



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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April 15, 2015

Steven M. Danowitz
Partner, Indirect – State and Local Tax
Ernst & Young, LLP
725 S. Figueroa Street
Los Angeles, CA 90017

Re: Your Request for Advice
Our File No. A-15-054

Dear Danowitz:

This letter responds to your request for advice on behalf of Mr. Carl Joseph, with respect to his duties under the post-governmental employment provisions of the Political Reform Act (the “Act”).¹

Please note that we are only providing advice under the conflict of interest provisions of the Act and not under other general conflict of interest prohibitions such as Section 1090. The Fair Political Practices Commission (the “Commission”) does not act as a finder of fact when it renders advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71.)

FACTS

Mr. Joseph was employed at the Franchise Tax Board (“FTB”) through March 13, 2015 and joined Ernst & Young, LLP (“Ernst”) on April 13, 2015 as a Principal in the Indirect Tax Department.

Prior to February 16, 2012, Mr. Joseph served as a staff attorney in the FTB’s Legal Division and then as Assistant Chief Counsel for the Multistate Tax Bureau, a Legal Division within the FTB. Mr. Joseph’s responsibilities included representing the FTB in multistate appeals before the Board of Equalization and in trial and appellate court proceedings. He also authored several Legal and Chief Counsel Rulings, and regulations addressing multistate tax law and provided technical drafting expertise to the Legislature on multistate tax issues.

From February 16, 2012 through March 13, 2015, Mr. Joseph served as Counsel, Multistate Affairs. His responsibilities in this role included coordinating multistate tax policy issues within the Legal Division, supervising regulatory efforts in the multistate arena, and overseeing protest and

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

appeals dealing with multistate tax issues. The scope of Mr. Joseph's responsibilities during his time at the FTB included the review and acceptance or denial of taxpayers' petitions to use an Alternative Apportionment Methodology ("AAM").

AAM petitions: The Revenue and Tax Code section 25137 allows multistate taxpayers to depart from the standard apportionment formula used for determining a taxpayer's California source taxable income. The taxpayer must file a petition to use the AAM for a specified tax period, often encompassing multiple tax years. If the petition is approved, upon the lapse of the specified tax period, a taxpayer may file an additional AAM petition covering a different specified tax period.

The AAM petition is generally reviewed by the FTB's audit staff, then the Multistate Audit Specialist, and then by the Multistate Tax Bureau. The Multistate Tax Bureau has the responsibility of approving or denying the petition. If the Multistate Tax Bureau denies a taxpayer's Alternative Apportionment Petition, the taxpayer may request for the three-member FTB to review the petition and make a determination.

In order for a petition to be approved, the taxpayer must show that the standard apportionment formula does not fairly represent the extent of the taxpayer's business activity in the state and thus, is distortive. Neither the California Revenue and Tax Code nor the state courts have provided a bright-line test for determining whether distortion exists; rather, the determination is made based on the facts and circumstances of each taxpayer's case.² As a result, since a taxpayer's California taxable income and apportionment factors change from year to year, the standard apportionment formula may be distortive in one tax year but not another; thus, a taxpayer may be permitted to use an alternative apportionment methodology in one year and not another. Accordingly, even if a petition is granted for a period that encompasses multiple tax years, each tax year is evaluated on its own merits to determine if the AAM will be permitted.

As part of Mr. Joseph's responsibilities as a Principal at Ernst, he may advise, counsel, consult, or otherwise assist in representing parties that file an AAM petition with the state of California and may be involved in petitions filed by parties that filed such petitions while Mr. Joseph was a state administrative official of the FTB. Mr. Joseph may have previously reviewed and approved or denied a petition for the same party, regarding the same subject matter, *but relating to a different tax year* and thus, a different fact pattern.

QUESTIONS CONCLUSIONS AND ANALYSIS

Public officials who leave state service are subject to two types of post-governmental employment provisions under the Act, the one-year ban and the permanent ban. In addition, Section 87407 and 87100 prohibits officials from making, participating in making, or using their position to

² You provided the following examples of cases where the Board of Equalization and the California Supreme court have analyzed the existence of distortion and the application of AAM by the FTB: *Appeal of Pacific Telephone and Telegraph Company*, 78-SBE-028 (1978); *Appeal of Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 89-SBE-017 (1989); and, *Microsoft Corporation v. Franchise Tax Board*, 39 Cal.4th 750 (2006).

influence decisions affecting persons with whom they are negotiating employment, or have any arrangement concerning employment. These provisions are commonly referred to as the “revolving door” prohibitions.

