SPIDELL'S
CALIFORNIA TAXLETTER®

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APRIL 2020 VOLUME 42.4

California grants extension to July 15 to file and pay taxes

The extension applies to all taxpayers.

By Lynn Freer, EA
Publisher

After a March 13, 2020, announcement that the FTB would grant an extension of time until June 15, 2020, for taxpayers affected by the coronavirus, on March 17, 2020, the FTB announced they will conform to the federal July 15, 2020, extended due date for all taxpayers.[1]

Extensions available

The relief postpones, until July 15, the filing and payment deadlines for all individuals, trusts, and business entities for:

- 2019 tax returns;
- 2019 tax return payments;
- 2020 1st and 2nd quarter estimate payments;
- 2020 LLC taxes and fees; and
- 2020 non-wage withholding payments.

Who qualifies?

Although the original FTB announcement stated the benefit applied only to taxpayers affected by the coronavirus, California conforms to the federal Notice 2020-17, which grants the extension to all taxpayers. Taxpayers do not need to do anything on their return itself nor with a payment because all returns and payments are granted an extension.

Fiscal year due dates

The FTB allows an extension for fiscal year returns. To see the due dates, go to:

www.ftb.ca.gov/about-ftb/newsroom/covid-19/extensions-to-file-pay.html

For information on the federal Families First Act, see page 15.

[1] FTB News Release (March 18, 2020)

EDD's Work Sharing Program lets employees work and collect UI

Suggest this program as an alternative to laying off employees.

By Lynn Freer, EA
Publisher

The coronavirus (COVID-19) has had a disastrous effect on many small businesses that, with a reduction in business, cannot afford to keep their employees working. Your customers are probably considering the use of layoffs, or outright terminations, to get their businesses through these tough economic times. But before making that critical decision, they should know that the EDD offers an alternative that may benefit both the business and the employees: the Unemployment Insurance Work Sharing Program.[1]

The Work Sharing Program offers employers the opportunity to cut back on the number of hours their employees work — thereby saving money — while allowing the employees to collect partial unemployment pay for the hours lost. The employer benefits by keeping employees and not spending the money to hire and train new employees when business picks up. Employees benefit by keeping their jobs. Employers can also rotate work-sharing days among those under the plan to lessen the impact on individual employees.

Program disadvantages

Employers must weigh the program's disadvantages against the alternatives. Employers must fill out and distribute weekly Forms DE 4581WS, Work Sharing Certification, and they will likely see an increase in their unemployment insurance rate, since employee benefits

SPIDELL'S CALIFORNIA TAXLETTER® (ISSN No. 0194-8237) is published on the first day of each month by **Spidell Publishing, Inc.**®, 1134 North Gilbert Street, Anaheim, California 92801-1401. Telephone: (714) 776-7850. Fax: (714) 776-9906. Web site: www.caltax.com. E-mail: subscriptions@spidell.com. The subscription price is $129 for 12 months. Periodicals Postage Paid at Anaheim, CA.© 2020, Spidell Publishing, Inc®. **POSTMASTER:** Please send address changes to **Spidell's California Taxletter**, P. O. Box 61044, Anaheim, California 92803-6144. Federal law prohibits unauthorized reproduction of **Spidell's California Taxletter**®. All reproduction must be approved in writing by **Spidell Publishing, Inc**.® Publisher Emeritus: Robert Spidell. Publisher: Lynn Freer. Editor: Renée Rodda. California Editor: Sandy Weiner, J.D. Senior Editor: Tim Hilger. Contributing Editor: Kathryn Zdan. Managing Editor: Austin Lewis. Layout: Ana Cervantes.

are paid from an employer's reserve account like normal unemployment. Employers should review their latest Form DE 2088, Notice of Contribution Rates and Statement of UI Reserve Account, for information on their UI account balances.

If an employee has income from any employer other than the work sharing employer, wages will be deducted dollar-for-dollar from Work Sharing Program benefits paid to the employee.[2]

The Work Sharing Program may not be used as a transition to a layoff.

Practice Pointer

Do not reduce hours before signing up for the program.

How to join the program

Employers must submit a Form DE 8686, Work Sharing Unemployment Insurance Plan Application, to the EDD and agree to several conditions to qualify for the Work Sharing Program:

- The employer must reduce both the workweek and wages paid to each participating employee by at least 10% but not more than 60%;
- The reduced workweek must apply to at least 10% of the workforce or 10% of one specific department or unit (minimum of two employees; companies with only one employee generally will not qualify for work sharing);
- The plan expires either at the end of the 12th calendar month after the plan's effective date or an earlier date agreed upon by the employer and the EDD. Employers whose work sharing plans are expiring have 10 days from the date of expiration to renew;
- The cutback can be for only one week or any combination of weeks for up to six months (subject to renewal); and
- If a collective bargaining agreement(s) covering the affected work unit(s) is in effect, the DE 8686 must have the concurrence, in writing, of each appropriate bargaining agent.[3]

Employees under this program may collect a percentage of unemployment benefits equal to the percent of the workweek they lost. To qualify for program benefits, participating employees must meet these criteria:

- Be regularly employed by the work sharing employer;
- Complete a normal workweek (with no hour or wage reductions) prior to participating in the Work Sharing Program;
- Be available for all work offered by the work sharing employer; and
- Accept any work offered by the work sharing employer.[4]

For more information on the Work Sharing Program, go to:

www.edd.ca.gov/unemployment/Work_Sharing_Program.htm

Example of work sharing plan: We Do Events is a small event planning company in San Francisco. The owner, Guy Layemoff, is experiencing a decline in business due to the COVID-19 pandemic.

