

Legal Updates & News

Bulletins

State and Local Tax Insights -- Winter 2007

March 2007

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In this issue:

- [New Jersey Attempts an End Run Around P.L. 86-272 While Throwout and Lanco Are Challenged](#)

New Jersey continues to take aggressive stances against foreign corporations. It asserts that physical presence is not necessary to subject a foreign corporation to income taxation in New Jersey. *See Lanco, Inc. v. Director, Division of Taxation*, 188 N.J. 380 (2006) (petition for certiorari pending) (holding that Quill's physical presence test does not apply to income taxes under the Commerce Clause). It applies the alternative minimum assessment ("AMA") to foreign corporations that are protected from net income based taxes by federal law P.L. 86-272 only if those corporations do not consent to jurisdiction under New Jersey's regular Corporation Business Tax ("CBT"). It removes receipts from the denominator of the receipts fraction based on whether another state has jurisdiction to tax the corporation or whether another state has decided to exercise its right to tax the corporation, under what has become known as the "throwout" rule. Further, when New Jersey throws receipts out of the denominator, it contradicts its subjectivity position (its Lanco economic nexus position) because it applies economic nexus standards for subjectivity in New Jersey yet refuses to apply those same economic nexus standards for subjectivity in other states.

- [California's LLC Tax: Current Litigation and Retroactive Legislation](#)

Section 17942 of California's Revenue & Taxation Code^[1] imposes an annual levy^[2] on all limited liability companies ("LLC") registered to do business in the state. Currently, the levy is unapportioned, such that an LLC's liability for the fee is set by its total gross receipts worldwide, rather than its income attributable to business within California. The San Francisco Superior Court in *Northwest Energetic Services, LLC v. Franchise Tax Board* ^[3] ("Northwest") found the unapportioned levy unconstitutional, and awarded Northwest Energetic Services a full refund of the amounts it had paid under section 17942. While the superior court's decision in Northwest is legally binding only for the taxpayer that brought the suit, because California's Franchise Tax Board ("FTB") recently sought review of the trial court's decision, the case will likely determine the fate of section 17942 on appeal. Similarly, another case challenging the constitutionality of section 17942 under different facts, *Ventas Finance I, LLC v. Franchise Tax Board*^[4] ("Ventas"), was recently decided by the San Francisco Superior Court. As in Northwest, the San Francisco Superior Court in Ventas ruled that section 17942 is unconstitutional because it is not apportioned.

- [New California FTB Time Goals for Processing Protests](#)

On October 27, 2006, the California Franchise Tax Board ("FTB") issued two Legal Notices regarding revised time goals for the processing of docketed protests. The first of these was Notice 2006-5, which announced a pilot project allowing certain taxpayers to request a one-year timeline for resolving a docketed protest. The second was Notice 2006-6, which announced a goal under new FTB procedures to complete docketed protests within 24 months or less of the filing date of the protest. These two recent Notices are the latest developments in a long history of efforts to expedite the California protest process.

- [Sales Factor Gross Receipts Cases Addressed by the California Supreme Court](#)

After years of litigation and speculation, the California Supreme Court issued its decisions in *Microsoft Corp. v. Franchise Tax Board*, 139 P.3d 1169 (Cal. 2006) (“*Microsoft*”) and *General Motors Corp. v. Franchise Tax Board*, 139 P.3d 1183 (Cal. 2006) (“*General Motors*”). Both cases presented the Revenue and Taxation Code section (“section”) 25120 “gross receipts” issue and the section 25137 “distortion” issue. The decisions will unquestionably have varied and widespread effects on many taxpayers doing business in California.

LLC Fee Refund Procedures

The FTB has posted the procedure for filing a protective claim for refund of fees paid pursuant to California Revenue & Taxation Code Section 17942 at: <http://www.ftb.ca.gov/professionals/taxnews/article/llcfee.html>.

