

Add Section 524 to the Evidence Code to specify that the burden of proof is with the Board in any assertion of penalties for intent to evade or fraud and requires a clear and convincing evidence standard for such assertions, as specified.

Source: Honorable Bill Leonard

Existing Law

Under existing law, Section 115 of the Evidence Code provides, in part, “Except as otherwise provided by *law*, the burden of proof requires proof by a preponderance of the evidence.” (Emphasis added.) Section 160 of the Evidence Code defines “law” to include constitutional, statutory, and decisional law.

The Revenue and Taxation Code allows for civil penalties, and even criminal sanctions, for persons committing fraud or intent to evade the tax. California’s Evidence Code does not specifically provide for the standard of proof with regard to civil tax fraud. However, the standard of proof has been defined through decisional (case) law. Specifically, the California Court of Appeal in *Marchica v. State Board of Equalization* (1951) 107 Cal.App.2d 501 determined that the standard of proof in civil tax fraud cases was the clear and convincing evidence standard. A 2002 decision of the Ninth Circuit Court of Appeals, *California State Board of Equalization v. Renovizor’s, Inc.*, 282 F.3d 1233, relied on the *Marchica* decision in concluding that “clear and convincing evidence must be shown to establish civil tax fraud under California law.” Effective January 9, 2003, the Board amended its Regulation 1703(c)(3)(C) to state this agency’s existing standard of proof: “Fraud or intent to evade shall be established by clear and convincing evidence.” The 2002 *Renovizor’s* decision was the impetus for the Board’s amendment of Regulation 1703(c)(3)(C). However, the *Renovizor’s* opinion, as a federal court decision, is not controlling on matters of state law. (See, e.g., *Howard Contracting v. G.A. MacDonald Constr. Co* (1998) 71 Cal.App. 4th 38, 52.)

This Proposal

This proposal would add Section 524 to the Evidence Code to provide that in any civil proceeding to which the Board is a party, the Board shall have the burden of proof by clear and convincing evidence in sustaining its assertion of a penalty for intent to evade or fraud against a taxpayer, with respect to any factual issue relevant to ascertaining the liability of a taxpayer.

The purpose of this proposal is to codify both the decision made in the *Marchica* case, as well as the clear and convincing standard set forth in the Board’s Regulation 1703, so that the standards for asserting penalties for fraud or intent to evade are the same at both the administrative and judicial levels. By codifying this standard in the law, the Evidence Code would be specific that in the case of civil tax fraud, the standard of proof would be the clear and convincing standard.

Section 524 is added to the Evidence Code, to read:

524. (a) Notwithstanding any other provision of law, in a civil proceeding to which the State Board of Equalization is a party, that board shall have the burden of proof by clear and convincing evidence in sustaining its assertion of a penalty for intent to evade or fraud against a taxpayer or feepayer, with respect to any factual issue relevant to ascertaining the liability of a taxpayer.

(b) Nothing in this section shall be construed to override any requirement to substantiate any item on a return or claim filed with the State Board of Equalization.

(c) Nothing in this section shall subject a taxpayer to unreasonable search or access to records in violation of the United States Constitution, the California Constitution, or any other law.