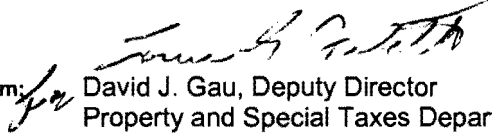


Memorandum

To: Honorable Jerome E. Horton, Chairman
 Honorable Michelle Steel, Vice Chair
 Honorable Betty T. Yee, First District
 Senator George Runner, Second District
 Honorable John Chiang, State Controller

Date : October 12, 2012

From:  David J. Gau, Deputy Director
 Property and Special Taxes Department

Subject: **Fire Prevention Fee Program Implementation Update
 Other Administrative Matters – Item P4.1**

As the Fire Prevention Fee implementation continues, I would like to provide you with the following statistical recap of mailings of advance notices and billings, appeals acknowledged by CAL FIRE, and total revenue received to date:

Fire Prevention Fee Report	
	Totals as of October 5, 2012
Advance Notices Mailed:	
Number of Notices (began mailing 8/3/12)	378,000
County Status	San Bernardino
Billings Mailed:	
Number of Billings (began mailing 8/13/12)	330,785
County Status	Orange
Appeal Cases Received	7,341
Revenue Received	\$10,831,807

In addition to reporting program statistics, we had sought a legal opinion on certain provisions of the program regarding the nature of the penalties, applicability and relief provisions. A copy of the October 5, 2012 response received from the Legal Department is attached for your reference. Here is a very brief summary of the applicable penalty provisions relating specifically to the Fire Prevention Fee:

- A 10% late payment penalty or a 10% finality penalty applies if the notice of determination is not petitioned or payment is not postmarked within 30 days of issue, pursuant to R&TC 55042, 55050 and 55044. Relief for penalties imposed pursuant to these sections may be directed to BOE for consideration.
- If a notice of determination is petitioned, a decision on the appeal is required within 60 days. A notice of redetermination is mailed and the feepayer has 30 days to postmark their payment or a 20% penalty is assessed on the unpaid fees due, pursuant to PRC 4225. This penalty continues to accrue on a monthly basis on the unpaid fees due. Requests received by BOE for relief of these penalties must be forwarded to CAL FIRE for review and consideration. BOE is not authorized to grant relief.


I request this item be placed on the Board's October 2012 Other Administrative Matters Calendar.

DJG:djk

Attachment

cc: Ms. Regina Evans
Mr. Joel Angeles
Mr. Alan LoFaso
Mr. Sean Wallentine

Ms. Marcy Jo Mandel
Ms. Joann Richmond
Ms. Lynn Bartolo
Ms. Debbie Kalfsbeek

Approved: 
Cynthia Bridges, Executive Director

BOARD APPROVED
at the _____ Board Meeting

Joann Richmond, Chief
Board Proceedings Division

Memorandum

To: Debbie Kalfsbeek
Acting Administrator
Program Policy and Administration Branch (MIC:31)

Date: October 5, 2012

From: Carolee D. Johnstone
Tax Counsel III (Specialist)
Tax and Fee Programs Division (MIC:82)



Subject: *State Responsibility Area Fire Prevention Fee, 20-Percent Penalty
Assignment No. 12-392*

This is in response to your email of August 30, 2012, requesting a legal opinion regarding the State Responsibility Area Fire Prevention Fee. First, you question the applicability of the 20-percent finality penalty imposed under Public Resources Code (PRC) section 4225. Second, you ask whether the Board of Equalization (BOE) is authorized to grant relief of this penalty.¹

As discussed below, we conclude that the 20-percent finality penalty imposed under PRC section 4225 is not in addition to but, instead, replaces the 10-percent finality penalty imposed under Revenue and Taxation Code (R&TC) section 55086 in cases where the feepayer has filed a timely petition for redetermination. Further, it is our opinion that the BOE is not authorized to grant relief, pursuant to section 55044 of the R&TC, from the 20-percent finality penalty imposed under section 4225 of the PRC. However, the BOE may grant relief, as permitted by statute, from the 10-percent finality penalty imposed in cases where the feepayer has not timely paid the amount due and payable or timely filed a petition for redetermination. (R&TC, § 55044, subd. (a).)

