

170.002.850

Memorandum

To: Jeffrey L. McGuire, Chief
Tax Policy Division (MIC:92)

Date: November 3, 2008

From: Bruce Emard
Tax Counsel III, MIC:82

Telephone: (916) 323-2481

Subject: Collection Activity Once Liens Expire

This memorandum replaces my October 28, 2008 memorandum to you regarding the same subject and responds to your June 30, 2008, memorandum to Robert Lambert, Assistant Chief Counsel for the Litigation Division of the Legal Department, requesting legal advice regarding the following questions:

Question Number 1. “Does Article 13, Section 30 of the California Constitution impose a limit of 30 years for the enforcement of collection action on state tax debts?”

Question Number 2. “Can the BOE issue a notice of levy, earnings withholding order for taxes, notice of state tax lien, or any other involuntary collection action in an attempt to collect a liability for which a notice of state tax lien under Government Code section 7171 or 7220 was never filed and more than ten years have passed since the liability became due and payable? If the BOE cannot take involuntary collection action under this circumstance, is it because the liability is considered outlawed?”

Question Number 3. “Can the BOE issue a notice of levy, earnings withholding order for taxes, notice of state tax lien, or any other involuntary collection action in an attempt to collect a liability for which a notice of state tax lien under Government Code section 7171 was filed with a county recorder for real property, more than 10 years have passed since the lien was filed and the lien was not extended? If the BOE cannot take involuntary collection action under this circumstance, is it because the liability is considered outlawed?”

Question Number 4. “Can the BOE issue a notice of levy, earnings withholding order for taxes, notice of state tax lien, or any other involuntary collection action in an attempt to collect a liability for which a notice of state tax lien under Government Code section 7220 was filed with the Secretary of State for personal property, more than 10 years have passed since the lien was filed and the lien was not extended? If the BOE cannot take involuntary collection action under this circumstance, is it because the liability is considered outlawed?”

General Statute of Limitations for Board of Equalization Collections

Unlike the Internal Revenue Service and the Franchise Tax Board which each have general collection statutes of limitations¹ there is no general statute of limitations in the California Revenue and Taxation Code or the Government Code that limits the collection of taxes and fees that the Board of Equalization administers. Arguably, the California Constitution imposes a 30 year limitations period on the collection of all California taxes, including the taxes the Board administers. It provides at Article 13, section 30 as follows,

“Every tax shall be conclusively presumed to have been paid after 30 years from the time it became a lien unless the property subject to the lien has been sold in the manner provided by the Legislature for the payment of the tax.”

I have researched case law and legal treatises for cases and articles that analyze this section of the state Constitution. There are none relevant to Board collection actions. There are no Board annotations that address this section of the state Constitution. I have spoken with attorneys at the Franchise Tax Board who explained to me that the Franchise Tax Board Legal Department has taken the legal position in the past that this section of the state Constitution applies only to property tax, although some attorneys at the Franchise Tax Board believe that this position should be changed. The broad language of this section of the state Constitution that reads, “every tax shall be conclusively presumed to have been paid after 30 years ...” (Emphasis added), supports an interpretation that this section includes all state taxes. However, the phrase, “from the time it became a lien unless the property subject to the lien has been sold ...” supports an interpretation that the language of the section was intended to apply to property tax only.

Considering the ambiguity in Article 13, section 30 of the state Constitution, the dearth of authority interpreting it, the legal interpretation of this section by the Franchise Tax Board Legal Department, and the nonexistence of any Revenue and Taxation Code section or Government Code section providing a general statute of limitations for collection of taxes and fees administered by the Board of Equalization, the Board of Equalization has two approaches available to it. The conservative approach is to maintain that there is a thirty year statute of limitations for collection of the taxes administered by the Board of Equalization. The more aggressive approach is to maintain that there is no statute of limitations for collection of these taxes. Whichever approach the Board adopts, the unpaid taxes administered by the Board remain due and payable for not less than thirty years from the date they become final.

