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## OCTOBER 2020 NEWSLETTER

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While many of our Miller Monson team members continue to work remotely, we are all available, virtually, for you, your family, and your business. For everyone's safety, we are not holding in-person meetings unless critical, but remain available by email and telephone, and can host conference and Zoom calls. We can also send a notary to your home or office so you can sign your documents. We value you, and will continue to meet your changing needs.



**New Staff:** We are pleased to announce that Timothy P. Kindelan has joined the firm to oversee its trust and business litigation practice. Mr. Kindelan represents clients in a wide variety of business, trust, real estate, and litigation matters, having acquired extensive expertise in these areas during his 37 years of practice. Most recently, Mr. Kindelan practiced law as a sole practitioner, after having previously managed the San Diego office of Arter & Hadden during the 1990's. He has served as a judge pro tem on the San Diego Municipal Court, as well as an arbitrator of attorney-client fee disputes. The addition of Mr. Kindelan's expertise in business litigation is an excellent fit to MMPPH's existing areas of practice and allows MMPPH to continue providing quality legal services to the community.

**New Staff:** We are pleased to announce that Erika P. Sanchez has joined the firm as an associate in the litigation practice group. In addition to litigation, Erika practices trademark law, advising clients on the selection, clearance, prosecution, and enforcement of their trademarks. Prior to joining the firm, she worked for a boutique intellectual property firm in Los Angeles. Erika received her Juris Doctor from Loyola Law School, Los Angeles in 2019. While at Loyola, she was Production Editor on the Loyola of Los Angeles Entertainment Law Review and a judicial intern for the Honorable Ronald F. Frazier in the San Diego Superior Court.



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## CALIFORNIA BILLS PROPOSE INCREASED TAXES FOR THE WEALTHY: HIGHER RATES AND A WEALTH TAX

By Katie Lepore, CPA, J.D.,  
LL.M., Taxation

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Surely state and local governments will feel the impact of the Coronavirus pandemic on their budgets, if they have not already. Two bills proposed in the California state legislature aimed to remedy the revenue shortfall by heavily taxing the wealthiest of Californians. One bill, *AB 1253*, sought to increase the highest marginal tax brackets. The other bill, *AB 2088*, looked to impose the first of its kind annual wealth tax on Californians with a global net worth of over \$30 million.

*California's legislative session ended on August 31. Special interest groups have vowed to reintroduce the bills at the start of the 2021 legislative session.*<sup>1</sup>

### Tax Bracket Increases

*AB 1253*, proposed by Assemblyman Miguel Santiago (D-Los Angeles), would increase California's top marginal income tax rate of 13.3% (consisting of a 12.3% marginal rate plus additional 1.0% mental health services tax), to a maximum 16.8%. The *Pacific Research Institute*, quoting *The Los Angeles Times*, estimates the bill could raise \$6.8 billion annually.<sup>2</sup>

California's tax rates are already the highest in the nation, and with the Trump Administration's

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<sup>1</sup> See [https://www.pacificresearch.org/next-tax-increases-on-the-docket/?gclid=Cj0KCCQjw1qL6BRCmARIsADV9JtaULqT2yKNV8or5HIC8II0QsILQTaCCYranvrltdJkukrjJACFB754aAsx6EALw\\_wcB](https://www.pacificresearch.org/next-tax-increases-on-the-docket/?gclid=Cj0KCCQjw1qL6BRCmARIsADV9JtaULqT2yKNV8or5HIC8II0QsILQTaCCYranvrltdJkukrjJACFB754aAsx6EALw_wcB)

<sup>2</sup> See [https://www.pacificresearch.org/next-tax-increases-on-the-docket/?gclid=Cj0KCCQjw1qL6BRCmARIsADV9JtaULqT2yKNV8or5HIC8II0QsILQTaCCYranvrltdJkukrjJACFB754aAsx6EALw\\_wcB](https://www.pacificresearch.org/next-tax-increases-on-the-docket/?gclid=Cj0KCCQjw1qL6BRCmARIsADV9JtaULqT2yKNV8or5HIC8II0QsILQTaCCYranvrltdJkukrjJACFB754aAsx6EALw_wcB)

