



*California State Board of Equalization,
Legislative and Research Division*

LEGISLATIVE BULLETIN



State Capitol Building (from the East) c.1945
Photo courtesy of California State Archives

SALES TAX LEGISLATION 2010

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Assembly Bill 1585 (Committee on Accountability) Chapter 7
State Government Reports – Requirements and Repeal Date

Urgency measure, effective February 26, 2010. Amends Sections 9795 and 10242.5 of, and adds Section 10231.5 to, the Government Code.

BILL SUMMARY

This bill, among other things, requires that the summary of a report prepared by a state agency be submitted to each Member of the appropriate house of the Legislature by that agency, instead of by the Legislative Counsel. This measure also requires that any bill requiring a report to include a repeal date.

Sponsor: Committee on Accountability and Administrative Review

LAW PRIOR TO AMENDMENT

Existing law requires or requests state and local agencies to prepare and submit various reports to the Governor, the Legislature, and other state entities. Government Code Section 9795 provides that any report required or requested by law to be submitted by a state or local agency to the members of either house of the Legislature generally, shall instead be submitted to the Legislative Counsel, the Secretary of the Senate, and the Chief Clerk of the Assembly. However, this provision does not apply if the report is required or requested by law to be directed to a committee or other specified entity within the Legislature. Existing law provides that when a state agency submits reports to the Legislative Counsel, the Secretary of the Senate, and the Chief Clerk of the Assembly, it must provide one hard copy and one electronic copy. Each report must include a summary of its contents, not to exceed one page. The Legislative Counsel is required to provide a copy of the summary to each Member of the appropriate house of the Legislature within two working days of receipt of the summary.

Current law requires a state agency report to include an Internet Web site where the report can be downloaded and a telephone number to call to order a hard copy of the report.

Government Code Section 10242.5 requires the Legislative Counsel to provide a list of reports due from various state and local agencies and to update this list on a continual basis. A list of agencies with reports due can be accessed on the California Legislative web site at www.agencyreports.ca.gov/.

Under various California Codes, the State Board of Equalization (BOE) is currently required to produce six statutorily-mandated reports, which includes the BOE's annual report. The following table lists the reports due from the BOE:

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Section	Report	Due Date
Government Code Section 13292.5	Requires specified state agencies, including the BOE, to submit a report identifying and describing the status of its liquidated and delinquent accounts.	No later than October 31 of each year
Government Code Section 15616	Report shall include: (1) The assessed value of state-assessed and locally assessed real and personal property in each county and the assessed value of state-assessed and locally assessed property in each incorporated city or town, and (2) Information concerning other BOE-administered taxes. (Information required under this section is reported and published in the BOE's annual report.)	Annually (BOE's annual report)
Government Code Section 15624	Report on all requests made by any county, city, or city and county or the assessor related to the following: (1) rendering advisory or other services, and (2) furnishing auditor and appraisal personnel to aid local taxing authorities in making post audits of personal property.	On the opening day of each regular session of the Legislature
Government Code Section 15646	Final survey report on local assessment procedures and practices employed by county assessors.	On the opening day of each regular session of the Legislature
Health and Safety Code Section 25178.1	Quarterly report on hazardous waste disposal, facilities, and generator fees collected pursuant to Health and Safety Code Sections 25174.1, 25205.2, and 25205.5	On the 15 th day of the second month following each quarter
Revenue and Taxation Code Section 30166.1	Report evaluating the average actual costs, including labor for applying indicia or impressions, bonding, warehousing, and leasing stamping equipment, including case cutters and packers, associated with applying stamps or meter impressions to cigarette packages.	No later than July 1, 2005, with updates every two years

AMENDMENT

This bill amends Government Code Sections 9795 and 10242.5 of, and adds Section 10231.5, to revise the procedures for mandatory reporting requirements by state agencies and deletes certain obsolete reports. Among its provisions, this bill:

- Requires that the summary of any report made by a state agency to either house of the Legislature be submitted to each Member of the appropriate house by that agency, instead of by the Legislative Counsel.
- Provides that any report required or requested by law to be submitted by a state agency to the Members of either house of the Legislature must instead be submitted as a printed copy to Legislative Counsel and the Secretary of the Senate and as an electronic copy to the Chief Clerk of the Assembly.

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- Provides that any bill introduced or amended in either house of the Legislature requiring a state agency to submit a report on any subject to the Legislature or Legislative Counsel must include a provision repealing or making inoperative the reporting requirement, no later than four years following the operative date of the bill or four years after the due date of any report required every four or more years.
- Requires the Legislative Counsel, in drafting a bill for introduction or an amendment that imposes a reporting requirement to include a provision repealing or making inoperative the reporting requirement, four years after the date on which the requirement becomes operative, unless the person requesting the bill or amendment directs Legislative Counsel to do otherwise, as specified.
- Contains a listing of existing reports, as specified, identified as obsolete, to be deleted from the list of reports maintained by Legislative Counsel.

The provisions of the bill became effective on February 26, 2010.

LEGISLATIVE HISTORY

There have been several bills introduced during the last few legislative sessions related to state agency reporting requirements. These include:

[SB 1641 \(Oropeza, 2008\)](#) would have allowed the BOE and the Franchise Tax Board to send any required report to the Legislature in electronic format instead of printing and mailing paper copies of the report. This bill was vetoed by Governor Schwarzenegger, and the veto message states:

“The historic delay in passing the 2008-2009 State Budget has forced me to prioritize the bills sent to my desk at the end of the year’s legislative session. Given the delay, I am only signing bills that are the highest priority for California. This bill does not meet that standard and I cannot sign it at this time.”

[AB 219 \(Nakanishi, 2005\)](#) would have required all state agencies to provide the California State Library with electronic copies of their publications. This bill was held in the Senate Appropriations Committee suspense file.

[AB 2482 \(Campbell, 2004\)](#) would have required state agencies to submit reports electronically and submit printed copies of the reports upon request. This bill failed passage in the Assembly Business and Professions Committee.

[AB 2198 \(Liu, 2004\)](#) would have established procedures for state agencies to submit mandated reports. In addition, this bill would have required state agencies to have electronic versions of reports available for download. This bill was never heard in committee.

COMMENTS

1. **Purpose.** This bill was the result of a hearing held by the Assembly Accountability and Administrative Review Committee in February 2009, which examined reporting requirements of state and local agencies and compliance in fulfilling those requirements. According to Committee staff, the main purpose of this bill was to create efficiencies relating to required reports due to the Legislature from state and local agencies.
2. **Implementing the new reporting requirements have a minor impact on the BOE’s operations.** Current law requires state agencies, including the BOE, to submit

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one printed copy and one electronic copy to the Legislative Counsel, the Secretary of the Senate, and the Chief Clerk of the Assembly. The bill clarifies reports to be submitted as a printed copy to the Legislative Counsel and the Secretary of the Senate, and as an electronic copy to the Chief Clerk of the Assembly. Current law provides that each report must include a one-page summary of its contents, which the Legislative Counsel is required to distribute to each member of the Legislature. The bill instead requires all state agencies, including the BOE, to submit a one-page electronic summary directly to each member of the Legislature.

3. **The bill requires Legislative Counsel to eliminate certain reports from the current list of required reports.** There are 12 BOE-related reports to be deleted from the current list maintained by Legislative Counsel. Of the 12 reports, 11 are one-time reports for which the BOE has completed and submitted those reports in accordance with the law. The report due pursuant to RTC 30166.1, which requires the BOE to provide updates to the Legislature every two years, evaluates the average actual costs incurred by cigarette distributors to apply tax stamps to cigarette packages. The BOE submitted the first report in July 2006 and the update in March 2008. BOE staff is currently working on the second update of this report.

Assembly Bill 1612 (Committee on Budget) Chapter 725
Sales Tax on In-Home Support Service Providers

Urgency measure, effective October 19, 2010, but operative date depends on federal government approval. Among its provisions, adds and repeals Article 4 (commencing with Section 6150) of Chapter 2 of Part 1 of Division 2 of the Revenue and Taxation Code.

BILL SUMMARY

In part, this budget trailer bill imposes a sales tax on providers of in-home support services (IHSS), and requires a seller, as defined, who is actively engaged in arranging for the retail sale of support services to apply for a seller's permit and collect the sales tax from the provider and remit the tax to the Board of Equalization (BOE).

The sales tax provisions would only become operative if a certain request for approvals are granted by the federal Centers for Medicare and Medicaid Services.

Sponsor: Committee on Budget

LAW PRIOR TO AMENDMENT

Under existing law, California imposes a sales tax on a retailer's gross receipts from the retail sale of tangible personal property in this state, unless the sale is specifically exempted or excluded from tax by law. This tax is imposed on the retailer who may collect reimbursement from the customer if the contract of sale so provides.

