

## U.S. Supreme Court denies petition for review of *Gillette* California Compact appeal

### Overview

On October 11, 2016, the United States Supreme Court (“the Court”) denied Taxpayers’ petition for writ of certiorari in *The Gillette Company, et. al. v. Franchise Tax Board*.<sup>1</sup> This Tax Alert summarizes the recent developments in the *Gillette* California case and provides some taxpayer considerations.

### Background

The taxpayers in *Gillette*, pursuant to the Multistate Tax Compact (Compact) contained in California Revenue & Taxation Code (CRTC) Section 38006, made an election (Compact Election) to apply the Compact’s apportionment formula. On December 31, 2015, the California Supreme Court, in reversing the decision of the California Court of Appeal, addressed whether taxpayers could “elect between the new statutory formula and that contained in the Compact” and concluded that “the Legislature may properly preclude a taxpayer from relying on the Compact’s election provision.” The Taxpayers sought to use the equally weighted, three-factor apportionment formula (property, payroll, and sales) available under the Compact in lieu of the three-factor formula with double-weighted sales provided in CRTC Section 25128. Analyzing the four-factor test derived from *Northeast Bancorp v. Board of Governors*, FRS, 472 U.S. 159 (1985), the California Supreme Court concluded that the Multistate Tax Compact was not a binding contract among its members. Thus, the California Legislature had the unilateral authority to eliminate the Compact’s election provision and had done so in the context of the amendment to Section 25128 requiring the use of the double-weighted sales factor including the amendatory language “[n]otwithstanding Section 38006.”<sup>2</sup>

On May 27, 2016, Taxpayers filed a petition for writ of certiorari with the Court requesting that the Court grant review of the California Supreme Court’s December 31, 2015 decision in this case. In its petition, Taxpayers presented the question – whether the Multistate Tax Compact has the status of a contract that binds its signatory States.<sup>3</sup> Taxpayers’ petition for review was rejected by the Court on October 11.<sup>4</sup>

### Considerations

Unless the Court grants a petition for rehearing,<sup>5</sup> the *Gillette* California Compact litigation has ended and the weighting of the apportionment formula pursuant to the Compact Election has been resolved for California tax purposes in favor of the state.<sup>6</sup> It is anticipated that within the coming months the Franchise Tax Board will issue

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<sup>1</sup> *The Gillette Company, et. al. v. California Franchise Tax Board*, Docket No. 15-1442, available [here](#).

<sup>2</sup> California Supreme Court Case No. S206587. The California Supreme Court’s decision is discussed in more detail in our Multistate Tax Alert, dated January 6, 2016, available [here](#).

<sup>3</sup> *Gillette v. FTB*, Petition for Writ of Certiorari.

<sup>4</sup> U.S. Supreme Court Order List, p. 9 (Oct. 11, 2016), available [here](#).

<sup>5</sup> See U.S. Supreme Court Rules, Rule 44.2, available [here](#). Generally, a petition for rehearing of the Court’s order denying a petition for writ of certiorari must be filed within twenty-five days from the date of the order and the time to file such petition will not be extended. The grounds upon which a petition for rehearing is filed is limited to “intervening circumstances of a substantial or controlling effect” or “other substantial grounds not previously presented.”

<sup>6</sup> Although the California Supreme Court’s decision could be read to address the Compact Election in its entirety, the issue involved in the case dealt only with taxpayers seeking to make the Compact Election for purposes of applying the equally weighted, three-factor apportionment formula. Some companies have made or considered making the Compact Election for other, non-factor weighting applications of the Compact’s allocation and apportionment provisions such as the definition of “gross receipts,” allocation of certain nonbusiness gains and losses, and others. Such taxpayers may need to reconsider, in consultation with their qualified tax advisers, the viability of such positions given the broad references to the Compact in the decision.

## External Multistate Tax Alert

guidance outlining the procedures for resolving pending cases impacted by the California Supreme Court's December 31, 2015 decision.

Although the *Gillette* Compact litigation may be over in California, taxpayer litigation challenging the constitutionality of the Michigan legislature's enactment of Public Act 282 of 2014, retroactively rescinding Michigan's membership in the MTC effective January 1, 2008, continues.<sup>7</sup> On September 13, 2016, the US Supreme Court granted the taxpayers an extension until November 21, 2016 to file their petition for review.<sup>8</sup>

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<sup>7</sup> *Gillette Commercial Operations North America and Subsidiaries, et al., v. Michigan Department of Revenue*, Docket No. 16A263, available [here](#). On June 24, 2016, the Michigan Supreme Court denied the taxpayers' application for leave to appeal the Michigan Court of Appeals' September 29, 2015 decision that upheld the lower court's decision that the enactment of Public Act 282 of 2014 (PA 282) retroactively rescinded Michigan's membership in the Multistate Tax Compact effective January 1, 2008. The Court of Appeals ruled that the enactment of PA 282 did not violate the state or federal Contract Clause, did not violate the state or federal Due Process Clause, did not violate the federal Commerce Clause, and did not violate any procedural and substantive provisions of the Michigan Constitution. The Michigan Court of Appeals decision is discussed in our Multistate Tax Alert, dated October 21, 2015, available [here](#).

<sup>8</sup> *Gillette v. Michigan Department of Revenue*, Docket No. 16A263, available [here](#).

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