

# PUBLICATION

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## Spotlight on SALT: Further Update on Gillette

December 4, 2012

We have previously analyzed the California Court of Appeals' decision in *The Gillette Company v. Franchise Tax Board*, and its immediate legislative aftermath (see our August 7, 2012 [Tax Alert](#)). Subsequently we discussed the follow-on developments in California and other states in the wake of *Gillette* (see our October 9, 2012 [Tax Alert](#)). Another update is now in order, as important developments continue to occur with respect to one of the most significant state tax cases of 2012.

On November 13, 2012, the California Franchise Tax Board (FTB) formally petitioned the California Supreme Court for review. In addition to the legal arguments that the FTB is raising in an attempt to persuade the California Supreme Court to take the case, the FTB in its brief pointed out that as much as \$750 million of corporation income tax refund claims could be at stake. Further, and as we described in August, there are also questions concerning the legality under the California Constitution of the state's legislative repeal of the Multistate Tax Compact and the legislative use of the alleged "doctrine of elections" to retroactively deny refund claims to other taxpayers as a result of the *Gillette* decision. An appeal of the *Gillette* decision to the California Supreme Court does not address these state constitutional and statutory questions.

While these developments are occurring in California, similar disputes are starting to arise in other states that are members of the Multistate Tax Commission and, like California prior to this summer's repeal, have also enacted the Multistate Tax Compact, including the "taxpayer option." A series of administrative decisions has been rendered in Texas, and the Michigan Court of Appeals recently issued its decision in *International Business Machines Corp. v. Dept. of Treasury*. While the taxpayers in these decisions have not fared as well as The Gillette Company to date, the controversy caused by the Multistate Tax Compact's "taxpayer option" appears far from concluded.

In the *IBM* case, the Michigan Court of Appeals rejected the taxpayer's argument that Michigan's enactment of the Compact provided an apportionment election for taxpayers. Rather, the Michigan Court of Appeals held that, since the apportionment provisions of the Compact and of Michigan's Business Tax Act could not be harmonized, the later enacted provision (the BTA) prevailed under Michigan rules of statutory construction. Administrative controversies have routinely been denied by the Texas Comptroller of Public Accounts on the basis that the Texas franchise (margin) tax, as well as the since-repealed franchise tax earned surplus component, were not income taxes subject to the Compact's "taxpayer option."

In our prior Alerts regarding the *Gillette* decision we have noted that California and Oregon have issued guidance on procedures for *Gillette* protective refund claims. Taxpayers should continue to monitor developments and address, where and if appropriate, whether such refund claims should be filed with California, Oregon and the other MTC member states.

If you would like to discuss the *Gillette* decision and how it may impact your company in California and elsewhere, please contact any attorney in the Firm's Tax Department.