You stated that Mr. Joseph has already left state service and that he will comply with the one-year ban with respect to any oral or written communication before the FTB. Accordingly, you are not requesting advice regarding the one-year ban or the prohibition on making, participating in making, or using his position to influence decisions affecting prospective employers.

The “permanent ban” prohibits a former state employee from “switching sides” and participating, for compensation, in certain proceedings involving the State of California and other specific parties, or assisting in the proceeding if the proceeding is one in which the former state employee participated while employed by the state. (Sections 87401 and 87402; Regulation 18741.1.) The permanent ban applies when an official has permanently left or takes a leave of absence from any particular office or employment. (Regulation 18741.1(a)(1).)

The permanent ban is a lifetime ban and applies to any formal or informal appearance or any oral or written communication – or aiding, advising, counseling, consulting, or assisting in representing any other person, other than the State of California, in an appearance or communication – made with the intent to influence any judicial, quasi-judicial, or other proceeding in which you participated while you served as a state administrative official. “‘Judicial, quasi-judicial or other proceeding’ means any proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties in any court or state administrative agency . . .” (Section 87400(c).)

Additionally, an official is considered to have “participated” in a proceeding if he or she took part in the proceeding “personally, and substantially through decision, approval, disapproval, formal written recommendation, rendering advice on a substantial basis, investigation, or use of confidential information . . .” (Section 87400(d).)

With respect to the permanent ban, you have confirmed that Mr. Joseph was a state administrative official and that the FTB is a state administrative agency as contemplated by Section 87400 et seq. Moreover, you stated that Mr. Joseph participated in the review and acceptance or denial of taxpayers’ AAM petitions as a state administrative official.

1. Is a taxpayer’s AAM petition a “judicial, quasi-judicial, or other proceeding?” If it is a “proceeding,” is it the same proceeding as the three-member FTB’s review of and determination of an appeal filed by the taxpayer challenging the Multistate Tax Bureau decision in which Mr. Joseph participated?

As noted above, a “judicial, quasi-judicial or other proceeding” means any proceeding, application, request for a *ruling or other determination*, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties in any court

or state administrative agency . . .” (Section 87400(c).) A petition to depart from the standard apportionment formula used for determining a taxpayer’s California source taxable income is the request for a ruling or determination of the FTB involving a specific party or parties. Thus, the AAM petition is a proceeding as contemplated by Section 87400.

You ask if the FTB determination of an AAM petition is the same proceeding as the three-member FTB’s review of and determination of an appeal filed by the taxpayer challenging the determination. Generally, a “new” proceeding involves different parties, or different factual or legal issues from those considered in previous proceedings. The appeal of an AAM denial would appear to involve identical parties, and identical factual and legal issues. Thus, the appeal of the AAM determination in which Mr. Joseph participated would be the same proceeding as the underlying determination.

2. Will Mr. Joseph, be subject to the permanent ban in a proceeding related to an AAM petition if the proceeding involves the same parties, the same subject matter, but a different tax year and thus, different facts as a proceeding in which Mr. Joseph previously participated as a state administrative official of the FTB?

As an initial matter, since you stated that an AAM petition may involve multiple tax periods, we reiterate that where Mr. Joseph participated in the decision regarding an AAM petition as a state administrative official, he is permanently banned from affecting these decisions as applied to those tax years. Thus, we construe your question to pertain to an AAM petition that may be filed for future tax years by someone who may have been filed in AAM petition in the past for prior tax years. Generally, different tax years are considered new proceedings for purposes of the permanent ban. For example, we advised in the *Estrada* Advice Letter, No. I-12-037 that:

“The permanent ban does not, however, prohibit you from representing other taxpayers. Nor would the permanent ban prohibit you from representing a taxpayer in a new proceeding, even though that taxpayer may have been a party to a previous proceeding in which you participated. We regard as ‘new’ a proceeding involving different parties, or different factual or legal issues from those considered in previous proceedings . . .

“Please note that regarding your specific question of whether you can represent a client in a proceeding involving a different tax year, the Act would consider this a new proceeding, to which the permanent ban would not apply.”

You stated that while an AAM petition may be related to or grow out of previous tax periods, each petition and each tax year involves different facts as a taxpayer’s taxable income and apportionment factors change from year to year. Based on these facts, we agree that future AAM petitions, even those involving the same parties and the similar subject matter, but different tax years (not including any tax year covered by an AAM decision in which Mr. Joseph was involved) constitute “new” proceedings. Therefore, Mr. Joseph may participate in these new proceedings.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Hyla P. Wagner
General Counsel

By: John W. Wallace
Assistant General Counsel

JWW:jgl