BACKGROUND

Effective July 8, 2011, chapter 1.5 (commencing with section 4210), entitled State Responsibility Area Fire Prevention Fees, was added to part 2 of division 4 of the Public Resources Code by Assembly Bill No. 29 (FPF Law). (Stats. 2011, 1st Ex. Sess., ch. 8, § 1.) The State Board of Forestry and Fire Protection (Board of Forestry) was directed to adopt emergency regulations to establish a fire prevention fee (FPF), not to exceed \$150, to be charged on each structure located on property within a state responsibility area (SRA). (PRC, § 4212, subd. (a)(1).) In January 2012, chapter 13 (commencing with section 1665.1), entitled State Responsibility Area Fees, was added to division 1.5 of title 14 of the California Code of Regulations and became operative effective January 23, 2012. (History note foll. Cal. Code Regs., tit. 14, § (Regulation or Reg.) 1665.1.)

¹ Questions that have arisen since your initial inquiry are addressed at the conclusion of this discussion.

The regulations specify that the FPF is "imposed on all property owners with one or more habitable structures within [SRAs]." (Reg. 1665.4.) The BOE is directed to collect the FPF annually, beginning with the 2011/12 fiscal year, in accordance with the Fee Collection Procedures Law² (FCPL), with some exceptions, as discussed below. (PRC, § 4213, subd. (a)(1).) The Department of Forestry and Fire Protection (CAL FIRE) is directed to provide the BOE with "the appropriate name and address of each person who is liable for the [FPF] and the amount of the fee to be assessed." (PRC, § 4213, subd. (c).) The person who is liable for the FPF is the owner of record of a habitable structure located on property within an SRA on July 1 of the fiscal year for which the fee is due. (Reg. 1665.2 [definition of "property owner"].) For each assessment after the 2011/12 assessment, CAL FIRE is required to provide the name, address, and fee information for each property owner by January 1 of the fiscal year for which the fee is due. (PRC, § 4213, subd. (c).)

The BOE issues a Notice of Determination (NOD) to (i.e., bills or assesses) the liable person, as determined by CAL FIRE, pursuant to R&TC section 55061 of the FCPL. (PRC, § 4213, subds. (a) & (c).) The liable person has 30 days from the date of the NOD to pay the amount of the FPF due or, if the person disputes the imposition or the amount of the fee, to submit a petition for redetermination to CAL FIRE, the Board of Forestry, and the BOE. (PRC, §§ 4213, subd. (b), 4220, 4221; Reg. 1665.5.) If the person does not pay the amount due or file a petition within the 30-day period, the NOD becomes final at the expiration of the 30-day period, and a finality penalty is added to the amount due and payable. (R&TC, §§ 55081, 55086; PRC, § 4220.) In addition, as of that date, interest begins to accrue. (R&TC, § 55061, subd. (a).)

As noted above, the BOE is directed to administer the FPF pursuant to the FCPL, with certain exceptions. Those exceptions pertain to the appeal and refund provisions of the FCPL. First,³ if a person disputes CAL FIRE's determination that the person is required to pay the FPF or the amount of the fee and files a petition for redetermination within 30 days from the date of the NOD, that appeal is to be reviewed by CAL FIRE pursuant to article 2 (commencing with section 4220) of the FPF Law, not by the BOE pursuant to the appeals provisions of the FCPL. (PRC, § 4213, subd. (a)(2).) If a person does submit a petition for redetermination within the 30-day time period, pursuant to PRC sections 4220 and 4221, CAL FIRE is required to reconsider if, and how much of, the fee is due and to notify the petitioner, the Board of Forestry, and the BOE in writing of its determination. (PRC, §§ 4222 & 4223.) The BOE will then issue a Notice of Redetermination (NOR), based on the determination made by CAL FIRE, and the amount redetermined becomes due and payable and final 30 days from the date of the NOR, at which time a finality penalty is added. (PRC, §§ 4224 & 4225.) In addition, interest begins to accrue as of that date. (R&TC, § 55061, subd. (a).)

² Part 30 (commencing with section 55001) of division 2 of the R&TC.