He decides to put his four full-time hourly employees on a work sharing program from March 15 to August 15. He has each employee work 20 hours (50% of normal) per week so he has two employees working at all times.

Assuming each employee qualifies for unemployment of $400 per week, each will receive $200 per week (50% × $400 unemployment benefit).

At a rate of $17 per hour, this means each employee will have the following gross pay under the work sharing plan:

Payroll from We Do Taxes: ($17 × 20 hours)	$340
Unemployment	+ $200
	$540

At $17 per hour, prior to the work sharing plan the employee received $680 ($17 × 40 hours). So each employee will have a $140 per week reduction in income.

However, it is important to note that the $200 UI benefit will not be subject to FICA, SDI, or California income tax, which will give each employee a little more take-home pay.

We Do Events Work Sharing Plan						
	Hours per week	Hourly rate	Weekly pay	Percent of workweek cutback and percent of unemployment	Unemployment benefit/ work sharing portion of unemployment	Gross weekly pay
Regular workweek	40	$17	$680	0	0/0	$680
Work sharing plan	20	$17	$340[1]	50%	$200[2]	$540

[1] UI benefit assumed for purposes of the example

[2] Not subject to FICA, SDI, or California income tax

1 UIC §1279.5

2 *Id.*

3 *Id.*

4 *Id.*

Extensions available from BOE, CDTFA, EDD, and OTA

There is more relief to come.

By Sandy Weiner, J.D.
California Editor

On March 12, 2020, Governor Newsom issued an executive order mandating California's tax agencies to provide payment and filing extensions to California taxpayers.[1]

CDTFA

The CDTFA is providing extensions for filing returns and making payments, relief from interest and penalties, and filing a claim for refund for sales and use taxes and other taxes administered by the CDTFA. The extensions are available through May 11, 2020.[2]

Requests for relief of interest or penalties related to late filing/payments or to a filing extension may be made:

- Online at:

www.cdtfa.ca.gov/services/#Request-Relief

- Via e-mail:

BTFD.RAUElectronicMaintenanceRequests@cdtfa.ca.gov

- By mail at:

CDTFA
Return Analysis Unit, MIC 35
P.O. Box 942879
Sacramento, CA 94279-0035

Taxpayers may also call the CDTFA's customer service center if they are unable to make a timely tax payment.

Public counters in CDTFA field offices are temporarily closed but CDTFA staff are still available to assist taxpayers by phone or by video appointments. To schedule a phone, video, or payment drop-off appointment, contact the CDTFA Customer Service Call Center at:

(800) 400-7115

EDD

Employers may request up to a 60-day extension to file state payroll reports and deposit state payroll taxes without penalty or interest.[3] The written request for extension noting the impact of COVID-19 must be received within 60 days from the original delinquent date of the payment or return. The request should be sent to:

EDD
P.O. Box 826880
Sacramento, CA 94280-0001

Additional information regarding disability, paid family leave, and unemployment insurance benefits available to employees impacted by COVID-19 is available at:

www.edd.ca.gov/about_edd/coronavirus-2019/faqs.htm

EDD offices closed

The EDD has closed its offices (although may still see people by appointment only). But the EDD has an online system to apply for unemployment, paid family leave, or state disability insurance benefits, available at:

https://edd.ca.gov/claims.htm

BOE

The state does not have the authority to extend the payment of property taxes because critical local services such as schools, fire, and police are dependent on this revenue. The California Association of County Treasurers and Tax Collectors have stated that they can waive penalties, costs, or other charges resulting from tax delinquency due to reasonable cause related to this crisis.[4] **Note:** April 10 falls on a Friday, but offices may be closed in some areas due to the COVID-19 virus. Contact the County office for more information.

Payments may be made by mailing in a check (postmarked by April 10), paying online either by e-check (no fee) or by credit card (2.5% fee) through the county website, or paying by the phone system.

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OTA

The OTA is currently taking the position that they do not have the statutory authority to grant an extension of the 30-day period to file an appeal from an FTB or CDTFA action. However, taxpayers will be given an automatic 60-calendar-day extension for all briefing or other document deadlines that fall between March 1, 2020, and May 18, 2020.[5] This applies to any OTA deadline to submit briefing, additional briefing, supplemental briefing, requested documentation, perfected appeals, petitions for rehearing, and/or perfected petitions for rehearing.

Other relief provided

The order also directs the agencies to provide extension relief related to audits, billing, notices, assessments, and refund claims. We will provide further information as it becomes available.

1 www.gov.ca.gov/wp-content/uploads/2020/03/3.12.20-EO-N-25-20-COVID-19.pdf

2 COVID-19 Statement, California Association of County Treasurers and Tax Collectors

3 FAQ #23 at: https://www.edd.ca.gov/about_edd/coronavirus-2019/faqs.htm

4 R&TC §4985.2

5 OTA Legal Notice 2020-01

Electric vehicle rebates are taxable

Taxability applies whether there's a 1099 or not.

