

## Gettin' SALTy Podcast – Episode 78

Speaker 1 ([00:00](#)):

This podcast episode reflects the opinions of the hosts and guests and not of Greenberg Traurig LLP. This episode is presented for informational purposes only and it is not intended to be construed or used as general legal advice nor a solicitation of any type.

John Ormonde ([00:17](#)):

Smithfield's harvesting facilities where all this processing happen, they need to be next to the hog farms and the hog farm need to be in the East and the Midwest because that's where the grain is.

Nikki Dobay ([00:27](#)):

Hello and welcome to GeTtin' SALTy, a state and local tax policy podcast hosted by Greenberg Traurig. My name is Nikki Dobay, shareholder in the Sacramento, California and Portland, Oregon offices. I am very pleased today to be joined by a new colleague, John Ormonde, shareholder in our Washington, D.C. office. John, thank you so much for joining me.

John Ormonde ([00:52](#)):

It's good to be here, Nikki.

Nikki Dobay ([00:53](#)):

So John, you joined us a bit ago, so getting comfortable here at GTs and we'll get into kind of your work background in a minute. But as a new guest to the podcast, I have a question that I ask all my new guests and it's how did you get into state and local tax or tax generally?

John Ormonde ([01:13](#)):

Well, I'd say I didn't know I wanted to be a SALT lawyer until I was in law school. I took Con Law I and I really liked the commerce clause and the federal restrictions on states. And so that intrigued me. And so I signed up for SALT my third semester in law school and I realized I really liked the subject matter and there's additional bonuses. There was a lot of math and portionment. And I guess I'm one of the few lawyers that says, "Oh, I'm really good at math and being a lawyer."

Nikki Dobay ([01:45](#)):

Okay.

John Ormonde ([01:45](#)):

So I thought it was a good combination where I could use one of my natural skillsets in the context of law.

Nikki Dobay ([01:52](#)):

Awesome. Well, that's a pretty good answer. Most people just fell into it after law school or something. And I've had a few guests that they just were born wanting to be a tax lawyer, but thank you for indulging me with that. Now I want you to give the listeners a bit of background on your background and let folks know where you focus your practice and what your goals are here at Greenberg.

John Ormonde ([02:22](#)):

Sure. I started out at Deloitte in the San Francisco office and I was in the state and local tax group and I ended up doing most of my work for the Cal Suite Group, which was primarily focused on California income tax issues and kind of reverse audit refund reviews. So I was part of that process and that really was a great experience for many reasons. But I'd say one of the top ones is I learned to understand how the California income tax return is put together, how the work papers operate and what people miss and where there might be opportunities to push back. I was there for a couple years and then actually my old law school professor, Darien Shanske said that there was a SALT litigator that was looking for an associate and he connected me with Amy Silverstein. I actually just wrote a memo on one of her cases for Deloitte. And so it was a great lunch because I got to talk to her all about her case. And I think I told her, "You're going to lose for this reason."

Nikki Dobay ([03:22](#)):

Oh, no.

John Ormonde ([03:23](#)):

And then she said, "You want a job?" She's like, "I'm glad you're not my opposing counsel."

Nikki Dobay ([03:27](#)):

Yes, yes.

John Ormonde ([03:28](#)):

But anyway, so I went to work with Amy and at Amy's firm, I was primarily doing California litigation, some FTB controversy. But another thing that happened there was it was around the time the San Francisco Gross Receipts Tax was enacted in 2014 and I joined Amy in 2017 and that was when things were starting to percolate up through audit and start to be litigated. So I kind of had a good background in California income tax and because San Francisco incorporated a lot of those California provisions into its return, it was a really good match for me to dive into San Francisco, figure out everything that's happening in the rules, how they apply and what positions we could take to help taxpayers save a little bit in San Francisco. But there I did a lot of San Francisco work, a lot of California income tax work, some sales and use tax and property tax, but all controversy.

Nikki Dobay ([04:28](#)):

Okay, okay. Awesome.

John Ormonde ([04:31](#)):

So then after Amy's... My wife wanted to move to Washington, D.C. after I became a partner at Amy's firm, which I couldn't say no to her.

