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In this viewpoint, Morris discusses what he describes as a mythical physical usefulness test prescribed in a California State Board of Equalization discussion paper and draft regulations. He writes that the underpinnings of the regs are built on an incorrect reading of *Lucent Technologies Inc. v. State Board of Equalization* and should be revised. Failing to do so could result in higher sales and use tax on some qualifying asset purchases, he says.

Many have searched in vain to find Yeti, Nessie, Bigfoot, and the California Technology Transfer Agreement (TTA) physical usefulness test. The landmark *Lucent* and *Nortel* decisions held that a sale of communications equipment along with the with the right to use the software needed to operate the tangible personal property (TPP) qualified for the TTA exemption.[1] Nevertheless, the initial California State Board of Equalization discussion paper and California regulations created a mythical TTA "physical usefulness test" to thwart use of the exemption for any physical assets beyond temporary storage devices (that is, disc, magnetic tape, dongle, etc.).[2] The BOE Physical Usefulness Test was devised by requiring any TPP intertwined with software be "wholly collateral" to the subsequent use of the software.[3] According to the BOE, "wholly collateral" means the software is only used to transport the software so that it can be copied, and once copied, the TPP is not otherwise physically useful.[4] This is a backdoor means of disqualifying any meaningful assets using software from qualifying for the TTA exclusion. The paper and regulations misapply *Lucent*'s rejection of the BOE's legal argument that software is per se taxable TPP to support its reasoning. The underpinnings of the regulations are built on an incorrect reading of *Lucent* and should be revised to provide an accurate foundation to apply to TTA transactions. Failure to correct the regulations will illogically result in greater sales and use tax post-*Lucent* than pre-*Lucent* on qualifying TTA asset purchases.

Background

The TTA statute was enacted in 1993 to exclude from sales and use tax the value of patented or copyrighted intangibles from TPP when acquired in a TTA agreement.[5] A TTA agreement simply requires that:

- a person holds a patent or copyright;

[1] *Lucent Technologies Inc. v. State Board of Equalization*, 241 Cal. App. 4th 19 (2015).

[2] State BOE, Initial Discussion Paper, "Software Technology Transfer Agreements" (June 17, 2016).

[3] *Id.* at 10.

[4] *Id.*

[5] Cal. Rev. & Tax. Code section 6011, subd. (c)(10)(D), and section 6012, subd. (c)(10)(D).

- that person assigns or licenses to another the right to make and sell a product or to use a process; and
- the resulting product or process is subject to the assignor's or licensor's patent or copyright interest.[6]

Thus, only the value of TPP is subject to tax when purchased in a TTA.[7] *Nortel* and *Lucent* both involved the purchase of telecommunications switching equipment using software patented and copyrighted by AT&T Inc.[8] The BOE made numerous legal arguments in both cases contending that software conveyed with the equipment did not qualify for the TTA exemption. In both cases, the court held that the value of software intertwined in the agreement to purchase telecommunications equipment should be excluded from tax. Not only did the court reject every legal argument presented by the BOE, but it even awarded legal fees to *Lucent* reflecting the court's view that the issue has already been settled in prior cases, including *Nortel*.[9] In January 2016 the California Supreme Court denied certiorari, making the findings in *Lucent* and *Nortel* final.[10] Since then, the BOE has initiated an interested party process and issued the paper and the regulations. Several interested party sessions have been canceled or delayed, and the taxation of TPP intertwined with intangibles in a TTA remains in limbo. And most refund claims filed have been held in abeyance pending completion of the interested party process and approval of regulations. The BOE indicated it would process refunds it views as fitting the fact pattern in *Lucent*.[11] However, under the BOE's reading of *Lucent*, only software conveyed on temporary storage media — that is, media that is "wholly collateral" (for example, tapes and discs) — qualifies for a refund.[12] Therefore, if TPP and the software are integrated in some fashion such that the TPP will have a continuing role in the use of the software (for example, technology asset integrating software and physical property), the transaction does not qualify as a TTA under *Lucent*. Thus, in the BOE's view, there is a TTA physical usefulness test that prevents any meaningful asset from qualifying for TTA treatment.

