california legislature—2013–14 regular session

ASSEMBLY BILL No. 879

Introduced by Assembly Member Bocanegra

February 22, 2013

An act to add Section 24416.23 to the Revenue and Taxation Code, relating to economic development.

legislative counsel's digest

AB 879, as introduced, Bocanegra. Emerging technology and biotechnology company: income taxes: net operating losses: transfers.

The Personal Income Tax Law and Corporation Tax Law impose taxes measured by income, and allow individual and corporate taxpayers to utilize net operating losses as carryovers and carrybacks of those losses for purposes of offsetting their individual and corporate tax liabilities.

This bill would require the Treasurer, in cooperation with the Franchise Tax Board, to establish a corporation business tax benefit certificate transfer program to allow a qualified transferor, defined as a new or expanding emerging technology and biotechnology company in this state with unused net operating losses, to surrender those net operating losses for use by a taxpayer subject to the Corporation Tax Law in this state in exchange for private financial assistance to be provided by that taxpayer to assist in the funding of costs incurred by the new or expanding emerging technology and biotechnology company, as provided.

This bill would provide that any net operating losses that are transferred pursuant to a corporation business tax benefit transfer certificate issued to a taxpayer is allowed beginning on or after the first day of the 4th taxable year after the date of issue of that certificate.

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: no.

The people of the State of California do enact as follows:

SECTION 1. Section 24416.23 is added to the Revenue and Taxation Code, to read:

24416.23. (a) For taxable years beginning on or after January 1, 2013, the Treasurer, in cooperation with the Franchise Tax Board, shall establish a corporation business tax benefit certificate transfer program to allow a qualified transferor with unused net operating losses, as described in Section 24416.20, to surrender those net operating losses for use by other taxpayers subject to tax under this part in exchange for private financial assistance to be provided by a qualified transferee that is the recipient of the qualified transferor's unused net operating loss, as evidenced by a corporation business tax benefit certificate, to assist the qualified transferor in the funding of costs incurred by the qualified transferor.

(b) The transferred net operating losses may be used on the tax return required to be filed pursuant to Part 10.2 (commencing with Section 18401) by a taxpayer subject to tax under this part.

(c) (1) The Treasurer, in cooperation with the Franchise Tax Board, shall review and approve applications by qualified transferors with unused but otherwise allowable net operating losses to surrender those net operating losses in exchange for private financial assistance to be made by the taxpayer that is the recipient of the corporation business tax benefit certificate in an amount equal to at least 80 percent of the amount of the surrendered tax net operating losses.

(2) For purposes of this subdivision, the amount of the tax benefit of the surrendered net operating losses is an amount equal to the amount of the net operating loss that is surrendered multiplied by the rate of tax of the qualified transferee, as imposed by Section 23151 or 23501.

(d) (1) The aggregate amount of the net operating losses that may be surrendered in any fiscal year pursuant to this section shall be an amount equal to the sum of sixty million dollars ($60,000,000) plus the amount of previously surrendered net operating losses that were recaptured under the provisions of this section.

(2) If the amount of net operating loss surrender applications for any particular fiscal year exceeds the aggregate amount described in paragraph (1), that excess shall be treated as having been applied for on the first day of the subsequent fiscal year.

(3) The Treasurer shall set aside at least twenty-five million dollars ($25,000,000) of the amount described in paragraph (1) for unused net operating losses of small qualified transferors.

(e) For purposes of this section:

(1) "Acquire" includes any transfer, whether or not for consideration.

(2) "Biotechnology" means the continually expanding body of fundamental knowledge about the functioning of biological systems from the macro level to the molecular and subatomic levels, as well as novel products, services, technologies, and subtechnologies developed as a result of insights gained from research advances that add to that body of fundamental knowledge.

(3) "Biotechnology company" means a corporation that owns, has filed for, or has a valid license to use protected, proprietary intellectual property and that is engaged in the research, development, production, or provision of biotechnology for the purpose of developing or providing products or processes for specific commercial or public purposes, including, but not limited to, medical, pharmaceutical, nutritional, and other health-related purposes, agricultural purposes, and environmental purposes.

(4) "Full-time employee" means a person employed by a qualified transferor for consideration for at least 35 hours a week, or who renders any other standard service generally accepted by custom or practice as full-time employment and whose wages are subject to withholding as required by Division 6 (commencing with Section 13000) of the Unemployment Insurance Code. To qualify as a "full-time employee," an employee must also receive from the qualified transferor health benefits under a group health plan, a health benefits plan, or a policy or contract of health insurance covering more than one person issued pursuant to the Insurance Code. "Full-time employee" shall not include any person who works as an independent contractor or on a consulting basis for the qualified transferor.

