taxpayer quitclaimed the property to a third party for no consideration. The property transferred remains subject to the Board's lien even though the taxpayer no longer has record title to the property. 11/20/95.

170.0066.800 **Refund of Use Tax Paid on Lease Payments.** The Board issued a Notice of Determination to a taxpayer for tax on the purchase of a vessel. The determination was issued for the period June 1, 1991 to December 31, 1992. The taxpayer filed a petition for redetermination and agreed that he had made a taxable use of the vessel in May 1991. The taxpayer also agreed that the correct measure of tax was the purchase price.

The Board agreed with the taxpayer that the vessel was purchased in May 1991. The Board noted that the taxpayer filed a sales tax return which covered the period January 1, 1991 through December 31, 1991. Therefore, the three-year statute of limitations applied and it expired. Since the statute of limitations has expired in 1995, the Board cannot issue deficiency determinations in 1996 covering the period of May 1991, when the vessel was purchased.

The taxpayer stated that since there is no deficiency determination, he is entitled to a refund of the use tax paid on the lease receipts with respect to this transaction.

Although a determination cannot be issued to enforce collection of the tax, the tax liability still accrued under the law and the use tax submitted with respect to the same transaction may be retained in satisfaction of the liability. 3/4/96.

170.0067 **Release of Liens.** Unpaid or underpaid tax, which has been “determined,” becomes due and payable on the date the determination becomes final. On that date, pursuant to section 6757, the amount of the determination, including interest, penalties, and other costs, becomes a perfected and enforceable state tax lien. This statutory lien remains in effect for ten years, after which the Board loses its power to collect the tax unless a Notice of State Tax Lien is filed or recorded within that period.

Section 7097(a) requires that the taxpayer be given written preliminary notice 30 days prior to the filing of the lien. However, failure to give such notice does not invalidate the lien nor does it create authority for the Board to release the lien. The Board’s authority to release a recorded lien is contained in sections 6740 and 7097, and the Board’s failure to give the required notice is not a reason for release. 12/14/94.

170.0068 **Rents of Bankrupt Spouse.** A husband and wife own rental property as joint tenants. There is an outstanding tax liability, but the wife’s liability has been discharged as the result of bankruptcy proceedings. The Board may only issue a notice of levy against one-half of the rents. 12/11/95.

170.0070 **Request for Release of Lien.** The U.S. Government seized property upon which the Board had filed a lien. The U.S. District Court did not include the Board’s lien among those to be paid upon the ordered sale of the property. The U.S. Marshal’s office requested that the Board release its lien to make the title company “feel more secure.” There is no legal requirement that the Board release liens until a tax liability has been paid. 10/19/93.

170.0075 **Sales Tax Deposit.** The sales tax deposit required by section 6701 is required to be held in trust for the beneficial interest of the taxpayer and used solely in the manner provided in sections 6701 and 6815. That is, the Board is restricted under state law from using the security for any purpose other than as specified in these

sections. This restriction is equally applicable in the bankruptcy proceedings. Hence, the Board of Equalization may not release the sales tax deposit to the trustee. It must be applied to the taxpayer's sales tax liability. 10/23/95.

**170.0078 Secured Creditor's Interest in Banked Funds.** The Board's attempt to levy on a taxpayer's bank account may be thwarted by a secured creditor's claim of having a security interest in the account funds. This interest could result from the sale of collateral in which the creditor had a perfected security interest. However, the creditor's interest extends only to the portion of the proceeds traceable to the wholesale cost of the collateral. If the sale of the collateral involves the collection of sales tax reimbursement or other retailer costs and mark-up, and the funds are commingled in the bank account, the security interest of the creditor does not extend to these peripheral amounts.

A party claiming a security interest in funds upon which the Board has levied may be required to trace the funds deposited in order to show that they are the proceeds from the sale of collateral. 10/18/93.

**170.0079 Security for Payment of Tax—Limited Partnerships.** An individual is the only named taxpayer on three different permits issued to three different limited partnerships in which he is a general partner. Each partnership, not the named general partner, is the "person" to whom the permit was issued and the Board may require each such person to post maximum security pursuant to section 6701. 12/10/85.

