

California Franchise Tax Developments—Fall 2010

Jeffrey M. Vesely • Kerne H. O. Matsubara • Annie H. Huang

I. Deductibility of Dividends/Expense Attribution

A. *Farmer Bros. v. FTB*, 108 Cal. App. 4th 976 (2003), cert. denied, 540 U.S. 1178 (2004)

1. California Court of Appeal held California Revenue and Taxation Code (RTC) § 24402 unconstitutional under the Commerce Clause. RTC § 24402 allows a dividends received deduction for dividends from noninsurance companies. Similar to RTC § 24410, which was previously held to be unconstitutional in *Ceridian*, the deduction under RTC § 24402 is limited by the payor's presence in California as determined by its apportionment factors. The Court held that such a limitation violated the Commerce Clause.

2. A full dividends received deduction was allowed by the Court subject to the ownership limitations contained in RTC § 24402(b).

3. California Supreme Court denied review. The United States Supreme Court denied the Franchise Tax Board's (FTB) petition for a writ of certiorari on February 23, 2004.

4. FTB Policy Regarding Post-*Farmer Bros.*

a. For years ended prior to December 1, 1999, taxpayers will be allowed a full dividends received deduction subject to the ownership limitations contained in RTC § 24402(b). The expense attribution provisions of RTC § 24425 will be applied.

(1) For water's edge taxpayers, a full dividends received deduction will be allowed under RTC § 24402 rather than a 75 percent deduction

under RTC § 24411. Further, no foreign investment interest offset will be applied. Rather, the expense attribution provisions of RTC § 24425 will be applied.

b. For years ending on or after December 1, 1999, no deduction will be allowed under RTC § 24402. The FTB will attempt to identify all taxpayers who have claimed a deduction under RTC § 24402 and will disallow that deduction.

(1) For water's edge taxpayers, the 75 percent dividends received deduction will be allowed.

(2) In a non-precedential summary decision, *River Garden Retirement Home*, SBE Case No. 297405 (September 12, 2006), the State Board of Equalization (SBE) agreed with the FTB and ruled that no deductions were allowable to the taxpayer under RTC § 24402 for the 1999 and 2000 taxable years.

(a) On October 2, 2007, the taxpayer filed suit for refund in the San Francisco Superior Court (No. CGC-07-467783).

(b) On February 8, 2008, the trial court sustained the FTB's demurrer without leave to amend on the ground that the plaintiff failed to state a cause of action.

(c) On July 15, 2010, the First District Court of Appeal largely followed the *Abbott Labs* decision which the Second District Court of Appeal handed down last year (see below). The Court concluded that RTC § 24402 cannot be saved by severance of the offending language and the remedy of disallowing the dividends received deduction did not violate the Due Process prohibition against retroactive tax increases.

(d) Petition for review has been filed.

(3) *Abbott Laboratories, et al. v. FTB*, Los Angeles Superior Court No. BC369808 (August 9, 2007)

(a) On April 20, 2007, the taxpayer filed a suit for refund challenging the FTB's policy of disallowing dividends received deduction under RTC § 24402 for the 1999 and 2000 tax years.

Jeffrey M. Vesely, Kerne H. O. Matsubara and Annie H. Huang are tax partners in the San Francisco office of Pillsbury Winthrop Shaw Pittman LLP. This outline can also be found as part of the Pillsbury Winthrop Shaw Pittman LLP Tax Page and was distributed to participants in the Council of State Taxation (COST) 2010 41st Annual Meeting, October 20-22, 2010, in Phoenix, Arizona. See Important Notice to Readers.

- (b) On August 9, 2007, the trial court sustained the FTB's demurrer without leave to amend and dismissed the case.
 - (i) The trial court held that in light of *Farmer Brothers*, the plaintiffs could not state a cause of action under RTC § 24402. The court went on to hold that it would not reform RTC § 24402.
 - (ii) The trial court did not discuss the severability provisions of RTC § 23057: "If any chapter, article, section, subsection, clause, sentence or phrase of this part which is reasonably separable from the remaining portions of this part, or the application thereof to any person, taxpayer or circumstance, is for any reason determined unconstitutional, such determination shall not affect the remainder of this part, nor, will the application of any such provision to other persons, taxpayers or circumstances, be affected thereby."
 - (c) On December 7, 2007, the taxpayer filed a notice of appeal.
 - (d) On March 20, 2009, in a published decision, the Court of Appeal affirmed in favor of the FTB. The Court held that *Farmer Bros.* found RTC § 24402 to be unconstitutional in its entirety and could not be reformed. The Court declined to apply the severability provisions of RTC § 23057.
 - (e) Petition for review was denied on October 28, 2009.
- (4) Other cases involving the deduction under RTC § 24402 post-*Farmer Bros.* that are currently pending include *Kiewit Corporation*, San Diego Superior Court Case No. 37-2009-00087282-CU-MC-CTL; *Microsoft Corporation*, San Francisco Superior Court Case No. CGC-08-471260.
- (5) *City of Modesto v. National Med, Inc.*, 128 Cal. App. 4th 518 (2005)
- (a) City tax case in which Court of Appeal, based on the Due Process Clause, declined to reform a prior unconstitutional ordinance to retroactively apply an apportionment provision since the period of retroactivity sought by the City was not "modest."
- c. Corporations which repatriated foreign earnings in 2004 and 2005 and were able to claim an 85-percent deduction for dividends received from controlled foreign corporations under IRC § 965 do not have the same ability under California law, since California has not conformed to IRC § 965.
- (1) If the corporation is a water's edge filer, a 75-percent dividends received deduction will be allowed and the foreign investment interest offset rules apply.
 - (2) In view of *Fujitsu* and *Apple* (see IV.A, IV.C and I.F below), consideration should be given to filing claims for refund.
- B. *Ceridian Corporation v. FTB*, 85 Cal. App. 4th 875 (2000)
1. Court of Appeal held that RTC § 24410, which allowed a dividends received deduction for dividends received from an insurance company, was unconstitutional under the Commerce Clause of the U. S. Constitution. RTC § 24410 allowed a deduction only where the payee was commercially domiciled in California. Under RTC § 24410, the deduction was further limited by the payor's presence in California as determined by its apportionment factors. The Court held both restrictions violated the Commerce Clause since they favored domestic (California) corporations over their foreign competitors.
 2. Case also raises the retroactive versus prospective remedy issue. While *Ceridian* was allowed a full deduction and accordingly obtained its refund, the Court left open the remedy with respect to other taxpayers.
 3. FTB Policy Regarding Post-*Ceridian*
 - a. For years ended prior to December 1, 1997, taxpayers will be allowed a full deduction for insurance company dividends. However, the expense attribution provisions of RTC § 24425 will be applied.
 - b. For years ending on or after December 1, 1997, no deduction will be allowed for insurance company dividends. The FTB will attempt to identify all taxpayers who have claimed a deduction under RTC § 24410 and will disallow that deduction.
 4. Assembly Bill No. 263
 - a. On September 29, 2004, legislation was enacted which would reverse FTB's policy statement for taxable years ending on or after December 1, 1997.
 - (1) For years ending on or after December 1, 1997 and beginning before January 1, 2004, taxpayers

