STATE BOARD OF EQUALIZATION
STAFF LEGISLATIVE BILL ANALYSIS

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Date Introduced:	**02/23/01**	Bill No:	**AB 1126**
Tax:	**Business Taxes**	Author:	**Assembly Revenue and Taxation Committee**
Board Position:	**Support – Board-sponsored**	Related Bills:	

BILL SUMMARY

This bill contains Board of Equalization-sponsored provisions for the sales and use tax and the special taxes and fees programs, which would do the following:

- Require the Board to use clear and convincing evidence to assert fraud or intent to evade. (§115.1)
- Change the hazardous waste generators' refund application dates. (§25205.5)
- Allow reimbursements to taxpayers for third party check charges. (§§7096, 9274, 30459.4, 32474, 40214, 41174, 43525, 45870, 46625, 50156.14, 55335, and 60633.1)
- Authorize e-filing for Special Taxes Programs. (§§7651, 7652, 7652.5, 7652.7, 7659.93, 8752, 8763, 30181, 30182, 30183, 30186, 30187, 30188, 30193, 32251, 32263, 40061, 40063, 40069, 41052, 41063 43151, 43152.6, 43152.7, 43152.9, 43152.13, 43152.14, 43173, 45151,45163, 45163.4, 46151, 46163, 50109, 50112.0, 55040, 55053, 60201, 60202, 60203, 60204, 60205, 60205.5, 60206, and 60253)
- Apply excess tax reimbursement to fuel payers who pass the tax on to their customers. (§§7670, 7671, 7675, 8127.5, 8776, 8781, 9151.5, 43201, 43451.5, 46201, 46202, 46501.5, 50113, 50139.5, 60310, and 60521.5)
- Clarify claim for refund time period. (§§32402, 45652, 46502, 50140, and 55222)

ANALYSIS

State that the burden of proving the existence of fraud or intent to evade for the purpose of imposing a penalty on any tax or fee pursuant to the Revenue and Taxation Code requires clear and convincing evidence.

Evidence Code Section 115.1

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.

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Current Law

Section 115 of the Evidence Code states, "except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence." The burden of proof to establish fraud or intent to evade tax is on the Board of Equalization (Board). (*Marchica v. State Bd. of Equalization* (1951) 107 Cal.App. 2d 501.) Since there is no other statutory standard of proof to establish fraud or intent to evade for purposes of the Sales and Use Tax Law, under Evidence Code Section 115 the Board must establish fraud or intent to evade tax by a preponderance of the evidence. (*Liodas v. Sahadi* (1977) 19 Cal.3d 278.)

When the Franchise Tax Board (FTB) asserts fraud against a taxpayer, the FTB also must carry the burden of proof. However, the FTB must establish fraud by clear and convincing evidence. (See Appeal of *Juan F. and Elizabeth M. Lope*, Cal. St. Bd. of Equal. (5/4/83); Appeal of *Gary D. Armstrong, Cal. St. Bd. of Equal*. (12/3/85).) The standard of proof by a preponderance of the evidence set forth in Evidence Code Section 115 does not apply to the FTB's assertion of fraud because Revenue and Taxation Code Section 19164 requires that the imposition of a fraud penalty by the FTB be determined in accordance with the provisions of Section 6663 of the Internal Revenue Code. Since, for purposes of Internal Revenue Code Section 6663, the government must carry its standard of proof by clear and convincing evidence, the same standard of proof by clear and convincing evidence must be satisfied by the FTB to establish fraud under Revenue and Taxation Code Section 19164.

Revenue and Taxation Code Section 19164 requires one standard of proof for FTB fraud cases, while Evidence Code Section 115 sets forth a different standard of proof that applies to other tax fraud matters. In order to obtain conformity in the standard of proof for imposition of fraud, penalties imposed under all tax programs included in the Revenue and Taxation Code as well as with the federal standard of proof in fraud cases, the Evidence Code should be amended to raise the standard of proof to clear and convincing evidence for the imposition of fraud penalties in tax matters, and therefore require the State to establish fraud by clear and convincing evidence for all tax programs included in the Revenue and Taxation Code. This standard would apply to all administrative and court actions in which the State asserts a penalty set forth in the Revenue and Taxation Code based on fraud or intent to evade tax, or the State's defense of such a penalty.