2017 *Tax Cuts and Jobs Act (TCJA)*, high-earning Californians have already been paying more tax than before *TCJA*. Due to the federal itemized deduction cap of \$10,000 on state and local taxes, all income taxes above \$10,000 paid to the Franchise Tax Board are no longer deductible. According to *Forbes*, the top 1% of earners in California account for nearly 46% of state tax revenues each year.<sup>3</sup>

### *Increased Rates*

If passed, Californians earning an annual income of over \$1,000,000 would pay an additional 1.0% for a total rate of 14.3%. Annual income of over \$2,000,000 would garner an additional 3.0% for a total rate of 16.3%; annual income of over \$5,000,000 would pay an additional 3.5% for a total marginal rate of 16.8%.

### *Timing*

The text of the bill, if passed, would make the tax brackets *retroactive* to January 1, 2020, but it is unclear whether that could happen now as the bill was not addressed in the 2020 legislative session. However, tax laws are permitted to be imposed retroactively.

### Wealth Tax

*AB 2088*, proposed by Assemblyman Rob Bonta (D-Oakland), would levy a 0.4% annual tax on Californians with a global net worth above \$30 million. No other state has ever enacted a net worth or wealth tax. According to *Forbes*, "the tax would be applied to the net worth of about 30,400 Californians, raising \$7.5 billion annually."<sup>4</sup>

### *Specific Terms*

The tax would be levied on taxpayers with a net worth of over \$30 million (\$15 million for married couples filing separately). Directly held real

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<sup>3</sup> See <https://www.forbes.com/sites/robertwood/2020/08/17/california-proposes-168-income-tax-rate-plus-4-wealth-tax/#3d0375d419a6>

<sup>4</sup> See <https://www.forbes.com/sites/robertwood/2020/08/17/california-proposes-168-income-tax-rate-plus-4-wealth-tax/#3d0375d419a6>

estate is excluded from the wealth tax. The bill's summary claims that this means property will not be taxed twice – since a property tax is already levied.

But, it appears that to be considered directly held, the property must quite literally be held by the individual. Real estate held through trusts, LLCs, corporations or the like, would be taxable, as the bill states that real estate held “as through a corporation, partnership, limited liability company, trust, or other such legal form, except to the extent that such inclusion is prohibited by the California Constitution, by the United States Constitution, or other governing federal law” is taxable. It is unclear whether the typical grantor, living/family trust would be excluded, but as a separate provision in the bill provides a credit for property taxes paid for “indirectly” held real estate, it seems that real estate held in a trust would likely be included in the wealth tax calculation with an offsetting credit for property taxes paid.

All other assets appear to be included in the net worth calculation though, such as stocks, mutual funds, brokerage accounts, interests in partnerships or LLCs, mortgages, off-shore accounts, bonds, farm assets, art and collectibles, etc. The annual tax would be reported with the taxpayer's income taxes each year, and the federal estate tax statutes are referenced for determination of the taxable estate.

The estate would be valued as of December 31 each year. Any transactions entered into for the purpose of avoiding the tax would be disregarded. There are provisions for a 20% penalty for understatements of over 20% of the taxpayer's wealth or \$1 million.

Taxpayers claiming a liquidity problem to pay the tax are deemed to only have a liquidity problem if their “hard to value assets” are more than 80% of their net worth.

Non-residents and part-time residents would have the tax levied based on the percentage of

days in the year they spend in California versus outside.

