

Memorandum

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

Date: July 16, 2014

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



Subject : **Board Meeting August 5-7, 2014**
Item N: Administrative Agenda
Proposed Revisions to Audit Manual, Chapter 1, *General Information*

In accordance with the established procedures for audit and compliance manual revisions, I am submitting proposed revisions to Audit Manual (AM) Chapter 1, *General Information*, section 0105.00, *Guidelines for RTC Section 6596 Relief*.

The proposed revisions, which incorporate current policies and procedures have been reviewed and approved by SUTD management, provided to Board Members, and posted at <http://www.boe.ca.gov/sutax/pmr.htm> to solicit comments from interested parties. No comments were received from interested parties or Board Members with regard to these revisions.

The revisions are attached for your reference. We request your approval to forward them to the Board Proceedings Division for placement on the Administrative Agenda as a consent item at the August 2014 meeting.

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

JLM:ljm
Attachment

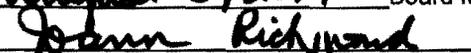
Approved:


Ms. Cynthia Bridges
Executive Director

STATE BOARD OF EQUALIZATION

BOARD APPROVED

At the August 5, 2014 Board Meeting


Joann Richmond, Chief
Board Proceedings Division



cc: (all with attachment)
Mr. Wayne Mashihara (MIC 46)
Ms. Susanne Buehler (MIC 92)
Mr. Kevin Hanks (MIC 49)

GUIDELINES FOR RTC SECTION 6596 RELIEF

0105.00

GENERAL

0105.02

Revenue and Taxation Code (RTC) section 6596 provides authority for the Board of Equalization (BOE) to relieve taxpayers of tax, interest, and penalty where the BOE finds that the failure to make a timely return or payment was due to the taxpayer's reasonable reliance on written advice from the BOE. Generally, a claim for refund cannot be based on a claim of erroneous advice under section 6596. Section 6596 only applies when there has been a failure to make a timely return or payment; thus a claim for refund cannot be based on erroneous written advice received *after* the return has been filed or payment has been made.

In general, claims of reliance on erroneous advice are ruled upon by the Board Members (Board). On September 30, 1992, the Board approved a Statement of Action delegating to the SUTD Deputy Director the authority to relieve taxpayers of tax, interest and penalty as provided by RTC section 6596. The SUTD Deputy Director's authority to grant RTC section 6596 relief is limited to cases where the district office and the taxpayer are in full agreement that RTC section 6596 relief applies.

The guidelines provided in this manual apply only in cases where RTC section 6596 relief falls within the limited authority delegated to the SUTD Deputy Director. This is an internal procedure when the district office and the taxpayer are in full agreement that RTC section 6596 relief applies. When the district office does not recommend relief, the taxpayer's request for relief shall follow the normal appeals process (see publication 17, *Appeals Procedures: Sales and Use Taxes and Special Taxes*, available at www.boe.ca.gov.)

When providing written advice, Property and Special Taxes Department (PSTD) staff should cite the comparable statute for the tax or fee program for which they are providing written information. PSTD disclaimer language should be the same as the examples contained within this section of the Audit Manual. However, the disclaimer must include reference to the comparable statute for the tax or fee program. Additionally, for PSTD programs, delegation of 6596 relief has not yet been granted to the Property and Special Taxes Deputy Director. All 6596 relief requests for PSTD accounts must be submitted to the Board for approval.

General Correspondence

The BOE receives and responds to numerous taxpayer inquiries received via letter and email. Responses prepared by BOE staff to email inquiries, whether sent by email or by letter, qualify as written tax advice. Therefore, written responses to taxpayer inquiries via email or letter should contain the appropriate section 6596 disclaimer language.

QUALIFIED ERRONEOUS ADVICE

0105.04

The erroneous advice must have been provided in writing, either in response to the taxpayer's written inquiry or in a prior audit, and must meet the criteria for qualified "written advice" set forth in Regulation 1705, *Relief from Liability*. PSTD accounts have similar "written advice" criteria noted in Regulation 4902, *Relief from Liability*.

Staff should emphasize that taxpayers should obtain written advice with respect to the questions they may have regarding the application of tax to a particular type of transaction. The taxpayer should be given a copy of BOE-8, *Get It in Writing* or a reference to the BOE-8 link on the BOE website.