Currently, and until July 1, 2011, the statewide sales and use tax rate is 8.25% and is imposed on taxable sales and purchases of tangible personal property. This rate is made up of the following components (additional district taxes are levied among various local jurisdictions and are not reflected in this chart):

Rate	Jurisdiction	R & T Code
4.75% 0.25% <u>1.00%</u> ¹ 6.00%	State (General Fund)	6051, 6201, 6051.3, 6201.3 6051.7, 6201.7
0.25%	State (Fiscal Recovery Fund)	6051.5, 6201.5
0.50%	Local Revenue Fund	6051.2, 6201.2
0.50%	Local Public Safety Fund	§35 Art XIII St. Constitution
1.00%	Local (0.25% County transportation funds 0.75% City and county operations)	7203.1

¹ This one percent sales and use tax rate will end on July 1, 2011. Thereafter, the state General Fund rate will be 5 percent.

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Generally, California's Sales and Use Tax Law does not impose a sales or use tax on sellers whose only sales consist of services. Therefore, under current law, sales of services by providers such as accountants, lawyers, doctors and other healthcare practitioners, maids, housekeepers, caretakers, and others, are generally not subject to sales or use tax.

Under the Welfare and Institutions Code, an IHSS program has been established to provide personal services and home care for over 400,000 eligible poor, aged, blind and disabled individuals by about 350,000 providers throughout the state to enable recipients to remain in their own homes and avoid institutionalization.

The Department of Social Services oversees the IHSS program at the state level and counties administer services at the local level.

Under current law, funding of the IHSS program is provided through a combination of about 50% federal (Medicaid), 32% state, and 18% county dollars.

Providers of these services receive payment for their hours worked. The providers submit timesheets twice a month to the county and are paid through a check issued by the State Controller. However, under certain conditions, a portion of a provider's wage may be paid from the recipient of the services.

AMENDMENT

This bill, among other things, adds Article 4 (commencing with Section 6150) to the Revenue and Taxation Code to do the following:

- Impose a sales tax of 7.25% (6.25% on and after July 1, 2011) on providers of IHSS at retail, measured by the gross receipts from the sale of those services. The proposed tax will become operative only if specified federal approval requests for matching funds are granted.
- For efficient administration of the tax, require sellers that are actively engaged in arranging for the retail sale of IHSS (such as a county social service department) to register with the BOE, collect the tax from the provider, and report and pay the tax to the BOE.
- Specify that sales tax prepayments shall not apply to sellers until no later than three months after the date that federal approval is obtained.
- Define "provider" to mean a natural person who is authorized by law to provide all of the IHSS as described in the bill and who makes a retail sale.
- Define "seller" to include the following:
 1. The Department of Social Services in its capacity as the state agency that oversees the IHSS program,
 2. A county in which county staff serve as homemakers pursuant to Welfare and Institutions Code Section 12302,
 3. A county that contracts with a nongovernmental contractor to arrange for the retail sale of IHSS, or
 4. Any other nongovernmental person that arranges for the retail of IHSS.
- Define "personal care services" and "support services."

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- Require the revenues from the proposed tax to be deposited in the State Treasury to the credit of the Personal Care IHSS Quality Assurance Revenue Fund, created by the bill.

The bill also adds Section 12306.6 to the Welfare and Institutions Code to do the following:

- Require the Director of the Department of Health Care Services (DHCS) to seek federal approval from the federal Centers for Medicare and Medicaid Services to implement these provisions, and notify the BOE within 10 days of receiving that approval.
- Specify that a provider of IHSS shall receive a supplementary payment equal to the sales tax collected plus an amount attributable to any payroll withholding for federal income tax and Social Security and Medicare taxes, as specified.

As an urgency bill, these provisions take effect October 19, 2010, but the imposition of the sales tax is contingent upon specified federal approval.

COMMENTS

1. **Purpose.** The idea of the imposition of the sales tax on IHSS workers' salaries was advanced by advocates in recent months, including the IHSS worker union (SEIU), and is intended to generate additional federal funds to provide some additional General Fund savings.

Under this bill, each IHSS provider would pay sales tax on their total wages that would be deducted from their paychecks (the IHSS program is administered by the counties, but all IHSS worker paychecks are generated by the State Controller). The bill intends to return to the IHSS worker the full amount of the sales tax withheld. There are approximately 350,000 IHSS workers in California, and about 60 "sellers" who arrange for the retail sale of IHSS.

As "sellers" defined in the bill, the sales tax would actually be remitted to the BOE by the various county social services departments and other nonprofit consortia who arrange for the providing of IHSS. Again, the intention is for them to receive federal matching funds from federal Medicaid dollars. Because of the large number of providers in each county, the "sellers" will each likely have measures of tax liabilities in excess of \$17,000 per month, and as such, will be required to report the tax quarterly with two prepayments each quarter pursuant to Section 6471 of the Sales and use Tax Law.

2. **Bill doesn't provide the BOE or affected taxpayers with much lead time.** Although the bill specifies that sales tax prepayments shall not apply to sellers "until no later than three months" after the date federal approval is obtained, the tax is operative the date the federal approval is made. This provides virtually no time to enable the BOE to notify the affected "sellers" to commence collection of the tax and to enable sellers to issue a supplementary payment as required by the bill.
3. **Bill has some confusing areas.** For example, as part of DHCS's request for federal approval, the bill requires that the director of DHCS seek to make the supplementary payments effective as of July 1, 2010 (the supplementary payments are to reimburse the providers for the amount of sales tax collected from them and to make up any differences in the providers pay due to any additional payroll withholding and other

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taxes attributable to the supplementary payments). However, the imposition of the sales tax does not begin until the date federal approval is made. It is unclear why supplementary payments would be necessary before commencement of the tax.

Another confusing area relates to the definition of “provider” in Section 6150. In (d)(2) the bill specifies that a “provider” means a nongovernmental person that arranges for the retail sale of all support services and excludes any natural person who provides services under the direction of the nongovernmental person. Yet, in defining “seller,” the bill includes any other nongovernmental person that arranges for the retail sale of support services. These definitions seem to overlap and are confusing. Staff will work with DHCS and the Department of Social Services to address these areas so that the BOE can properly administer the sales tax.

[Assembly Bill 2195 \(Silva\) Chapter 168](#)

Burden of Proof

Effective January 1, 2011. Adds Section 524 to the Evidence Code.

BILL SUMMARY

This bill adds a new provision to the Evidence Code to specify that the burden of proof is with the Board of Equalization (BOE) in any assertion of penalties for intent to evade or fraud and requires a clear and convincing evidence standard for such assertions, as specified.

Sponsor: Assembly Member Jim Silva

LAW PRIOR TO AMENDMENT

Under existing law, Evidence Code Section 115 provides, in part, "Except as otherwise provided by *law*, the burden of proof requires proof by a preponderance of the evidence." (Emphasis added.) Evidence Code Section 160 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 BOE 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 BOE'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.)

AMENDMENT

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

The provisions of this bill are effective January 1, 2011.

IN GENERAL

As a matter of law, fraud is never presumed, but must be proven and the burden of proof is on the BOE. (*Marchica v. Board of Equalization, supra*, 107 Cal.App.2d 501.)

However, the standard of proof in administrative and civil tax cases is not “beyond a reasonable doubt,” as it is in a criminal prosecution. (See *Helvering v. Mitchell* (1938) 303 U.S. 391.) Rather, the standard of proof is the “clear and convincing” standard as set forth in the BOE’s Regulation 1703(c)(3)(C). It is rare to find direct evidence that fraud has occurred, and thus it is often necessary and appropriate to make the determination based on circumstantial evidence. In addition, it would be difficult and unreasonable for the BOE to assert fraud and then require the taxpayer to prove it never occurred.

BACKGROUND

Previous measures which included the Evidence Code change proposed in this bill, as well as provisions that shifted the burden of proof in court or administrative tax proceeding with respect to any factual issue relevant to ascertaining the tax liability of a cooperating taxpayer, were introduced in the 2007-08 Legislative Session ([AB 1600](#) and [AB 2727](#), La Malfa) and in 2009 ([AB 1387](#), Tran). The Assembly Revenue and Taxation Committee held all three measures.

Also, during the 2005-06 Legislative Session, a similar bill to those described above was introduced ([SB 633](#), Dutton). That measure was never heard in committee.

In the 1997-98 Legislative Session (after the California Court of Appeal’s 1951 decision in *Marchica*, but before the Ninth Circuit Court of Appeals’ 2002 decision in *Renovizor’s*), [AB 1631](#) (Sweeney, et al.) was amended on April 15, 1998, to, among other things, clarify that the FTB and BOE have the burden of proof by “clear and convincing evidence” regarding penalties for intent to evade or fraud cases against the taxpayer. This measure died in the Assembly Appropriations Committee.

COMMENTS

1. **Purpose.** To codify the clear and convincing standard set forth in the BOE’s Regulation 1703.
2. **Amendments.** The April 21, 2010 amendment deleted the provision that would have shifted the burden of proof from taxpayers to the BOE and the Franchise Tax Board in collecting taxes or fees in any court or administrative tax proceeding as specified, under certain conditions. This amendment was suggested by the Assembly Revenue and Taxation Committee.
3. **The Evidence Code change is consistent with the BOE’s current practice as well as case law, and makes sense.** It is appropriate that the standards for asserting penalties for fraud or intent to evade be the same at both the administrative and judicial levels. This bill would codify the decision in the *Marchica* case so that the Evidence Code is clear that in the case of civil tax fraud, the standard of proof shall be the clear and convincing standard. It also codifies the BOE’s Regulation 1703(c)(3)(C), which states the BOE’s existing practice that, in asserting fraud, the BOE has to prove fraud or intent to evade by clear and convincing evidence.

