

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION FOUR

THE GILLETTE COMPANY & SUBSIDIARIES,
Plaintiffs and Appellants,

Case No. A130803

v.

CALIFORNIA FRANCHISE TAX BOARD, AN AGENCY
OF THE STATE OF CALIFORNIA,
Defendant and Respondent.

San Francisco County Superior Court, Case No. CGC-10-495911
[Consolidated Case Nos. CGC-10-495912; CGC-10-495916; CGC-
10-496437; CGC-10-496438; CGC-10-499083]
Honorable Richard A. Kramer, Judge

**RESPONDENT FRANCHISE TAX BOARD'S
PETITION FOR REHEARING**

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Case No. A130803

PETITION FOR REHEARING

TO THE HONORABLE IGNAZIO J. RUVOLO, PRESIDING JUSTICE,
AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE
CALIFORNIA COURT OF APPEAL, FIRST APPELLATE DISTRICT,
DIVISION FOUR:

Respondent Franchise Tax Board (FTB) respectfully petitions this Court for a rehearing of the Court's July 24, 2012 decision reversing the judgment of the trial court. (Cal. Rules of Court, rule 8.268.) Rehearing is necessary to address two issues critical to providing guidance to trial courts and parties in similar circumstances. Those issues are: 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,¹ in a manner that conflicts with established principles of

¹ Unless otherwise indicated, all statutory references are to the Revenue and Taxation Code.

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?

The briefs filed in this case extensively discuss the question of whether appellant Taxpayers are entitled to elect to determine their business income apportioned to California using the equally weighted three-factor apportionment formula contained in section 38006, even though the Legislature amended section 25128 in 1993 to specifically provide “[n]otwithstanding section 38006,” taxpayers “shall” use a double-weighted sales factor apportionment formula. The Court held that this language was ineffective to accomplish the Legislature’s intent. Instead, the Court found that California is bound by the apportionment election provision of the Multistate Tax Compact (Compact) unless and until California withdraws from the Compact by enacting a statute that repeals section 38006 because the Compact is a valid and enforceable interstate compact. The Court further ruled that the Compact supersedes section 25128.

However, the decision does not address the constitutional validity, or practical utility, of section 25128, if any, in light of the Court’s ruling. The decision does not state whether the Court’s determination that section 25128 failed to mandate a double-weighted apportionment formula is based on principles of statutory construction, or because it determined that the 1993 amendment to section 25128 unconstitutionally violates the rules against impairment of contracts or the legislative reenactment doctrine because it attempts to override the Compact. This results in confusion for the parties (and any reviewing court) as to the basis for the court’s decision and will generate confusion in the law as to the meaning of this significant case of first impression.

LEGAL DISCUSSION

THE COURT'S DECISION DOES NOT DETERMINE WHETHER SECTION 25128 PERMITS TAXPAYERS TO ELECT TO USE THE COMPACT OR WHETHER AMENDED SECTION 25128 IS UNCONSTITUTIONAL AND THEREFORE INVALID BECAUSE IT PROHIBITS SUCH AN ELECTION

Although the decision concludes that the Compact supersedes section 25128, it does not state whether the language of section 25128 mandated the exclusive use of the double-weighted sales apportionment formula pursuant to established rules of statutory construction. The Court acknowledges that the Legislature amended section 25128 in 1993 to double-weight to the sales factor and specified that the new formula was mandatory. (Slip Opinion p. 7.) However, the Court then held that amended section 25128 did not have that effect as the Compact supersedes section 25128. This holding suggests or implicitly determines that section 25128 should be statutorily interpreted as an override of the Compact's equally weighted three-factor apportionment formula and as such, the statute is unconstitutional and invalid. The Court's decision does not provide this crucial statutory construction determination. Without specifying the reason for the statute's invalidity, lower courts will be left to wonder whether section 25128 is valid, and if not, why not. Moreover, the to extent section 25128 is valid, the inevitable question that emerges is how is the statute to be applied in the future in light of this Court's ruling.

The decision states a "*construction* of section 25128 that overrides and disables California's obligation under the Compact to afford taxpayers the option of apportioning income under the UDITPA formula would be unconstitutional, violative of the prohibition against impairing contracts." (Opinion p. 20. Emphasis added.) This conclusion sidesteps the question of what the Court has determined to be the actual and proper construction of

the language of section 25128. As it currently reads, the decision suggests that the Court's "construction" of section 25128 conflicts with established precedent about the meaning of the plain language contained in section 25128. (*Klasjic v. Castaic Lake Water Agency* (2004) 121 Cal.App.4th 5, 13 [the statutory phrase "notwithstanding any other law" has been called a "term of art" that declares the legislative intent to override all contrary law]; *In re Luis B.* (2006) 142 Cal.App.4th 1117, 1123 ["use of the mandatory language 'shall' indicates a legislative intent to impose a mandatory duty; no discretion is granted"].) Without further explanation of the Court's reasoning, it is not clear whether the Court has determined that the 1993 amendment to section 25128 is being declared unconstitutional or whether the court has reconciled the provisions of amended section 25128 with those of section 38006.

These distinctions are significant because an absence of explanation creates uncertainty as to the proper interpretation of numerous other California statutes that contain similar "notwithstanding" language. The decision creates further uncertainty for taxpayers who are required to file returns and the FTB which must enforce the tax laws because it is unclear how section 25128 is to be interpreted and applied consistent with this Court's ruling in the future. Because the decision does not explicitly hold that amended section 25128 is unconstitutional, the statute remains on the books and must be enforced by the FTB pursuant to Article III, section 3.5 of the California Constitution, which provides as follows:

An administrative agency, including an administrative agency created by the Constitution or an initiative statute, has no power:

(a) To declare a statute unenforceable, or refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional;

(b) To declare a statute unconstitutional;

(c) To declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulations.

Accordingly, if the Court holds that amended section 25128 is unconstitutional, then the FTB (and/or the Legislature) would need to address whether the amendments to section 25128 in 1993 were unconstitutional in their entirety and or only in part. This issue has obvious significant impact on the State and all taxpayers.

Based on the foregoing, the FTB respectfully requests that this Court grant a rehearing.

Dated: August 8, 2012

Respectfully submitted,

KAMALA D. HARRIS

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CERTIFICATE OF WORD COUNT

I certify that the text of the Franchise Tax Board's Petition for Rehearing consists of 1,470 words pursuant to Cal. Rules of Court, rule 8.204(c)(1).

Dated: August 8, 2012

KAMALA D. HARRIS
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DECLARATION OF SERVICE BY MESSENGER

**Case Name: The Gillette Company & Subsidiaries v California Franchise Tax Board
Court of Appeal Case No.: A130803
San Francisco Superior Court Case No. CGC10495911**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is: 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004.

On August 8, 2012, I caused the attached

RESPONDENT FRANCHISE TAX BOARD'S PETITION FOR REHEARING

to be personally served by **ACE MESSENGER SERVICE** by placing a true copy thereof for delivery to the following person(s) at the address(es) as follows:

Amy L. Silverstein, Esq.
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55 Hawthorne Street, Suite 440
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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on August 8, 2012, at San Francisco, California.

Joan Randolph
Declarant



Signature

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: The Gillette Company & Subsidiaries v California Franchise Tax Board
Court of Appeal Case No.: A130803
San Francisco Superior Court Case No. CGC10495911

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On August 8, 2012, I served the attached

RESPONDENT FRANCHISE TAX BOARD'S PETITION FOR REHEARING

by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on August 8, 2012, at San Francisco, California.

Joan Randolph
Declarant


Signature

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