**170.0080 Security for Tax.** Money deposited by retailer must be returned to him upon close out, even though a third party furnished the money, unless retailer submits an assignment of deposit to third party. 9/28/50.

**170.0083 Security Interest in Deposit Account.** On May 1, 1995, a partnership signed an agreement with a bank which granted the bank a security interest in its "Deposit Accounts." The agreement provided in part that:

"Grantor shall not pledge, mortgage, encumber or otherwise permit the collateral to be subject to any lien, security interest, encumbrance or charges, other than the security interest provided in this Agreement, without prior consent to Lender."

Included within a description of an "event of default" is a forfeiture proceeding by a governmental agency. The agreement also provided that in the event of default the entire indebtedness is immediately due and payable and the bank had full power to sell, lease, transfer or otherwise deal with the collateral or proceeds thereof.

The bank account included amounts collected as sales tax reimbursement. The Board filed a levy on the account. However, rather than paying the levy from amounts in the account, the bank applied all amounts in the account to the loan.

In California, the seller has no obligation to collect sales tax reimbursement from its customers. Whether the purchaser is obligated to reimburse the seller for the tax depends solely upon the terms of the agreement of sale. Under these circumstance, amounts collected as sales tax reimbursement and then deposited in an account are no different than other funds obtained under contracts and then deposited in the account. Thus, the fact that the account may have had some sales

tax reimbursement included in the account does not impair the bank's right to the money under its perfected security agreement. 3/18/97.

**170.0086 Seizure and Sale—Minimum Bids.** The Board has requested the sheriff to seize and sell property to satisfy a tax liability. Pursuant to Code of Civil Procedure (C. C. P.) section 701.620, the property cannot be sold at a sheriff's sale unless the highest bid received by the sheriff exceeds (1) the amount of all preferred labor claims that are required by C. C. P. section 1206 to be satisfied from the sales proceeds, (2) if the purchaser at the sale is not the Board, the amount of any deposits made pursuant to C. C. P. section 720.260 and (3) the taxpayer's exemption from motor vehicles, household furnishings or tools of trade if applicable to the property to be sold.

If the sheriff does not receive a bid at the sale that exceeds these amounts, the sheriff is required by C. C. P. sections 701.620(c) and 699.060 to release the seized property to the "person from whom it was taken." 5/31/95.

**170.0140 Spendthrift Trust.** A spendthrift trust is a trust which provides that the interest of the beneficiary can neither be transferred by the beneficiary nor reached by the beneficiary's creditors. Such trusts are created for the purpose of providing a fund for another and, at the same time, securing it against his or her own improvidence or incapacity. However, a creditor may reach the surplus of rents and profits of a spendthrift trust beyond the sum that is necessary for the education or support of the beneficiary. The question of whether such surplus may be reached may be tried in statutory proceedings supplemental to execution, such as the examination of the debtor. 5/31/85.

**170.0190 State Tax Liens.** Sales and Use Tax Law section 6757 provides that any amount imposed under the law that is not paid when it becomes due and payable is a perfected and enforceable state tax lien. The lien continues in effect for ten years from the date of its creation or recordation, unless it is sooner released or otherwise discharged. A lien was filed in the Secretary of State's office and also a copy of the lien was filed four days later with the county recorder. Subsequently, a Release of Lien was filed with the county recorder sixty days later.

The fact that a copy of the lien was filed with a county recorder and released sixty days later has no effect on the continuing life of the lien. The lien filed with the Secretary of State remains in effect. 10/15/93.

**170.0193 Statute of Limitation—Unregistered Co-owner of Vehicle.** Two parties, A and B, entered into an agreement to invest in a classic vehicle for \$28,000 with the intention of maintaining it, selling it in the future, and sharing the profit. Only one of the purchasers, B, registered the vehicle with the Department of Motor Vehicles (DMV). B falsely reported a purchase price of \$2,000 to the DMV and paid use tax on the reported \$2,000 purchase price. Since the three-year statute of limitations had already expired since the use tax was paid DMV, the question arises whether the Board can issue a Notice of Determination against the unregistered co-owner, A, based on the eight-year statute of limitations applying with respect to A.