In the same way that Bigfoot has not been found, a physical usefulness test has not been found in *Lucent*.

Mythical TTA Physical Usefulness Test

Only purchases of TPP potentially qualify for the TTA exclusion from gross receipts for sales and use tax purposes;[13] therefore, a purchase of an intangible not intertwined with tangible property does not qualify for the TTA exclusion.[14] The purchase of TPP is necessary to even apply the TTA exclusion. Logically, there would be no need for a TTA exclusion to separate intangibles from tangibles unless the physical asset had some permanence and continuing use beyond

[6] *Lucent Technologies Inc.*, 241 Cal. App. 4th at 36.

[7] Cal. Rev. & Tax. Code section 6011(c)(10)(A), (B), and (C).

[8] *Lucent Technologies Inc.*, 241 Cal. App. 4th at 34. "To begin, Nortel explicitly decided whether an agreement factually identical to the agreements at issue here was a technology transfer agreement."

[9] *Id.* at 35. "The net result is that AT&T/Lucent incurred more than $2.5 million in litigation costs to receive a tax refund to which it was indisputably entitled under controlling law. It is certainly up to the Board to decide whether to take positions at odds with binding, on-point authority, but section 7156 makes clear that the Board is not free to require taxpayers to bear the cost of a litigation strategy aimed at taking a third, fourth, or fifth bite at the apple. The trial court properly awarded AT&T/Lucent its 'reasonable litigation costs.'"

[10] *Lucent Technologies Inc.*, No. S230657 (petition for review denied Jan. 20, 2016).

[11] Letter from TTA Refund Team, "Audit Determination & Refund Section BOE-196 (7-16) Retailer Software TTA Refund Claims." In accordance with the summary of the chief counsel memo and the March 30, 2016, BOE meeting, the BOE has begun processing TTA refund claims for taxpayers with facts like those in *Lucent* if the following conditions apply:

- The retailer of the software is the holder of the copyright or patent interests in the software.
- The retailer transfers the software to the buyer on tangible storage media.
- The retailer transfers, in writing, a license to the buyer to copy the software.
- The tangible storage media is wholly collateral to the buyer's use of the license regarding the software, such as the tapes and discs used in *Lucent*.
- The retailer is the exclusive retailer of its non-custom software recorded on the same or like type of wholly collateral tangible storage media.

[12] *Supra* note 2, at 4.

[13] Cal. Rev. & Tax. Code section 6011(a). The sales price is "the total amount for which tangible personal property is sold."

[14] Cal. Rev. & Tax. Code section 6011 (c)(10). The sales price does not include any of the following: "The amount charged for intangible personal property transferred with tangible personal property in any technology transfer agreement."

transporting software on a temporary storage media.

To explain the BOE's error requires a review of the *Lucent* analysis of the judicial history on taxation of intertwined assets and the *Lucent* analysis of the BOE legal arguments for the taxation of the software at issue in *Lucent*.

Lucent set the analytical stage by reviewing the judicial history of bundled transactions in three contexts: (1) more than one object in a bundled transaction; (2) an inextricably intertwined transaction involving services and TPP; and (3) an inextricably intertwined transaction involving intangibles and TPP.

In the context of a transaction that includes intangibles and TPP, if the separate elements can be identified, the taxable and nontaxable elements will be unbundled and taxed accordingly (for example, Dell Computer separation of nontaxable warranty and taxable computer).

> Where the transaction involves components that are "readily separable" and not "inextricably intertwined," the sales tax is assessed against the component of the transaction involving tangible personal property and not assessed against the remaining, not-taxable component.[15]

The court noted that services are treated differently from intangibles when part of an inextricably intertwined transaction.

