



Best Practices for Dispute Resolution at the Formal Appeal and Litigation Levels Using California as a Model

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Agenda

- Before the Audit
- During the Audit
- Protest
- Claim for Refund
- OTA Appeal
- Settlement Bureau
- Request for Alternative Apportionment
- Refund Suit



Before the Audit

- Key to a successful audit is to be prepared and organized
- Review your prior audits
- Review FTB audit policies and procedures
- Pull together facts and arguments for issues which will likely be audited
- Know the values of your issues
- Prepare an audit strategy
- Check on your company's record retention policy
- Put litigation hold on documents
- Should you request an advance ruling on certain issues?
- Should you enter into a pre-filing agreement or closing agreement with respect to certain issues?
- Should you request a managed audit?



During the Audit

- Information Document Requests
 - All requests and responses should be in writing
- Scope of IDRs
 - Fishing expeditions not permitted
 - Must be reasonably relevant to the issues in the audit and the tax years in issue
 - Must not be unduly burdensome
 - Unreasonable search and seizure
- Are the requested documents privileged?
 - Attorney Client Privilege
 - Attorney Work Product



During the Audit *(cont.)*

- Specific requests
 - Tax accrual workpapers
 - 50-state apportionment data
 - Interviews of employees
 - Plant tours
- Penalty for failure to finish information
 - How do you avoid?
- Waivers
 - Should you always grant them?
 - Risks if you do not grant a waiver



During the Audit *(cont.)*

- Raising affirmative issues
 - When should you consider raising them?
 - Follow claim for refund procedures
- Deposition to preserve testimony
 - Do you have key witnesses who are elderly or not in good health?
 - Showcase your case?
- Hiring outside advisors
 - When should you consider doing so?
 - In what capacity?
 - Use of Kovel letters
 - Be prepared for future litigation
- Settlement with the auditor?



Protest

- Statute of limitations
 - Must be filed within 60 days of the date shown on Notice of Proposed Assessment
- What must the written protest include?
 - Must specify the grounds upon which it is based
 - Request an oral hearing
 - Consider also filing protective claim for refund
 - Request copy of audit files
- No payment required
 - Interest will continue to accrue
- Docketed versus undocketed protests
 - Hearing officer may or may not be an attorney



Protest *(cont.)*

- Procedures are informal
- Information requests are common
 - Exhaustion of administrative remedies issues
- May supplement your protest
- Hearing(s) are informal
 - No “record” created in the administrative process
 - May want to showcase key witnesses
- May want to make protest proceedings more formal
 - Comprehensive briefs
 - Use of declarations
- Resolution versus settlement
- Closing agreements
- FTB staff has no right of appeal



Claim for Refund

- Alternative to protest
 - More common today in light of California's Large Corporate Underpayment Penalty (LCUP)
- Statute of limitations
 - Four years after last day prescribed for filing return
 - One year from date of overpayment
 - Effect of federal waivers
- Requirements for valid claim
 - Grounds should be clearly set forth
 - Request an oral hearing
- Docketed versus undocketed claims



Claim for Refund *(cont.)*

- Procedures are informal
 - Similar to protest proceedings
 - Payment of tax after filing protest or an appeal with the OTA converts protest into a claim for refund on the grounds set forth in the original written protest
 - Consider filing a claim with the payment to cover all grounds and arguments
- Deemed denial of claims
 - Unlike a protest, a claim may be deemed denied by a taxpayer six months after filing thereof
 - Taxpayer may file an appeal to OTA or a suit for refund after the six month period



OTA Appeal

- Office of Tax Appeals (OTA) replaced the Board of Equalization on 1/1/18
- Administrative appeal
 - If taxpayer's protest or claim is denied, it may file an administrative appeal to the OTA
- Statute of limitations
 - Different depending upon whether taxpayer is appealing a denial of a protest versus a denial of a claim for refund
 - Protest – 30 days from the Notice of Action
 - Claim – 90 days from the Notice of Action
- No payment required
- Requirements for appeal
- De novo proceeding



OTA Appeal *(cont.)*

- Procedures are more formal
 - Formal briefing
 - Formal hearing before 3-judge panel of OTA
 - Rules of evidence are lax
 - Written decision is issued
- Does a taxpayer have to go through the OTA to exhaust administrative remedies?
- Advantages versus disadvantages of going through the OTA



Settlement Bureau

- Separate bureau within the FTB
 - Attorneys and auditors are settlement officers
 - Confidential process
- Settlement versus resolution
- When may a taxpayer request to transfer a case into settlement?
- When should you consider doing so?
- Are you willing to settle your case? Why?
- Advantages versus disadvantages



Request for Alternative Apportionment Under RTC 25137

- Additional administrative step
- Staff versus the 3-member FTB
 - Confidentiality waived before the 3-member FTB
- 25137 Committee
 - Considers all requests for alternative apportionment by taxpayers or staff
- Not required for exhaustion of administrative remedies



Refund Suit

- Pay-to-play
- State Superior Court
- De novo proceedings
- Non-jury trial
- Refund action limited to the grounds set forth in claim for refund
- Attorney General's Office represents FTB in court
- Where should you file your action?
- Trial or summary judgment?
- Assignment to a single judge?
 - Complex Department



Refund Suit *(cont.)*

- Discovery – offensive versus defensive
- Stipulated facts
- Percipient witnesses
- Expert witnesses
- Mandatory settlement conference v. early settlement program v. informal settlement discussions
- Alternative dispute resolution
 - Arbitration
 - Mediation



Questions?



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