



10.12.11

FTB NOTICE 2011-06

Subject: Chief Counsel Rulings for "Doing Business"

Revenue and Taxation Code (R&TC) section 23101 was recently amended to add specific conditions for "doing business" in California for taxable years beginning on or after January 1, 2011. These new threshold tests, when met by an entity, provide that the entity is "doing business" in the state. However, when the entity does not meet one or more of those conditions, it still must determine whether it was "actively engaging in any transaction for the purpose of financial or pecuniary gain or profit" under the general rule for "doing business" found within R&TC Section 23101, subdivision (a). As a result, for those unique circumstances where a putative taxpayer is unsure whether its activities constitute "doing business" in California under the general rule of 23101, subdivision (a), the FTB will accept requests for written advice on that issue, but will continue to decline to rule on whether the specific factual threshold tests of R&TC Section 23101, subdivision (b), have been met.

As explained in FTB Notice 2009-08, which provides the guidelines for FTB Rulings (hereinafter "Guidelines"), pursuant to R&TC section 21012, subdivision (h), the FTB may issue Chief Counsel Rulings that interpret and apply California law to a specific set of facts. Putative taxpayers desiring a written determination whether particular activities or transactions amount to "doing business" should follow the Guidelines to submit a proper request for a Chief Counsel Ruling to the FTB.

However, petitioners should note that the Guidelines at paragraph C. describe certain no-ruling areas where the FTB will not provide written advice. At subsection 6. of paragraph C., the Guidelines state that no ruling will be issued where the answer to a question depends principally upon factual issues. The FTB will therefore not provide written advice on "doing business" under R&TC 23101, subdivision (b), given the principally factual nature of any such determination.

A request for a Chief Counsel Ruling will not prevent putative taxpayers from applying for the FTB's Voluntary Disclosure Program (VDP). While persons who request advice pursuant to this Notice must disclose the identity of the putative taxpayer, provided a VDP applicant otherwise meets the requirements for VDP eligibility (defined at R&TC 19191 *et. seq.*), that applicant may still request admission into the VDP program. A VDP application may be submitted even where guidance requested under this Notice results in a preliminary determination by the Legal Division that the taxpayer's activities do constitute "doing business" and thus that a return filing obligation exists, whether or not a Chief Counsel Ruling on the issue is ultimately issued to that taxpayer.

Nothing in this FTB Notice supersedes the statutory processes in place under R&TC section 23101.5 for petitioning the FTB for a determination whether a corporation is "not doing business." That section continues to be operative and the FTB will continue to review petitions brought forward under that section of the Revenue and Taxation Code.

The principal author of this notice is L. Red Gobuty of the Franchise Tax Board, Legal Division. For further information regarding this notice, contact Mr. Gobuty at P.O. Box 1720, Rancho Cordova, Ca 95741-1720.