> ["California views sales of tangible property bundled with intangibles, rather than services, differently."][16]

Regarding bundled services, the entire transaction is taxable or exempt depending on the true object of the transaction.

> This determination is dispositive: If the "true object" is the sale of tangible personal property, the whole transaction is subject to the sales tax; if the "true object" is the performance of a service, no portion—even the tangible storage media used to perform the service—of the transaction is subject to the sales tax. (*General Business Sys. v. State Board of Equalization* (1984) 162 Cal. App. 3d 50, 55 [no sales tax to be assessed on tangible storage media used to provide a service].)[17]

On the other hand, there is a different rule when an intangible is inextricably intertwined with TPP. All that is necessary for the transaction to be taxable is for the TPP to be "physically useful" to the subsequent use of the intangible.

> Where, as here, the untaxable component is intangible personal property, the default rule is to determine whether the tangible portion of the transaction is "essential" or "physically useful" to the purchaser's subsequent use of the intangible personal property portion of the transaction . . . Under this rule, the "true object" of the transaction is irrelevant. Thus, when a seller confers an intangible license to copy a copyrighted matter and gives the buyer a physical copy of the copyrighted matter needed to make use of that license . . . the entire transaction is subject to the sales tax.[18]

If the TPP is not physically useful to the subsequent use of the intangible, the entire transaction is exempt from tax. That is the case when the tangible media is simply used to convey the information and has no continuing role in the use of the intangible property.

> Conversely, when a seller grants an intangible license to copy copyrighted material or to use a patent and transfers the material using tangible media that is not essential to the buyer's use of the license or any further manufacturing process — as is the case when software is transmitted via a disk that is "not essential" or otherwise physically useful to the buyer's subsequent use of that software — the entire transaction is not subject to the sales tax. (*Microsoft Corp. v. Franchise Tax Board* (2012) 212 Cal. App. 4th 78, 92 (*Microsoft*) [so holding].) This

[15] *Lucent Technologies Inc.*, 241 Cal. App. 4th at 6.

[16] *Id.* at 7.

[17] *Id.*

[18] *Id.* at 7-8.

> default rule is thus an all-or-nothing affair; depending on the centrality of the tangible personal property to the subsequent use of the intangible personal property, either the entire transaction is taxable or it is not.[19]

It is not correct to infer from that language that if the tangible media is useful to the subsequent use of the software, it is taxable under the *Lucent* analysis (referencing the analysis in *Microsoft*). The court pivoted away from that approach in the context of a TTA.

> But this is only the default rule. In 1993, our Legislature enacted the technology transfer agreement statutes and thereby set up a special rule for technology transfer agreements by excluding them from the definition of "sales" and "gross receipts." . . . Instead of sales tax liability attaching to all or none of the transaction, a taxpayer who enters into a contract that qualifies as a technology transfer agreement is required to sort the tangible personal property from the intangible, and to pay sales tax on the tangible personal property that is transferred but not on "the amount charged for [the] intangible personal property transferred."[20]

Thus, under the *Lucent* analysis of a TTA, it is irrelevant whether the TPP is physically useful; the TPP will be subject to tax based on the value of the TPP. Thus, TPP that is simply used to convey the intangible property will be subject to tax, and TPP that has continuing usefulness (that is, not wholly collateral) will also be subject to tax. Obviously, the TPP with continuing physical usefulness will have a greater value than TPP simply used to convey the intangible property.

> As we conclude above, the fact that placing a computer program on storage media physically alters that media does not thereby transmogrify the software itself into tangible personal property; the media is tangible, the software is not. Thus, the price of blank media is the price of the tangible personal property, and is what is to be taxed under the technology transfer agreement statutes.[21]

After presenting the principle that a TTA requires separation of TPP value, the court then went on to address each BOE legal argument individually, writing, "We will consider each of the BOE's arguments separately."[22]

The BOE argued that computer software did not involve an intertwined intangible and TPP because software was TPP. It is important to understand that the BOE was trying to avoid treatment of software as a TTA by establishing that software did not involve any intangible and was thus fully taxable as TPP.

