California's Altered Tax Landscape

The decline of the Board of Equalization and the rise of two new tax agencies under AB 102 and AB 131.

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On January 10, 2017, California Assemblymember Phil Ting introduced and read Assembly Bill ("AB") 102 for the first time. Introduced as a placeholder bill, AB 102 consisted of a single section and sentence: "SECTION 1. It is the intent of the Legislature to enact statutory changes relating to the Budget." Then, in less than two weeks in June 2017, the California Legislature gutted and amended this innocuous bill into a 19-page plan to drastically alter the landscape of California's tax system. As signed by the governor, AB 102 stripped the California State Board of Equalization of all but its constitutional powers, created a new agency named the California Department of Tax and Fee Administration, and created a second new agency named the Office of Tax Appeals. Three months later, clean-up legislation in AB 131 made further changes. This article discusses the history and events leading up to those changes and provides a glimpse of the (somewhat uncertain) California tax landscape going forward.

The Board of Equalization and AB 102—Deep History and Recent Controversy

The Board of Equalization was created under the California Constitution. Thus, while some of its powers (until AB 102) were granted it by the Legislature, some of its powers, and its existence, derive directly
from the California Constitution. Delegates to California's first Constitutional Convention at Colton Hall in Monterey approved the state's original Constitution in October 1849,1 which the electorate ratified one month later by a vote of 12,061 to 811.2 Beginning in December 1849, the First Regular Session of the Legislature met in San Jose (California's first state capital) and, in 1850, passed legislation for assessing and collecting public revenue, which included the imposition of a real and personal property tax. 3

The Legislature created the state's first Board of Equalization 20 years later, during the 1869-1870 session.4 Initially, the Board of Equalization consisted of three members, two of whom were appointed by the Governor, and the State Controller, ex officio, as the third member.5 The significance of that original statutory body was short-lived, however, because in 1874 the California Supreme Court declared that legislation enacted in the subsequent 1871-1872 session was unconstitutional in so far as it had delegated to the Board of Equalization the right to fix the rate of taxation, which the court considered to be a delegation of legislative power in derogation of the California Constitution.6 Thus, the Board of Equalization lacked any meaningful power until the California Constitution of 1879 created a new Board of Equalization ("Board") consisting of one member from each of the three then-existing congressional districts in the state and the Controller again as an ex officio member.7

After the creation of the Board as a Constitutional Agency of the State of California in 1879, the Legislature further defined its duties by statute over time. For example, when the Bank and Corporation Act of 1929 ("Act") created the Franchise Tax Commissioner8 to administer the Act, with the Commissioner having the power to hear protests of tax determinations,9 the legislation provided that appeals from actions of the Commissioner were to be made to the Board.10 The same roles were repeated under the enactment of the Personal Income Tax Act of 1935, where administration was assigned to the Commissioner, with appellate jurisdiction given to the Board.11 The roles continued after 1949 legislation replaced the "Franchise Tax Commissioner" with the "Franchise Tax Board."12 Thus, until 2018, for nearly 90 years, the Board—as an elected body—served an appellate function for California's corporate franchise and personal income tax systems. In addition the Board served an appellate function for the taxes and fees which it administers under either its constitutional or statutory authority, e.g., sales and use tax, fuel tax, and centrally assessed property tax.

The Board's appellate function and the lack of a so-called "tax court" in California have been identified over the years as significant flaws in the California tax system. Indeed, more than half of the states provide taxpayers with an opportunity for a hearing before a person who is both knowledgeable about state tax and independent from the administrative body or bodies responsible for raising state revenue.13 Board Members have never been required to demonstrate knowledge of state tax or any related
experience prior to serving on the Board. Further, the overlap between the Board and the three-member Franchise Tax Board (with both the Controller and the Board Chair serving on both bodies) has raised questions regarding the independence of the former.

However, the recent, and successful, pressure for the Legislature to reform the Board arose principally from other concerns. In November 2015, the Controller issued a report highly critical of the Board and which made eleven "Findings," among them: (1) inadequate internal accounting and administrative controls to appropriately allocate money in the Board's State Retail Sales Tax Fund ("RSTF"); (2) inaccurately adjusted fund allocations in quarterly RSTF true-ups; (3) improper allocation of sales tax on diesel fuel and use tax in the RSTF; (4) improper use of office revolving funds and a lack of supporting documentation; (5) inadequate controls over salary advances; and (6) inadequate controls over travel advances and reimbursement claims.

