

SUMMARY OF SECOND INTERESTED PARTIES MEETING

Regulation Section 25137, Alternative Apportionment Method Petition Procedures

Administration:

On November 26, 2018 at 10:00 a.m., at the Franchise Tax Board (FTB) central office in Sacramento, interested members of the public (participants) attended the second 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.

Melissa Williams, Tax Counsel IV, Multistate Tax Bureau, and Craig Swieso, FTB Assistant Chief Counsel, Multistate Tax Bureau, served as the IPM Facilitators (hereinafter Facilitator, either collectively or individually). Ms. Williams listed the documents made available as handouts: the Draft Language; the Explanation of Draft Language; and the Notice. Ms. Williams then explained that the purpose of the meeting was to provide the public with an opportunity to discuss and provide comments on potential amendments to the Regulation. 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.

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. Members of the public also presented topics for discussion.

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., December 26, 2018.

Subsection 25137(d)

Facilitator's Remarks

The Facilitator mentioned that a taxpayer initiated California Revenue and Taxation Code (RTC) section 25137 petition for an alternative apportionment methodology (variance action) may be made to Franchise Tax Board staff (Staff) during audit, protest, claim for refund, or with the original return as long as the variance action is approved by the FTB's section 25137 committee responsible for deciding how to handle the petition (Committee) before the return is filed.

The Facilitator noted that Regulation section 25137(d) was amended to become the introductory paragraph for the procedural aspects of hearing and deciding variance actions and appealing an adverse variance action decision (hereinafter "appeal") to the FTB's Three-member board (Board, itself).

The Facilitator noted that Staff does not have the right to appeal either a Committee imposition of a variance action, variance action decision or appeal decision of the Board, itself.

Comments

Several commentators asked the Facilitator if the word "may" in Regulation section 25137(d) could be replaced with the word "shall." In response, the Facilitator indicated that the word "may" addresses the fact that taxpayers have several paths for adjudication of their variance action, and any appeal of an adverse variance action decision, to the Board, itself. The Board, itself, "may" hear the initial petition instead of Staff. The Board, itself "may" also hear taxpayer's appeal from Staff's adverse variance action decision to which the taxpayer objects. The Facilitator stated that FTB would consider revising the term "may" in Regulation Section 25137(d) to "shall."

A commentator noted confusion whether a taxpayer could bypass the Board, itself, and challenge a Committee variance action decision directly with the Office of Tax Appeals (OTA), or proceed to Superior Court to litigate the matter.

A commentator noted that conditions imposed on taxpayers who are looking to appeal to the Board, itself are "overly restrictive" and deny taxpayers the administrative rights currently available to them. The commentator felt that requiring taxpayers to appear before the Board, itself, before they proceed to the OTA or courts is not supported by any authority.

A commentator suggested that failure to appeal to the Board, itself should not prevent taxpayers from filing an appeal with OTA or bringing an action in court. This commentator suggested that "forcing" the Board, itself to hear taxpayer's appeals would increase workload "in a dramatic fashion," and the Board, itself "would not be able to conduct all those hearings."

Another commentator suggested that the proposed Regulation language should clarify taxpayers must appeal the Board, itself, before they have exhausted all administrative remedies. The Facilitator agreed that the proposed Regulation language should clarify that taxpayers must appeal to the Board, itself, before they have exhausted all administrative remedies.

A commentator also stated that procedures need to be written for when taxpayers want to file a variance action along with their tax return, noting that currently there are no such rules.

Regulation Subsection 25137(d)(1)

Facilitator's Remarks

The Facilitator explained that proposed Regulation subsection 25137(d)(1) contains the definitions of words and phrases used throughout the regulation.

Comments

A commentator wanted the addition of a definition to differentiate between a temporary Staff decision and a final decision of the Board, itself.

Subsection 25137(d)(3)

Facilitator's Remarks

The Facilitator noted that proposed Regulation subsection 25137(d)(3) provides procedures that apply when taxpayers wish to appeal to the Board, itself.