> A. Software as "tangible personal property"
>
> The Board argues that the computer software in this case is tangible personal property, and offers the following syllogism in support of its position: (1) tangible personal property is property that "may be seen . . . or which is in any other manner perceptible to the senses" (section 6016); (2) the act of placing data — in this case, AT&T/Lucent's software — on magnetic tapes and compact discs physically alters those tapes and discs; ergo, (3) the software can be (microscopically) seen and perceived by the senses, thereby rendering it tangible personal property.[23]

In responding to this legal argument, the court rejected the BOE's argument that software was tangible property by noting that precedent had already established that transferring software on TPP was not taxable unless the TPP was physically useful to the use of the software. The purpose of this analysis was to establish that software had already been determined to be an intangible not subject to taxation if the TPP was not physically useful to the continuing use of the property. The court provided that analysis not to

[19] *Id.* at 8-9.
[20] *Id.* at 9-10.
[21] *Id.* at 33-34.
[22] *Id.* at 13.
[23] *Id.*

suggest that software transferred on physical media would be taxable "if the tangible media were physically useful," but to demonstrate that the courts had already concluded that software was not TPP.

> We reject that syllogism for two reasons. First and foremost, it is inconsistent with precedent. As detailed above, when tangible and intangible property is inextricably intertwined, whether the property is subject to the sales tax turns on whether the tangible property is "essential" or "physically useful" to the subsequent use of the intangible personal property. More to the point, the California courts have on multiple occasions held that the transmission of software using a tape or disc in conjunction with the grant of a license to copy or use that software does not yield a taxable transaction because the tape or disc is "merely . . . a convenient storage medium [used] to transfer [the] copyrighted content" and hence not in itself essential or physically useful to the later use of the intangible personal property. . . . By seeking to make the physical alteration of the storage media dispositive, the Board ignores this precedent.[24]

The court used the "physical usefulness" precedent to debunk the BOE's notion that software is per se TPP and thus did not involve an intertwined intangible and tangible property. The BOE made that argument to avoid having to even consider the TTA statute, which would have meant software was taxable as TPP. It would be disingenuous and an incorrect reading of the court's analysis to suggest that the court's use of physical usefulness precedent in that context created a physical usefulness test that excludes any asset with continuing value from TTA treatment. As noted, the court had already established that the TTA exclusion supersedes the old all-or-nothing physical usefulness test.

The court continued its response to the BOE's legal argument that software is taxable TPP, finding it would be absurd to view software as TPP when it was wholly collateral (that is, irrelevant) to the subsequent use of the license. Put another way, it would make no sense to treat software as TPP simply because a tangible medium was used to convey the software when the software could be conveyed electronically and would not be treated as tangible media.

> Second, the Board's construction of section 6016 leads to an absurd result . . . in construing a statute we are to avoid an interpretation that leads to absurd results. . . . If we accepted the Board's construction of section 6016, AT&T/Lucent would be liable for nearly $25 million in sales tax because it decided to transmit its software to the telephone companies using tapes and discs, but would have been liable for no sales tax on the software if had instead transmitted the software electronically (via email or through uploading it to a remote server on the Internet for later download by the telephone companies) (Cal. Code Regs., tit. 18, section 1502, subd. (f)(1)(D) [sale of canned computer program not subject to sales tax if "transferred by remote telecommunications from the seller's place of business"]). Ascribing such tremendous consequences to the manner in which a software program is transmitted — when that manner is wholly collateral to the subsequent use of the licenses regarding that software and when that manner is so easily manipulated by the buyer and seller — is an absurd result nowhere sanctioned by the language of, or policy underlying, California's sales tax law.[25]

The court provided that analysis not to suggest that software transferred on physical media that had continuing physical usefulness was taxable TPP, but rather to demonstrate the absurdity of the BOE argument that software was dispositively taxable as TPP and that the TTA analysis was unnecessary. It would be wrong to infer, in the context of the court finding the BOE's legal argument that software is TPP was absurd, that the court intended software to be taxable if

[24] *Id.* at 13.

