

## Summary of First Interested Parties Meeting

### Regulation Section 25137, Alternative Apportionment Method Petition Procedures

- I. **Administration:** On June 30, 2017 at 1:00 p.m., at the Franchise Tax Board (FTB) central office in Sacramento, interested members of the public (participants) attended the first Interested Parties Meeting (IPM) on potential amendments to California Code of Regulations, Title 18, section 25137 (Regulation). Participants attended in person and by telephone. Participants physically present were asked to register at the entrance and phone participants introduced themselves.

Craig Swieso, FTB Assistant Chief Counsel, and Fred Campbell-Craven, FTB Deputy Chief Counsel, served as the IPM Facilitators (hereinafter Facilitator, either collectively or individually). Mr. Swieso listed the document made available as handouts: the Discussion Topics. Mr. Swieso then explained the purpose of the meeting was to provide the public with an opportunity to discuss and provide comments on potential amendments to Regulation section 25137. Participants were advised they had 30 days from the date of the IPM to submit written comments, and that this summary of the IPM and comments would thereafter be prepared and published online.

- II. **Discussion:** The IPM discussion generally followed the Discussion Topics identified in the handout. The Facilitator made opening remarks to each topic and invited comment. Members of the public also presented topics for discussion.
- III. **Summary:** The opening remarks for each discussion topic are presented below and are followed by a summary of the comments received during the IPM and in writing by the close of the IPM comment period, i.e., August 7, 2017.

#### Discussion Topic 1 – Subject: Should these topics be addressed via an FTB Notice or amendments to Regulation section 25137(d)?

##### *Facilitator's Remarks*

The Facilitator noted that there are already provisions in Regulation section 25137(d) that address a taxpayer proceeding to the three-member FTB (Board, itself) after an adverse Regulation determination. The facilitator suggested that amending the Regulation at section 25137(d) is probably the more appropriate vehicle for developing detailed rules for taxpayers proceeding before the Board, itself. The Facilitator indicated that an FTB Notice would not serve that function as well. The Facilitator also noted that the number of petitions that are filed with the FTB is unknown but the number that are appealed to the Board. Itself, has been one in the prior eight years.

##### *Comments*

Commentators made positive remarks about amending the Regulation at section 25137(d). One commentator was pleased about the entire process being reduced to writing. Another commentator noted that currently taxpayers are operating under a seventeen year old law. Another pondered how many petitions have been filed. Another commentator pointed out

there were no procedures providing how the Board, itself, was to handle the appeal of an adverse Regulation determination.

Discussion Topic 2 – Subject: As a prerequisite for Section 25137 petitions to be considered by the Board, Itself, how should Section 25137 petitions initially be considered by Franchise Tax Board staff?

*Facilitator's Remarks*

The Facilitator noted that the underlying Section 25137 petition is filed with the FTB and not the 37 committee responsible for deciding how to handle the petition (Committee). The Facilitator provided a procedural overview, noting that where a taxpayer, while in audit, requests Section 25137 relief, the auditor will bring that taxpayer's Section 25137 request to the Committee. The Facilitator noted that where the auditor independently proposes an alternative apportionment under section 25137, it is treated as a petition and follows the same process, coming before the Committee. For both the taxpayer's petition and an auditor's proposal, the auditor goes through designated audit coordinators to get materials to the Committee, and the same standard applies to auditors and to taxpayers alike, with the party seeking alternative relief bearing the burden of proof. The Committee process is informal. The Facilitator noted that the 25137 petition process is confidential and determinations are not made public, that the Committee is very sensitive to treating similarly situated taxpayers the same and that the Committee is respectful of the taxpayer's costs in the Section 25137 petition process.

The Facilitator informed participants that the Committee is comprised of Tax Counsels IV and an Attorney V as well as the Assistant Chief Counsel and Deputy Chief Counsel for Multistate, and that the Committee meets when there is a Section 25137 petition or audit proposed alternative apportionment to consider.

The Facilitator also noted that when a taxpayer appeals the denial of a Section 25137 petition that appeal goes before the Board itself. The Facilitator suggested that Franchise Tax Board staff (Staff) responsibilities in proceeding to the Board, itself, should be generally outlined in the Regulation, and specifically set forth in detail in an FTB Notice on the subject.

