

TITLE 18. FRANCHISE TAX BOARD
AMENDMENTS TO PROPOSED
REGULATION SECTION 25136, RELATING TO
SALES OF OTHER THAN TANGIBLE PERSONAL PROPERTY

A hearing was held on January 13, 2010 by Melissa Potter of the Franchise Tax Board Legal Division, the "hearing officer," on proposed amendments to California Code of Regulations, title 18, section 25136 (Regulation section 25136), which was noticed in the California Regulatory Notice Register on October 23, 2009.

After department staff reviewed the proposed regulation language and considered the comments submitted at and before the hearing, the hearing officer now recommends that the facts in the examples be amended to clarify the effect of the cascading rules. The hearing officer also recommends that another amendment be made to insert clear language regarding the effective date of the regulation. These nonsubstantial changes (within the meaning of Govt. Code Section 11346.8) and sufficiently related changes (within the meaning of Govt. Code Section 11346.8) recommended by the hearing officer are reflected in the attachment hereto. These amendments to the regulation are reflected by double underscore for additions and double strikeout for deletions. Changes to Regulation section 25136 are as follows:

1. The first sentence in the examples under Regulation sections 25136(d)(3)(A), (B), (C), (D) and (E) is amended so that it is clear that the taxpayer in the example is not a provider of personal services which would instead be governed by the provisions of Regulation 25136 (d)(2)(C). The examples in each subsection referred to above are amended to read:

The taxpayer, a satellite TV provider, contracts with its customer, an owner of apartment buildings, to provide and install satellite dishes for \$1,000,000 in this state.

2. The last sentence in the examples under Regulation sections 25136(d)(3)(B), (C), (D), and (E) was determined to be unnecessary and as a result caused confusion. It is deleted in order to simplify the examples:

~~(See subsection (d)(2), Special Rules, for examples of exceptions to this method of assignment of a receipt to the sales factor numerator.)~~

3. The entire example in Regulation section 25136(d)(3)(C) is amended because several commentators felt it was disjointed and confusing. In addition some facts were unnecessarily repeated. The example is amended to read:

The taxpayer, a satellite TV provider, contracts with its customer, an owner of apartment buildings, to provide and install satellite dishes for \$1,000,000 in this state and States A and B on an as needed basis. The taxpayer then subcontracts with and pays agent or independent contractor X to install the satellite dishes in this state and States A and B for \$200 per installation. The taxpayer's records show that X installed 1,000 satellite dishes each in this state and State A and 1,750 satellite dishes in State B. The contract between the taxpayer and X does

not indicate the taxpayer's costs associated with X's installation of the satellite dishes in each state. However, the taxpayer's contract with its customer indicates that the activity will take place in this state and States A and B, and the taxpayer's records indicate the number of installations in each state. ~~the taxpayer's contract with its customer indicates that the cost of X's performance is \$200 per installation.~~ Accordingly, the taxpayer can reasonably determine at the time of filing its return the costs of performing installation services in each state ~~because the taxpayer's records the number of installations in each state and the contract between the taxpayer and its customers indicate the costs of each installation.~~ The taxpayer's cost of performance is \$200,000 in both this State and State A and is \$350,000 in State B. The taxpayer's greater cost of performance of \$350,000 will be assigned to State B pursuant to subsection (d)(3)(C) for purposes of assigning the \$1,000,000 receipt to the numerator of the sales factor. ~~(See subsection (d)(2), Special Rules, for examples of exceptions to this method of assignment of a receipt to the sales factor numerator.)~~

4. Subsection (e) is added to set forth that the amendments to the regulation are applicable to taxable years beginning on or after January 1, 2008. Interested parties requested that the proposed regulation include an effective date within the regulation and the January 1, 2008 date is reasonable as the date had been publicly disclosed and discussed in two Franchise Tax Board public meetings: the first in September, 2007 and the second in June 2008. In the June 2008 Franchise Tax Board public meeting, staff requested and the Board approved that the applicable date for the amendments to the regulation would be for taxable years beginning on or after January 1, 2008. The new language reads:

(e) The amendments to this regulation are applicable to taxable years beginning on or after January 1, 2008.

These nonsubstantial and sufficiently related changes are being made available to the public for the 15-day period required by Government Code section 11346.8(c) and Section 44 of Title 1 of the California Code of Regulations. Written comments regarding these changes will be accepted until 5:00 p.m. on March 10, 2010.

A copy of these proposed amendments are being sent to all individuals who requested notification of such changes, as well as those who attended the hearing and those who commented orally or in writing, and will be available to other persons upon request. All inquiries and written comments concerning this notice should be directed to Colleen Berwick (916) 845-3306, FAX (916) 845-3648, E-Mail: colleen.berwick@ftb.ca.gov, or by mail to the Legal Department, Attn: Colleen Berwick, P.O. Box 1720, Rancho Cordova, CA 95741-1720. This notice and the proposed amendment and adoption will also be made available at the Franchise Tax Board's website at <http://www.ftb.ca.gov/>.