[25] *Id.* at 14.

the tangible media was physically useful to the continuing use of software. The court was simply addressing the narrow argument the BOE offered that software was TPP. That did not alter the principle the court had already established that when a transaction qualifies as a TTA, the tangible value of the TPP must be separated from the value of the intangible. The court did not reach its conclusion based on TPP that is used only to transmit intangible property. The statute did not limit TTA treatment to tangible media that was not physically useful to the use of the intangibles; as noted, the court specifically rejected the continuing physical usefulness analysis that predated the TTA statute.

> Instead of sales tax liability attaching to all or none of the transaction, a taxpayer who enters into a contract that qualifies as a technology transfer agreement is required to sort the tangible personal property from the intangible, and to pay sales tax on the tangible personal property that is transferred but not on "the amount charged for [the] intangible personal property transferred."[26]

The paper and the regulations misuse the court's rebuttal of the BOE's legal argument that software is per se TPP. The paper and the regulations ignore the fact that the physical usefulness discussion was exclusively provided to debunk the BOE's TPP position. The BOE plucked the language from the court rebuttal of the TPP legal argument and instead used the court's language out of context in the paper to assert that:

> The tangible storage media is "wholly collateral" to the transferee's subsequent use of licenses regarding the software, meaning the storage media is only being used to transmit the software so that it can be copied and used in conjunction with a computer or computers, and, once the software is copied, the storage media is not essential or otherwise physically useful.[27]

This is not at all what the court said. As outlined above, the court explained that software was not dispositively TPP because: (1) the value of the intangible could be conveyed electronically; and (2) software had already been held to be exempt from tax if the media was not essential or physically useful to the continuing use of the software.[28]

The court clearly meant to respond to the BOE TPP legal argument, using the term "wholly collateral" to illustrate that whether software was transferred on tangible media or transferred electronically, it was irrelevant to the use of the program, thus demonstrating that software is not taxable as TPP. Put another way, software is not TPP, because it can be transmitted and used electronically, illustrating its intangible value. The court did not pin its holding on the fact that the media was wholly collateral to the use of the software or that the media had no continuing physical usefulness. The court applied the physical usefulness test to demonstrate that software was not TPP.[29] As previously noted, intertwined transactions are already exempt if the media is not physically useful without regard to the TTA rules.[30]

Unfortunately, the paper takes that legal analysis of the per se software TPP issue and inappropriately applies the concepts throughout the paper and the proposed regulation:

> 5. "Software technology transfer agreement" means an agreement evidenced by a writing (e.g., invoice, purchase order, contract, etc.) under which a holder-retailer assigns or licenses the right to reproduce or copy non-custom software subject to the holder-retailer's copyright or patent interest to a person and transmits a copy of the non-custom software to the person on tangible storage media that is wholly collateral to the person's subsequent use of the licenses regarding that software. "Software technology transfer agreement" does not mean or include a non-holder-retailer's

[26] *Id.* at 10.

[27] *Supra* note 2, at 10.

[28] *Lucent Technologies Inc.*, 241 Cal. App. 4th at 13.

[29] *Id.*

[30] *Id.*

> agreement to sell tangible storage media on which non-custom software is recorded.
>
> 6. Tangible storage media is "wholly collateral" to a person's subsequent use of licenses regarding software recorded on the storage media if the storage media is only being used to transmit the software to the person so that it can be copied and used in conjunction with a computer or computers, and, once the software is copied, Initial Discussion Paper Exhibit 1 Staff's Proposed Amendments to Regulation 1507 Page 5 of 6[,] the storage media is not essential or otherwise physically useful, except to restore copies of the software on the computer or computers. A computer's internal storage media, such as a computer's internal hard drive or memory, is not wholly collateral to the subsequent use of software recorded on it.[31]

That inappropriate use of the TPP legal argument needs to be removed from the paper and the regulation to avoid applying a legal requirement that was not advanced by the court and is inconsistent with the actual holding of the court.

