BOARD OF EQUALIZATION

STATE OF CALIFORNIA

In the Matter of the Appeal of:	**FORMAL OPINION**
	2010-SBE-001
NASSCO HOLDINGS, INC.	Case No. 317434

Representing the Parties:

For Appellant: Gail H. Morse, Jenner & Block, LLP
Jon A. Sperring, PricewaterhouseCoopers, LLP

For Respondent: William Gardner, Tax Counsel III

Counsel for the Board of Equalization: John O. Johnson, Tax Counsel

ORDER DENYING PETITION FOR REHEARING

On February 25, 2009, we issued a decision in which we concluded that appellant is entitled to apply its enterprise zone (EZ) hiring credits and Manufacturer"s Investment Credit (MIC) to reduce its alternative minimum tax liabilities for the 1994, 1995, 1999, 2000, and 2001 appeal years. Respondent (Franchise Tax Board) then filed a petition for rehearing pursuant to section 19048 of the Revenue and Taxation Code (R&TC). Upon consideration of the petition for rehearing, we conclude that the grounds set forth therein do not constitute good cause for a new hearing, as required by the *Appeal of Wilson Development, Inc.* (94-SBE-007), decided by this Board on October 5, 1994. Specifically, we find that our decision is not contrary to law, and we find no accident or surprise at the hearing or newly discovered evidence which justifies a new hearing. We also do not find that a new hearing is warranted strictly based on the importance of the legal principle involved. In their briefs on the petition, both appellant and respondent requested publication of our opinion due to its potential

impact on a large number of taxpayers, and to provide guidance to respondent. The decision in this appeal involves an issue of continuing public interest, and makes a significant contribution to the law by reviewing the legislative history of a statute. (See Cal. Code Regs., tit. 18, § 5452, subds. (e)(3) & (e)(4).) Accordingly, we provide the following discussion of the grounds for our decision issued in favor of appellant, and our denial of respondent's petition for rehearing.

I. Factual and Procedural Background

Appellant, a shipbuilding company, has an industrial manufacturing facility located in San Diego, California. The parties agree that appellant is eligible to use EZ hiring credits because it conducts almost 100 percent of its business within the enterprise zone. Although neither party specifically discusses the MIC, the parties appear to agree that appellant is eligible to receive the MIC as well. As such, we do not address the merits regarding the eligibility of either credit here. For each year at issue, appellant incurred an alternative minimum tax (AMT) liability and offset that liability with tax credits, eliminating the AMT, and reducing its tax liability to zero.

Respondent subsequently audited appellant"s returns and denied its use of tax credits to offset the AMT. Respondent issued proposed assessments for each tax year and appellant timely protested. Respondent affirmed the disallowance of appellant"s attempted use of the MIC and EZ hiring credits to offset the AMT. Appellant appealed to this Board. We issued a decision in favor of appellant and respondent then filed a timely petition for rehearing.

II. Law and Analysis

The issue in this matter is whether appellant may apply its MIC and EZ hiring credits to reduce its AMT liabilities, pursuant to R&TC section 23036, subdivision (d)(1).

A. *Alternative Minimum Tax Legislation*

The corporate AMT was created by Congress in the Tax Reform Act of 1986, and is codified in sections 55 through 59 of the Internal Revenue Code (IRC). In order to determine whether a taxpayer owes the AMT, the taxpayer must compute both its tentative minimum tax (TMT) and its regular tax for the taxable year, and must pay the greater of the two. (*Sequa Corp. v. United States* (S.D.N.Y. 2004) 350 F.Supp.2d 447, 448.) IRC section 55(a) defines the AMT as "a tax equal to the excess (if any) of . . . the tentative minimum tax for the taxable year, over . . . the regular tax for the

taxable year." Thus, if the TMT exceeds the regular tax, the regular tax continues to be imposed and the difference is added to it as AMT.