³ The second exception is to the refund provisions of FCPL: the BOE is expressly prohibited from accepting any claim for refund "based on the assertion that a determination by [CAL FIRE] improperly or erroneously calculated the amount of the [FPF], or incorrectly determined that the person is subject to that fee." (PRC, § 4213, subd. (a)(3)(A).) The BOE may process a claim for refund pursuant to chapter 5 (commencing with section 55221) of the FCPL only if CAL FIRE or a court sets aside CAL FIRE's original determination and determines that the person is entitled to a refund and the person files a claim for refund with the BOE on that basis. (PRC, § 4213, subd. (a)(3).)

DISCUSSION

The provision at issue here applies when the NOR becomes final (i.e., 30 days from the date it is issued by the BOE). It reads as follows:

The [FPF] determined to be due by [CAL FIRE] under this article is due and payable at the time it becomes final, and if it is not paid when due and payable, notwithstanding the penalty imposed pursuant to Section 55042 of the Revenue and Taxation Code, a penalty of 20 percent of the fee determined to be due shall be added to the amount due and payable for each 30-day period in which the fee remains unpaid. (PRC, § 4225 [emphasis added].)

We are presuming that the Legislature meant to refer to R&TC section 55086 rather than R&TC section 55042 in the above-quoted statute. R&TC section 55086 imposes a 10-percent penalty for failure to timely pay or petition an NOD, whereas R&TC section 55042 imposes a 10-percent penalty for failure to make timely payment of all fees other than fees assessed in a NOD (e.g., payments associated with the filing of a return). Since the BOE always assesses the FPF by NOD (feepayers do not file a return), R&TC section 55086 is the applicable penalty. Legal intends to work with you and your staff to prepare a legislative proposal for the Board's consideration that would correct this apparent drafting error. In any case, our analysis below reflects our understanding of the actual legislative intent.

First Question. Is the 20-percent "finality" penalty imposed by section 4225 in addition to, or does it replace, the 10 percent "finality" penalty imposed by section 55086 of the FCPL?

R&TC section 55086, which is located in article 3 of chapter 3, provides that:

All amounts determined to be due by the [BOE pursuant to R&TC section 55061, i.e., by NOD] are due and payable at the time they become final, and if not paid when due and payable, a penalty of 10 percent of the amount determined to be due shall be added to the amount due and payable.

In other words, this penalty would normally be imposed when the amount initially determined by CAL FIRE to be due and noticed by the BOE pursuant to R&TC section 55061 has not been paid and becomes final, either 30 days from the date of the NOD or 30 days from the date of the NOR. (R&TC, §§ 55081,⁴ 55085, 55086.)

Webster's defines "notwithstanding" to mean "despite" when used, as here, as a preposition. As the term "notwithstanding" is used in PRC section 4213, subdivision (a)(2), it is clear that "despite" the appeal provisions in the FCPL, CAL FIRE will make its determination pursuant to the provisions of Article 2 of the FPF law and the determination is not subject to petition for redetermination by BOE (i.e., it is clear that the appeal provisions in the FCPL are replaced by the provisions of Article 2 of the FPF law). Further, in subdivision (a)(3)(A), "despite" the

⁴ R&TC section 55081 states, in relevant part, that, with respect to the BOE's determination under R&TC section 55061, "[i]f a petition for redetermination is not filed within the 30-day period, the amount determined to be due becomes final at the expiration thereof."

refund provisions in the FCPL, the BOE may not accept a claim for refund based on grounds that the person is not subject to the FPF or the amount of the FPF is wrong (i.e., it is clear that the refund provisions in the FCPL are unequivocally made inapplicable when the claim is based on these grounds).

Turning to PRC section 4225, quoted above, "despite" the penalty imposed pursuant to R&TC section 55086, "a penalty of 20 percent of the fee . . . shall be added to the amount due." Although not as clearly expressed as in PRC section 4213, it would be reasonable to conclude that the 20-percent penalty replaces the 10-percent penalty imposed by R&TC section 55086. Looking at it from another perspective, the R&TC section 55086 penalty is imposed if the feepayer does not pay the amount due and payable at the time the BOE's determination, pursuant to R&TC section 55061, becomes final, which is, if a petition for redetermination is submitted, 30 days after notice of the redetermination (i.e., the NOR) is sent to the feepayer (R&TC, § 55085).

