

California BOE currently reviewing software TTA refund claims similar to *Lucent* fact pattern

Overview

The California Board of Equalization (BOE) has begun processing technology transfer agreement (TTA) refund claims that constitute non-custom software¹ transactions under fact patterns similar to the software TTA considered in *Lucent Technologies, Inc. v. Board of Equalization (Lucent)*.²

The BOE has identified taxpayers who have filed TTA refund claims and has sent identified taxpayers a standardized form letter from the TTA Refund Team, Audit Determination & Refund Section (Letter)³ along with a Technology Transfer Agreement Claim for Refund Questionnaire (Questionnaire)⁴ to help process refund claims with facts similar to *Lucent*.

This Tax Alert summarizes the Letter and Questionnaire, as well as provides some related taxpayer considerations.

Retailer Software TTA Refund Claims

In accordance with the Summary of Chief Counsel Memo and the BOE Meeting held on March 30, 2016,⁵ the BOE has begun processing TTA refund claims for taxpayers with facts similar to *Lucent* as long as all of the following apply:

1. The retailer of the software is the holder of the copyright or patent interests in the software;
2. The retailer transfers the software to the buyer on tangible storage media;
3. The retailer transfers, in writing, a license to the buyer to copy the software;
4. The tangible storage media is wholly collateral to the buyer's use of the license regarding the software, such as the tapes and discs used in *Lucent*; and
5. The retailer is the exclusive retailer of its non-custom software recorded on the same or like type of wholly collateral tangible storage media.⁶

In order for the BOE to process the TTA refund claims, taxpayers must complete the Questionnaire for each software transaction claimed.⁷ The BOE will use the responses provided in the Questionnaire in their analysis and process only those transactions that are similar to the facts in *Lucent*.⁸ The BOE has not issued formal guidance on the consequence of a failure to respond. It is recommended that taxpayers confirm with the BOE that their claim will continue to be held in abeyance if a response is not submitted to the BOE, if the response is not timely submitted to the BOE or the facts do not align with the facts in *Lucent*.

Additionally, it appears the BOE has centralized the TTA refund process. They have requested the responses to the Letter and Questionnaire to be sent to TTARefunds@boe.ca.gov or mailed to: Audit Determination & Refund Section, TTA Refunds MIC: 89, Board of Equalization, PO Box 942879, Sacramento, CA 94279.

¹ Cal. Rev. & Tax. Code § 6010.9

² *Lucent Technologies, Inc. v. Board of Equalization* (2015) 241 Cal.App.4th 19

³ Letter from TTA Refund Team, Audit Determination & Refund Section BOE-196 (7-16)

⁴ Form BOE-196-Q (7-16)

⁵ For additional information on this Chief Counsel Memo and BOE Meeting, please see our Multistate Tax Alert from May 5, 2016 available [here](#).

⁶ Letter from TTA Refund Team, Audit Determination & Refund Section BOE-196 (7-16)

⁷ *Id.*

⁸ *Id.*

Embedded and Pre-loaded Software TTAs

While the BOE has discussed potential approaches to determine the treatment of TTAs of embedded and pre-loaded software, they have not opined on requirements nor will they be processing those claims at this time. The BOE is in the early stages of revising Regulation 1507, Technology Transfer Agreements and Regulation 1502, Computers, Programs and Data Processing. We expect further guidance on the sales and use tax treatment of embedded and pre-loaded software TTA's in late 2016 or early 2017 as the Interested Parties Process is completed.

Considerations

Taxpayers should consult with their tax advisers when responding to the Letter and Questionnaire if they have filed any TTA refund claims. Additionally, taxpayers may want to consider whether there are any additional California sales and use tax refund opportunities available for years open under the statute of limitations⁹ for tax paid on software, or other copyrighted or patented interests, embedded or pre-loaded in tangible personal property.

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⁹ See Cal. Rev. & Tax. Code §§ 6902, 6902.3. Generally the statute of limitations in California is three years following the month on which the overpayment of tax was made. Thus, taxpayers may want to consider whether to file a refund claim with the State of California to prevent transactions from falling outside of the statute of limitations.

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