



COST's 48th Annual Meeting Orlando, FL

California's State Board of Equalization is Being Substantially Replaced

Moderator:

Nikki Dobay, COST, Washington, DC

Panel:

Eric J. Coffill, Eversheds Sutherland (US) LLP, Sacramento, CA

Marty Dakessian, Dakessian Law, Ltd., Los Angeles, CA

Jeff Vesely, Pillsbury Winthrop, San Francisco, CA

Overview: AB 102 overhauls CA tax system

- State Board of Equalization gutted
- New California Department of Tax and Fee Administration (CDTFA)
- New Office of Tax Appeals (OTA)

Trouble Brewing at the State Board of Equalization

- November 2015 Report by State Controller
- March 2017 Report by Department of Finance
- Calls for Reform by Board Members
- April 2017 Call for Reform by the Governor
- State Personnel nepotism audit

AB 102 (Cal. Stats. 2017, Ch. 16)

- Proposed June 12, 2017
- Passed June 15, 2017
- Signed June 27, 2017

Significantly Diminished Powers of State Board of Equalization

- Board lost nearly all its statutory powers
 - Lost administrative authority over sales tax
 - Lost administrative authority over 30 other tax and fee programs
 - Lost administrative appellate authority over all these taxes to new OTA
- Board retained constitutional functions
 - Kept property tax, insurance gross premiums tax, alcoholic beverage tax
 - Retained property tax regulatory authority
 - Retained ability to hear cases concerning these taxes
- No more ex parte communications as of July 1, 2017

The New CDTFA

- Effective July 1, 2017, assumed Board's duties for
 - Sale and other business taxes and fees
 - Appeals conferences
 - Settlement
- Personnel move from SBE to CDTFA
- New Director, Chief Deputy, and Chief Counsel

The New OTA

- As of 1/1/2018, SBE appellate function over most taxes. Function moves to OTA
 - New Director, Chief Deputy and Chief Counsel
- OTA will hear corporate franchise and personal income tax appeals
- OTA will hear appeals in sales/use tax matters and other special taxes and fees

Issues and Discussion Regarding How OTA Will Operate

- Panel(s) of three administrative law judges
- Must follow Administrative Procedures Act
- Must follow ABA Model Act “to the extent possible.”

Administrative Law Judges

Must:

- Be member of California bar for at least five years
- Know federal and state tax law
- Subscribe to Code of Judicial Ethics

Administrative Procedures Act

- Open hearings (but webcast unclear)
- Disqualification of judges
- Alternative dispute resolution
- Discovery rights
- Formal/informal hearings
- Administrative decisions must be in writing and based on the record

APA: Evidentiary Rules

- Right to subpoena witnesses
- Right to examine and cross-examine
- Hearsay permitted, but can't be only proof
- Witness testimony only under oath
- Affidavits allowed but witness subject to cross

ABA Model Act

- Judges
- Court personnel
- Constitutional issues
- Declaratory relief
- Discovery rights broader than under APA

Other rules under AB 102

- Choice of representation
- Written opinions within 100 days
- Trial de novo confirmed
- No right of appeal to Superior Court from OTA for CDTFA or FTB
- Pay-to-Play continues
- No *ex parte* communications with ALJs

AB 131 (Cal. Stats. 2017, Ch. 252)

- Clean-Up Bill to AB 102
- Signed September 16, 2017
- Little clarification
 - Retains appeals conference process at CDTFA for sales/use taxes and other excise taxes and fees administered by CDTFA
 - If BOE case is continued after December 31, OTA will hear it.
 - Permits BOE to publish Section 40 opinion if case is final before December 31.
 - OTA should adopt rules of practice that don't require "specialized knowledge."
 - "Tax appeals panels and appeals hearings not to be construed to be or to be conducted by a tax court"

Issues and Discussion Regarding How OTA Will Operate

- Effect of prior SBE decisions?
 - Formal opinions? Memorandum opinions? Summary decisions? Letter decisions?
- Will OTA decide constitutional issues?
- Effect on FTB Settlement Bureau and CDTFA Settlement Bureau?
- Closed hearings are supposed to be allowed, but what about sealed records?
- Length of hearings?
- How will the SBE rules of practice be applied in light of the requirement that they must not be in conflict with APA?
- Is the OTA really SBE reform?