AMENDED IN ASSEMBLY AUGUST 17, 2010

AMENDED IN ASSEMBLY AUGUST 2, 2010

AMENDED IN SENATE MAY 19, 2010

AMENDED IN SENATE APRIL 6, 2010

SENATE BILL No. 1391

Introduced by Senator Yee

February 19, 2010

An act to add Sections 17060 and 23603 to the Revenue and Taxation Code, relating to taxation~~, to take effect immediately, tax levy~~.

LEGISLATIVE COUNSEL'S DIGEST

SB 1391, as amended, Yee. Income taxes: business tax incentives: reporting information and recapture.

The Personal Income Tax Law and the Corporation Tax Law authorize various credits, deductions, exclusions, exemptions, and other tax benefits with respect to the taxes imposed by those laws.

This bill would require a taxpayer, as described, doing business in California that claims a business tax incentive, as provided, to submit to the Franchise Tax Board on the original return specified information, including the number of employees employed by the taxpayer in the state.

The bill would also require, in cases in which a taxpayer has a *disqualifying event resulting in a* net decrease in the number of full-time employees for a business tax incentive added by statute on or after January 1, 2011, the business tax incentive to be~~ disallowed and the entire amount of any business tax incentives previously allowed to be recaptured or the tax liability to be recomputed and the taxpayer to be liable for any credits on previous tax returns, as specified~~ *recaptured,* *and the taxable amount computed in accordance with specified procedures*.

~~This bill would take effect immediately as a tax levy.~~

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 17060 is added to the Revenue and Taxation Code, to read:

17060. (a) Notwithstanding any other provision of this part, for taxable years beginning on or after January 1, 2011, a taxpayer doing business in this state that claims any business tax incentive shall annually include on the timely filed original return, in the form and manner as required by forms and instructions prescribed by the Franchise Tax Board, the number of full-time, part-time, and temporary employees, as defined, employed by the taxpayer in the state for the current and preceding taxable years.

~~(b) (1) Notwithstanding any other law, for any business tax incentive that is allowed by an act that takes effect on or after January 1, 2011, both of the following shall apply if the taxpayer has a net decrease, as determined under subdivision (c), in the number of full-time equivalent employees in the state according to the information provided pursuant to subdivision (a):~~

~~(A) The entire amount of the business tax incentives for all taxable years shall be disallowed.~~

~~(B) Any previously allowed business tax incentives shall be recaptured or the tax liability shall be recomputed and the taxpayer shall be liable for the entire amount of any tax from disallowed business tax incentives on previous tax returns.~~

(b) (1) Notwithstanding any other law, for any business tax incentive that is allowed by an act that takes effect in a taxable year beginning on or after January 1, 2011, if the taxpayer has a disqualifying event occur before the close of the recapture period, the business tax incentive shall be subject to recapture as specified in subdivision (e).

(2) For purposes of this section, "disqualifying event" means a net decrease, as determined under subdivision (c), in the average number of full-time equivalent employees, calculated as of the last day of the current taxable year.

(3) For purposes of this section, "recapture period" shall, with respect to the amount of any business tax incentive that reduces a taxpayer's taxable income or "net tax" in the current taxable year, be the first full taxable year beginning after the close of the taxable year in which the business tax incentive reduces either the taxpayer's taxable income or "net tax," as defined in Section 17039, and the four succeeding taxable years.

~~(2)~~

(4) For purposes of this subdivision, a "business tax incentive" means a credit, deduction, exclusion, exemption, or any other tax benefit provided by the state added ~~to this part~~ *by an act that takes effect beginning* on or after January 1, 2011, enacted with the ~~principal~~ purpose of creating new jobs in the state, and allowed to taxpayers engaged in or carrying on any trade, business, profession, vocation or calling, or commercial activity in the state~~, including activities in the state that benefit an affiliated entity of the taxpayer, with respect to the income attributable to the taxpayer's trade, business, profession, vocation or calling, or commercial activity.~~.

(c) (1) The net decrease in full-time equivalent employees in the state shall be determined, on and after January 1, 2014, on a full-time equivalent basis by subtracting from the amount determined in subparagraph (A) the amount determined in subparagraph (B).