Nikki Dobay ([04:40](#)):

Okay, that's good.

John Ormonde ([04:42](#)):

I moved out to D.C. and I was co-counsel with some partners at Eversheds on a case and they said to me, "John, it's dark outside your windows. Why is it dark?" And I said, "Because I'm on the East Coast." And then they found out I was here and then they poached me from Amy. At Eversheds, I kept doing the

same work, a lot of San Francisco grocery seats tax, other local taxes and a lot of California litigation. And then more recently I joined Greenberg and I'd say that's still the focus of my practice is mostly California work, California localities, and then also other Gross Receipts Taxes in other states because I was so entrenched in the positions that are associated with Gross Receipts Taxes in San Francisco and the other California localities that made sense to put me on other Gross Receipts Tax cases in other states too, like Washington, Ohio and Oregon. And so I have some of those cases that I like to work on as well.

Nikki Dobay ([05:50](#)):

Yeah. I just wanted to make sure the listeners are well aware that despite your sitting in D.C. that your primary focus is California and then yes, it's been great to have you to be able to talk through a lot of those Gross Receipts Tax issues in Washington and Oregon as they keep expanding their tax bases. So they're definitely tricky ones, but we're super happy to have you here and excited to have you on the podcast. And then the other thing as you were providing your background that I just wanted to kind of mention or note is the time that you spent at Deloitte reviewing returns. And I spent some time at PwC reviewing returns and as much as I disliked that work, it's been kind of invaluable to understand where things end up on a tax return and just how that process comes together. So it is really helpful as you're reading the law to kind of know how that's going to translate onto a form.

John Ormonde ([06:55](#)):

Yeah. I'd say the other thing I learned was how to work in Excel. I don't do it much anymore, I don't build models, but I'm good at reviewing them at least and I can understand what's going on. That's [inaudible 00:07:07]-

Nikki Dobay ([07:06](#)):

Yes, yes. I had to get comfortable with Excel at that time too. All right, John. So the next thing I wanted to talk with you about because you were one of the litigators on the Smithfield case and obviously this case has gotten quite a bit of attention. It was being talked about at the FTA as perhaps the single most important case for the foreseeable future on the issue of apportionment. And so I thought, to the extent you can kind of dive in and give the listeners some inside baseball, what can you tell us about that case and maybe what's most important is what it really means for other taxpayers going forward.

John Ormonde ([07:54](#)):

Yep. I was heavily involved in the case, probably the primary drafter of the trial court briefing and did direct examination in court and sometimes sat at the first chair at the table. I was definitely deep involved. I probably spent more time on that case than any other case in the last four years. The case had two issues. The second issue is the more broadly applicable one that everybody's talking about. But the first one's interesting too if you're in the right industry. And the first issue was whether Smithfield was an agricultural business or more precisely, under a qualified taxpayer under 25128 that can use three-factor apportionment. And the second issue is whether they're entitled to alternative apportionment under Section 25137. The first issue, FTB has a regulation that interprets 25128 for agricultural businesses, 25128-2 and 25128-2, it provides clarity on the Gross Receipts Tax in section 25128, which says if more than 50% of the gross receipts of the combined group are from a qualified activity, in this case agricultural business activities, then the taxpayer can use a three-factor apportionment rather than a single sales factor apportionment.

([09:10](#)):

And the issue with that that came up was that the regulation provides for a product-based approach, I'd call it. It looks at the character of the final product and based on that character, determines whether or not the product generates an agricultural receipt or a non-agricultural receipt and it's an all or nothing, either it's agricultural or not. And my favorite example from the regulation, because my family had an almond farm, was if a farmer grows an almond and sells the almond with the shell on, then that's an agricultural receipt. But if you take the shell off and sell just the nut, that's not an agricultural receipt, because you "processed", in quotation marks, I'm doing the quotes, but you can't see it, processed the almond. And that one really struck me as odd because my uncle is an almond farmer in Modesto and I remember growing up going into his-

PART 1 OF 4 ENDS [00:10:04]

John Ormonde ([10:03](#)):

An almond farmer in Modesto. I remember going up going into his barn warehouse and he had big bins full of almonds and none of them had the shell on. And that's how he made his money, he sold the almonds without the shell. And if you told my uncle who drives around a farm 10 hours a day irrigating and looking at trees that he's not in an agricultural business, he would think you're crazy.