### *Administrative Issues*

As one can imagine, a tax of this kind could cause a large number of administrative nightmares. Small business owners would need to value their closely-held stock annually, perhaps requiring the need to hire an appraiser. Corporate executives with stock options, especially with restrictions, would have difficulty valuing the stock, likely opening the door to a Franchise Tax Board (FTB) audit. And such audit risk would be annual, unlike the federal estate tax that is levied only at death. The bill authorizes the FTB to enact a system to value hard-to-value assets or those which are not publicly traded, but presumably would not grant enough time to decipher and implement such a system before the tax is levied. The tax forms would require amendments and edits too.

Of course, the tax itself is one drawback, but the administrative hassle and cost each year has its own price tag. Tax accountants, attorneys, and appraisers would likely see a huge influx of work annually for the mere purpose of valuing their clients' estate.

### *Fleeing the State*

It is unclear whether lawmakers believe the bill would cause a desire of these high-net worth Californians to leave the sunshine state, but the possibility was anticipated. Californians moving one year after the bill is enacted would be subject to 90% of the tax. Those leaving two years after the bill is enacted are only responsible for 80% of the tax, declining by 10% for each year thereafter. Of course, that raises constitutional questions that would need to be analyzed, but the bill has yet to even be debated, let alone passed.

Consequently, anyone who left the state in the last 10 years could be impacted by the bill as well.<sup>5</sup> For example, a citizen could be living in

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<sup>5</sup> See <https://www.latimes.com/opinion/story/2020-08-13/california-wealth-tax-proposal>

another state, or abroad, paying no income taxes to California and possibly be subject to its annual wealth tax.

There is presumably some risk to these taxpayers leaving the state altogether in droves, thereby depriving the state of the annual income tax it could have received had the laws never changed. Others worry that leaving California will simply increase their chance of audit, one now based on residency, wherein California evaluates how many days were spent in the state versus outside, along with other factors, to determine if the taxpayer reaches nexus for California taxation.

### Fate of the Bills

As mentioned earlier, the California 2020 legislative session ended on August 31. The bills would need to be reintroduced next session for consideration. As the wealth tax is a “tax levy,” it would require approval of two-thirds of both houses to be sent to Governor Newsom for signature.

The *Pacific Research Institute* reports that Governor Newsom urged caution on the part of lawmakers, encouraging them to think about how this would affect businesses moving to the state, recruiting young talent, and the overall impact on state revenues. Further, Governor Newsom reminded the media that there is already a November ballot measure, Prop 15, aimed at raising tax revenues at the expense of wealthy landlords by virtue of removing the Proposition 13 protections for commercial properties.<sup>6</sup>

### General Opinions

Of course, with a bill like this, there is likely to be heated debate and sentimental arguments on both sides. Some will say the wealthy already pay their fair share of taxes through higher rates, and taxing them twice essentially

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<sup>6</sup> See [https://www.pacificresearch.org/next-tax-increases-on-the-docket/?gclid=Cj0KCQjw1qL6BRCmARIsADV9JtaULqT2yKNV8or5HIC8II0QsILQTaCCYranvridtJkukrjJACFB754aAsx6EALw\\_wcB](https://www.pacificresearch.org/next-tax-increases-on-the-docket/?gclid=Cj0KCQjw1qL6BRCmARIsADV9JtaULqT2yKNV8or5HIC8II0QsILQTaCCYranvridtJkukrjJACFB754aAsx6EALw_wcB)

on the same thing – the asset and the income earned from that asset – is not right. Others will say that the pandemic drastically affected the classes disproportionately and those with ample resources should step-up to help their fellow citizens in a time of need. There have already been public comments recommending that the proposed 0.4% be increased to a higher percentage.<sup>7</sup>

From a more technical standpoint, *The Los Angeles Times* asks whether it would decrease capital gains tax revenues because taxpayers would be more likely to sell assets at a loss to have liquidity to pay the net worth tax.<sup>8</sup>

### Conclusion

Understandably, people may be alarmed at hearing about these possible changes to the law. For now, Californians will have to wait to see if the bills are reintroduced during the next legislative session.