- were allowed to elect to claim an 80-percent dividends received deduction. No expense attribution would be allowed.
- (a) Taxpayers were required to make a retroactive irrevocable election.
 - (b) At least 80 percent of each class of stock of the insurance company must be owned.
 - (c) Election applied only to taxable years during the election period for which the statute of limitations was open or if the statute had closed for any taxable year, to taxable years for which a final tax determination had not been made because of a dispute over the dividends received deduction or the expenses related to that deduction.
 - (d) Elections were required to be made by filing amended returns which had to be filed by March 28, 2005.
- (2) For years beginning on or after January 1, 2004, a dividends received deduction would be allowed. No restriction on the use of expense attribution.
 - (a) Deduction would be equal to 80% of the qualified dividends (increases to 85% in 2008).
 - (b) Dividend deduction may be reduced if insurance company overcapitalized (“anti-stuffing”).
 - (c) Certain transfers of property to insurers in an exchange described in various IRC provisions and which would otherwise result in non-recognition of gain will be deemed taxable events.
 - (3) FTB Notice 2004-6 was issued by the FTB to inform taxpayers how to make the election.
- b. AB 263 also amended RTC § 24425 for taxable years beginning on or after January 1, 2004.
- (1) Deductions disallowed to non-insurer for specified expenses paid or incurred to the insurer if the amount paid would constitute income to the insurer if the insurer were subject to California franchise tax.
 - (2) Interest payable to third parties by an affiliated taxpayer is subject to disallowance if the borrowed funds are used to contribute capital to the insurer.
 - (a) This disallowance does not apply to situations where the borrowed funds are loaned to the insurer.
5. Taxpayers not electing under AB 263 will be subject to the FTB’s policy referred to above in **I.B.3.b.**
 - a. The FTB’s policy has not been sustained and may be subject to attack under various theories.
 6. *Argonaut Group, Inc.*, SBE Case No. 287738 (June 28, 2006)
 - a. In a letter decision, the SBE ruled that the taxpayer could not include its insurance company subsidiaries in its combined report “by proxy,” under RTC § 25137, for purposes of determining its California franchise tax liability.
 - b. Petition for rehearing was granted and the SBE ruled in favor of taxpayer on January 21, 2009. The SBE reversed its earlier decision and concluded that the taxpayer could use an alternative formula to include its insurance company subsidiaries in the combined report.
 7. *Electronic Data Systems Corp.*, SBE Case No. 361467 (August 8, 2008)
 - a. In a letter decision, the SBE ruled that the taxpayer’s unitary and wholly owned Texas based insurance subsidiary should be included in its California combined report. The SBE rejected the FTB’s contention that Legal Ruling 385 should apply to out of state insurance companies. Thus, taxpayer’s sales factor properly included the premiums received by the insurance subsidiary during the course of the subsidiary’s Texas insurance activities.
- C. *American General Realty Investment Corp., Inc.*, San Francisco Superior Court No. CGC-03-425690 (April 28, 2005)
1. On June 25, 2003, the SBE concluded that the FTB properly disallowed under RTC § 24425, a portion of the interest expenses incurred by the taxpayer’s unitary financial and real estate subsidiaries on the theory that the interest expenses were indirectly traceable to insurance company dividends which were deductible under *Ceridian*.
 2. The San Francisco Superior Court reversed the SBE’s decision. The trial court concluded

that no interest expense deductions should be disallowed.

- a. The trial court concluded that RTC § 24344(b) should be applied before RTC § 24425 and thus since the taxpayer's business interest income exceeded the total amount of interest expense being deducted against business income, all of the interest expense could be deducted.
 - b. The trial court also concluded that even if RTC § 24425 was applicable, none of the taxpayer's interest expense was incurred to purchase or carry the insurance company stock, to contribute equity capital to the insurance company or to refinance any indebtedness directly or indirectly used for any such purpose.
 - c. The trial court concluded that under the facts presented, the debt was incurred solely for purpose of conducting the consumer finance and real estate businesses and the debt proceeds were used exclusively to generate taxable income in the ordinary course of their respective businesses.
 - d. On September 14, 2005, the trial court granted the taxpayer's request for attorneys' fees based on market rates.
 - e. The FTB did not appeal.
- D. *Beneficial California, Inc.*, SBE Case No. 203445 (September 1, 2005)
1. In a summary decision, the SBE unanimously concluded that none of the taxpayer's interest expense should be disallowed under RTC § 24425. The SBE found that under the facts and circumstances of the case, the requisite connection between the interest expense and the insurance company which paid the deductible dividends was absent.
- E. *Mercury General Corporation*, San Francisco Superior Court No. CGC-07-462688 (Aug. 4, 2008)
1. On June 25, 2003, in a letter decision similar to *American General*, the SBE affirmed the FTB's disallowance of the deduction of administrative expenses and interest expense under RTC § 24425 on the theory that the expenses were indirectly traceable to insurance company dividends which were deductible under *Ceridian*.
 2. The taxpayer's petition for rehearing was granted with respect to the deduction of administrative

expenses, not interest expense. On March 28, 2006, the SBE reaffirmed its decision disallowing the deduction of administrative expenses.

3. The taxpayer filed a suit for refund in the San Francisco Superior Court challenging the SBE's decision.
 4. On August 4, 2008, the trial court entered judgment in favor of the plaintiff on the RTC § 24425 issue and concluded that all of the administrative expenses were deductible.
 5. Plaintiff's motion for attorneys fees was denied on October 23, 2008.
 6. The FTB did not appeal.
- F. *Apple Inc.*, San Francisco Superior Court No. CGC-08-471129 (Jan. 26, 2010).
1. On January 26, 2010, the trial court issued a final statement of decision in favor of the plaintiff and concluded that the FTB's disallowance of interest expense deductions under RTC § 24425 was erroneous.
 2. The trial court concluded that the dominant purpose of plaintiff's borrowing which generated the interest expense was to fund domestic working capital needs and not to provide funds to the foreign dividend payors whose dividends were deductible under RTC § 24402.
 3. The trial court held that none of the interest expense deductions should be disallowed.
 4. The case is on appeal. See **IV.C** below.

II. Apportionment Formula

- A. Sales Factor
1. Gross receipts from treasury function activities. Numerous matters pending administratively and in court.
 - a. *General Motors Corporation v. FTB*, 39 Cal. 4th 773 (2006)
 - (1) California Supreme Court concluded that, except with respect to repurchase agreements ("repos"), gross proceeds from the sale of marketable securities in the course of treasury function activities, including redemptions on maturity, are to be included in the sales factor.

- The Court remanded for further proceedings the issue whether inclusion of such proceeds in the sales factor is distortive under RTC § 25137. In the case of repos, only the interest received from repos should be included in the sales factor.
- (2) The Court also concluded that research credits can only be used by the member of the unitary group which generated the credit, not the entire group. (See III.B below.)
 - (3) On January 29, 2007, the Court of Appeal remanded the case to the trial court to resolve the matter consistent with the Supreme Court's decisions in *General Motors* and *Microsoft*.
- b. *Microsoft Corporation v. FTB*, 39 Cal. 4th 750 (2006)
- (1) California Supreme Court held that gross proceeds from the sale of marketable securities, including redemptions on maturity, are includible in the sales factor.
 - (2) Based on the specific facts in the case, the Court concluded that the FTB sustained its burden of proving that the inclusion of gross receipts from treasury function activities in the denominator of the sales factor created a distortion under RTC § 25137. (See II.B.1 below)
- c. *Limited Stores, Inc. v. FTB*, 152 Cal. App. 4th 1491 (2007)
- (1) Trial court concluded that the return of principal must be excluded from the gross receipts generated by the taxpayer's sale of short-term financial investments and thus from the sales factor.
 - (2) In dicta, the court held that the inclusion of gross receipts would be distortive.
 - (3) On July 28, 2005, Court of Appeal affirmed in an unpublished opinion (No. A102915).
 - (4) On October 26, 2005, the California Supreme Court granted the taxpayer's petition for review. The matter is deferred pending *General Motors* and *Microsoft*.
 - (5) On November 15, 2006, the California Supreme Court returned the case to the Court of Appeal with instructions to that court to vacate its prior decision and reconsider the case in light of *General Motors* and *Microsoft*.
- (6) Upon remand, the Court of Appeal held that the return of principal from short-term financial instruments was a "gross receipt" for sales factor purposes.
 - (7) The Court further held that inclusion of gross receipts in the sales factor was distortive under RTC § 25137 because the taxpayer's treasury functions were qualitatively different from its principal, retail store business.
- d. *General Mills, Inc. & Subsidiaries v. FTB*, 172 Cal. App. 4th 1535 (2009).
- (1) Trial court concluded that commodity hedging transactions did not generate gross receipts for sales factor purposes.
 - (2) Because of its holding above, the court did not consider the issue whether inclusion of such receipts would be distortive under RTC § 25137.
 - (3) On April 15, 2009, the Court of Appeal reversed the trial court's decision. The Court concluded that the gross receipts from the hedging transactions should be included in the sales factor. However, since the trial court did not reach the RTC § 25137 issue, the case was remanded to the trial court to address that issue.
 - (4) Petition for review was denied on July 29, 2009.
 - (5) The case has been tried on remand on the RTC § 25137 issue. No decision has been issued by the trial court.
- e. *Square D Co. v. FTB*, San Francisco Superior Court No. CGC 05-442465 (Apr. 11, 2007)
- (1) Trial court concluded that the taxpayer's gross receipts from Eurodollar time deposits were includible in the sales factor.
 - (2) However, the court also concluded that the FTB proved, by clear and convincing evidence, that the inclusion of such receipts was distortive under RTC § 25137.
 - (3) The case is now closed.
- f. *Toys R Us, Inc. v. FTB*, 138 Cal. App. 4th 339 (2006), vacated on remand (2006).
- (1) Trial court concluded that the term "gross receipts" in RTC §§ 25120 and 25134 does not include the return of capital from the taxpayer's investment in short-term paper and thus only

