



STATE OF CALIFORNIA  
Taxpayers' Rights Advocate Office MS F385  
**FRANCHISE TAX BOARD**  
PO BOX 157  
SACRAMENTO CA 95741-0157

02.01.2024

Ryan, LLC

Dear Gina Rodriguez:

Thank you for presenting your issues at the December 2023 Taxpayers' Bill of Rights Hearing. As the Taxpayers' Rights Advocate, your concerns are important to me.

The following responses are provided by the appropriate program areas within the department:

### **Question 1**

FTB releases an NPO when an assessment is less than a refund claim, as an example. NPOs are not listed as an approved jurisdictional forum in the OTA's regulations (18 CCR Sec. 30103). Therefore, the OTA generally is prohibited from hearing an appeal based on an NPO. Without a way to appeal an NPA to the OTA, taxpayers have no recourse to advance their disputes with the FTB.

If the OTA is not going to update their regulations to allow NPOs to be appealed, **our request is to have the FTB review their NPO procedures** and find a way for taxpayers in an NPO situation to continue their disputes. Perhaps consider issuing a Notice of Action to deny or partially deny a refund claim, and then issue a Notice of Proposed Assessment (NPA) for the same tax year. There might be a better approach, but no matter what solution, the goal must be to provide taxpayers with appeal rights in these situations.

### **Response 1**

FTB provides appeal rights on all fully or partially denied claims for refunds and all assessments that were fully or partially affirmed in Protest.

### **Multiple year audit adjustments**

A Notice of Proposed Over Assessment (NPO) is generally issued when there are multiple years in an audit cycle and there is at least one Notice of Proposed Assessment (NPA) and one partial claim denial. The NPO is a non-appealable interim notification issued as a courtesy to taxpayers informing them about a pending partial claim denial. The purpose of using this interim notification is to allow taxpayers an opportunity to first exhaust the administrative process related to a Protest should they wish to protest the NPA and not have to deal with a Protest and

an Appeal concurrently. Once the Protest is complete, two final notices are issued – the Notice of Action (Form 5930/5931) to reflect the Protest determination and Notice of Action on Cancellation, Credit or Refund (FTB 5847/ 5848) to reflect the partial claim denial. Both of these notices are appealable at the Office of Tax Appeals (OTA). Thus, taxpayers are provided with appeal rights at OTA for both of these situations simultaneously, as they are a part of the same audit cycle, at the end of the audit and protest process.

If the audit results in an NPA for one year and a full claim denial for another year, this results in two notices – NPA and a Full Claim Denial (FTB 5847/ 5848). While the NPA is issued to the taxpayer, the Full Claim Denial notice is kept on hold until the Protest process is complete (if protested). Upon completion of the Protest, the Notice of Action reflecting the Protest determination is issued along with the Full Claim Denial Notice (which was on hold) providing taxpayers the opportunity to appeal the notices simultaneously at the end of the Audit and Protest process.

### **Same-year audit adjustments**

When we have a situation with adjustments for assessment combined with a refund claim in the same year resulting in a net NPA, this results in two notices – NPA and a Full Claim Denial. The NPA is issued to the taxpayer, and the claim denial notice is kept on hold while taxpayer is provided an opportunity to protest the NPA. If protested, once the Protest is complete, the Notice of Action reflecting the Protest determination is issued along with the Full Claim Denial Notice (which was on hold) to allow the entire case to proceed to any appeal process simultaneously.

When the positive adjustments for assessment and refund claim combination results in a reduced net refund, we issue a partial claim denial notice (Notice of Action on Cancellation, Credit or Refund (FTB 5847/ 5848)). This partial claim denial notice is an appealable notice and provides taxpayers an opportunity to appeal the partial claim denial.

If you believe that you received an NPO that is not consistent with these procedures, please reach out to me.

### **Question 2**

We continue to hear complaints from taxpayers across the world about the time it takes for the FTB to conclude audits, including audits of refund claims, as well as the time it takes to resolve protests and petitions for alternative apportionment.

For refund claims, taxpayers can use the statutory deemed denied rule and appeal to the OTA if the FTB takes no action within six months. However, that pushes incomplete audits to the OTA, putting pressure on them, has the potential to clog the appeals system, and is not a good solution. The issue of slow resolution of controversy cases has been around for more than 30 years. As far back as 1988, when the Taxpayers' Bill of Rights (TBOR) was enacted, the California Legislature wanted to ensure that the FTB took great care with its audit and protest inventory and passed R&TC §21010, which

states, in part, that the FTB must, no later than July 1, 1989:

“Develop a plan to reduce the time required to resolve amended return claims for refund, protests, and appeals. The plan shall include determination of standard time frames and special review of cases which take more time than the appropriate standard time frame.”

Then in 2003, FTB’s regulations under 18 CCR §19032 were adopted. These regulations provide timeframes that are intended to provide an orderly audit process, and state, in part:

“The taxpayer should have the expectation that the audit of the tax return be conducted in a manner so that resolution of the audit will be achieved within a two-year period commencing with the date of ‘initial audit contact.’”

