

## SIXTY-DAY NOTICE OF CHANGES TO PROPOSED REGULATION SECTION 23663

The third interested parties meeting for proposed regulations under Revenue and Taxation Code (RTC) section 23663 was held on June 12, 2014. At the third interested parties meeting staff elicited and received public comments on draft language for new regulations that address defective assignments under RTC section 23663. Staff informed the attendees that staff planned to amend the draft regulatory language based on the comments received at the interested parties meeting. Further, attendees generally indicated agreement with staff's proposal to have the amended regulatory language disseminated through an online posted notice, and that it would not be necessary to hold an additional interested parties meeting solely for the purpose of discussing the minor changes in the amended language. Attendees requested, and staff agreed, to allow the public at least 60 days, through November 1, 2014, to comment on the amended regulatory language.

This notice discusses the proposed amendments staff has made to the draft regulatory language based on comments at the June 12, 2014 interested parties meeting. All changes made to the regulatory language are tracked using the standard format of deleted language being struck through and added language being underscored. Staff intends to present the amended regulatory language at the Franchise Tax Board meeting on December 4, 2014 and request permission to proceed with the formal Administrative Procedures Act process following that meeting. However, staff may delay bringing proposed language to the Franchise Tax Board in order to address any comments or concerns raised by or received from interested parties in response to this notice.

The following documents are posted with this notice:

- [The Meeting Notice for the third interested parties meeting held on June 12, 2014.](#)
- [The Amended Proposed Regulations 23663-1 through 23663-5 based on the amendments discussed within this notice.](#)

The proposed amendments are summarized below.

### **1) Regulation 23663-3(d)(2)**

The proposed regulation states that when the Franchise Tax Board (FTB) audits an assignor or assignee and determines that the assignor and assignee were not unitary on the required dates for a credit assignment, then the credits that were the subject of that defective assignment are not available to the assignor until a final determination that the assignor and assignee were not unitary is made for both the assignor and assignee. Furthermore, the regulation provides that if the FTB only issued a notice of proposed assessment (NPA) for the assignor or assignee, but not both, then the credits still would not be available to the assignor until a final determination had been made for both the assignor and assignee.

*Amended language:* In the case where the FTB issues an NPA for only the assignor or the assignee, but not both, then the limitation on the credits shall be based solely on whether a final determination has been made for the entity to whom the NPA was issued.

## **2) Regulation 23663-4(b)(3) and –(4)(b)(4) and Regulation 23663-4(d)(2)**

In the proposed regulation a correction of an error is allowed when a taxpayer presents clear and convincing contemporaneous evidence demonstrating that an error was made on the taxpayer's defective assignment and what the intended assignment was. The proposed regulation includes a number of examples demonstrating how the department would view various kinds of evidence. A practitioner expressed concern that the details of an assignment may not be documented, which in turn would result in a taxpayer not being able to take advantage of the correction of an error rules. Staff believes the documentation standards in the regulation are necessary to avoid retroactive tax planning and are also necessary in order to be consistent with the statute's explicit requirements that assignment elections be made on an original tax return and be irrevocable once made. Further, staff notes that the correction of an error regulation is a special, generous exception created to allow the correction of defective assignments only in those limited circumstances where evidence contemporaneous to the defective election clearly and convincingly demonstrates the intended assignment. Finally, staff notes that the proposed regulation informs taxpayers of exactly what is necessary to document an assignment, so taxpayers can choose to document their assignments in a manner which allows them to take advantage of the correction of an error rules.

However, staff notes that the proposed regulation allows a correction of an error request to be made only once every four taxable year period. Therefore, to the extent a taxpayer requests a correction of an error but the request is not granted, the four taxable year limitation would apply. Staff proposes instead basing the limitation on those instances in which a request is both requested and granted.

*Amended language:* The four taxable year limitation will only be triggered when a correction of an error request is requested and granted.

## **3) Regulation 23663-4(b)(6)**

The proposed regulation states that a request for the correction of an error must be made no later than 60 days before the filing date of the taxpayer's subsequent year's tax return. The 60-day deadline was originally inserted in order to allow staff sufficient time to review a request and respond to a taxpayer before their next tax filing deadline. At the interested parties meeting a practitioner proffered that many prior year defective assignments would likely not be noticed by practitioners until after the 60-day deadline had passed, and would likely only be discovered during the preparation of the subsequent year's tax return. After due consideration of the comment, staff believes that allowing taxpayers to request a correction of an error through their tax filing deadline for their subsequent year's tax return outweighs the benefit of having staff respond to such request before the taxpayer's tax filing deadline.

*Amended language:* The request for a correction of an error will be due no later than the earlier of the extended due date or filing date of the taxpayer's subsequent year's tax return.

Staff further notes that additional very minor, self-explanatory grammatical and other changes that were discussed at the third interested parties meeting were also made to the proposed regulatory language. In addition, the headers for Regulations 23663-1 and 23663-5 were moved to inside the regulations to comport with the department's general regulation drafting style.

Written comments regarding the amended language will be accepted until 5:00 p.m. on November 1, 2014. All inquiries and written comments concerning this notice should be directed to Ciro Immordino or Richard Tay per the below contact information.

Ciro Immordino

- Email: [ciro.immordino@ftb.ca.gov](mailto:ciro.immordino@ftb.ca.gov)
- Telephone: (916) 845-4066
- Address: Legal Division (MS A260), P.O. Box 1720, Rancho Cordova, CA 95741-1720

Richard Tay

- Email: [richard.tay@ftb.ca.gov](mailto:richard.tay@ftb.ca.gov)
- Telephone: (916) 845-7917
- Address: Legal Division (MS A260), P.O. Box 1720, Rancho Cordova, CA 95741-1720

This notice and the proposed amendment will also be made available at the Franchise Tax Board's website at [www.ftb.ca.gov](http://www.ftb.ca.gov).