

Summary of Fourth Interested Parties Meeting

Regulation Section 25137, Alternative Apportionment Method Petition Procedures

I. Administration

On August 11, 2020, at 10:00 a.m., through the Franchise Tax Board (FTB) conference phone line, interested members of the public (participants) attended the fourth Interested Parties Meeting (IPM) on the potential adoption of amendments to California Code of Regulations, Title 18, section 25137 (Regulation).

Melissa Williams, Tax Counsel IV, Hanna Cho, Tax Counsel III, and Red Gobuty, Tax Counsel IV, served as the IPM facilitators (hereinafter Facilitator, either collectively or individually). Mr. Gobuty explained the purpose of the IPM was to provide the public with an opportunity to discuss and provide comments on the potential amendments to the Regulation. Mr. Gobuty listed the documents made available as handouts: the Draft Language; the Explanation of Draft Language; and the Notice. Participants were advised they had until September 8, 2020 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 ordering of the subsections of the proposed draft Regulation text identified in the Explanation of Draft Language handout. The Facilitator made opening remarks for each discussion topic and invited comment.

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., September 8, 2020.

Subsection 25137(d)

Facilitator's Remarks

The Facilitator proposed modifying subsection (d) using the newly defined word "petition," with the intent to clarify when the procedures under subsection (d) would apply.

The Facilitator noted that the statute does not require the FTB, itself, to hear and decide matters and therefore the Regulation does not require it. The Facilitator also noted that there is nothing in the language of Revenue and Taxation Code section 25137 that grants taxpayers the right to argue their petition before the FTB, itself, or require the FTB, itself, to grant taxpayers a hearing. The Facilitator clarified that FTB Resolutions

2000-10 and 2017-01 (Resolutions) remain in force, and that FTB staff will continue to follow the Resolutions. Finally, the Facilitator explained that the language in the proposed Regulation is intended to be in line with the Resolutions.

Comments

A commentator wondered how the "may" language in this subsection interacts with the "shall" language in the Resolutions. The commentator asked whether this new draft language invalidates those Resolutions.

A commentator suggested incorporating the "shall" language from the Resolutions into the draft language. The commentator stated that the "may" language in the Regulation contradicts and potentially invalidates the Resolutions that previously state that the FTB, itself, "shall" hear petitions. The commentator also stated that the statute itself does not include any direct references to the FTB's obligations in response to a taxpayer's petition. The commentator suggested that "may" as referenced in the statute refers to the authority of the FTB, itself, to require, on its own volition, an alternative methodology and for the taxpayer to petition for alternative treatment. The commentator further indicated that nothing in the language of the statute itself would prevent the FTB from implementing regulations that require the FTB, itself, to hear petitions brought forward by a taxpayer requesting an alternative apportionment method.

Subsection 25137(d)(1)

Facilitator's Remarks

The Facilitator proposed amending three (3) definitions and adding one (1) defined term.

Comments

No comments were received.

Subsection 25137(d)(2)(A)

Facilitator's Remarks

The Facilitator explained that the Bagley-Keene Act, which can be found in Government Code sections 11120-11132, requires among other provisions, that state boards and commissions, including the FTB, itself, conduct all meetings in public.

The Facilitator noted that any records submitted to the FTB for consideration during an open meeting, itself, as well as any decision of the FTB, itself, are subject to the California Public Records Act and Bagley-Keene Act, unless otherwise provided.

The Facilitator noted that no provisions under the Bagley-Keene Act expressly authorize section 25137 petition hearings to be heard in closed session and any express authorization would need to be added legislatively.

Comments

A commentator requested legal authority for the position that there are no exceptions to the requirement for public disclosure of all records for any entity subject to Bagley-Keene; that there are no exceptions possible even for sensitive or proprietary information, such as taxpayer information.

Another commentator stated that based on Government Code section 11126(c)(10), it would be helpful to have provisions to allow closed sessions to prevent the disclosure of confidential tax information.

Another commentator stated that existing law allows for closed sessions for confidential information, so a legislative solution is not needed.

