



**STATE BOARD OF EQUALIZATION
STAFF LEGISLATIVE BILL ANALYSIS**

DRAFT

Date Amended:	04/21/10	Bill Number:	AB 2195
Tax:	Sales and Use Special Taxes and Fees Property Taxes	Author:	Silva
Related Bills:			

BILL SUMMARY

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

SUMMARY OF AMENDMENTS

The amendment to this bill since our last analysis deletes the provision that would have shifted the burden of proof from taxpayers to the Board and the Franchise Tax Board in collecting taxes or fees in any court or administrative tax proceeding as specified, under certain conditions.

ANALYSIS

CURRENT LAW

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 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 staff analysis is provided to address various administrative, cost, revenue and policy issues; it is not to be construed to reflect or suggest the Board's formal position.

PROPOSED LAW

This bill 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 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.

This bill would become 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 Board. (*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 Board’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 Board 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 Board 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. **Sponsor and purpose.** The author is sponsoring this provision of the bill in order to codify the clear and convincing standard set forth in the Board’s Regulation 1703.
2. **The April 21, 2010 amendment** deletes the provision that would have shifted the burden of proof from taxpayers to the Board 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 Board’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 would also codify the Board’s Regulation 1703(c)(3)(C), which states the Board’s existing practice that, in asserting fraud, the Board has to prove fraud or intent to evade by clear and convincing evidence.

COST ESTIMATE

Enactment of this bill would not materially affect the Board’s administrative costs.

REVENUE ESTIMATE

Enactment of this bill would not affect state or local revenues.

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