Nikki Dobay ([10:23](#)):

He'd probably get a little mad at you.

John Ormonde ([10:25](#)):

So in Smithfield, we had an expert on tax policy, Rick Pomp, who's a great professor. Yes. Well known. So I had him call my uncle and ask him, "Hey, how much does it cost you to take the shell off the almond?" My uncle said, "Maybe one cent on the dollar." He's like, "But let me connect you with my almond sheller." So he called the almond sheller and the almond sheller gave him a quote to shell like a ton of almonds. And it was great. In court Rick got up there and pointed out the absurdity of one of the examples in the regulation and said, "I called an almond sheller and I got the price quote and it's one to 2% of the cost of a pound of almonds when you buy it in the store is taking the shell off."

([11:07](#)):

So applying this test in theory, 98% of every dollar from a sale of almonds would be attributable to agricultural business activities. Growing the almond, pruning the trees, irrigating all the things that lead up to the almond. But for 2% of the cost, you completely have changed how a taxpayer's treated, which is just kind of unreasonable, I think. And so to take that example and apply it to Smithfield, and Smithfield sold a lot of bacon, it sold a lot of pork chops and it sells a lot of hams and pork bellies and all sorts of parts of the pigs.

Nikki Dobay ([11:45](#)):

Pork products.

John Ormonde ([11:45](#)):

Pork products. All sorts of pork products.

Nikki Dobay ([11:46](#)):

Yes.

John Ormonde ([11:47](#)):

But FTV said that the only thing that counts is that they sell a live hog, and sometimes they did that. Sometimes they sell live hogs because they didn't meet their own weight standard or whatever it was or they had its little excess one day. But it was a small amount. But they said those are agricultural, but as soon as you kill the-

Nikki Dobay ([12:07](#)):

Oh. Otherwise you're processing it. Okay.

John Ormonde ([12:09](#)):

Well, you put it down.

Nikki Dobay ([12:14](#)):

Yes. You process it.

John Ormonde ([12:14](#)):

Well, as soon as you start processing the hog, anything you sell is not agricultural. And so we thought that, just like the almond, it doesn't make sense. It doesn't quite make sense. And the real reason I think it doesn't make sense was the purpose of 25128. If you go back into the history, the purpose was to provide relief. So the state was going from at the time three factor apportionment in 1993 to double weighted sales and they said, "We're going to carve out some industries and keep them on three factor." And it carved out extractive industries like oil and gas and it carved out agricultural businesses. Later it pulled in financial institutions and other ... But, the original enactment was to pull out extractive and agricultural. And the reason was is we're not going to incentivize these businesses to relocate their manufacturing centers to California by enacting a single sales factor, which doesn't give any weight to payroll property. So it shouldn't change your apportionment based on relocating.

[\(13:15\)](#):

But they realized that an almond farmer can't pick up an orchard-

Nikki Dobay ([13:19](#)):

Right. They might move out.

John Ormonde ([13:20](#)):

... and move the orchard because you're tied down to the land and the weather, the environment, the soil. And the same thing with extractive mining, oil and gas companies, they need the oil and the ground or the metals in the ground so they can't move either. So they said, "We're not going to punish those taxpayers for not moving to California." And so that's why they carved them out.

[\(13:40\)](#):

But taking that purpose and applying it to Smithfield or applying it to an almond farmer or a winery or whatever it is, they have their business and it's really tied to the ground. We're not going to cause them to move. But Smithfield's harvesting facilities where all this processing happen, they need to be next to the hog farms and the hog farms need to be in the East and the Midwest because that's where the grain is. And so they're tied to the land as well. Just like a winery tied to the land just because they process the grapes, they're not going to process the grapes on the other side of the country. So it's wherever the

agricultural activity is, wherever the mining or the extractive activity is, that's where the business is going to be.

