




California FTB Issues Guidance Recognizing Taxpayers Will Appeal *Gillette*

by Amy Hamilton

Full Text Published by **taxanalysts**[®]

Recognizing that *Gillette Co. v. Franchise Tax Board* is being appealed to the U.S. Supreme Court, the California FTB is advising taxpayers and their representatives that it will wait until the litigation is fully resolved before acting on cases raising the Multistate Tax Compact election issue.

In Notice 2016-01 , dated February 23, the FTB also said that taxpayers can stop the accrual of interest until the conclusion of the litigation by making a tax deposit -- but that it will impose penalties on a case-by-case basis after *Gillette* is fully resolved.

Immediately after the California Supreme Court on December 31 held in *Gillette*  that the compact and its provisions are not binding, Amy Silverstein of Silverstein & Pomerantz LLP said the taxpayers plan to file a petition with the U.S. Supreme Court. (Prior coverage )

Marty Dakessian of Dakessian Law Ltd., who coauthored the amicus brief filed in *Gillette* on behalf of the Institute for Tax Professionals, said taxpayers could be waiting for a while for resolution of whether the U.S. Supreme Court will hear this case.

He added that with Justice Antonin Scalia's death, it's unclear how the current composition of the Court will react to *Gillette*'s cert petition.

"I would not count *Gillette* out, given the extensive discussion of federal law affecting compacts in the California Supreme Court's opinion," Dakessian said. "That has left the door open for the high court, and the FTB can't be pleased about that."

Dakessian called it outrageous that the FTB is still leaving open the possibility of imposing penalties on taxpayers for making the compact election.

"At the very least, the FTB must agree that reasonable minds can differ on the subject after we had the lower court in California rule in favor of the taxpayer," Dakessian said. "No penalties should be imposed on any taxpayers for making this election -- categorically."

In addition to saying it 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, the FTB said it will continue to hold administrative protests until the conclusion of *Gillette*.

The FTB said it will also seek to defer administrative appeals before the State Board of Equalization until all litigation has concluded.

Jamie Yesnowitz of Grant Thornton LLP said the main form of protests in front of the BOE would be the *Gillette*-style three-factor election protests.

"Note, however, that making the compact election also means the taxpayer has to use other elements of Article IV, including cost of performance under the compact for sourcing sales of services and intangibles instead of the newer California market-based sourcing," Yesnowitz said.

He added that there could be some matters pending in which the refund results from the combined effect of the application of cost-of-performance sourcing or other elements of Article IV and the use of equally weighted factors.

The FTB said that for tax years before California's 2012 repeal of the compact, its staff will conclude audits to the extent possible but will not issue notices of proposed assessment or denials of claims for refunds until the conclusion of the litigation.

In cases in which the statute of limitations barring additional proposed assessments may expire before the conclusion of *Gillette*, the FTB said it will request a waiver from the taxpayer. 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, the FTB said it will proceed to issue an appropriate notice of proposed assessment.