



STATE OF CALIFORNIA  
**FRANCHISE TAX BOARD - Legal Branch**  
PO Box 1720  
Rancho Cordova CA 95741-1720  
(916) 845-3309 Fax (916) 845-3648

STEVE WESTLY  
Chair

CAROLE MIGDEN  
Member

STEVE PEACE  
Member

**October 24, 2003**

## **FTB NOTICE 2003- 9**

### **SUBJECT: Revenue Procedure 2003-33 – Automatic Extensions to Make Internal Revenue Code Section 338 Elections**

The Internal Revenue Service (hereinafter "IRS") issued Revenue Procedure (hereinafter "Rev. Proc.") 2003-33 (2003-16 I.R.B. 803) on April 21, 2003, generally effective for Internal Revenue Code (hereinafter "IRC") section 338 elections filed after April 2, 2003. Rev. Proc. 2003-33 grants a twelve-month extension of time to file an election under IRC section 338 from the date of discovery of the failure to file a timely election under that section to any person described in Section 4 of Rev. Proc. 2003-33 that complies with the requirements set forth in Section 5 thereof. Rev. Proc. 2003-33 was issued pursuant to Treasury Regulation (hereinafter "Treas. Reg.") section 301.9100-3, which regulation was promulgated under the authority of IRC section 7805.

Revenue and Taxation (hereinafter "Rev. and Tax.") Code section 23051.5, subdivision (d), states that when applying the IRC, regulations promulgated in final form or issued as temporary regulations shall be applicable to the extent that they do not conflict with part 11 of the Rev. and Tax. Code or with regulations issued by the Franchise Tax Board (hereinafter "FTB"). Rev. and Tax. Code section 23051.5, subdivision (e)(1), states that whenever a taxpayer is allowed to make an election under the Rev. and Tax. Code, a proper election filed with the IRS in accordance with the IRC or regulations issued by the Secretary shall be deemed a proper election for purposes of part 11 of the Rev. and Tax. Code, unless otherwise expressly provided in that part or in regulations issued by the FTB. Rev. and Tax. Code section 23051.5, subdivision (e)(3), states that to obtain treatment other than that elected for federal purposes, a separate election shall be filed with the FTB at the time and in the manner which may be required by the FTB.<sup>1</sup>

If a taxpayer makes a proper federal election under IRC section 338 for federal income tax purposes, the election will be deemed a proper election for California tax purposes, unless the taxpayer makes a separate California election. If, in making a proper federal election under IRC section 338, the taxpayer receives an extension of time to make the election pursuant to Rev. Proc. 2003-33 or other relevant authority, the election will still be proper for California tax purposes. Although the federal election is made pursuant to

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<sup>1</sup> A separate election is one in which the taxpayer either chooses not to make the same election for California tax purposes as the taxpayer made for federal income tax purposes or chooses to make an election for California tax purposes that the taxpayer has not made for federal income tax purposes. In both situations, the election must be allowable under both federal and California tax law.

federal authority to which California does not conform, it is deemed to be proper by the express language of Rev. and Tax. Code section 23051.5, subdivision (e)(1).

On the other hand, if a taxpayer wants to make an election for California tax purposes that is different than the election the taxpayer made for federal income tax purposes, then the taxpayer must file a separate election as required under California law. However, since California has not conformed to IRC section 7805, Treas. Reg. section 301.9100-3 cannot be relied upon to provide an extension of the due date for filing any separate California election. In addition, Rev. Proc. 2003-33 cannot be relied upon for extending the due date of a separate election filed under Rev. and Tax. Code section 23051.5, subdivision (e)(3), relating to an IRC section 338 election. In this situation, since there is no authority under California law to grant an extension of time to make the separate IRC section 338 election for state purposes, the taxpayer must make any separate California election under IRC section 338 within the normal time periods for making such elections (and may not rely upon Rev. Proc. 2003-33 to extend that filing period).

#### **DRAFTING INFORMATION**

The principal authors of this notice are Cody C. Cinnamon and Debra S. Petersen of the Franchise Tax Board Legal Branch. For further information regarding this notice, contact Ms. Cinnamon or Ms. Petersen at the Franchise Tax Board Legal Branch, P.O. Box 1720, Rancho Cordova, CA 95741-1720.