

## California Supreme Court Grants Review in *Gillette*

January 22, 2013

### Overview

The California Supreme court recently granted the Franchise Tax Board's ("FTB") petition for review<sup>1</sup> of the California Court of Appeal's decision in *The Gillette Company, et al., v. California Franchise Tax Board* ("*Gillette*").<sup>2</sup> In that decision, the California Court of Appeal upheld the right of the taxpayers to elect to allocate and apportion income to California using the Multistate Tax Compact ("Compact"), as statutorily adopted in California Revenue and Taxation Code ("CRTC") Section 38006. The Compact election allowed the taxpayers to apply the Compact's equally-weighted, three-factor apportionment formula (property, payroll and sales), eliminating the double weighting of the sales factor applicable to most taxpayers.

In this Tax Alert we summarize the *Gillette* decision and provide some taxpayer considerations.

### Summary of *Gillette*

In upholding the taxpayers' right to make the Compact election, the Court of Appeal in *Gillette* ruled that: (1) the election was a valid enforceable interstate compact that cannot be unilaterally altered or amended and supersedes other statutes, (2) CRTC Section 25128 (which generally requires double-weighting of the sales factor in the apportionment formula) violated the "Contracts Clause" under both the United States and California Constitutions, and (3) CRTC Section 25128 violated the "Reenactment Clause" of the California Constitution.

In the FTB's briefs filed with the California Supreme Court as part of the petition for review of the case, the FTB indicated that "the decision affects tens of thousands California businesses, plus an untold number of businesses in the remaining 19 member states of the Compact" and that "the FTB estimates that the decision might require up to \$750 million in tax refunds in California."

### Considerations

Pending the ultimate resolution of this case, taxpayers may want to consider electing to apply the Compact, both prospectively and retroactively, if the equally-weighted apportionment formula and other provisions of the Compact<sup>3</sup> would be beneficial. In addition, taxpayers should consult the FTB's Notice 2012-01 and Tax News Flash (both issued on October 15, 2012), which provide guidance regarding refund claim procedures and the potential application of the Large Corporate Underpayment Penalty pursuant to CRTC Section 19138.<sup>4</sup>

<sup>1</sup> *The Gillette Company, et al. v. California Franchise Tax Board*, 2013 Cal. LEXIS 282 (Jan. 16, 2013), petition for review granted.

<sup>2</sup> *The Gillette Company, et al. v. California Franchise Tax Board*, 209 Cal. App. 4th 938 (Oct. 2, 2012). For more in-depth summaries of the *Gillette* decision, please see our External Tax Alerts dated October 4, 2012, accessible at: [http://www.deloitte.com/assets/Dcom-UnitedStates/Local%20Assets/Documents/Tax/us\\_tax\\_multistate\\_CA\\_Alert\\_10-04-2012.pdf](http://www.deloitte.com/assets/Dcom-UnitedStates/Local%20Assets/Documents/Tax/us_tax_multistate_CA_Alert_10-04-2012.pdf); and July 27, 2012, accessible at: [http://www.deloitte.com/assets/Dcom-UnitedStates/Local%20Assets/Documents/us\\_tax\\_multistate\\_CA\\_MTC\\_Alert\\_7-26-2012.pdf](http://www.deloitte.com/assets/Dcom-UnitedStates/Local%20Assets/Documents/us_tax_multistate_CA_MTC_Alert_7-26-2012.pdf).

<sup>3</sup> It is important to note that taxpayers making the election adopt the full Compact allocation and apportionment regime in place of California's standard regime and thus we recommend that taxpayers carefully consider all the potential implications before making the election.

<sup>4</sup> For a summary of FTB Notice 1012-01 and the FTB Tax News Flash, please see our External Tax Alert dated October 8, 2012, accessible at:

[http://www.deloitte.com/assets/Dcom-UnitedStates/Local%20Assets/Documents/Tax/us\\_tax\\_multistate\\_CA\\_10\\_08\\_12.pdf](http://www.deloitte.com/assets/Dcom-UnitedStates/Local%20Assets/Documents/Tax/us_tax_multistate_CA_10_08_12.pdf).

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