

NOTE: This handout is intended only for purposes of facilitating discussion at the Interested Parties Meeting scheduled for November 26, 2018.

FRANCHISE TAX BOARD

CALIFORNIA CODE OF REGULATIONS TITLE 18, DIVISION 3, CHAPTER 3.5, SUBCHAPTER 17, Article 2.5, Section 25137 REGARDING OTHER APPORTIONMENT METHODS

§ 25137. Other Apportionment Methods.

(a) Special Rules. In General. Section 25137 provides that if the allocation and apportionment provisions of the Uniform Division of Income for Tax Purposes Act do not fairly represent the extent of the taxpayer's business activity in this state, the taxpayer may petition for or the Franchise Tax Board may require, in respect to all or any part of the taxpayer's business activity, if reasonable:

- (1) Separate accounting;
- (2) The exclusion of any one or more of the factors;
- (3) The inclusion of one or more additional factors which will fairly represent the taxpayer's business activity in this state; or
- (4) The employment of any other method to effectuate an equitable allocation and apportionment of the taxpayer's income.

Section 25137 permits a departure from the allocation and apportionment provisions of the Uniform Division of Income for Tax Purposes Act only in limited and specific cases.

Section 25137 may be invoked only in specific cases where unusual fact situations (which ordinarily will be unique and nonrecurring) produce incongruous results under the apportionment and allocation provisions contained in these regulations.

In the case of certain industries such as air transportation, rail transportation, ship transportation, trucking, television, radio, motion pictures, various types of professional athletics, and so forth, the foregoing regulations in respect to the apportionment formula do not set forth appropriate procedures for determining the apportionment factors. Nothing in Section 25137 or in this Regulation shall preclude the Franchise Tax Board from establishing appropriate procedures under Sections 25129 to 25136 inclusive, for determining the apportionment factors for each such industry, but such procedures shall be applied uniformly.

(b) Special Rules. Property Factor.

(1) The following special rules for determining the net annual rental rate as provided by California Code of Regulations, title 18, section 25130, subsection (b), are established in respect to the property factor of the apportionment formula:

- (A) Subrents. If the subrents taken into account in determining the net annual rental rate under Regulation 25130, subsection (b), produce a negative or

clearly inaccurate value for any item of property, another method which will properly reflect the value of rented property may be required by the Franchise Tax Board or requested by the taxpayer.

In no case however shall such value be less than an amount which bears the same ratio to the annual rental rate paid by the taxpayer for such property as the fair market value of that portion of the property used by the taxpayer bears to the total fair market value of the rented property.

EXAMPLE:

The taxpayer rents a 10-story building at an annual rental rate of \$1,000,000. Taxpayer occupies two stories and sublets eight stories for \$1,000,000 a year. The net annual rental rate of the taxpayer must not be less than two-tenths of the taxpayer's annual rental rate for the entire year, or \$200,000.

(B) Property of others in general. If property owned by others is used by the taxpayer at no charge or rented by the taxpayer for a nominal rate, the net annual rental rate for such property shall be determined on the basis of a reasonable market rental rate for such property.

(C) Natural resources. Without regard to whether the following property is also described in subsection (b)(1)(B), if a taxpayer enters upon property owned by others for the purpose of extracting natural resources such as timber, oil, gas or hard minerals, and irrespective of whether such entry or extraction is pursuant to an agreement between the holder of the interest in the property and the taxpayer (and also irrespective of whether such relationship is characterized as a profit à prendre or some other relationship), consideration actually paid by the taxpayer to the holder of the interest in the property that constitutes a sharing of current or future production or extraction of the timber, oil, gas or hard minerals from such property (irrespective of the method of payment or how such consideration is characterized, whether as a royalty, advance royalty, rental or otherwise) and consideration actually paid by the taxpayer for the right to enter the property and extract the timber, oil, gas or hard minerals (such as forest management fees, fire protection fees, reforestation or reclamation fees, road maintenance fees, etc.) for the taxable year at issue shall constitute the net annual rental rate. The net annual rental rate shall then be multiplied by eight (8) in accordance with Revenue and Taxation Code section 25130. Improvements shall not be included in the calculation of a net annual rental rate, but are separately accounted for. (See California Code of Regulations, title 18, section 25130, subsection (b)(5).)