[Assembly Bill 2433 \(Ruskin\) Chapter 139](#)

Use of Employment Development Department Information

Effective January 1, 2011. Amend Section 1095 of the Unemployment Insurance Code.

BILL SUMMARY

This BOE-sponsored bill authorizes the BOE to admit into evidence the Employment Development Department's confidential employment tax information in hearings and court proceedings to resolve disputes regarding the BOE's administration of a fee or tax law, the amount owed by a tax or feepayer, or the amount to be refunded.

Sponsor: Board of Equalization (BOE)

LAW PRIOR TO AMENDMENT

Under existing Unemployment Insurance Code (UIC) Section 322, the Employment Development Department (EDD) may exchange information with state agencies, as specified. The BOE is an authorized receiver of the EDD confidential information and has an existing reciprocal sharing agreement for the exchange of information.

Section 1094 of the UIC specifies that unless specifically provided, the information obtained by the EDD in the administration of the UIC is confidential, not open to the public, and shall be for the exclusive use and information of the director of EDD in discharge of his or her duties. Additionally, Section 1094 provides that the information released to authorized entities, such as the BOE, is not admissible as evidence in any action or special proceeding, other than those actions or special proceedings described in Section 1095 or provided for in the UIC. Wages and amounts to be deducted and withheld, as specified in the UIC, may be disclosed in the administration of franchise and income tax laws.

Section 1095 of the UIC authorizes certain state, local, and federal government agencies to use the EDD confidential information as evidence in an action or special proceeding. Some of the current authorized uses include determining entitlement to general assistance, investigating disability income, administering child support programs, investigating workers comp insurance fraud, and verifying employment history.

As an authorized receiver, the BOE uses the EDD's confidential information to verify a feepayer's reported number of employees for both the environmental fee and the occupational lead poisoning prevention fee. The applicability and amount of the fee for both programs is based, in part, on the size of a feepayer's employee workforce. The BOE also uses EDD's information to discover unregistered feepayers and underreported taxes and/or fees, and to verify refunds. In addition, the EDD's information is useful for collection purposes and as a basis for claims in bankruptcy. Consequently, the EDD's information is critical to arriving at the correct resolution of a fee dispute heard by the BOE in an administrative hearing or litigated in a court proceeding.

AMENDMENT

This bill amends the UIC Section 1095 to specifically authorize the BOE to admit into evidence EDD's confidential employment tax information in BOE hearings and court proceedings to resolve disputes regarding the BOE's administration of a fee or tax law, the amount owed by a tax or feepayer, or the amount to be refunded.

The use of this information to sustain a taxpayer liability, or verify a refund, is consistent with the use of other confidential information obtained by the BOE. This bill also eases the compliance burden on employers, as the use of EDD information is less burdensome than providing access to their payroll records. This measure clarifies in statute that the BOE may efficiently and effectively use the information it currently obtains from the EDD to enforce the tax and fee laws it administers.

BACKGROUND

Beginning January, 1, 2007, [Assembly Bill 1803](#) (Ch. 77, Stats. 2006) expanded the environmental fee to include general partnerships, limited partnerships, limited liability partnerships, limited liability companies and sole proprietorships, as well as corporations. The expansion of the fee was intended to address the erosion in the annual environmental fee base, which was occurring in part because fewer businesses were being classified as corporations. The implementation of this legislation resulted in an increase in the number of registrants by approximately 7,700. Thus, there was a corresponding increase in revenue and an increase in appealed assessments, thereby placing greater pressure on limited audit resources to review payroll records in spite of the fact that the program only received one audit position to manage the increased workload.

Moreover, in the past, the BOE had relied upon an interagency agreement with the EDD in which the BOE believed that the EDD information could be used in "any action or special proceeding," as long as it was presented in summary form. Recently, the EDD reiterated to BOE staff that Section 1094 provisions specify that the confidential information released to authorized entities cannot be admitted as evidence in "any action or special proceeding" unless specifically authorized by Section 1094 or 1095, or some other statutory provision in the UIC.

The most recent information sharing agreement with EDD, which covers the period November 1, 2008 through June 30, 2011, specifies that the EDD will provide access to its confidential information, provided the BOE "maintains confidentiality of the information as required by UIC Section 1094." There is no ambiguity in the most recent agreement, which has prompted the BOE to change its practices in using the information, and in the case of both the environmental fee and the occupational lead poisoning prevention fee, ensures that the BOE would need to audit an employer's actual payroll records. However, even examination of the actual payroll records does not eliminate the need for the BOE to access and compare actual payroll to that reported to EDD, which still results in the potential for a BOE assessment to be based on EDD payroll records. Auditing actual payroll records is intrusive to the feepayer, costly to the state, and inefficient, when this same information is readily available to the BOE by directly accessing EDD information.

COMMENT

1. **Purpose.** To clarify in statute that the BOE may admit as evidence in any action or special proceeding the information it currently obtains from the EDD.
2. **The BOE currently has access to EDD confidential information.** As stated, the BOE is an authorized receiver of the EDD confidential information. In September 2009 the BOE completed its most recent information sharing agreement for the exchange of confidential information with the EDD. This bill allows the BOE to use the confidential information it already received from the EDD. The BOE views this bill as being an efficient and effective use of information sharing and believes it is less burdensome on affected taxpayers.

If the BOE is unable to use the EDD information as evidence in a BOE hearing, then we may need to request the actual payroll records from the taxpayer. This alternative places an additional compliance burden on the taxpayer and increases the workload for both the BOE and the taxpayer.

3. **The environmental fee and the occupational lead poisoning prevention fee are directly affected by the EDD information.** The applicability and amount of the fee for both programs is based, in part, on the size of a feepayer's employee workforce. The BOE uses the data obtained from EDD as a basis for an audit or assessment, for failing to file a return, for a refund request, or to identify businesses that failed to register as a feepayer with the BOE. Without passage of this bill, the BOE would have still been able to perform these functions, but it would have been prohibited from using that same information in an appeal to be heard and decided by the BOE. In those situations, the BOE would have needed to request the employer records from the feepayer.
4. **It is the intent of the BOE to continue to protect the confidentiality of the EDD information.** The BOE takes seriously its responsibility to protect the confidential employment information and intends to make it policy that, with respect to employee information gathered and used by the BOE in administering the above fee programs, it would include only the last four digits of the social security number and the first two initials of the first and last name, along with other relevant compensation or employment information for the employees. The BOE worked in collaboration with the EDD on the proposed language and it will continue to work cooperatively in addressing our reciprocal responsibilities and concerns regarding taxpayer confidentiality.

[Assembly Billx8 6 \(Committee on Budget\) Chapter 11](#)
[Senate Bill 70 \(Committee on Budget & Fiscal review\) Chapter 9](#)

Fuel Tax Swap

ABx8 6: Urgency measure, effective March 22, 2010, but operative July 1, 2010 or July 1, 2011. Among its provisions, adds Sections 6051.8, 6201.8 and 6357.7 to the Revenue and Taxation Code.

SB 70: Urgency measure, effective March 23, 2010, but operative July 1, 2010 or July 1, 2011. Amends Sections 6051.8, 6201.8 and 6480.1of, and adds Section 6357.3 to, the Revenue and Taxation Code.

BILL SUMMARY

This bill implements provisions related to the 2009-10 Special Session budget agreement. The provisions which impact the Board of Equalization (BOE):

- Beginning July 1, 2010, **exempt from the State General Fund (6%) portion sales and use tax rate sales and purchases of motor vehicle fuel (gasoline)** and aviation gasoline.
- Beginning July 1, 2010, impose an **additional excise tax on gasoline** of 17.3 cents (\$0.173) per gallon, with an equivalent floor stock tax, as specified. The bill also provides a **rate adjustment** mechanism that seeks to balance the revenues from the additional excise taxes on gasoline against the proposed state General Fund sales and use tax exemption on gasoline.
- Beginning July 1, 2011, **impose an additional 1.75 percent sales and use tax on diesel fuel**, the revenues of which would be estimated by the BOE and deposited into the Public Transportation Account.
- **Beginning July 1, 2011, decrease the excise tax rate on diesel fuel** to \$0.136 per gallon. Also provides for a **rate adjustment** that would balance the decreased excise tax revenues on diesel fuel against the proposed state sales and use rate increase of 1.75% on diesel fuel.

Sponsor: Committee on Budget

**Sales and Use Tax Exemption on Gasoline;
Additional Sales and Use Tax on Diesel Fuel**

Revenue and Taxation Code Sections 6051.8, 6201.8, and 6357.1

LAW PRIOR TO AMENDMENT

Existing law imposes a sales or use tax on the gross receipts from the sale of, or the storage, use, or other consumption of, tangible personal property, unless specifically exempted by statute. Under existing law, sales of gasoline and diesel fuel are generally subject to state and local sales or use tax (sales of diesel fuel used in certain farming activities are exempt from the state rate of 6.25 percent).