A commentator stated that the confidentiality of taxpayer information is a critical tenet of our country's tax system, encourages taxpayers to be honest, and promotes voluntary compliance with the tax laws. The commentator suggests draft language be amended to add that the petition filed by the taxpayer should be confidential and remain so if the FTB, itself, decides not to take up the petition. This commentator expressed concern that the language as it reads now would allow the disclosure of information where a taxpayer did not file a petition, because FTB staff could decide to submit the alternative apportionment method variance action and taxpayer information to the FTB, itself. The commentator felt that this would discourage taxpayer participation in these petitions and could lead to competitive advantages or other risks. The commentator felt that if public disclosure was limited to situations in which the taxpayer filed a petition before the FTB, itself, the taxpayer could weigh the risks and benefits of potential public disclosure and decide whether to file a petition.

Subsection 25137(d)(2)(B)

Facilitator's Remarks

The Facilitator proposed deleting this subparagraph and explained that a waiver of confidentiality is no longer necessary as there should be no expectation of confidentiality with documents filed with the FTB, itself.

The Facilitator noted that three (3) additional deadlines for filing a petition were added, and specified that the petition should be relevant to the taxable years of the underlying deadline event. The Facilitator stated that the deadlines apply only to petitions brought before the FTB, itself, and do not apply to variance action requests brought before the FTB staff. The Facilitator also explained that the word "warranted" was replaced with "appropriate."

The Facilitator noted that an additional deadline for filing a petition sixty (60) days after a taxpayer has received a final audit report is unnecessary as there are other opportunities available for taxpayers to file a petition after an audit is complete. The Facilitator explained that, for instance, a taxpayer could file a variance action request with the FTB staff which would trigger the deadline of sixty (60) days following a FTB staff determination. However, the Facilitator stated that the FTB would further consider adding an additional deadline after a taxpayer has received a final audit report.

Comments

A commentator mentioned that he appreciated that additional dates and deadlines were added because it is very helpful for taxpayers. The commentator suggested an additional deadline to file a petition of sixty (60) days after a taxpayer has received a final audit report. In a case where there is no assessment and therefore no protest filed, the commentator felt that the deadline to file after one hundred and twenty (120) days after a claim for refund would not be sufficient if that deadline is passed due to the length of the audit. The commentator stated that a taxpayer might not know what methodology the FTB is applying until it receives a final audit report and therefore might be helpful to have this additional deadline.

A commentator stated that for refund claims, a claim is deemed denied if a taxpayer has not received a letter in six (6) months. The commentator stated that a similar deemed denial situation would be helpful so that the taxpayer could be deemed to have exhausted its remedies and take its case to the courts or the Office of Tax Appeals.

A commentator suggested that the FTB should add a one-year deadline by which a taxpayer may bring an action against the FTB. This would provide a remedy for taxpayers who might have lengthy and prolonged petitions before the FTB, itself, without resolution and may lessen the administrative burden on the agency.

Subsection 25137(d)(2)(C)

Facilitator's Remarks

The Facilitator proposed providing a 60 day timeframe for when the Executive Officer of the FTB will notify the FTB, itself, of the receipt of the petition.

Comments

No comments were received.

Subsection 25137(d)(2)(D)

Facilitator's Remarks

The Facilitator explained that the Chief Counsel of the FTB will notify the taxpayer of the receipt of the petition in writing and provide a briefing schedule.

Comments

No comments were received.

Subsection 25137(d)(2)(E)

Facilitator's Remarks

The Facilitator proposed modifying this subsection in light of the newly proposed definition of the word "petition." The Facilitator also explained that the word "warranted"

was replaced with "appropriate" as a more accurate measurement of the proposed alternative apportionment methodology.

The Facilitator noted that the FTB has the authority to oppose petitions to the FTB, itself. The Facilitator mentioned that the Chief Counsel believes in fairness of law and does not ensure any outcome; FTB staff is not told what the outcome should be.

Comments

A commentator wondered whether FTB staff already has authority under the law or procedures to oppose a taxpayer petition to the FTB, itself. The commentator questioned whether this provision was necessary at all and asked whether the Chief Counsel could ensure FTB staff determines whether the alternative apportionment methodology is appropriate. The commentator wondered if the reason for this provision was a timing issue since prior versions of the Regulation required staff determinations to be done on the front end and whether this provision is really necessary now that the prior version is removed.