In July 2016, the Legislature directed the Department of Finance to evaluate the Board's Sales and Use Tax Program's activities, which it did by Final Report dated March 30, 2017. The March 2017 Report also was highly critical of the Board and concluded, in part, that its "operational culture impacts its ability to report accurate and reliable information to decision makers including the Legislature, Finance, and the Board," and that "certain board member practices have intervened in administrative activities and created inconsistencies in operations, breakdowns in centralized processes, and in certain instances result in activities contrary to state law and budgetary and legislative directives."

In response to the March 2017 Report, Controller Betty Yee and Board Member Fiona Ma each called for different types of reform at the Board. However, the event which more directly precipitated the legislative changes resulting in AB 102 was that on April 13, 2017, Governor Brown informed the Board that, as a result of the March 2017 Report, he was: (1) "directing the Department of Human Resources and requesting the Department of Justice to coordinate the investigations of Board employee complaints and the potential misuse of state resources;" (2) "suspending the Board's delegations for personnel, contracting and technology;" and (3) "convening legislative leaders to identify statutory changes to address the problems at the Board and enact changes by June 2017."

On April 20, 2017, the Senate Budget and Fiscal Review Committee, Subcommittee 4 on State Administration and General Government, held a one-day Oversight Hearing on the Board. In connection with that hearing, the Legislative Analyst's Office issued to the Subcommittee a report on options for "[r]forming the Board. Among the options presented for making "major changes" was the removal of the Board's appellate duties, which the Legislature "could instead assign . . . to another entity, such as a
specialized tax court. At this hearing, David Gau, Executive Director for the Board, told the Subcommittee the Board was "at a tipping point."

Legislative proposals to reform the Board are nothing new. Indeed, such proposals have been made for at least 60 years to either consolidate the multiple California tax agencies into a single Department of Revenue or to merge the Franchise Tax Board ("FTB") and the Board. However, 2017 was apparently the year for action as a result of the Governor's April 13, 2017 letter.

The response to AB 102—heralding change amidst cautionary flags

On May 18, 2017, just over four months after it was introduced, AB 102 (still consisting of a single sentence) passed the Assembly and was read for the first time in the Senate. On June 7, 2017, the Legislative Analyst's Office issued a report to the Assembly Budget Subcommittee No. 6 on Options for Reforming the State Board of Equalization, which was largely the same as its April 20, 2017 report to the Senate Committee on Budget and Fiscal Review. Less than one week later, on June 12, 2017, AB 102 was gutted and amended in the Senate and transformed into a 19-page bill titled "The Taxpayer Transparency and Fairness Act of 2017," which was authored by the Committee on Budget. On June 13, 2017, AB 102 was heard by the Senate Committee on Budget and Fiscal Review—the only legislative committee to hear the bill—and returned that same day to the Senate.

On June 15, 2017, AB 102 passed the Senate, where it had "lingered" for three hours with 18 of the 21 necessary votes before it finally passed on a 22 to 13 vote. It was then ordered to the Assembly for concurrence in the Senate amendments, and the Assembly concurred that same day on a 52 to 25 vote. On June 21, 2017, the bill was enrolled and sent to the Governor. A one-time companion bill in this process, SB 86, which had comparable provisions, did not proceed and was left in committee. On June 27, 2017, Governor Brown signed AB 102 into law.

Reaction to AB 102 was mixed. Some was positive. Controller Yee, who identified herself as "[o]ne of the plan's key architects," "cheered" the Legislature's approval of the overhaul. Treasurer John Chiang, who formerly sat on the Board as an elected Member and subsequently in his capacity as Controller, remarked that "[t]he time has come for lasting change and true reform at the Board of Equalization" and voiced his support for AB 102. Assemblymember Ting, Chair of the Assembly Budget Committee and instrumental in AB 102, noted "critical reforms" to the Board "ensure more accountability" to the people it serves. Board Member Ma praised the bill and stated "[t]he BOE is currently like a dysfunctional family," while highlighting that for the past two years she had been a "leading figure calling for meaningful
transparency, checks and balances, and other needed major organizational and structural reforms."\(^{33}\) Dan Walters, long-time political columnist for the *Sacramento Bee*, commented, "It's about time. The five-member tax agency has been an embarrassment for decades."\(^{34}\)