PRC section 4224 provides that CAL FIRE's decision on a petition for redetermination becomes final 30 days after the BOE sends the NOR to the feepayer. Then, PRC section 4225 provides that the 20-percent penalty will be imposed if the feepayer does not pay the amount due and payable by the time the CAL FIRE's decision becomes final. In other words, both the R&TC section 55086 and the PRC section 4225 penalties are "finality" penalties, and the language of PRC sections 4224 and 4225 mirrors the language of R&TC sections 55085 and 55086. Accordingly, although not as expressly stated as in PRC section 4213, we conclude that, at the time CAL FIRE's decision upon a petition of redetermination becomes final (PRC, § 4224), the penalty imposed pursuant to PRC section 4225 applies in place of, not in addition to, the penalty imposed under R&TC section 55086.

We note, however, that the 20-percent finality penalty imposed pursuant to PRC section 4225, which effectively preempts the 10-percent finality imposed by the FCPL at R&TC section 55086, applies only to fees determined to be due "under this article." PRC section 4222, pursuant to which the NOR is issued, is under the same article as PRC section 4225 (Article 2 - Appeals Process), but PRC section 4213, pursuant to which the NOD is issued, is under the preceding article. Thus, the 20-percent finality penalty applies only when a person petitions a NOD and receives an NOR that goes final, pursuant to PRC sections 4222 and 4224. If the person does not file a petition for redetermination within 30 days from the date of the NOD, the amount CAL FIRE initially determined to be due, pursuant to PRC section 4213, becomes final pursuant to R&TC section 55081. Thus, a person who does not petition an NOD cannot be subject to the 20-percent finality penalty specified at PRC section 4225 but rather is subject to the 10-percent finality penalty imposed pursuant to R&TC section 55086 that applies generally.

Second Question. May the BOE grant relief from the 20-percent penalty imposed pursuant to PRC section 4225 under the FPF Law pursuant to R&TC section 55044?

The BOE's authority to grant relief from penalties is as follows:

If the [BOE] finds that a person's failure to make a timely return or payment is due to reasonable cause and circumstances beyond the person's control, and

occurred notwithstanding the exercise of ordinary care and the absence of willful neglect, the person may be relieved of the penalty provided by Sections 55042, 55050, and 55086. (R&TC, § 55044, subd. (a) [emphasis added].)

By its express terms, R&TC section 55044 does not authorize the BOE to grant relief of penalties imposed pursuant to other Codes, such as the PRC. Further, since the FPF finality penalty is imposed under the auspices of the PRC and under CAL FIRE's purview, it seems reasonable to conclude that the Legislature did not intend for the BOE to be able to relieve a penalty that is imposed, not under the appeals provisions of the FCPL, but under the appeals provisions of the FPF Law, as one element of the appeals process under the FPF Law. Accordingly, it is our opinion that the BOE is not authorized to grant relief from the 20-percent finality penalty imposed under PRC section 4225.

On the other hand, again by its express terms, it is our opinion that the BOE is authorized by R&TC section 55044 to grant relief, as specified, from the 10-percent finality penalty imposed under R&TC section 55086, where no petition for redetermination was filed and the amount due was not paid in full by the time the NOD became final.

Additional Questions. Lastly, as previously noted, since you originally posed the two questions discussed above, several additional questions have arisen. Since we have concluded that the BOE is not authorized to grant relief from the 20-percent finality penalty imposed under PRC section 4225 in cases where the feepayer files a timely petition for redetermination, the question as to the grounds on which this penalty may be relieved is moot.⁵ In addition, there are, unfortunately, no provisions in the FPF Law for feePAYERS to submit, or for CAL FIRE to accept and consider, requests for relief from this penalty. The grounds for relieving the 10-percent finality penalty imposed under R&TC section 55086, in cases where the feepayer does not file a petition for redetermination, are set forth in R&TC section 55044.

A second additional question pertains to the finality penalty and its application when a feepayer enters into an installment payment agreement with the BOE before the NOD or NOR becomes final (i.e., within 30 days from the date of the NOD or NOR) and to other situations involving installment payment agreements. The installment payment agreement provision is located in the chapter of the FCPL pertaining to the BOE's collection function, and provides, as is relevant here:

(a) The [BOE] may, in its discretion, enter into a written installment payment agreement with a person for the payment of any fees due, together with interest thereon and any applicable penalties, in installments over an agreed period. . . .

