



STATE OF CALIFORNIA

STATE BOARD OF EQUALIZATION

450 N STREET, SACRAMENTO, CALIFORNIA
PO BOX 942879, SACRAMENTO, CALIFORNIA 94279-0001
916-324-0293 • FAX 916-322-2958
www.boe.ca.gov

BETTY T. YEE
First District, San Francisco

BILL LEONARD
Second District,
Ontario/Sacramento

MICHELLE STEEL
Third District, Rolling Hills Estates

JUDY CHU, Ph.D.
Fourth District, Los Angeles

JOHN CHIANG
State Controller

RAMON J. HIRSIG
Executive Director

July 9, 2009

Dear Interested Party:

Attached is a copy of Current Legal Digest (CLD) Number 1077 for your information and review. This CLD contains four new annotations, nineteen proposed revisions to existing annotations and three deletions of annotations. After review, please submit any questions, comments, or suggestions for changes by August 10, 2009. You may complete the electronic CLD Comments Form at <http://www.boe.ca.gov/sutax/cld/cldmail.htm>, or mail your written comments to:

Board of Equalization
Annotation Coordinator, MIC: 50
P.O. Box 942879
Sacramento CA 94279-0050

Please note, the new annotations and/or suggested revisions of existing annotations contained in the attached CLD are drafts and may not accurately reflect the Board's official position on certain issues nor reflect the language that will be used in the final annotation.

CLD's are circulated for 30 days, at which time any questions are addressed and/or suggested modifications taken into consideration. After review of the final version by the Board's Legal Division, they are printed in the *Business Taxes Law Guide*. At that time, the CLD becomes obsolete.

Randy Ferris
Assistant Chief Counsel

Attachment: Current Legal Digest 1077

E-file now, find out how . . . www.boe.ca.gov



CALIFORNIA STATE BOARD OF EQUALIZATION

CURRENT LEGAL DIGEST NO. 1077

July 9, 2009

170.0002.850 Collection Activity Once Liens Expire. Neither the California Revenue and Taxation Code (RTC) or the Government Code contains a general statute of limitations limiting the collection of taxes and fees that the Board of Equalization administers. The California Constitution arguably imposes a 30-year limitations period on the collection of all California taxes, however, the Board cannot exercise all enforced collection remedies for thirty years because most of the collection remedies available to the Board under the RTC, the Government Code, or the Code of Civil Procedure, contain individual limitations periods for their exercise.

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 (RTC 6757(a)). The state tax lien attaches to all property and rights to property, belonging to the taxpayer and located in the State of California (Gov. Code section 7170(a)). A state tax lien continues in effect for ten 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. 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. When a notice of state tax lien is timely filed or recorded, the state tax lien continues in effect for a period of ten years from the date of filing or recording.

Notice of Levy

The notice of levy provisions in RTC section 6703 contain no time limitation for the exercise of this collection remedy by the Board. Therefore, a notice of levy may be exercised after a tax lien expires.

Notice To Withhold and Warrants

The limitations placed on the Board's use of the notice to creditors (also known as a Notice to Withhold) by RTC section 6702 and on the use of warrants by RTC section 6776, prevent the Board's exercising these remedies after the Board's statutory lien expires.

Court Action

The outside limitation placed on the Board's use of court action under RTC section 6711 is that it may not be exercised after the Board's statutory lien expires. However, *People v. Garg* (1993) holds 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.

Seizure and Sale

The seizure and sale provisions of RTC section 6796 limits the Board's use of this collection remedy to 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

Under Code of Civil Procedure sections 706.070 through 706.084, the Board's use of this collection remedy is limited to the time during which the Board has a state tax lien. 11/3/08.