California law provides for the application of the federal AMT to the Corporation Tax Law, except as otherwise provided. (Rev. & Tax. Code, § 23400, subd. (a).) R&TC section 23455, subdivision (a), modifies IRC section 55(b)(1) relating to the TMT. Similar to the federal AMT, if a taxpayer's regular corporate franchise tax computed in accordance with Chapter 2 (commencing with R&TC section 23101) is less than the TMT, the taxpayer is required to pay the difference as the AMT.[1]

Subdivision (c)(1) of R&TC section 23455 modifies the IRC section 55(c) definition of "regular tax" and subdivisions (a) and (b) of R&TC section 23036 each provide definitions of the term "tax." Specifically, subdivision (a) of R&TC section 23036 defines the term "tax" without any reference to the AMT provided by Chapter 2.5 of Part 11.[2] Subdivision (a) provides that:

> (1) The term "tax" includes any of the following:
> (A) The tax imposed under Chapter 2 (commencing with Section 23101).
> (B) The tax imposed under Chapter 3 (commencing with Section 23501).
> (C) The tax on unrelated business taxable income, imposed under Section 23731.
> (D) The tax on S corporations imposed under Section 23802.
> (2) The term "tax" does not include any amount imposed under paragraph (1) of subdivision (e) of Section 24667 or paragraph (2) of subdivision (f) of Section 24667.

Subdivision (b) of R&TC section 23036 includes the AMT in the definition of "tax" for the purpose of tax administration under Part 10.2.

Subdivision (d)(1) of R&TC section 23036 states that "[n]o credit may reduce the 'tax' below the tentative minimum tax (as defined by paragraph (1) of subdivision (a) of Section 23455), except the following credits . . . ." In other words, subdivision (d)(1) of R&TC section 23036 provides that, except for specified credits, including the MIC and EZ credits, no credit may reduce the "tax" below the TMT.

B. *Parties' Contentions*

Appellant contends the term "tax" in R&TC section 23036, subdivision (d)(1), includes

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[1] If a taxpayer's regular tax (before credits are applied) is lower than its TMT, the difference is added to the taxpayer's tax liability in the form of an AMT amount. The taxpayer will have an amount of regular tax, plus an amount of AMT, which combine to equal its TMT value. (Rev. & Tax. Code, Div. 2, Part 11, Ch. 2.5 (commencing at section 23400).)

[2] Subdivisions (a), (b), and (d) of R&TC section 23036 are discussed here. Subdivisions (c) and (e) through (j) of section 23036 are not relevant to the issue in this appeal.

the AMT and that this is the only interpretation which harmonizes the different subdivisions of the statute and comports with the demonstrated legislative intent to permit taxpayers to offset the AMT with specified credits. Appellant argues that the term "tax" in section 23036 is defined one way in subdivision (a), another way in subdivision (b), and not specifically defined in subdivision (d). Appellant contends that, when the language of section 23036 is read as a comprehensive whole, the plain language of the statute allows the use of the EZ hiring credits (as well as the other credits listed in section 23036, subdivision (d)) as exceptions to the general rule that credits cannot reduce the AMT.

More specifically, appellant contends that R&TC section 23036, subdivision (a), defines "tax" as including, but not limited to, the tax imposed by Chapter 2 of Part 11 (i.e., the corporation franchise tax measured by net income or the minimum franchise tax). Further, while subdivision (b) defines "tax" to include the alternative minimum tax for the various administrative purposes of withholding, deficiency assessments, filing returns, and payments, subdivision (d) does not define the term "tax" when providing that "[n]o credit may reduce the "tax" below the tentative minimum tax . . . ." Consequently, when viewing the statute as a whole, appellant argues that the plain language of the statute does not support respondent"s contention that the meaning of the term "tax" necessarily means "regular tax." In addition, appellant argues that if the Legislature had intended to limit the meaning of "tax" to "regular tax" it could have simply included a cross-reference in R&TC section 23036 to the definition of "regular tax" in R&TC section 23455, just as it cross-referenced the meaning of "tentative minimum tax" (TMT) in the same statute.[3]

Alternatively, appellant argues, the statute is ambiguous in its use of the term "tax" and in its application to taxpayers. Therefore, appellant presents legislative history which shows legislative intent to allow the use of EZ hiring credits to offset AMT liabilities. Appellant contends this legislative intent should be followed and that it should be allowed to reduce its AMT liability using available credits.