Subsection 25137(d)(2)(F)

Facilitator's Remarks

The Facilitator explained that in instances where a taxpayer files an appeal with the Office of Tax Appeals for the same taxable years in which the alternative apportionment methodology is relevant, the taxpayer and FTB staff will be required to file a joint request to defer proceedings with the Office of Tax Appeals pending a decision by the FTB, itself.

Comments

No comments were received.

Subsection 25137(d)(2)(G)

Facilitator's Remarks

The Facilitator proposed replacing the word "determination," which refers to staff determinations, with the word "decision," which refers to the FTB, itself, decisions.

Comments

No comments were received.

Subsection 25137(d)(2)(H)

Facilitator's Remarks

The Facilitator noted that the word "calendar" would replace "working" and explained that the sixty (60) calendar day deadline to file the opening brief begins from the date of the document notifying the taxpayer of the receipt of the taxpayer's petition.

Comments

No comments were received.

Subsection 25137(d)(2)(I)

Facilitator's Remarks

The Facilitator mentioned that the Chief Counsel of the FTB, rather than FTB staff, will notify the taxpayer in writing of the hearing date.

The Facilitator noted that the FTB will consider adding a provision providing advance notice to the taxpayer of the hearing date.

Comments

A commentator stated that there is no advance notice requirement and suggested a thirty (30) day notice provided to taxpayers before a hearing is scheduled.

Subsection 25137(d)(3)

Facilitator's Remarks

The Facilitator proposed adding a separate heading and subsection for procedures applicable to hearings on petitions filed pursuant to subsection (d).

Comments

No comments were received.

Subsection 25137(d)(3)(A)

Facilitator's Remarks

The Facilitator noted that the word "each" was added to clarify that the time limit applies to each party rather than to both parties combined.

Comments

No comments were received.

Subsection 25137(d)(3)(B)

Facilitator's Remarks

The Facilitator explained that the Executive Officer of the FTB, or the Executive Officer's designee, will notify the FTB, itself, of any witness and the general nature and expected duration of the testimony.

Comments

No comments were received.

Subsection 25137(d)(4)(A)

Facilitator's Remarks

The Facilitator explained that the ex-parte communication rule begins from the date of notification to the taxpayer and the FTB, itself, of the taxpayer's petition.

Comments

No comments were received.

Subsection 25137(d)(4)(C)

Facilitator's Remarks

The Facilitator proposed creating separate subparagraphs to make clear the instances when the ex-parte communication rule does not apply. The Facilitator mentioned the replacement of the word "working" with "calendar." The Facilitator also explained that the deadline to provide the documentation of the telephonic or in-person meeting to all parties is ten (10) calendar days and the deadline to respond is twenty (20) calendar days.

Comments

No comments were received.

Subsection 25137(d)(4)(D)

Facilitator's Remarks

The Facilitator noted that the phrase "open session of a regularly-scheduled meeting" was changed to "open session at a regularly-scheduled meeting" to accurately state a defined term.

Comments

No comments were received.

References

Facilitator's Remarks

The Facilitator noted that all referenced statutes were included.

Comments

No comments were received.

Miscellaneous

Facilitator's Remarks

The Facilitator noted that the FTB will consider whether a taxpayer needs to go to the FTB, itself, before filing an appeal with the Office of Tax Appeals.

Comments

A commentator wondered whether there is anything in the Regulation that states whether a taxpayer needs to go to the FTB, itself, before filing an appeal with the Office of Tax Appeals. The commentator stated that currently the FTB, itself, has discretion as to whether it will hear a petition and this might be relevant to whether there is an exhaustion requirement.

IV. Next Steps

The Facilitator indicated FTB staff would review comments received from the participants during the comment period and release a summary of those comments on the FTB website. The Facilitator noted that if the draft Regulation language addresses all issues sufficiently, then FTB staff will next seek permission from the FTB, itself, to move forward with the formal regulatory process.