By Kathryn Zdan, EA
Contributing Editor

A recent question from our Message Board asked whether California electric vehicle rebates are taxable for federal or California purposes. The question mentions that 1099s usually are not issued for these rebates; while that is normal, the rebates are still taxable. California conforms to the federal definition of gross income from IRC §61 for both personal and corporate income tax purposes.[1]

California's electric car rebates are not specifically excluded from gross income by law for either federal or California purposes, so they are includible in gross income for both.

California electric car rebates

The California electric vehicle rebates are issued through the California Clean Vehicle Rebate Project (CVRP), which is administered by the California Center for Sustainable Energy (CSE) for the California Air Resources Board. Taxpayers can get a rebate of up to $7,000 for the purchase or lease of a new plug-in hybrid electric vehicle, battery electric vehicle, or a fuel cell electric vehicle.

Californians must apply for the rebates directly from the CVRP. In other words, the rebates are not state tax credits, and they are issued in a transaction wholly separate from the purchase price of the vehicle. As such, the rebates do not represent a reduction in the purchase price of the vehicle because they do not come from the seller of the vehicle, directly or indirectly.

Caution

Note the following excerpt from the CVRP website: *"CSE does not issue a 1099 for your rebate. We cannot offer tax advice of any kind, and advise you to contact a certified public accountant or tax professional regarding the taxability of the CVRP rebate."*[2]

Just because the CSE, or any other source, does not issue a 1099 does not mean the rebate is not taxable.

Federal rulings on this issue

The IRS has ruled in multiple private letter rulings that rebates and discounts that represent purchase price reductions are not included in gross income.[3] Rebates and discounts that are considered purchase price reductions are those that are offered directly or indirectly from the sellers of goods and services.

In another private letter ruling, the IRS ruled that rebates, nontax credits, and other incentives provided by state agencies are not purchase price reductions and are therefore includible in gross income.[4]

Preapproval program

Through a pilot CVRP program launched in 2018, San Diego County residents can get preapproved for rebates to help pay for eligible vehicles. The pilot program is limited to San Diego County residents for now but will be available statewide in the future.

According to the CVRP website, *"The dealerships listed on this page have agreed to participate in the CVRP Rebate Now Preapproval Pilot. If you've applied for a preapproved CVRP rebate and are currently shopping for a clean vehicle, the dealerships below can apply your preapproved rebate amount toward your purchase or lease, reducing the amount you pay for your vehicle up front."*

If the rebate is applied to reduce the upfront cost of the vehicle this appears to meet the requirement that the rebate be obtained "from the seller of the vehicle directly or indirectly" and would therefore not be taxable.

More rebate information

For information on vehicle eligibility and rebate amounts, go to:

https://cleanvehiclerebate.org/eng/eligible-vehicles

1 R&TC §§17071, 24271

2 See, e.g., PLRs 9623035, 201027015, 199939021, 200142019, 200816027

3 PLR 201004005

4 See https://cleanvehiclerebate.org/eng/faqs

OTA upholds "drop and swap" like §1031 exchange

Is the OTA taking a more favorable view of these transactions than the former Board of Equalization?

By Sandy Weiner, J.D.
California Editor

In ***Appeal of Mitchell***, the Office of Tax Appeals (OTA) ruled a taxpayer conducted a valid IRC §1031 like-kind exchange and therefore was not liable for tax on her share of the gain in the year of the sale.[1]

The OTA found that the taxpayer-partner timely exchanged her 10% tenant-in-common (TIC) interest in property for a replacement property and therefore complied with the §1031 statutory requirements. (The property was previously owned by a partnership, of which the taxpayer owned a 10% interest.) IRC §1031 requires that the same party sell the relinquished property and purchase the replacement property.

In the decision, the OTA stated that "a taxpayer's 1031 exchange can be preceded by a tax-free acquisition of the relinquished property or followed by a tax-free transfer of the replacement property." In other words, the OTA appears to be open to "drop and swap" and "swap and drop" type transactions.

Too good to be true?

This decision is a welcome roadmap for tax professionals and attorneys advising partnerships and their partners how to transact a sale of real property when only some of the partners want to undertake a §1031 exchange and the others want to cash out.

However, it's important to remember that this decision is not precedential so the FTB is not bound by its findings, nor is another OTA administrative law judge panel (as we've seen with other issues before the OTA). In fact, last year the OTA denied a taxpayer's petition for rehearing of a decision by the five-member Board of Equalization in which the BOE upheld the FTB's assessment based on similar arguments (discussed in more detail later under "Board's narrower interpretation"), finding that the BOE's decision was supported by the evidence and was not "contrary to the law."[2]

The drop-and-swap exchange

In the ***Mitchell*** case, the property was sold to a third party on November 28, 2007, after the managing partner of the partnership had negotiated the sale of the property over the course of 11 months. The day prior to the closing, the partnership redeemed the taxpayer's and her mother's 10% and 8% partnership interests, respectively, in exchange for 10% and 8% TIC interests in the property. The following day, the partnership, the taxpayer, and her mother all signed a grant deed to the purchaser to complete the sale of the property.

Who relinquished the property?