Some reaction was less positive. Board Chairwoman Diane Harkey issued a memorandum to legislators in opposition which stated the Board already had taken action to reform, urged the draft legislation should not be included in the 2017 budget, and argued more time should be allowed for a deliberative process to fully weigh the issues.\(^{35}\) Board Vice Chair George Runner stated in response to AB 102, "[b]y gutting the power of elected representatives, this bill leaves taxpayers defenseless against a revenue-hungry and powerful state bureaucracy that's unaccountable to the public."\(^{36}\)

Industry voices, when heard, generally were not supportive, especially of the "hurry up" legislative process for AB 102. The June 12, 2017 (As Amended) Bill Analysis of AB 102 prepared by the Senate Committee on Budget and Fiscal Review for its committee hearing the following day stated there was no support or opposition "on file."\(^{37}\) Nonetheless, opposition made its voice known.\(^{38}\) Teresa Casazza, President and Chief Executive Officer of the California Taxpayers Association, wrote in the *San Jose Mercury News* that while reform was needed, "[t]hree days to consider a complete overhaul of the agency that collects one-third of the state's revenue" was a rushed approach when "the state should take the time to do it right."\(^{39}\) The California Taxpayers Association voiced support for AB 1210, an alternative bill with less drastic reforms.\(^{40}\) In the end, the California Taxpayers Association, writing on behalf of 51 business groups and associations which included the California Chamber of Commerce, the California Business Roundtable, the California Manufacturers & Technology Association, and the Silicon Valley Leadership Group, issued a "Floor Alert" in opposition to AB 102 which "strongly opposed" eliminating the "existing checks and balances between taxpayers and tax collectors" and pointed out the proposed legislation was "being pursued with a lack of transparency, and would unfairly undermine taxpayers' rights."\(^{41}\)

**AB 131—the clean-up bill to AB 102**

After returning from its summer recess on August 21, 2017, the California Legislature went to work on clean-up legislation related to AB 102 in response to issues raised during the recess with regard to California's new tax system structure. With the Legislature's interim recess looming after September 15, 2017, the Senate resurrected and amended budget trailer bill AB 131 on September 6, 2017, as the vehicle to bring clarification to AB 102.\(^{42}\) After two rounds of additional amendments, AB 131 passed the Senate on September 15, 2017, on a vote of 34 to 4, with two Senators not recording votes. That same
day, AB 131 then passed the Assembly on a vote of 78 to 1, and was enrolled and sent to the Governor. On September 16, 2017, Governor Brown signed AB 131 into law.43

One Agency Becomes Three—Significant Structural Changes Under AB 102 And AB 131

In brief, three dramatic changes were made under AB 102. First, it reduced the Board's duties only to those established by the California Constitution, primarily related to the administration of California's property tax laws.44 Second, it established a new agency named the California Department of Tax and Fee Administration ("CDTFA") to assume most of the Board's duties, including administration of California's sales and use taxes and a host of special taxes.45 Third, it established a new Office of Tax Appeals ("OTA") to serve as the appellate body for the majority of administrative tax appeals arising from taxpayer disputes before the newly created CDTFA and the FTB.46

Back to (California constitutional) basics—changes to the Board

There are two main issues to watch for at the "future" Board in the aftermath of AB 102 and AB 131. The first issue is how the Board will carry out its appellate function until January 1, 2018, for existing disputes involving all taxes it administers and how those powers (and pending cases) will be transitioned to the OTA. The second issue is how the Board will function in the future after its powers are reduced to only its constitutional functions.

*The countdown begins—the Board's appellate function:* AB 102 provides that in order to ensure an orderly transition, all taxpayer appeals that are set on the calendar for hearing at the Board on or before December 31, 2017, including those not related to its constitutional functions, will be heard and decided by Board members.47 However, beginning January 1, 2018, the Board will only continue to hear appeals related to programs it constitutionally administers. Starting on that date, the independent OTA will hear appeals on all other tax and fee matters, such as corporate franchise and personal income tax appeals, sales tax and use tax appeals, and appeals related to other special taxes and fees.