Tax Advice Provided in a Written Communication

Written advice by the ~~Board~~ BOE to a taxpayer in response to a taxpayer's specific written inquiry or from the taxpayer's representative seeking ~~relief from liability~~ a written opinion will constitute written advice that can be relied ~~on~~ upon for relief in accordance with RTC section 6596. To be considered a specific written inquiry, the taxpayer or the taxpayer's representatives ~~s~~ must identify the specific taxpayer for whom the advice is requested. Such an inquiry must also fully describe the specific facts and circumstances of the activity or transactions for which the advice was requested.

In responding to accountants, attorneys, or other taxpayer's representatives where the name of the taxpayer is not ~~divulged~~ provided, ~~the writer~~ BOE staff ~~will~~ should ask that the representative ~~divulge~~ provide the name and ~~permit~~ account number of the taxpayer in order for the BOE to provide a response that may be relied upon. ~~This will also~~ to enable the ~~Board~~ BOE to maintain appropriate records with respect to the information provided. The taxpayer's name and ~~permit~~ account number will be referenced in the ~~Board's~~ BOE's response.

Tax advice provided to trade/industry associations, franchisors that do not identify their members, taxpayer's representatives failing to identify their clients, and/or taxpayers whose written inquiries ~~whose questions~~ are vague or general in nature must include the following statement:

The answer given is intended to provide general information regarding the application of the tax and will not serve as a basis for relief of liability under Revenue and Taxation Code section 6596.

~~If individual taxpayers are identified but background information is incomplete, the taxpayer should be encouraged to write again setting forth the specific facts. Staff is encouraged not to make presumptions. However, should it become necessary to do so, they should be clearly identified as such in the letter.~~

Written advice may only be relied upon by the taxpayer to which it was originally issued or a legal or statutory successor to that taxpayer. The taxpayer's suppliers, customers, or other business associates are not protected under RTC section 6596 by the written advice to the taxpayer. Written advice that may ~~serve~~ be relied upon for relief under RTC section 6596 must include the following statement:

~~The opinion expressed in this letter may~~ Provided the facts discussed below are accurate and verifiable by audit, only be relied upon for relief under section 6596 of the Revenue and Taxation Code (RTC) by [state taxpayer's name] may rely on this response for purposes of Revenue and Taxation Code (RTC) section 6596. If you

provide this letter to your customers or vendors, those customers or vendors must write to the Board of Equalization (BOE) and obtain their own written opinion in order for them to qualify for relief under RTC section 6596. Any person seeking relief under this section will be required to furnish a copy of such person's own original written inquiry to the ~~Board~~ BOE along with a copy of the written response received from the ~~Board~~ BOE.

If individual taxpayers are identified, but background information is incomplete, staff should make reasonable efforts to obtain additional facts. If staff is unable to obtain the additional facts from the taxpayer, the written response should contain clearly identified assumptions. When the assumptions made by staff are consistent with the facts of the transaction(s) in question, the written tax advice may be relied upon for relief under RTC section 6596. Written advice to taxpayers that include staff's assumptions must include the following statement:

Before discussing your questions in more detail below, please note the facts you provided are not sufficiently complete. Therefore, assumptions have been made in this letter to answer your questions. If the actual facts differ from the facts summarized in this letter, or if any of the assumptions made are incorrect, the opinion expressed in this letter will not qualify for relief under Revenue and Taxation Code (RTC) section 6596. Provided both the summarized and assumed facts of this letter are accurate and verifiable by audit, [state taxpayer's name] may rely on this response for purposes of RTC section 6596.

Written tax advice prepared by BOE staff, including email responses, must include one of the above statements regarding relief under RTC section 6596 if the written tax advice indicates any part of the transaction is exempt from tax. Written tax advice indicating the transaction is subject to tax, rather than exempt from tax, need not include any of the above statements regarding relief under RTC section 6596.

