

Jackson|DeMarco|Tidus  
Peckenpaugh  
A L A W C O R P O R A T I O N

April 2006

To: All Persons Involved with Limited Liability Companies

**Re: Protective Claim for Past Payments of  
Limited Liability Company Annual Fee**

Ladies and Gentlemen:

A San Francisco Superior Court recently held that the California annual fee (based on gross receipts) paid by limited liability companies is unconstitutional under the Commerce Clause and the Due Process Clauses of the United States Constitution.

The case is named *Northwestern Energetic Services, LLC. v. California Franchise Tax Board*, Case Number CGC-05-437721, in the San Francisco Superior Court.

The basis for the ruling was that the annual fee is a tax. All taxes must be apportioned among the various states on a reasonable basis. The annual fee charged by California on gross receipts of a limited liability company is not fairly apportioned to recognize the level of activity within California and outside of California. This failure to fairly apportion the tax between activities within California and outside of California was found to be unconstitutional as a violation of the due process and commerce clauses of the United States Constitution.

The decision in *Northwest Energetic* is not final and is on appeal. However, if the appellate courts agree with the San Francisco Superior Court, then all LLCs that paid the fee might be entitled to a refund. In order to obtain a refund, a claim for refund must be made.

The Franchise Tax Board has established a procedure for making a protective claim for refund. The information extracted from the website of the Franchise Tax Board is as follows:

**Q. What are the procedures for filing an LLC fee protective claim?**

**A.** If you wish to file a protective claim based on recent court cases, including *Northwest Energetic Services*, challenging the constitutionality of LLC fees, the representative or LLC should fax a letter to the Franchise Tax Board with the following information:

Irvine Office  
2030 Main Street, Suite 1200  
Irvine, California 92614  
t 949.752.8585 f 949.752.0597

Westlake Village Office  
2815 Townsgate Road, Suite 200  
Westlake Village, California 91361  
t 805.230.0023 f 805.230.0087

[www.jdtplaw.com](http://www.jdtplaw.com)

- LLC name and identification number issued by the Secretary of State. Unregistered LLCs use the identification number issued by the Franchise Tax Board.
- A statement indicating that this is a protective claim.
- The tax years involved.
- The amount of the claim, which should match the amount of the annual fee that the LLC paid.
- A description of the issue – stating that the LLC fee is unconstitutional is enough.
- Name of person to contact, phone number, and fax number.

The letter must be signed by the representative with power of attorney or signed by the LLC's managing member.

We will send a fax confirmation receipt. We cannot email information since the letter will contain confidential information.

**Note:** Although a fax is preferred, taxpayers may also mail their protective claims.

Fax: (916) 845-9796

Mail: FRANCHISE TAX BOARD  
PO Box 942867  
Sacramento, CA 94267-8888

You can find these instructions on the website of the Franchise Tax Board at the following internet address:

<http://www.ftb.ca.gov/forms/misc/3556.html#proclaim>

If you desire to file a protective claim for refund, then you should go to the website of the Franchise Tax Board and check for any update of these instructions.

**For annual fees paid for calendar year 2001, a protective claim must be filed with the Franchise Tax Board on or before April 15, 2006.** You have little time to accomplish this filing if you had an LLC that paid the annual fee for calendar year 2001. You should file separate protective claims for each calendar year after calendar year 2001 for which an annual fee was paid. You must continue paying the annual fee to keep your limited liability company in good standing and filing protective claims for refund for each year until the court rulings become final.

If you need additional assistance with respect to this matter, please contact your tax preparer. Your tax preparer may suggest an alternative method of filing a protective claim for refund. You can also contact one of our attorneys, listed below, who are knowledgeable with respect to this matter:

Douglas F. Landrum (949) 851-7420 or [dlandrum@jdtplaw.com](mailto:dlandrum@jdtplaw.com)

James H. Shnell (949) 851-7462 or [jshnell@jdtplaw.com](mailto:jshnell@jdtplaw.com)

Stanley E. Heyman (805) 418-1906 or [sheyman@jdtplaw.com](mailto:sheyman@jdtplaw.com)

The *Northwest Energetic* decision is not final and may be overturned on appeal. The Franchise Tax Board will not act on a protective claim for refund unless the decision in *Northwest Energetic* becomes final.

If you desire to be placed on a mailing list for further updates concerning *Northwest Energetic*, related cases and the status of the limited liability company annual fee, please contact any of the attorneys listed above, or Cathy Richardson at (949) 851-7485 or [crichardson@jdtplaw.com](mailto:crichardson@jdtplaw.com).

This is the last correspondence that you will receive from us concerning this matter unless you request to be placed on our mailing list for matters pertaining to the annual fee.

**Jackson|DeMarco|Tidus|Peckenpaugh**