Based on the agreement, both A and B were engaged in a joint venture for which there was a business purpose. The Board has previously taken the position that in circumstances where a taxpayer may be operating as a joint venture unbeknownst to the Board, the newly discovered joint venture would get the benefit of the joint venture having filed returns, even if the Board is unaware that a taxpayer may be operating as a joint venture. These principles were based on the rationale that the newly discovered joint venture would take the detriments and benefits flowing from his or her joint venture status. These principles would apply whether the return was filed in the name of the joint venture or a sole proprietor.

Based on these principles, A would get the benefit of B's filing of the registration, i.e., the return. The three-year statute of limitations has expired with respect to A, as with B. Thus, A cannot be held liable for the use tax measured by the \$28,000 purchase price. In other words, absent the Board's finding of fraud in the underreporting of tax, the Board is barred by the statute of limitations from issuing the Notice of Determination against A. 1/29/97.

**170.0195 Statute of Limitations.** If a timely notice of determination has been issued for sales tax, it is also effective as to use tax and vice versa. However, a timely notice of determination issued against one party to a transaction does not toll the statute of limitations against any another party to the transaction who may be held liable for the tax. 5/26/93; 5/31/94. (Am. 2007-1).

**170.0198 Statutory Lien.** A taxpayer operated a mini-market and became indebted for sales taxes arising from the operations of this business. On September 12, 1995, the taxpayer, with knowledge of his tax liability to the Board, conveyed to a third party an undivided one-half interest in certain real property in which the taxpayer had held a 100% interest. The grant deed conveying this interest indicated that no documentary transfer tax was paid on the transfer. The grant deed was recorded on September 21, 1995. On March 1996, the taxpayer conveyed all his remaining interest in the real property (that is, his remaining half interest) to the same third party. The grant deed indicated that "no consideration" was paid for the transfer and no documentary transfer tax was paid.

When the taxpayer failed to pay the sales taxes due by him, a statutory lien arose for those taxes pursuant to Revenue and Taxation Code section 6757 and Government Code section 7170(a). The lien attached to all property and right to property real or personal, tangible or intangible, including all after-acquired property and rights to property, belonging to the taxpayer and located in this state.

The statutory lien attached to the real property in question at the time that the taxpayer owned the property. The taxpayer transferred this property to the third party in violation of Civil Code sections 3439.04 and 3449.05. The lien that the Board recorded was intended to put successors of the taxpayer's interest in the property on notice of the Board's statutory lien and that those successors would take title to the property subject to that lien. In the present matter, the third party took the property subject to the Board's lien. 7/2/96.

**170.0200 Statutory Tax Lien.** The statutory tax lien provided by Sales and Use Tax Law section 6757 continues for a minimum of ten years unless the liability is paid in full prior to that time. Any number of Notices of State Tax Lien may be filed or

recorded and then released in the ten year period, all with different lien numbers, without affecting the legality of the lien. At the end of the ten year period, the lien may be extended for an additional ten year period. 10/15/93.

170.0210 **Subordinate to Vehicle Code Section 9802 (c).** Under Vehicle Code section 9802 (c), use tax has priority over Sales and Use Tax section 6756. Vehicle Code section 9802 (c) also has priority over purchase money security interest, which security interest has priority over section 6756. 3/27/84.

170.0240 **Trustee Liability.** A successor trustee of a business trust may be held liable for the taxes of the trust notwithstanding that the trust agreement provides that the trustee shall not be held liable. In *People v. Sisco* (1939) 31 Cal.App.2d 345, the appellate court held that trustees of a business trust are personally liable for the obligations of their trust unless specifically exempted either expressly or by implication. 5/6/97.

170.0250 **Uniform Partnership Act (Revised Act).** Prior to the enactment of the revised Uniform Partnership Act, the Board was not required to issue a determination against an individual partner if a determination had been validly issued to the partnership. There was no restriction on the Board's ability to execute on, or to impose a lien on, a partner's assets to satisfy a determination issued to the partnership. The revised Act provides that new partnerships formed after January 1, 1997 will be governed by the revised Act. Partnerships formed prior to January 1, 1997 will be governed by the existing Uniform Partnership Act (existing Act) until January 1, 1999.

