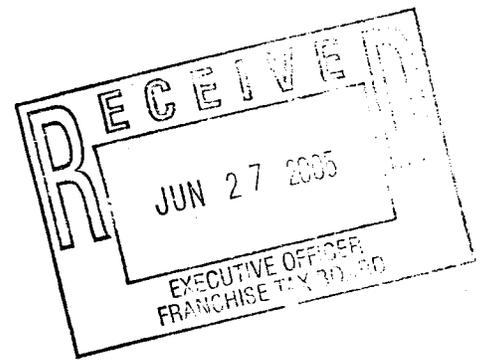


Memo June 24, 2005  
To Gerry Goldberg, Executive Officer, FTB  
From Tom Campbell, Member, FTB  
Re Fujitsu IT Holdings v. FTB



Dear Gerry,

Can you kindly see that this gets to the right person?

Consistent with the Brown Act and all other applicable statutes dealing with our proceedings, I wanted to get to my fellow Members my preliminary opinion on the matter that was put over at last week's meeting. But, please, do let me know before this memo or any description of it is made public if there is no way of communicating otherwise. I know there is a deliberative memo exception under the Freedom of Information Act; perhaps there is a California counterpart.

The Court of Appeal's decision is ambiguous. It does, indeed, say "In the absence of any clear and controlling guidance on this question." That would indicate no basis in constitutional law. To the same point is the statement, "No statute, regulation or other administrative pronouncement provides clear guidance on this question." However, the Court also says, "For the reasons indicated above, including those relied on by the trial court." The trial court, of course, had constitutional reasons, among others, for its decision. We don't know which of the reasons relied on by the trial court the Court of Appeal was adopting. And, strangest of all, just after saying there is no clear and controlling guidance, the Court of Appeal cites Zamudio to say it will interpret a statute as consistent with applicable constitutional provisions. That would be a gratuitous statement unless there are constitutional bases for the decision.

In terms of the Court's reasoning, however, it's clear they rely most heavily on their interpretation of our regulations. All the other references are more or less general; it's only in discussing the regulations that the Court becomes specific.

Thus, I think it is possible that the Court would have ruled differently if the regulations had been clear and different. However, in an earlier part of the opinion, the Court says deference to administrative regulation and interpretation is weak when the administering agency has vacillated. They may very well interpret our new regulations not as explaining the prior regulations, but as vacillating.

I favor promulgating the new regulations. I'm persuaded on the merits that the staff's position, as reflected in the new regulations, is correct. Apportionment of dividends between sources is fair where the dividends are, by definition, not related to the business activity that was included within the "water's edge." Apportioning them sequentially is illogical, since those dividends due to the business activity that was included within the water's edge have already been used to offset that income.

However, I also believe it would be fairest that the new regulations be prospective only. There will undoubtedly be a new case, and at that time, we will learn if the Court of Appeal has an independent constitutional or statutory ground for reaching a decision contrary to the FTB and BOE. Making our new regulations retroactive is a bit too much for me, because the Court of Appeal may well have based its opinion on constitutional grounds. I just can't be sure.

Ideally, Gerry, my views could be circulated to the other Members in their present, tentative and deliberative posture. If so, perhaps they will circulate back responses to me. To repeat, if, however, such circulations must be made public, then let's speak about another way to proceed, as my views on this are tentative, and I could well be persuaded to change as I learn more.

Kind regards, and best wishes on the years ahead!

A handwritten signature in black ink, appearing to read "Tom". The signature is written in a cursive style with a horizontal line underneath the name.