EXAMPLE: On December 31, 2000, a taxpayer engaged in the paper products business enters into a 50-year forest management agreement with a government entity to commence January 1, 2001, that allows it to extract 100,000 cords of timber per year from forests owned by that government entity. In exchange for the right to enter the government's land

and extract timber, the taxpayer agrees to pay a royalty fee of \$10.00 per cord extracted, plus a \$10,000 per year access fee, \$10,000 fire protection fee for any fires caused by the taxpayer, and an additional reforestation fee of 10 percent of the royalty fee paid. The forest management agreement also requires the taxpayer to make \$1 million worth of improvements to an existing mill facility owned by the government entity. In taxable year 2001, the taxpayer extracts 50,000 cords and does not cause any fires to occur. It also makes the \$1 million in improvements to the existing mill facility. The taxpayer therefore pays the government entity the \$10,000 access fee, \$500,000 in royalty fees (\$10.00 per cord times 50,000 cords), and an additional \$50,000 for the reforestation fee (10 percent of the \$500,000 royalty fee). Under these facts, the taxpayer is entitled to claim \$560,000 as the net annual rental rate. The taxpayer reports \$4,480,000 (\$560,000 multiplied by 8) for property factor purposes for this property for taxable year 2001. In addition, the taxpayer reports the \$1 million in improvements in the property factor as property owned by the taxpayer in accordance with California Code of Regulations, title 18, section 25130, subsection (b)(5), for taxable year 2001.

(D) Definitions. For purposes of subsection (b) the following definitions apply.

1. A "reasonable market rental rate" shall mean the rate at which a lessor is willing to lease and a lessee is willing to pay in an open and competitive marketplace for the property.
2. A "nominal rate" shall mean a token payment compared to a rental rate at which a lessor is willing to lease and a lessee is willing to pay in an open and competitive marketplace for the property.
3. "Agreement" shall mean contract, lease or similar arrangement for the use of property.

(c) Special Rules -Sales Factor.

(1) The following special rules are established in respect to the sales factor of the apportionment formula:

(A) Where substantial amounts of gross receipts arise from an occasional sale of a fixed asset or other property held or used in the regular course of the taxpayer's trade or business, such gross receipts shall be excluded from the sales factor. For example, gross receipts from the sale of a factory, patent, or affiliate's stock will be excluded if substantial. For purposes of this subsection, sales of assets to the same purchaser in a single year will be aggregated to determine if the combined gross receipts are substantial.

1. For purposes of this subsection, a sale is substantial if its exclusion results in a five percent or greater decrease in the sales factor denominator of the taxpayer or, if the taxpayer is part of a combined reporting group, a five percent or greater decrease in the sales factor denominator of the group as a whole.

2. For purposes of this subsection, a sale is occasional if the transaction is outside of the taxpayer's normal course of business and occurs infrequently.

(B) Insubstantial amounts of gross receipts arising from incidental or occasional transactions or activities may be excluded from the sales factor unless such exclusion would materially affect the amount of income apportioned to this state. For example, the taxpayer ordinarily may include or exclude from the sales factor gross receipts from such transactions as the sale of office furniture, business automobiles, etc.

(C) Where the income producing activity in respect to business income from intangible personal property can be readily identified, such income is included in the denominator of the sales factor and, if the income producing activity occurs in this state, in the numerator of the sales factor as well. For example, usually the income producing activity can be readily identified in respect to interest income received on deferred payments on sales of tangible property (Regulation 25134, sub. (a)(1)(A)) and income from the sale, licensing or other use of intangible personal property (Regulation 25136, sub. (b)(4)).

Where business income from intangible property cannot readily be attributed to any particular income producing activity of the taxpayer, such income cannot be assigned to the numerator of the sales factor for any state and shall be excluded from the denominator of the sales factor. For example, where business income in the form of dividends received on stock, royalties received on patents or copyrights, or interest received on bonds, debentures or government securities results from the mere holding of the intangible personal property by the taxpayer, such dividends and interest shall be excluded from the denominator of the sales factor.

