

Summary of Third Interested Parties Meeting

Regulation Section 25137, Alternative Apportionment Method Petition Procedures

I. ADMINISTRATION

On December 4, 2019 at 1:30 p.m., at the Franchise Tax Board (FTB) central office in Sacramento, interested members of the public (Participants) attended the third Interested Parties Meeting (IPM) on the potential adoption of amendments to regulation section 25137 under Title 18 of the California Code of Regulations (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, Craig Swieso, Assistant Chief Counsel, 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 December 27, 2019 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. 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., December 27, 2019.

IV. CLOSING

The Facilitator indicated that staff would review comments received from the public during the comment period and would prepare a new set of amendments.

25137(d) PROCEDURAL RULES

Subsection 25137(d)

Facilitator's Remarks:

The Facilitator remarked that this subsection only addresses 2 types of petitions: (1) to petition Franchise Tax Board, itself, to hear a petition for an alternative apportionment methodology; and (2) to petition the Franchise Tax Board, itself, from an adverse variance action determination by Franchise Tax Board staff. The same procedure applies to both. The word "appeals" was replaced with "petition" to be consistent with (d).

Commentators' Comments:

Several commentators suggested that to be consistent with FTB Board Resolutions 2000-10 and 2017-01 the word "may" in the newly proposed regulatory language should be "shall". Commentators suggested that these resolutions were recently signed by board members whereas the original language in (d) was drafted decades ago. One commentator said that to petition the three-member board only to have the board deny to hear and decide the matter, would be unfair to the petitioning taxpayer.

A commentator suggested that there was lots of confusion on when the procedural rules of proposed Regulation subsection (d) apply, and that the subsection should clarify these rules shall apply only to petitions to be heard in front of the three member Franchise Tax Board, itself, and would not apply to petitions before staff.

Subsection 25137(d)(1)(B)

Facilitator's Remarks:

The Facilitator explained that unless someone had a comment about one of the definitions, the Facilitator would skip over "definitions" at proposed Regulation (d)(1), and discuss the next item on the agenda.

Commentators' Comments:

Several commentators inquired about the "ex-parte communication" definition at proposed Regulation (d)(1)(B). Commentators suggested that the word "impending" is confusing and could mean that the rules apply to a petition that is before the Franchise Tax Board staff. Commentators suggested that the word "impending" is inconsistent with Franchise Tax Board Resolution 2017-01. Some commentators suggested that the Franchise Tax Board reference 25137(d)(2) and take out the word "impending" from the definition. The Facilitator acknowledged that the ex-parte communication rules apply only when a petition is before the

Franchise Tax Board, itself and not when a matter is before the Franchise Tax Board staff or when the petitioner is only thinking about filing a petition.

Subsection 25137(d)(2) and 25137(d)(2)(A)

Facilitator's Remarks:

The Facilitator explained that this subsection provides for procedures for the two types of petitions that may be filed with the Franchise Tax Board, itself: (1) the petition to the Franchise Tax Board, itself, for an alternative apportionment methodology or (2) a petition to the Franchise Tax Board, itself, from an adverse variance action determination by Franchise Tax Board staff.

The Facilitator also noted that under proposed Regulation (d)(2)(A), the timelines for filing such a petition are no later than either 60 days after a determination letter is issued, 120 days after a claim for refund is filed, or 60 days before a scheduled protest hearing.

Deputy Chief Counsel Bill Gardner pointed out that each of the three timeframes could come up in various contexts. For instance, where a taxpayer files a claim for refund, and there is no 25137 issue at that point, but while working the claim, a 25137 issue is discovered. The Facilitator reiterated that these timeframes are only for petitions that will be filed with the Franchise Tax Board, itself.

Commentators' Comments:

A commentator felt that the timeframes for filing a petition with the Franchise Tax Board, itself, are hard and fast rules and there should be exceptions to those rules, otherwise, the Franchise Tax Board would not be able to get to the right answer. The commentator stated that facts can change in a protest or a claim for refund process, therefore necessitating exceptions for when the 25137 issue comes up outside these timeframes.

