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BOE REJECTS FTB POSITION IN PACIFICORP CASE

In a tax appeal where most of the discussion was on an attempt by the Franchise Tax Board to classify electricity as tangible personal property for corporate tax apportionment purposes, the State Board of Equalization on April 17 ruled unanimously for the taxpayer (*Appeal of PacificCorp*, No. 90027).

Issues in the case were whether the sale of electricity was a sale of tangible personal property to be included in the sales factor numerator in the apportionment formula and whether the sales occurred in Oregon.

The board also directed its staff to prepare a written opinion. BOE Member Dean Andal said he wanted the opinion to include the sentence: "For purposes of California tax law, electricity is intangible." Marcy Jo Mandel, representing Controller Kathleen Connell, agreed. BOE Member Johan Klehs said he wasn't ready to reach that conclusion and wanted more time to study the issue prior to consideration of the written opinion.

Sacramento attorney Eric Coffill (Morrison and Foerster) represented PacificCorp. He said the FTB recently changed its position, having formerly administered the law with such sales treated as intangible. He said court decisions, rulings and policies in other states and the Multistate Tax Commission all view electricity as intangible property.

In an *amicus* brief filed on behalf of the taxpayer, Cal-Tax General Counsel Greg Turner noted that electricity has been generated for over 100 years and the FTB has been apportioning income for nearly 70 years. What has changed to make electricity tangible rather than intangible? he asked. He said electricity cannot be traced to a destination and cannot be stored for future use, and is therefore intangible. Mr. Turner added that characterizing electricity as tangible property would create a tax incentive for out-of-state firms not to sell electricity to California.

Los Angeles attorney Rick Richman, in an *amicus* brief filed on behalf of Edison International, said the FTB has a long-standing regulation (**Reg. 24405**) that electricity is not tangible personal property. "The FTB cannot properly argue electricity (a) is tangible personal property for the purposes of one section of the Bank and Corporation tax law, but (b) is not tangible personal property for purposes of another section of the same law," he wrote.

FTB attorney Craig Swieso argued that electrons are tangible and presented an expert witness who gave a demonstration of how a flashlight operates. He said the 1992 *McDonnell Douglas* case (see [Caltaxletter](#) of November 30, 1992) triggered a revision of the FTB thinking on whether electricity is intangible. (The case was a sales tax case that had nothing to do with electricity or intangible property.)

Board members also said the FTB has no consistent principle, but was just trying to find more revenue. Mr. Turner criticized the FTB for embarking on a "course that marks California as an

unpredictable climate in which to do business because the position of one of California's taxing agencies changes with the wind or, perhaps, with the forecast of revenues."