Respondent argues that no ambiguity exists in section 23036 and that the tax credits listed in R&TC section 23036, subdivision (d)(1), are not allowed to offset the AMT in this instance because

[3] Subdivision (d)(1) of R&TC section 23036 describes the term "tentative minimum tax" as it is "defined by paragraph (1) of subdivision (a) of Section 23455." (Rev. & Tax. Code, § 23036, subd. (d)(1).)

the credits may only be used to offset "tax" pursuant to the definition provided by subdivision (a) of the statute, which does not include AMT. Respondent argues that appellant incorrectly used the MIC and EZ credits to directly offset its AMT. Respondent contends that the definition of "tax" in R&TC section 23036, subdivision (a), is the appropriate definition of "tax" for use in subdivision (d)(1), and that the AMT is included in the definition of "tax" only for the purposes stated in R&TC section 23036, subdivision (b).

Respondent has interpreted the operation of subdivision (d)(1) of R&TC section 23036 as follows. Respondent contends that a taxpayer can reduce its regular tax below the TMT all the way to zero, using available MIC and EZ hiring credits. However, respondent argues that the same taxpayer cannot reduce any AMT liability using the same available credits. Respondent addresses the legislative history of the statute for the first time in its petition for rehearing briefing, contending that the Legislature knew the MIC and EZ hiring credits would not be applicable to offset AMT liabilities. In the alternative, respondent also argues that the author of Assembly Bill (AB) 57 (Stats. 1993, Ch. 879) (i.e., the bill which added the EZ hiring credits to subdivision (d)(1) of R&TC section 23036) may not have understood how to make the EZ credits applicable to the AMT.

At the oral hearing, appellant discussed the legislative history of solar energy credits contained in subdivision (d)(1) of R&TC section 23036. Appellant drew a correlation between these credits and the EZ credits, pointing out that solar energy credits could previously be used to reduce the AMT. Respondent asserts this analogy is flawed. In 1988, Senate Bill (SB) 1801 repealed R&TC section 23630, and the law therein was instead incorporated into R&TC section 23036. (Stats. 1988, Ch. 1465, §§ 17 & 29.) As a result of these statutory changes, respondent contends the solar energy credits, located in subdivision (d)(1) of R&TC section 23036, could no longer be used to reduce the AMT. SB 1801 also, however, amended the solar energy credit statutes and added a clause to R&TC section 23601.4 which specified that the solar energy credits could be applied against the "tax" and the AMT. (Stats. 1988, Ch. 1465, § 23.) This, respondent asserts, allowed the solar energy credits to be applied against the AMT because the statute for the solar energy credits explicitly allowed it, and not necessarily because the use of the credits was allowed through R&TC section 23036. Respondent further argues that the language added to the solar energy credit statute by SB 1801 suggests the Legislature

understood that the credits in subdivision (d)(1) of R&TC section 23036 could not be applied against the AMT. Respondent notes there are no similar provisions in the MIC or EZ hiring credit statutes which explicitly provide for the application of credits against the AMT.

C. *Ambiguity*

The plain meaning of statutory language ordinarily is conclusive. (*Appeal of Michael and Sonia Kishner*, 99-SBE-007, Sept. 29, 1999 (citing *United States v. Ron Pair Enters, Inc*. (1989) 489 U.S. 235, 241-242).) The objective of statutory interpretation is to ascertain and effectuate legislative intent by giving meaning to every word and phrase in the statute to accomplish a result consistent with the legislative purpose. (*Plaza Hollister Ltd. Partnership v. County of San Benito* (1999) 72 Cal.App.4th 1, 35.)

If a statute is found to be ambiguous in its terms (i.e., patent ambiguity) or effect (i.e., latent ambiguity), we may look to the legislative history to help determine the appropriate application of the statute. (*Coburn v. Sievert* (2005) 133 Cal.App.4th 1483.) Following the above discussion of the relevant statute (i.e., R&TC section 23036), we find that a plain reading of R&TC section 23036 reveals ambiguity in the use of the term "tax." The statute does not clearly express the meaning of the term "tax" for purposes of subdivision (d)(1). While respondent would have us apply the definition as set forth in subdivision (a), that section includes some types of tax, and excludes others, but does not specify where AMT falls in this definition.

In addition, the statute as interpreted by respondent produces absurd results. In *Coburn v. Sievert, supra*, the court stated that a latent ambiguity is found when a literal application of a statute would frustrate the purposes of the statute or would produce absurd consequences. (*Coburn* at p. 1495.) That decision also stated that a court should not create a latent ambiguity where none exists and, conversely, "a court should not sacrifice legislative intent or purpose by overlooking a latent ambiguity and adopting a literal construction." (*Id*. at p. 1496.)

