

SUMMARY OF FIFTH INTERESTED PARTIES MEETING

REGULATION SECTION 25136-2, MARKET-BASED SOURCING RULES FOR SALES OF OTHER THAN TANGIBLE PERSONAL PROPERTY

- I. **Administration:** On July 21, 2020, at 10:00 a.m., the Franchise Tax Board (FTB) held a telephonic Interested Parties Meeting (IPM) that was attended by interested members of the public (Participants) concerning potential amendments to California Code of Regulations (CCR), Title 18, section 25136-2 (Regulation). This was the fifth IPM on this regulation project. Participants were able to submit written comments by email and verbally during the IPM.

Melissa Williams, FTB Tax Counsel IV, Thomas Lo Grossman, FTB Tax Counsel IV, and Amanda Smith, FTB Tax Counsel, served as the IPM Facilitators (Facilitator(s)). Mr. Lo Grossman listed the documents made available as handouts: the IPM announcement, draft language, and a draft language explanation document (Explanation Document). Mr. Lo Grossman explained the purpose of the IPM was to provide the public with an opportunity to discuss and provide comments on draft amendments to the Regulation. Participants were advised they had thirty days 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 was telephonic in nature due to the pandemic. The IPM was organized by the Facilitators first describing proposed changes to the language, followed by the Facilitator addressing written questions received during the pendency of the IPM. Thereafter participants asked questions and made comments, and the Facilitators responded..
- III. **Summary:** Facilitator remarks for each set of proposed Regulation amendments 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.

Discussion Topic 1. (b)(8) at pp. 4 – Definitions

Facilitator's Remarks

A Facilitator mentioned the definition of reasonable approximation contains a reference to population based apportionment based on the most recent US census data. A facilitator stated that Staff therefore proposed adding language to indicate a reference date to determine which census is most recent. The Facilitator stated that this was meant to increase clarity.

Comments

There were no comments on this discussion topic.

Discussion Topic 2. (c)(1) at pp.4-6. Assignment of sales of services -- individuals

Facilitator's Remarks:

A Facilitator mentioned the regulation as proposed by Staff blended the rules for assignment of receipts from services to individual and businesses.

Comments:

One commenter stated that the billing address in the above language is necessary to avoid an onerous and compliance burden. The commenter also proposed safe harbor rules and another example.

Discussion Topic 3.p New Proposed assignment of receipts from services (c)(1) on pp.6-7.

Facilitator's Remarks:

A Facilitator mentioned that the proposed amendments substantially modified the rules for assigning receipts from services provided to individual, business entities, and government entities.

Comments:

A commentator pointed out that "Substantiated" is not defined.

Another commenter stated that the proposed language is over burdensome.

One commentator proposed that the language in regards to government contractors be eliminated.

Discussion Topic 4. (c)(1)(F).10. Example on pp.11

Facilitator's Remarks:

A Facilitator mentioned that Staff had proposed a new example indicating how a broker should assign its receipts from services. A Facilitator stated the proposed language was added to clarify that brokerage services for the sale

of marketable securities should be apportioned based on the rules at subsection (c) and not the rules at subsection (f).

Comments

A commenter disputed the effectiveness of the above-example and suggested it be removed.

Discussion Topic 5 (d)(1)(A) on pp.15-17. Intangibles

Facilitator's Remarks:

A Facilitator mentioned that Staff had proposed adding a tie-breaker rule and alternate rules to the regulation that would be applicable when applying the asset tests for assignment of the complete transfer of intangible property

Comments:

There were no comments on this discussion topic.

Discussion Topic 6 (d)(1)(C) at pp. 18, 19 – Intangibles, complete transfer, example

Facilitator's Remarks:

A Facilitator mentioned that in response to public feedback, Staff proposed to bring back a previously discussed provision that assigned gross receipts to this state if the billing address of the purchaser is in this state.

Comments:

There were no comments on this discussion topic.

Discussion Topic 7 (f), (l)(2), (l)(2)(A) and (l)(2)(C) at pp. 24-26. Modified language related to marketable securities.

Facilitator's Remarks:

A Facilitator mentioned that Staff had proposed to add a definition at subsection (f) for the term "customer" applicable to the subsection to eliminate confusion.

A Facilitator stated that at subsection (f), the language as Staff proposed replaced "sales of marketable securities" with "sales from marketable securities." Additionally, the Facilitator stated that using "from" in lieu of "of" parallels language describing other sales throughout the regulation and conforms to the definition of sales provided in the statute.

A Facilitator also stated that because the location of a customer may be reasonably approximated under subsection (f)(3), Staff proposed to add the phrase "sales from marketable securities" to subsections (i)(2), (i)(2)(A), and (i)(2)(C) which address application of reasonable approximation rules.

Finally, at subsection (f)(4), a Facilitator stated that Staff proposed modifying the example to make it more explicit that the rules for apportionment of the sale of marketable securities apply to the principle and not the agent, such as a broker.

Comments:

There were no comments on this discussion topic.

Discussion Topic 8. (j) and (j)(2) on p.27. Corrected applicability date and clerical errors.

Facilitator's Remarks:

A Facilitator mentioned that Staff had proposed to change the subsection title from "Effective date" to "Applicability dates" because the subsection concerns dates that the original regulation and its various amendments are applicable, not effective. A facilitator stated that the reason for this was that effective dates for adoption of amendments to this regulation are controlled by statute pursuant to Government Code section 11343.4.

Furthermore, a Facilitator mentioned that the current regulation language references non-existent examples in subsection (j)(2) and that Staff proposed to delete these references.

Comments:

There were no comments on this discussion topic.

Discussion Topic 9. Added applicability date on pp.27

Facilitator's Remarks

A Facilitator mentioned that Staff had proposed language to indicate an applicability date for the new amendments proposed in the Draft Language document of taxable years beginning on or after January 1, 2019.

Comments

One commentator urged prospective applicability.

Discussion Topic 10. Retroactive application election on pp. 27

Facilitator's Remarks

A Facilitator mentioned that Staff had proposed elective retroactive application for the new amendments proposed in the Draft Language document to taxable years beginning on or after January 1, 2108.

Comments:

There were no comments on this discussion topic.

Additional comments not directly related to topics Facilitators introduced at the IPM

General Comments

A commentator stated that the proposed use of the term "foreign jurisdictions" in the definition for reasonable approximation was inconsistent and burdensome.

A commenter stated that the simplifying rules creates inconsistencies between similarly situated taxpayers.

A commenter stated that the rules for using all available sources of information and reasonable approximation seem functionally similar.

A commentator desired to revisit the question of whether to use a delivery rule for services related to tangible personal property.

A commenter stated that billing address should come before reasonable approximation when determining which assignment rule to apply.

A commenter stated that taking taxpayer resources into account when asking for taxpayer documentation was unduly burdensome.

A commenter stated that the use of US population when assigning government services was too narrow a view.

A commenter stated that the asset management service rule needed clarification.

Comments on Examples

A commenter stated that the fly fishing example could lead to unreasonable outcomes.

A commenter stated that the Audit Corp example should be kept in the language and not removed.

A commenter stated that the Audit Corp example should be redrafted.

A commenter stated that the forward looking aspects of the pharmaceutical industry examples were unreasonable.

Requests for new Examples

A commenter requested an example for certain classes of government contracts.

A commenter requested an example for financial services.