A "preponderance of the evidence" simply requires the trier of fact to believe that the existence of a fact is more probable than its nonexistence before finding in favor of the party who has the burden of proof. (In re Angelia P. (1981) 28 Cal.3d 908, 918.) "Clear and convincing evidence" requires a finding of high probability; the evidence must be so clear as to leave no substantial doubt. (Id. at 919.) However, clear and convincing evidence is not evidence beyond a reasonable doubt. Evidence of a charge is clear and convincing provided there is a "high probability" that the charge is true. The evidence need not establish the fact beyond a reasonable doubt. (*Broadman v. Commission on Judicial Performance* (1998) 18 Cal.4th 1079, 1090.)

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State excise tax matters as well as State income tax matters are reviewed by the California courts on a *de novo* basis. In other words, taxpayers are entitled to a full evidentiary hearing on the merits of their claims and the tax agency bears the burden of establishing fraud in accordance with law as set forth in the statutes and in the decisions of the California courts. In a *de novo* proceeding, all issues of fact and law that were presented to the administrative agency are considered anew by the court, regardless of the holding by the administrative agency, and the court will apply the standard of proof in accordance with law. Accordingly, if litigation involves a fraud penalty imposed under the Sales and Use Tax Law, the court will require the Board to establish that fraud by a preponderance of the evidence.

Comment

It is appropriate that the standards be the same at both the administrative and judicial levels. Therefore, the Evidence Code is the appropriate code in which to make the change. For example, suppose the Board were to maintain a clear and convincing standard of proof for its sales tax cases and the Board is convinced at an oral hearing that there is clear and convincing evidence of fraud. The taxpayer thereafter files a suit for refund. If, in the court's opinion, the Board is unable to establish fraud by clear and convincing evidence, the court would nevertheless uphold the fraud penalty if the Board were able to establish the fraud by a preponderance of the evidence. This amendment would also provide that the court would use the clear and convincing standard of proof.

Change the refund application date until after the Department of Toxic Substances Control has determined whether or not surplus funds are available.

Health and Safety Code Section 25205.5

Current Law

Under existing law, Section 25205.5 of the Health and Safety Code imposes a fee on a generator for each generator site for each calendar year unless the generator has paid a facility fee or received a credit per Section 25205.2(i) for each specific site for the calendar year for which the fee is due. The fee is divided into different tiers based on the tonnage of waste generated, with a significant incremental increase in the fee as a generator produces more waste and moves from one tier to the next.

Section 25205.5 also provides that a generator of hazardous waste is eligible for a refund of all or part of the state generator fee paid if all of the following apply:

- The generator paid an inspection fee to a Certified Unified Program Agency, which imposed the fee as part of a single fee system and fee accountability program in compliance with Section 25404.5;
- The generator received a credit for the generator fee or generator surcharge, as provided in Section 43152.7 or 43152.11, respectively, for fees paid to a local hazardous waste management program pursuant to a Memorandum of Understanding filed with the Department of Toxic Substances Control (DTSC) for waste generated in 1996; and,

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- The DTSC certifies that funds are available to pay all or part of the refund.

Section 25205.9 of the Health and Safety Code requires the DTSC, on or before June 30 of each year, to determine if there are surplus funds in the Hazardous Waste Control Account and allocate the surplus, upon appropriation by the Legislature, to pay the refunds provided by Sections 25205.5(h) and 25205.5(i).

To be eligible for a refund, a generator must submit an application for refund to the Board of Equalization by March 31 of the fiscal year during which the generator paid the generator fee. Accordingly, a generator must submit an application to the Board for a possible refund of state generator fees paid approximately 3 months before the DTSC determines whether or not there are surplus funds available to pay the refunds. An application received after March 31 is void, not processed by the Board, and returned to the applicant. In 1999 and 2000, the Board has denied all claims for refunds because the DTSC did not certify that there were surplus funds available for refunds.

Comment

By postponing the filing date until after the DTSC determines whether surplus funds are available to pay the refunds, this amendment would allow a generator to ascertain, prior to submitting a refund application, whether refunds will be issued. This amendment is intended to save feepayers and the Board the expense of preparing and processing claims for those fiscal years when surplus funds are determined not to be available. This change would eliminate a time consuming and unnecessary refund claim process for both feepayers and the Board in those years when funds will not be available for refunds.

Allow reimbursement of any reasonable third party check charges imposed on a taxpayer due to an erroneous levy.