- the interest earned from those investments is includible in the sales factor.
- (2) In dicta, the court held that if the return of capital was included in the sales factor, RTC § 25137 would apply.
- (3) On April 5, 2006, the Court of Appeal affirmed the trial court's decision in a published opinion. The opinion was modified on May 4, 2006 (138 Cal. App. 4th 339).
- (a) The Court of Appeal disagreed with the trial court regarding the meaning of the term "gross receipts." The Court concluded that return of capital is included within gross receipts under RTC §§ 25120 and 25134.
- (b) The Court of Appeal concluded that under RTC § 25137, the inclusion of return of capital resulted in distortion and thus should be excluded.
- (4) Both the FTB and the taxpayer filed petitions for rehearing. The Court of Appeal denied both petitions. The Court, however, modified the opinion to strike its original burden of proof discussion and to instead note that under RTC § 25137, the party seeking to deviate from the standard apportionment formula bears the burden of proof.
- (5) On July 26, 2006, the California Supreme Court granted the taxpayer's petition for review. The matter is deferred pending *General Motors* and *Microsoft*.
- (6) On November 15, 2006, the California Supreme Court returned the case to the Court of Appeal with instructions to that court to vacate its prior decision and reconsider the case in light of *General Motors* and *Microsoft*.
- (7) On April 30, 2009, following a mediation the appeal was dismissed.
- g. *Montgomery Ward and Co., Inc.*, San Diego Superior Court No. GIC 802767 (Dec. 10, 2007)
- (1) On October 3, 2002, in a summary decision, the SBE held that inclusion of the return of capital portion of the taxpayer's sales of various financial investments resulted in a distortion of the formula and thus those receipts were to be excluded.
- (2) The San Diego Superior Court reversed the SBE's decision. In granting summary judgment for the taxpayer, the trial court concluded that the FTB failed to meet its two-part burden of showing distortion and that its proposed alternative to the standard apportionment formula is reasonable.
- (3) The FTB did not appeal.
- h. *Home Depot USA, Inc.*, SBE Case No. 298683 (Dec. 16, 2008)
- (1) The SBE held that Home Depot could include its gross receipts from certain treasury functions in its sales factor.
- (2) Both parties agreed that a qualitative difference between the treasury receipts and receipts generated in the ordinary course of business must exist for the FTB to depart from the standard formula, and such difference existed in this case. However, the parties disagreed on the significance of the quantitative difference between the apportionment results with and without the inclusion of the gross receipts from treasury function.
- (3) Taxpayer argued that quantitatively, the apportionment results varied by only 3.3 percent with and without the inclusion of the gross receipts, and that this variation was insufficient to satisfy the necessary quantitative difference.
- (4) FTB argued that inclusion of gross receipts from a treasury function in the sales factor always results in failure of the standard apportionment formula where there is a qualitative difference between the treasury function and the taxpayer's ordinary business operations.
- (5) The administrative cases that were deferred pending the resolution of *Home Depot* are now being re-activated before the State Board of Equalization.
- (6) In 2008, the FTB put forth a general proposal for settling pending treasury function cases. It is based on the percentage of gross receipts from treasury activities in the sales factor denominator (*i.e.*, total gross receipts including treasury receipts).
- (a) The tax amounts conceded by FTB are as follows:

Percentage	FTB Concession
Up to 6.6%	75%
More than 6.6%, up to 17.3%	60%
More than 17.3%, up to 27.9%	30%
More than 27.9%, up to 33.9%	15%
More than 33.9%, up to 50%	10%
More than 50%	5%

- (b) Query: what types of gross receipts should be considered gross receipts from treasury activities?
- (c) In June 2010, the FTB extended the above proposal (entitled Treasury Function Resolution Program) to taxpayers with pending audits, protests and refund claims. To participate in this program a taxpayer had to have filed a return or claim before January 1, 2010 which included treasury receipts in the sales factor. The taxpayer had to advise the FTB by August 16, 2010 that it wanted to participate in the program.
2. Statutory Amendment to RTC § 25120
- a. For taxable years beginning on or after January 1, 2011, “gross receipts” do **not** include, among other items, amounts received from certain transactions in connection with the taxpayer’s treasury function activities. See Legislative Updates–AB X3 15 at [VIII.B.2.b](#), below.
3. FTB Regulation 25137(c)(1)(D)
- a. Effective for taxable years beginning on or after January 1, 2007, the FTB amended Regulation 25137(c)(1) by adding subparagraph (D) which would exclude from the sales factor all interest, dividends and gains (gross and net) in connection with the taxpayer’s treasury function.
- b. “Treasury function” is defined as “the pooling, management, and investment of intangible assets for the purpose of satisfying the cash flow needs of the trade or business” It includes the use of futures and options contracts to hedge foreign currency fluctuations, but does not include futures and options transactions to hedge price risks of the products or commodities consumed, produced or sold by the taxpayer.
- c. Registered broker-dealers and other taxpayers principally engaged in the business of purchasing and selling intangibles of the type typically held in a taxpayer’s treasury function is not considered to be performing a treasury function.
4. FTB Legal Ruling 2006-1
- a. On April 28, 2006, the FTB issued a legal ruling to address the issue of how to reflect, for apportionment factor purposes, activities related to income that is excluded from the measure of tax, in whole or in part.
- b. The FTB concluded that deductible dividends are not to be included in the sales factor to the extent of the amount which is deducted. Thus, for a 75-percent dividends received deduction under RTC § 24411, only 25 percent of the dividend would be included.
- (1) This is contrary to the FTB’s proposed amendments to Regulation 25106.5-1.
- (2) The proposed amendments to Regulation 25106.5-1 are intended to clarify the FTB staff’s position that deductible dividends (RTC §§ 24402, 24410 and 24411) are includible in the sales factor while eliminated dividends (RTC § 25106) are not to be included. See [IV.D](#) below.
5. FTB Legal Ruling 2006-2 and Amendment to Regulation 25136
- a. On May 3, 2006, the FTB issued a legal ruling to address the application of the “on behalf of” rule of Regulation 25136(b). Under Regulation 25136(b), receipts from services or sales of intangible personal property are assigned to the state where the “income producing activity” was performed, based on where the greater costs of performance occurred. Income producing activity generally does not include activities performed on behalf of a taxpayer, such as those of an independent contractor.
- b. When a contractor and subcontractor are members of the same unitary combined reporting group, the activities of the subcontractor will be considered income producing activities directly engaged in by the contractor for purposes of the “on behalf of” rule.
- (1) Payments made by the contractor to the subcontractor will be assigned to the location where the subcontractor actually performed the service.
- (2) FTB’s analysis assumes that members of a combined report must be treated as a single corporate enterprise. Query whether the FTB essentially has applied a *Finnigan* analysis and whether FTB’s analysis is consistent with its position on credit “siloeing” at issue in the pending *General Motors* case.
- (3) FTB recognizes that, in the case of water’s edge taxpayers, the “on behalf of” rule excludes activities performed by members outside the water’s edge combined report.
- c. On June 4, 2007, the FTB issued Chief Counsel Ruling 2007-2 which deals with the issue whether the investment activities of third party investors who manage investments on behalf of a taxpayer

pursuant to an agreement, constitute income producing activity under RTC § 25136 and Regulation 25136.