Several commentators stated that the timelines are vague but replacing the last sentence of proposed Regulation (d)(2)(A) with "Such petition shall be filed before the later of:" or simply replacing "no later than either" with "the latter of" within the sentence would help

Another commentator stated that it is unclear whether a failure to meet the deadlines operates as a denial of the petition or a withdrawal of the petition. The commenter noted that if it operates as a withdrawal, then the taxpayer should still be allowed to resubmit the petition so long as that is done within the applicable statute of limitations.

Another commentator stated that the word "should" could replace the word "shall" because a guideline would be more practical than a rule.

Several commentators suggested the addition of a timeframe of 60 days after issuance of the final audit report. They reasoned that it would be a vehicle for a 25137 petition where there was no deficiency and other situations that did not fit into the current proposed timeframes.

Another commentator stated that it makes no sense for a taxpayer to pursue and "appeal" to the Franchise Tax Board, itself, under either proposed Regulation 25137(d)(A)(1) or (3) until the fundamental issue is resolved in Protest. This commentator believed that the subsection should be revised to reflect a deadline triggered by a final finding by a Protest Hearing Officer rather than a scheduled protest hearing.

Another commentator said the proposed amendments do not make it clear whether the timeframes provided are about filing a petition with FTB staff or bringing a petition before the board.

Also, several commentators expressed confusion what starts the clock for the first 60 days rule at proposed Regulation (d)(2)(A)1. The commentators were confused whether the "written advice action determination" meant a letter, a Notice of Proposed Action, a Notice of Action, an Audit Issue Presentation Sheet, or something else.

Several commentators also mentioned that in the event the taxpayer requests settlement, the timeframes in proposed Regulation (d)(2)(A) should be tolled during settlement or until sixty days after settlement attempts have concluded without reaching settlement.

A commentator expressed concern that the 120 day time-limit for filing a variance action before the Franchise Tax Board responds to a claim for refund is unduly restrictive and suggested that the 120 day time-limit be limited to claims for refund based in part by a request for a variance action.

Subsection 25137(d)(2)(B)

Facilitator's Remarks:

The Facilitator noted that this subsection addresses the waiver of confidentiality in connection with the taxpayer's petition to the Franchise Tax Board, itself.

Commentators' Comments:

One commentator stated that the waiver should state the reason, such as "sensitive data." This commentator also suggested that redacting sensitive data could be done and that the Franchise Tax Board should negotiate with the taxpayer for reasonable alternatives to a blanket waiver requirement.

Several commentators suggested that the waiver should be filed at a different timeframe than as detailed in the proposed Regulation because there could be a large gap between the filing of the petition and the hearing date. Commentators suggested a waiver filing requirement right before the hearing and not earlier, and also no earlier than 15 days before the hearing. In response the Facilitator noted that the language could be more specific that the waiver of confidentiality is only applicable when a taxpayer wants to be before the Franchise Tax Board itself.

A commentator suggested that the Franchise Tax Board may want to consider exploring exceptions to the confidential waiver for proprietary information, such as trade secrets.

Subsection (d)(2)(C)

Facilitator's Remarks:

The Facilitator noted that this provision provides that upon the filing of the taxpayer's petition and waiver of confidentiality, the Executive Officer or the Executive Officer's designee shall notify the Franchise Tax Board, itself, of the taxpayer's petition.

Commentators' Comments:

A commentator suggested that the issue of the timing of the waiver of confidentiality be addressed here as well.

A commentator questioned whether taxpayers should also be notified of Franchise Tax Board's receipt of the taxpayer's petition.

Subsection 25137(d)(2)(D)

Facilitator's Remarks:

The Facilitator indicated that this subsection was modified to address the situation where the petition to the Franchise Tax Board, itself, has not been previously reviewed and analyzed by Franchise Tax Board staff. The subsection provides that the Chief Counsel of the Franchise Tax Board will ensure that Franchise Tax Board staff reviews and analyzes the petition if it has not previously done so and make a determination on whether the alternative apportionment methodology is warranted.