(A) The total number of full-time equivalent employees in the state employed in the three preceding taxable years by the taxpayer and by any trade or business acquired by the taxpayer during the current taxable year, divided by three.

(B) The total number of full-time equivalent employees employed in the state in the current taxable year by the taxpayer and by any trade or business acquired by the taxpayer during the current taxable year.

(C) For purposes of this paragraph, employees in the state who are employed in any trade or business sold by a taxpayer shall be excluded in the determination of the amounts in subparagraphs (A) and (B).

(2) "Full-time equivalent" means either of the following:

(A) In the case of a full-time employee paid hourly qualified wages, "full-time equivalent" means the total number of hours worked for the taxpayer by the employee (not to exceed 2,000 hours per employee) divided by 2,000.

(B) In the case of a salaried full-time employee, "full-time equivalent" means the total number of weeks worked for the taxpayer by the employee divided by 52.

(3) All employees of the trades or businesses that are treated as related under either Section 267, 318, or 707 of the Internal Revenue Code shall be treated as employed by a single taxpayer.

~~(d)~~

~~(e) Section 19521, related to computation of interest, shall apply to any tax from disallowed business tax incentives. For purposes of this section, all of the following definitions apply:~~

(d) For purposes of this section, all of the following definitions apply:

(1) "Full-time employee" means an employee who works an average of 35 hours in a week, calculated monthly.

(2) "Part-time employee" means an employee who works less than an average of 35 hours in a week, calculated monthly.

(3) "Temporary employee" means an employee who works less than 120 days per year.

(e) (1) In the case of a disqualifying event, there shall be added to taxable income, or the "net tax" as defined in Section 17039, as the case may be, of the taxpayer for the taxable year in which the disqualifying event occurs, the recapture amount computed pursuant to subparagraph (A) and the interest amount computed pursuant to subparagraph (B).

(A) The recapture amount shall be computed by multiplying the total amount of the business tax incentive allowed to the taxpayer in the current taxable year and prior taxable years excluding the amounts previously recaptured, by a fraction, the numerator of which is the net decrease in full-time equivalent employees as determined under subdivision (c), and the denominator of which is the cumulative increase in the full-time equivalent employees calculated from the last day of the first taxable year the business tax incentive was claimed on the return to the last day of the taxable year immediately preceding the taxable year of the disqualifying event.

(i) If the denominator of the fraction computed under subparagraph (A) equals zero or a negative amount, 100 percent of the business tax incentive shall be subject to recapture.

(ii) If the fraction computed under subparagraph (A) is greater than one, not more than 100 percent of the business tax incentive shall be subject to recapture.

(B) The interest amount shall be computed using the adjusted annual rate established by Section 19521 from the due date of the return for each taxable year in which the business tax incentive reduced a taxpayer's taxable income or "net tax" to the date of the payment of additional tax resulting from the application of this subdivision.

(2) The amount of recapture computed under this subdivision shall be first applied against the applicable business tax incentive that reduced income or "net tax" for the earliest taxable year, and then to the succeeding taxable year and thereafter, and if there is any excess amount of recapture computed under this subdivision that exceeds the amount of business tax incentives that reduced a taxpayer's taxable income or "net tax" in a prior taxable year, then such excess shall be applied against remaining carryovers of such business tax incentives, if any.

(3) The recapture amount imposed under this section shall be in addition to any other recapture amounts imposed under this part.

(f) This section shall not apply to a taxpayer with ~~50~~ *25* or fewer employees and with net business income of less than five hundred thousand dollars ($500,000) for the taxable year. For purposes of this subdivision, business income means:

(1) Income from a trade or business, whether conducted by the taxpayer or by a passthrough entity owned directly or indirectly by the taxpayer. For purposes of this paragraph, the term "passthrough entity" means a partnership or an "S" corporation.

(2) Income from rental activity.

(3) Income attributable to a farming business.

(g) Nothing in this section shall limit the authority of the Franchise Tax Board to audit the information provided by the taxpayer pursuant to subdivision (a).