(5) "Group health plan" means an employee welfare benefit plan, as defined in Title 1 of Section 3 of the Employee Retirement Income Security Act of 1974 (Public Law 93-406; 29 U.S.C. Sec. 1002(1)), to the extent that the plan provides medical care and including items and services paid for as medical care to employees or their dependents, as defined under the terms of the plan, directly or through insurance, reimbursement, or otherwise.

(6) "New or expanding" means a technology or biotechnology company that, at the end of the calendar year prior to the year in which the company files an application for surrender of unused but otherwise allowable net operating losses, on the date which the application is submitted, and on the date on which the company received the corporation business tax benefit certificate, has fewer than 225 employees in the United States, that has at least one full-time employee working in this state if the company has been incorporated for less than three years, that has at least five full-time employees in this state if the company has been incorporated for more than three years but less than five years, and that has at least 10 full-time employees working in this state if the company has been incorporated for more than five years.

(7) "Qualified transferee" means a corporation subject to tax imposed by Section 23151 or 23501.

(8) "Qualified transferor" means a new or expanding emerging technology and biotechnology company in this state that either:

(A) Has not demonstrated positive net operating income in any of the two previous taxable years consisting of 12 calendar months each of ongoing operations as determined on its financial statements issued according to generally accepted accounting standards endorsed by the Financial Accounting Standards Board.

(B) Is not directly or indirectly at least 50 percent owned or controlled by another corporation that has demonstrated positive net operating income in any of two previous taxable years consisting of 12 calendar months each of ongoing operations as determined on its financial statements issued according to generally accepted accounting standards endorsed by the Financial Accounting Standards Board, or is part of a consolidated group of affiliated corporations, as filed for federal income tax purposes, that in the aggregate has demonstrated positive net operating income in any of the two previous full years of ongoing operations as determined on its combined financial statements issued according to generally accepted accounting standards endorsed by the Financial Accounting Standards Board.

(9) "Related person" shall mean any person that is related to the taxpayer under either Section 267 or 318 of the Internal Revenue Code.

(10) "Small qualified transferor" means a qualified transferor with total unused net operating losses, prior to the transfer of any unused net operating loss pursuant to this section, of less than two hundred fifty thousand dollars ($250,000).

(11) "Technology company" means an emerging corporation that owns, has filed for, or has a valid license to use protected, proprietary intellectual property; and that employs some combination of the following: highly educated or trained managers and workers, or both, employed in this state who use sophisticated scientific research service or production equipment, processes, or knowledge to discover, develop, test, transfer, or manufacture a product or service.

(f) (1) The maximum lifetime amount, as limited by subdivision (h) of this section, of net operating losses that a qualified transferee shall be permitted to surrender pursuant to this section is fifteen million dollars ($15,000,000).

(2) Applications must be received on or before June 30.

(3) A certificate shall not be issued pursuant to this section unless the qualified transferor provides the Treasurer with the identification of the specific net operating losses by taxable year that are included in the application.

(g) For purposes of this section, the Treasurer shall:

(1) In consultation with the Franchise Tax Board, establish rules for the recapture of all or a portion of the amount of a grant of a corporation business tax benefit certificate from a qualified transferee having surrendered tax benefits pursuant to this section, in the event the qualified transferee fails to use the private financial assistance received for the surrender of tax benefits as required by this section.

(2) In cooperation with the Franchise Tax Board, review and approve applications by taxpayers subject to tax under this part to acquire surrendered net operating losses pursuant to this section, which shall be issued in the form of corporation business tax benefit transfer certificates, in exchange for private financial assistance to be made by the qualified transferee to the qualified

transferor in an amount equal to at least 80 percent of the amount of the tax benefit of the surrendered net operating losses.

(3) (A) Issue the corporation business tax benefit transfer certificate.

(B) A certificate shall not be issued unless the qualified transferor certifies that as of the date of the exchange of the corporation business tax benefit certificate it is operating as a new or expanding emerging technology or biotechnology company and has no current intention to cease operating as a new or expanding emerging technology or biotechnology company.

(C) The private financial assistance shall assist in funding expenses in connection with the operation of the qualified transferor in the state, including, but not limited to, the expenses of fixed assets, such as the construction and acquisition and development of real estate, materials, startup, tenant fitout, working capital, salaries, research and development expenditures, and any other similar expenses.

(D) Require a qualified transferee to enter into a written agreement with the qualified transferor concerning the terms and conditions of the private financial assistance made in exchange for the certificate.