- (1) The FTB distinguished Legal Ruling 2007-2 and concluded that the receipts were not generated by income producing activities and thus were excludible from the sales factor.
 - d. The FTB proposed an amendment to Regulation 25136, regarding the assignment of sales of other than tangible personal property, to conform to recent changes by the Multistate Tax Commission relating to the “on behalf of” rule under MTC Regulation IV.17. Specifically, the amendment would include the activities of an independent contractor in the taxpayer’s “income producing activity.” The amendment, which became final on July 17, 2010, is applicable retroactively to taxable years beginning after 2007.
6. FTB Legal Ruling 2003-3
- a. On December 4, 2003, the FTB issued a legal ruling to address the issue when income producing activity exists with respect to a business income dividend so that the dividend is includible in the sales factor.
 - b. The FTB concluded that a dividend payee that participates in the management and operations of the dividend payor is engaged in income producing activity with respect to the dividend so that the dividend is includible in the payee’s sales factor.
 - c. Departure from the FTB’s position set forth in its Multistate Audit Technique Manual Section 7562.
 - d. This ruling becomes quite relevant in post-*Ceridian* and post-*Farmer Bros.* years where the FTB is disallowing deductions for RTC § 24410 and RTC § 24402 dividends. The FTB is applying it on audit.
7. FTB Legal Ruling 2005-1
- a. On March 21, 2005, the FTB issued a legal ruling to address the issue of what constitutes a “personal service” for purposes of attributing gross receipts to California using the so-called “time-spread method” provided by Regulation 25136(d)(2)(c).
 - b. Under the time-spread method, gross receipts for performing personal services are attributed to a state based on a ratio of time spent performing the services within and without the state.
 - (1) Separate income producing activities in each state.
 - c. Time-spread method applies only when capital is not a material income producing factor.
8. Amendments to Regulation 25128
- a. The FTB held interested parties meetings in January and September 2008 to discuss whether Regulation 25128, relating to double- vs. single-weighting of the sales factor, should be amended to provide greater clarity with respect to what constitutes “banking or financial business activity.”
9. Equally-weighted apportionment formula under MTC
- a. A number of companies recently have filed complaints in San Francisco Superior Court claiming refunds based on the election to compute California apportionable income using an equally-weighted three-factor apportionment formula under the Multistate Tax Compact (“MTC”), in place of California’s standard three-factor formula under RTC § 25128 which includes a double-weighted sales factor.
 - b. Pending cases include: *The Gillette Company & Subsidiaries*, Case No. CGC-10-495911; *Kimberly-Clark World Wide, Inc. & Subsidiaries*, Case No. CGC-10-495916; and *The Procter & Gamble Manufacturing Co. & Affiliates*, CGC-10-495912.
- B. Distortion
1. *Microsoft Corporation v. FTB*, 39 Cal. 4th 750 (2006)
 - a. The California Supreme Court concluded that the FTB sustained its burden of proving the inclusion of gross receipts from treasury function activities in the denominator of the sales factor created a distortion under RTC § 25137. The Court further concluded that the FTB’s “cure” for the distortion of including net receipts from the redemption transactions was reasonable. In reaching these conclusions, the Court emphasized the following:
 - (1) Section 25137 is not confined to correcting unconstitutional distortions.
 - (2) The comparison of low margin sales (treasury function) with higher margin sales (software transactions) presents a problem for Uniform Division of Income for Tax Purposes Act (“UDITPA”). UDITPA’s sales factor contains an implicit assumption that a corporation’s margins will not vary inordinately from state to state.

- (3) The comparison of margins in determining whether distortion exists under Section 25137 is not a prohibited separate accounting analysis.
- (4) Section 25137 is not to be applied in only unique non-recurring situations.
- (5) While the “cure” the FTB proposed in this case was reasonable, the Court cautioned that the FTB’s approach might fail the test of reasonableness in another case. For example, if, unlike the instant case, the treasury operations provide a substantial portion of a taxpayer’s income, the use of Section 25137 may be inappropriate.
- (6) The party seeking to apply Section 25137 has the burden of proving by clear and convincing evidence that the standard formula does not fairly represent the extent of the taxpayer’s business activities in California.
- b. The Court’s decision opens the door for challenges to the standard apportionment formula for both taxpayers and the government. The endorsement of a comparison of margins between functions of the unitary business is a significant development.
- c. FTB Audit Practice. Currently, auditors are analyzing whether distortion exists in the treasury function setting under four different tests—*Microsoft*, *Merrill Lynch*, *Pacific Telephone* and *Toys-R-Us*. If the taxpayer fails any of the four tests, the auditors are instructed to remove the gross receipts from the sales factor.
- d. FTB Notice 2006-3 (Sept. 28, 2006).
- (1) The FTB announced that, for purposes of applying FTB Notice 2004-5, a taxpayer that excludes from the sales factor the amount realized on the redemption of marketable securities as part of its treasury function, and includes only the interest income and net gains from such securities, will not be subject to the accuracy related penalty under RTC § 19164.
- (2) The FTB based its position on *Microsoft* and *Pacific Telephone*.
- e. Technical Advice Memorandum 2007-3.
- (1) In TAM 2007-3, the FTB set forth the types of treasury activity information that should be collected from taxpayers upon audit post-*Microsoft* and *General Motors*, including the taxpayer’s main line of business, the number of treasury and total employees, the gross margin from treasury function compared to other activities and the percentage of total income that would be assigned to the location of the treasury function.
- (2) Purpose of the information is to enable the FTB to perform a quantitative distortion analysis.
2. *Weyerhaeuser Company*, SBE Case Nos. 104355 and 246164
- a. Case involves distortion issues pertaining to the taxpayer’s timber activities in the State of Washington vis-à-vis its activities in California.
- b. The taxpayer’s Washington timber activities generate virtually all of its unitary income, yet the standard apportionment formula does not reflect this fact. The taxpayer is contending that RTC § 25137 should be applied to correct the distortion.
- c. Case also involves the proper inclusion of gross receipts for taxpayer’s treasury function in the sales factor. The FTB is arguing that the gross receipts from the taxpayer’s treasury function activity should be excluded from the sales factor under RTC § 25137. The taxpayer disagrees and is arguing that if the FTB has sustained its burden of proof under RTC § 25137 on this issue, then so has the taxpayer with respect to its Washington timber activities.
- d. Other issues include the inclusion of a proper value for government-owned property in the property factor and various manufacturers’ investment tax credit (MIC) issues.
- e. Oral argument held January 25, 2005.
- f. The SBE deferred its decision on the treasury function sales factor and the Washington timber distortion issues pending the California Supreme Court’s decision in *General Motors*. It was further deferred pending *Home Depot* (see II.A.1.h above).
3. *Microsoft Corporation v. FTB*, San Francisco Superior Court No. CGC-08-471260. Suit for refund filed on January 22, 2008, raising the following issues for the 1995 and 1996 tax years:
- a. Whether royalty income from computer software products should be sourced outside California based upon costs of performance for sales factor purposes.
- b. Whether gross receipts from marketable securities should be included in the sales factor.

- c. Whether the value of trademarks, copyrights, patents and other intangible assets should be included in the property factor.
 - d. Whether a deduction under RTC § 24402 should be allowed for dividends received for the years at issue.
4. Airline Apportionment Formula
- a. *Alaska Airlines, Inc.*, SBE Case No. 342596 (March 1, 2007), CCH Calif. Tax Rptr. ¶ 404-226. In a letter decision, the SBE held that the FTB incorrectly applied Regulation 25137-7, California's special apportionment formula for airlines.
 - b. Effective April 18, 2010, the FTB adopted Regulation 25101.3 and amended Regulation 25137-7 to require that air transportation companies engaging in business within and outside California group aircraft by model, for purposes of determining payroll, sales and property factors used to apportion income. In addition, all members of a unitary group that are engaged in a unitary business of providing air transportation must apportion business income from air transportation as provided in Regulation 25137-7.
5. Trucking Apportionment Formula
- a. *Swift Transportation Co., Inc.*, SBE Case No. 266318 (February 4, 2008), CCH Calif. Tax Rptr. ¶ 404-616. In a letter decision, the SBE upheld the FTB's position that the special apportionment formula for trucking companies set forth in Regulation 25137-11 applied to all members of the taxpayer's combined reporting group and not just the trucking company.
 - b. FTB held an interested parties meeting on May 26, 2009 to discuss updating Regulation 25137-11.
6. Franchisors
- a. In Chief Counsel Ruling 2010-2, the FTB determined that the special apportionment and allocation of income rules applicable to franchisors under Regulation 25137-3 applies to a company's licensing activity which includes granting licenses for the use of the company's trademark to licensees who market products bearing the company's trademark. The FTB also concluded that royalty and franchise payments by the company's foreign subsidiaries are treated as payments by third-party licensees, where the company has made a water's edge election.
7. Special Industry and Other Proposed Regulations
- a. The FTB held interested parties meetings in January 2008 and May 2009 to consider revising Regulation 25137-8, regarding apportionment for the motion picture and television industry. On June 16, 2009, the three-member FTB approved proceeding with the formal rulemaking process to adopt proposed amendments to Regulation 25137-8.
 - b. The FTB held an interested parties meeting in January 2008 to consider revising Regulation 25137-12, regarding apportionment for print media businesses.
 - c. The FTB held an interested parties meeting on September 19, 2008 to consider revising Regulation 25137-1, regarding apportionment and allocation of partnership income.