### **“BOOKING.COM”: TRADEMARKS IN THE DIGITAL AGE**

*By Erika P. Sanchez, J.D.*

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The United States Supreme Court entered a new technological era in May 2020 when it conducted its first ever oral argument by telephone conference call. Consistent with the tech theme, the case before the Court concerned whether a travel-reservation website could achieve federal trademark registration for the mark, “Booking.com.”

By way of background, United States trademark law involves a scale of distinctiveness which distinguishes between “arbitrary,” “fanciful,” “suggestive,” “descriptive,” and “generic” marks.

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<sup>7</sup> See <https://www.bizjournals.com/sanfrancisco/news/2020/08/13/proposed-california-wealth-tax-called-embarrassin.html>

<sup>8</sup> See <https://www.latimes.com/opinion/story/2020-08-13/california-wealth-tax-proposal>

Arbitrary (e.g., Camel cigarettes), fanciful (e.g., Kodak film), and suggestive (e.g., Tide laundry detergent) marks can receive federal registration because they are “inherently distinctive.”<sup>1</sup> Meanwhile, descriptive terms, which describe their products or services, may only receive federal trademark protection if they acquire secondary meaning or “acquired distinctiveness,” meaning if they “achieve significance ‘in the minds of the public’ as identifying the applicant’s goods or services.”<sup>2</sup>

However, generic marks, which merely name the products or services, can never be entitled to protection and are not trademarkable. Because the purpose of trademarks is to identify a source, a trademark cannot be the generic term for a product or service. Knowledge of the classifications of marks based on their distinctiveness is essential for brand owners seeking federal trademark registration.

In *Booking.com*, the United States Patent and Trademark Office, or USPTO, refused registration concluding that “Booking.com” is a generic name for online hotel-reservation services.<sup>3</sup> The USPTO wanted a rule barring registration of any generic term appended with “.com.” Accordingly, the USPTO held that “Booking.com” was generic, and even if “Booking.com” was descriptive, it lacked secondary meaning.<sup>4</sup> However, the district court found that the consuming public primarily understood “Booking.com” as descriptive and, relying on “new evidence of consumer perception,” found that the term had “acquired secondary meaning as to hotel-reservation services.”<sup>5</sup> The USPTO only appealed the district court’s finding that “Booking.com” was not generic.<sup>6</sup> However, the appellate court affirmed the district court’s holding.<sup>7</sup>

<sup>1</sup> *Wal-Mart Stores, Inc. v Samara Brothers, Inc.*, 529 U.S. 205, 210-11 (2000).

<sup>2</sup> *U.S. Patent & Trademark Office v. Booking.com B.V.*, 140 S. Ct. 2298, 2303 (2020).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 2303-04.

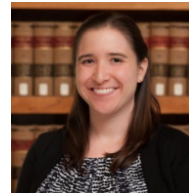
<sup>6</sup> *Id.* at 2304.

<sup>7</sup> *Id.*

In an 8 to 1 majority, the Supreme Court rejected the USPTO’s nearly *per se* rule that “[w]hen a generic term is combined with a generic Internet-domain-name suffix like ‘.com,’ the resulting combination is generic.”<sup>8</sup> Instead, the Supreme Court focused on a fundamental principle in trademark law that “[b]ecause ‘Booking.com’ is not a generic name to consumers, it is not generic.”<sup>9</sup> Indeed, the record was undisputed that “Booking.com” did provide secondary meaning to consumers.

The Supreme Court’s decision means brand owners will not be categorically denied federal trademark protection of “generic.com” marks. Instead, brand owners will have the opportunity to present evidence and show the USPTO that consumers recognize the terms as a trademark. Brand owners should be prepared to gather strong evidence, like market research or a well-designed survey, to meet the hurdle of secondary meaning.

Although this decision is a positive development that reflects the increase in online consumer activity and our modern digital age, when adopting a new mark, brand owners should still endeavor to develop and use strong, inherently distinctive trademarks that can be immediately registered and protected.