The FTB’s website states that to file a protective claim pending the final outcome of litigation, an LLC should fax a letter to the FTB containing the following information:

- The name of the LLC and the identification number issued by the Secretary of State (unregistered LLCs should use the identification number issued by the FTB).
- A statement indicating that the LLC is filing a protective claim for refund.
- The tax years involved.
- The amount of the claim, which should match the amount of the annual fee that the LLC paid.
- A description of the issue (stating that the LLC fee is unconstitutional is sufficient).
- The name of a contact person and that person’s phone number and fax number.

The letter must be signed by a representative with power of attorney or by the LLC’s managing partner. We recommend that a taxpayer who may wish to file a claim for refund consult with counsel, to ensure that its claim is complete and timely filed within the statute of limitations.

The Summer Tax Institute

The Summer Tax Institute is an educational program administered by the Center for State and Local Taxation at the University of California, Davis and is offering an intensive four-day course for professionals who wish to gain expertise in state and local taxation.

June 18-21, 2007

University of California, Davis campus

You earn continuing education credits for 33 course hours. Classes include Comprehensive Income Tax Track, Advanced Income Tax Track, and Multistate Sales & Use Tax Track.

Please visit www.summertax.org for more information.

Welcome!

Morrison & Foerster’s State and Local Tax Group would like to welcome Scott Reiber as an associate in the San Francisco office. Scott received his B.Comm. in International Business from the University of Alberta in 2003 and his J.D. from Columbia Law School in 2004.

Scott Reiber can be reached at sreiber@mof.com or 415.268.7630.

Upcoming 2007 Conferences

Following is a list of SALT conferences through June 2007, in which Morrison & Foerster attorneys will be participating.

March 29

Cleveland TEI Tax Conference
Cleveland, OH
Paul H. Frankel

April 24

Dallas TEI Tax Conference
Dallas, TX
Paul H. Frankel

April 25

Philadelphia TEI Tax Conference
Philadelphia, PA
Eric J. Coffill and Hollis L. Hyans

April 26

Morrison & Foerster Annual "East Coast" Tax Seminar
New York, NY
Paul H. Frankel, Hollis L. Hyans, Craig B. Fields, Irwin M. Slomka, Carley A. Roberts, Michael Pearl, Amy F. Nogid, Roberta Moseley Nero, R. Gregory Roberts, and Mitchell A. Newmark.

May 1

New Mexico Tax Conference
Santa Fe, N.M.
Paul H. Frankel

May 3

COST School
Atlanta, GA
Paul H. Frankel

May 7

Energy Tax Association, 2007 Annual Meeting
San Antonio, TX
Craig B. Fields

May 8

Portland TEI Tax Conference
Portland, OR
Paul H. Frankel

May 16

Georgetown University Law Center, Advanced State and Local Tax Institute
Washington, D.C.
Craig B. Fields and Hollis L. Hyans

May 17

Morrison & Foerster Annual "West Coast" Tax Seminar
San Francisco, CA
Thomas H. Steele, Eric J. Coffill, Peter B. Kanter, Irwin M. Slomka, James P. Kratochvill, Andres Vallejo, Carley A. Roberts, and Pilar M. Sansone

May 18

Georgetown SALT Conference
Washington, D.C.
Paul H. Frankel

May 18

Los Angeles TEI Tax Conference
Los Angeles, CA
Thomas H. Steele, Eric J. Coffill, Peter B. Kanter, Andres Vallejo, Carley A. Roberts, and Pilar M. Sansone

May 21

COST Income Tax Conference
New Orleans, LA
Paul H. Frankel

May 23

Denver TEI Tax Conference
Denver, CO
Thomas H. Steele

May 30

Cincinnati IPT Tax Conference
Cincinnati, OH
Paul H. Frankel

June 14

University of Wisconsin Tax Conference
Milwaukee, WI
Paul H. Frankel

October 17-19

Paul J. Hartman SALT Forum (Vanderbilt University)
Nashville, TN
Paul H. Frankel, Hollis L. Hyans, and Craig B. Fields

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