



02.23.16

## FTB NOTICE 2016-01

### **Subject: Action on Cases Involving the Compact Election Issue After the Decision of the California Supreme Court in *The Gillette Company v. Franchise Tax Board***

This notice supplements the information in FTB Notice 2012-01, which can be found at [https://www.ftb.ca.gov/law/notices/2012/2012\\_01.pdf](https://www.ftb.ca.gov/law/notices/2012/2012_01.pdf).

**Purpose:** This notice is issued for the purpose of advising taxpayers and their representatives of the intended courses of action of the Franchise Tax Board (FTB) at this time on compact election cases. Taxpayers are advised to comply with all applicable laws and procedures to protect their rights and interests, and should not rely on any of the information in this notice that may result in any activity contrary to statutes or regulations. The intended courses of action in this notice may be withdrawn or revised at any time as warranted by circumstances of the *Gillette* litigation.

**Background:** On December 31, 2015, the California Supreme Court issued its decision in *The Gillette Company v. Franchise Tax Board* (2015) 62 Cal.4th 468. This case addresses the issue of whether taxpayers may elect to utilize the apportionment formula contained in the Multistate Tax Compact, former Revenue and Taxation Code Section 38006, rather than the double-weighted sales factor mandated in the prior version of Revenue and Taxation Code section 25128.

The trial court dismissed the suit for refund on the ground that such an election was not available. The First District Court of Appeal reversed the trial court's judgment of dismissal and held that such an election was available. The California Supreme Court then reversed the decision of the Court of Appeal, holding that an election was not available as a matter of law.

The FTB has received inquiries as to what action, if any, it will take on cases raising the compact election issue after the California Supreme Court decision. In addition, counsel for *Gillette* has stated that plaintiff intends to seek a writ of certiorari in the United States Supreme Court. Thus, although state court action on this matter has concluded, it is possible that the litigation may continue in the United States Supreme Court. In light of this possibility, the FTB is issuing this notice to advise taxpayers and representatives how it will handle cases involving the compact election issue during the time period prior to conclusion of all litigation on this case.

**Action on Cases:**

**Claims for Refund.** The Franchise Tax Board will take no action at this time on claims for refund that have been made to avoid the bar of refunds by the statute of limitations. At this time, the FTB intends to take action on those claims only when the *Gillette* case has been fully resolved either by a denial of a petition for a writ of certiorari by the United States Supreme Court or any subsequent final state court action after a decision by the United States Supreme Court.

**Protests and Administrative Appeals Before The State Board of Equalization.** The FTB will continue to hold administrative protests involving the compact election issue as outlined above and will not take action on those protests until the conclusion of litigation. In addition, the FTB will seek to defer administrative appeals pending before the State Board of Equalization until all litigation has concluded.

**Audits.** In cases where the compact election is an issue, the FTB will proceed with audits in the normal course of business. For taxable years before the repeal of the Compact, Audit staff will conclude audits to the greatest extent possible but will not issue Notices of Proposed Assessment or denials of claims for refund until the conclusion of litigation in *Gillette*. In cases where the statutes of limitation barring additional proposed assessments may expire before the conclusion of litigation, audit staff will request a waiver from the taxpayer to extend applicable statutes of limitation. If a waiver is timely executed the case will continue to be held until litigation has concluded. If a taxpayer declines to execute a waiver, then audit staff will issue the appropriate Notice of Proposed Assessment according to normal business practices.

**Stopping Accrual of Interest on Deficiency Assessments.** Taxpayers may make tax deposits pursuant to Revenue and Taxation Code section 19041.5 to stop the accrual of interest in cases where interest will accrue until the conclusion of litigation.

**Penalties.** In cases involving the compact election issue, penalties will be imposed on a case-by-case basis after the conclusion of litigation in accordance with applicable law.

The principal author of this notice is Norman Scott of the Franchise Tax Board Legal Division. For further information regarding this notice, contact Mr. Scott at P.O. Box 1720, Rancho Cordova, CA 95741-1720.