The application of R&TC section 23036 as asserted by respondent prevents EZ hiring credits from being used to reduce a taxpayer's AMT liability while allowing the use of those credits to reduce a taxpayer's regular tax liability. For example, for a taxpayer whose regular tax is zero, and has an AMT liability equal to the full value of its TMT, the taxpayer would not be able to reduce its final tax

liability with available EZ hiring credits, while a second taxpayer with a regular tax equal to or greater than its TMT would be able to reduce its entire tax liability down to zero if it has available EZ hiring credits. This example illustrates that, when applied as interpreted by respondent, R&TC section 23036 can create widely disparate outcomes for taxpayers with EZ hiring credits based solely on whether their regular tax falls above or below their TMT value, essentially penalizing a taxpayer with available EZ hiring credits and a lower regular tax.

These two possible results indicate that a literal application of this statute does not follow a consistent course of public policy, equity, or fairness, and produces a result that may be unfair to taxpayers and not based on good policy. Consequently, this is an instance in which a literal application of the statute, as respondent applies it, produces a result that frustrates the purpose of the statute, or at least creates an absurd result. Accordingly, a review of the legislative history is necessary so we can correctly apply the statute.

D. *Legislative History*

Both parties provided legislative materials, dating from 1987 through 2004, to illustrate the history and intent behind the statutes. The essence of R&TC section 23036, subdivision (d)(1), was previously contained in R&TC section 23630. (Stats. 1988, Ch. 11, § 54 (AB 2130).) R&TC section 23630 provided an exception which allowed certain solar energy credits to reduce "taxes imposed by this part below the" TMT. The "taxes imposed by this part" there included the AMT, allowing the enumerated solar energy credits to reduce AMT liabilities. A low-income housing credit was also added to the exception provided by R&TC section 23630 in 1988 by SB 1705. (Stats. 1988, Ch. 31, § 3.)

Later that year, R&TC section 23630 was repealed and subdivision (d)(1) was added to R&TC section 23036 by SB 1801. (Stats. 1988, Ch. 1465, §§ 17 & 29.) This legislative action also split the then-existing statutory language of R&TC section 23036 into subdivisions (a) and (b). With the creation of subdivisions (a) and (b), the solar energy credits and the low-income housing credit contained in subdivision (d)(1) became available to reduce the "tax" below the TMT under subdivision (a), and could specifically reduce the AMT below the TMT under subdivision (b) for purposes of tax administration. Other credits were later added to subdivision (d)(1) and the phrasing in subdivision (a)(1) of R&TC section 23036 was changed from "tax means" to "tax includes." (Stats. 1990, Ch. 1349,

§ 16 (SB 1925).) Subsequently, with the enactments of AB 57 and SB 671 in 1993, the EZ credits and then the MIC, respectively, were added to the exceptions in subdivision (d)(1) of R&TC section 23036. (Stats. 1993, Ch. 879, § 3; Stats. 1993, Ch. 881 § 17.5.)

AB 57 added the EZ credits to the list of exceptions from the rule provided by R&TC section 23036, subdivision (d)(1). The final Senate Floor analysis, written by the author of the bill, provides in part that, "[t]his bill would permit the jobs credit and sales tax credit available to businesses located in enterprise zones… to be used in computing AMT," and "[t]he bill is intended to make the full benefits promised under the enterprise zone… concepts available whether the taxpayer is subject to regular tax or alternative minimum tax. The argument is that if a benefit is offered to a business as an inducement to locate in a zone, the operation of our 'tax break limit,' the AMT, should not thwart that objective." (Sen. Floor analysis of Assem. Bill No. 57 (1993-1994).) These excerpts from the analysis, written by the bill's author and presented in the final Senate Floor analysis, clearly show that the intent of the bill was to allow EZ credits to be used against the AMT. Furthermore, the Legislative Counsel Digest‟s summary of the bill when it was chaptered on October 6, 1993, lists the credits in the bill, including the EZ hiring credit, and states "[t]his bill would additionally allow those credits to reduce the alternative minimum tax."