(D) The numerator and denominator of the sales factor shall exclude interest and dividends from intangible assets held in connection with a treasury function of the taxpayer's unitary business as well as the gross receipts and overall net gains from the maturity, redemption, sale, exchange or other disposition of such intangible assets.

1. "Treasury function" is the pooling, management, and investment of intangible assets for the purpose of satisfying the cash flow needs of the trade or business, such as providing liquidity for a taxpayer's business cycle, providing a reserve for business contingencies, business acquisitions, etc. A treasury function includes the use of futures contracts and options contracts to hedge foreign currency fluctuations. A treasury function does not include a taxpayer's trading function that engages in futures and option transactions for the purpose of hedging price risk of the products or commodities consumed, produced, or sold by the taxpayer. A taxpayer principally

engaged in the trade or business of purchasing and selling intangible assets of the type typically held in a taxpayer's treasury function, such as a registered broker-dealer, is not performing a treasury function with respect to income so produced.

2. This subsection shall not apply to entities that apportion their income under the rules of regulation 25137-4.2.

3. This subsection is applicable to taxable years beginning on or after January 1, 2007.

(d) In cases deemed appropriate by the Franchise Tax Board it may elect to hear and decide petitions filed pursuant to Section 25137 instead of having this function performed by the FTB staff, as well as hear and decide taxpayer appeals of denied petitions for a variance action or FTB staff impositions of alternative apportionment methodologies pursuant to regulation section 25137. ~~As a condition to having such petition considered by the Board, the petitioning taxpayer shall waive in writing the confidentiality provisions of Section 19542 with respect to such petition and to any other facts which may be deemed relevant in making a determination. Consideration of said petitions by the Board shall be open session at a regularly scheduled meeting.~~

(1) Definitions

(A) "Board member staff" means staff employed by any of the three members of the Franchise Tax Board.

(B) "Brief" means a written document containing an argument or arguments supporting a party's position. A brief may, but is not required to, include citations to specific laws, regulations, or other authorities. A brief may be in the form of a letter, other informal writing, or formal legal writing. Briefs are subject to the requirements identified in these regulations.

(C) "Ex-parte communication" means communication between one of the three members of the Franchise Tax Board and/or Board member staff, and the petitioner and/or his or her representative, or FTB staff.

(D) "FTB staff" means staff employed by the Franchise Tax Board.

(E) "Open session at a regularly-scheduled meeting" means the open session of a Franchise Tax Board regularly scheduled meeting

(F) "Three-member board" means California Franchise Tax Board as defined by California Government Code section 15700.

(G) To "make a record" means to memorialize in writing the identity of who initiated the inadvertent ex-parte communication, and all parties to the

appeal who were entitled to participate. The record made must reflect the general substance of what was discussed and the response of any Franchise Tax Board member and/or the Board member's staff. If any documents are provided or exchanged, they must be identified, copied and made part of the record.

(H) "Variance action" means a taxpayer filed petition for an alternative apportionment methodology pursuant to Section 25137, or FTB staff imposition of an alternative apportionment methodology pursuant to Section 25137, to which the taxpayer objects.

(2) In the event a variance action has been filed with FTB staff by a taxpayer, the following procedures shall apply:

(A) The taxpayer, and/or its representative, may present facts and assertions pertaining to the variance action in person to FTB staff who will hear and decide the variance action.

(B) If a variance action initiated by the taxpayer pursuant to Section 25137 is not granted by FTB staff, either in whole or in part, or if the variance action was imposed by staff requiring employment of an alternative apportionment methodology in a manner to which the taxpayer objects, the taxpayer may appeal the variance action to the Board, itself.

(3) In the event the taxpayer desires to appeal a variance action to the Three-member board, the following procedures shall apply:

(A) The taxpayer must waive, in writing, the confidentiality provisions of Section 19542 with respect to such variance action, which waiver must be sent to the Franchise Tax Board Chief Counsel.