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Under existing law, an excise tax of 18 cents per gallon is imposed on gasoline and diesel fuel, and under Section 6011(b)(3) and Section 6012(a)(4) of the Sales and Use Tax Law, the 18 cents per gallon excise tax on gasoline is includable in the computation of sales and use tax. The 18 cents per gallon excise tax imposed on diesel fuel is *not* subject to sales or use tax.

Under current law, the statewide sales and use tax rate is 8.25 percent and is imposed on the sale and purchase of both motor vehicle fuel and diesel fuel. The components of this rate are as follows:

- 6 percent state tax allocated to the state's General Fund (Sections 6051, 6051.3, 6051.7, 6201, 6201.3, and 6201.7)
- 0.25 percent state tax allocated to the Fiscal Recovery Fund (Section 6051.5 and 6201.5)
- 0.50 percent state tax allocated to the Local Revenue Fund which is dedicated to local governments for program realignment (Section 6051.2 and 6201.2)
- 0.50 percent state tax allocated to the Local Public Safety Fund which is dedicated to local governments to fund public safety services (Section 35 of Article XIII of the California Constitution).

In addition to the state portion of sales use tax rate, the following local taxes are imposed by cities and/or counties and are administered by the BOE:

- 1 percent Bradley-Burns Uniform Local Sales and Use Tax which is allocated to cities and counties (Part 1.5, commencing with Section 7200).
- Voter approved Transactions and Use Tax levied at varying rates from 0.10 to 1 percent by some cities, counties, and special taxing jurisdictions in various cities and counties within the state and which are distributed to those local agencies (Parts 1.6 and 1.7, commencing with Section 7251).

AMENDMENT

These bills add Sections 6051.8 and 6201.8 to the Sales and Use Tax Law to impose an additional 1.75 percent state sales and use tax operative July 1, 2011 on sales of diesel fuel, as defined in Section 60022 of the Diesel Fuel Tax Law.

Further, these bills provide an exemption, operative July 1, 2010, from the state General Fund portion (6%) of the sales and use tax rate on sales and purchases of gasoline, as defined in Section 7326 of the Motor Vehicle Fuel Tax Law (gasoline and aviation gasoline).

The bills require the BOE and the Department of Finance to recognize that the state no longer receives state sales and use tax revenues from the sale and purchase of motor vehicle fuel for purposes of making specified estimates.

As an urgency measure, ABx8 6 became effective March 22, 2010, while SB 70 was effective March 23, 2010.

COMMENTS

1. **An additional tax on diesel fuel sales adds complexity.** Imposing a different rate of tax on sales of diesel fuel adds another level of administrative complexity. A segregation for sales of diesel fuel will be required on sales and use tax returns, with a

separate calculation to account for the proposed tax. This will result in added workload and administrative costs for the BOE.

2. **Exemption for purchases of diesel fuel for qualifying farming activities will not be affected.** Section 6357.1 of the Sales and Use Tax Law currently contains an exemption from the state General Fund rate of 6 percent and the Fiscal Recovery Fund rate of .25 percent for sales and purchases of diesel fuel used in farming activities, as defined. As Section 6357.1 reads, sales of diesel fuel qualifying for the exemption under Section 6357.1 will *not* be subjected to this additional 1.75 percent sales and use tax.
3. **BOE is required to recognize that the state no longer receives sales and use tax revenues on motor vehicle fuel.** The bill requires the BOE to recognize that the state no longer receives “state” sales and use tax revenues from the sale and purchase of motor vehicle fuel for purposes of making specified estimates in Section 7102 of existing law. We will assume “state” for purposes of this section, only means state General Fund revenues.

Further, since state sales and use tax revenues on sales of motor vehicle fuel can continue to be reported to the BOE for years through such means as audits, installment payment agreements, and through other voluntary or involuntary payments, it appears any such payments the BOE receives on and after July 1, 2010 shall not be counted for purposes of estimating the amount of sales and use tax revenues that are transferred pursuant to Section 7102 of existing law.
4. **These bills have a companion measure, [ABx8 9](#),** which provides for the expenditure and non-tax implementation provisions of this fuel tax swap proposal.

<p>Additional Excise Tax on Gasoline and Annual Rate Adjustment <i>Revenue and Taxation Code Sections 7360, 7361.1, and 7653.1</i></p>

LAW PRIOR TO AMENDMENT

Under the **Motor Vehicle Fuel Tax Law** (Part 2 (commencing with Section 7301) of Division 2 of the Revenue and Taxation Code), the state imposes an excise tax of \$0.18 per gallon on the removal of gasoline at the refinery or terminal rack, upon entry into the state, and upon sale to an unlicensed person.

Under this same law (Chapter 12 (commencing with Section 8500)) the Metropolitan Transportation Commission (Commission) has the authority to levy a local tax on motor vehicle fuel to fund transportation projects. The Commission is made up of nine Bay Area members that include the City and County of San Francisco, and the counties of Alameda, Contra Costa, Marin, Napa, San Mateo, Santa Clara, Solano, and Sonoma.

Under the **Diesel Fuel Tax Law** (Part 31 (commencing with Section 60001) of Division 2 of the Revenue and Taxation Code), the state imposes an excise tax of \$0.18 per gallon on the removal of diesel fuel at the refinery or terminal rack, upon entry into the state, and upon sale to an unlicensed person.

Under the **Use Fuel Tax Law** (Part 3 (commencing with Section 8601) of Division 2 of the Revenue and Taxation Code), the state imposes an excise tax of \$0.18 per gallon for use of fuels. For liquefied petroleum gas (LPG), liquid natural gas (LNG), compressed natural

gas (CNG), ethanol, and methanol, which are types of use fuels, the excise tax rates are \$0.06, \$0.06, \$0.07, \$0.09, and \$0.09, respectively. In lieu of the specified tax rates, an annual flat rate fuel tax may be paid by the owner or operator of vehicles powered by LPG, LNG, or CNG. The flat rate is based on the vehicles weight.

Additionally, Parts 1, 1.5, and 1.6 of Division 2 of the Revenue and Taxation Code impose state, local, and transactions **sales and use taxes** on all tangible personal property, including gasoline and diesel, sold at retail. The rates in the different cities and counties throughout the state range from 8.25% to 10.75%, depending upon the jurisdiction in which the tangible personal property is purchased.

Lastly, the **Local Motor Vehicle Fuel Tax Law**, as contained in Part 4 (commencing with Section 9501) of Division 2 of the Revenue and Taxation Code, authorizes counties to impose countywide excise taxes on motor vehicle fuel at increments of one cent per gallon, provided a majority of the voters approve the proposition. The funds collected must be used only for purposes authorized by Article XIX of the California Constitution, such as transportation planning and construction. To date, however, no county imposes a local fuel tax under this authority.

AMENDMENT

Additional Excise Tax on Gasoline. This bill amends Sections 7360 of, and adds Sections 7361.1 and 7653.1 to, the Motor Vehicle Fuel Tax Law to:

- Beginning July 1, 2010, impose an additional 17.3 cent surtax on each gallon of gasoline subject to the tax in Sections 7362, 7363, and 7364.
- On July 1, 2010, impose a floor stock tax of \$0.173 per gallon on tax-paid gasoline in storage of 1,000 gallons or more.
- Require each supplier, wholesaler, and retailer meeting the floor stock tax requirements to file a floor stock tax return with the BOE by August 31, 2010, payable to the State Controller.

Gasoline Tax Rate Adjustment. Section 7360(b)(2): For the 2011-12 fiscal year and each fiscal year thereafter, the BOE will be required to adjust the surtax rate on gasoline, on or before March 1 of the fiscal year immediately preceding the applicable fiscal year, so that the adjusted rate would generate an amount of revenue that would equal the amount of revenue loss attributable to the proposed state General Fund sales and use tax exemption for gasoline (hereinafter referred to as “proposed Section 6357.7 exemption”), based on estimates made by the BOE.

The rate adjustment for the 2011-12 fiscal year will then be based on the estimated amount of excise tax gasoline revenue that would equal the estimated amount of revenue loss attributable to the proposed Section 6357.7 exemption.

Section 7360(b)(3) For the 2012-13 fiscal year and each fiscal year thereafter, beginning with the rate adjustment on or before March 1, 2012, the BOE will continue to adjust the surtax rate on gasoline as described in Section 7360 (b)(2), and will also take into account the extent to which the actual amount of revenues from the excise tax on gasoline, and, as applicable, the revenues from the one-time floor stock tax on gasoline, and the associated revenue loss attributable to the proposed Section 6357.7 exemption **resulted in a net revenue gain or loss** for the fiscal year ending prior to the rate adjustment date on or before March 1.

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The rate adjustment for the 2012-13 fiscal year will then be based on:

- (a) the estimated amount of excise tax gasoline revenue that equals the estimated amount of revenue loss attributable to the proposed Section 6357.7 exemption, and
- (b) taking into account the actual excise tax revenues from the one-time floor stock tax as specified in Section 7361.1, and also
- (c) taking into account the extent to which the actual excise tax gasoline revenue for the 2011-12 fiscal year and the associated revenue loss attributable to the proposed Section 6357.7 exemption for that fiscal year resulted in a net revenue gain or loss for the 2011-12 fiscal year.