[\(14:17\)](#):

So the fact that you do a little bit after that, one extra step or do a little processing doesn't necessarily change where your business needs to be located. And so we thought that Smithfield fell within that framework and the original intent. And a better way to judge whether or not a business is going to move is not to look at the character of the end product, but to look at all the activities that you had to engage in to produce those gross receipts. And that's what our expert did on the first issue was drill in and decide if you sell a pork chop, what percent of that pork chop was attributable to raising the hog and what percent was attributable to the harvesting or the processing?

Nikki Dobay [\(15:00\)](#):

Right. What was the percentage?

John Ormonde [\(15:01\)](#):

So this is one of the bit ... When we were learning all the facts, we found out from somebody that as it came out in the trial that about 80% of a pork chop is like the meat and about 10% is harvesting, and harvesting counts under the reg. FTV says harvesting is I think only things probably that happen out in the field. But when we spoke to the industry, the meat industry, or even like I was talking to one of my friends is a hunter and they call after they hurt the animal, end its life, they harvest the meat and that's what you call it. So it's like the harvesting term was really what happens at the harvesting facilities. When we found out that the industry term is like, what we think of the slaughterhouse is called a harvesting.

Nikki Dobay [\(15:52\)](#):

Harvesting. Okay. Okay. Yeah.

John Ormonde [\(15:54\)](#):

And so when you look at the harvesting plus the meat costs on a pork chop, you're up to like 90%. It goes down, like a sausage or something might be-

Nikki Dobay [\(16:04\)](#):

Right. Right. Then there's more processing.

John Ormonde [\(16:05\)](#):

... 30%, bacon might be 30 something percent. But when you added up all Smithfield's receipts and broke them down that way by the activities, we determined that over 60% of the activities were agriculture.

Nikki Dobay [\(16:19\)](#):

On an aggregate basis.

John Ormonde [\(16:21\)](#):

Which met the test. So that was the first issue. And the court agreed with us on the reg and said the product-based approach is wrong, said to the extent it results in a different outcome for Smithfield, the regulation's invalid. And so it's undetermined how the Court of Appeal will view that. But for now, at least there's a decision saying that this product-based approach is the wrong approach. I would say anyone who's in the extract ... Well, anyone who's in the agricultural industry who's been using single sales factor as out of-state business should be thinking, well, do I have an argument that I-

Nikki Dobay ([17:01](#)):

The three factor.

John Ormonde ([17:03](#)):

... can use three factor because when you look at my activities, even though my product is somewhat processed, when you look at what I did, if you actually have the farm, if you're vertically integrated, essentially, you might be able to qualify for three-factor apportionment.

Nikki Dobay ([17:18](#)):

All right.

John Ormonde ([17:19](#)):

So that's the first issue.

Nikki Dobay ([17:20](#)):

That's the first issue. Then the second one.

John Ormonde ([17:23](#)):

Second one's the one everyone cares about.

Nikki Dobay ([17:24](#)):

Okay. Except for all the people-

John Ormonde ([17:26](#)):

Except for the agricultural people.

Nikki Dobay ([17:28](#)):

Right. Right. And they're very important.

John Ormonde ([17:28](#)):

Very important.

Nikki Dobay ([17:29](#)):

Very important.

Nikki Dobay ([17:31](#)):

Yes. Yes.

John Ormonde ([17:32](#)):

We don't want to forget about them.

Nikki Dobay ([17:32](#)):

No, no.

John Ormonde ([17:34](#)):

But the second issue is alternative apportionment and Section 25137 in the Rev and Tax Code says if the standard formula doesn't fairly reflect your business activities in the state, then you may be entitled to an alternative apportionment formula. Either the state can assert it or the taxpayer can assert it, but ultimately when it gets to court, it's reviewed de novo. So it's not like there's a presumption against you per se. But that same statute's also modeled word for word, Section 18 UDIPA. So this would be applicable in probably 20 plus states, and other states have similar language even though it might not be the exact model statute.