(B) To file an appeal under this regulation, the taxpayer must submit a brief, as provided for within this section, within sixty (60) calendar days of being notified in writing by FTB staff that a variance action initiated by the taxpayer filing a petition pursuant to Section 25137 was denied, in whole or in part, by FTB staff, or a variance action was imposed by FTB staff requiring employment of an alternative apportionment methodology. After the taxpayer has submitted its opening brief, FTB staff has thirty (30) days to submit its opening brief. Thereafter, the taxpayer has thirty (30) days to submit a reply brief. Further briefing may be required by the Franchise Tax Board. All briefs are subject to the following rules:

1. Briefs are limited to double-spaced thirty (30) pages and 12 point font per inch of paper.

2. Reply briefs are limited to double-spaced fifteen (15) pages and 12 font per inch of paper.
3. All briefing must be filed by the parties with the Franchise Tax Board Chief Counsel.

(C) Upon submittal of the taxpayer's opening appeal brief and the written waiver of the confidentiality provisions of Section 19542 with respect to such variance action and to any other facts that may be deemed relevant by the three-member board in making a decision on the variance action, the Franchise Tax Board's Executive Officer, or the Executive Officer's designee, shall notify the Three-member board of the taxpayer's request to have the Three-member board hear and decide the appeal of the variance action.

(D) If a notice of proposed deficiency assessment, within the meaning of Section 19057(a), has not been mailed to the taxpayer with respect to the tax year pertaining to the variance action, the taxpayer must agree in writing if requested by the Franchise Tax Board to an extension of the statute of limitations for the mailing of the notice of proposed deficiency assessment, until 180 days after the appeal of the variance action has been heard and decided by the Franchise Tax Board.

(E) Upon notification by the Executive Officer or the Executive Officer's designee, as provided above in subsection (3)(C), the Franchise Tax Board shall set a hearing in an open session at a Three-member board meeting to hear and decide the taxpayer's appeal of the variance action. The taxpayer will be notified in writing by the Franchise Tax Board of the hearing date.

(F) The Franchise Tax Board, shall give the parties to the appeal thirty (30) minutes to present their respective positions and an additional fifteen (15) minutes for the taxpayer's reply. The Three-member board has the discretion to allow additional time as warranted. Presentations of the parties at the hearing shall occur as follows:

1. The taxpayer shall first make its opening presentation.
2. FTB staff shall make its opening presentation immediately following the taxpayer's opening presentation.
3. The taxpayer shall make its reply presentation immediately following FTB staff's presentation.

(G) Witnesses. A party wishing to have an expert or percipient witness or witnesses testify, must notify the Franchise Tax Board and the other party to the proceeding no later than fifteen (15) days prior to the hearing date, of the identity of the witness or witnesses, the general nature of the expected testimony, and the expected duration of the testimony at the hearing.

(H) The Three-member board shall render its decision on the variance action during an open session, when the Three-member board has reached its decision.

(4) Applicability of Ex-parte Communication Rules

(A) Ex-parte communication rules do not apply during the pendency of a variance action that is before FTB staff or the Three-member board.

(B) Ex-parte communication rules apply during the pendency of any appeal to the Franchise Tax Board of a variance action as follows: There shall be no communication, direct or indirect, regarding any substantive issue relating to the appeal between any Franchise Tax Board member or Board member staff, appellant or appellant's employee or representative, and/or FTB staff, without notice and opportunity for all parties to participate in the communication.

(C) Applicability of the ex-parte communication rules ends when the Franchise Tax Board renders its decision on the appeal of a variance action.

