



MULTISTATE INCOME/FRANCHISE TAX

## California court denies FTB's motion to modify judgment declaring P.L. 86-272 guidance invalid

### Tax Alert

### Overview

On February 13, 2024, the San Francisco Superior Court issued an Order denying the California Franchise Tax Board's ("FTB's") motion to vacate and modify the court's judgment entered in December of 2023 ("Motion to Vacate and Modify Judgment"), in *Am. Catalog Mailers Ass'n v. Franchise Tax Bd.*, which concluded that the FTB's Technical Advice Memorandum 2022-01 ("TAM 2022-01") and Publication 1050 were void because they constituted regulations that were required to be adopted, but were not adopted, in compliance with the California Administrative Procedure Act ("APA"). TAM 2022-01 and Publication 1050 provided the FTB's interpretation on the manner in which Public Law 86-272 (15 U.S.C. sections 381-384) ("P.L. 86-272") applies to certain activities conducted via the Internet. See our prior [Tax Alert](#) for details relating to the court's December 2023 judgment.

On the same date, the court also issued a separate Order, concluding that the taxpayer was the prevailing party in this case under the applicable California provisions, thereby awarding the taxpayer attorney's fees in the amount of \$332,891.50. The court's two February 2024 Orders may be accessed at the San Francisco Superior Court's website under [Case No. CGC-22-601363](#).

This Tax Alert summarizes the court's February 2024 Order denying the FTB's Motion to Vacate and Modify Judgment.

### Summary of the California Superior Court's February 2024 Order denying FTB's Motion to Vacate and Modify Judgment

In the FTB's Motion to Vacate and Modify Judgment, the FTB objected, among others, to the language in the judgment stating that "[t]he TAM and Publication 1050 are . . . declared void and without force and effect, and their guidance may not be relied upon[,]" claiming that this language contradicted well-established California Supreme Court precedent. The court disagreed with the FTB, finding that the "California Supreme Court has held squarely that 'when the APA applies, administrative policies that are not adopted in accordance

with its requirements are ‘void’ regulations that are ‘not entitled to any deference’” and “[b]y definition, a ‘void’ regulation *is* one that lacks any force and effect, a phrase that is commonly utilized to mean exactly the same thing.” Additionally, the court stated, among others, that “[a]n agency may not properly enforce or rely upon a regulation adopted in violation of the APA[,]” “[n]or may a court properly defer to such a void regulation.”

Although the court noted that “the FTB is correct in observing that a ‘void’ regulation is ‘not necessarily . . . wrong[,]’” the court stated that the judgment did not state that the FTB’s interpretation in the TAM and Publication 1050 was wrong and in any event, was not presently at issue. The court also noted that contrary to the FTB’s contentions, as concluded in the accompanying Order, taxpayer “unquestionably is the prevailing party in this action” under the applicable California provisions and therefore is entitled to an award of reasonable attorney’s fees.

## Get in touch

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