The Facilitator mentioned that at Audit, a variance action can be raised. However, where a taxpayer wants to request settlement, (which would include consideration of any adverse variance action decision that was brought up during the audit), because the proposed procedures require that an adverse variance action decision must be appealed to the Board, itself within sixty days, then it seems there may be a problem with the taxpayer being able to participate in settlement (if accepted) without violating the sixty day deadline to file an appeal of the adverse variance action decision with the Board, itself. The Facilitator posed that a solution might be to toll the sixty day deadline for an appeal of any adverse variance action decision, while the matter is pending before FTB legal division's Settlement Bureau consideration.

Comments

One commentator wondered what would be the outcome if the taxpayer did not file a brief within the sixty day timeframe required by the proposed Regulation procedures.

Another commentator stated that sixty days is not a meaningful enough amount of time for a taxpayer to consider whether the taxpayer should appeal to the Board, itself. A commentator articulated an opinion that the sixty day rule for appealing to the Board, itself is arbitrary and will impact the ability of the taxpayer to fully develop the distortion matter. The commentator suggested that taxpayers can't make a decision before the audit or protest is completed, and the impact of FTB's determination understood. Moreover, the commentator suggested any legal or factual errors in FTB's determination letter at the conclusion of a protest could not be addressed within sixty days, and therefore suggested a 180 day timeframe for filing any appeal with the Board, itself.

Another commentator stated a taxpayer ought to be able to file its appeal to the Board, itself anytime it wants during the entire process of any audit and/or protest.

A commentator suggested that the proposed Regulation could be modified to require the taxpayer to notify the FTB of its intention to pursue settlement within sixty days of the taxpayer being notified of an adverse variance action decision by Staff. The commentator suggested that this notification requirement, if satisfied, would put the Taxpayer's appeal rights on hold until sixty days after the FTB legal division's Settlement Bureau consideration.

A commentator expressed concern that taxpayers want to be certain that their confidential briefs and exhibits are withheld from the public prior to any hearing before the Board, itself. Another commentator inquired about having the waiver of confidentiality attach only to the board that actually hears the case as opposed to the board that is constituted at the time the appeal is filed.

Several commentators inquired whether a waiver of confidentiality could be rescinded before a hearing on an appeal is noticed or held.

A commentator suggested that a broad waiver of confidentiality will have a chilling effect on taxpayer's seeking an appeal before the Board, itself, noting that confidentiality is already a serious problem for taxpayers because there are no reasonable limits on the state disclosing taxpayer information. This commentator also suggested a closed appeal hearing possibility, if the potential harm to a taxpayer from a public hearing outweighs the benefits of a public hearing. The commentator further noted that if a waiver of confidentiality is required it should be limited to only relevant information to the matter, and that if a taxpayer withdraws a matter from consideration by the Board, itself, the taxpayer should be able to withdraw the waiver of confidentiality in connection to supporting documents from that matter. Finally, the commentator suggested that parties should stipulate to the relevant matters in order to limit matters that are submitted to and heard by the Board, itself.

Regulation Section 25137(d)(G)

Facilitator's Remarks

The Facilitator noted that this provision is about witnesses.

Comments

A commentator suggested that the Board, itself, should have the discretion to add time to witnesses' testimony.

Miscellaneous comments made during the IPM, and not designated to a specific Regulation subsection:

A commentator opined that some of the ex-parte communication provisions were contradictory and was concerned that one party could block the other party by failing to agree.

A commentator suggested that the proposed Regulation language does not identify the party that carries the burden of proof as to proving distortion.

A commentator noted the proposed Regulation asks taxpayers to waive the statute of limitations in RTC section 19057 until 180 days after the Board, itself, decides an appeal, but suggested in the alternative that taxpayers should be able request a waiver for thirty days but no more than 180 days after completing briefing the matter. The commentator felt that providing for such a waiver timeframe, in conjunction with providing substantial time for taxpayers to petition the Board, itself, could obviate the need for a waiver during any hearing.

A commentator suggested the proposed Regulatory text requires the FTB's Executive Officer to set an appeal hearing for open session but that the timeframe for any hearing should not be contingent on any action by any FTB Staff.

A commentator indicated they believe the proposed Regulatory rules for ex parte communications are not clear.

Next Steps

The Facilitator indicated that staff would review comments received and schedule a future IPM at which revisions to the draft language would be presented.