The Facilitator also noted that currently, where Staff proposes an alternate apportionment methodology that is treated as a petition before the Committee, Staff may not appeal an adverse decision by the Committee.

*Comments*

A commentator noted that there was no formal guidance yet, about the 25137 petition process, with another commentator suggesting the process needs to be put into writing. A second commentator stated the public would appreciate flexibility with the 25137 petition procedures. Another commentator worried that a company that lacked sophistication or resources could not afford to make a Section 25137 petition request, and requested that the process be more streamlined. Another commentator recommended that the 25137 petition process should be less formal. One commentator wondered about who was on the Committee and how often it meets.

Several commentators stated that taxpayers should be able to make their presentations personally to the Committee and not filtered by Staff. A commentator expressed that the written word and verbal word present very differently from one another.

Discussion Topic 3 – Subject: When Section 25137 petitions are considered by the Board, itself, should there be formal time limits imposed on the various parties with respect to their verbal presentations?

#### *Facilitator Remarks*

The Facilitator noted that traditionally, time limits at the California Board of Equalization (BOE) have been ten (10) minutes for the taxpayer, ten (10) minutes for the FTB, and then five (5) minutes for the taxpayer's rebuttal, followed by questions from BOE board members. The Facilitator pointed out that at the last 25137 matter that came before the Board, itself, for decision, there were no time constraints.

#### *Comments*

Two commentators stated that there should be no artificial time limits, with a suggestion offered for there to be flexibility in allowing taxpayer's to ask for additional time when their petition is submitted to the Board, itself,. A commentator noted that five minutes is not enough time for rebuttal. Commenting on the time allotment to parties before the BOE, one commentator said there was a BOE procedure for requesting more time, but the parties don't learn of their time limits until the day of the BOE hearing.

Commentators discussed whether the Board, itself should keep time limits, offered views that time limitations may depend on the meeting agenda, and noted that the Board, itself could move an appeal matter last on the agenda so that timing would be less of an issue.

Discussion Topic 4 – Subject: What should the contents of a 25137 petition be? Should the materials submitted by taxpayers with respect to Section 25137 petitions be set forth in a standardized format?

#### *Facilitator Remarks*

The Facilitator pointed out that currently, there is no standardized format for commencing a petition. The Facilitator noted that FTB is considering whether a formal standardized brief should be filed to commence a 25137 petition, or whether a letter to the Committee would suffice. The Facilitator indicated that in the past the FTB protected taxpayer's exhibits during the 25137 petition process as confidential but that the petition, itself, was a matter of public record. Explaining confidentiality of petitions in light of the confidentiality waiver the taxpayer had to execute to submit a 25137 petition, the Facilitator noted that the Bagley-Keene Act should have prevented the confidentiality of any document filed with the FTB.

#### *Comments*

One commentator asked what a standardized 25137 petition would look like. Other commentators indicated there used to be confidentiality of the materials submitted to the FTB, noting that historically, the 25137 petition was a matter of public record, but the exhibits were confidential. A commentator indicated confusion whether the FTB's auditor

could appeal a negative decision from the Committee on that auditor's proposed alternative apportionment under section 25137.

Discussion Topic 5 – Subject: Should Staff's determination letter pertaining to Section 25137 petitions be set forth in a standardized format?

*Facilitator Remarks*

None.

*Comments*

None.

Discussion Topic 6 – Subject: With respect to the materials considered by the Board, itself, should there be a formal time frame for their submission?

*Facilitator Remarks*

The Facilitator indicated that currently there is no set order for submission of materials.

*Comments*

None.

Discussion Topic 7 – Subject: When Section 25137 petitions are considered by the Board, itself, in what order should the verbal presentations occur? (i.e. after the various parties have presented their case in chief, should the taxpayer be allowed a final summation?)

*Facilitator Remarks*

None.

*Comments*

None.

Discussion Topic 8 – Subject: If a Section 25137 petition is denied by the Board, itself, should the taxpayer have an opportunity for reconsideration by the Board and should there be a time limit for requesting such reconsideration?

*Facilitator Remarks*

None.