(h) 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 subdivision (a).

(i) The amount of the understatement of tax for the taxable year that is attributable to the disallowance or recapture of a business tax incentive, as defined in subdivision (b), shall be excluded from the calculation of any penalty imposed under Part 10 (commencing with Section 17001) and Part 10.2 (commencing with Section 18401).

SEC. 2. Section 23603 is added to the Revenue and Taxation Code, to read:

23603. (a) Notwithstanding any other provision of this part, for taxable years on or after January 1, 2011, a taxpayer doing business in the state that claims any business tax incentive shall annually include on the timely filed original return, in the form and manner as required by forms and instructions prescribed by the Franchise Tax Board, the number of full-time, part-time, and temporary employees, as defined, employed by the taxpayer in the state for the current and preceding taxable years.

~~(b) (1) Notwithstanding any other law, for any business tax incentive that is allowed by an act that takes effect on or after January 1, 2011, both of the following shall apply if the taxpayer has a net decrease, as determined under subdivision (c), in the number of full-time equivalent employees in the state according to the information provided pursuant to subdivision (a):~~

~~(A) The entire amount of the business tax incentives for all taxable years shall be disallowed.~~

~~(B) Any previously allowed business tax incentives shall be recaptured or the tax liability shall be recomputed and the taxpayer shall be liable for the entire amount of any tax from disallowed business tax incentives on previous tax returns.~~

(b) (1) Notwithstanding any other law, for any business tax incentive that is allowed by an act that takes effect in a taxable year beginning on or after January 1, 2011, if the taxpayer has a disqualifying event, as defined, occur before the close of the recapture period, the business tax incentive shall be subject to recapture as specified in subdivision (e).

(2) For purposes of this section, "disqualifying event" means a net decrease, as determined under subdivision (c), in the average number of full-time equivalent employees, calculated as of the last day of the current taxable year.

(3) For purposes of this section, "recapture period" shall, with respect to the amount of any business tax incentive that reduces a

taxpayer's net income or "tax" in the current taxable year, be the first full taxable year beginning after the close of the taxable year in which the business tax incentive reduces either the taxpayer's net income or "tax," as defined in Section 23036, and the four succeeding taxable years.

~~(2)~~ *(4)* For purposes of this subdivision, a "business tax incentive" means a credit, deduction, exclusion, exemption, or any other tax benefit provided by the state added ~~to this part~~ *by an act that takes effect beginning* on or after January 1, 2011, enacted with the ~~principal~~ purpose of creating new jobs in the state, and allowed to taxpayers engaged in or carrying on any trade, business, profession, vocation or calling, or commercial ~~activity in the state, including activities in the state that benefit an affiliated entity of the taxpayer, with respect to the income attributable to the taxpayer's trade, business, profession, vocation or calling, or commercial activity.~~ *activity in this state.*

(c) (1) The net decrease in full-time equivalent employees in the state shall be determined, on and after January 1, 2014, on a full-time equivalent basis by subtracting from the amount determined in subparagraph (A) the amount determined in subparagraph (B).

(A) The total number of full-time equivalent employees employed in the three preceding taxable years by the taxpayer and by any trade or business acquired by the taxpayer during the current taxable year, divided by three.

(B) The total number of full-time equivalent employees employed in the state in the current taxable year by the taxpayer and by any trade or business acquired by the taxpayer during the current taxable year.

(2) "Full-time equivalent" means either of the following:

(A) In the case of a full-time employee paid hourly qualified wages, "full-time equivalent" means the total number of hours worked for the taxpayer by the employee (not to exceed 2,000 hours per employee) divided by 2,000.

(B) In the case of a salaried full-time employee, "full-time equivalent" means the total number of weeks worked for the taxpayer by the employee divided by 52.

(3) All employees of the trades or businesses that are treated as related under either Section 267, 318, or 707 of the Internal Revenue Code shall be treated as employed by a single taxpayer.

~~(d)~~

~~(e) 19521, relating to computation of interest, shall apply to any tax from disallowed business tax incentives. For purposes of this section, all of the following definitions apply:~~

(d) For purposes of this section, all of the following definitions apply:

(1) "Full-time employee" means an employee who works an average of 35 hours in a week, calculated monthly.