III. Credits

A. Enterprise Zone Hiring Credits

- 1. *Deluxe Corporation*, 2006-SBE-003 (December 15, 2006)
 - a. Case involved challenge to FTB's position of looking behind vouchers obtained from local enterprise zones. The taxpayer is arguing "voucher reliance" and that RTC § 23622.7 only requires that a certificate (voucher) be obtained from the enterprise zone or other appropriate agency and provided to the FTB upon request.
 - b. On January 31, 2006, the SBE held in a 4-1 vote that the FTB is permitted to look behind the vouchers. Post-hearing briefs were filed regarding whether the 51 remaining employees qualify for the credit.
 - c. On December 15, 2006, the SBE issued a formal opinion confirming the decision in January that the FTB is permitted to look behind the vouchers. In a letter decision issued that same day, the SBE concluded that 15 of the 51 employees at issue qualified for the credit.
 - d. On April 11, 2007, the taxpayer filed a suit for refund in the San Francisco Superior Court (No. CGC-07-462305).
 - e. Trial was scheduled for July 14, 2008, but case settled and has been dismissed.

2. *Dicon Fiberoptics, Inc. v. Franchise Tax Board*, Los Angeles Superior Court No. BC 367885
 - a. On March 13, 2007, a suit for refund was filed challenging the FTB's authority to look behind the vouchers.
 - b. On August 17, 2007, the trial court sustained the FTB's demurrer without leave to amend.
 - c. On October 3, 2007, an order of dismissal of plaintiff's action was filed.
 - d. Plaintiff filed a notice of appeal on October 23, 2007. Oral argument was heard on January 27, 2009.
 - e. On February 4, 2009, the Court of Appeal requested that the parties submit letter briefs addressing the "appropriate allocation of the burden of proof between the FTB and the taxpayer."
 - f. Parties filed letter briefs on February 13, 2009, and reply briefs on February 20, 2009. Case was submitted on February 20, 2009.
 - g. The Court of Appeal issued a published opinion in favor of the taxpayer on May 7, 2009.
 - h. The Court of Appeal concluded that, while the FTB had the authority to look behind the vouchers, the FTB had the burden of proof to demonstrate the invalidity of the vouchers.
 - (1) The vouchers are *de facto* valid.
 - (2) The FTB cannot request additional information from the taxpayer.
 - i. The FTB filed a Petition for Rehearing, which was denied.
 - j. The FTB then filed a Petition for Review with the California Supreme Court, which was granted on August 19, 2009.
 - k. The case is fully briefed and is awaiting oral argument.
3. *Jessica McClintock and Jessica McClintock, Inc.*, Nos. 304497 and 304512 (August 14, 2007)
 - a. Case involved the following issues: (1) whether subsection (c) of Section 1603 of the JTPA ("the 10% exception") provides a separate eligibility category for purposes of the hiring credit; and if yes, then (2) whether the employees in question were eligible for services under subsection (c) of section 1603 of the JTPA.
 - b. The FTB argued that subsection (c) does not provide a separate eligibility category. The FTB further argued that individuals who could be enrolled in a JTPA program pursuant to subsection (c) were not "eligible" for JTPA services under RTC § 23622.7 and could only constitute qualified employees for purposes of the hiring credit if they were actually enrolled under the JTPA. The FTB also argued that "older worker" is not a barrier to employment because it is not enumerated in the statute.
 - c. The SBE voted 5-0 to grant the taxpayer's refund claims. The SBE held that for the 10% exception, an employee only needs to be eligible for JTPA services (and not required to be enrolled in JTPA) to be a qualified employee. The SBE further held that "older worker" is a barrier to employment for purposes of the 10% exception because of the legislative history, EDD publications and the FTB's own audit manual. The SBE concluded that the "older worker" need not meet low-income guidelines.
 - d. On April 1, 2008, the FTB announced in its *Tax News* that based on purported "new information," it is taking the position in pending appeals at the SBE that an individual must be both 55 years or older and meet low-income guidelines.
4. On November 27, 2006, vouchering regulations were issued by the Department of Housing and Community Development.
5. *Taiheiyo Cement USA, Inc.*, SBE Case No. 332855 (February 4, 2008).
 - a. In a letter decision, the SBE sustained the FTB's disallowance of the enterprise zone sales and use tax credit for property that the taxpayer currently expensed.
 - b. On July 11, 2008, the SBE granted the taxpayer's petition for rehearing.
 - c. In July 2010, the Los Angeles Superior Court, Case No. BC422623, entered judgment in favor of the FTB. Case is currently on appeal (B226067).
6. *DeVry, Inc.*, SBE Case No. 357029 (August 19, 2008)
 - a. In a letter decision, the SBE reaffirmed its decision in *Jessica McClintock and Jessica McClintock, Inc.*, SBE Case Nos. 304497 and 304512 (August 14, 2007), and held that "older workers" need not meet low-income guidelines in order to be "qualified employees" for the enterprise zone hiring credit.

- b. The SBE did not agree with the FTB's stringent requirement of third-party verification for disabled and dislocated worker categories.
7. *NASSCO Holdings, Inc.*, SBE Case No. 317434 (Feb. 25, 2009)
 - a. In a letter decision, the SBE held that the taxpayer is entitled to apply its EZ and MIC tax credits to reduce its alternative minimum tax liabilities, which results in no tax owed.
 - b. The FTB filed a petition for rehearing, which the SBE denied on August 31, 2009.
 - c. On August 31, 2009, the SBE also directed staff to draft a formal opinion in favor of the taxpayer. The draft opinion is scheduled for a Board vote later this year.
- B. Separate But Unitary
1. *General Motors Corporation v. FTB*, 39 Cal. 4th 773 (2006)
 - a. California Supreme Court rejected the taxpayer's argument that a research expense credit should be applied against the tax liability of the unitary group, or in the alternative, should be "intrastate-apportioned" against the tax liability of each of the taxpayer-members of the unitary group.
 - b. The Court accepted the FTB's argument that the credit should be limited to the taxpayer which incurred the research expenses.
 2. Cases pending in the administrative process challenging the siloing of credits under RTC § 25137.
 3. Credit Assignment
 - a. AB 1452, enacted on September 30, 2008, added RTC § 23663, which provides that an "eligible credit" may be assigned by a taxpayer to an "eligible assignee." The election to assign is irrevocable and is required to be made on the taxpayer's original return for the taxable year in which the assignment is made.
 - (1) "Eligible credit" means any credit earned by a taxpayer in a taxable year beginning on or after July 1, 2008, or any credit earned prior to July 1, 2008, that is eligible to be carried forward to the taxpayer's first taxable year beginning on or after July 1, 2008.
 - (2) "Eligible assignee" means any "affiliated corporation" that is properly treated as a member of the same combined reporting group.
 - (3) "Affiliated corporation" means a corporation that is a member of a commonly controlled group.
- b. The FTB released a set of Frequently Asked Questions ("FAQs") and Form 3544 concerning the new credit assignment provisions. On April 3, 2009, FTB held an interested parties meeting ("IPM") to discuss the FAQs, and released a summary of the IPM. FTB addressed the manner in which the credit assignment election must be made, substantiation of the credit after assignment, and post-assignment credit utilization limitations. The FAQs were recently amended to address limitations on credits attributed to a disregarded business entity and assignment limitations relating to the low income housing tax credit and the California film and television tax credit.

