

## California - A.B. 131 Enacted: Procedures for Office of Tax Appeals and Department of Tax and Fee Administration Clarified

### Overview

Assembly Bill ("A.B.") 131<sup>1</sup> was recently enacted, clarifying certain provisions of the previously-adopted A.B. 102. A.B. 102, which was enacted on June 27, 2017, had reduced the functions of the Board of Equalization ("BOE") to the core responsibilities granted to it under the California Constitution and created two new tax agencies – the California Department of Tax and Fee Administration ("CDTFA") and the Office of Tax Appeals ("OTA") – which would take over many of the responsibilities previously handled by the BOE.<sup>2</sup> A.B. 131 clarifies various ambiguities and uncertainties that were triggered by the enactment of A.B. 102 with respect to the duties, responsibilities, and rules that apply to the BOE, CDTFA, and OTA.<sup>3</sup>

This Tax Alert summarizes the more notable provisions of AB 131 and provides some taxpayer considerations.

### Role of BOE and OTA With Respect to Appeals Conducted Through December 31, 2017

Under A.B. 102, as of July 1, 2017, the BOE was only allowed to continue the duties, powers, and responsibilities granted to it under the California Constitution (including adjusting the motor vehicle fuel tax rate for fiscal year 2018-2019) and thus, was not permitted to hear appeals as of that date. A.B. 102 also provided that, beginning on January 1, 2018, the OTA would assume the appeals function. This raised the question of how appeals that were scheduled to be heard between July 1, 2017 and January 1, 2018 as well as matters that were initially heard by the five BOE members but were subsequently deferred for further proceedings into 2018, were to be handled.

A.B. 131 resolves this ambiguity by providing that the BOE will continue to hear tax appeals until December 31, 2017 provided that any such appeal is both calendared for a BOE hearing prior to January 1, 2018 and is actually heard, decided, and finalized before January 1, 2018.<sup>4</sup> Any appeals that are not finalized before January 1, 2018 will be transferred to the OTA, and the BOE will have no legal authority relative to those appeals.<sup>5</sup>

### OTA Appeal Procedures and Administration

*Taxpayer Representation.* With respect to who may represent the taxpayer on an appeal before the OTA, A.B. 131 provides that, in addition to the other enumerated individuals, both certified public accountants and public accountants may represent a taxpayer on such an appeal.<sup>6</sup> A.B. 131 further states that the tax appeals panels

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<sup>1</sup> A.B. 131, 2017-2018 Reg. Sess. (Cal. 2017), available [here](#).

<sup>2</sup> See A.B. 102, 2017-2018 Reg. Sess. (Cal. 2017). On June 27, 2017, Deloitte Tax LLP issued an External Multistate Tax Alert re A.B. 102, available [here](#).

<sup>3</sup> A.B. 131 also provides some clarification on CDTFA reporting requirements and transfers to the General Fund for funds received relating to the certain sales and use tax exemptions. See A.B. 131 at 3, 13-19. In addition, A.B. 131 revised the calculation factors for the Earned Income Tax Credit to expand the credit amount for taxable years on or after January 1, 2017. A.B. 131 at 5, 22-23.

<sup>4</sup> A.B. 131 at 9.

<sup>5</sup> *Id.*

<sup>6</sup> A.B. 131 at 12.

and appeals hearings conducted by the tax appeals panels shall not be construed to be, or to be conducted by, a tax court.<sup>7</sup>

*Appeals Conducted Pursuant to Administrative Procedures Act.* A.B. 131 also provides that OTA appeals hearings and proceedings must be conducted pursuant to the Administrative Procedures Act.<sup>8</sup> Any regulations adopted to carry out this purpose must, to the extent possible, be consistent with the Model State Administrative Tax Tribunal Act.<sup>9</sup> The OTA must also adopt regulations for the presentation of evidence and preparation for hearings and proceedings before a tax appeals panel that do not require application of specialized knowledge.<sup>10</sup>

The Administrative Procedures Act requires a hearing to be open to the public.<sup>11</sup> However, A.B. 131 now authorizes taxpayers to request a closed hearing, subject to the approval of the OTA.<sup>12</sup> The OTA must establish a process under which a person filing an appeal may request a closed hearing and objective criteria for determining whether to grant a request for a closed hearing.<sup>13</sup>

*De Novo Appeal from OTA Decision.* A.B. 102 provided that “[t]he person filing the appeal may appeal the decision of the tax appeals panel to the superior court in accordance with the law imposing the tax or fee” and that the standard of judicial review to be applied was “review de novo.”<sup>14</sup> A.B. 131 clarified this language by providing that “[i]f a person that sought relief from a tax appeals panel disagrees with its decision, the person may bring an action in superior court in accordance with the law imposing the tax or fee for a trial de novo.”<sup>15</sup>

*Additional OTA Administrative Provisions.* A.B. 102 provided for tax appeals panels within the OTA that each consist of three administrative law judges (“ALJs”) designated by the OTA’s Director.<sup>16</sup> Each ALJ must meet certain requirements before he or she is designated as an ALJ on the tax appeals panel, one of which is to subscribe to the Code of Judicial Ethics adopted by the California Supreme Court.<sup>17</sup> A.B. 131 clarifies that this requirement includes, but is not limited to, the canons governing conflicts of interest.<sup>18</sup>

