

1 contends the Levy on limited liability companies as codified in section 17942 violates the
2 Commerce Clause of the United States Constitution or the Due Process Clauses of the United
3 States and California Constitutions.

4 Plaintiff and Defendant filed their Opening Trial Brief on June 9, 2006, and June 12,
5 2006, respectively. Plaintiff's Reply Brief was filed on July 7, 2006; Defendant's was filed on
6 July 14, 2006. The Court heard oral argument from the parties on August 14, 2006, and the
7 matter was deemed submitted on August 30, 2006.

8 After consideration of the parties' briefs and the authorities cited therein, as well as the
9 oral arguments, this Court finds as follows:

10 (1) This Levy, pursuant to section 17492, is a tax. The record in this case confirms
11 that the purpose of the Levy is to raise revenue. Also, the revenue from a fee must be dedicated
12 to its purpose, e.g. the regulatory scheme it is intended to fund. Here, however, the Levy is
13 intended for, and used solely for, general governmental purposes. In light of the revenue raising
14 purpose and the deposit of the proceeds into the general fund for general governmental purpose,
15 this Court concludes that the Levy is a tax.

16 (2) The Levy is unconstitutional as applied to Plaintiff because it is not fairly
17 apportioned. A fundamental constitutional principle governing state taxation is that a state tax
18 must be fairly apportioned; that is, it must be adjusted to the level of activity in the state.
19 *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977), states in part: the tax or levy
20 must (1) be "applied to an activity with a substantial nexus with the taxing state;" (2) be "fairly
21 apportioned;" (3) "not discriminate against interstate commerce;" and (4) be "fairly related to the
22 service provided by the state." The Levy imposed here is based on the plaintiff's worldwide
23 gross receipts rather than its in-state activities. Since it is unapportioned, it violates the
24 Commerce and Due Process Clauses.

25 (3) Section 17942 cannot be reformed. Reformation is a narrow exception to the
26 principle that an unconstitutional statute is unenforceable, and is appropriate only when a court
27 "can say with confidence that (i) it is possible to reform the statute in a manner that closely
28 effectuates policy judgments clearly articulated by the enacting body, and (ii) the enacting body

1 would have preferred the reformed construction to invalidation of the statute.” *City of Modesto*
2 *v. National Med., Inc.*, 128 Cal.App.4th at 528 (2005). Adding an apportionment mechanism as
3 Defendant suggests would run contra to the Legislature’s expressed intent. The legislative
4 history establishes that the Legislature considered and rejected apportionment of the Levy.
5 Defendant has provided no evidence of the type of apportionment mechanism the Legislature
6 would have enacted. Neither the statute nor the legislative history contains any indication of the
7 type of apportionment scheme the Legislature would have enacted.

8 **CONCLUSION**

9 For the foregoing reasons, this Court finds that the Levy imposed on the plaintiff under
10 section 17942 is an unapportioned tax, it violates the Commerce Clause of the United States
11 Constitution and the Due Process Clauses of the California and United States Constitutions, and
12 the statutory language of section 17942 cannot be reformed. Accordingly, section 17942 is
13 invalid and Ventas is entitled to a refund of all amounts paid, plus interest and costs as provided
14 by law.

15 Pursuant to Rule of Court, rule 232(a), a Statement of Decision, if requested, will be
16 prepared by the plaintiff together with a proposed judgment. If a Statement of Decision is not
17 requested within 10 days, this Tentative Decision shall be the Statement of Decision.

18
19 DATED: *November 6, 2006.* 
20 PAUL H. ALVARADO
21 Judge of the Superior Court
22
23
24
25
26
27
28

1 CERTIFICATE OF SERVICE BY MAIL

2 (Code Civ. Proc. 1013a(4))

3
4 I, BETH WILDER:, a deputy clerk of the Superior Court for the City and
County of San Francisco, certify that:

5 1) I am not a party to this action;

6 2) On NOV 07 2006, I served the attached:

7
8
9 TENTATIVE DECISION

10
11 by placing a copy thereof in a sealed envelope, addressed as follows:

12 Amy L. Silverstein, Esq.
13 Edwin Weisman, Esq.
14 Silverstein & Pomerantz, LLP
55 Hawthorne Street, Suite 440
San Francisco, CA 94105

Marguerite C. Stricklin, Esq.
Office of the Attorney General
1515 Clay Street, 20th Floor
P. O. Box 70550
Oakland, CA 94612

15 and,

16 3) I then placed the sealed envelope in the outgoing mail at 400 McAllister
17 Street, San Francisco, CA 94102-4514 on the date indicated above for collection, attachment of
18 required prepaid postage, and mailing on that date following standard court practices.

19
20 DATED: NOV 07 2006

GORDON PARK-LI, Clerk

21
22
23 By: BETH WILDER:, Deputy