

PROPOSED REGULATION SECTION 23663
INTERESTED PARTIES MEETING DISCUSSION PAPER

Revenue and Taxation Code (RTC) section 23663 permits the assignment of credits among affiliated members of the same combined reporting group. RTC section 23663 was added by Section 10 of AB 1452 (Stats. 2008, ch. 763) and is specifically operative for assignments made in taxable years beginning on or after July 1, 2008, and first permits assigned credits to be claimed against the “tax” of the assignee in taxable years beginning on or after January 1, 2010.

An assignment is made as an election on a taxpayer's original tax return on the Form FTB 3544 and is irrevocable under RTC section 23663, subdivision (c). In some situations taxpayers have made defective elections, such as when the total credits available to be assigned are less than the assignor contemplated when the original tax return was filed, or an assignee was not a member of the same combined reporting group on the required dates. Because the assignment election is irrevocable, taxpayers are left with no clear recourse to fix such defective elections, and the department has not yet established any standards to apply in adjusting such defective elections.

Under RTC section 23663, subdivision (e), paragraph (4), the Franchise Tax Board is specifically authorized to issue necessary regulations to specify the treatment of any assignment that does not comply with the requirements of section 23663, including where the taxpayer and assignee are not members of the same combined reporting group on the dates required.

DISCUSSION TOPICS

The focus of this interested parties meeting will be to discuss the following issues regarding treatment and possible correction of defective elections under RTC section 23663:

1. Discussion of possible scenarios in which a request to correct a defective election should be granted or denied, which in turn staff may use as examples in any regulations.
2. Standards which should be used by the department to review requests for the correction of a defective election.
3. Possible methods to correct a defective election.
4. The procedure under which the correction of a defective election should be requested by a taxpayer.

In order to encourage private sector participation and input in this project, staff is not proposing draft language at this time. Instead, the interested parties meeting will include discussion of the above-listed items.

1. Examples of Defective Elections

- A. What are examples of defective elections?
 - 1) When the total credits available to be assigned turn out to be less than the assignor contemplated when the original tax return was filed.
 - 2) When an assignee turns out to not be a member of the same combined reporting group.
 - 3) Discussion of other examples that interested parties have encountered or foresee.
- B. Should the correction of elections be limited to certain scenarios considered to be "defective elections"?
 - 1) What should not be considered a defective election?
 - 2) How should the term "defective election" be defined?

2. Standards for the department to evaluate requests

- A. Would a standard similar to the "prejudice to the interests of the government" standard in Treasury Regulation section 301.9100-3(c)(1) be an appropriate threshold standard to review requests for corrections? In regard to RTC section 23663, use of this threshold would essentially mean that the statutes of limitations are still open for both the assignor as well as any assignees that would be impacted by the correction.
 - 1) How should a request be evaluated when one or more assignees do not consent to the correction of a defective election?
 - 2) What should happen if the statute of limitations for a relevant tax year is closed for any of the taxpayers involved in the defective assignment?
- B. What additional standards, if any, should be used by the department to review requests for the correction of an election?

3. Correction of a defective election

- A. How should the correction of a defective election work mechanically:
 - 1) Should the defectively assigned credits flow back to the assignor, so that the assignor can use them or reassign the credits on a subsequent year's original tax return?
 - i. In what tax year would the credits be deemed to be available for the assignor's use and/or subsequent reassignment?
 - ii. What about credits that might expire in the hands of the assignor before a reassignment can be made?

- 2) Another method would be for credits to be reassigned in the same tax year as the original election.
 - i. If so, should the reassignment of credits be done in accordance with a set formula?
 1. If so, what should the formula be?
 2. For example, reassignments could be made on a proportionate basis to the remaining valid assignees if the election were defective due to failure of the assignor and assignee to be unitary on the required dates.
 - ii. Would this effectively remove the "irrevocable" language from RTC section 23663, subdivision (c)(1)?
- 3) Still another method would be to have different methods for correcting different types of defective elections?
 - i. If so, what should the correction be for the following scenarios:
 1. When the total credits available to be assigned turn out to be less than the assignor contemplated when the original tax return was filed?
 2. When an assignee turns out to not be a member of the same combined reporting group as the assignor?
 3. Other scenarios?
 - 4) What are other possible methods to correct defective elections?
- B. Would the method for correcting a defective election require that any changes be made to the existing Form 3544 on which the election is made on a taxpayer's original tax return?

4. Procedure to request correction

- A. In what format should the request for correction be made?
- B. Should amended tax returns implementing the effects of the correction of a defective election be filed with the request?
- C. What position should taxpayers take on tax returns which become due after submission of the request but before any such request is either granted or denied?
- D. Should the request for correction be required to be signed by all parties involved, i.e. the assignor and assignees who would be impacted by the correction?

5. Other Issues?

COST IMPACTS OF PROPOSED RULEMAKING

In addition to discussion regarding potential language for this regulation, the Administrative Procedure Act (APA) requires the department to assess the economic impact of this proposed regulation on business, representative private persons, and small businesses. Recent legislation (SB 617, Stats. 2011, ch. 496) revised certain aspects of the standardized regulatory cost impact analysis, particularly with respect to "major regulations" (as defined), but also with respect to other rulemaking activities. As a result, the department intends to solicit information from interested parties during the pre-APA process that will assist in preparation of the regulatory cost impact analysis.

Specifically, the APA requires the department to assess the economic and fiscal impact of this regulation on the following –

- (1) Estimated private sector cost impacts on businesses and/or employees, small businesses, jobs or occupations, competitiveness of California businesses, reporting requirements, or individuals. This includes the total number and types of businesses impacted, including the number or percentage of those businesses that are small businesses, the number of businesses that will be created or eliminated, the geographic extent of the impacts (local or statewide), the number of jobs created or eliminated, and the ability of California businesses to compete with businesses in other states.
- (2) Estimated total statewide dollar costs that businesses and individuals may incur to comply with this regulation, including start-up and ongoing costs. This includes an identification of the costs for each industry affected, the annual costs a typical business may incur to comply with these requirements (including programming, recordkeeping, reporting and other paperwork, whether or not the paperwork is required to be submitted), whether the regulation directly impacts housing costs, and whether there are comparable federal regulations.
- (3) Estimated benefits from the regulation (both whom will benefit and by how much).
- (4) Any suggested alternatives to the proposed regulation, and the costs and benefits of those suggested alternatives under 1, 2 and 3 above.
- (5) Whether the estimated costs of this regulation to California businesses will exceed \$10 million.

The department encourages submission of any comments and/or cost data on the items set forth above by any interested parties.