Under Corporations Code section 16307(c), (a section of the revised Act), a judgment against a partnership is not by itself a judgment against a partner. A judgment against a partnership may not be satisfied from a partner's asset unless there is also a judgment against the partner. Corporations Code section 16307(d) further provides that a judgment creditor of a partner may not levy execution against the assets of the partner to satisfy a judgment based on a claim against the partnership until any of the conditions described in section 16307(d)(1) through (4) exist.

However, at the time the Legislature adopted the revised Act, it also added Revenue and Taxation Code section 6381, which provides:

“The Board shall not be subject to subdivisions (c) and (d) of section 16307 of the Corporations Code unless, at the time of application for a seller's permit, the applicant furnishes to the Board a written partnership agreement that provides that all business assets shall be held in the name of the partnership.”

Therefore, unless a partnership formed after January 1, 1997 and applying for a seller's permit after January 1, 1997 furnishes to the Board the written partnership agreement described in section 6831, there should be no changes in the Board's ability to lien or levy on a partner's assets for a partnership liability. If a partnership formed after January 1, 1997 and applying for a seller's permit after January 1, 1997 furnishes to the Board the written partnership agreement described in section 6831, the Board will be required to issue a determination against an individual partner before that partner's assets are subject to lien or levy.

After the determinations become due and payable, the Board may file or record liens against that partner's assets and, if the Board can show that any of the conditions described in Corporations Code section 16307(d)(1) through (4) exist, it may levy against the partner's assets. 12/16/96.

170.0260 **Unjust Enrichment—Third Party Claim.** While the *Decorative Carpets, Inc.* case involves excess tax reimbursement, it also stands for the proposition that the seller of tangible personal property cannot be unjustly enriched at the expense of the consumer or the state. Therefore, in a Uniform Commercial Code filing, which is superior to the Board's lien, the amount equal to the sales tax reimbursement should not be part of the receipts that are payable to a third party since, that which would unjustly enrich the seller would also unjustly enrich the security holder. 6/22/92.

170.0280 **Validity of Taxing Ordinances.** State constitution Article III, section 3.5, prohibits the Board from failing or refusing to enforce any tax ordinance on the ground that it is unconstitutional until an appellate court has so ruled. The decision of a superior court is not controlling. Taxpayers who unilaterally rely on such decisions and thereby fail to collect or pay taxes covered by such cases are not forgiven from their obligations to do so. 3/1/94.

170.0293 **Bankruptcy Automatic Stay—Lien Extensions.** According to the United States Bankruptcy Code 11 U.S.C. § 362 (b)(3), an act to maintain or continue the perfection of an interest in property is not a violation of the automatic stay. Therefore, if a sales or use tax lien is filed prior to the date the tax debtor petitions for bankruptcy under a chapter of the United States Bankruptcy Code and the lien is subsequently extended during the course of the bankruptcy proceedings, the lien extension is not a violation of the automatic stay and is not required to be released as such. 5/17/02. (2003–2).

170.0295 **Bankruptcy Automatic Stay—Merged Corporation.** Corporation A merged into Corporation B pursuant to a statutory merger, but did not notify the Board of the merger. Subsequently, Corporation B filed bankruptcy. The Board may not issue a determination or take collection action against Corporation B for the liabilities of Corporation A which has merged into Corporation B.

In a statutory merger, the surviving corporation succeeds to all the assets and liabilities of the disappearing corporation. Thus, a bankruptcy stay applies to the operations and liabilities of Corporation A as the disappearing corporation of the merger. Any liability should be collected through the proofs of claims filed in the bankruptcy action. 1/10/96.

170.0300 **Limited Partnership.** A limited partner is not liable for the debts of a partnership. However, a person who takes part in the control of a partnership is a general partner, regardless of recitals in the partnership agreement that he/she is a limited partner. A person who has the authority to decide which partnership bills to pay along with the right to sign checks without consultation with the named general partners is exercising control of the business and will be treated as a general partner. 8/8/94.