It can also be demonstrated that the court did not make a distinction between software transferred through tangible media with continuing physical usefulness versus software transferred on tangible media with no continuing physical usefulness, based on the court's rejection of the BOE's argument that the TTA statutes codified the decision in *Intel.* In *Intel*, intellectual property was transferred on tangible media that was not physically useful to the use of the IP.

> As a part of the contract, petitioner transferred written information, instructions, schematics, database tapes, and test tapes. The database tapes contained the IC design in digitized form defining the tooling coordinates. The test tapes were used to evaluate test ICs produced by Burroughs. Neither the database tapes nor the test tapes had existed previously in the form in which they had been transferred. If the test ICs performed to specification, the process transfer would be regarded as successful. Neither the database tapes nor the test tapes were used to operate equipment, either to produce ICs or tooling.[32]

The court rejected the BOE's contention that the TTA statute should be limited to the decision in *Intel*. Thus, under *Lucent* a TTA is not limited to circumstances that involve the transfer of IP on tangible media when the tangible media is not physically useful to the licensee's/assignee's exercise of the copyright/patent interest. Accordingly, qualification of software as a TTA is not contingent on the property simply being used to convey the IP (for example, disc, magnetic tape, dongle, and the like).

> Second, the Board asserts that the technology transfer agreement statutes codified the decision in *Petition of Intel Corporation* . . . but the statutes are not limited to Intel's factual context. Indeed, the statutes' legislative history indicates that the Board warned the Legislature of how broadly the statutes could be construed, and the Legislature enacted the statutes anyway. (Nortel, *supra*, 191 Cal. App. 4th at p. 1269 ["The Legislature enacted the [technology transfer agreement] statutes over the Board's objections"].)[33]

The court specifically noted that the statute could be broadly interpreted and was not limited to the facts in *Intel* involving a transfer of intangible property on tangible media with no use of the TPP in the equipment operations or tooling.

The court in *Preston* made clear that transactions involving significant TPP and transactions involving insignificant TPP would qualify as TTAs. If the TPP has significant value, then it must have continuing physical usefulness and, even though physically useful with

[31] *See* proposed reg. section 1507 (c)(5) and (6).

[32] *Petition of Intel Corp.*, California State Board of Equalization, No. SY GH 26-624781-010 (June 4, 1992).

[33] *Lucent Technologies Inc.*, 241 Cal. App. 4th at 25.

significant value, the transaction will nevertheless still qualify as a TTA.

> When Assembly Bill No. 103 reached the Senate, some analyses raised a concern that the proposed legislation was more expansive than Intel. "[T]he use of 'or' instead of 'and' [in the definition of technology transfer agreement] broadens the Board's Intel decision to include not only those high technology agreements in which relatively little tangible personal property is transferred along with very valuable intangible rights to make and sell a product, but also copyright agreements involving a substantial proportion of tangible personal property."[34]

Preston held that transferring intangibles intertwined with TPP qualifies as a TTA whether the TPP is of high value or low value. In either case, there is a continuing use of the TPP to exploit the intangibles that are intertwined with the TPP. That is the very essence of a TTA — intertwined intangibles with tangibles. It would be inconsistent with that principle to treat software differently than other intangibles by excluding software intertwined with TPP that is physically useful to the use of the intangibles. Adding a physical usefulness test essentially eliminates software from TTA treatment. That is, if the physical media cannot have continuing physical usefulness, then the software is not actually intertwined with the TPP. It is separable by the fact that the physical media is simply a means of conveying intangible information. And when that information is intertwined with TPP, then it would not qualify as a TTA because the TPP has physical usefulness.