Subsequent fiscal years will follow the format of estimates as described in Section 7360(b)(2) and reconciling the estimates as described in (b)(3).

The revenues imposed by the rate increase will be deposited into the Motor Vehicle Fuel Account.

Diesel Tax Rate Reduction and Annual Rate Adjustment
Revenue and Taxation Code Section 60050

LAW PRIOR TO AMENDMENT

As previously explained, under the Diesel Fuel Tax Law, the state imposes an excise tax of \$0.18 per gallon in the same manner.

The Sales and Use Tax Law imposes a sales or use tax on the gross receipts from the sale of, and on the sales price of, tangible personal property, unless specifically exempted by statute. Existing law *excludes* from the definition of “gross receipts” and “sales price” the amount of any tax imposed upon diesel fuel pursuant to Part 31 (commencing with Section 60001).

Therefore, under the existing Sales and Use Tax Law, the computation of sales tax on the sale of diesel fuel includes only the 24.4 cents per gallon imposed at the federal level.

AMENDMENT

Diesel Fuel Tax Rate Reduced. This bill amends Section 60050 of the Diesel Fuel Tax Law to reduce, beginning July 1, 2011, the diesel fuel excise tax rate to 13.6 cents on each gallon of diesel fuel subject to the tax in Sections 60051, 60052, and 60058.

Diesel Fuel Tax Rate Adjustment. Section 60050(b)(2): For the 2012-13 fiscal year and each fiscal year thereafter, the BOE will be required to adjust the reduced excise tax rate on diesel fuel, on or before March 1 of the fiscal year immediately preceding the applicable fiscal year, so that the adjusted rate will generate a revenue loss that equals the amount of revenue gain attributable to the 1.75% sales and use tax rate increase on sales of diesel fuel, based on estimates made by the BOE.

The rate adjustment for the 2012-13 fiscal year will then be based on:

- (a) determining the difference between the estimated amounts of state excise tax diesel revenue at the previous rate of \$0.18 and the reduced rate of \$0.136, and comparing that difference to the estimated amount of revenue gain attributable to the 1.75% sales and use tax increase on sales of diesel fuel, then,

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- (b) adjusting the rate so that the estimated amount of revenue loss attributable to the state excise tax diesel fuel rate equals the estimated revenue gain from the increased state sales and use tax on sales of diesel fuel.

Section 60050(b)(3): For the 2013-14 fiscal year and each fiscal year thereafter, beginning with the rate adjustment on or before March 1, 2013, the BOE will continue to adjust the excise tax rate on diesel fuel as described in Section 60050 (b)(2), and will take into account the extent to which the actual amount of revenues from the increased sales and use tax on sales of diesel fuel and the associated revenue loss attributable to the state excise tax diesel fuel rate **differed from** the estimates used in making the adjustments (Section 60050(b)(2)) for the fiscal year ending prior to the rate adjustment date on or before March 1.

The rate adjustment for the 2013-14 fiscal year will then be based on:

- (a) determining the difference between the estimated amounts of state excise tax diesel revenue at the previous rate of \$0.18 and the rate as adjusted for the previous fiscal year, and comparing that difference to the estimated amount of revenue gain attributable to the 1.75% sales and use tax increase on sales of diesel fuel, then,
- (b) adjusting the rate so that the estimated amount of revenue loss attributable to the state excise tax diesel fuel rate equals the estimated revenue gain from the 1.75% sales and use tax increase of sales of diesel fuel, and
- (c) taking into account the extent to which the actual revenue from the 1.75% sales and use tax increase on sales of diesel fuel for the 2011-12 fiscal year and the associated revenue loss attributable to the state excise tax diesel fuel rate for that fiscal year differed from the estimated amounts used to set that rate for the 2011-12 fiscal year.

Subsequent fiscal years will follow the format of look-forward estimates as described in Section 60050(b)(2) and the look-back reconciling of the estimates as described in (b)(3).

The revenues imposed by the rate increase will be deposited into the Motor Vehicle Fuel Account.

BACKGROUND

In 1990, voters approved Senate Constitutional Amendment 1 (Proposition 111) in the June direct primary election. Approval of this measure made operative Assembly Bill 471 (Ch. 106, Stats. 1989) and Senate Bill 300 (Ch. 105, Stats. 1989). These bills, among other things, increased the rate of tax imposed on most motor vehicle fuels from \$0.09 to \$0.14 per gallon, effective August 1, 1990. Further, on January 1, 1991, and each January 1 thereafter through 1994, the excise tax increased by \$0.01 per gallon to the current \$0.18 per gallon.

In 2000, [Assembly Bill 2114](#) (Ch. 1053, Longville) changed the point of imposition of the tax up the chain of distribution from the first distribution of the fuel to the removal of the fuel from the refinery or terminal rack. The bill also provided for a backup tax, which applies to the sale and/or delivery of gasoline into the fuel tank of a motor vehicle on which the tax has not been paid or the tax on the fuel has been refunded. The bill also provided for a floor stock tax.

COMMENTS

1. **The bill contains a one-time floor stock tax for the surtax on gasoline.** A floor stock tax serves to equalize the excise tax paid on those gallons of fuel held in inventory by a supplier, wholesaler or retailer prior to the effective date of a tax increase and on those gallons purchased after the tax increase. Having a large fuel inventory before a tax rate increase takes effect can bring about a small windfall to a seller, who can raise the selling price of the fuel purchased prior to the increase and attribute the increase in price to the tax rate increase. However, the additional funds collected are profit to the seller and not excise tax paid to the state. A floor stock tax mitigates this windfall.
2. **The gasoline tax rate is increased and the diesel fuel tax rate is reduced.** The current gasoline tax rate of \$0.18 remains in effect. This act adds a surtax of \$0.173 per gallon. The total combined state excise tax rate for gasoline would be \$0.353 per gallon, operative July 1, 2010.

The diesel fuel tax rate would be reduced, from \$0.18 per gallon to only \$0.136 per gallon, operative July 1, 2011.
3. **The BOE currently co-administers the state's excise tax on gasoline.** The BOE handles various administrative functions that would be affected by a gasoline rate increase and floor stock tax, including, but not limited to the following: identifying and notifying taxpayers, developing floor stock tax returns, revising existing returns, modifying computer programming, carrying out compliance and audit efforts to ensure proper reporting, revising publications and internet information, and increasing investigative activities. While the BOE processes the payments and refunds for the diesel fuel taxes, the Controller processes gasoline tax payments and refunds. BOE staff will continue to evaluate and identify tax and industry related issues that arise from the additional gasoline tax and the diesel fuel rate reduction.
4. **Rate adjustments for the surtax on gasoline and the excise tax on diesel fuel.** In general, and as described in their respective sections, the BOE will have the responsibility of attempting to balance revenue losses against the revenue gains. For gasoline, the BOE will adjust the surtax rate, up or down, so that the revenues equal the amount of General Fund revenue losses attributable to the state General Fund sales and use tax exemption on gasoline. For diesel fuel, the BOE will adjust the excise tax rate, up or down, so that the revenue loss equals the amount of revenue gain from the sales and use rate increase of 1.75% on diesel fuel.

Rate adjustments will be determined by March 1, and will be effective during the state's next fiscal year, beginning July 1. In general, rate adjustments will be based on forward-looking estimates, subject to consumption and price volatility, and look-back reconciling of those estimates.
5. **With a gasoline tax increase, local jurisdictions could see an increase in sales and use tax revenues.** Existing Sales and Use Tax Law expressly includes within the definition of "gross receipts" and "sales price" the amount of any tax imposed by the state under the Motor Vehicle Fuel Tax Law. Accordingly, retailers are required to include within their computation of sales or use tax on their sales or purchases of gasoline, any such state excise tax imposed. Accordingly, any increase in the state excise tax on motor vehicle fuel imposed under the Motor Vehicle Fuel Tax Law

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results in an increase in sales and use tax revenues. Although this bill provides a state General Fund sales and use tax exemption on sales of gasoline, a statewide base sales and use tax rate of 2.25% that is dedicated to local governments will continue to apply (with higher tax rates in certain districts with voter-approved district tax rates: <http://www.boe.ca.gov/sutax/pdf/districtratelist.pdf>)

Accordingly, under this bill, with a proposed 17.3 cent excise tax increase on each gallon of gasoline beginning on July 1, 2010, for every 10 gallons of gasoline sold, an additional four cents in local sales and use tax revenue will be generated, with additional amounts for those districts imposing district taxes.

[Senate Bill 71 \(Padilla, et al.\) Chapter 10](#)

***California Alternative Energy and Advanced
Transportation Financing Authority Exclusion***

Urgency measure, effective March 24, 2010. Amends Section 26003 of, and adds and repeals Section 26011.8 to, the Public Resources Code.

BILL SUMMARY

This bill amends the definition of “project” in the Public Resources Code for purposes of expanding the authorization for the California Alternative Energy and Advanced Transportation Financing Authority (CAEATFA) to provide financial assistance to participating parties in the form of the sales and use tax exclusion established in Revenue and Taxation Code Section 6010.8 of the Sales and Use Tax Law, under specified criteria.

