

## Legal Updates & News

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#### FTB to Process Refunds of LLC Fees Based on Ventas Decision

May 2009

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The California Franchise Tax Board (FTB) has issued FTB Notice 2009-04 (May 22, 2009) (Notice) to inform taxpayers that it will process claims for refund filed by limited liability companies (LLCs) with substantially the same factual situation as *Ventas Finance I, LLC v. Franchise Tax Board*,<sup>[1]</sup> where an LLC earned income within and outside of California and challenged the constitutionality of California's LLC fee under Revenue and Taxation Code Section 17942. The FTB has already begun processing claims for refunds from LLCs that paid the fee but did no business and earned no income attributable to activities in California, based on a California Court of Appeal ruling in *Northwest Energetic Services LLC v. Franchise Tax Board*.<sup>[2]</sup>

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In *Ventas*, a California Court of Appeal held that California's LLC fee was unconstitutional because the statute did not provide a method of fair apportionment for calculating the total income used to determine the LLC fee. As a result of the ruling, LLCs that earned income in California and elsewhere are due a refund of the difference between the total amount paid and the amount that would have been due if the fee had been fairly apportioned based on California activity.

The Notice states that the FTB will process the claims for refund using a "Default Method," whereby the FTB will calculate the revised LLC fee and the refund amount, if any, by using the LLC's Schedule R filed with the LLC's Return of Income (Form 568). If an LLC did not attach a Schedule R to its originally filed Form 568, then the LLC must submit a Schedule R.

LLCs that do not wish to use the "Default Method" may inform the FTB that they wish to use the "Alternative Method" as described in the Notice. Under the "Alternative Method," an LLC must complete and submit the LLC Income Worksheet from the 2008 LLC Tax Booklet (Form 568 Booklet) with the respective information for each tax year for which the LLC filed a claim for refund. The FTB will calculate the revised LLC fee and the refund amount, if any, based on the information provided by the LLC. LLCs must provide the completed LLC Income Worksheets to the FTB no later than August 20, 2009; otherwise, the FTB will compute the revised LLC fee and the refund amount, if any, using the "Default Method."

An LLC that wants to file a new claim for refund<sup>[3]</sup> based on the *Ventas* decision should fax a letter to the FTB stating: “This letter constitutes a claim for refund for (taxpayer’s name) – Income Earned Within and Outside of California.” The letter must include the LLC’s name and address,<sup>[4]</sup> the LLC’s Secretary of State file number or FTB temporary LLC number and Federal Employer Identification Number, and the tax years involved. In addition, an LLC using the “Default Method” must include a completed Schedule R if a Schedule R was not attached to the LLC’s original Form 568 filed for each tax year that a claim for refund is filed. An LLC using the “Alternative Method” must include a completed 2008 LLC Income Worksheet with the respective information for each tax year that a claim for refund is filed.

The letter must be signed by the LLC’s managing member or representative with a power of attorney under penalty of perjury.

For taxable years beginning on or after January 1, 2007, Section 17942 of the Revenue and Taxation Code has been revised. The LLC fee is now determined by reference to the total income derived from or attributable to California.

If you have any questions or would like further information on these developments, please contact: Carley Roberts, [CRoberts@mofo.com](mailto:CRoberts@mofo.com); Tim Gustafson, [TGustafson@mofo.com](mailto:TGustafson@mofo.com); or Andres Vallejo, [AVallejo@mofo.com](mailto:AVallejo@mofo.com), of Morrison & Foerster’s State and Local Tax group.

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<sup>[1]</sup> 165 Cal. App. 4th 1207 (2008), *review denied*. Nov. 12, 2008, *cert. denied*. 556 U.S. \_\_\_\_ (2009) [2009 U.S. LEXIS 2647].

<sup>[2]</sup> 159 Cal. App. 4th 841 (2008), *mod. op. on reh’g*, 2008 Cal. LEXIS 303 (2008).

<sup>[3]</sup> Claims for refund may only be filed for those tax years for which the statute of limitations remains open.

<sup>[4]</sup> The LLC must also include the name and phone number of the managing member or designated contact person.