IV. Water's Edge Election

- A. *Fujitsu Holdings, Inc. v. FTB*, 120 Cal. App. 4th 459 (2004)
 1. California Court of Appeal concluded that for purposes of calculating the Subpart F inclusion ratio under the water's edge combined report, dividends from lower-tier controlled foreign corporations should be excluded and not taken into account under RTC § 25106. In addition, the Court concluded that California has adopted the previously taxed income provisions of IRC § 959.
 2. The Court also concluded that refunds of UK Advance Corporation Tax payments are dividends under California law and thus subject to elimination under RTC § 25106.
 3. On the preferential ordering v. pro rata dividend deduction issue, the Court also concluded that the elimination provisions of RTC § 25106 are to be applied prior to the 75-percent dividends received deduction provisions of RTC § 24411.
 4. In the only portion of the opinion in which the Court agreed with the FTB, the Court concluded that California's water's edge method of reporting does not facially discriminate against foreign commerce. The court distinguished

- the *Kraft v. Iowa* decision on the basis of the “footnote 23” argument which has been accepted by some other states.
5. The FTB’s petition for review was denied by the California Supreme Court.
- B. *Baxter Healthcare Corporation*, SBE Case No. 150881 (August 1, 2002)
1. In a summary decision, the SBE concluded that Treasury Regulation 1.954-2(b) (1) excluded from Subpart F income for California water’s edge purposes, the dividend paid by one foreign subsidiary to another foreign subsidiary.
 2. The SBE agreed with the taxpayer that IRC § 959(b) was incorporated into California law through the operation of Treasury Regulation 1.954-2(b)(1).
- C. *Apple Inc. v. FTB*, San Francisco Superior Court No. CGC-08-471129 (Jan. 26, 2010)
1. On November 20, 2006, the SBE issued a formal opinion and agreed with the FTB—contrary to *Fujitsu* (see IV.A above)—that the dividends paid by a controlled foreign corporation that was partially included in a water’s edge combined report is prorated among the RTC § 25106 dividend elimination provision and the RTC § 24402 dividend deduction provision (“LIFO proration approach”).
 2. On January 16, 2008, the taxpayer filed a suit for refund in San Francisco Superior Court.
 3. The plaintiff contends that the issue has already been decided by the Court of Appeal in *Fujitsu*. In that case, the Court rejected the FTB’s LIFO proration approach and concluded that such dividends are to be paid first from unitary earnings and thus eliminated under RTC § 25106 (“preferential ordering”).
 4. The FTB has refused to follow *Fujitsu* and contends that it is not binding precedent.
 5. The FTB has attempted to amend Regulations 24411 and 25106.5-1 to conform to the SBE decision in *Appeal of Apple*, rather than *Fujitsu*. (See IV.D below)
 6. Case also involves RTC § 24425 and interest expense disallowance issues. (See I.F above).
 7. Trial was held on February 25-26, 2009. On January 26, 2010, the trial court issued a final statement of decision in favor of the FTB on the distributions ordering issue and in favor of the plaintiff on the interest expense disallowance issue.
 8. The plaintiff appealed the distributions ordering issue and the FTB cross-appealed on the interest expense disallowance issue. The plaintiff also appealed the trial court’s denial of an award of attorneys’ fees.
- D. FTB Proposed Amendments to Regulations 24411 and 25106.5-1
1. On February 9, 2005, the FTB staff requested approval from the 3-member FTB to proceed with amendments to Regulations 24411 and 25106.5-1.
 2. The amendments are designed to reverse the Court of Appeal decision in *Fujitsu* regarding the dividend ordering rules of RTC § 25106 and RTC § 24411.
 3. In response to opposition voiced at the FTB meeting, the staff was ordered to hold a symposium for interested parties rather than proceed directly into the formal regulatory process. See FTB Notice 2005-1.
 4. On April 4, 2007, the FTB approved going forward into the formal regulatory process. A public hearing was held on January 16, 2008. FTB staff issued a report dated March 6, 2008 in response to public comments.
 5. On March 6, 2008, the FTB staff pulled the regulation from the Board agenda and decided not to move forward on the regulation.
- E. Proposed Legislative and Regulatory Amendments
1. In Legislative Proposal 08-03 the FTB proposed to revise the way in which the income from a controlled foreign corporation (CFC) is included in the water’s edge combined report. Currently, Subpart F income from a CFC is not included in the combined report. Rather, the ratio of a CFC’s Subpart F income to its earnings and profits (the “inclusion ratio”) is used to determine the extent to which the CFC’s income and apportionment factors are included in the combined report. In LP 08-03,

the inclusion ratio method would be replaced by the inclusion in the combined report of 100 percent of the Subpart F income from a CFC, subject to a 27 percent deduction.

2. Effective as of May 6, 2009, the FTB adopted amendments to Regulation 25111 and new Regulation 25113, which relate to water's edge election issues.
3. Effective as of June 20, 2009, the FTB adopted amendments to Regulation 25114 regarding presumptions arising from federal audit for water's edge taxpayers.

V. California Tax Amnesty ... Not?

A. *General Electric Company v. Franchise Tax Board*, San Francisco Superior Court No. 449157

1. The taxpayer challenged the validity of the Amnesty Penalty under RTC § 19777.5 (SB 1100) in a declaratory relief action.
2. It was the taxpayer's position that the Amnesty Penalty is invalid for a number of reasons and sought a declaration from the Court to that effect.
 - a. The taxpayer alleged that the Amnesty Penalty is unconstitutional under the Due Process Clause due to the absence of a plain, speedy and efficient remedy to challenge the merits of the penalty either in court or administratively.
 - b. The taxpayer alleged that the Amnesty Penalty is unconstitutional under the Due Process Clause due to its retroactive nature.
 - c. The taxpayer alleged that the FTB's interpretation of "due and payable" in RTC § 19777.5 is at odds with RTC § 19049. The taxpayer requested a declaration from the Court, consistent with RTC § 19049, that no Amnesty Penalty will arise if the taxpayer pays the amount of the assessment on or before it receives a notice and demand for payment or within 15 days thereafter.
3. The FTB filed a demurrer to the complaint on the ground that the action was not ripe. The Court sustained the demurrer with leave to amend. On May 10, 2006, the taxpayer filed an amended complaint, to which the FTB filed another demurrer on ripeness grounds. The Court sustained the FTB's demurrer.

4. On September 15, 2006, the taxpayer filed a notice of appeal.
5. On July 13, 2007, after briefs were filed and while the case was awaiting oral argument, the case settled and the appeal was dismissed.

B. Other pending cases involving the amnesty penalty

1. *River Garden Retirement Home v. FTB* (see I.A.4.b(2) above). On September 24, 2008, the trial court granted the FTB's motion for summary judgment on the Amnesty Penalty issue. The court held that even if the plaintiff's interpretation of "due and payable" was correct, payment was not made within 15 days of notice and demand. On July 15, 2010, the appellate court held that an amount becomes "due and payable" for purposes of the Amnesty Penalty upon a final determination of tax and thus affirmed the imposition of the penalty. The Court also concluded that RTC § 19777.5 did not operate retroactively and thus did not violate the substantive Due Process Clause. A petition for review was filed on August 25, 2010.
2. Other pending cases in California superior court challenging the validity of the amnesty penalty include *Microsoft Corporation v. FTB* and *Cutler v. FTB*.

VI. Penalties

A. 20-Percent Understatement Penalty under RTC § 19138

1. In 2009, California imposed a new penalty on corporate taxpayers equal to 20 percent of the understatement of tax if the understatement exceeds \$1 million.
2. In the case of taxpayers filing a combined report, the \$1 million threshold applies to the aggregate amount of the understatement for all entities in the combined report.
3. The penalty applies to understatements made on an original or amended return filed on or before the original or extended due date of the return for the taxable year.
4. The penalty is in addition to any other penalties and applies to taxable years beginning on or

after January 1, 2003 for which the statute of limitations on assessment has not expired.

5. The penalty will not apply to understatements in the following situations:
 - a. The taxpayer filed an amended return on or before May 31, 2009 and paid the amount of tax shown on that return by May 31, 2009; or
 - b. There is a change of law that causes the understatement, where the law change occurs after the date the taxpayer filed the return (or the extended due date for the return, whichever is earlier) for the taxable year for which the change is operative; or
 - c. The understatement is attributable to the taxpayer's reasonable reliance on a legal ruling by the FTB Chief Counsel.
6. RTC § 19138 does not expressly provide for any "reasonable cause" exception and limits the grounds for refund or credit of any penalty paid to computational errors.
7. The California Taxpayers' Association (Cal-Tax) filed a lawsuit against the FTB in February 2009 to enjoin the enforcement of the penalty. On May 21, 2009, the trial court rejected the challenge to the penalty. Cal-Tax has filed an appeal. The case has been fully briefed and is awaiting oral argument.

VII. Tax Shelters

- A. Challenges to FTB's Disallowance of REIT and RIC Dividend Deductions
 1. *City National Corporation v. FTB*, Los Angeles Superior Court No. BC334772
 - a. The taxpayer is challenging the FTB's disallowance of REIT and RIC dividend deductions.
 - b. The FTB's demurrer on procedural grounds was sustained without leave to amend.
 - c. On January 16, 2007, the Court of Appeal reversed the lower court and held that the taxpayer was not barred from proceeding with its suit for refund.
 - d. On April 11, 2007, the California Supreme Court denied the FTB's petition for review.
 - e. The case settled in May 2010.