([18:17](#)):

I would say that the key issue and the key takeaway from the alternative apportionment decision was that what the meaning of business activities is. And FTV said, "Well, we have single sales factor market sourcing, that's our standard formula. And so business activities, it means market." And so you should read Section 25137 to say if the standard formula doesn't fairly reflect your market in California, then you're entitled to alternative apportionment formula. But it doesn't say that and business activities has a long and historic meaning in state and local tax and I'd say a key piece of this is that Section 18 UDIPA, as enacted in California, was intended to be a relief valve for constitutional violations.

([19:08](#)):

So when you're asking, "Well, what does business activities mean?" It probably means the same thing that it meant for constitutional purposes, which the external consistency requirement has to fairly reflect your business activities in the state. I put together a good argument that business activities is not limited to market.

Nikki Dobay ([19:33](#)):

To sales?

John Ormonde ([19:34](#)):

To sales, to where your market is.

Nikki Dobay ([19:34](#)):

Right. Right.

John Ormonde ([19:35](#)):

And there was a bunch of ... Some of the decisions were from three factor days, but the statute ... Just because California changed their standard rule, doesn't mean the meaning of this other provision changed on its own own.

Nikki Dobay ([19:47](#)):

Absolutely. Yeah. Yeah.

John Ormonde ([19:48](#)):

The words mean what they were when they were enacted. So there's older decisions that talk about, I think appeal of Merrill Lynch at the state board said business activities are reflected by the contribution of employees, which is reflected in the payroll factor, by the contribution of capital-

PART 2 OF 4 ENDS [00:20:04]

John Ormonde ([20:03](#)):

Employees, which is reflected in the payroll factor by the contribution of capital investments, which is reflected in the property factor. And then there were some other cases, there was a great Court of Appeal decision that was applying the constitutional standard, but it talked about what business activities meant. And it was a taxpayer that was based in California and arguing that a lot of my sales are out of state, I should be entitled. It's unconstitutional to tax me on so much of my income because my operations are here in California. And the Court of Appeal rejected that and said, "No, business activities means not only the location of your final sale, but it means everything that led up to that. It means the manufacturing. It means what you're doing at your headquarters. It means everything that contributes to producing income."

Nikki Dobay ([20:45](#)):

Right. Right.

John Ormonde ([20:46](#)):

And so I'd say the big takeaway from that decision is that business activities doesn't mean only market, it means everything you do and it includes the activities of payroll and property. And we wanted to point out in the briefing that there are things that are not picked up by the three-factor formula either like payroll, property and sales, there are things that are excluded from payroll, there's things that are excluded from property. And so no formula is perfect.

Nikki Dobay ([21:13](#)):

Perfect, right.

John Ormonde ([21:14](#)):

But three-factor was a much better test to represent-

Nikki Dobay ([21:18](#)):

Right of business Activity overall.

John Ormonde ([21:18](#)):

The activity that produced your income. And now that California's gone to the single-sales factor, presumably to be competitive in a business environment, doesn't mean that single-sales factor fairly reflects your business activities as required under the Constitution.

Nikki Dobay ([21:37](#)):

Yeah. Yeah.

John Ormonde ([21:37](#)):

So I'd say that's the main takeaway. I guess another thing to point out was how we proved distortion. So the question is like, well, what were my business activities in California versus outside of California. And I'd say the overarching issue is like where did I earn my income, is this an income tax? So you should think about how can we prove where we earned our income. We hired an expert to look at our activities in California and elsewhere and try to attribute income to them.

([22:09](#)):

And the way we did that was we looked at our cost of operations in California and then we looked at our cost of operations outside of California and we figured out what the entity-wide profit margin was. I think it's in the record so I can say it's around, in the year issue is around 5%. And so we took, let's say we had \$ 100 million of operating expenses in California. We said, well, we should have had a \$5 million return on that. So that we figured out what our tax should have been in California or what our apportionment should have been in California based on what Smithfield expected to earn from their activities in California.

Nikki Dobay ([22:49](#)):

Okay. Okay. So basically looking at the percentage of the costs of doing business in the state to reflect what the income would be attributable from.

John Ormonde ([23:00](#)):

And maybe not just like the actual cost-

Nikki Dobay ([23:02](#)):

Got it, got it.