The FTB argued that the §1031 deferral claimed by the taxpayer was invalid because under the "substance over form" doctrine, it was the partnership that sold the relinquished property and not the taxpayer. It was the managing partner of the partnership that negotiated the terms of the sale and the offer, counter-offer, and purchase agreement were all negotiated in the partnership's name and not the partners' names.

However, the OTA found that all parties to the exchange (the partnership, all the partners, and the purchaser) were aware from the beginning that some of the partners wanted to participate in a §1031 exchange and that the managing partner was negotiating the sale on behalf of all of the partners, some of whom wanted to cash out and some of whom wanted to make a like-kind exchange. In fact, the counter-offer made by the purchaser allowed for an escrow extension for purposes of facilitating a §1031 exchange.

The OTA found that IRC §1031 does not require ownership of the relinquished property for any particular period of time and that the Ninth Circuit Court of Appeals had noted another decision with approval, which stated that "one need not assume the benefits and burdens of ownership in property before exchanging it but may properly acquire title solely for the purpose of exchange and accept title and transfer it in exchange for other like property, all as a part of the same transaction with no resulting gain."[3] Therefore the way the transactions were structured resulted in the sale of the property by the partnership and the taxpayer and her mother, and not just the partnership.

Assignment of income

The FTB also argued unsuccessfully that the transaction as structured was an invalid anticipatory assignment of income. However, the OTA rejected this argument because there cannot be an improper assignment of income when the partnership was a passthrough entity that did not owe taxes on the income to begin with.

Board's narrower interpretation

In one of its last decisions issued prior to transferring its appellate duties to the OTA, the Board of Equalization (Board) reached the opposite conclusion in the ***Pau*** appeal involving a partner in three separate tiered entity partnerships in which the partnership exchanged the partner's partnership interest for TIC interests in the property immediately before the property was sold.[4] In ***Pau***, the Board ruled that it was the partnerships, and not the partner, that sold the property or purchased the replacement property. The case illustrates the minefields that taxpayers face when navigating these types of complex transactions involving multiple entities and transactions.

What's all this swapping?

In a typical drop-and-swap scenario, the entity converts the partnership interests to TIC interests, therefore "dropping" the title to the property to the TICs. Each investor receives a tax-free distribution of their share of the investment property's title. With title placed in the name of the individual investors, rather than the partnership, each investor is free to either cash out or make a like-kind exchange using the equity obtained from the original property as payment.

<u>Swap and drop:</u> A partnership may do the reverse: make the exchange, and after waiting "long enough," elect out of the partnership treatment. To avoid the step transaction treatment, the partnership should drop title to the individual partners, or refinance the new property to acquire cash to redeem the partner wanting to leave.

The IRS has indicated that a post-exchange distribution may occur relatively soon after the exchange without destroying the tax shield.[5]

<u>Drop and swap:</u> Although the ***Mitchell*** and ***Pau*** cases appear to involve what's known as a "drop-and-swap" transaction, the drop-and-swap issues were not argued in these cases. In these cases, the issue was who actually negotiated the sale, and therefore it involved a "substance over form" analysis. However, typically these multiple entity/transaction §1031 exchanges involve drop-and-swap or swap-and-drop transactions.

While drop-and-swap transactions are commonly used, the IRS and the FTB will attack the strategy on two fronts:

- <u>Step transaction:</u> The IRS may determine that the arrangement was designed solely to avoid taxation and disallow the exchange; and
- <u>Investment:</u> They will assess whether the property is held long enough to be treated as an investment.

In general terms, it is always better to provide sufficient time between the "drop" and the "swap," or vice versa, so as to avoid an audit.

1 ***Appeal of Mitchell***, 2018-OTA-210, petition for rehearing denied, 2020-OTA-001

2 ***Appeal of Pau***, petition for rehearing denied, 2019-OTA-119

3 ***Alderson v. Comm.*** (1963) 317 F.2d 790

4 ***Appeal of Pau*** (December 17, 2017), Cal. St. Bd. of Equal., Case No. 959931

5 PLR 200521002

FTB notices delayed

In February 2020, there was a delay in the printing and mailing of some FTB notices.[1] Approximately 290,000 various notices were delayed; however, of those, there are only 17,000 that could have a financial impact to taxpayers. The FTB will waive penalties and interest resulting from the delay and is working to minimize impacts to affected taxpayers.

The issue first came to light in late February and was due to a problem with one of the FTB's print servers. The notice delay will be anywhere from a couple of days to a few weeks.

For the 17,000 notices that have potential financial impacts, these are mostly personal income taxpayers. The FTB will include inserts into the delayed notices to instruct taxpayers on what to do. While most taxpayers will not be impacted, the insert included with the notice will provide direction to taxpayers impacted by the notice delay.

[1] FTB Tax News (March 2020)

Change in partnership and LLC returns causes confusion

Beware of line 5 on Form 568 and line 25 on Form 565.

By Lynn Freer, EA
Publisher

Forms 568, Limited Liability Company Return of Income, and 565, Partnership Return of Income, now include a line for "Partnership level tax." The FTB has included this line to report partnership-level (CPAR) tax when there is a federal audit or an administrative adjustment. However, this line is causing some confusion because the form instructions do not make clear what the line is for, or when it should be used.