Sponsor: Senator Padilla

LAW PRIOR TO AMENDMENT

Under existing law, California imposes a sales tax on a retailer’s gross receipts from the retail sale of tangible personal property in this state, unless the sale is specifically exempt from taxation by statute. This tax is imposed on the retailer who may collect reimbursement from the customer if the contract of sale so provides. Under the law, it is presumed that gross receipts from a particular sale of tangible personal property are subject to tax, unless the seller can establish either that the sale was not a retail transaction or that the sale is subject to an exemption.

Revenue and Taxation Code Section 6010.8 provides that “sale” and “purchase” do not include any transfer of title of tangible personal property constituting any project to the CAEATFA by any participating party, nor any lease or transfer of title of tangible personal property constituting any project by the authority to any participating party, when the transfer or lease is made pursuant to Division 16 (commencing with Section 26000) of the Public Resources Code. The terms “project” and “participating party” are defined in Section 6010.8 by reference to Section 26003 of the Public Resources Code.

Under subdivision (f) of Public Resources Code Section 26003, “participating party” means either of the following:

- (1) Any person or any entity or group of entities engaged in business or operations in the state, whether organized for profit or not for profit, that applies for financial assistance from CAEATFA for the purpose of implementing a project in a manner prescribed by CAEATFA.
- (2) Any public agency or nonprofit corporation that applies for financial assistance from CAEATFA for the purpose of implementing a project in a manner prescribed by CAEATFA.

Subdivision (g) of Public Resources Code Section 26003 defines “project” as any land, building, improvement thereto, rehabilitation, work, property, or structure, real or personal,

stationary or mobile, including, but not limited to, machinery and equipment, whether or not in existence or under construction, that utilizes or is designed to utilize, an alternative source, or that is utilized for the design, technology transfer, manufacture, production, assembly, distribution, or service of advanced transportation technologies.

AMENDMENT

This bill amends Section 26003 of, and adds and repeals Section 26011.8 to, the Public Resources Code to do the following:

- Amend the definition of “project” to include any tangible personal property that is utilized for the design, manufacture, production, or assembly of advanced transportation technologies or alternative source products, components, or systems.
- Authorize CAEATFA to approve “projects” that would be excluded from sales and use tax and specify the criteria under which CAEATFA would approve those projects.

As an urgency measure, the provisions of the bill became effective March 24, 2010.

BACKGROUND

The CAEATFA was created in 1980 with an authorization of \$200 million in revenue bonds to finance projects that utilize alternative sources of energy, such as cogeneration, wind, and geothermal power. It was renamed in 1994 as the California Alternative Energy and Advanced Transportation Financing Authority and its charge was expanded to include the financing of "advanced transportation" technologies.

The CAEATFA consists of five members: the Director of Finance, Chairman of the California Energy Commission, President of the Public Utilities Commission, Controller, and Treasurer.

IN GENERAL

In a typical transaction involving the financing of manufacturing equipment with CAEATFA, persons who are applying for financing would pay an application fee and would be required to obtain a resolution from the CAEATFA BOE approving the proposed transaction. If approved, that person (or its special purpose entity) would be regarded as a participating party, and the transaction would be regarded as a “project” for purposes of the Public Resources Code and the sales and use tax exclusion.

The participating party may then purchase the manufacturing equipment (and other property meeting the “project” definition) without payment of tax, and resell the equipment to CAEATFA. This transfer may be excluded from sales and use taxes as a transfer from a participating party to CAEATFA.

The applicant and CAEATFA then enter into a lease, whereby CAEATFA transfers to the applicant the manufacturing equipment. Upon complete installation of all the manufacturing equipment, ownership of the manufacturing equipment is transferred from CAEATFA to the participating party. This transfer may also be excluded from sales and use taxes.

COMMENTS

1. **Purpose.** To improve the ability of CAEATFA to offer financial assistance in the form of a sales and use tax exclusion to manufacturers of advanced transportation technologies and renewable energy. The goal is to promote the creation of California-

based manufacturing, jobs, the reduction of greenhouse gases, and reductions in air and water pollution and energy consumption.

2. **Any change to the Public Resources Code’s definition of “project” can have a direct sales and use tax implication.** The exclusion provided in Revenue and Taxation Code Section 6010.8 is linked directly with the term “project” as defined in Public Resources Code Section 26003. When that term is broadened within the context of the Public Resources Code, it can result in a direct state and local sales and use tax revenue loss.

Since this bill broadens the definition of “project” to include tangible personal property related to specified renewable energy projects, the potential for a direct sales and use tax state and local revenue loss exists. The extent of that loss is dependent on the number of new projects approved by the CAEATFA pursuant to this bill and the dollar amount of machinery and equipment and other tangible personal property sold, leased or transferred pursuant to Section 6010.8.

3. **CAEATFA will determine the extent to which the sales and use tax exclusion applies.** The bill requires CAEATFA to publish notice of the availability of project applications and deadlines for submission of project applications to CAEATFA. It also requires CAEATFA to evaluate those applications based on several criteria, including, among other things, the extent to which the project develops manufacturing facilities or purchases equipment for manufacturing facilities located in California, and the extent to which the anticipated benefit to the state from the project equals or exceeds the projected benefit to the participating party from the sales and use tax exclusion.
4. **Once exclusions exceed \$100 million, the bill requires CAEATFA to provide a 20-day advance notice to the Legislature.** An “exclusion” for purposes of the Sales and Use Tax Law is generally regarded as an amount which otherwise would constitute a “sale” and a “purchase,” but which, under the specific provision of the Sales and Use Tax Law (i.e., in this case, Section 6010.8), is excluded from those terms. Therefore, CAEATFA is required to provide the 20-day advance notice when the amount of purchases excluded from the tax exceeds \$100 million, which amounts to about \$9 million in sales and use tax.

5. **Related legislation.** The following bills were introduced during the 2009-10 Regular Session and various Extraordinary Sessions contained provisions similar to this bill:

[AB 1111](#) (Blakeslee) – Died in the Assembly Appropriations Committee.

[ABx3 82](#) (Blakeslee) – Died at the desk. This bill was never heard.

[ABx6 3](#) (Blakeslee) – This bill was never heard.

[SB 1467](#) (Padilla, et al.) – Referred to the Senate Revenue and Taxation Committee and Utilities and Energy, Utilities and Communications Committee.

[SBx6 12](#) (Padilla, et al.) – Introduced February 25, 2010

[SBx8 22](#) (Padilla, et al.) – Referred to Senate Rules Committee.

[SB 338](#) (Alquist) – Held in the Senate Appropriations Committee.

Senate Bill 858 (Committee on Budget and Fiscal Review) Chapter 721

Use Tax Line

Cost Collection Recovery Fee

Urgency measure, effective October 19, 2010. Among its provisions, amends Section 6453 of, repeals and adds Sections 6452.1 and 6487.3 to, and adds Section 6833 to, the Revenue and Taxation Code.

BILL SUMMARY

In part, this budget trailer bill does the following:

- Reinstates the provisions that provide for the separate line on the Franchise Tax Board (FTB) income tax returns for use tax reporting that expired on December 31, 2009, and
- Authorize the Board of Equalization (BOE) to impose and collect a collection cost recovery fee on any person that fails to pay amounts due and owing.

Sponsor: Committee on Budget and Fiscal Review

Use Tax Line

Revenue and Taxation Code Sections 6452.1, 6453, 6487.3, and 18510

LAW PRIOR TO AMENDMENT

Under existing law, Chapter 3 (commencing with Section 6201) of Part 1 of Division 2 of the Revenue and Taxation Code, a use tax is imposed on the storage, use, or other consumption in this state of tangible personal property purchased from any retailer. The use tax is imposed on the purchaser, and unless that purchaser pays the use tax to a retailer registered to collect the California use tax, the purchaser is liable for the tax, unless the use of that property is specifically exempted or excluded from tax.

In an effort to increase the public's awareness of the use tax and to encourage voluntary compliance in reporting the use tax, legislation enacted in 2003 ([SB 1009](#), Ch. 718) required the FTB to revise the personal income tax and corporation tax returns to add a separate line for use tax reporting and accompanying instructions in the booklet. This legislation allowed consumers and businesses that are not required to be registered with the BOE to report use tax on their state income tax returns for purchases made on or after January 1, 2003, and through December 31, 2009, as an alternative to reporting the tax to the BOE (businesses and certain consumers already registered with the BOE, however, may not use this alternative).

AMENDMENT

This bill repeals and adds Sections 6452.1, 6487.3, and 18510 of, and amends 6453 of, the Revenue and Taxation Code to reinstate the provisions that provide for the separate line on the FTB income tax returns for use tax reporting that expired on December 31, 2009.

The bill's provisions become effective October 19, 2010, and apply to taxable purchases made during the calendar year 2010 for which use tax was not paid to the BOE.