2. *City National Corporation v. FTB*, Sacramento Superior Court No. 06AS02275

- a. In an action similar to the above case but for subsequent taxable years, the taxpayer is claiming a refund with respect to REIT dividend deductions.
- b. The case settled in May 2010 (see above).

B. FTB Notice 2008-4

1. On June 6, 2008, the FTB issued Notice 2008-4 regarding resolution of Bogus Optional Basis ("BOB") transactions and certain employee stock ownership plan ("ESOP") transactions.

VIII. Legislative Updates

A. AB 1452

1. Enacted on September 30, 2008
2. NOL Carryback
 - a. RTC § 24416 is amended to conform to the federal NOL carryback rules for NOLs attributable to taxable years beginning on or after January 1, 2011, with some modifications including the following:
 - (1) Allow an NOL to be carried back only 2 years;
 - (2) Limit the amount of NOL carryback attributable to taxable year 2011 to 50% of the NOL;
 - (3) Limit the amount of NOL carryback attributable to taxable year 2012 to 75% of the NOL;
 - (4) Disallow NOL carrybacks to any taxable year beginning before January 1, 2009.

3. NOL Suspension

- a. Newly added RTC § 24416.9 disallows NOL deductions by suspending them for taxable years 2008 and 2009 for a taxpayer with income subject to tax of \$500,000 or more.

4. Credit Assignment

- a. See III.B.3 above.

B. AB X3 15

1. Nexus Standard

- a. The definition of "doing business" under RTC § 23101 is amended.

- b. For taxable years beginning on or after January 1, 2011, a taxpayer is doing business in this state if any of the following conditions has been satisfied:
- (1) The taxpayer is organized or commercially domiciled in this state;
 - (2) Sales of the taxpayer in this state exceed the lesser of \$500,000 or 25 percent of the taxpayer's total sales;
 - (3) The real property and tangible personal property of the taxpayer in this state exceed the lesser of \$50,000 or 25 percent of the taxpayer's total real property and tangible personal property;
 - (4) The amount paid in this state by the taxpayer for compensation exceeds the lesser of \$50,000 or 25 percent of the total compensation paid by the taxpayer.
- c. However, in the Assembly Floor analysis for the bill, it is stated that because of federal law, nexus "does not currently, and would not under this measure, extend to companies whose only connection is that they sell tangible property in the state."
2. Apportionment Formula and Sales Factor Issues
- a. Single sales factor election
- (1) Multistate taxpayers may make an irrevocable annual election on an original timely filed return to apportion its income using a single sales factor. This election will be available for taxable years beginning on or after January 1, 2011. The election is not available to taxpayers listed in RTC § 25128(b), which derive more than 50 percent of their gross receipts from agricultural, extractive, savings and loan, or banking or financial activities. Those taxpayers must continue to use the standard, equally weighted three-factor apportionment formula. RTC § 25128.5.
 - (2) A study released in June 2010 indicated that changing to the single sales factor formula will create 144,000 new jobs in California and increase state revenues by \$411 million annually.
- b. Gross receipts
- (1) For taxable years beginning before January 1, 2011, "sales" for purposes of the sales factor includes all gross receipts not allocated under RTC §§ 25123 through 25127. This is a "clarifying" non-substantive change.
 - (2) For taxable years beginning on or after January 1, 2011, "gross receipts" include the gross amount realized in a transaction producing business income and recognized under the Internal Revenue Code, without reduction for basis or costs of goods sold. RTC § 25120(f). However, gross receipts, even if business income, shall not include the following:
 - (a) Repayment, maturity, or redemption of the principal of a loan, bond, mutual fund, certificate of deposit, or similar marketable instrument;
 - (b) The principal amount received under a repurchase agreement or other transaction properly characterized as a loan;
 - (c) Proceeds from the issuance of a taxpayer's own stock or from sale of treasury stock;
 - (d) Damages and other amounts received as the result of litigation;
 - (e) Property acquired by an agent on behalf of another;
 - (f) Tax refunds and other tax benefit recoveries;
 - (g) Pension reversions;
 - (h) Contributions to capital (except for sales of security by securities dealers);
 - (i) Income from discharge of indebtedness;
 - (j) Amounts realized from exchanges of inventory that are not recognized under the Internal Revenue Code;
 - (k) Amounts received from transactions in intangible assets held in connection with a treasury function of the taxpayer's unitary business and the gross receipts and overall net gains from the maturity, redemption, sale, exchange, or other disposition of those intangible assets;
 - (i) "Treasury function" means the pooling, management, and investment of intangible assets for purposes of satisfying the cash flow needs of the taxpayer's trade or business, such as providing liquidity for a taxpayer's business cycle, providing a reserve for business contingencies, and business acquisitions, and also includes the use of futures contracts and options contracts to hedge foreign currency fluctuations.
 - (l) Amounts received from hedging transactions involving intangible assets.

c. *Finnigan* Returns (Again)

- (1) For taxable years beginning on or after January 1, 2011, all sales of a combined reporting group properly assigned to this state must be included in the sales factor numerator regardless of whether the member of the combined reporting group making the sale is subject to tax in California. Sales not assigned to California are not included in the California sales factor numerator if a member of the combined reporting group is subject to tax in the state of the purchaser. RTC § 25135(b).

d. Sourcing of sales from intangibles

- (1) For taxable years beginning on or after January 1, 2011, for sales factor purposes, sales of other than tangible personal property are sourced (new RTC § 25136):
 - (a) For sales from services, to the state where the purchaser receives the benefit of the services, to the extent the benefits are received;
 - (b) For sales of intangible property, to the state where the intangible property is used, to the extent it is used; and in the case of marketable securities, to the location of the customer;
 - (c) For sales from the sale, lease, rental, or licensing of real or tangible property, to the state where the property is located.

3. Motion Picture Production Credit

- a. For taxable years beginning on or after January 1, 2011, a credit is allowed for 20 percent of the qualified expenditures of qualified motion pictures, or 25 percent of such expenditures for independent films or a television series whose production was relocated to California primarily because of the credit.
- b. The credit may be carried forward for 6 years, and is available for individuals and corporations.

4. Small Business Hiring Credit

- a. For taxable years beginning on or after January 1, 2009, small businesses may claim a \$3,000 tax credit for each qualified full-time employee hired during the taxable year which results in a net increase in full-time employees from the previous year.
- b. Only employers having 20 or fewer employees may qualify for the credit as a small businesses.

C. Pending Legislation and Ballot Measures (November 2010) of Note

1. *Proposition 24*: Measure to repeal recent legislation that would allow businesses to carry back losses, share tax credits among affiliated corporations and elect to use a single sales factor apportionment formula.
2. *Proposition 25*: Measure to change the legislative vote requirement to pass a budget from two-thirds to a simple majority. The two-thirds vote requirement for taxes would be retained.
3. *Proposition 26*: Measure to increase the legislative vote requirement to two-thirds for state levies and charges by expanding the definition of a “tax” subject to the two-thirds vote.

IX. Miscellaneous

A. Attorneys Fees

1. *Northwest Energetic Services, LLC v. FTB*, San Francisco Superior Court No. CGC-05-437721 (March 3, 2006)
 - a. Attorneys fees were granted based on a “private attorney general” doctrine (California Code of Civil Procedure Section 1021.5).
 - b. On appeal, the Court of Appeal reversed and remanded the case to the trial court on the issue of attorney fees. 159 Cal App. 4th 841 (2008).
 - c. Case was settled in July 2010.
2. *Hyatt v. FTB*, Nevada District Court Case No. A382999 (2008)
 - a. In August 2008, a Clark County, Nevada jury rendered a verdict in favor of plaintiff and awarded \$388 million in damages, including \$1.1 million for attorneys’ fees.
 - b. FTB filed an appeal with the Nevada Supreme Court.