Revise annotation 170.0001 **Bankruptcy Effect on Ten-Year State Tax Lien.** The amount of any unpaid or underpaid tax, which has become due and payable as that term is defined in Revenue and Taxation Code section 6757, becomes a perfected and enforceable state tax lien on the date it becomes due and payable. ~~The A statutory state tax lien remains continues~~ in effect for ten years from the date of its creation unless it is released or discharged. Under Government Code section 7170(a), Unless if a Notice notice of State state tax Lien lien is not filed or recorded during that ten-year period, the ~~Board loses its power to collect the tax upon expiration of the ten year period~~ tax lien is extinguished ten years after the date of its creation. 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. When a notice of state tax lien is timely filed or recorded, the state tax lien continues in effect for a period of ten years from the date of filing or recording. If the taxpayer declares bankruptcy during the period, time continues to run for expiration of the lien. If the ~~ten-ten-year~~ period has not expired when the taxpayer emerges from bankruptcy, the Board has the remainder of the period, or a 30-day period, whichever is longer, to file a Notice notice of State state Tax tax Lien lien. If the ten-year period has expired, the Board still has a 30-day period within which to file the Notice. 12/21/94, 11/3/08.

Revise annotation 190.0870 **Septic Tanks.** A person who, ~~under a lump sum contract,~~ furnishes ~~and places~~ a septic tank and places it in its final resting place with no further movement being made of the tank; is regarded as a construction contractor furnishing and installing materials (the septic tank); whether or not ~~he also~~ attachesing the leach lines to the septic tank. 8/19/75.

Delete Annotation 190.1088 **Utility Vaults - Final Resting Place** 4/13/76) because the annotation is incorrect and lacks sufficient analysis to support its conclusion.

Note: The new proposed annotations contained in this CLD are drafts and may not accurately reflect the text of the final annotation.

220.0275 **Trailing nexus.** After a retailer ceases activities that had caused it to be a “retailer engaged in business” in this state pursuant to Revenue and Taxation Code section 6203, the lingering effects of the retailer’s physical presence in this state may continue to generate sales for the retailer for a reasonable period thereafter. So long as the retailer continues to generate sales from the lingering effects of its physical presence in California, the retailer is considered to be engaged in business in this state. This concept is generally referred to as “trailing nexus.” The concept of trailing nexus was implicitly endorsed by the Board when it found that an online bookseller had nexus with California as long as coupons distributed by its in-state representative could be redeemed at its website. (See *In the Matter of Barnes & Noble.com*, State Board of Equalization Memorandum Opinion, September 12, 2002, at p. 5.) The trailing nexus period generally consists of the quarter in which the retailer ceases the activities that had caused it to be a “retailer engaged in business” in California, as well as the entire quarter that follows. Depending on the facts and circumstances specific to each retailer, the period of trailing nexus may be shorter or longer than the general “quarter-plus-a-quarter” approach. 5/1/09.

Revise annotation 245.0028, **Aloe Berry Nectar.** Aloe Berry Nectar’s label states that this product is “100% Stabilized Aloe Vera with Natural Cranberry and Apple Concentrate,” and makes no ~~medicinal or~~ weight-loss claims for it. This is a food product, the sales of which are not subject to tax. 6/17/91.

Revise annotation 245.0085 **Barley Essence Barley Powder.** Barley Essence Barley Powder is described as “nature’s concentrated whole food, containing vitamins, minerals, amino acids, active enzymes, and ~~E~~chlorophyll for complete balanced nutrition.” This is a powdered health food made from brown rice and the dried juice of the barley plant. This product is not described as a food or dietary supplement or adjunct nor does it make any ~~medicinal or~~ weight loss claims. This product qualifies as a vegetable juice product, the sales of which ~~are is~~ exempt from tax. 6/5/91.

Revise annotation 245.0496 **Herbal Extracts.** These are plant extracts ~~which that~~ have been cold processed in a mixture of alcohol and water. They are sold in a one-ounce bottle with a dropper. The label states “for use as a beverage.”

The herbal extracts as described are exempt food products provided that they are sold as a beverage and ~~provided that~~ the label or packaging makes no claim to the product’s ~~medicinal or curative qualities or its~~ dietary benefits. 8/23/89.

Note: The new proposed annotations contained in this CLD are drafts and may not accurately reflect the text of the final annotation.

Revise annotation 245.0498 **Herb Capsules**. Nature's Sunshine Herb products are sold in capsule form. They are an herbal food combination containing such items as kelp plant, dandelion root and alfalfa herb.

Since the label ~~makes no medical claims and it~~ does not state that the product is to be used as a dietary supplement or adjunct, these products qualify as food products the sales of which ~~are~~ is exempt from tax. 2/5/92.