Review – Tax Advice Provided in a Written Communication

~~A record of the number of letters received and responded to will be maintained by~~ SUTD District Administrators and Headquarters' Section Supervisors must report the number of written inquiries received and responded to electronically on SharePoint. Written inquiries received and responded to must be reported by the 7th of the month following the quarter end. For example, written inquiries received and responded to in 4th quarter 2013 must be reported by January 7, 2014. ~~A monthly report, along with~~

Copies of all ~~letters~~ SUTD written responses confirming transactions of an exempt nature, modification/rescission letters, and the taxpayer's original written inquiry ~~letter~~ will be forwarded to the Audit and Information Section (MIC 44) for final review of the ~~letters'~~ accuracy of the written response. Any ~~correspondence~~ written response requiring adjustment will be returned to the originating party for modification or to rescind the written tax advice. Correspondence that advises a transaction is taxable should not be forwarded to the Audit and Information Section. All written responses, regardless of whether or not the written tax advice provides that the transactions are exempt or subject to tax, should be filed in accordance with existing policy. ~~not providing exemption advice,~~

~~which would otherwise entitle a taxpayer to relief under RTC section 6596, should not be forwarded to the Audit and Information Section.~~

PSTD Division Chiefs are responsible for maintaining a file of all original written requests regarding transactions/activities of an exempt nature. They are also responsible for ensuring all written responses are accurate. Additionally, all written responses confirming exemptions, along with any subsequent modifications/rescissions should be maintained as well.

Written Tax Advice Provided in a Prior Audit

Presentation of a taxpayer's books and records to a tax auditor for examination is considered a written request for the audit report by the audited person and any person with shared accounting and common ownership with the audited person. If a prior audit report of the person requesting relief contains written evidence that demonstrates the issue in question was examined, either in a sample or census (actual) review, such evidence will be considered "written advice from the ~~Board~~BOE." The facts and conditions in the current situation at hand must be the same as those during the prior audit. Audit comments, schedules, and other writings prepared by the ~~Board~~BOE that become part of the AWP's which reflect that the activity or transaction in question was properly reported and no amount was due are sufficient for a finding of relief from liability, unless it can be shown that the person seeking relief knew such advice was erroneous.

A person will be considered to have shared accounting and common ownership and may rely on the advice given in the audit if the person: ~~may rely on the advice provided during the audit if the person:~~

1. Is engaged in the same line of business as the audited person.
2. Has common verifiable controlling ownership of 50% or greater ownership or is a common majority shareholder with the audited person, and
3. Shares centralized accounting functions with the audited person. The audited person routinely follows the same business practices that are followed by each entity involved. Evidence that may indicate sharing of centralized accounting functions includes, but is not limited to, the following:
 - Quantifiable control of the accounting practices of each business by the common ownership or management that dictates office policies for accounting and tax return preparation.
 - Shared accounting staff or an outside firm who maintains books and records and prepares sales and use tax returns.
 - Shared accounting policies and procedures.

These requirements must be established as existing during the periods for which relief is sought. A subsequent written notification stating that the advice was not valid at the time it was issued or was subsequently rendered invalid to any party with shared accounting and common ownership, including the audited party, serves as notification to all parties with shared accounting and common ownership, including the audited party, that the prior written advice may not be relied upon as of the notification date.

The following are examples of qualified written advice provided in a prior audit:

1. A prior audit's examination of sales invoices, whether on an actual or a sample basis, qualifies as written advice with respect to the charges on ~~these~~ the invoices examined.
2. Prior audit comments or schedules that state that a specific item or charge is exempt or was properly reported constitute written advice with respect to that item or charge.
3. Markings on a no-change audit report indicating the examination of a specific type of transaction generally qualify as written advice with respect to that type of transaction.

The following do not qualify as written advice:

1. Written comments, other than audit comments, that indicate the ~~Board~~ BOE staff provided erroneous advice during a conversation with the taxpayer, either over the phone or in person. Such advice is not in response to a written inquiry from the taxpayer and is verbal, with or without documentation of such conversation.
2. A sales and use tax return accepted by the ~~Board~~ BOE that contains an erroneous deduction is not written advice, whether or not the taxpayer was asked to explain the deduction or provide supporting documentation. To qualify as written advice, the ~~Board~~ BOE staff must have responded in writing to specific facts and circumstances of the deduction in question, as described in writing by the taxpayer.
3. Waiver of an audit does not constitute written advice for RTC section 6596 purposes.
4. Acceptance by the ~~Board~~ BOE staff during an audit, of the percentage used by the taxpayer in reporting taxable or exempt portion of a sale is not misinformation when a different percentage is deemed more appropriate in the succeeding audit. When the taxpayer reports on an estimated basis, the accuracy of that estimate will be tested as part of every audit.
5. The use of, or failure to use, a percentage of error from a prior audit (AM section 0405.33) does not create a basis for a claim for relief under RTC section 6596 in relation to a subsequent audit.