Accordingly, there is a "window" through January 1, 2018, in which the Board will continue to hear pending appeals on all tax and fee matters. Taxpayers who have such appeals pending should take note of this timeline and its effect on whether such a matter will be heard and decided by the Board, or will instead be heard and decided by the newly created OTA after January 1, 2018. AB 131 provides that "in
order to ensure a seamless transition" from the Board to the OTA, the Board has continuing authority to take action on an appeal if: (1) hearing for the appeal "is placed on the calendar of a meeting of the State Board of Equalization to be held before January 1, 2018;" and (2) "[t]he appeal is heard, determined, decided, or is otherwise final before January 1, 2018."48

Conversely, the Board is prohibited from acting on an appeal heard at a Board meeting prior to January 1, 2018, if the Board's "hearing, determination, decision, or any other action is . . . not final before January 1, 2018."49 It is important to note here that Board decisions are not "final" until at least 30 days after the Board renders its determination (typically at a hearing).50 As a practical matter, then, even for those matters heard by the Board on its December 2017 calendar, all subsequent actions—e.g., consideration of a petition for rehearing, a rehearing (if any), and issuing an opinion—must be taken by the OTA under new Government Code § 15600(d)(2).

A significant change to the Board's current procedures, including its continuing appellate function through January 1, 2018, is that effective July 1, 2017, ex parte communications involving the Board are restricted in relation to a board adjudicatory proceeding 51 This change will not only impact the Board's appellate function in appeals from FTB actions, which continues until January 1, 2018, but also its continuing administration of constitutionally mandated programs. Recall the Board's Rules of Tax Appeals provide that constituents, their subordinates, other governmental agencies, and taxpayers, and their authorized representatives, including member of the State Bar, "may contact Board Members and a Board Member's Staff at any time, including while a matter involving such persons is awaiting an oral hearing before the Board."52 AB 102 provides that, effective July 1, 2017, ex parte communications of the Board shall follow those provided in California's Administrative Procedure Act ("APA"), which prohibits such communications and which has no provision even remotely comparable to the Board's former rule quoted above.53

**The Board's continuing powers:** Regarding the limited powers retained by the Board after July 1, 2017, under AB 102, first, the Board continues to retain its power to equalize and adjust property tax assessments, and related powers.54 Second, the Board retains its powers to measure county assessment levels and adjust secured local assessment roles, and related powers.55 Third, the Board retains its power to assess certain property lying within two or more counties and property used by certain industries, including property used by regulated railway or telephone companies and companies selling gas or electricity.56 Fourth, the Board retains its power to tax insurers.57 Fifth, the Board retains its power to assess and collect excise taxes on the manufacture, importation and sale of alcoholic beverages.58 Finally, the Board retains its duty to adjust the rate of the motor vehicle fuel tax for fiscal year 2018-2019.59 Because the Board currently administers the above constitutionally mandated programs, one
should not anticipate many significant changes in the immediate future to the Board's current administrative practices with respect to them going forward. However, two changes are noteworthy.

First, bear in mind that as of July 1, 2017, and as discussed above, *ex parte* communications with Board members are prohibited in dispute matters. Second, also effective July 1, 2017, AB 102 significantly restricts the Board's general administrative powers and will create a much smaller administrative footprint for the agency. For example, each Board Member elected by a district shall have only one office in Sacramento and one district office, and each Board Member is limited in the number and type of staff positions available. Further, an organizational chart for the Board for the period July 1, 2017 through December 31, 2017, shows a total of just 205 positions, a dramatic drop from the approximately 4,000 employees previously at the Board.

**California's first new tax agency—the Department of Tax and Fee Administration**

As of July 1, 2017, most (i.e., non-constitutionally mandated) duties, other than the appellate function, performed previously by the Board were automatically transferred to the newly created CDTFA, which reports to the California Government Operations Agency. Specifically, AB 102 provides that, effective July 1, 2017, the CDTFA "is the successor to, and vested with, all of the duties, powers and responsibilities" of the Board. All laws prescribing the duties, powers and responsibility of the Board to which the CDTFA succeeds and the rules and regulations established under those laws "are expressly continued in force, including, but not limited to, existing processes and remedies available to a taxpayer or fee payer such as settlement options and appeals processes." Further, unless the context requires otherwise, any reference to the Board in "any statute, regulation, or contract, or in any other code, with respect to the functions transferred" to the CDTFA under AB 102, "shall be deemed" to refer to the CDTFA. Any permit, registration, or other authorization issued by the Board and in effect on June 30, 2017, is deemed to be a permit, registration or other authorization of the CDTFA on and after July 1, 2017.