Beginning in 2018, amending a California LLC or a partnership return is done by checking a box on the Form 568 or 565, respectively; there is no longer a separate amended return form. This means that any lines that will be needed for amended returns are included on the original return. The new partnership level tax line will be used on future amended California returns to report adjustments after a federal audit of that tax year.

The line is also used when the partnership/limited liability company makes an administrative adjustment request and elects to have the partnership/limited liability company pay an imputed underpayment.

There were no federal CPAR audits for the 2018 year in 2018. So, when more than 600 taxpayers made an entry on the partnership level tax line, the FTB responded appropriately by sending letters questioning why an amount was entered.

To the best of our knowledge, the IRS has not begun auditing 2018 — much less 2019 — partnership returns. So, for 2019 returns, it is highly unlikely there should be an entry in this box. And unfortunately, the FTB has said that due to budget constraints, they most likely will not contact taxpayers and could possibly assess tax if a taxpayer incorrectly enters an amount on the line.

FTB has asked for help from software companies

The FTB is looking into ways the computerized tax processors could help prompt people so they do not enter an amount there on a timely filed original return, including a diagnostic that would alert the tax professional about when and how to use this line.

Spidell's suggested change

A part of the problem is that the instructions for the line are very basic, and unless someone understands CPAR and California's partial nonconformity, they may enter an amount they should not have entered. As it is too late to change the form for the 2019 return, the FTB has agreed to change the form instructions instead. We have suggested something along the lines of:

"Use this line to amend a return where the IRS made an assessment based on a centralized partnership audit regime (CPAR) audit or an audit adjustment request (AAR) where there was no California partnership push-out election in effect."

The FTB has also requested that software providers provide a diagnostic whenever this line is used.

We have asked that the FTB ignore entries on this line through the end of 2020 on an original return as it is highly unlikely a 2019 return audit will be completed before the end of 2020. They have said that this is not possible, which we don't find as an acceptable, taxpayer-friendly solution to the confusion.

For future years, we have suggested a "Yes" or "No" box on the return, asking if the assessment is part of a CPAR audit and only allowing a number to be entered if the answer is yes.

California partial conformity to CPAR (centralized partnership audit regime)

California requires partnerships to report results of a CPAR audit as well as any changes reported on an administrative adjustment request. However, for California purposes the adjustment goes on the LLC/partnership return for the reviewed (audited) year even though for federal purposes, the adjustment is reported on the year the final determination is made. See "Partnerships required to report federal adjustments from partnership-level audits" in the November 2018 issue of *Spidell's California Taxletter®*.

Push-out election

A push-out election is made to push the assessment out to the original partners rather than the partnership paying the tax. When a push-out election is properly made, the partnership still has the responsibility to report each change or correction to the FTB by filing an amended return, or by providing the FTB a copy of the revenue agent report (RAR), even if there is no additional liability imposed at the partnership level.[1] This is the same guidance given for reporting other RARs.[2]

However, when a push-out election is properly made (or for a year prior to 2018) and an amended return is filed, the partnership does **not** need to compute a partnership level tax or report the partnership level tax on the amended return. So you would not enter a number on these lines.

However, if there was no push-out in a CPAR audit, the taxpayer must amend the entity return, using the form for the reviewed tax year, checking the amended return box, and entering the amount on the adjustment line (currently lines 5 and 25 for Forms 568 and 565, respectively).

> **Example of CPAR adjustment:** In 2020, the IRS audited XYZ LLC, a California LLC, for the 2018 year. In 2021, the IRS made an assessment of $10,000 against the partnership. XYZ did not elect out of the CPAR requirements and did not make a push-out election.
>
> XYZ must report the adjustment on their 2021 federal return and pay the federal tax at the maximum individual tax rate. For California purposes, XYZ must amend its 2018 return and report the $10,000 adjustment, paying tax at the maximum California rate.

1 R&TC section 18622.5(a) and (d)(2)

2 FTB Publication 1008

FTB delay leads to partial interest abatement for taxpayer

The FTB's failure to act in a timely manner was a managerial act.

By Kathryn Zdan, EA
Contributing Editor

In a precedential decision, a taxpayer who failed to report pension income on his timely filed 2010 return was allowed partial interest abatement where the FTB took an inordinately long time to assign a hearing officer to the taxpayer's case.[1]

The taxpayer appealed an additional $8,434 in tax plus interest for the unreported income, arguing that the FTB had not timely issued the proposed assessment and that interest should be abated. In looking at the timeline of events, the FTB issued the notice within the four-year timeframe for issuing the proposed assessment so the taxpayer was liable for the additional tax.[2]

The taxpayer requested interest abatement for three periods:

1. The date the FTB first received the federal audit information (November 26, 2013) until the date the FTB sent the NPA to the taxpayer (August 15, 2014);
2. The date the FTB received the taxpayer's protest letter (October 17, 2014) until the date the FTB sent a letter explaining their position (June 15, 2015); and
3. The date of the taxpayer's reply to the FTB's position letter (which he faxed to the FTB on November 6, 2015) until the date the FTB sent a letter scheduling a protest hearing (which the FTB mailed on March 23, 2017).

First FTB written contact

For the first period, interest abatement was denied because no interest may be abated for any period accruing before the date the FTB first contacted the taxpayer in writing concerning the deficiency.[3] The NPA was the first contact from the FTB so interest that accrued prior to that contact date cannot be abated.