*Comments*

None.

Discussion Topic 10 – Subject: When Section 25137 petitions are considered by the Board, itself, should the Board, issue a written determination with respect to its decision?

*Facilitator Remarks*

The Facilitator mentioned that currently the Board, itself, either votes on how to decide the appeal following the hearing or votes to wait for another public session to have a vote on the

appeal. The Facilitator noted that the Board's order has to be reflected in the minutes of an open session meeting, and the vote is approved at the next open session meeting and recorded in those minutes. The Facilitator further noted there is no formal guidance as to how this is to happen.

With respect to writing a determination, the Facilitator noted that perhaps Staff could be instructed by the Board, itself to write the determination, and then at the next board meeting, the Board could modify it or vote on it (satisfying the Bagley-Keene Act). The Facilitator noted that the Board, itself, only meets 4 times a years and it could take half a year to get a decision.

#### *Comments*

One commentator wanted a determination letter with an explanation so everyone knows the reasoning behind the decisions, suggesting that one way to accomplish this would be to allow expansive oral arguments so that both parties get an informed decision.

Discussion Topic 11 – Subject: Should witnesses be allowed to testify when Section 25137 petition appeals are considered by the Board, itself? If so, what procedures (if any) should be established as to whether witnesses should be sworn under penalty of perjury and whether the opposing party should be allowed to pose questions to the witnesses?

#### *Facilitator Remarks*

The Facilitator asked questions for discussion on this topic, querying participants whether witnesses should be allowed to testify, whether there should be timeframes, and whether Staff should be allowed to cross-examine a witness. The facilitator noted that usually the facts are not in dispute in a 25137 petition, just the legal arguments. The Facilitator also asked what amount of time is reasonable, noting that parties should be able to use their time the way they want to.

#### *Comments*

A commentator noted that at the BOE, testimony was under oath. Commentators also noted that at the BOE it used to be that posing questions would cut into the allotted argument time, and that where a case was complicated, a practitioner would need all of their allotted time. Commentators felt that parties should not have their time restricted, but there should be a consideration of the length of a presentation, and that perhaps parties should have more than the timeframes the BOE allowed, suggesting a possibility of allowing 30 minutes to each party to argue their petition positions.

Discussion Topic 12 – Should different procedures be established for Section 25137 petitions filed while issues are under examination by the FTB's Audit Division (as opposed to when a Section 25137 petition has been filed with Staff), both while Staff is considering the petition and when the Board, itself is considering a taxpayer's appeal following Staff action? For example, should a taxpayer bringing a Section 25137 petition while under examination by the FTB's Audit Division be required to enter into a waiver of the applicable statute of limitations for issuing a proposed assessment for some reasonable period of time as a condition to having its Section 25137 petition considered by the Board, itself?

### *Facilitator Remarks*

The Facilitator mentioned that the FTB is considering whether or not a statute of limitations waiver for a reasonable period of time should be a precondition to a Section 25137 petition being considered by the Committee, while issues are under FTB Audit's examination, both while Staff is looking at the petition and when the Board, itself, considers an appeal of the Section 25137 petition denial.

The Facilitator stated that if a Section 25137 petition is denied during audit, then a taxpayer could exercise its protest rights if the taxpayer does not agree with the decision, or the taxpayer could appeal the denial of the Section 25137 petition to the Board, itself. Concurrently, a taxpayer should file both (1) a protest of Audit's Notice of Proposed Assessments the taxpayer does not agree with and (2) an appeal to the Board, itself for the denial of the Section 25137 petition. The Facilitator also cautioned that filing an appeal of the Section 25137 petition denial with the Board, itself, will not protect a taxpayer's protest rights.

The Facilitator also noted that the current Regulation is very broad, and does not say much about appealing a Section 25137 petition to the Board, itself, and that as a result the procedures need to be flushed out.

### *Comments*

Several commentators indicated that waiving the statute of limitations during the pendency of a Section 25137 petition makes sense. Commentators noted that a taxpayer should have the flexibility of going to the Board, itself during the audit process and before being assessed.

- IV. **Next Steps:** The Facilitator indicated that staff would review comments received and schedule a future IPM at which draft language would be presented.