Time Limitations for Specific Collection Remedies

Notwithstanding the above, the Board cannot exercise all enforced collection remedies indefinitely (should the Board adopt the position that there is no general statute of limitations for its collection actions), or for thirty years (should the Board adopt the position that the state Constitution limits its tax collection actions). To the contrary, most of the collection remedies available to the Board under the Revenue and Taxation Code, the Government Code, and the Code of Civil Procedure, contain individual limitations periods for their exercise. Each statutory collection remedy must be

¹ See Rev. & Tax Code section 19255 for the 20-year statute of limitations and Government Code section 13943.1(b) for the 30-year statute of limitations affecting Franchise Tax Board collection actions. See Internal Revenue Code section 6502(a) (1) for the 10-year statute of limitations affecting Internal Revenue Service collection actions.

examined independently to determine the time limitations, if any, for its exercise. It would be too lengthy to address each collection remedy for each tax and fee program administered by the Board in this memorandum. If there is a particular remedy not addressed by this memorandum for which you require a legal opinion, please contact me. However, for the purpose of addressing the specific questions you have raised, it is helpful to analyze some of the collection remedies provided to the Board under the Sales and Use Tax Law, the Government Code, and the Code of Civil Procedure.

Tax Liens

Perfected state tax liens arise by operation of law on the date that a sales or use tax obligation becomes due and payable and the taxpayer fails to pay it (Rev. & Tax. Code § 6757(a)). The state tax lien attaches to all property and rights to property whether real or personal, tangible or intangible, including all after-acquired property and rights to property, belonging to the taxpayer and located in the state of California (Gov. Code § 7170(a)). A state tax lien continues in effect for 10 years from the date of its creation unless it is released or discharged. If a notice of state tax lien is not filed or recorded, the tax lien is extinguished 10 years after the date of its creation (Gov. Code section 7170(a)). At any time before a tax lien is extinguished, the Board may file or record a notice of state tax lien. A notice of state tax lien is not effective to extend a statutory lien if it is filed or recorded after the statutory lien expires (Gov. Code § 7171 (a) and (b)). When a notice of state tax lien is timely filed or recorded, the state tax lien continues in effect for a period of 10 years from the date of filing or recording (Gov. Code § 7172(b)).

Notice to Creditors

The notice to creditors (also known as a notice to withhold) provisions of Revenue and Taxation Code section 6702 contain a specific time limitation for the exercise of this collection remedy by the Board. The time limitation of the statute states as follows, “the board may, not later than three years after the payment became delinquent, or within 10 years after the last ... recording or filing of a notice of state tax lien ..., give notice ... After receiving the notice the persons so notified shall neither transfer nor make any other disposition of the credits, other personal property, or debts in their possession or under their control at the time they receive the notice until the board consents to a transfer or disposition or until 60 days elapse after the receipt of the notice, whichever period expires the earlier.”

The outside limitation placed on this Board collection remedy is that it may not be exercised after the Board’s statutory lien expires. The Board’s statutory lien expires 10 years after it was created or ten years after a notice of state tax lien was last filed with the Office of the Secretary of State or last recorded with an office of a county recorder.

Notice of Levy

The notice of levy provisions of Revenue and Taxation Code section 6703 contain no time limitation for the exercise of this collection remedy by the Board.

Court Action

The court action provisions of Revenue and Taxation Code section 6711 contain a specific time limitation for commencement of lawsuits by the Board. The statute states as follows,

“At any time within three years after any tax or any amount of tax required to be collected becomes due and payable and at any time within three years after the delinquency of any tax or any amount of tax required to be collected, or within the period during which a lien is in force as the result of ... the recording or filing of a notice of state tax lien ... the board may bring an action in the courts of this state ...”

The outside limitation placed on this Board collection remedy is that it may not be exercised after the Board’s statutory lien expires. See, however, *People v. Garg (1993)* 16 Cal. App. 4th 357, for the holding that an action to collect money from a Board taxpayer may be commenced only within the three year period stated in the statute. An action to enforce a state tax lien may be commenced before the lien is extinguished.