BACKGROUND

During the past three Legislative Sessions, the BOE has sponsored legislation to not only eliminate the sunset date of these provisions, but to also *require* consumers who have failed to report use tax to the BOE on their taxable purchases for the preceding year to report the use tax on the income tax returns for the taxable year in which the liability for the qualified use tax was incurred. However, none of these attempts was successful. The first and third attempts ([AB 969](#), 2007, Eng and [AB 469](#), 2009, Eng) were vetoed by the Governor, and the second attempt ([AB 1957](#), 2008, Eng) failed passage in the Senate Revenue and Taxation Committee.

COMMENTS

1. **Purpose.** The use tax line on the state income tax returns provides a simple means to both educate taxpayers and tax preparers as well as enable purchasers to voluntarily report their use tax obligations.

Use tax reported under these provisions has increased each year since this section was enacted. In 2004, use tax of \$2.8 million was reported, in 2005, \$4.6 million, in 2006 and 2007, approximately \$5.5 million was collected, in 2008, \$9 million was reported, and in 2009, \$10 million was reported. Surprisingly, individuals report a much greater proportion of the tax than businesses (in 2009, for example, businesses only reported \$1.7 million of the total \$10 million), yet businesses contribute a greater share of the use tax gap.

Prior to the inclusion of the use tax line on the income tax returns, individuals had to read far into the Form 540 instruction booklet for information regarding the use tax. In 2002, for example, use tax instructions were on page 60 in a 68-page book. Typically, individuals consult the 540 instruction booklet only if they have a question about a particular line on the return. Because there was no line provided for use tax reporting, individuals had little reason to look to the instruction booklet for use tax information.

2. **Related legislation.** [AB 1618](#) (Committee on Budget) is an identical budget trailer bill. This year's [AB 2676](#) (Ma) was sponsored by the BOE and also contained these provisions (and other provisions also sponsored by the BOE). However, the Governor vetoed that measure, stating that the most significant provisions of AB 2676 have already been addressed by the Budget Conference Committee. Thus, the Governor [vetoed](#) the bill, stating that AB 2676 is unnecessary sanctions imposed in current law for making payments after the due date far outweigh the limited relief this bill provides.

Collection Cost Recovery Fee

Revenue and Taxation Code Sections 6833, 9035, 11534, 30354.7, 32390, 38577, 40168, 41127.8, 43449, 45610, 46466, 50138.8, 55211, and 60495

LAW PRIOR TO AMENDMENT

Existing Chapter 4.3 (commencing with Section 16580) of Part 2 of Division 4 of Title 2 of the Government Code (GC), known as the Accounts Receivable Management (ARM) Act, provides that a participant, including the BOE, may have certain requirements, or be able to utilize certain methods, related to collections. Specifically, GC Section 16583.1 allows a state agency to impose a reasonable fee, not to exceed the actual costs, to recover the agency's collection costs on a past due account.

Existing law authorizes the BOE to use various collection actions to collect delinquent accounts receivables, including, but not limited to: bank levies, liens, wage garnishments, till-tap and keeper warrants, permit revocations, alcoholic beverage license suspensions, seizure and sale of assets, offsets, and court actions. The BOE's use of these tools is consistent with its established collection policies and procedures as provided in the Compliance Policy and Procedures Manual, Chapter 7, [Collections](#).

The State's procedures for collection of delinquent accounts are detailed in the State Administrative Manual (SAM) Section 8776 et seq.

Penalty relief provisions that are included in the various tax, fee, and surcharge laws in the Revenue and Taxation Code permit the BOE to provide penalty relief in those cases where the BOE finds that a person's failure to make a timely return or payment is due to reasonable cause and circumstances beyond the person's control and occurred notwithstanding the exercise of ordinary care and the absence of willful neglect.

AMENDMENT

This bill adds Sections 6833 (Sales and Use Tax Law), 9035 (Use Fuel Tax Law), 11534 (Private Railroad Car Tax), 30354.7 (Cigarette and Tobacco Products Tax Law), 32390 (Alcoholic Beverage Tax Law), 38577 (Timber Yield Tax), 40168 (Energy Resources Surcharge Law), 41127.8 (Emergency Telephone Users Surcharge Law), 43449 (Hazardous Substances Tax Law), 45610 (Integrated Waste Management Fee Law), 46466 (Oil Spill Response, Prevention, and Administration Fees Law), 50138.8 (Underground Storage Tank Maintenance Fee Law), 55211 (Fee Collection Procedures Law), and 60495 (Diesel Fuel Tax Law), to the Revenue and Taxation Code to authorize the BOE to impose and collect a collection cost recovery fee on any person that fails to pay amounts due and owing. The collection fee shall be in an amount equal to the BOE's costs for collection, as reasonably determined by the BOE.

The fee may only be imposed if the BOE has mailed a demand notice to that person requiring payment and advising the person that continued failure to pay may result in collection action, including the addition of a collection fee. The fee is operative with respect to a demand notice for payment which is mailed on or after January 1, 2011.

Interest will not accrue on the collection fee, but the fee shall be collected in the same manner as the related unpaid tax or fee liability is collected.

The BOE may relieve the taxpayer of the fee if the BOE finds that a person's failure to pay the amount being collected is due to reasonable cause and circumstances beyond the person's control and occurred notwithstanding the exercise of ordinary care and the

absence of willful neglect. Any person requesting relief from the collection fee must file a statement with the BOE, under penalty of perjury, stating the facts upon which the person bases the request for relief.

Funds received by the BOE would be deposited into the same tax or fee fund that the revenues derived from those taxes or fees are deposited.

The measure is effective immediately, but the collection fee is operative with respect to a demand notice for payment which is mailed on or after January 1, 2011.

IN GENERAL

Fees for collection of past due accounts are imposed by the FTB and taxing agencies in other states. The FTB currently imposes a flat rate fee for collecting liabilities greater than \$100. As of July 2009, the fee was \$217 for individuals and \$413 for corporations.

The BOE contacted six other state taxing agencies to obtain information regarding collection fees. In general, the taxing agencies imposed a fee when a liability remained unpaid for 90-100 days. They also imposed the fee retroactively to all unpaid liabilities, and most taxing agencies have been imposing collection fees since 1988; the FTB's collection fee started in 1993.

BACKGROUND

Senate Bill [SBx4 16](#) (Chapter 23, Stats. 2009), among other things, added GC Section 16583.1, which authorized state agencies to impose a fee to recover collection costs on past due liabilities.

COMMENTS

1. **Purpose.** To provide specific authority within BOE's tax laws to collect a cost recovery fee using our normal collection actions.
2. **This bill allows the BOE to collect the fee using our normal collection actions.** Government Code Section 16583.1 allows a state agency to impose a reasonable fee, not to exceed the actual costs, to recover the collection costs on a past due account. However, there are no current provisions that allow the BOE to obtain payment of the fee through involuntary collection actions, such as liens, levies, wage garnishments, and other collection actions.

If enacted, this bill would be effective immediately, but the collection fee would be operative with respect to a demand notice for payment which is mailed on or after January 1, 2011. The actual implementation date, amount of the fee, programming, notices, and other important administrative details would be addressed administratively by the BOE.

3. **The relief of the collection fee is similar to the current relief of penalty provisions.** As mentioned previously, taxpayers may be relieved of a penalty in those cases where the BOE finds that a person's failure to make a timely return or payment is due to reasonable cause and circumstances beyond the person's control, and occurred notwithstanding the exercise of ordinary care and the absence of willful neglect. The BOE would administer a request for relief from the collection fee in a manner that is consistent with the current relief of penalty provisions.

Senate Bill 1028 (Correa) Chapter 316

Interest: Daily Basis

Effective January 1, 2011. Adds Sections 6591.6, 7655.5, 8876.5, 12631.5, 30281.5, 32252.5, 40101.5, 41095.5, 43155.5, 45153.5, 46154.5, 50112.1, 55042.5, 60207.5 to the Revenue and Taxation Code.

BILL SUMMARY

This BOE-sponsored bill imposes interest on a daily basis in cases where the BOE, itself, meeting as a public body finds, taking into account all facts and circumstances, that it would be inequitable to impose an entire month's interest on a prepayment or payment made one day late, under specified circumstances.

Sponsor: Board of Equalization (BOE)

LAW PRIOR TO AMENDMENT

Under existing law, persons who pay their tax and fee (hereinafter tax) obligations after the date they are due are required to pay a penalty of 10 percent of the tax, plus monthly, simple interest on those unpaid taxes. In the case of a late prepayment, the law imposes a 6 percent penalty. The current rate of interest for late payments is seven percent annually. Under current law, interest accrues on any unpaid tax, from the date the tax was due to the last day of the month in which it is paid. For example, if a taxpayer makes a late payment on the third of the month, interest would accrue to the end of that month.

Regardless of whether a taxpayer makes a tax payment two days after the return due date or at the end of the month following the due date, the taxpayer, under current law, is charged interest for the entire month. In the case of electronic funds transfers (EFT), a payment made after the 3:00 p.m. deadline is likewise subject to an entire month's interest charge.

Under existing law, the BOE has authority to relieve a late payment penalty when the BOE finds that the taxpayer's failure to make a timely payment is due to reasonable cause and circumstances beyond the person's control. However, interest on the late payment is generally not relievable (except in cases of a disaster or where the failure to pay the tax timely was due to an unreasonable error or delay by a BOE employee or a Department of Motor Vehicles employee under specified circumstances). Consequently, aside from these exceptions, and regardless of the reason, whether a taxpayer is 10 minutes late, as in the case of an EFT taxpayer, or 28 days late, current law requires that an entire month's interest be assessed.