Revenue and Taxation Code Sections 7096, 9274, 30459.4, 32474, 40214, 41174, 43525, 45870, 46625, 50156.14, 55335, and 60633.1

Current Law

Under current law, Revenue and Taxation Code Section 7096 provides that a taxpayer may file a claim with the Board for reimbursement of bank charges incurred by the taxpayer as the direct result of an erroneous levy or notice to withhold issued by the Board. Bank charges include a financial institution's customary charge for complying with the levy or notice to withhold instructions and reasonable charges for overdrafts that are a direct consequence of the erroneous levy or notice to withhold. The charges are those paid by the taxpayer and not waived or reimbursed by the financial institution. However, the current law contains no provisions for reimbursement of other check charge fees imposed on the taxpayer.

Taxpayers are routinely reimbursed for bank charges related to erroneous levies, but not for related third party charges, such as bounced check charges imposed by daycare centers, retailers, or utility companies. While the amounts involved are relatively minor (approximately $40 each for the 10 or so cases each year), the Board has disallowed third party reimbursements because those charges are not covered by Section 7096.

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Comment

These amendments would add reasonable third party check charges to the amount that the Board is authorized to reimburse a taxpayer from charges they incur due to an erroneous levy or notice to withhold by the Board. It is fair and equitable to reimburse taxpayers for third party charges and this proposed change is well within the intent of the original legislation that authorized the Board to reimburse taxpayers for Board errors.

Authorize the Board to accept Special Taxes Program returns by electronic media and to prescribe the method of authenticating a return.

Revenue and Taxation Code Sections 7651, 7652, 7652.5, 7652.7, 7659.93, 8752, 8763, 30181, 30182, 30183, 30186, 30187, 30188, 30193, 32251, 32263, 40061, 40063, 40069, 41052, 41063, 43173, 43151, 45163, 43152.6, 43152.7, 43152.9, 43152.13, 43152.14, 45151, 46151, 50112.10, 55040, 50109, 60201, 60202, 60203, 60204, 60205, 60205.5, 60206, 60253, and 60253

Current Law

Under current Sales and Use Tax Law, the Board is authorized to accept sales and use tax returns by electronic media. Current law also requires that any return filed with the Board be authenticated in a manner prescribed by the Board.

Comments

With the proliferation of computers, local area networks, and electronic mail, these amendments would provide the Special Taxes Department with the opportunity to be responsive to these changing technologies. Many states have implemented forms of electronic transmission of returns, and both the Internal Revenue Service and the Franchise Tax Board are currently accepting returns through the use of electronic media. Recently the Board has received requests from the petroleum and trucking industries to allow them to file their returns electronically.

There are many benefits to allowing taxpayers to file electronically. For example, as more and more taxpayers take advantage of the opportunity to file electronically, processing costs in the mailroom, the cashiering unit, the data entry group, and the file area could potentially be reduced. It could also reduce data entry errors and possibly provide for more accurate tax returns. In addition, over time, electronic filing could reduce the physical space needed for housing documents in expensive office space. Instead, returns and other documents could be stored on electronic media, such as magnetic tape or disks, in less expensive off-site locations. Electronic filing could also provide accessible, up-to-date return information in a more timely manner through its automatic entry of information into the computer system.

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These amendments would adopt provisions similar to the Sales and Use Tax Law, to the benefit of both taxpayers and the Board, for the following Special Taxes programs: Motor Vehicle Fuel Tax Law, Use Fuel Tax Law, Cigarette and Tobacco Products Tax Law, Alcoholic Beverage Tax Law, Energy Resources Surcharge Law, Emergency Telephone Users Surcharge Law, Hazardous Substances Tax Law, Integrated Waste Management Fee Law, Oil Spill Response, Prevention, and Administration Fees Law, Underground Storage Tank Maintenance Fee Law, Fee Collection Procedures Law, and Diesel Fuel Tax Law.

These amendments would also allow taxpayers to be authenticated by means other than a traditional signature, in order for the Special Taxes Department to be better equipped to handle the acceptance of documents filed electronically. This would afford taxpayers and the Special Taxes Department the opportunity to take advantage of the many benefits of electronic filing.