(e) Except in the case of fraud, if an installment payment agreement is entered into within 45 days from the date on which the board's notice of determination or

⁵ If it were to be decided that the BOE is authorized to grant relief from the 20-percent finality penalty imposed under PRC section 4225, it would seem reasonable to apply the same factors, pursuant to the same considerations, as are presently applied when deciding whether to grant requests for relief from the 10-percent finality penalty imposed pursuant to R&TC section 55044.

redetermination becomes final, [which is 30 days from the date of the NOD or NOR,] and the person complies with the terms of the installment payment agreement, the [BOE] shall relieve the penalty imposed pursuant to Section 55086. (R&TC, § 55209 [emphasis added].)

Installment Payment Agreements

The BOE's Compliance Policy and Procedures Manual (CPPM), pertaining to administration of the Sales and Use Tax Law, provides some guidance with respect to the administration of this provision as it applies to the FPF. There are two types of installment payment agreements, a Standard Installment Payment Agreement (IPA) and a Streamlined Installment Payment Agreement (SIPA). (CPPM, at § 770.010.) A feepayer must meet certain criteria to be eligible to enter into a SIPA, but generally the feepayer is not required to provide financial documentation in order to be considered for a SIPA. (*Ibid.*) If the feepayer does not meet the criteria for a SIPA, the feepayer may request to pay the liability owed under an IPA but must provide a significant amount of financial documentation, such as a complete financial statement, in order for the BOE collector to determine the feepayer's need for an IPA, his or her ability and willingness to meet its terms, and, foremost, whether the IPA plan is in the best interest of the state. (*Ibid.*) Considering the nature and amount of the FPF, it is reasonable to expect that a SIPA would be appropriate for most, if not all, feepayers under the FPF Law who would want to pay the fee in installments. We understand that the Program Policy and Administration Branch will be developing installment payment agreement criteria specifically tailored to the FPF program.

20-Percent Penalty and Installment Payment Agreements

Entering into an agreement to make installment payments does not constitute payment of a tax or fee liability. Under most, if not all, of the tax and fee programs administered by the BOE, a 10-percent finality penalty is imposed (e.g., under R&TC section 55086) 30 days from the date of the NOD or, if the taxpayer or feepayer files a petition for redetermination, from the date of the NOR, i.e., when the NOD or NOR becomes final. Even where the taxpayer or feepayer enters into an installment payment agreement within those 30 days, the finality penalty is imposed at the expiration of the 30 days because the full amount due has not been paid. Accordingly, the 10-percent finality penalty imposed by R&TC section 55086 or the 20-percent finality penalty imposed by PRC section 4225 would be imposed at the expiration of the 30-day period following the date of the NOD or the NOR, respectively, even if the feepayer offered and the BOE accepted a proposal for a SIPA or IPA within that 30-day period. Further, the 20-percent penalty would continue to be imposed each month until the amount due, including the penalty amount, is paid in full. The same would be true if the feepayer enters into a SIPA or IPA after the 30-day period has expired.

As determined above, the BOE is authorized to relieve the 10-percent finality penalty imposed pursuant to R&TC section 55086, once the feepayer has complied with the terms of the agreement, in cases where the feepayer did not file a timely petition for redetermination and entered into an agreement within 45 days from the date the NOD became final. (R&TC, § 55209, subd. (e).) However, the BOE is not authorized to relieve the 20-percent finality

imposed pursuant to PRC section 4225 in cases where the feepayer files a timely petition for redetermination, even where the feepayer timely enters into and complies with the terms of the agreement.

Offer in Compromise

A third question that has arisen is whether the Offer in Compromise (OIC) provision in the FCPL, R&TC section 55332.5, is applicable to the FPF. Our conclusion is that OIC is available to persons subject to the FPF. OIC is part of the FCPL that PRC section 4213 specifically makes applicable to the FPF.

Please let me know if you have any further questions.

CDJ/mcb

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cc: Lynn Bartolo (MIC:57)