Revise annotation 245.0499 **Herbal/Food Combination**. Under California law, no particular claims for nutritive value are required for an item to be considered a food for human consumption. Herbal products, the labels of which ~~make no medicinal claims nor~~ do not designate the product as a food supplement or adjuncts, are food products. Thus, the sale of such products ~~are~~ is exempt from sales and use taxes. 1/31/94.

Revise annotation 245.1120 **Aloe Vera Gel**. Aloe Vera Gel if sold for use as a dietary supplement ~~or for medicinal purposes,~~ does not qualify as a food product under section 6359. 7/19/67; 2/11/91.

Revise annotation 245.1122 **ANABAENA Flos Aqua** is a freeze dried product consisting of pure premium blue-green algae. It is labeled as a pure food product and contains naturally chelated vitamins, minerals, lipids, nucleic acids, chlorophyll, amino acids, and enzymes. Regulation 1602 provides that “. . . unusual foods such as brewer's yeast, wheat germ, and seaweed are not subject to tax unless their label states they are a food supplement or the equivalent.” As such, ANABAENA Flos Aqua is a food product unless it is labeled ~~ed claims medicinal benefits or calls itself as~~ a food supplement. 11/16/81.

Revise annotation 245.1215 **Juice Plus+**. This product provides natural fruit powders, fruit fibers, and food enzymes, along with food actives and acidophilus. Although Juice Plus+ is in capsule form, the label does not state that it is either a food or dietary supplement or adjunct. It also does not indicate that the purpose of the product is to increase, decrease, or maintain the intake of vitamins, minerals, proteins, or calories. ~~Nor does the label make medicinal claims.~~ The supplier states “. . . being sold as a real food, not a food supplement, vitamin or diet product.” Therefore, it is considered a food product, the sales of which are exempt from tax under Regulation 1602(a)(1). 12/16/93.

Note: The new proposed annotations contained in this CLD are drafts and may not accurately reflect the text of the final annotation.

Revise annotation 245.1296 **Spirulina Plankton**. Spirulina Plankton is a dehydrated vegetable aquatic organism in powdered form. It is a food source containing up to 71 percent vegetable protein, vitamins, minerals, trace elements, and chlorophyll. Regulation 1602 provides that “. . . unusual foods such as brewer’s yeast, wheat germ, and seaweed are not subject to tax unless their label states they are a food supplement or the equivalent.” As such, Spirulina Plankton is a food product unless the label ~~claims medicinal benefits or calls itself~~ indicates it is a food supplement. 4/27/81.

Revise annotation 245.1412 **Ashitaba Percent Powder and Tablets**. Manufacturer’s sales brochure for “Ashitaba Percent” powder and “Ashitaba Percent” tablets includes descriptions of the products as “vegetable supplements” that are “approved by the medical and pharmaceutical field in clinical laboratories to have exceptional nutritional value contained in the element chalcones which is essential to good health.” The brochure also contains statements that it “helps strengthen the immune system, lowers cholesterol, balances the pH, and aids in preventing ulcers and many other ailments;” that “chalcone actually prevents and slows down the growth of cancer cells.” Furthermore, the brochure states “there is a lot of vitamin B12 contained in the element of the “Ashitaba” and “vitamin B12 activates brain cells, increases concentration.”

The Board has previously concluded that promotional literature is part of the labeling or packaging of the product that the literature describes. Therefore, even if “Ashitaba Percent” product label did not describe it as a food supplement, if the promotional literature continues to describe the product as a food supplement, the product will be considered as described on its package or label as a food or dietary supplement or adjunct. Based on this information, both of these products are excluded from the definition of “food products” by subdivisions ~~(a)(4) and (a)(5)~~ of Regulation 1602. 3/29/96.

Revise annotation 245.1416.500 **Dried Seaweed, Algae, and Wheatgrass**. These products are sold in powdered form. Dried seaweed, algae, and wheatgrass in powdered form are exempt food products provided that the label or packaging makes no claim ~~to of~~ the products’ medicinal or curative qualities or to a dietary benefits. 8/23/93.

Note: The new proposed annotations contained in this CLD are drafts and may not accurately reflect the text of the final annotation.

