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## California LLC Fee Is Again Held Unconstitutional

The Superior Court in San Francisco has issued another tentative ruling that the California LLC fee is unconstitutional. The ruling in the second case, *Ventas Finance I LLC v Franchise Tax Board*, Case No. CGC-05-440001 (SF Sup. Ct. Nov. 7, 2006), will be final in 90 days from November 7, 2006, unless the Franchise Tax Board appeals, which it will likely do. The decision in the *Ventas Finance I* case goes beyond the decision in the *Northwest Energetic Services, LLC* case in that the decision in the *Ventas Finance I* case held that the LLC fee authorized in Revenue and Taxation Code section 17942 is disallowed in its entirety, not just the portion related to non-California source income. The court further held that the statute can not be reformed because the legislature originally considered adding an apportionment section in R&TC§ 17942 and intentionally decided against it. California law holds that a statute can not be reformed to achieve a purpose the legislature originally decided against.

If the *Ventas Finance I* decision is upheld on appeal, which may take a few years, the outcome of this case will be that the LLC fee is disallowed in its entirety, this includes fees based on California source income as well as non-California source income.

One would assume that the legislature would address this issue in the very near future and pass legislation basing such LLC gross receipts fees solely on California-source income. However, under California law, it would appear unlikely that such legislation could be made retroactive.

These decisions do not affect the flat minimum franchise tax of \$800 based on Revenue and Tax Code section 17941, which continues to be valid. However, an LLC that has paid any gross receipts tax under R&TC§ 17942, and this includes both in-state and out-of-state LLCs, should file protective claims for refunds with the California Franchise Tax Board for every year in which such LLC has paid a gross receipts tax.

A protective claim will preserve the LLC's right to obtain a refund if the Superior Court ruling in *Ventas Finance I* is upheld upon appeal and the tax is indeed confirmed to be unconstitutional. Such a claim will also help meet the four-year statute of limitations for filing refunds.

The FTB has established a procedure for making a protective claim for refund. Further details can be obtained on the FTB's website. See FTB Public Service Bulletin 2006-03-21.

See also <http://www.ftb.ca.gov/forms/misc/3556.html#proclaim>:

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