Reasonable response time

For the second period, the FTB conceded that six months was a reasonable period of time to issue a position letter to the taxpayer and agreed to abate the interest for the remaining time beyond six months — which is April 17, 2015, through June 15, 2015, when the taxpayer actually received the letter. The OTA did not disagree with the FTB's determination regarding reasonable response time.

Ministerial or managerial delay

For the third period, the OTA granted interest abatement due to an unreasonable delay.

The FTB can abate interest (whether paid or unpaid) if the deficiency or proposed deficiency was attributable in whole or in part to any unreasonable error or delay in performing a ministerial or managerial act. Interest can also be abated if the final deficiency was delayed due to the FTB officer or employee being dilatory in performing a ministerial or managerial act.

The definition of "managerial act" includes "the exercise of judgment or discretion relating to management of personnel."[4] Because the FTB took 248 days (from February 2, 2016, when the protest hearing file was created, until October 21, 2016) to assign a hearing officer, the OTA found this to be an unreasonable delay in preforming a managerial act. The OTA also noted the lack of explanation from the FTB regarding the delay and a lack of evidence that any FTB employee was working on the case during this time period.

Requesting abatement

Requests for interest abatement due to IRS or FTB ministerial error or delay should be submitted using Form FTB 3701, Request for Abatement of Interest, which is available at:

www.ftb.ca.gov/forms/misc/3701.pdf

Interest abatement

To obtain relief from interest, a taxpayer must qualify under one of three statutes: R&TC §§19104, 19112, or 21012.

FTB or IRS error or delay: Under R&TC §19104(a)(1), the FTB may abate interest related to a proposed deficiency to the extent the interest is attributable in whole or in part to:

1. An unreasonable error or delay;
2. By an officer or employee of FTB;
3. In performing a ministerial or managerial act; and
4. Which occurred after the FTB contacted the taxpayer in writing regarding the proposed assessment, provided no significant aspect of that error or delay is attributable to the taxpayer.

Under R&TC §19104(a)(3), the FTB can abate California interest payments that are based on an IRS error or delay, if the IRS abated interest for the related federal deficiency under IRC §6404(e).

Financial hardship: R&TC §19112 requires a showing of extreme financial hardship caused by significant disability or other catastrophic circumstance. Catastrophic circumstances can include a sudden crippling or terminal illness, or an accident resulting in loss or reduction of income over a long period of time or a natural disaster such as fire, flood, or earthquake.

Along with the written request, the taxpayer or entity must submit a completed Form FTB 3561, Financial Statement. If the taxpayer or entity is claiming significant disability, a detailed physician's statement to support the disability must be included.

Reliance on written advice: R&TC §21012 allows the FTB to waive interest in certain circumstances when a taxpayer, after submitting to the FTB a formal written request for advice and receiving a written response, reasonably relies on that advice and fails to make a timely return or payment.

This section applies only to a taxpayer who made the written request and properly relied on such advice. In support of the request for interest waiver under this section, the taxpayer must provide a copy of the original written request, a statement made under penalty of perjury setting forth the facts on which the claim for waiver is made, and any other information that the FTB may require.

1 *Appeal of Gorin*, 2019-OTA-018P

2 R&TC §19060(b)

3 R&TC §19104(b)(1)

4 Treas. Regs. §301.6404-2(b)(1)

Estate gets refund of tax paid with improperly filed return

Some help from the IRS extended the statute of limitations for the refund.

By Renée Rodda, J.D.
Editor

The OTA granted a refund claim that was filed after the general statute of limitations had expired because it was within two years of the IRS making a final federal determination on the estate's account.[1]

This case is an excellent example of the problems that can occur when an executor does not have the expertise to properly file tax returns and does not seek the guidance of a tax professional.

Wrong return filed

The decedent passed away on August 25, 2010. His 2010 federal and California individual income tax returns were timely filed, but only the federal return noted that the taxpayer was deceased.

In 2015, the executor of the decedent's estate received a notice from the FTB requesting that she file a 2011 individual tax return for herself. She responded to the notice by stating that the income reported to her was from the sale of the decedent's assets, and she filed both federal and 2011 individual tax returns for the decedent (not fiduciary returns) and paid the tax she thought was due.

The FTB accepted the Form 540 as filed. The IRS accepted the Form 1040, but treated it as a return filed on behalf of the estate that should have been filed on Form 1041. They recalculated the tax liability accordingly and sent a notice to the executor.

In November 2016, the executor filed an amended 1041, stating that the income had been improperly reported and requesting a refund of all the amounts paid. In January 2017, she filed an amended Form 540, attached a copy of the Form 541 that should have been filed, and requested a refund from California as well.

In March 2017, the IRS accepted the amended Form 1041, deleted all taxes, penalties, and interest on the account, and issued a refund to the executor.

The FTB deleted the taxes, penalties, and interest but denied the refund claim, stating that it was not timely filed.

SOL for refunds

The normal California statute of limitations period for claiming a refund is the later of these dates:

- Four years from the due date of the return without regard to extensions;
- Four years from the date of a timely filed return (including extensions); or
- One year from the date of overpayment.[2]

In this case, the return in question was due April 15, 2012, the taxes were paid in 2015, and the amended return requesting the refund was filed January 12, 2017. The refund claim was more than four years from the due date of the return and more than one year from the overpayment.