AMENDMENT

This bill adds Sections 6591.6, 7655.5, 8876.5, 12631.5, 30281.5, 32252.5, 40101.5, 41095.5, 43155.5, 45153.5, 46154.5, 50112.1, 55042.5, and 60207.5 to the sales and use tax and special tax and fee laws in the Revenue and Taxation Code to provide that, if the Members of the BOE, meeting as a public body, find, taking into account all facts and circumstances, that it is inequitable to compute interest on a monthly basis when a taxpayer is only one day late in making an electronic payment, interest shall be computed on a daily basis, provided all of the following apply:

STATE BOARD OF EQUALIZATION

- 1) The payment of the tax or prepayment was made one day after the date the tax or prepayment was due.
- 2) The person was granted relief from all penalties that applied to that payment of tax or prepayment.
- 3) The person files a request for an oral hearing before the BOE.

The provisions of the bill become effective January 1, 2011.

BACKGROUND

During a 47-year period ending in 1997, the BOE's administrative policy was, in essence, to allow a 1-day grace period in cases where a mailing of a return or payment was postmarked one day after the due date. For example, if a remittance was due by law on April 30, and postmarked May 1, the payment was nevertheless deemed timely. This policy recognized the complications in the U.S. Postal Service and gave the taxpayer the benefit of the doubt that the mailing was actually timely made, but the postmark did not reflect the actual date in which it was placed in the mail. However, the BOE's legal staff reviewed this policy and opined that there was no legal basis on which the BOE could legally provide this 1-day grace period. The BOE therefore eliminated the 1-day grace period policy. As a consequence of the BOE's change in policy, staff workload increased significantly. This change resulted in a large increase in late billings, followed by hundreds of taxpayers filing declarations of timely mailing requesting that the penalty and interest be cancelled, with over half of the declarations filed attributable to a mailing that was postmarked only one day after the due date. This change in policy has also had a negative impact with taxpayers who are usually otherwise in compliance with the law.

Many taxpayers are required to file returns on a monthly basis, or a quarterly basis, or on a quarterly basis with two prepayments within each quarter. Due to the frequency of the return filings, it seemed logical to authorize the BOE to adopt a uniform policy of acceptance of returns based on considerations such as current U.S. Postal Service and technology available for filing. Therefore, in the 1999 Legislative Session, the BOE sponsored [AB 1638](#) (Stats. 1999, Ch. 929) to allow the BOE to reinstate its prior practice of allowing taxpayers a uniform grace day with respect to their filings under all BOE-administered taxes and fees. However, this uniform grace day is only allowed with respect to remittances, claims for credit or refund, documents, or returns that are delivered to the BOE by United States mail or through a bona fide commercial delivery service, and does not apply to electronic payments of tax.

Similar bills were sponsored by the BOE for the last two years ([AB 1901](#), Silva, 2008 and [AB 693](#), Silva, 2009). AB 1901 passed the Assembly on a 75 to 0 vote, but failed passage in the Senate Revenue and Taxation Committee. AB 693 died in the Assembly Revenue and Taxation Committee.

COMMENTS

1. **Purpose.** To provide some limited flexibility for the Members of the BOE to address the inequity of applying an entire month's interest to a liability when the liability is paid only one day late and the late payment is due to reasonable cause or circumstances beyond the taxpayer's control. Both the Franchise Tax Board and the Employment Development Department compute interest on a daily basis, and the BOE should have that ability, when the facts and circumstances warrant.

Also, unlike income tax return due dates, most of the taxpayers to which this bill would apply are required to make EFT payments each month to the BOE, and the due dates of these payments vary. For example, for sales tax, a payment is required every month, and for seven months of the year, the due date is the 24th. For four of the months, the due date is the end of the month. And for the June payment, the due date is the 15th of the month. A payment only 10 minutes late for these taxpayers automatically results in an entire month's interest charge – currently at a seven percent annual rate.

2. **The August 2, 2010 amendments** clarified that the provisions of the bill only apply to electronic payments, and added a sunset date of January 1, 2016.
3. **Bill could encourage taxpayers paying late to pay more promptly.** Interest is imposed on outstanding amounts of tax due to compensate the State for its inability to use the funds and to encourage timely remittance of tax due. Enactment of this bill is consistent with that principle, as the bill would continue to require the imposition of interest on the late payment, but only for the one day that the payment was late. Moreover, it would encourage those otherwise law-abiding taxpayers who, due to unique situations, inadvertently missed by one day the payment deadline to pay the tax promptly so that they could be considered for relief of the entire remaining month's interest charge. (Currently, if a taxpayer is late in making his or her payment, there's no real financial incentive to quickly remit the payment, since an entire month's interest is charged regardless if the payment arrives one day late or 28 days late.)
4. **Bill would not undermine the filing deadline.** The sanctions imposed in current law for making payments after the due date far outweigh the limited relief this bill would provide.

Generally, a taxpayer who is only one day late in making a tax payment is not making a conscious decision to be late. Usually, such late payments are a result of an inadvertent error or circumstances beyond the taxpayer's control. However, when any taxpayer is late in making a payment, delinquency charges (penalty and interest) automatically apply. These delinquency charges are mandatory, i.e., they are imposed in every case and regardless of the facts behind the late payment (e.g., an accounting error, an incorrect judgment or a willful act). The taxpayer can request relief of the imposed penalty, but not every request is granted, and ongoing, repeated requests are rarely granted. This proposal would not change the imposition of these sanctions.

The most severe delinquency charge for persons who make a payment one day after the due date is the late payment penalty – 10% for a late tax payment and 6% for a late prepayment. Taxpayers who remit their late payment within one month of the due date are, in addition to the penalty, required to pay the monthly interest charge of less than 1/2 of one percent. A taxpayer who makes a conscious decision to pay one day beyond the due date runs the risk of having to pay the late payment penalty as well as having to pay the entire monthly interest charge. These risks far outweigh the possible benefit of the bill's daily computation of interest. Thus, enactment of this bill would not undermine compliance with the filing deadlines imposed by law.

5. **Related legislation.** Two other bills were considered during the 2009-10 Legislative Session that would have provided some relief of interest. [AB 2375](#) (Knight), which failed passage in the Senate Revenue and Taxation Committee on July 1, 2010, would have authorized the Members of the BOE, meeting as a public body, to relieve all or a portion of interest imposed by law when the BOE found that a person's failure to make a timely payment was due to extraordinary circumstances, as defined, and that that it would have been inequitable to hold the person liable for the applicable interest, under specified circumstances. [AB 2556](#) (Fuller), which was held in the Assembly Appropriations Committee on May 28, 2010, would have authorized the BOE to relieve all or part of the interest imposed on a person where use tax was remitted to the BOE within 90 days of the BOE notifying the taxpayer of a nonpayment of use tax, when that notification was made as a result of the BOE obtaining information with respect to the liability from the United States Customs Service.

TABLE OF SECTIONS AFFECTED

SECTIONS		BILL AND CHAPTER NUMBER		SUBJECT
Revenue & Taxation Code				
§6051.8	Add	ABx8 6	Ch. 11	Diesel fuel surtax
§6051.8	Amend	SB 70	Ch. 9	Diesel fuel surtax
Article 4 (commencing with Section 6150)	Add	AB 1612	Ch. 725	Sales tax on in-home support service providers
§6201.8	Add	ABx8 6	Ch. 11	Diesel fuel use tax surtax
§6201.8	Amend	SB 70	Ch. 9	Diesel fuel use tax surtax
§6357.3	Add	SB 70	Ch. 9	Diesel fuel exemption: off-road use
§6357.7	Add	ABx8 6	Ch. 11	Gasoline exemption: state tax portion
§6452.1	Add Repeal	SB 858	Ch. 721	Use tax line
§6453	Amend	SB 858	Ch. 721	Use tax line
§6480.1	Amend	SB 70	Ch. 9	Gasoline and diesel fuel: prepayment
§6487.3	Add Repeal	SB 858	Ch. 721	Use tax line
§6591.6	Add	SB 1028	Ch. 316	Interest: daily basis
§6833	Add	SB 858	Ch. 721	Collection cost recovery fee
Evidence Code				
§524	Add	AB 2195	Ch. 168	Burden of proof
Government Code				
§9795	Amend	AB 1585	Ch. 7	Reports to the Legislature
§10231.5	Add	AB 1585	Ch. 7	New reports: repeal date
§10242.5	Amend	AB 1585	Ch. 7	Electronic list of reports

TABLE OF SECTIONS AFFECTED (CONTINUED)

Public Resources Code				
§26003	Amend	SB 71	Ch. 10	California Alternative Energy and Advanced Transportation Financing Authority Exclusion: Definitions
§26011.8	Add Repeal	SB 71	Ch. 10	California Alternative Energy and Advanced Transportation Financing Authority Exclusion: Greenhouse gas reduction
Unemployment Insurance Code				
§1095	Amend	AB 2433	Ch. 139	Use of EDD information