## FEDERAL TAX NEWS

By Katie Lepore, CPA, J.D.,  
LL.M., Taxation

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**2021 Tax Rates.** Thomson Reuters issued projected 2021 tax rates for those taxes that are adjusted for cost-of-living. The projections estimate that the federal estate and gift tax lifetime exemption, as well as the exemption from generation skipping transfer tax will be \$11,700,000 for 2021, with the annual gift tax exclusion remaining at \$15,000. Trusts are

<sup>8</sup> *Id.* at 2305.

<sup>9</sup> *Id.*

expected to be subjected to the highest federal marginal income tax bracket of 37% at \$13,050 of taxable income.

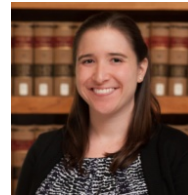
**Final Regulations Issued.** On September 21, the IRS released final regulations regarding 100% bonus depreciation, originally created by the 2017 *Tax Cuts and Jobs Act*. Earlier in September, the IRS issued final regulations regarding Section 163(j) interest expense deductions. On September 30, the IRS finalized regulations relating to the meals and entertainment deduction.

**Trust Deductions.** On September 21, the IRS released final regulations regarding deductions for estates and non-grantor trusts, stating that most deductions are *not* miscellaneous itemized deductions. Specifically outlined as non-itemized deductions are the personal exemption, distribution deduction, and those costs paid for or incurred in connection with the administration of the trust or estate which would not have been otherwise incurred but for it being a trust or estate. The regulations also address the character of deductions and provide guidance in allocating excess deductions in a trust or estate's final year to beneficiaries.

**CDC Orders Eviction Moratorium.** The CDC and Department of Health and Human Services ordered on September 1 that residential landlords cannot evict a "covered person" between September 4 and December 31 for nonpayment of rent. Generally, the protection applies to tenants who have annual income below \$99,000 who have exhausted governmental resources.

**Social Security Tax Deferral.** On August 8, President Trump signed a Presidential Memorandum allowing employers/employees to defer tax withholding for the employee's portion of the Social Security tax (the employer portion is not deferred). The IRS issued guidance on August 28 through Notice 2020-65 stating that employers may defer the Social Security tax withholding on wages earned from September 1

to December 31, 2020. Employees who earn less than \$4,000 pre-tax during a bi-weekly pay period are eligible for the deferral. The federal government has deferred payment to government employees, i.e., military and government service. However, these deferred amounts are due by May 1, 2021, making anyone who deferred the taxes in 2020 have much larger withholding amounts in early 2021. Employers are liable for this tax, making them unlikely to defer the tax, in case the employee, particularly a seasonal worker, is no longer an employee in early 2021. President Trump has stated he would like to pass legislation in 2021 to forgive the deferred tax, though the election results and opinion of new Congress remain to be seen.



**CALIFORNIA TAX UPDATE**  
*By Katie Lepore, CPA, J.D., LL.M., Taxation*

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**Eviction Moratorium.** On August 13, 2020, the Judicial Council of California voted to terminate Emergency Rules 1 and 2, which placed restrictions on courts with regard to evictions. The Rules were designed to provide additional time to tenants before unlawful detainer eviction cases could be heard or become effective. However, on August 31, Governor Newsom signed into law *AB 3088*, the *COVID-19 Tenant Relief Act of 2020*, and the *COVID-19 Small Landlord and Homeowner Relief Act of 2020*. Residential landlords may not evict tenants before February 1, 2021 for unpaid rent during the period March 4, 2020 to August 31, 2020, providing the tenant showed COVID-19 hardship. Unpaid rent is due February 1, 2021 and landlords may seek repayment on March 1. For unpaid rent accrued between September 1, 2020 to January 31, 2021, tenants must pay at least 25% of the rent to avoid eviction. Small landlords who own 1-4 rental units are provided some foreclosure protections if tenants did not pay rent.