These amendments would also address requirements under the existing Diesel Fuel Tax Law whereby a terminal operator is required to file with the Board a copy of any return filed with the Internal Revenue Service. That return must be filed with the Board within 10 days after filing with the Internal Revenue Service. In addition, the new Internal Revenue Service's ExSTARS system will require a terminal operator to file an electronic return at a secure web site and will provide the return to the state if the terminal operator signs a consent form. And finally, the current law has an incorrect reference to the Internal Revenue Service regulation for the terminal operator return.

These amendments would allow the state to accept an electronic return, spell out what the terminal operator is required to file with the state, allow the state to accept the report filed with the Internal Revenue Service if the terminal operator gives consent, and correct the reference to the Internal Revenue Service law and regulation.

Section 41052 is also proposed to be amended in AB 1458 (Kelley). In order to incorporate all of the amendments from both bills, double-joining language should be added to both bills in the event they are both enacted.

Apply excess tax reimbursement to all persons in the fuel distribution chain that reimburse themselves by passing the tax on to their customers.

Revenue and Taxation Code Sections 7670, 7671, 7675, 8127.5, 8776, 8781, 9151.5, 43201, 43451.5, 46201, 46202, 46501.5, 50113, 50139.5, 60310, and 60521.5

Current Law

Under existing Sales and Use Tax law, when an amount represented by a person to a customer as constituting reimbursement for taxes due is computed upon an amount that is not taxable or is in excess of the taxable amount and is actually paid by the customer to the person, the amount so paid is required to be returned by the person to the customer upon notification by the Board or by the customer that such excess tax

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has been collected. In the event of his or her failure or refusal to do so, the amount so paid is required to be remitted to the state.

The Motor Vehicle Fuel Tax Law, Use Fuel Tax Law, Diesel Fuel Tax Law, Hazardous Substances Tax Law (Childhood Lead Poisoning Prevention Fee), Oil Spill Response, Prevention, and Administration Fees Law and Underground Storage Tax Maintenance Fee Law currently have similar provisions to those in the Sales and Use Tax Law, except the phrase "when an amount represented by a person to a customer" is replaced with "when an amount represented by a person who is a taxpayer to a customer." In effect, this differing language limits who is required to return the excess tax reimbursement to a customer, or if the person fails or refuses to do so, remit the excess tax reimbursement to the Board since it specifies the "person" must be a "taxpayer." Therefore, if any person other than a "taxpayer" collects excess tax reimbursement from a customer, that person is not obligated to return those amounts to the customer or remit those amounts to the state.

For example, the motor vehicle fuel tax and diesel fuel tax are collected high in the fuel distribution chain and remitted to the state by a licensed taxpayer. As the fuel flows through the distribution chain to the user, the wholesaler and retailer reimburse themselves by passing the fuel tax on to their customer. Accordingly, any person below the point of taxation in the distribution chain who is not considered a "taxpayer" could be unjustly enriched with excess fuel tax if that person computed the wrong amount of fuel tax or did not deliver the actual gallons on which the fuel tax was computed.

The Board has found retail stations that have "under pumped" fuel to customers by charging for ten gallons but delivering only eight gallons. The customer has therefore paid fuel tax on the ten gallons. If the retailer is not considered "a taxpayer" under the Motor Vehicle Fuel Tax Law or the Diesel Fuel Tax Law, they are not legally required to return the excess tax reimbursement to the customer or pay that amount to the state.

One major case involved ten companies that were using a computer chip in their pumps to illegally overcharge their customers. Because one of the companies was a "taxpayer" (it possessed a fuel tax license), it was billed by the Board for $400,000 in excess fuel tax reimbursement. However, none of the remaining nine companies were considered a "taxpayer" under the law. Therefore, those nine companies were not required to return the $205,000 in excess tax collected to their customers, nor were they required to remit those amounts to the state.

Excess tax or fee reimbursement could also be collected under the Hazardous Substance Tax Law (Childhood Poisoning Prevention Fee), Oil Spill Response, Prevention, and Administration Fees Law and Underground Storage Maintenance Fee Law, by a person other than a "taxpayer" or "feepayer." Current law under these programs would not require this person to return the excess tax or fees to their customer or require those amounts to be paid to the state. Accordingly, this proposal would also extend the excess tax reimbursement provisions to the Hazardous Substance Tax Law (Childhood Poisoning Prevention Fee), Oil Spill Response, Prevention, and Administration Fees Law and Underground Storage Maintenance Fee Law.

