

AMENDED IN ASSEMBLY AUGUST 20, 2010

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.

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 recaptured, and the taxable amount computed in accordance with specified procedures.

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

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

1 SECTION 1. Section 17060 is added to the Revenue and
2 Taxation Code, to read:
3 17060. (a) Notwithstanding any other provision of this part,
4 for taxable years beginning on or after January 1, 2011, a taxpayer
5 doing business in this state that claims any business tax incentive
6 shall annually include on the timely filed original return, in the
7 form and manner as required by forms and instructions prescribed
8 by the Franchise Tax Board, the number of full-time, part-time,
9 and temporary employees, as defined, employed by the taxpayer
10 in the state for the current and preceding taxable years.
11 (b) (1) Notwithstanding any other law, for any business tax
12 incentive that is allowed by an act that takes effect in a taxable
13 year beginning on or after January 1, 2011, if the taxpayer has a
14 disqualifying event occur before the close of the recapture period,
15 the business tax incentive shall be subject to recapture as specified
16 in subdivision (e).
17 (2) For purposes of this section, “disqualifying event” means a
18 net decrease, as determined under subdivision (c), in the average
19 number of full-time equivalent employees, calculated as of the last
20 day of the current taxable year.
21 (3) For purposes of this section, “recapture period” shall, with
22 respect to the amount of any business tax incentive that reduces a
23 taxpayer’s taxable income or “net tax” in the current taxable year,
24 be the first full taxable year beginning after the close of the taxable
25 year in which the business tax incentive reduces either the
26 taxpayer’s taxable income or “net tax,” as defined in Section 17039,
27 and the four succeeding taxable years.
28 (4) For purposes of this subdivision, a “business tax incentive”
29 means a credit, deduction, exclusion, exemption, or any other tax
30 benefit provided by the state added by an act that takes effect
31 beginning on or after January 1, 2011, enacted with the purpose
32 of creating new jobs in the state, and allowed to taxpayers engaged
33 in or carrying on any trade, business, profession, vocation or
34 calling, or commercial activity in the 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 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) 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

1 pursuant to subparagraph (A) and the interest amount computed
2 pursuant to subparagraph (B).

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

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

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

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

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

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

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

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

5 (2) Income from rental activity.

6 (3) Income attributable to a farming business.

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

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

15 (i) The amount of the understatement of tax for the taxable year
16 that is attributable to the disallowance or recapture of a business
17 tax incentive, as defined in subdivision (b), shall be excluded from
18 the calculation of any penalty imposed under Part 10 (commencing
19 with Section 17001) and Part 10.2 (commencing with Section
20 18401).

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

23 23603. (a) Notwithstanding any other provision of this part,
24 for taxable years on or after January 1, 2011, a taxpayer doing
25 business in the state that claims any business tax incentive shall
26 annually include on the timely filed original return, in the form
27 and manner as required by forms and instructions prescribed by
28 the Franchise Tax Board, the number of full-time, part-time, and
29 temporary employees, as defined, employed by the taxpayer in the
30 state for the current and preceding taxable years.

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

37 (2) For purposes of this section, “disqualifying event” means a
38 net decrease, as determined under subdivision (c), in the average
39 number of full-time equivalent employees, calculated as of the last
40 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.

(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 by an act that takes effect beginning on or after January 1, 2011, enacted with the 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 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.

(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 of 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) 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.

(g) This section shall not apply to a taxpayer with 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.

(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).

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

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

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