

PUBLICATION

Spotlight on SALT: California Appeals Court Reaffirms Its Gillette Decision and FTB Issues Warning as to Gillette Reliance

October 9, 2012

On July 24, 2012, a California Court of Appeals in *The Gillette Company v. Franchise Tax Board* held that Article III of the Multistate Tax Compact (Compact), enacted by California in 1974, provides corporate taxpayers with an income apportionment election, despite changes to California's tax statutes arguably preventing such elections that have occurred since 1993 and 2011. For more background and analysis of the *Gillette* decisions and its ramifications for corporate taxpayers, California, and other states, see our August 7, 2012 [Tax Alert](#).

After the *Gillette* decision was issued, the California Franchise Tax Board moved for rehearing. On October 2, 2012, the Court of Appeal reaffirmed its July 24 decision.

What Should Corporate Taxpayers Be Doing?

Notwithstanding the California uncertainties that we noted in our August 7 [Tax Alert](#) and the likelihood that the Franchise Tax Board will try to appeal the Court of Appeals' decision to the California Supreme Court, corporate taxpayers with California income and franchise tax filing obligations should review whether the *Gillette* decision and the "Compact election" presents refund opportunities for them. For example, some taxpayers may benefit from an equally-weighted three factor income apportionment formula, as opposed to California's statutory formula with a double-weighted sales factor. In addition, there may be advantages for service providers and other taxpayers earning income from intangibles under the Compact election compared to California's recent move toward market-based sourcing of gross receipts to the sales factor.

Protective refund claims should certainly be considered. However, taxpayers should proceed cautiously if contemplating making a Compact election on an original tax return. On October 5, 2012, the Franchise Tax Board issued FTB Notice 2012-01, providing guidance on the protective refund claim procedure. The Franchise Tax Board announced that it will impose the 20 percent Large Corporate Underpayment Penalty to 2011 returns making the Compact election (if *Gillette* is subsequently reversed or vacated) unless the FTB does not appeal the decision and the Court of Appeals' decision becomes final on November 1, 2012.

There are 19 member states of the Multistate Tax Commission (MTC) who have enacted the Compact. Although *Gillette* is not precedent in any of these states, it is persuasive authority. As a result, some of the other MTC states may present similar Compact elections and protective refund claims could be in order for corporate taxpayers depending on their facts and circumstances. For example, similar litigation is pending in Michigan and Oregon, and the Oregon Department of Revenue recently issued guidance on how protective refund claims should be prepared and filed in light of the pending controversy.

If you would like to discuss the *Gillette* decision or other income tax issues confronting multistate businesses, please contact one of the attorneys in the Firm's Tax Department.