Also chaptered in 1993, SB 671 added the MIC to the list of exceptions from the rule that credits cannot be used to reduce "tax" below the TMT found in R&TC section 23036, subdivision (d)(1). The final Assembly Floor analysis to SB 671 provides, in regard to the MIC, that, "[t]he credit could be claimed against both the regular tax and the alternative minimum tax, and unused credits could be carried forward for up to 8 years (10 years for „small‟ firms)." (Assem. Floor analysis of Assem. Bill No. 671 (1993-1994).) This excerpt from the final Assembly Floor analysis clearly shows an intent that the MIC could be applied against the AMT.[4] The foregoing legislative history of R&TC section 23036, subdivision (d), regarding the MIC and EZ credits, shows an intent by the Legislature that these credits could be applied to reduce a taxpayer's AMT liability. Therefore, we conclude that appellant‟s MIC and EZ hiring credits may be used to offset its AMT liabilities for the appeal years.

[4] The last Senate Committee Analysis also contained the same language.

III. Petition for Rehearing

In *Appeal of Wilson Development, Inc.*, *supra*, we determined that good cause for a new hearing may be shown where one of the following grounds exists, and the rights of the complaining party are materially affected: 1) irregularity in the proceedings before this Board by which the party was prevented from having a fair consideration of its case; 2) accident or surprise, which ordinary prudence could not have guarded against; 3) newly discovered evidence, material for the party making the petition for rehearing, which the party could not, with reasonable diligence, have discovered and produced prior to our decision of the appeal; 4) insufficiency of the evidence to justify the decision, or the decision is against law; or 5) error in law. The arguments presented in the briefing for this petition for rehearing involve whether this Board"s decision is contrary to law, whether there was accident or surprise at the hearing, whether there is newly discovered evidence, and whether the importance of the legal principle involved warrants a rehearing.

A. *Whether this Board's Decision is Contrary to Law*

Respondent contends in its petition for rehearing that the statute is not ambiguous, and that this Board"s interpretation of the statute is erroneous as a matter of law. In addition, respondent contends that even if the statute is deemed ambiguous, a full look at the appropriate legislative history for AB 57 and SB 1801 will show that this Board"s decision is contrary to the legislative intent.

Appellant contends that this Board"s decision is not contrary to law, restating its argument from the hearing and its briefs asserting that a plain reading of the statute supports this Board"s decision. Appellant argues in the alternative that there is latent ambiguity in the statute because the result supported by respondent frustrates the purpose of the statute and creates an absurd result, and that once ambiguity is found, whether patent or latent, this Board may look to the legislative history which clearly shows that this Board"s decision was proper.

The question of whether the decision is contrary to law (or against law) is not one which involves a weighing of the evidence, but instead requires a finding that the decision is "unsupported by any substantial evidence." (*Sanchez-Corea v. Bank of Am.* (1985) 38 Cal. 3d 892, 906.) This requires a review of the decision to "indulge in all legitimate and reasonable inferences" to uphold the decision. (*Id*. at p. 907.) The question before us with respect to the petition for rehearing is not over the quality or

nature of the reasoning behind our decision, but whether our decision can or cannot be valid according to the law. Based on the discussion above, and under the standard of review provided for in *Sanchez-Corea, supra*, and *Appeal of Wilson Development, Inc., supra*, we find that our decision is not contrary to law and a rehearing is therefore not warranted on this basis.

B. *Accident or Surprise*

Respondent asserts that this Board"s finding that R&TC section 23036 is ambiguous, and thereby opening the analysis to a review of the legislative history, was not a legal theory that either party asserted or briefed. Respondent also contends that it was not given time to adequately rebut appellant"s arguments made only at the hearing, including arguments regarding AB 2130 and provisions in place prior to SB 1801. These contentions suggest that the hearing was subject to surprise presentations of evidence and arguments for which respondent could not have guarded against with ordinary prudence.

Appellant contends that there was no surprise at the hearing for which respondent could not have been prepared with ordinary prudence, since it should have reasonably been aware that the legislative history of R&TC section 23036 was going to be discussed. Appellant contends that the legislative history was discussed in detail prior to the hearing. Appellant contends that respondent chose to argue only that the law was clear, and chose not to argue legislative history. Appellant notes that at the hearing, while discussing the legislative history of the bills that preceded and formed the relevant statute at issue, a Board Member asked respondent if it had an opportunity to look into the legislative history and offered respondent more time to review and discuss the legislative history, but respondent declined the opportunity to take more time to review the material.

