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In this installment of Commerce Crossroads, Wilford examines a Florida lawsuit against the state of California over how it apportions business income tax.

The National Taxpayers Union is a party to one of the lawsuits asserting that the change in California's apportionment law is unconstitutionally retroactive.

On October 28 Florida filed a constitutional challenge against California over how it apportions business income tax. The case targets some of California's "special rules" governing apportionment,[1] alleging that they unconstitutionally discriminate against interstate commerce.[2]

California has long had a reputation for exporting tax burdens and aggressive tax enforcement against nonresidents, but California has only intensified these dubious legal efforts as its residents leave for greener pastures at a rate of one per minute and 44 seconds.[3] The fact that Florida has been the primary beneficiary of this flood of outmigration from states like California is a stated factor in its decision to put this issue before the courts.

Florida's complaint marks the second time in just over a year that California faces legal challenges to business apportionment rules. In August 2024 nonprofit organizations National Taxpayers Union (NTU) and the California Taxpayers Association separately challenged parts of the recently enacted S.B. 167 for retroactively adjusting apportionment rules.

Should the Golden State lose any of these cases, it would provide a much-needed reinforcement of the *Complete Auto*[4] guardrails that protect against states abusing apportionment rules to unconstitutionally target nonresidents for special tax burdens.

Florida's Lawsuit Challenging Apportionment Special Rules

Cases that pit one state against another always carry special interest, not least because they trigger the U.S. Supreme Court's original jurisdiction, bypassing the layers of appeals that normal tax cases must navigate should the Court grant certiorari. But Florida's challenge against California's apportionment special rules is of particular note, given the slew of similar apportionment or nexus questions that have come before the Court in recent years.

California, like many other states with a business income tax, has single-sales-factor apportionment for business income, while Florida uses a three-factor formula.[5] While three-factor apportionment used to be the standard, single

[1] Cal. Code Regs. tit. 18, section 25137.

[2] Complaint, *Florida v. California*, No. 22O163 (U.S. 2025).

[3] Andrew Wilford, "Interstate Migration in Minutes: How Fast Are Taxpayers Leaving or Entering Each State?" National Taxpayers Union Foundation (Nov. 24, 2025). Figures are based on net migration, not just outmigration.

[4] *Complete Auto Transit Inc. v. Brady*, 430 U.S. 274, 279 (1977).

[5] Florida double-weights sales, making it 50 percent of the apportionment calculation.

factor has gained popularity ever since the 1978 *Moorman* decision.[6]

The problem with single-factor apportionment (and, perversely, its appeal to state policymakers) is that single factor allows states to claim more tax liability from out-of-state businesses and less from in-state businesses compared with a three-factor formula. The excluded property and payroll factors are far more likely to be sourced to a business's headquarters, while sales are generally sourced to a greater degree to other states.

Nevertheless, single-factor apportionment has enjoyed the Supreme Court's blessing ever since the aforementioned *Moorman* decision. And consequently, while Florida's motion for leave contains a lengthy discussion of the history of apportionment factors, single-factor apportionment itself is not truly at issue in this case.

Rather, Florida is seeking to challenge special rules that allow the California Franchise Tax Board to exclude certain income (specifically, large, one-time sales such as the liquidation of factory property or sale of patents) from the sales factor denominator while still including this in the business's income base. The application of these rules can result in substantial alterations to a business's apportionment determination.

Florida's lawsuit alleges that this "supercharges California's single-sales factor tariff."[7] Rhetorical flourishes aside, while single-factor apportionment exacerbates the results this produces, the lawsuit puts the focus on California's claim to be able to arbitrarily exclude certain income from the apportionment denominator while still treating it as taxable income.

It's a well-known fact that differences in apportionment regimes can lead to businesses with income in multiple states facing tax obligations on greater than 100 percent of their income — this is double taxation that nevertheless passes the internal consistency test. The potential internal consistency issue with what California is doing is that two states using the *same* single-sales factor apportionment system could impose double taxation with these rules in place.

Setting aside Florida for a moment, imagine an Oregon-based business with $100,000 in normal sales — half in California, half in Oregon (Oregon being another state that uses single-factor apportionment). This business also has a special one-time sale of a factory in Oregon with a value of $900,000. California decides under the special rules to exclude the $900,000 factory sale from the sales factor denominator, claiming 50 percent of the business's income.[8] Oregon, meanwhile, claims *95 percent* of the same business's income.[9] This is clearly not internally consistent.

Note that California would still claim the power to tax this $900,000 sale despite excluding it from the apportionment formula. Consequently, the business would face Oregon tax on $950,000 in income (95 percent of $1 million in total sales), and California tax on $500,000 in income (50 percent of $1 million in sales).

The application of the rule remains up to the FTB's discretion. Oregon could have the exact same special rules and simply decide *not* to exclude the sale from its sales factor denominator, with the same result.

