

## **Summary of Third and First Interested Parties Meetings**

### Revenue and Taxation Code Section 23663

**I. Administration:** On June 12, 2014, at 1:30 p.m., members of the public attended the third interested parties meeting for proposed regulations under Revenue and Taxation Code (RTC) section 23663 at the Franchise Tax Board office in Sacramento. Parties attended in person and by telephone and were asked to register.

This meeting also included the first interested parties meeting regarding rules clarifying when an assignee is considered an eligible assignee in the same combined reporting group under RTC section 23663.

The interested parties meeting panel was comprised of Ciro Immordino and Richard Tay, attorneys with the Franchise Tax Board's (FTB) General Tax Bureau, and Doug Powers, an attorney with the FTB's Technical Resources Bureau.

**II. Background:** 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. RTC section 23663 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 Form FTB 3544 and is irrevocable once made under RTC section 23663, subdivision (c). In some situations, taxpayers have made defective assignments. Under RTC section 23663, subdivision (e), paragraph (4), the FTB 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.

A first interested parties meeting for the defective assignment regulations was held on October 1, 2012, and a second interested parties meeting was held on December 5, 2013.

**III. Purpose:** To elicit public input on language for proposed regulations which define and provide rules for the treatment of defective assignments. The proposed rules include default rules for the allocation of credits that are the subject of defective assignments, alternative allocations that are available before first contact, and corrections of errors that are available before the filing of the subsequent year's tax return.

The purpose of the meeting was also to elicit public input on a proposed regulation which would clarify when an assignee is considered an eligible assignee, specifically in the context of reorganizations and other corporate restructurings, such as transactions in which tax attributes, including credits, would survive under Internal Revenue Code section 381 or otherwise.

**IV. Discussion:** Staff noted that comments from previous interested parties meetings regarding the structure of the proposed regulations had been positive. Staff then noted that a table of contents for the proposed regulations was not included with the interested parties meeting materials but that it would be added as Regulation 23663-0. Staff asked if there were any global

comments. After receiving no global comments, staff began a section by section discussion of the proposed regulations.

In regard to the definition of first contact one attendee commented that an initial audit contact for a field audit occurs when a meeting takes place as opposed to when a letter is sent. Staff agreed with the comment and noted that the language would be revised to better include initial audit contacts from field audits. Staff also noted that a mathematical revision would be made to Example 4 of Regulation 23663-1(h).

An attendee requested changes to the rule in Regulation 23663-3(d), under which credits would not be allocated to an assignor in cases that the FTB issued a notice of proposed assessment to either the assignor or assignee, but not both. Staff responded that FTB would consider the attendee's suggestion. An attendee also asked what appeal procedures would be available to taxpayers who received an unfavorable determination by FTB under Regulation 23663-4(d) that entities were not unitary. Staff responded that FTB was aware of that issue and the proper determination was still being reviewed.

Regarding Regulation 23663-4, an attendee commented that taxpayers may have difficulty meeting the clear and convincing contemporaneous evidence standard. Staff responded that the documentation requirements are necessary in order to be consistent with the statute's explicit requirements that assignments be made on an original tax return and be irrevocable, and are also necessary to avoid retroactive tax planning. Furthermore, staff noted that the proposed regulation informs taxpayers of exactly what is necessary to meet the documentation requirement. In regard to the 60-day deadline to request a correction of an error, an attendee commented that many practitioners would likely not notice a defective assignment until after the 60-day deadline had passed. Staff responded that FTB would consider the comment. Staff also noted that FTB was seeing many assignments which were defective due to the term "various" being used. An attendee asked if the proposed regulation would give taxpayers an opportunity to correct these types of defective assignments. Staff responded that Regulation 23663-4(d) was structured to allow for taxpayers to correct pre-regulation defective assignment elections.

Staff then moved on to the first interested parties meeting regarding a proposed regulation which would clarify when an assignee is considered an eligible assignee in the same combined reporting group. Regarding the question in the interested parties meeting notice of which corporation, if any, in the combined group to which B may assign credits under RTC section 23663 where in 2012, B and C are acquired by the X group in a tax-free reorganization, staff commented that the credits could only be assigned to C. Staff asked if any attendees did not agree with this result and no attendee noted disagreement. Staff then asked for any exceptions attendees could think of for this result. No attendees had any comments.

Next, staff asked attendees the question from the notice as to which corporation, if any, in the combined group may Y assign B's former credits under RTC section 23663, assuming that B was merged or liquidated into Y so that the 2010 credits earned by B are now Y's credits. An attendee responded that the credits should still only be assignable to C. Another attendee questioned whether Internal Revenue Code section 381 and the unitary status of the entities may change the result.

**V. Future Action:** Staff thanked all the parties for their attendance and input, and indicated that additional comments will be taken through July 10, 2014. Staff informed the attendees that staff

planned to amend the draft regulatory language based on the comments received at this third interested parties meeting. Attendees 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.