If there were a continuing physical usefulness test associated with TPP transferred with software, there would be no need to apply the TTA exemption to software transfers. That is, the entire software purchase would be exempt if conveyed by temporary storage media under the historical physical usefulness test. Yet illogically, if TTA qualification were limited to those transactions, TTA treatment would result in greater tax since the value of the temporary storage media would be taxable.[35] Clearly the TTA statute was not intended to increase taxation, and it was not intended to only apply to TPP used to transport intangible information with no continuing usefulness.

Had the court ignored the TTA statute, it could have found the tangible property portion of the sale of switches taxable under the separation of TPP and intangibles rationale under *Dell*.[36] And the court could have found the entire sale of software exempt since there was no continuing physical usefulness of the blank tapes and discs. Instead, the court held that the switches were taxable and the blank tapes and compact discs were taxable under the separation of TPP from tangibles TTA regime.

> AT&T/Lucent was obligated to pay sales taxes on the tangible portion of the sale (that is, for the switches, the instructions, and the 3,954 blank tapes and/or compact discs used to transmit the software), but not required to pay sales taxes on the intangible portion (that is, for the software and licenses).[37]

In *Nortel*, the court held that prewritten copyrighted or patented software qualified as a TTA. The court did not limit that statement to software that was conveyed on tangible media with no continuing physical usefulness. Rather, *Nortel* held that qualification as a TTA is based on whether the software is copyrighted and patented. Thus, the inquiry should be whether the intangible is patented or copyrighted, not whether the software is conveyed on TPP with no continuing physical usefulness.

> The BOE exceeded its authority by excluding all prewritten computer programs from the definition of a TTA, even the licensing of a prewritten program "that is subject to [a] patent or copyright interest." (Sections 6011, subd. (c)(10)(D), 6012, subd. (c)(10)(D).) By doing so, the

[34] *Preston v. State Board of Equalization*, 25 Cal. 4th 197 (2001).

[35] *Lucent Technologies Inc.*, 241 Cal. App. 4th at 4.

[36] *Dell Inc. v. The Superior Court of the City and County of San Francisco*, 159 Cal. App. 4th 911 (2008). ("A mixed transaction involving separately identifiable transfers of tangible and intangible property distinguishable from a bundled sale of intertwined property. Dell's sale of computers with service contracts is not, properly speaking, a bundled sale").

[37] *Lucent Technologies Inc.*, 241 Cal. App. 4th at 5.

BOE altered or impaired the scope of the TTA statutes. If the Legislature did not want the TTA statutes to apply to prewritten — but copyrighted or patented — computer programs, it would have expressly excluded prewritten programs, as it did in section 6010.9. 9 To the extent that regulation 1507, subdivision (a)(1) excludes from the definition of a TTA prewritten computer programs that are subject to a copyright or patent, the regulation exceeds the scope of the BOE's authority and does not effectuate the purpose of the TTA statutes: It is, for these reasons, invalid.[38]

Lucent rejected the BOE's legal argument that the TTA exclusion should not apply because software was taxable as TPP. Lucent noted that the tangible media was "wholly collateral" or irrelevant to the subsequent use of the software. Thus, if the tangible media is wholly collateral, then there must be intangible property involved proving that software is not taxable as TPP. The BOE inventively took the court's rejection of its software taxable as TPP legal argument to assert that any property that is not wholly collateral with no continuing physical usefulness will not qualify for TTA treatment. The inappropriate use of Lucent rejection of the BOE's software per se taxable TPP legal argument undermines the entire foundation of the paper and regulations. Fuzzy, distant pictures of a forest creature do not prove Bigfoot exists, and the BOE's fuzzy use of the old all-or-nothing physical usefulness test does not prove a physical usefulness test in a TTA. ■

[38] *Nortel Networks Inc. v. State Board of Equalization*, 191 Cal. App. 4th 1259 (2011); *petition for review denied*, California Supreme Court, No. S190946 (Apr. 27, 2011).