Commentators' Comments:

Several commentators asked what "warranted" meant. The commentators stated that "warranted" seemed too harsh and suggested that "recommendation" be the term used instead of "warranted."

One commentator suggested that language should be added to denote that "The FTB staff recommendation on whether the alternative apportionment methodology is recommended will not be entitled to a presumption of correctness when considered by the Franchise Tax Board, itself."

Another commentator stated this subsection is confusing because there appear to be different determination standards, and it is not clear what impact FTB's staffs' determination whether an alternative apportionment methodology was warranted will have on the overall petition process.

Subsection 25137(d)(2)(E)

Facilitator's Remarks:

The Facilitator noted that the purpose of this subsection is to provide that when Franchise Tax Board staff has made a determination on whether the alternative apportionment formula methodology is warranted, the Chief Counsel of the Franchise Tax Board shall acknowledge the taxpayer's petition and initiate the briefing schedule for the parties. This subsection clarifies that Ex-parte communication rules apply when the Franchise Tax Board Chief Counsel acknowledges the taxpayer's petition, and continue until the Franchise Tax Board, itself, renders a decision. The subsection also denotes that the taxpayer must submit a brief within sixty days of the acknowledgement.

Commentators' Comments:

One commentator suggested that there should be a provision for allowing additional briefing.

Commentators expressed confusion whether the term "days" means "business days" or "calendar days" and asked for clarification within the proposed Regulation.

Subsection 25137(d)(2)(E)1. and 2.

Facilitator's Remarks:

The Facilitator noted that these provisions provide page limitations for briefs.

Commentators' Comments:

A commentator thought additional pages for briefing might be necessary.

Another commentator suggested that because of the complex nature of variance actions taxpayers should be allowed an unlimited number of exhibits to their briefs.

Subsection 25137(d)(2)(G)

Facilitator's Remarks:

The facilitator noted that this provision establishes how a hearing date is set and noticed.

Commentators' Comments:

Several commentators suggested taxpayers be given advance notice of the hearing date, with some commentators suggesting at least thirty days-notice, and others suggesting at least sixty days-notice of the hearing date.

Subsection 25137(d)(2)(I)

Facilitator's Remarks:

The Facilitator noted that this provision addresses the rules for witnesses.

Commentators' Comments

One commentator thought it would be more practical if a party notified the opposing party and the Franchise Tax Board, itself, 30 days prior to the hearing of the identity of witnesses, the general nature of the expected testimony, and the expected duration of the testimony at the hearing.

Subsection 25137(d)(2)(J)

Facilitator's Remarks:

The Facilitator indicated that this provision addresses when the decision of the Franchise Tax board, itself, will be made regarding a taxpayer's petition.

Commentators' Comments:

Several commentators were concerned that the Franchise Tax board, itself, would fail to rule on the matter indefinitely. To deal with this uncertainty, one commentator suggested that the Franchise Tax Board, itself, issue its determination at the next regularly scheduled, open session Franchise Tax Board meeting. Several commentators suggested that there be a cap of one hundred days for a decision. Several commentators suggested a one year statute or two year statute of limitations for the Franchise Tax Board, itself, to render a decision. Several commentators suggested that there be a provision to allow for interest abatement in the event the Franchise Tax Board, itself, fails to render a decision within two years.

Another commentator expressed uncertainty what a taxpayer would need to do to exhaust all administrative remedies if the Franchise Tax Board, itself, fails to render a decision within a period of time. Commentators suggested that perhaps there could be a "deemed denied" provision in the proposed Regulation, when the Franchise Tax Board, itself, has not decided a petition within a set amount of time. Commentators suggested that this would allow a taxpayer to declare that they have exhausted all administrative remedies and go forward to the Office of Tax Appeals or litigate the matter in Superior Court.

A commentator also expressed uncertainty whether a taxpayer can waive going to the Franchise Tax Board, itself for a decision on a petition, so that the taxpayer can seek a decision on the written record, and more quickly move on to Office of Tax Appeals or superior court.