B. Limited Liability Company Issues

1. *Northwest Energetic Services, LLC v. FTB*, San Francisco Superior Court No. CGC-05-437721 (March 3, 2006)

- a. The trial court concluded that California's LLC fee under RTC § 17942 violates the Commerce and Due Process Clauses because it is based on worldwide gross income and not apportioned between gross income sourced within and without California.
 - b. The LLC in *Northwest Energetic* was a Washington state LLC that registered to do business in California, but never had any sales, property, payroll or other activity in California.
 - c. While the court's decision appears to conclude that the LLC fee is unconstitutional and cannot be imposed on any LLC, including those with California activities, it remains uncertain whether a California court would be as willing to conclude the fee is unconstitutional for an LLC that generated all, or most, of its income from California sources.
 - d. On appeal, the Court affirmed but reversed and remanded the case to the trial court on the issue of attorney fees. 159 Cal App. 4th 841 (2008). The FTB did not seek review of the LLC fee issue by the California Supreme Court.
 - e. On April 14, 2008, the FTB issued Notice 2008-2 summarizing the information needed for taxpayers filing claims for refund based on the Northwest Energetic decision.
 - f. For taxable years beginning on or after January 1, 2007, legislation was enacted that provides that total income from all sources reportable to California means gross income, plus cost of goods sold, derived from or attributable to California within the meaning of specified provisions of the Corporation Tax Law relating to apportionment and allocation.
2. *Ventas Finance I, LLC v. FTB*, San Francisco Superior Court No. CGC-05-440001 (November 7, 2006)
 - a. Similar to *Northwest Energetic*, the trial court concluded the LLC fee under RTC § 17942 was an unfairly apportioned tax.
 - b. The Court concluded that RTC § 17942 could not be reformed to add an apportionment mechanism since that was contrary to the Legislature's intent.
 - c. The taxpayer had approximately 10 percent of its revenues from California sources.
 - d. On appeal, the Court of Appeal affirmed the unconstitutionality of the fee but reversed the trial court's determination that the company was due a refund for the entire amount of the fee it paid.
 - e. On September 19, 2008, the taxpayer filed a petition for review with the California Supreme Court.
 - f. Plaintiff's petition for review was denied on November 13, 2008.
 - g. On April 6, 2009, the U.S. Supreme Court denied plaintiff's petition for a writ of certiorari.
 3. *Bakersfield Mall LLC v. FTB*, San Francisco Superior Court No. CGC 07-462728
 - a. A limited liability company that does business solely within California filed suit challenging the constitutionality of the LLC fee. The suit seeks class status for LLCs that derive all income from within California.
 - b. The FTB's demurrer was overruled and the case is currently pending in trial court.
- C. Business/Nonbusiness Income
1. *Appeal of Comcast*, SBE Case No. 424198
 - a. Pending SBE appeal involving business/nonbusiness income issues, including the classification of a break-up fee.
 2. *Appeal of Crane Co. & Subsidiaries*, SBE Case No. 357027 (June 30, 2009)
 - a. In a summary decision, the SBE determined that a taxpayer's gain from the sale of stock in an affiliate in which the taxpayer owned a 49 percent interest is apportionable business income under the functional test.
 - b. The SBE found that the stock was purchased pursuant to a strategic business relationship.
 - c. Taxpayer conceded that the acquisition and disposition of the stock was an integral part of its business.
 - d. Taxpayer argued that the element of management was lacking.
 - e. Taxpayer also conceded that the sale of the assets of its wireless business sold as part of a package with the sale of stock in issue generated business income.
 3. *Appeals of Rheem Manufacturing Company*, SBE Case No. 485872 (2010)
 - a. The SBE ruled that the FTB properly classified a manufacturing company's sale of stock in a

distribution company as business income because the ownership of the stock was integral to the taxpayer's strategic business relationship with the distribution company.

D. Intercompany Transactions

1. On April 21, 2010 and September 22, 2010, the FTB held interested parties meetings regarding possible amendments to Regulation 25106.5-1 relating to intercompany transactions between members of a combined reporting group.
 - a. FTB has proposed amendments to specify that a taxpayer that makes an election under Regulation 25106.5-1(e) to currently recognize intercompany income/loss on a separate basis shall not include the gross receipts related to such income in the sales factor in the year of the election.
 - b. FTB also has proposed amendments to address certain issues relating to the FTB's deferred intercompany stock account ("DISA") provisions. Under the FTB's current DISA rules, gain from distributions in excess of basis is deferred until a triggering event occurs (e.g., member leaves the combined reporting group). FTB has proposed amendments to state that (1) a "brother-sister" merger between members of a combined reporting group will not trigger the recognition of a DISA and (2) a distribution through various tiers of subsidiaries should not trigger more than one DISA. Also under consideration is whether the Regulation should be amended to state that a subsequent capital contribution reduces a DISA.
2. FTB Notice 2009-1 (Feb. 20, 2009).
 - a. The FTB announced that it is enforcing the requirement under Regulation 25106.5-1 that taxpayers annually disclose their DISA balances to the FTB (Form 3726). Failure to do so can result in the FTB, in its discretion, requiring that undisclosed DISA amounts be taken into account in any year of such failure.

E. Miscellaneous FTB Chief Counsel Rulings

1. IRC § 355 transactions
 - a. In Chief Counsel Rulings 2009-1 and 2009-2, the FTB analyzed various transactions to determine whether the subject entities were engaged in the active conduct of a trade or business within the meaning of IRC § 355(b), as in effect prior to its amendment under the Tax Increase Prevention and Reconciliation Act of 2005 ("TIPRA"). The FTB concluded that, due to California's lack of

conformity to TIPRA at the time of the ruling, the pre-TIPRA active trade or business requirement would need to be satisfied under pre-TIPRA IRC § 355(b) for California purposes.

2. Investment partnerships

- a. In California, the taxable income of a nonresident from sources within the State does not include dividends, interest or gains/losses from "qualifying investment securities," if certain requirements are met. RTC § 17955(a).
- b. RTC § 17955(c)(3)(A) lists various "qualifying investment securities," including, without limitation, common and preferred stock, bonds, debentures and other debt securities, foreign and domestic currency deposits or equivalents, various forward/futures contracts, options and other securities.
- c. In Chief Counsel Ruling 2010-1, the FTB concluded that commodity-linked derivatives are "qualifying investment securities" even though not specifically mentioned in the list set forth under RTC § 17955(c)(3)(A).

F. Right to Jury Trial

1. In *Gonzales v. FTB*, Case No. S176943, now pending before the California Supreme Court, the issue is whether the taxpayer may have his request for a tax refund decided by a jury. The case is fully briefed and is awaiting oral argument.

G. Sales/Use and Property Taxes

1. Sales and Use Tax

- a. The SBE has adopted new California sales and use tax audit procedures under Regulation 1698.5, which became effective on August 18, 2010. Regulation 1698.5 sets forth the new audit procedures to establish the responsibilities of taxpayers and SBE staff and to ensure the completion of audits in a timely and efficient manner, including the expectation that sales and use tax audits be completed within a two-year period.

2. Property Tax

- a. On August 16, 2010, the California Court of Appeal held in *Phelps v. Orange County Assessment Appeals Board No. 1*, Case No. G040428, that the transfer of a trust beneficiary's right to income from trust property to the beneficiary's children was a

change of ownership for property tax reassessment purposes.

- b. On September 15, 2010, the SBE authorized the publication of Assessors' Handbook Section 401, Change in Ownership, a copy of which is posted on the SBE's website. The new section is a compilation of information included in the statutes, property tax rules and court cases as they relate to changes in ownership under Proposition 13. Topics covered include changes in ownership pertaining to tenancies in common, joint tenancies, trusts and estates, legal entities, leases and others.

H. Local Taxes

1. *Chevron v. City of Richmond*, Contra Costa Superior Court, Case No. C09-00491 (Dec. 16, 2009)
 - a. City's business tax was held to be facially invalid under the Commerce Clause and the Internal Consistency Test. City's appeal was dismissed; case is now final.
2. *The Roman Catholic Archbishop of San Francisco, A Corporation Sole v. City and County of San Francisco*, San Francisco Superior Court, Case No. CGC-10-498795 (pending)
 - a. Case involves the issue whether documentary transfer tax applies to the transfer of parish and school real property within the San Francisco Archdiocese.

Important Notice to Readers

This material is not intended to constitute a complete analysis of all tax considerations. Internal Revenue Service regulations generally provide that, for the purpose of avoiding United States federal tax penalties, a taxpayer may rely only on formal written opinions meeting specific regulatory requirements. This material does not meet those requirements. Accordingly, this material was not intended or written to be used, and a taxpayer cannot use it, for the purpose of avoiding United States federal or other tax penalties or of promoting, marketing or recommending to another party any tax-related matters.