Florida's complaint claims violations of the commerce clause (under all four prongs of the *Complete Auto* test), the import-export clause, and the due process clause. Whether this case is taken up at the Supreme Court may require the justices not to be confused into thinking this is another case about how different apportionment methods create effective double taxation despite being internally consistent. Five justices must grant a motion for leave to file an original action, of which two (Justice Samuel A. Alito Jr. and Justice Clarence Thomas) do so in every such case because they view hearing original action cases as mandatory.

Should the Supreme Court signal openness to Florida's challenge, it could have significant implications for challenges to other state efforts to export tax burdens to nonresidents. For instance,

[6] *Moorman Manufacturing Co. v. Bair*, 437 U.S. 267 (1978).

[7] Complaint, *supra* note 2, at 12.

[8] $50,000 in California sales out of $100,000 in sales (excluding the $900,000 factory sale).

[9] $950,000 in Oregon sales out of $1 million (including the $900,000 factory sale).

New Hampshire challenged Massachusetts's taxation of New Hampshire residents living and working in New Hampshire during the COVID-19 pandemic, only for the motion for leave to be denied after Massachusetts allowed the underlying policy to expire.[10] Yet other states continue to enforce similar rules on a permanent basis,[11] and Supreme Court review of Florida's case may represent renewed willingness to consider judicial oversight of these kinds of interstate tax grabs.

Section 25128.9 Lawsuits

The NTU and CalTax lawsuits, while also addressing California's apportionment regulations, focus on a less frequently litigated issue: retroactivity.

In 2023 the California Office of Tax Appeals (OTA) decided in favor of taxpayers in two different challenges to apportionment determinations by the FTB.[12] In both cases, taxpayers were challenging the FTB's attempt to exclude tax-exempt income from their apportionment determinations. In both cases, the FTB's apportionment determinations, rejected by the OTA, would have increased the taxpayers' California business income tax liability.

Within a year of the second OTA ruling, California passed S.B. 167, section 18 of which added section 25128.9 to the California Revenue and Taxation Code, which arguably excludes exempt and nontaxable income from apportionment calculations by adopting the earlier FTB standards.

But far less important than the policy question whether taxable income should be factored into apportionment is the scope of section 25128.9. The language of section 25128.9 claims that it "shall apply to taxable years beginning *before*, on, or after the effective date of the act adding this section" (emphasis added). In other words, not only is the change retroactive, it is retroactive on an *unlimited* basis.

There's good reason why legislators generally avoid making policy changes retroactive. It is hard enough for taxpayers to comply with tax rules as written at the time of filing. When retroactive tax changes come into play, taxpayers go from needing the help of a CPA to accurately file their taxes to needing a prophet.

Section 25128.9 attempts to forestall this objection by claiming that "this section does not constitute a change in, but is declaratory of, existing law," a somewhat ludicrous claim given the fact that the FTB had lost court cases on the basis of that claim less than a year earlier. I can write that I am, and always have been, the president of the United States, but that does not make it true.

The potential consequences of California succeeding in this absurd gambit are hard to overstate. California could feel free to retroactively change any tax rule that resulted in an unfavorable tax appeal ruling, then go back and collect any refunds it was required to provide. The state of California would become Lucy holding the football, and taxpayers would become Charlie Brown.

The jurisprudence on this matter appears as crystal clear as things get in the realm of tax law. Past Supreme Court cases like *United States v. Carlton* allow for retroactive application of laws under some circumstances, but not on an unlimited basis[13] — unlimited retroactivity representing a violation of the due process clause.

As with many such cases, the NTU and CalTax suits are mired in technical questions over whether administrative remedies have been exhausted. A state superior court judge recently ruled in favor of the government on these technical questions in both cases, each time without reaching the merits of the case. The NTU has already announced its intention to appeal.[14]

[10] *New Hampshire v. Massachusetts*, *cert. denied*, 141 S. Ct. 2848 (June 28, 2021).

[11] Wilford, "The 2025 ROAM Index: How State Tax Codes Affect Remote and Mobile Workers," National Taxpayers Union Foundation (July 16, 2025).

[12] *In the Matter of the Appeal of Southern Minnesota Beet Sugar Cooperative*, 2023-OTA-342P; *In the Matter of the Appeal of Microsoft Corp.*, 2024-OTA-130.

[13] *United States v. Carlton*, 512 U.S. 26 (1994).

[14] Joe Bishop-Henchman, "Round 1 in *National Taxpayers Union v. California Franchise Tax Board*," National Taxpayers Union Foundation (Oct. 17, 2025).

Conclusion

With California estimated to lose over $4.5 billion in revenue in 2025 to individual migration alone,[15] it's little wonder that the Golden State is looking to rake in more loot from taxpayers in other states. But aside from the detrimental consequences of such unscrupulous efforts on the broader national economy and affected taxpayers, such actions also carry the possibility of judicial rebuke.

As states continue to compete for new residents and questions of nexus and apportionment only become murkier in an increasingly digital economy, such state-level mercantilism is likely to become more prevalent. Taxpayers have no recourse in such cases other than Congress and the Constitution. ■

[15]Wilford, "Florida Continues to Attract New Residents; New York, California, and Illinois Lose the Most Population," National Taxpayers Union Foundation (May 29, 2025).