In the *Appeal of Wilson Development, Inc., supra,* we adopted the aforementioned grounds for granting a rehearing from Code of Civil Procedure (CCP) section 657, which sets forth the grounds for a new trial in a California trial court. Interpreting CCP section 657, the Supreme Court determined that the terms "accident" and "surprise" have substantially the same meaning, and they denote some condition or situation in which a party is unexpectedly placed, to his injury, without any negligence on his part. (*Kauffman v. De Mutiis* (1948) 31 Cal.2d 429, 432.) Additionally, a new hearing is appropriate only if the accident or surprise materially affected the substantial rights of the party seeking the rehearing. (Code Civ. Proc., § 657; *Appeal of Wilson Development, supra*.)

The arguments in this appeal centered on the interpretation of R&TC section 23036. Both parties argued during initial briefing that the plain language of the statute reached two very different results, suggesting that there may be at least the perception of some ambiguity in the statute. While respondent acknowledged that appellant was discussing legislative history at the inception of the briefing, three and a half years prior to the hearing, respondent chose not to discuss it. Appellant provided expansive documents concerning legislative history for the first time at the hearing, and respondent was given an opportunity by this Board to address the legislative history or to state that it was not prepared to adequately argue the issue and needed more time. Respondent chose not to request more time.

A party cannot later declare it was surprised by an argument and unable to adequately address it when it has willingly chosen not to fully address that same argument throughout the appeal process and declined the opportunity we extended during the oral hearing to request more time to address the issue prior to our decision. We conclude, therefore, that the discussion regarding legislative history at the hearing did not place respondent in an unexpected situation to its injury, without any negligence on its part, as required to validate a rehearing under this basis.

C. *Newly Discovered Evidence*

Respondent states that we requested further information on February 17, 2009, but contends that it could not procure the evidence from its archives until after the hearing on February 25, 2009. This evidence includes: memoranda regarding the "Tentative Minimum Tax Limitation on Enterprise Zone tax credits," respondent"s bill analysis for AB 57, and personal notes regarding respondent"s internal and external communications. Respondent contends that these documents constitute newly discovered evidence regarding the legislative history of AB 57 which it could not produce in time for the hearing.

Appellant contends that respondent has not shown that its allegedly newly discovered evidence is both material to respondent"s position and could not have reasonably been discovered and produced prior to the hearing. Appellant notes that one of respondent"s exhibits on petition (respondent's bill analysis) was provided in the original briefing, and that the other two documents (the memoranda and personal notes) are not material to respondent"s position because they are internal

documents that do not constitute legislative history and therefore cannot be used to interpret R&TC section 23036.

We noted in *Appeal of Wilson Development, Inc., supra*, that we prefer to have a record of all the relevant evidence before us when we make our decision. However, when evidence could have been, but was not, submitted prior to the hearing, the need to efficiently resolve matters usually controls. If a party attempts to submit evidence after a decision, they must show that the proffered evidence could not have been produced prior to the hearing in order for us to consider the evidence when deciding whether or not to grant the petition for rehearing. "Moreover, the construction of what appears to be „new" evidence from information which existed prior to the hearing does not constitute „newly discovered" evidence which a party could not have produced prior to a decision of the appeal." (*Appeal of Wilson Development, Inc.*, *supra.*)

We requested additional information less than two weeks prior to the hearing, asking for the type of documents which respondent provided with its petition for rehearing. Regardless, as discussed above, respondent was on notice, at the beginning of the appeal, that the issue of legislative history had been raised by appellant. Respondent had ample opportunity to address this issue, and discover and produce all relevant information. The fact that it now wishes it had more fully explored the issue does not provide a basis for a rehearing.

One of the documents (respondent"s AB 57 bill analysis) is clearly not newly discovered evidence since it was previously provided during the appeal.[5] Respondent should have produced the other two documents prior to the hearing as the documents were located in respondent"s archives. Even if these documents were not reasonably available, the documents reflect respondent"s interpretation of AB 57 and therefore would not be considered a part of the legislative history since they do not reflect the "collegial view of the legislature as a whole." (*Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.* (2005) 133 Cal.App.4th 26, 30.) As such, while instructive as to respondent"s interpretation of AB 57, the documents do not demonstrate the legislative intent behind the amendments to R&TC section 23036.