John Ormonde ([23:02](#)):

... The investment in our California business and then the return we expected from that compared to what the single-sales factor produced. And so it was like about a 600% distortion, which exceeded the constitutional standard, kind of the Hans Rees 250%. It exceeded by far all the authorities in California under Section 25137. A lot of them dealt with the treasury cases or related cases like General Mills, Microsoft, but all those cases were 100% or less. And so when you look at us, we were 600%. It was clear that if there is a quantitative element to the test... That was another thing. In the court, in a footnote in the decision kind of dismisses the quantitative and qualitative test, like in the General Mills case and say the statutory touchstone is really whether it's fair. And you don't necessarily have to apply this quantitative and qualitative element outside of the paradigm of the treasury cases.

Nikki Dobay ([24:05](#)):

Okay,

John Ormonde ([24:06](#)):

Outside of those cases, you have more flexibility in showing that it's unfair.

## Gettin' SALTy Podcast – Episode 78

Nikki Dobay ([24:12](#)):

Okay. Okay. And I haven't looked at this. Has the FTB appealed? I haven't heard that they...

John Ormonde ([24:21](#)):

It should be, I haven't checked in the last week, but it should be, I believe, sometime later in the next month or so, we'll know. I want to say it's 60 days after the record.

Nikki Dobay ([24:34](#)):

Oh, I see. Okay.

John Ormonde ([24:36](#)):

Yeah.

Nikki Dobay ([24:37](#)):

After the record is closed or whatnot. Yep.

John Ormonde ([24:39](#)):

Yeah. Well, the order from the trial court has to be served on FTB and then 60 days later. So I haven't checked when the actual deadline is, but I think in the next couple of months we'll know for sure.

Nikki Dobay ([24:50](#)):

Okay. Okay. So that's-

John Ormonde ([24:51](#)):

It might be shorter than that, but in the next couple months we'll know and I suspect they will appeal. But I guess if they don't, we know why, which was they were scared of losing on appeal because FTB is bound by a Court of Appeal decision, but a trial court decision, they can continue to disregard it and not suffer any immediate consequences.

Nikki Dobay ([25:16](#)):

Right, right. I mean, yeah, you could definitely see there may be a reason they wouldn't want to appeal and risk a Court of Appeals decision.

John Ormonde ([25:25](#)):

Yeah.

Nikki Dobay ([25:27](#)):

Well, I mean, this case is definitely getting a ton of attention just being at the various conferences, everybody's talking about it. And I will likely be discussing it with Michael Fitali later this summer at the MTC meeting. But I just also want to say congratulations on the outcome in that. I know it was a significant piece of what you've been working on for the last several years.

[\(25:56\)](#):

So John, what else in California do you want the listeners to know about? Are there any other big percolating issues that you want to kind of give some insights into?

John Ormonde ([26:13](#)):

Yeah, I could talk about the cases I'm going to work on now. One with you, right?

Nikki Dobay ([26:18](#)):

Yes. Oh yes, yes, yes. We can definitely talk about the NTU case. So in NTU, this is a case that's currently pending before the Court of Appeals. We haven't started briefing in it yet, but when Shale was here, we did do a few podcasts on it and talk about the issue, which has to do with California's repeal or not repeal, but I guess the enactment of a new apportionment provision. I know you'll give us the number of that.

John Ormonde ([26:54](#)):

25128.9.

Nikki Dobay ([26:56](#)):

Yes. And it essentially, well, it's very confusing, but it no longer says that you could use gross receipts for purposes of apportionment, even though gross receipts is still in another provision because it says you have to deduct things from your gross receipts where there are deductions taken. And it's always been a bit of a mystery what it actually means, but the crux of the NTU case is whether or not that repeal being retroactive is constitutional or not. So we had an unfortunate loss at the trial court level based on standing. So we will be taking on that standing issue, but we are also going to argue the merits of this.

John Ormonde ([27:47](#)):

I think so, yeah.

Nikki Dobay ([27:47](#)):

Yeah.

John Ormonde ([27:48](#)):

There's good authority because it's a purely legal issue, I don't think there's anything that bars the Court of Appeal from ruling on it because there's no factual determinations that are disputed. So I think there's a good argument that we can reach the merits of the Court of Appeal. I'd also say the focus has been on the gross receipts issue, but it modifies all three factors of 25128.9.