A.B. 131 provides that the Director of the OTA will administer and direct the day-to-day operations of the office which includes, but is not limited to, ensuring that each hearing office is sufficiently staffed and that appeals hearings are heard and resolved in a timely and efficient manner.<sup>19</sup> The Director may not oversee, direct, supervise, or otherwise be involved in the tax appeals panels’ decision-making process.<sup>20</sup>

### **CDTFA Appeal Procedures and Administration**

A.B. 131 provides that the CDTFA will conduct appeals conferences in the same manner as before the restructuring of the BOE, and the rules and regulations governing these appeals conferences will continue to apply.<sup>21</sup> The CDTFA may amend, repeal, or add any regulations that may be necessary for carrying out its duties, powers, and responsibilities in this respect. If the CDTFA denies a taxpayer’s request for relief in an appeals conference, that taxpayer may appeal to the OTA.<sup>22</sup>

A.B. 102 prohibited disclosure by the director, chief deputy director, or any other person who has obtained knowledge about a business during an inspection of the taxpayer’s records of certain confidential taxpayer information (with certain exceptions), unless the Governors directs otherwise.<sup>23</sup> A.B. 131 allows the CDTFA to

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<sup>7</sup> A.B. 131 at 12.

<sup>8</sup> A.B. 131 at 13.

<sup>9</sup> *Id.*

<sup>10</sup> A.B. 131 at 13.

<sup>11</sup> A.B. 131 at 2.

<sup>12</sup> A.B. 131 at 12.

<sup>13</sup> *Id.*

<sup>14</sup> A.B. 102 at 19.

<sup>15</sup> A.B. 131 at 12.

<sup>16</sup> A.B. 102 at 17.

<sup>17</sup> A.B. 102 at 17-18.

<sup>18</sup> A.B. 131 at 11.

<sup>19</sup> A.B. 131 at 11.

<sup>20</sup> *Id.*

<sup>21</sup> A.B. 131 at 7.

<sup>22</sup> *Id.*

<sup>23</sup> A.B. 102 at 12-13.

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disclose certain listed information to specific individuals,<sup>24</sup> for use in any actions or proceedings affecting the personnel rights of a current or former employee,<sup>25</sup> or in preparation for such action or proceeding, to the extent the CDTFA determines that the information is or may be relevant and material to the action or proceeding.<sup>26</sup> Civil and criminal penalties may apply for unauthorized disclosures.<sup>27</sup>

A.B. 131 also allows the CDTFA to obtain copies of full-face engraved pictures or photographs of licensees directly from the Department of Motor Vehicles to enforce its duties, powers, and responsibilities.<sup>28</sup> The BOE has the same authority, but A.B. 131 clarifies that it may only obtain such copies to enforce the duties, powers, and responsibilities that the BOE retains under A.B. 102.<sup>29</sup>

### Considerations

A.B. 131 addresses some of the ambiguities and open questions that remained after A.B. 102 was enacted. However, until the CDTFA and OTA adopt regulations to provide additional guidance, it is uncertain how the transfer of the BOE's prior duties, powers, and responsibilities to the CDTFA and OTA will actually impact taxpayers as well as the exact process by which the OTA will conduct appeals hearings and procedures, including the process and criteria surrounding requests for closed hearings before the OTA.

Moreover, taxpayers should consider the impact that A.B. 131 may have on their appeals that are currently before the BOE. Under A.B. 131, appeals that are not calendared for a BOE hearing prior to January 1, 2018 and actually heard, decided, and finalized before January 1, 2018 will be transferred to the OTA. Taxpayers who currently have appeals before the BOE or other matters before the FTB or BOE should consult their tax advisers to discuss available options.

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<sup>24</sup> Persons where disclosure is permitted are: (1) an employee or former employee of the department who is, or may be, a party to an administrative action or proceeding affecting the personnel rights of that employee or former employee, (2) upon written request by the employee or former employee of the CDTFA, to the employee's or former employee's duly authorized legal representative, (3) officers and employees of the CDTFA for use in any action or proceeding affecting the rights of an employee or former employee, to the extent necessary to advance or protect the interests of the State of California, and (4) an administrative law judge, administrative board member, judge or justice, or authorized officer or employee thereof in connection with an administrative hearing, adjudication, or appeal thereof, related to an action or proceeding affecting the personnel rights of an employee or former employee of the CDTFA. A.B. 131 at 8.

<sup>25</sup> "An action or proceeding affecting the personnel rights of an employee or former employee of the [CDTFA]" is defined to mean "action or proceeding arising under either of the following: (1) The State Civil Service Act (commencing with Section 18500 of Division 5). (2) The Ralph C. Dills Act (Chapter 10.3 (commencing with Section 3512) of Division 4 of Title 1." A.B. 131 at 8.

<sup>26</sup> A.B. 131 at 8.

<sup>27</sup> *Id.*

<sup>28</sup> A.B. 131 at 7.

<sup>29</sup> A.B. 131 at 11.

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