Final federal determinations

The general statute of limitations for California can be extended if the IRS grants the taxpayer a refund. If a change or adjustment is allowed by the IRS, the taxpayer has two years from the date of the final federal determination to request a refund from the FTB.[3]

In this case the IRS accepted the executor's refund claim in March of 2017. Although the IRS refund was granted to the decedent's estate, and the FTB alleged that the liability was paid under the decedent's individual account, the OTA granted the refund.

1 *Appeal of Chewning* (July 9, 2019) 2019-OTA-203
2 R&TC §19306
3 R&TC §18622(a)

Overview of the federal Families First Act (H.R. 6201)

Federal benefits are different from Paid Family Leave and SDI.

By Lynn Freer, EA
Publisher

On March 18, 2020, the President signed the Families First Coronavirus Response Act (the Act, or FFCRA)[1] to provide immediate relief to individuals and employers, which will affect California employers with fewer than 500 employees. The act provides two different types of employer-paid leave benefits:

- Up to 80 hours of paid sick leave for workers who are ill, quarantined or complying with shelter-in-place orders, seeking care, or taking care of sick individuals (whether or not related);[2] and
- Up to 12 weeks (10 of which are employer-paid) of paid family leave benefits for people caring for minor children whose school or child care is closed.[3]

The payments must begin by April 1, 2020, and must be made through December 31, 2020.

Small business exemption

For purposes of Paid Family Leave only, the Secretary of Labor may:

- Exempt small businesses with fewer than 50 employees from the requirement if the imposition of the child-care related employer-paid sick leave or family leave benefits would jeopardize the viability of the employer to stay in business; and
- Exclude certain health care providers and emergency responders from eligibility from the paid sick time and paid family leave.[4]

Mandatory paid sick leave

Employers with fewer than 500 employees (including some government employers) must provide up to 80 hours of paid sick leave to each employee unable to work (or telework). Here are some things you should know:

- All employers with fewer than 500 employees must provide this benefit. There is no small employer exception;
- There is no minimum threshold of days the employee must have worked; and
- An employer cannot require an employee to use other paid leave benefits prior to claiming the paid sick time required under the Act.

California issues

We have contacted the EDD to find out how this benefit works with California's SDI. We are unsure whether this benefit or SDI would be first, although it appears that the federal sick leave would be first.

Also, California SDI is available for an employee with an illness or injury, either physical or mental, which prevents customary work. Disability includes elective surgery, pregnancy, childbirth, or related medical conditions. There is no provision in the SDI program for caring for a family member.

Federal paid sick leave benefit amount

The amount of the benefit is dependent on the reason for the worker taking the leave as outlined in the chart below.

Available Sick Leave Benefit

Reason for leave	Amount of benefit
The worker: • Is subject to a federal, state, or local quarantine or isolation order related to COVID-19; • Has been advised by a health care provider to self-quarantine due to concerns related to COVID-19; or • Is experiencing symptoms of COVID-19 and is seeking a medical diagnosis.	100% of the employee's regular rate of pay (not less than the applicable minimum wage rate) up to a maximum of $511 per day and $5,110 in aggregate for a total of 10 days
The worker is: • Caring for an individual who is subject to governmental quarantine, or isolation order has been advised by a health care provider to self-quarantine; • Caring for his/her child or if the child's school or place of care has been closed, or the child care provider is unavailable due to COVID-19 precautions; or • Experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.	Two-thirds of the regular rate of pay up to a maximum of $200 per day and $2,000 in aggregate for a total of 10 days

Federal paid family leave

Employers must also pay benefits for employees taking family leave to care for a child due to a school or child care closure or whose child care provider is unavailable due to the virus. Until December 31, 2020, the act allows employees who have worked more than 30 days for an employer who employs fewer than 500 employees to take up to 12 weeks of employer-paid family leave.

Here are the specifics:

- The rate of pay may not be less than two-thirds of an employee's regular rate of pay, times the number of hours the employee would otherwise be normally scheduled to work. It may not exceed $200 per day and $10,000 in aggregate;
- Employers must pay part-time employees for the amount they typically earn in a two-week period. If a worker's hours vary, then the payment is based on the average number of hours for the prior six months;
- If the employee is a new hire who had not yet worked six months, then the employer must use the hours the worker is reasonably anticipated to have worked; and
- The first 10 days of an employee's family leave may be unpaid, although the employee may be covered by the act's mandatory paid sick leave benefits during this period.

California paid family leave

Paid Family Leave provides benefits to individuals who need to take time off work to care for a seriously ill child, parent, parent-in-law, grandparent, grandchild, sibling, spouse, or registered domestic partner. Benefits are also available to new parents who need time to bond with a new child entering their life either by birth, adoption, or foster care placement. In other words, none of the COVID-19–related benefits would qualify for Paid Family Leave.

We believe the federal paid leave benefits would be paid prior to the California leave, but we are awaiting confirmation from the EDD.

Employers paying paid sick leave or paid family leave benefits (previously discussed) may claim a dollar-for-dollar refundable credit against their payroll taxes (referred to as the "Child Care Leave Credit").[5] Employers will be able to retain an amount of the payroll taxes equal to the amount of qualifying paid sick leave and paid family leave that they paid, rather than deposit them with the IRS.