Nikki Dobay ([28:15](#)):

Okay.

John Ormonde ([28:15](#)):

It says that transactions or activities that aren't included in net income or loss, so they set it up so it only really applies to those deductible income items, I think, in FTB's view. I mean, there might be arguments about when it could apply elsewhere, but FTB's, I think, intent was to probably... Well, I guess the legislature wrote it, but I think FTB was involved.

Nikki Dobay ([28:48](#)):

Yeah, I think they were real involved.

John Ormonde ([28:53](#)):

And I'd say I was working on the CalTax litigation in my prior firm and then CalTax didn't appeal. So that's why I had to move here because I was so invested in the issue that I couldn't let it go.

Nikki Dobay ([29:09](#)):

Right, right. Yes. And I'm very happy to have you here as a California expert because I was really mostly involved in the case because of the associational standing issue because that's an issue I have worked on in several states. And so when it came to be that the crux of the associational standing issue was based on the California Constitution, I was like, "This isn't really in my wheelhouse anymore." But I still think we can win that associational standing issue too.

John Ormonde ([29:43](#)):

Yeah. The court that it's going before on appeal ruled in 2010 that CalTax had standing to challenge the LCUP provisions. So at least we have some good authority on our side that we should have standing.

Nikki Dobay ([30:01](#)):

Right, right. And NTU...

PART 3 OF 4 ENDS [00:30:04]

John Ormonde ([30:02](#)):

... shouldn't have standing.

Nikki Dobay ([30:02](#)):

Right, right. And NTU's position has always been that they don't need to name a specific member, and I stand behind that 100%. And so, it would be really looking forward to a favorable Court of Appeals decision on that issue, because I think it could be a real helpful tool for taxpayers to have in their toolbox if they can rely on associations more to raise some of these issues that are constitutional issues where there's no facts at issue, because California kind of does some unconstitutional things sometimes.

John Ormonde ([30:40](#)):

Sometimes.

Nikki Dobay ([30:40](#)):

Okay.

John Ormonde ([30:46](#)):

I think they do a lot, but... Well, I'd say the localities probably do it even more.

Nikki Dobay ([30:49](#)):

Yes.

## Gettin' SALTy Podcast – Episode 78

John Ormonde ([30:52](#)):

On the retroactivity front, they push the envelope.

Nikki Dobay ([30:56](#)):

Right, right. Well, John, any final thoughts? We'll definitely be back, because I know you've done a lot of work in San Francisco and they're always doing crazy things, and so we probably should jump back on and just have a whole episode about San Francisco. But any final thoughts or words of wisdom?

John Ormonde ([31:19](#)):

One other case that we've got right now that I think could be pretty important, maybe not for corporate tax, big groups, but is Garcia-Rojas versus Franchise Tax Board.

Nikki Dobay ([31:29](#)):

Yes. Yep.

John Ormonde ([31:30](#)):

And in that case, the Court of Appeal held that a sole proprietor was not engaged in a unitary business, even though it was a sole proprietor in Texas who was performing services for a customer in California. And so, FTB, under Section 17951-4, which incorporates UDITPA, effectively-

Nikki Dobay ([31:51](#)):

Yep.

John Ormonde ([31:52](#)):

... said that we can source your sales based on market and now you have a tax liability in California. The Court of Appeal said that that regulation, it only applies to a unitary business, and that the sole proprietor... He was a doctor reviewing X-rays, I think.

Nikki Dobay ([32:07](#)):

Right.

John Ormonde ([32:08](#)):

That he was only engaged in one business activity-

Nikki Dobay ([32:11](#)):

Yes.

John Ormonde ([32:12](#)):

... and he was only one entity. And the Court of Appeal said that unitary business has been defined, and it quotes some of their decisions as "two or more entities"-

Nikki Dobay ([32:22](#)):

Right.

## Gettin' SALTy Podcast – Episode 78

John Ormonde ([32:22](#)):

... or "two or more separate activities." And so, it'll be interesting to see... FTB petitioned for a review of the California Supreme Court, so we'll see how that goes. But it's hard to say how broad you can apply that decision. But presumably, if you just have one entity-

Nikki Dobay ([32:41](#)):

Right.