Warrant

The warrant provisions of Revenue and Taxation Code section 6776 contain a specific time limitation for the exercise of this collection remedy by the Board. The statute states as follows:

“At any time within three years after any person is delinquent in the payment of any amount herein required to be paid, or within 10 years after the last recording . . . or filing of a notice of state tax lien ..., the board or its authorized representative may issue a warrant for the enforcement of any liens and for the collection of any amount required to be paid to the state under this part.”

The outside limitation placed on this Board collection remedy is that it may not be exercised after the Board’s statutory lien expires.

Seizure and Sale

The seizure and sale provisions of Revenue and Taxation Code section 6796 contain a specific time limitation for the exercise of this collection remedy by the Board. The statute states,

“At any time within three years after any person is delinquent in the payment of any amount, the board may forthwith collect the amount in the following manner: The board shall seize any property, real or personal, of the person and sell the property, or a sufficient part of it, at public auction to pay the amount due ...”

The limitation placed on this Board collection remedy is three years from the date of delinquency. There is no reference in the statute to the Board’s tax lien period.

Earnings Withholding Order for Taxes

The earnings withholding order for taxes provisions of Code of Civil Procedure sections 706.070 through 706.084 contain a specific time limitation for the exercise of this collection remedy by the Board. Code of Civil Procedure section 706.070 (b) states,

“State tax liability” means an amount for which the state has a state tax lien as defined in Section 7162 of the Government Code ...”

The limitation placed on this Board collection remedy is the time during which the Board has a state tax lien.

The Board’s “Balance Outlawed” Policy

As you noted in your memorandum, in the Discharge from Accountability section of the Board’s Compliance Policy and Management Guidelines, there are references to the concept of a tax liability becoming “balance outlawed.” This concept of “balance outlawed” is a policy adopted by the Board; I can find no legal support for it in the Revenue and Taxation Code, the Sales and Use Tax Regulations, or case law. The policy appears to have been adopted as one basis for discharging a liability from accountability. While the source of this policy and concept is difficult to trace, it appears to be supported by Sales and Use Tax Annotations. Sales and Use Tax Annotation 170.0001 states in part,

“The lien remains in effect for ten years. Unless a Notice of State Tax Lien is filed or recorded during that ten-year period, the Board loses its power to collect upon expiration of the lien.”

Sales and Use Tax Annotation 170.0067 states in part,

“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.”

The back-up legal opinion for Sales and Use Tax Annotation 170.0001 has no language to the effect that the Board loses its power to collect upon expiration of the lien. The back-up legal opinion for Sales and Use Tax Annotation 170.0067 states,

“Generally, the Board loses enforcement power to collect a tax liability ten years after a state tax lien arises unless a Notice of State Tax Lien is filed or recorded within that period - (see Rev. & Tax Code §§ 6702, 6711, and 6776).”

These back-up legal opinions do not contain legal authority that supports a broad rule that the Board loses all of its power to collect tax when a tax lien expires. Rather, the back-up legal opinion for Sales and Use Tax Annotation 170.0001 cites no legal authority for such a rule and the back-up legal opinion for Annotation 170.0067 states a generalization that the Board loses its power to collect unless a notice of state tax lien is filed or recorded while the statutory tax lien is in effect. It cites sections 6702, 6711, and 6776 of the Revenue and Taxation Code only as the legal authority for this general statement. This general statement should be limited to those powers to collect set forth in the statutes specifically cited in the legal opinion. This generalization should not be

extended to the notice of levy power in Revenue and Taxation Code section 6703. It does not contain time limits for its exercise and it is not cited in the legal opinion.

Responses to Your Questions

Answer to Question Number 1. While there is ambiguity in the language of Article 13, section 30 of the state Constitution, a conservative approach is to read it as imposing a 30 year period to collect sales and use tax obligations. There is no statute or regulation that imposes a shorter general statute of limitations on all Board collection actions. However, there are shorter time limitations placed on certain specific Board collection remedies.