(h) For purposes of this section, in determining whether a company is a qualified transferor, the following shall apply:

(1) (A) In a case where a taxpayer purchases or otherwise acquires all or any portion of the assets of an existing trade or business, irrespective of the form of entity, that is doing business in this state, within the meaning of Section 23101, the trade or business thereafter conducted by the taxpayer or any related person shall not be treated as a qualified transferor if the aggregate fair market value of the acquired assets, including real, personal, tangible, and intangible property, used by the taxpayer or any related person in the conduct of its trade or business exceeds 20 percent of the aggregate fair market value of the total assets of the trade or business being conducted by the taxpayer or any related person.

(B) For purposes of this paragraph:

(i) The determination of the relative fair market values of the acquired assets and the total assets shall be made as of the last day of the first taxable year in which the taxpayer or any related person first uses any of the acquired trade or business assets in its business activity.

(ii) Any acquired assets that constituted property described in Section 1221(1) of the Internal Revenue Code in the hands of the transferor shall not be treated as assets acquired from an existing trade or business, unless those assets also constitute property described in Section 1221(1) of the Internal Revenue Code in the hands of the acquiring taxpayer or related person.

(2) In any case where the legal form under which a trade or business activity is being conducted is changed, the change in form shall be disregarded and the determination of whether the trade or business activity is a new business shall be made by treating the taxpayer as having purchased or otherwise acquired all or any portion of the assets of an existing trade or business under paragraph (1).

(i) (1) Any net operating losses that are transferred pursuant to a corporation business tax benefit transfer certificate issued to a taxpayer under this section shall only be allowed beginning on or after the first day of the fourth taxable year after the date of issue of that certificate.

(2) The surrender of net operating losses under subdivision (c) shall be irrevocable once made.

(3) A qualified transferor surrendering net operating losses under this section shall reduce the amount of its unused net operating loss by the amount of surrendered net operating losses, as reflected on the certificate issued under this section, and the amount of the surrendered net operating loss shall not be available as a deduction by the qualified transferor in any taxable year, nor shall it thereafter be included in the amount of any net operating loss carryover of the qualified transferor.

(4) (A) A qualified transferee, as reflected on the certificate under this section, may deduct all or any portion of the net operating loss transferred against the taxable income of the qualified transferee for the taxable year beginning on or after the first day of the fourth taxable year after the issue date of the certificate, or any subsequent taxable year, subject to any carryover period limitations that apply to the surrendered net operating loss in the hands of the qualified transferor.

(B) The carryover period under Section 172 of the Internal Revenue Code, as modified for purposes of this part, for any net operating loss received under the provisions of this section shall be extended in the hands of the qualified transferee for three additional taxable years, but the carryover period for any net operating losses retained by the qualified transferor shall not be extended under the rules of this subparagraph.

(5) A qualified transferee shall not sell, otherwise transfer, or thereafter assign the certificate to any other taxpayer.

(j) If any consideration is paid by the qualified transferee to the qualified transferor for a corporation business tax benefit certificate under this section, then both of the following shall apply:

(1) A deduction shall not be allowed to the qualified transferee under this part with respect to any amounts so paid.

(2) The amounts so received by the qualified transferor as financial assistance shall be includable in gross income subject to tax under this part.

(k) (1) Except as specifically provided in this section, following a surrender of a net operating loss by a qualified transferor under this section, the qualified transferee shall be treated as if it originally generated the net operating loss.

(2) Any limitations on the allowance of any net operating loss transferred under this section that would apply to the qualified transferor in the absence of the transfer shall also apply to the same extent to the allowance of that net operating loss to the qualified transferee.

(*l*) Notwithstanding subdivision (d) of Section 24416.20, Section 172(b)(1) of the Internal Revenue Code, relating to years to which the loss may be carried, is modified to provide that net operating loss carrybacks shall not be allowed for any net operating losses received by a qualified transferee pursuant to this section.

(m) (1) The Treasurer, in consultation with the Franchise Tax Board, shall specify the form and manner in which the surrender required under this section shall be made, as well as any necessary information that shall be required to be provided by the qualified transferor to the qualified transferee and the Franchise Tax Board.

(2) Any taxpayer that surrenders any net operating loss under this section shall report any information, in the form and manner specified by the Franchise Tax Board, necessary to substantiate any net operating loss transferred under this section and verify the transfer and subsequent application of any surrendered net operating losses.

(3) Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code shall not apply to any standard, criterion, procedure, determination, rule, notice, or guideline established or issued by the Franchise Tax Board pursuant to paragraphs (1) and (2).

(4) The Treasurer and the Franchise Tax Board may each issue regulations necessary to implement the purposes of this section.

(n) (1) The qualified transferor and the qualified transferee shall be jointly and severally liable for any tax, addition to tax, or penalty that results from the disallowance, in whole or in part, of any net operating loss surrendered under this section.

(2) This section shall not limit the authority of the Franchise Tax Board to audit either the qualified transferor or the qualified transferee with respect to any surrendered net operating loss under this section.

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