John Ormonde ([32:42](#)):

... that does one thing and you're under the personal income tax rules, that maybe you're not subject to UDITPA and that you can use the personal income tax rules to source.

Nikki Dobay ([32:56](#)):

Brad and Jen were on last month, I think, talking about that case after the Court of Appeals decision came out, and I was just having a hard time wrapping my brain around the FTB's position on that, because I don't think of individuals as being engaged in a unitary business.

John Ormonde ([33:17](#)):

Yeah.

Nikki Dobay ([33:17](#)):

And so, it just seemed so counterintuitive to me. Well, we'll see what happens with the petition.

John Ormonde ([33:27](#)):

Yeah.

Nikki Dobay ([33:27](#)):

But it just seemed a little out there.

John Ormonde ([33:32](#)):

I'd say it's-

Nikki Dobay ([33:32](#)):

And I would hope that other states wouldn't start down that path.

John Ormonde ([33:35](#)):

Yeah. I'd say the other thing is if you're an individual and you're trying to fill out your personal income tax return, you actually make it to the regulation, right?

Nikki Dobay ([33:45](#)):

Right.

John Ormonde ([33:46](#)):

## Gettin' SALTy Podcast – Episode 78

You get through the statutes, you get to the regulation and you read-

Nikki Dobay ([33:50](#)):

Yeah.

John Ormonde ([33:50](#)):

You read unitary business and you're like, "Well, I'm not engaged in a unitary business."

Nikki Dobay ([33:55](#)):

No. No.

John Ormonde ([33:56](#)):

So I just think from a readability, taxpayer-

Nikki Dobay ([34:00](#)):

Right.

John Ormonde ([34:00](#)):

... sole proprietor perspective-

Nikki Dobay ([34:03](#)):

Right, right.

John Ormonde ([34:03](#)):

... to require them to understand what a unitary business is and to engage in some sort of analysis to determine whether maybe they have to pay taxes in 20, 30, 40 states as an individual-

Nikki Dobay ([34:14](#)):

Right, right.

John Ormonde ([34:15](#)):

... is probably asking too much.

Nikki Dobay ([34:17](#)):

Well, yes, I think that's asking way too much. All right, John. Well, I can't let you leave without a surprise non-tax question.

John Ormonde ([34:27](#)):

Oh, boy.

Nikki Dobay ([34:27](#)):

So I had to call a phone-a-friend for this one because I decided the question I had, I didn't want to ask on the air, so we'll talk about that later. So the World Cup is happening. That's what the people tell me. My

## Gettin' SALTy Podcast – Episode 78

listeners know I'm not a good sports fan at all. But the question is, who are you rooting for? So I was told I had to come up with something, and so I decided I'm going to root for Mexico. But are you following the World Cup? Are you rooting for someone? Are you involved in this at all?

John Ormonde ([35:07](#)):

I'm the least involved person, mainly because my wife doesn't let me watch any sports.

Nikki Dobay ([35:13](#)):

Okay.

John Ormonde ([35:13](#)):

I realized it a little bit is not fun because you lose track of who everybody is.

Nikki Dobay ([35:19](#)):

Okay.

John Ormonde ([35:20](#)):

I'll go with Mexico because I don't know who the other...

Nikki Dobay ([35:26](#)):

I had to ask this person. I said, "Can I say Mexico?" And she said yes. She's rooting for Costa Rica, so now you know who I'm talking about.

John Ormonde ([35:37](#)):

Oh, wow. Yeah. I think I know.

Nikki Dobay ([35:38](#)):

Okay. So this was an epic fail of a surprise non-tax question for both of us. So next time, it will definitely be better. But John, thank you so much for joining us. Thank you for filling the listeners in about the Smithfield case. Again, that is definitely one that's being watched. Thank you to the listeners for tuning in. Information for John and I will be in the show notes. And I will be back with you again in a few weeks on the next GeTtin' SALTy.

PART 4 OF 4 ENDS [00:36:14]