

CERTIFIED FOR PUBLICATION

COPY

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

TOYS "R" US, INC., et al.,
 Plaintiffs and Appellants,
 v.
 FRANCHISE TAX BOARD,
 Defendant and Respondent.

C045386

(Super. Ct. No.
01AS04316)

ORDER MODIFYING
OPINION, DENYING
REQUEST FOR PARTIAL
DEPUBLICATION OF
OPINION, AND DENYING
REHEARING

[NO CHANGE IN
JUDGMENT]

THE COURT:

It is ordered that the opinion filed herein on April 5, 2006, be modified as follows:

1. On page 20, the first full paragraph, beginning with "As the FTB concedes," is deleted and the following paragraphs are inserted in its place:

As the FTB concedes, no California appellate court has addressed the question of who has the burden of proof under section 25137. However, several State Board of Equalization (SBE) cases have determined that the party seeking to deviate from the statutory allocation formula bears the burden of proving the use of the normal formula does not fairly represent the extent of the taxpayer's activity in California. (*Appeals of Bank of Tokyo* (SBE 1995) Westlaw, 1995 WL 671975; *Appeal of Aimor Corp.* (SBE 1983) Westlaw, 1983 WL 15592; *Appeal of California First Bank* (SBE 1985))

Westlaw, 1985 WL 15830; *Appeal of New York Football Giants, Inc.* (SBE 1977) Westlaw, 1977 WL 3825.) For the reasons expressed below, we conclude the FTB has met this burden.

The SBE has noted that showing distortion in the standard formula is a difficult hurdle to overcome. However, "Section 25137 must be analyzed on a case-by-case basis; there is no bright line rule that determines when the standard formula does not adequately deal with a particular situation. However, our prior opinions reveal five examples of unusual fact situations that may trigger section 25137: [¶] . . . [¶] (4) One or more of the standard factors is biased by a substantial activity that is not related to the taxpayer's main line of business. For example, the taxpayer continuously reinvests a large pool of 'working capital,' generating large receipts that are allocated to the site of the investment activity. However, the investments are unrelated to the services provided by the taxpayer at its primary business." (*Appeal of Crisa Corp.* (SBE 2002) Westlaw, 2002 WL 1400003, fn. omitted.) It is this latter situation the FTB argues merits imposition of section 25137 in the present case: the inclusion of income and principal from short-term investments in the sales factor distorts the income apportioned to California and does not fairly represent Toys's activity in the state.

2. On pages 20 and 21, the paragraph beginning with "Under former section 25101" is deleted in its entirety.
3. On page 21, the first full paragraph, beginning with "In general, in a suit for a refund," is deleted in its entirety.
4. On page 21, the paragraph beginning with "We agree" is deleted in its entirety.
5. On page 27, the last paragraph, the sentence reading "The State Board of Equalization (SBE) held that a company's treasury function receipts could be excluded from the sales factor in the apportionment formula" is modified to read as follows:

The SBE held that a company's treasury function receipts could be excluded from the sales factor in the apportionment formula.

There is no change in the judgment.

Respondent's request for partial depublication of the opinion is denied.

Appellants' and respondent's petitions for rehearing are denied.

BY THE COURT:

BLEASE, Acting P.J.

RAYE, J.