

Multistate Tax
EXTERNAL ALERT

California Court of Appeal Vacates Earlier *Gillette* Decision

August 10, 2012

Overview

On August 9, 2012, the California Court of Appeal for the First District vacated, on its own motion, its July 24, 2012 opinion and ordered a rehearing in *The Gillette Company, et al., v. California Franchise Tax Board* (“*Gillette*”).¹ While we do not know the reason for the rehearing because this action is upon the Court’s own motion, it is possibly a response to one or both of the recent petitions from the parties in the case. On August 8, 2012, the Franchise Tax Board filed a Petition for Rehearing to resolve the following issues:

- 1) Whether the Court interpreted the meaning of the phrases ‘[n]otwithstanding [any other provision of law],’ and ‘shall,’ in Section 25128 of the Revenue and Taxation Code, in a manner that conflicts with established principles of statutory construction; and alternatively 2) If the Court interpreted the meaning of the language in Section 25128 consistent with well established precedent, did the Court determine that section 25128 is unconstitutional?²

Also on August 8, 2012, the taxpayers filed a Request to Modify the opinion for a “non-substantive modification” to clarify the Court’s statement in the July 24, 2012 opinion that any legislation repealing the Multistate Tax Compact (“MTC”) codified in California Revenue and Taxation Code Section (“Section”) 38006 “must be prospective in nature.”³ Specifically, taxpayers have requested language stating that, for the tax years at issue, California had not repealed Section 38006 and withdrawn from the MTC. Further, taxpayers requested that any reference to Senate Bill 1015, enacted on June 28, 2012, that attempts to repeal the MTC be accompanied with a statement that the Court expresses no opinion on the validity of S.B. 1015.⁴

Because the rehearing was ordered on the court’s own motion without granting either party’s petition and with no indication of the issues to be resolved, the uncertainty for taxpayers in this area of California law is, at least temporarily, increased.

Contacts

We will continue to follow the developments of this litigation, and will provide further updates as appropriate. In the meantime, if you have questions regarding the *Gillette* decision, California’s

¹ *The Gillette Company, et. al. v. California Franchise Tax Board*, No. A130803 (Cal. Ct. App. Jul. 24, 2012), available at <http://www.courts.ca.gov/opinions/documents/A130803.PDF>. For more on the Original Court of Appeal decision, please also see our prior Multistate Tax Alerts “California Court of Appeal Upholds Taxpayer Right to Make Three Factor MTC Election”, dated July 27, 2012, available at:

http://www.deloitte.com/view/en_US/us/Services/tax/Multistate-Tax/567040ac44bd8310VgnVCM2000001b56f00aRCRD.htm#

and “California Repeals the Multistate Tax Compact Election”, dated June 29, 2012, available at:

http://www.deloitte.com/view/en_US/us/Services/tax/Multistate-Tax/f59741d845d48310VgnVCM2000001b56f00aRCRD.htm#.

² Respondent Franchise Tax Board’s Petition for Rehearing, *The Gillette Company, et. al. v. California Franchise Tax Board*, No. A130803 (Cal. Ct. App. Aug. 8, 2012).

³ Appellants’ Request for Non-Substantive Modification of Opinion, *The Gillette Company, et. al. v. California Franchise Tax Board*, No. A130803 (Cal. Ct. App. Aug. 8, 2012).

⁴ On August 9, 2012, newly amended legislation surfaced (Senate Bill 911) that would attempt to compel companies to elect into a single sales factor apportionment formula by prohibiting California state agencies from entering into any contracts with a taxpayer that uses the standard three-factor apportionment formula with a double weighted sales factor.. It purports to also take aim at taxpayers that litigate in California to use an equally weighted three-factor formula. Senate Bill 911 appears to only require a simple majority vote to pass.

attempted repeal of the Compact, or pertaining to other California tax matters, please contact any of the following Deloitte Tax professionals or your Lead Multistate Professional.

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