Revise annotation 245.1416.800 **Efficon**. Efficon is a liquid formula taken to improve male sexual performance. The product label gives detailed instructions to the dosage, how to be swallowed, and how often to be taken. A detailed warning is given as to circumstances when the user should decrease the dose, discontinue the dose, or simply not take it at all. Efficon is advertised on the label as a treatment or mitigation for male sexual problems, ~~and as previously sold under prescription, Efficon is, therefore, being marketed as having medical qualities.~~ Accordingly, when Efficon is sold over-the-counter, its sales are not exempt from tax under section 6369. 1/28/98. (MAm. 1999-2).

Revise annotation 245.1417 **Evergreen**. This is a liquid product, which is added to another liquid in order to be consumed. ~~This product is designed to help fortify the blood with added zinc and minerals. This product not only is designed to increase the body's intake of minerals but also is making specific medicinal claims.~~ Sales of this product are subject to tax. 4/7/94.

Revise annotation 245.1446 **Fortune Delight**. This product is described as having herbal ingredients. If the label does not ~~make specific medicinal claims for the product or~~ designate it as a food supplement, it qualifies as a food product the sales of which are exempt from tax. 4/7/94.

Revise annotation 245.1497 **Lecithin**. This product is sold in whole, bulk form. Lecithin is a food product whose sale is exempt provided that the label or package makes ~~no claim of medicinal qualities or~~ indication that the product is sold as dietary supplement or adjunct. 8/23/89.

Revise annotation 245.1520 **Mil-Kee-Whey**. This product is a whey based food beverage drink composed principally of dairy whey, nonfat dry milk, milk protein, and corn syrup. The label does not describe it as a food supplement nor does it make any ~~medicinal or~~ weight loss claims. Mil-Kee-Whey is a food product the sale of which is therefore exempt from tax. 1/23/84.

Revise annotation 245.1705 **Simply Nutritious Mega C**. This is a noncarbonated fruit juice that has been fortified with vitamin C. Since the ~~product is not sold or marketed as a medicine, and the~~ label does not indicate it is a food or dietary supplement or adjunct, this product is a food item, the sales of which ~~are~~ is exempt from tax. 3/16/98. (MAm. 1999-2).

Note: The new proposed annotations contained in this CLD are drafts and may not accurately reflect the text of the final annotation.

Delete Annotation 305.0013, **Half-Indian Couple** (4/30/81) because it creates an inaccurate definition of the term "Indian" that is contrary to the intent of Sales and Use Tax Regulation 1616.

305.0019.100 **Indian and Non-Indian Couples.** Provided that all the other requirements for exemption are met under Regulation 1616, sales to couples involving Indians who have entered into officially recognized family relationships under either California law (i.e., a marriage or a domestic partnership under the Domestic Partner Rights and Responsibilities Act of 2003) or duly enacted tribal law should receive the same tax treatment regardless of whether the Indians have formed legal unions with Indians or non-Indians. Under such circumstances, neither the half-interest in the property attributable to the non-Indian nor the half-interest attributable to the Indian is subject to tax. 7/10/09.

Delete annotation 425.0463 **Insulin Syringes** (3/31/92) because the annotation has been superseded by Regulation 1591.1.

700.0005 **Allocation of Local Use Tax for Transactions of \$500,000 or More.** An out-of-state retailer sold voting machines to a California county. The transaction totaled more than \$500,000 and, prior to the election; the machines were shipped to and stored at a county storage facility within a city in that county. A question was raised as to whether the use tax on the first functional use of the voting machines should be allocated directly to the city where the machines were first stored or directly to the cities and county where the machines were first used for voting purposes.

Voting machines are designed to gather votes in an election. Therefore, first functional use of the voting machines occurs when the voting machines are used in an election and Regulation 1802(d)(1) mandates that the local use tax be reported to the jurisdiction where each machine was first used to gather votes in an election. The local use tax should not be allocated to any location to which a machine was delivered or where a machine was stored prior to such use.

Generally, a retailer is able to ascertain where it shipped property rather than where its customer actually puts the property to its first functional use and the retailer will allocate the local use tax to the ship-to location. However, BOE staff may review the transactions on a case-by-case basis to determine the actual location of first functional use. If the location of first functional use is different from the delivery or storage location, the tax should be reallocated to the location of first functional use. 9/2/08.

Note: The new proposed annotations contained in this CLD are drafts and may not accurately reflect the text of the final annotation.