There are a few exceptions to the “two-year rule,” but absent an exception, there are no consequences if the FTB fails to meet the two-year deadline. Under property tax laws, if the assessors do not complete an appeal within two years, taxpayers automatically win. Wouldn’t it be great for taxpayers to have a similar rule at the FTB?

In both 2013 and 2014, I testified on behalf of CalTax on this exact issue, and stated that the slow resolution of controversy cases was the number one complaint from taxpayers (just as it is today). Back then, besides the slow resolution of audits and protests, the slow resolution of appeals was also in the mix. However, with the creation of the OTA, the delay in resolving appeals has largely gone away. What wasn’t in the mix 10 years ago, was the slow resolution of alternative apportionment petitions. This workload has increased undoubtedly due to the voter-approved single sales factor apportionment formula, which became mandatory in the 2013 tax year.

As a result of my testimony a decade ago, FTB staff responded on February 4, 2015, that their short-term solution was to focus on both Audit Division and Legal Division cases that were more than 36 months old and to focus on closing the oldest cases. The FTB also stated that they would be proactive with technical reviewers and have auditor and attorneys collaborate more closely.

There are no public reports of which I am aware that describe the FTB’s aging inventory or the amount of revenue associated with those cases. With this year’s expected \$68 billion budget deficit, our request is to have the FTB review its inventory and report to the public the type of workload (audit, protest, and alternative apportionment petition, etc.), the taxable years involved, the amount of revenue involved, and the status of each case. If the FTB is unable to produce such a report publicly, then the three-member Franchise Tax Board should be privy to it, so that the appropriate budget requests and allocations can be made, especially to the Audit Division and Legal Division. If the FTB needs support for additional resources, Ryan is in a position to help.

## **Response 2**

### **Audits and Claims**

Our goal is to complete an audit within two years of our initial contact with taxpayers. Different types of audits/claims have different target time frames, depending on complexity. Low complexity cases are resolved fairly quickly, while high complexity cases may take 2 to 3 years. Occasionally closure of an audit may be delayed. Some common situations contributing to delaying the closure of an audit include:

- Taxpayer files a claim near the end of the audit
- The auditor is informed a federal audit determination will be issued soon
- The issue under audit is also at issue in a prior cycle that is pending at protest, appeal, or litigation.

FTB staff are continuously identifying strategies to address a broader range of taxpayers. These strategies involve less intrusive contacts, such as educational letters, where there is opportunity for self-compliance.

### **Protests**

FTB's Audit Protest Section and Legal Division both resolve protests for assessments that taxpayers believe are incorrect. Our Protest Section is responsible for undocketed protest cases while the Legal Division resolves docketed protest cases. Docketed protest cases generally involve highly complex issues, issues of first impression, and/or large dollar amounts.

Our goal is to minimize and reduce the number of protests older than two years. During the most recent four fiscal years, we have seen a significant drop in the number of protests more than 36 months old and the number of protests between 24 and 36 months old. Staff continue to work on further reducing the number of such protests.

A successful resolution of an audit, claim, or protest requires cooperation and a time commitment from both FTB staff and taxpayer. If a taxpayer or representative has concerns regarding the process or timeline on a specific case, we encourage them to reach out to the supervisor or manager so that we can expeditiously address any concern.

We also invite taxpayers to participate in the Audit Customer Experience Survey after completion of an audit or protest. This survey allows us to gather insights and identify opportunities for a better audit experience for taxpayers. Feedback has been very positive; we will continue sending surveys to ensure accuracy, timeliness, and communication are continually improved.

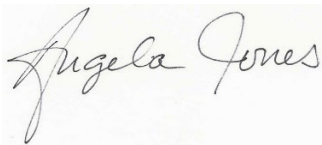
## **Alternative Apportionment Petitions**

Most requests for alternative apportionment are made during an audit, after an auditor has made a preliminary determination, or in a claim for refund. Those requests are generally addressed by staff in the final determinations of such matters. Occasionally, a taxpayer may request alternative apportionment for the first time during the protest of a Notice of Proposed Assessment, or during the appeal of a Notice of Action to the Office of Tax Appeals (OTA). When that occurs, the request is reviewed by the assigned staff member.

Pursuant to subdivision (d) of Regulation 25137, FTB itself, may hear a taxpayer's petition for alternative apportionment pursuant to Revenue and Taxation Code section 25137. A taxpayer's petition to the Board itself is not mandatory; however, it is an option pursuant to the regulation and pursuant to FTB's Resolution 2000-10 which states the Board itself, will hear all cases in which the taxpayer has requested a hearing before the Board where FTB staff has recommended the petition be denied. Taxpayers who disagree with a section 25137 determination of either FTB staff, and/or a determination of the Board itself, can appeal such determinations to OTA.

Historically, FTB receives very few petitions to the Board itself. When a petition to the Board itself is made, such process requires generally less than twelve months to complete. Taxpayers who wish to avail themselves to this option can review recent revisions to subdivision (d) of Regulation 25137 to understand the process and the timelines involved in such an option.

Sincerely,

A handwritten signature in cursive script that reads "Angela Jones". The signature is written in black ink on a light-colored background.

Angela Jones

Taxpayers' Rights Advocate

cc: Malia M. Cohen

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Joe Stephenshaw

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