(D) Permitted communications between the Franchise Tax Board, FTB staff, and the taxpayer and/or its employees and/or representatives during the pendency of an appeal of a variance action include:

1. Briefs and oral presentations at open session are not ex-parte communications, and are permitted communications.

2. Ex-parte communications are permitted provided that the communication does not pertain to any matters within the variance action, but instead involves communication between the taxpayer, the representative, the board member or Board member staff, and FTB staff that only relates to the scheduling of a future discussion about the substantive matters of the variance action. If this is the goal of such an ex-parte communication, then:

a. The Franchise Tax Board member and/or Board member staff shall invite all parties and/or their representatives to participate in a scheduled telephonic discussion or in person meeting as soon as

practicable. Any communication for purposes of setting up this scheduled future discussion or in person meeting shall only concern the scheduling and not the substance of the subject variance request. All parties and/or their representatives and the Franchise Tax Board member and/or Board member staff shall work together and make a reasonable effort to find a mutually agreeable date, time, and place to hold the telephonic discussion or in person meeting. If the parties cannot agree on a date, time, and place to hold the telephonic discussion or in person meeting, then the meeting it shall not be held.

b. All parties must be given the opportunity to participate in a telephonic discussion or attend an in person meeting scheduled at a mutually agreeable place, date, and time. Regardless of whether all parties actually participate in the telephonic discussion or attend the in person meeting, the Franchise Tax Board member and/or Board member's staff participating in the telephonic discussion or attending the in person meeting must:

i. Document in writing substantive matters discussed at the telephonic discussion or in person meeting.

ii. Provide the documentation and copies of any materials shared by the parties, the Franchise Tax Board member, and/or Board member staff participating in the telephonic discussion or attending the in person meeting to all parties to the appeal and their representatives within fifteen (15) days of the telephonic discussion or in person meeting. If any party is absent from the telephonic discussion or in person meeting, the Franchise Tax Board member and/or the Board member staff must provide an opportunity for the absent party or parties to respond to the documentation and any materials supplied for the telephonic discussion or in person meeting within fifteen (15) days of the telephonic discussion or in person meeting. The documentation of specific matters discussed must be in sufficient context and detail to allow the absent party or parties the opportunity to respond to any matters discussed at the telephonic discussion or in person meeting in writing and/or submit any other materials for consideration he or she may wish to provide to the Board member and/or Board member staff. Any such writing or material must also be supplied at the same time to the opposing party or its representatives within ten (10) days before the hearing.

- (E) When there has been an ex-parte communication, the Franchise Tax Board member and/or Board member staff must make a record of the ex-parte communication and provide it to the Franchise Tax Board members present at the Franchise Tax Board's open meeting where the Franchise Tax Board will consider the appeal of the variance action. If any documents are provided or exchanged, copies must be provided to all parties and/or their representatives within fifteen (15) days of the telephonic discussion or in person meeting.
- (F) In the event a Franchise Tax Board member and/or or the Board member staff have an inadvertent ex-parte communication with any party to the appeal of a variance action, then the Franchise Tax Board member and/or or the Board member staff must make a record of that ex-parte communication. If any documents are provided or exchanged, they must be identified, made part of the written record, and copies provided to all parties and/or their representatives at the Franchise Tax Board's open meeting where the Franchise Tax Board will hear and decide the appeal of the variance action. The preparation and distribution of such documents are subject to the requirements of Government Code section 11125.2(c).
- (G) Because the Bagley-Keene Act, set forth at California Government Code sections 11120 through 11132, prohibits a Franchise Tax Board member from sharing any written or oral information received during an ex-parte communication, even if the communication is inadvertent, with any other Franchise Tax Board member except at a duly noticed open meeting of the Franchise Tax Board, the Franchise Tax Board member involved in an ex-parte communication must report that communication at the formal hearing, where the Franchise Tax Board will hear and decide the appeal of a variance action. The Franchise Tax Board member must disclose the ex-parte communication on the record to the public, and other Franchise Tax Board members, and distribute the writing memorializing the communication as summarized above to the other Franchise Tax Board members, as well as make available all documents exchanged or provided during the ex-parte communication. The preparation and distribution of the documents between the Franchise Tax Board members are subject to the provisions of Government Code section 11125.1(c).
- (H) The Franchise Tax Board staff must include a short summary of the ex-parte communication in the minutes of the Franchise Tax Board open meeting at which the ex-parte communication is disclosed.

(5) Applicability date. The revisions to this subsection prospectively apply to variance actions and appeals of variance actions filed on or after the effective date of these changes.

Note: Authority cited: Section 19503, Revenue and Taxation Code.

Reference: Section 25137, Revenue and Taxation Code.