170.0305 **Codebtor Stay.** A memorandum was received which stated that 11 U. S. C. section 1301(a) appears to exempt the “stays” of action against codebtor from any “. . . individual (who) becomes liable on or secured such debt in the ordinary course of such individual’s business . . . ”

11 U. S. C. section 1301 imposes the stay on the collection of a “consumer debt” from a codebtor of a Chapter 13 debtor. Business tax liability is not a “consumer debt.” However, the ability of the Board to collect the partnership liability from a codebtor partner does not mean that the Board may collect that liability from property in the bankruptcy estate of the debtor. The automatic stay pertaining to the debtor prohibits the Board from taking “any action to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate.” (11 U. S. C. section 362(a)(3).) The property of the debtor estate contains all of the assets of a business even if the debtor has only an 80% interest in the partnership. See U. S. C. section 541(a)(1). If the codebtor is paid a salary by the business (in addition to any profits due him), his salary may presently be garnished for the partnership liability. However, the “automatic stay” in effect for the debtor’s bankruptcy action prevents any creditor (including the Board) from taking any collection action (including the installation of a keeper) against the business for pre-petition liabilities. If the Board can discover any assets of the codebtor which are not partnership assets forming part of the debtor’s bankruptcy estate, those assets are not subject to a “stay” and may be levied upon. 6/4/93.

170.0308 **General Lien.** An attorney representing a taxpayer stated that the bank has a general lien on all of the depositor’s property in its possession pursuant to Civil Code section 3054(a). Further, with respect to money, the relationship between a bank and a depositor is a debtor or creditor relationship, and the money belongs to the bank. The attorney also stated that if the bank owed money to the debtor, that obligation was subject to an equitable set off and since the money in the deposit account was the property of the bank and not the property of the taxpayer-depositor, the bank is not required to pay its money to satisfy the customer’s tax liability.

Since Government Code section 7170(a) provides that the state tax lien attaches to all property and right to property and then carves out an exception for deposit accounts subject to security interest, a state tax lien must have priority over a bank’s later assertion to a right of equitable set off in an account not subject to a security interest. See *Bradbury v. Kaiser* (1991) 3 Cal.App.4th, 5 Cal.Rptr.2d 325. The adoption of the Uniform Commercial Code in California and other states has modified the “banker’s lien” provided in section 3054 of the Civil Code so that only deposits in which the bank has a security interest will be subject to the right of set off. See *National Acceptance Company of America v. Virginia Capital Bank* (1980) 491F Supp. 1269. It is believed that Commercial Code sections 9301 and 9302 and Code of Civil Procedure section 701.040 deprives the bank of a right to a “banker’s lien” for the funds in dispute. If the bank can show that the taxpayer has signed an agreement in which a security interest was granted to the bank in funds in the taxpayer’s accounts levied upon and that security agreement was executed prior to the levy, the bank has a right to equitable set off of the

amount due it on the matured loan default. If the bank has no such security interest, it has no right to set off any funds levied upon. 6/4/93.

[170.0600](#) **Three-Party Checks.** There is no rule which permits the Board to deposit a check prepared by a third party and made payable to two payees, not in the alternative, when only one payee has endorsed the check. 9/10/97. (M98-3).

170.0700 **Willfully Fails to Pay—Defined.** The failure to pay taxes is willful if the corporation had money on hand and other corporate debts were voluntarily paid without paying taxes due. On the other hand, a corporation which has its cash and other liquid assets seized or levied upon by creditors cannot be said to have had available funds. Further, it cannot be assumed simply because there is evidence of sales tax reimbursement that the monies were available when the taxes became due and payable. 5/1/91.

**(b) LIABILITY OF CORPORATE OFFICER**

[170.1200](#) **Bankrupt Corporation.** Corporate officers of a bankrupt corporation who have not themselves filed for bankruptcy may be held liable for the corporate tax debt if the requirements of section 6829 are met. The automatic stay of the bankruptcy law applies only to entities that have filed. 4/10/95.

170.1212 **Bankruptcy Stay—Suspended Corporation.** The Franchise Tax Board (FTB) suspended a corporation. Subsequently, the corporation filed for bankruptcy. It is not a violation of the automatic stay to continue the suspension during bankruptcy proceedings. Therefore, if the corporation continues to do business during the bankruptcy proceedings and while its corporate powers have been suspended by the FTB, dual determinations may be issued against the corporate officers for post petition liabilities and post confirmation debt. 12/11/95.