**Filing Extension for Wildfire Victims.** The IRS and FTB announced an extension to file tax returns for taxpayers affected by recent California wildfires, if located in a FEMA-designated affected area. The revised due date is now December 15, 2020.

**Hiring Credit.** SB1447, passed on September 9, provides a tax credit to small businesses for hiring new employees in 2020. Eligible businesses must reserve the credit with the CDTFA between December 1, 2020 and January 15, 2021 in order to claim it. For businesses with less than 100 employees, the business must have had a 50% decline in gross receipts between second quarter 2020 and second quarter 2019. The credit is given for a hiring increase when comparing employees during second quarter 2019 to the average number of full-time employees during July 1, 2020 to November 30, 2020. A credit may be available of up to \$1,000 for net increases in full time equivalent employees.

**Revocable Transfer on Death Deeds Extended.** On September 4, the Governor signed into law SB1305, which extends the sunset date of revocable transfer-on-death deeds. Originally, this type of deed was set to expire January 1, 2021, and now is allowable through January 1, 2022.

**Minority Interest Foreign LLC Subject to Annual LLC Tax.** The California Office of Tax Appeals ruled in *In the Matter of the Appeal of Aroya Inv. I, LLC, 2020-OTA-255P* (Cal. Office of Tax Appeals Jul. 7, 2020) that a foreign out-of-state LLC was subject to the California annual LLC tax of \$800 because it held a minority interest in an LLC that owned California real property. The foreign LLC owned less than 1% of the California LLC which owned property in San Diego, creating California-source rental income. California has a bright-line test that a company is doing business in California if the value of its real and tangible personal property located in California exceeds \$50,000. Because the minority interest in a \$60 million

California property exceeded this threshold, the foreign LLC was subject to this tax.

**Statute of Limitations Inapplicable if No Notice Given.** On August 27, 2020, a California Court of Appeal held in *Prang v. Los Angeles Cnty. Assessment Appeals Bd No. 2, 54 Cal. App. 5th 1*, that when a taxpayer did not file the proper form or give notice to the Board of Equalization as to a change in ownership in a company which held California real property, the statute of limitations did not apply. In California, companies which undergo a change in ownership, subjecting the company's real property to reassessment, are required to file notice with the BOE. The County has four years to go back and reassess from the date of the change in ownership and issue retroactive escape assessments. In the case, the taxpayer filed a Certificate of Merger with the County in 2006, but only filed with the BOE in 2013. The court held that the four-year limit on reassessments begins to run only when there is a delay between the event and its discovery by the assessor; the 4-year limit does not apply if the taxpayer never gives notice to the BOE. The Certificate of Merger was not sufficient notice and the assessor could issue escape assessments back to the triggering date.

**Capital Costs Disregarded from Personal Property Taxes.** On June 26, 2020, in *Church v. San Mateo County Assessment Appeals Board, 52 Cal. App. 5th 310*, the First District Court of Appeal found that a County Assessor may not include certain capitalized expenses to calculate assessed value. Specifically, the court held that capitalized loan costs, which are generally amortized, or startup costs, could not be added to the fair market value of the equipment, distinguishing between book value and fair market value.

**San Francisco Tax Ballot Measures and Gross Receipts Tax.** On July 28, 2020, the San Francisco Board of Supervisors and County of San Francisco voted to add two tax measures to the November ballot. The first is dubbed the "Overpaid Executive Gross

Receipts Tax” as Proposition L, which would levy a tax on businesses based on the differential between the CEO’s salary and the median employee salary. The other measure, Proposition F, would amend the business tax system in the City and County and increase the gross receipts tax. Further, on September 9, the California Supreme Court declined to review the California Court of Appeal’s decision in *City and Cnty. of San Francisco v. All Persons Interested in re: Prop. C*, 51 Cal. App. 5th 703, effectively stating that a gross receipts tax passed by proposition does not require a supermajority vote of the legislature. Therefore, voters can pass new tax laws by majority vote, rather than certain tax bills passed by the legislature that require supermajority approval.

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