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California - FTB interested parties meetings on defective credit sharing elections and California research credits

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In brief

On October 1, 2012, the Franchise Tax Board (FTB) held an Interested Parties Meeting (IPM) to discuss and identify defective credit sharing elections for purposes of addressing ways to remedy such deficiencies. At the conclusion of the IPM, it was decided that the FTB would hold a second IPM before drafting any proposed regulatory language. Any written comments are welcome and need to be submitted to the FTB by October 31, 2012.

Please note the FTB will be holding another, unrelated, IPM on October 11, 2012, to discuss the audit process and documentation issues involving the California Research and Development Credit (R&D). This may be a good opportunity to gain insights on the FTB's thinking with respect to the R&D credit. [[Interested Parties Meeting Notice](#)]

In detail

California credit assignments

California Revenue and Taxation Code (CRTC) section 23663 permits the assignment of credits among affiliated members of the same combined reporting group. A credit



assignment is made with an irrevocable election on an original tax return. CRTC section 23663 became effective for assignments made in taxable years beginning on or after July 1, 2008, with the first permitted assigned credits to be claimed against the tax of the assignee in taxable years beginning on or after January 1, 2010. Form FTB 3544 is used for this election. The FTB became aware of defective credit assignments and began a new regulation project to provide guidance to address these issues.

October 1 Interested Parties Meeting

On October 1, 2012, the FTB held an Interested Parties Meeting to discuss and begin to identify scenarios where taxpayers made defective credit assignment elections and explore potential remedies. During the meeting, the FTB said there were about 4-6 defective credit cases currently in front of them. The nature of the defects included changing the percentage of credit assigned; filing amended returns; revising the credit assignment; dropping assignees; and, in one case, assigning credit to the wrong assignee.

Two primary defective assignment scenarios were identified and discussed. The first involved a credit assignor assigning an incorrect amount of credit. The FTB felt strongly a defect only exists when an assignor assigns too much credit (more credit than is available to assign). According to the FTB, if a taxpayer assigns less credit than is actually available, that is not defective because the assignment can still be accomplished as set out on FTB Form 3544. IPM attendees raised the issue that another defect the FTB should consider is taxpayer error, e.g., when a taxpayer correctly computes the credit assignment but includes the wrong credit amount on FTB Form 3544. It was also discussed that a percentage of credit assignment could be used rather than a dollar amount, although the FTB felt that the statutory language required assignment based on dollar amount. This discussion evolved to the idea that a percentage could be included along with a dollar amount.

The second defective scenario involved an assignor improperly assigning credit to an assignee that is not a member of the combined group. The FTB discussed whether the credit should return to the assignor to be used or reassigned and whether statute of limitation issues arise when the credit is incorrectly assigned. To resolve these matters, IPM attendees suggested a "back up" assignee list on FTB Form 3544. This did not seem to get much traction with the group. Most agreed that the credit should go back to the assignor (i.e., that an invalid assignment means the credit was never assigned in the first place). There was a suggestion to have a check box on Form 3544 stating that credit is assigned back to the assignor in the event of a problem. The FTB emphasized that the assignor and assignee were joint and severally liable and that if a subsequent audit found the assignment to be invalid and the assignee member had left the group, the FTB could still go after the assignor for the credit amount.

At the conclusion of the IPM, it was decided that the FTB would hold a second IPM before drafting any proposed regulatory language. Any written comments are welcome and need to be submitted to the FTB by October 31, 2012.

California research credits

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Let's talk

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