The payroll taxes that may be retained are:

- Federal income taxes;
- The employee share of Social Security and Medicare taxes; and
- The employer share of Social Security and Medicare taxes with respect to **all** employees.

The credits are claimed on Form 941, Employer's Quarterly Federal Tax Return, and any excess amount is refunded.

Caution

The payroll credit allows employers who withhold payroll taxes and federal income taxes from their employees to keep those funds in their own pocket and not remit them to the IRS, to the extent the employer can claim a credit for paid family and medical leave or paid sick leave under the act.

Employers should proceed with great caution when calculating their credits and determine which payroll taxes they can keep in their own pocket. Any errors and the employer may face payroll trust fund penalties for not remitting the required payroll taxes to the IRS.

Taxation of benefits

Paid sick leave and paid family leave benefits discussed above are not considered wages for OASDI tax purposes. However, they are wages for income tax purposes.

We believe that for California purposes, the wages are subject to personal income tax and SDI withholding.

Amount of credit

The credit may be claimed for 100% of the paid sick leave and paid family leave benefits previously discussed:

- Increased by:
  - The amount of the employer's qualified health plan expenses allocable to the paid sick leave wages if these expenses are excluded from the employee's gross income; and
  - The 1.45% Medicare tax paid on such benefits; and
- Reduced by any credits claimed for the employment of qualified veterans or for research expenditures of qualified small business employees claimed by the employer.

Self-employed taxpayers

Self-employed individuals may claim similar refundable credits to the ones discussed above against their self-employment tax for leave taken between March 18, 2020, and December 31, 2020.[6] The credit may only be claimed by an individual who:

- Regularly carries on any trade or business; and
- Would be entitled to receive paid sick leave benefits or paid family leave benefits if the individual were an employee of an employer (other than himself or herself).

The amount of the paid sick leave and paid family leave credit for self-employed individuals is based on the average daily self-employment income, up to the applicable $511 and $200 daily caps. "Average daily self-employment income" is determined by multiplying the net earnings from self-employment of the individual for the taxable year divided by 260.

Benefits chart available

For a chart that compares the various benefits available to workers impacted by COVID-19, go to:

www.caltax.com/spidellweb/public/editorial/cat/0420CAT-COVID19-chart.pdf

1 H.R. 6201; P.L. 116-127
2 FFCRA §5102
3 FFCRA §3102
4 FFCRA §§3102, 5111
5 IRC §§7001, 7002
6 FFCRA §§7002, 7004

Late-breaking news: Canceling an FTB payment

If your client scheduled either a 2020 estimate or 2019 tax payment for April 15 through tax preparation software and they want to postpone it until July 15, they may cancel the payment by calling FTB's e-file help desk at:

(916) 845-0353

They must cancel the payment at least two working days before the scheduled withdrawal; if the scheduled withdrawal is on April 15, 2020, you must cancel it by April 13, 2020. We suggest calling earlier than April 13 to ensure they are able to actually get through to a person in time to cancel the payment.

Taxpayers who scheduled the payment through the FTB's Web Pay must go online to cancel the payment via MyFTB. If they have no MyFTB account, they must call the FTB.

New payments may be scheduled online using Web Pay.

California Contacts

The FTB allows an extension for fiscal year returns. To see the due dates, go to:	www.ftb.ca.gov/about-ftb/newsroom/covid-19/extensions-to-file-pay.html
For more information on the Work Sharing Program, go to:	www.edd.ca.gov/unemployment/Work_Sharing_Program.htm
Requests for relief of interest or penalties related to late filing/payments or to a filing extension may be made at:	www.cdtfa.ca.gov/services/#Request-Relief BTFD.RAUElectronicMaintenanceRequests@cdtfa.ca.gov California Department of Tax and Fee Administration • Return Analysis Unit, MIC 35 • P.O. Box 942879 • Sacramento, CA 94279-0035
To schedule a phone, video, or payment drop off appointment, contact the CDTFA Customer Service Call Center at:	(800) 400-7115
A written request for a 60-day extension to file state payroll reports and deposit state payroll taxes can be sent to:	EDD • P.O. Box 826880 • Sacramento, CA 94280-0001
For information on the various benefits available to employees impacted by COVID-19 may be found at:	www.edd.ca.gov/about_edd/coronavirus-2019/faqs.htm
To apply for unemployment, paid family leave, or state disability insurance benefits, see:	https://edd.ca.gov/claims.htm
Information on clean vehicle eligibility and rebate amounts is available at:	https://cleanvehiclerebate.org/eng/eligible-vehicles
Get Form FTB 3701, Request for Abatement of Interest, at:	www.ftb.ca.gov/forms/misc/3701.pdf
For a chart that compares the various benefits available to workers impacted by COVID-19, go to:	www.caltax.com/spidellweb/public/editorial/cat/0420CAT-COVID19-chart.pdf
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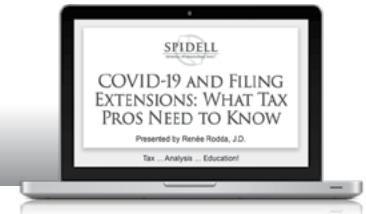

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