[5] Respondent"s AB 57 bill analysis exhibit was provided as part of respondent"s response to the Board Member inquiry prior to the hearing.

D. *Whether the importance of the legal principle involved warrants a rehearing*

Respondent contends in its petition that a rehearing should be allowed because the legal principle involved is highly important and our decision may establish a precedent which would negatively affect a large number of taxpayers.[6] Respondent contends that this Board's decision will alter the definition of "tax" for corporations from how it has been interpreted for more than twenty years. Respondent requests a rehearing on the basis that the legal principle involved is of great importance and that potential injustice may result for other taxpayers who rely upon this decision.

Respondent states this Board should allow a rehearing so that we may base our decision on a more complete record of the legislative history. Respondent cites to a section of *In re Jessup, infra*, noting that it was not referenced in *Appeal of Wilson Development, Inc., supra*, which provides for a rehearing to review a decision for accuracy, explaining:

> The effect of this is, no doubt, to cause some inconvenience and delay to the parties interested, but this inconvenience is less to be dreaded than the greater inconvenience of making a bad precedent, or the injustice of allowing a decision to stand which we believe to be wrong.

(*In re Jessup* (1889) 81 Cal. 408, at 472.)

While we chose to incorporate part of *In re Jessup, supra*, into our opinion in *Appeal of Wilson Development, Inc., supra*, we did not incorporate the passage referenced by respondent above and instead used the following language from that case: "[w]hen the evidence could have been submitted before our decision, but was not, the goal of reaching the correct result must usually fall to the need to efficiently resolve matters before this [B]oard." (*Appeal of Wilson Development, Inc., supra*.)

In addition to the five reasons enumerated above for granting a petition for rehearing, we provided another reason in *Appeal of Wilson Development, Inc., supra*, for granting such a petition by quoting the California Supreme Court in *In re Jessup, supra*, as stating that:

> [i]f we are satisfied, from the petition, that, owing to any mistake of law or misunderstanding of facts, our decision has done an injustice in the particular case, or if the principle involved is important, and the decision will make a precedent establishing a rule of property or of right, and it is seriously doubted whether we have correctly decided, we grant a rehearing.

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[6] For example, respondent states that taxpayers may lose potential tax credits for years in which the statute of limitations for a claim for refund has already passed, and that taxpayers assigning EZ credits as eligible credits to affiliated corporations may be exposing themselves to additional liability.

(*In re Jessup supra*, 471-472.) This partially mirrors reason number four, listed above, for granting a rehearing by saying that a rehearing is warranted when there is injustice based on a mistake of law or misunderstanding of facts. This also provides for an additional basis for rehearing, based on three factors: 1) the principle involved is important, 2) the decision will make a precedent establishing a rule of property or of right, and 3) there is serious doubt as to whether we have correctly decided the appeal.

While the principle involved is important and this formal opinion will constitute precedent for the correct application of the law, the analysis and discussion contained within this opinion show that there is no serious doubt as to whether we have reached the correct resolution of this matter. Therefore, a rehearing is not warranted based on the legal principles involved.

IV. Conclusion

For the reasons set forth in this opinion, we conclude that appellant is entitled to apply its MIC and EZ hiring credits to reduce its AMT liabilities for the 1994, 1995, 1999, 2000, and 2001 appeal years. We further conclude that respondent has failed to demonstrate proper grounds for a rehearing. Respondent's petition for rehearing is therefore denied.

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ORDER

Therefore, it is hereby ordered that the petition be denied and that our order of February 25, 2009, be, and the same is hereby, affirmed.

Done at Sacramento, California, this 17th day of November, 2010, by the State Board of Equalization, with Board Members Ms. Yee, Mr. Horton, Ms. Alby*, Ms. Steel, and Ms. Mandel** present. Ms. Yee abstained.

_____, Chairwoman

Barbara Alby*, Member

Michelle Steel, Member

Jerome Horton, Member

_____, Member

* Acting Member Second District

**For John Chiang per Government Code section 7.9.