Answer to Question Number 2. When a Board statutory tax lien expires after ten years, it is extinguished. It cannot be revived after ten years by filing or recording a notice of state tax lien. Certain collection remedies such as notices to withhold, warrants, earnings withholding orders for taxes, and lawsuits cannot be exercised after a tax lien expires. This is not because they have become outlawed by some general collection statute of limitations but because they each have time limits included within their statutory provisions. A notice of levy may be exercised after a tax lien expires. This is because there is no time limit included within its statutory provisions tied to a state tax lien. Each statutory collection remedy must be examined independently to determine the time limitations, if any, for its exercise.

Answer to Question Number 3. If a Board statutory tax lien expires after ten years from the date of recordation of a notice of state tax lien with a county recorder's office, it is extinguished. It cannot be revived after ten years by recording a new notice of state tax lien. (Caveat: if a notice of state tax lien also was filed with the Office of the Secretary of State and less than ten years has passed, the statutory tax lien has not expired and it may be renewed with the Office of the Secretary of State) Certain collection remedies such as notices to withhold, warrants, earnings withholding orders for taxes, and lawsuits cannot be exercised after a tax lien expires. This is not because they have become outlawed by some general collection statute of limitations but because they each have time limits included within their statutory provisions. A notice of levy may be exercised after a tax lien expires. This is because there is no time limit included within its statutory provisions tied to a state tax lien. Each statutory collection remedy must be examined independently to determine the time limitations, if any, for its exercise.

Answer to Question Number 4. If a Board statutory tax lien expires after ten years from the date of filing of a notice of state tax lien with the Office of the Secretary of State, it is extinguished. It cannot be revived after ten years by filing a new notice of state tax lien. (Caveat: if a notice of state tax lien also was recorded with an office of a county recorder and less than ten years has passed, the statutory tax lien has not expired and it may be renewed with the office of the county recorder). Certain collection remedies such as notices to withhold, warrants, earnings withholding orders for taxes, and lawsuits cannot be exercised after a tax lien expires. This is not because they have become outlawed by some general collection statute of limitations but because they each have time limits included within their statutory provisions. A notice of levy may be exercised after a tax lien expires. This is because there is no time limit included within its statutory provisions tied to a state tax lien. Each statutory collection remedy must be examined independently to determine the time limitations, if any, for its exercise.

Recommendations

As discussed above, while some collection remedies available to the Board are legally precluded when a state tax lien expires, not all collection remedies are so precluded. This is inconsistent with certain policies stated within the CPMG regarding “balance outlawed” and certain statements in the Sales and Use Tax Annotations regarding the Board losing its power to collect after a tax lien expires. Therefore, the Board’s Compliance Policy and Management Guidelines should be reviewed to determine whether the concept of “balance outlawed” should be amended or eliminated. Also, Sales and Use Tax Annotations 170.0001 and 170.0067 should be reviewed to determine whether they should be amended or removed. Finally, the Board should consider legislative amendments to the Revenue and Taxation Code, the Government Code, or both to add a general statute of limitations for Board collection actions.

cc:

Ms. Randie L. Henry (MIC: 43)
Ms. Freda Orendt (MIC: 47)
Mr. Stephen Rudd (MIC: 46)
Mr. Todd Gillman (MIC: 70)
Ms. Kelly Reilly (MIC: 47)
Ms. Erin Little (MIC: 46)
Ms. Susanne Buehler (MIC: 40)
Mr. Richard Reger (MIC: 40)
Ms. Roberta Cornell (MIC: 55)
Ms. Sandy McCaleb (MIC: 43)
Ms. Mary Ann Hay (MIC: 46)
Mr. Michael Loretta (MIC: 46)
Mr. Larry Bergkamp (MIC: 92)
Ms. Gina Fong (MIC: 52)
Mr. Tim Fairchild (MIC: 40)
Mr. Robert Lambert (MIC: 82)
Ms. Dana Flanagan McBeth (MIC:82)