Another commentator suggested that any failure to file a 25137 petition before the Franchise Tax Board, itself, should not prevent a taxpayer from bringing the matter to the Office of Tax Appeals or litigating a matter in court. The commentator suggested that failing to file a 25137 petition before the Franchise Tax Board, itself, should not be used to limit taxpayers' remedies, and that the proposed regulation would "dramatically" increase the workload of the Franchise Tax Board, itself.

EX-PARTE COMMUNICATION RULES

Subsection 25137(d)(3)(C)2

Facilitator's Remarks:

The facilitator noted that this subsection addresses ex-parte procedures, including timelines, and when a party chooses not to participate in a telephonic discussion or in-person meeting.

Commentators' Comments:

One commentator suggested that if one of the parties could not attend the telephonic discussion or in-person meeting for reasonable cause, then the meeting should not occur. The commentator provided an example noting that when, a meeting is set up for a Board member, staff for the board member, taxpayer and its representative and Franchise Tax Board staff; if the taxpayer's representative is unexpectedly obligated in court for the same day and time, then the meeting should not go forward and should be continued to a mutually agreeable date and time in the future.

Another commentator suggested that as it is written in the proposed Regulation, a taxpayer who didn't attend the meeting has 15 days to respond to all materials shared at the meeting and subsequently provided to her/him which means necessarily that meetings are precluded for the last two weeks up until the set date of any hearing.

25137(d)(4)

Facilitator's Remarks:

The facilitator noted that this subsection addresses the timeline of the applicability of the amendments to this regulation.

Commentators' Concerns:

Several commentators suggested the proposed Regulation should provide a procedural framework for taxpayers who already have a 25137 petition in process. The commentators suggested the applicability of the regulation be modified such that 60 days after the regulation becomes effective a taxpayer may petition the Franchise Tax Board, itself, and noting that in the current proposed regulatory text, a taxpayer would be barred from making such a petition because of the deadlines under 25137(d)(2). The commentators agreed with a Facilitator suggestion that this sixty day period from the effective date of the regulation could be an additional timeframe added to the proposed Regulation at (d)(2)(A).

MISCELLANEOUS COMMENTS NOT ATTRIBUTABLE TO A PARTICULAR SUBSECTION

Several commentators wondered whether the Franchise Tax Board, itself, has access to the case file regularly maintained by the Franchise Tax Board and if so, suggested that the Franchise Tax Board, itself, should state the extent to which the Franchise Tax Board has access to the case file so that taxpayers know what material is accessible by the Franchise Tax Board. Relatedly, a commentator stated that the Franchise Tax Board, itself, should have unrestricted access to the entire administrative file. Another commentator stated the taxpayer should have unrestricted access to the administrative record subject to any limitations provided in the regulation, including prior appeals with identical issues.

A commentator stated that taxpayers are not provided with information about the handling of a 25137 petition, and stated that it would be beneficial to taxpayers if they could be informed of the administrative proceedings regarding a 25137 petition and be provided copies of records of all communications of the group.

A commentator stated that the process for filing a petition with Franchise Tax Board staff is not part of this regulation project, and that taxpayers should be informed of the administrative process for staff handling 25137 petitions. The commentator suggested a formal regulation setting out the process for 25137 petitions being handled by Franchise Tax Board staff.

A commentator suggested that the regulation provide guidance when a taxpayer is entitled to 25137 relief. This commentator also stated that taxpayers, who can establish duplicate taxation arising out of California's one factor formula because the taxpayers sell tangible personal property, should be afforded relief under 25137. The commentator suggested that when a taxpayer's activities consist of the sale of tangible personal property, that taxpayer should be entitled to elect to file its return on a three-factor (sales, property, payroll) formula basis.

A commentator suggested there was confusion as to why the Franchise Tax Board is amending 25137 when there are so few cases that would be impacted by it.

Next Steps

The Facilitator indicated that staff would review comments received by the comment deadline and schedule a future IPM at which additional draft language would be presented.