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Under current Sales and Use Tax Law, if the Board is not satisfied with the return or returns of the tax or the amount of tax, or other amount, required to be paid to the state by any person, it may compute and determine the amount required to be paid upon the basis of the facts contained in the return or returns, or upon the basis of any information within its possession or that may come into its possession. Existing Motor Vehicle Fuel Tax Law, Use Fuel Tax Law, Diesel Fuel Tax Law, Hazardous Substance Tax Law, Oil Spill Response, Prevention, and Administration Fees Law, and Underground Storage Maintenance Fee Law include similar provisions. However, it only applies to "taxpayers" or "feepayers" filing returns. Accordingly, if any person, other than a taxpayer or feepayer collects excess tax or fees and refuses to return that amount to his or her customer or to remit the excess tax to the state, the Board cannot issue a deficiency determination for the excess tax.

Comment

These amendments would conform the Motor Vehicle Fuel Tax Law, Use Fuel Tax Law and Diesel Fuel Tax Law to the Sales and Use Tax Law thereby allowing the state to require any person in the fuel distribution chain who collects an amount represented by that person to a customer as constituting reimbursement for taxes due, computed upon an amount that is not taxable or is in excess of the taxable amount and is actually paid by the customer to the person, to either return the excess fuel tax to his or her customer or remit the excess fuel tax to the state. These amendments would also conform the Motor Vehicle Fuel Tax Law, Use Fuel Tax Law, and Diesel Fuel Tax Law to the Sales and Use Tax Law by requiring that any excess tax remitted to the state include interest from the date the customer paid the excess tax to the date the tax is remitted to the state, since the person would have had use of the excess tax.

Finally, these amendments would conform the Sales and Use Tax Law, the Motor Vehicle Fuel Tax Law, Use Fuel Tax Law, Diesel Fuel Tax Law, Hazardous Substance Tax Law, Oil Spill Response, Prevention, and Administration Fees Law, and Underground Storage Maintenance Fee Law, to allow the state to issue a determination for excess taxes or fees when any person fails to return the excess taxes or fees to the customer or to remit the amounts to the state.

Clarify the time period in which a claim for refund may be filed.

Revenue and Taxation Code Sections 32402, 45652, 46502, 50140, and 55222

Current Law

Under existing law, Section 6902 of the Revenue and Taxation Code provides that the Board shall not approve a refund of the sales and use tax: (1) within three years after the due date of the payment for the period for which the overpayment was made; or, (2) with respect to determined amounts after six months from the date the determinations become final; or (3) after six months from the date of overpayment, whichever period expires later, unless a claim for refund is filed with the Board within that period. Several other tax and fee programs administered by the Board contain identical provisions.

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However, Sections 45652 (Integrated Waste Management Fee Law), 46502 (Oil Spill Response, Prevention and Administration Fee Law), 50140 (Underground Storage Tank Fee Law), and 55222 (Fee Collection Procedures Law) are similar, except that the phrase "after six months from the date the determinations become final" is replaced by "within six months after the determinations have become final". There appears to be no apparent reason for this difference, and the language is difficult to interpret and apply. For example, this may be interpreted to mean that the taxpayer may file a claim for refund at any time after six months after the determination becomes final, in effect eliminating the statute of limitations.

Under current law, Section 32402 (Alcoholic Beverage Tax Law) also includes the phrase "within six months after the determinations become final" rather than "after six months from the date the determinations become final". In addition, Section 32402 does not contain the third option, the filing of a claim for refund after six months from the date of overpayment, thus imposing a more restrictive statute of limitations on the filing of claims for refund in this tax program.

Comment

These amendments would provide claim for refund language consistent with the Sales and Use Tax Law and the other tax and fee laws administered by the Board. These amendments would also make the Alcoholic Beverage Tax Law consistent with the claim for refund provisions of the Sales and Use Tax Law and the other tax and fee laws administered by the Board.

COST ESTIMATE

Any Board costs associated with this bill would be absorbable.

REVENUE ESTIMATE

The amendments that would allow reimbursement of third-party check charges would result in an annual revenue loss of less than $1,000.

The amendments that would apply excess tax reimbursement for fuel taxes could increase revenues. In one consumer fraud case, lack of authority to collect excess tax reimbursement cost the state $200,000.

The remainder of the provisions would not effect the state's revenues.

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