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3 **BOARD OF EQUALIZATION**  
4 **STATE OF CALIFORNIA**  
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6 In the Matter of the Appeal of: ) **FORMAL OPINION**  
7 ) **2010-SBE-001**  
8 **NASSCO HOLDINGS, INC.** ) Case No. 317434  
9 )  
10 \_\_\_\_\_ )

11 Representing the Parties:

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

14 For Respondent: William Gardner, Tax Counsel III

15 Counsel for the Board of Equalization: John O. Johnson, Tax Counsel  
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17 ORDER DENYING PETITION FOR REHEARING

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

Appeal of NASSCO Holdings, Inc.

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

6 I. Factual and Procedural Background

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

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

19 II. Law and Analysis

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

22 A. *Alternative Minimum Tax Legislation*

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

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

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

8 Subdivision (c)(1) of R&TC section 23455 modifies the IRC section 55(c) definition of  
9 “regular tax” and subdivisions (a) and (b) of R&TC section 23036 each provide definitions of the term  
10 “tax.” Specifically, subdivision (a) of R&TC section 23036 defines the term “tax” without any  
11 reference to the AMT provided by Chapter 2.5 of Part 11.<sup>2</sup> Subdivision (a) provides that:

12 (1) The term “tax” includes any of the following:

13 (A) The tax imposed under Chapter 2 (commencing with Section 23101).

14 (B) The tax imposed under Chapter 3 (commencing with Section 23501).

15 (C) The tax on unrelated business taxable income, imposed under Section 23731.

16 (D) The tax on S corporations imposed under Section 23802.

17 (2) The term “tax” does not include any amount imposed under paragraph (1) of  
18 subdivision (e) of Section 24667 or paragraph (2) of subdivision (f) of Section 24667.

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

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

### 26 B. *Parties’ Contentions*

27 Appellant contends the term “tax” in R&TC section 23036, subdivision (d)(1), includes  
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<sup>1</sup> 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).)

<sup>2</sup> 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.

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

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

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

25 Respondent argues that no ambiguity exists in section 23036 and that the tax credits listed  
26 in R&TC section 23036, subdivision (d)(1), are not allowed to offset the AMT in this instance because  
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<sup>3</sup> 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).)

1 the credits may only be used to offset “tax” pursuant to the definition provided by subdivision (a) of the  
2 statute, which does not include AMT. Respondent argues that appellant incorrectly used the MIC and  
3 EZ credits to directly offset its AMT. Respondent contends that the definition of “tax” in R&TC section  
4 23036, subdivision (a), is the appropriate definition of “tax” for use in subdivision (d)(1), and that the  
5 AMT is included in the definition of “tax” only for the purposes stated in R&TC section 23036,  
6 subdivision (b).

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

16 At the oral hearing, appellant discussed the legislative history of solar energy credits  
17 contained in subdivision (d)(1) of R&TC section 23036. Appellant drew a correlation between these  
18 credits and the EZ credits, pointing out that solar energy credits could previously be used to reduce the  
19 AMT. Respondent asserts this analogy is flawed. In 1988, Senate Bill (SB) 1801 repealed R&TC  
20 section 23630, and the law therein was instead incorporated into R&TC section 23036. (Stats. 1988, Ch.  
21 1465, §§ 17 & 29.) As a result of these statutory changes, respondent contends the solar energy credits,  
22 located in subdivision (d)(1) of R&TC section 23036, could no longer be used to reduce the AMT. SB  
23 1801 also, however, amended the solar energy credit statutes and added a clause to R&TC section  
24 23601.4 which specified that the solar energy credits could be applied against the “tax” and the AMT.  
25 (Stats. 1988, Ch. 1465, § 23.) This, respondent asserts, allowed the solar energy credits to be applied  
26 against the AMT because the statute for the solar energy credits explicitly allowed it, and not necessarily  
27 because the use of the credits was allowed through R&TC section 23036. Respondent further argues  
28 that the language added to the solar energy credit statute by SB 1801 suggests the Legislature

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

4 C. *Ambiguity*

5 The plain meaning of statutory language ordinarily is conclusive. (*Appeal of Michael*  
6 *and Sonia Kishner*, 99-SBE-007, Sept. 29, 1999 (citing *United States v. Ron Pair Enters, Inc.* (1989)  
7 489 U.S. 235, 241-242).) The objective of statutory interpretation is to ascertain and effectuate  
8 legislative intent by giving meaning to every word and phrase in the statute to accomplish a result  
9 consistent with the legislative purpose. (*Plaza Hollister Ltd. Partnership v. County of San Benito* (1999)  
10 72 Cal.App.4th 1, 35.)

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

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

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

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

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

13           D.     *Legislative History*

14           Both parties provided legislative materials, dating from 1987 through 2004, to illustrate  
15 the history and intent behind the statutes. The essence of R&TC section 23036, subdivision (d)(1), was  
16 previously contained in R&TC section 23630. (Stats. 1988, Ch. 11, § 54 (AB 2130).) R&TC section  
17 23630 provided an exception which allowed certain solar energy credits to reduce “taxes imposed by  
18 this part below the” TMT. The “taxes imposed by this part” there included the AMT, allowing the  
19 enumerated solar energy credits to reduce AMT liabilities. A low-income housing credit was also added  
20 to the exception provided by R&TC section 23630 in 1988 by SB 1705. (Stats. 1988, Ch. 31, § 3.)

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

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

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

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

27 \_\_\_\_\_  
28 <sup>4</sup> The last Senate Committee Analysis also contained the same language.

1 III. Petition for Rehearing

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

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

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

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

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

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

5 B. *Accident or Surprise*

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

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

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

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

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

16           C.     *Newly Discovered Evidence*

17           Respondent states that we requested further information on February 17, 2009, but  
18 contends that it could not procure the evidence from its archives until after the hearing on February 25,  
19 2009. This evidence includes: memoranda regarding the “Tentative Minimum Tax Limitation on  
20 Enterprise Zone tax credits,” respondent’s bill analysis for AB 57, and personal notes regarding  
21 respondent’s internal and external communications. Respondent contends that these documents  
22 constitute newly discovered evidence regarding the legislative history of AB 57 which it could not  
23 produce in time for the hearing.

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

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

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

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

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

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<sup>5</sup> Respondent’s AB 57 bill analysis exhibit was provided as part of respondent’s response to the Board Member inquiry prior to the hearing.

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

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

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

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

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

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

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

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

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<sup>6</sup> 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.

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

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

11 IV.    Conclusion

12           For the reasons set forth in this opinion, we conclude that appellant is entitled to apply its  
13 MIC and EZ hiring credits to reduce its AMT liabilities for the 1994, 1995, 1999, 2000, and 2001 appeal  
14 years. We further conclude that respondent has failed to demonstrate proper grounds for a rehearing.  
15 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.