170.1235 **Corporate Officer Liable for Corporation's Tax Liability.** The president of a corporation was prosecuted in Municipal Court for violation of section 7153 in that he, as president of a corporation, engaged in business without obtaining the required seller's permit from the Board and failed to file the required sales tax returns. After conviction, the president was required, as a condition of probation, to pay restitution to the Board in the form of taxes due by the corporation. The corporation subsequently filed Chapter 7 bankruptcy.

As a corporation, 11 U.S.C. section 727(a) prohibits it from obtaining a bankruptcy discharge of its liability to the Board in a Chapter 7 proceeding. Only individuals are discharged in bankruptcy. Therefore, the court's order requiring the president to pay restitution to the Board in the form of taxes due from the corporation was proper as the corporation's tax liability was not discharged. 8/19/96.

[170.1250](#) **Discharge in Bankruptcy.** The Board issued two determinations in October 1990 for taxes against a corporate officer for a tax liability arising out of operations of the corporation during the period the corporation had been suspended by the Franchise Tax Board. The determinations included periods in 1982 through 1984. The taxpayer had filed bankruptcy on August 27, 1989 and discharge was granted on December 2, 1989. Neither the corporation nor the corporate officer had filed tax returns for the period involved. The corporate

officer is liable for the tax. Tax liabilities for which a return was not filed as required are not discharged in the bankruptcy. Even if returns were filed, the taxes would not have been discharged unless the corporate officer listed the Board as a creditor or the Board had knowledge of the bankruptcy in time to file a claim. 10/2/95.

**170.1262 Discharge in Bankruptcy—Corporate Officer.** The Board held a corporate officer liable for taxes owed by the corporation for the period of April 1, 1984, through June 15, 1987. The corporate officer claimed that the liability in question is an excise tax and that, pursuant to 11 U.S.C. section 507(a)(7)(E), he is discharged of any liability since returns were filed by the corporation during the period in question and the liability arose more than three years prior to the filing of the corporate officer's bankruptcy petition.

Pursuant to U.S.C. section 523(a), a bankruptcy discharge does not discharge an individual debtor from debt when such debt is neither listed nor scheduled in the corporate officer's bankruptcy petition. Since the liability was not listed, the corporate officer cannot be discharged in a Chapter 7 bankruptcy. 7/31/95.

**170.1300 Foreclosure Does Not Affect Corporate Officer Liability.** A corporation's source of financing foreclosed on the corporation and the business terminated. The corporation had collected sales tax reimbursement from its customers but had failed to pay tax to the Board. The foreclosure and business termination do not prevent the liability of a responsible corporate officer who willfully failed to pay tax to the Board for the tax debt of the corporation. It is immaterial that the corporate business was terminated prior to the date that the tax was required to be paid to the Board. 11/30/93.

**170.1800 Personal Liability.** The key to personal liability under section 6829 is determining who, based upon the investigation of the facts and circumstances of the case, had the actual duty and responsibility for reporting and paying the sales and use taxes within the day-to-day operation of the corporation. This could be a "chief financial officer," "general manager," or any other similarly titled person hired for this purpose, given the authority to so act, and who may have assured the officers and the Board of Directors of the corporation that the taxes were current.

The failure of a corporate officer (with general supervisory control over a corporation) to insure that taxes are paid when he or she discovers that the person delegated to pay taxes has not paid those taxes will make the corporate officer personally liable under section 6829. 5/4/94.

**170.2200 Tax Reimbursement.** A necessary element of establishing corporate officer liability for sales tax is the requirement that tax reimbursement must have been obtained by the corporation. If a liability is established by means of a notice of determination, only the portion of the liability upon which tax reimbursement was obtained may be assessed against corporate officers. For example, if the determination is based on disallowed sales for resale or interstate sales, normally tax reimbursement would not have been obtained. In this case, a sales tax based corporate officer liability assessment may not be made against the corporate officers. 5/22/86.