(2) "Part-time employee" means an employee who works less than an average of 35 hours in a week, calculated monthly.

(3) "Temporary employee" means an employee who works less than 120 days per year.

(e) (1) In the case of a disqualifying event, there shall be added to net income, or the "tax," as defined in Section 23036, as the case may be, of the taxpayer for the taxable year in which the disqualifying event occurs, the recapture amount computed pursuant to subparagraph (A) and the interest amount computed pursuant to subparagraph (B).

(A) The recapture amount shall be computed by multiplying the total amount of the business tax incentive allowed to the taxpayer in the current taxable year and prior taxable years excluding the amounts previously recaptured, by a fraction, the numerator of which is the net decrease in full-time equivalent employees as determined under subdivision (c), and the denominator of which is the cumulative increase in the full-time equivalent employees calculated from the last day of the first taxable year the business tax incentive was claimed on the return to the last day of the taxable year immediately preceding the taxable year of the disqualifying event.

(i) If the denominator of the fraction computed under subparagraph (A) equals zero or a negative amount, 100 percent of the business tax incentive shall be subject to recapture.

(ii) If the fraction computed under subparagraph (A) is greater than one, not more than 100 percent of the business tax incentive shall be subject to recapture.

(B) The interest amount shall be computed using the adjusted annual rate established by Section 19521 from the due date of the

return for each taxable year in which the business tax incentive reduced a taxpayer's net income or "tax" to the date of the payment of additional tax resulting from the application of this subdivision.

(2) The amount of recapture computed under this subdivision shall be first applied against the applicable business tax incentive that reduced net income or "tax" for the earliest taxable year, and then to the succeeding taxable year and thereafter, and if there is any excess amount of recapture computed under this subdivision that exceeds the amount of business tax incentives that reduced a taxpayer's net income or "tax" in a prior taxable year, then such excess shall be applied against remaining carryovers of such business tax incentives, if any.

(3) The recapture amount imposed under this section shall be in addition to any other recapture amounts imposed under this part.

(f) (1) In the case of any business tax incentive that is allowed to be sold, assigned, or otherwise transferred under the provisions of this part to another taxpayer, any such sale, assignment, or other transfer shall only be valid if the seller or assignor expressly agrees, and continues, to provide to the buyer or assignee and the Franchise Tax Board, in the form and manner specified by the Franchise Tax Board, any necessary information to calculate whether a disqualifying event has occurred with respect to the seller or assignor under the rules of this section.

(2) In the case where a disqualifying event has occurred under this section, the buyer or assignee shall be required to include in its net income or "tax" the amount of any required recapture.

(3) The rules of this subdivision shall apply to any business tax incentive that is sold, assigned, or otherwise transferred under the provisions of this part, notwithstanding any other provision of this part to the contrary.

(4) Notwithstanding any other provision of law, if a seller or assignor fails to satisfy the reporting requirements of this subdivision, then a notice of proposed deficiency assessment attributable to the business tax incentive with respect to which the reporting requirements were not satisfied may be mailed to the buyer or assignee within four years from the date on which the reporting requirements are satisfied by the seller or assignor.

~~(f)~~

(g) This section shall not apply to a taxpayer with ~~50~~ *25* or fewer employees and with income subject to tax under this part of less than five hundred thousand dollars ($500,000) for the taxable year.

~~(g)~~

(h) Nothing in this section shall limit the authority of the Franchise Tax Board to audit the information provided by the taxpayer pursuant to subdivision (a).

~~(h)~~

(i) 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 subdivision (a).

(j) The amount of the understatement of tax for the taxable year that is attributable to the disallowance or recapture of a business tax incentive, as defined in subdivision (b), shall be excluded from the calculation of any penalty imposed under Part 10.2 (commencing with Section 18401) and Part 11 (commencing with Section 23001).

~~SEC. 3. This act provides for a tax levy within the meaning of Article IV of the Constitution and shall go into immediate effect.~~

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