Accordingly, as a matter of law, the statutes and regulations formerly governing the day-to-day operations of the Board now automatically apply, as of July 1, 2017, to the newly created CDTFA. The Governor's administration states its aim is for "a seamless transition and ensuring that taxpayers will see no difference in service." The CDTFA announced on its website in early July that tax and fee payers, "who are required to register with, file returns, and pay taxes and fees due, should continue to file and make payments to the Board according to their regular schedule using current processes and forms."
announcement states there will be no current changes to any processes and the CDTFA will announce future changes as they are determined, and there should not be any disruption of services.71

One concern raised under AB 102 was the fate of the appeals conference process formerly available at the Board for the taxes it administered, such as sales and use tax. Prior to July 1, 2017, upon the filing by a taxpayer of an appeal from a proposed assessment by the Board (a document typically known as a "petition for redetermination"), an appeals conference would be held by the Appeals Division of the Board, following which the Board's Appeals' staff would issue its Decision and Recommendation ("D&R") in the case.72 Taxpayers not satisfied with the D&R could then ask to have the matter heard and decided by the Board.73 AB 102 was not clear on whether such conferences could or would take place at the CDTFA.

AB 131 now provides that such appeals conferences will continue to be conducted at the CDTFA in the same manner as before the Board prior to the July 1, 2017, transfer of the Board's powers and responsibilities.74 Further, the Board's rules regarding appeals conferences will apply to CDTFA appeals conferences, although the CDTFA may "amend, repeal, or add regulations as necessary or appropriate" to carry out its functions.75 AB 131 also makes clear that a taxpayer may request a hearing before the OTA if the CDTFA denies (in the D&R) a taxpayer's request for relief at an appeals conference.76

Concerning the makeup of the CDTFA, the new agency is headquartered in Sacramento and is under the control of a director appointed by the Governor.77 Logistics are an ongoing process, with the newly created CDTFA largely occupying former Board space at the present time. All civil service employees at the Board who were previously engaged in the performance of functions transferred to the CDTFA under AB 102 were automatically transferred to the CDTFA.78 Accordingly, well over 4,000 positions were moved from the Board to the CDTFA, effective July 1. Thus, it came as no surprise that the initial organizational chart for the new CDTFA looks very much like that of the former Board.79 For example, there is a Legal Division, an Appeals Division, a Litigation Division, a Settlement and Taxpayer Services Division, a Legislative Section and a Field Operations Division, which includes all CDTFA field offices both in and outside of California.80

A chief deputy director and a chief counsel are appointed by the Governor, and all appointees hold office at the pleasure of the Governor.81 On June, 30, 2017, the Governor appointed David Botelho as acting director.82 Botelho had most recently served as program budget manager at the California Department of Finance from 2013 to 2016.83 On July 10, 2017, the Governor announced the appointment of Nicolas Maduros as director (subject to Senate confirmation).84 Maduros, a Democrat, most recently served as Chief of Staff at the U.S. Small Business Administration in Washington, D.C.85 On July 13, 2017, the
Governor appointed Tad Egawa, a Republican, to serve as the CDTFA's chief counsel. Prior to his appointment, Egawa served as general counsel at the California Department of Housing and Community Development since 2015.

California's second new tax agency—the Office of Tax Appeals

Certainly the most significant change made under AB 102 is the removal of the appellate function from the Board and its transfer to the newly created OTA. Created on paper as of July 1, 2017, the OTA will be fully operative by January 1, 2018. The OTA is headquartered in Sacramento, with hearing offices to be located in Sacramento, Fresno and Los Angeles. The office is under the control of a director. The Governor appoints the director, chief deputy director, and chief counsel, with the appointment of the director requiring Senate confirmation. On October 3, 2017, the Governor appointed Kristen Kane as Chief Counsel and Acting Director of the OTA. Kane, a Democrat, was Deputy Director of the California Competes Tax Credit Program at the Governor’s Office of Business and Economic Development (GO-Biz) and had served as tax counsel at the FTB from 2010 to 2016. AB 131 includes an expanded description of the OTA director’s duties. The director is in charge of “administer[ing] and direct[ing] the day-to-day operations” of the OTA, and must ensure “that each hearing office is sufficiently staffed and that appeals hearings are heard and resolved in a timely and efficient manner.” The director, however, is expressly prohibited from involvement in the decision-making process of the OTA’s tax appeal panels.

While the Board sat en banc on a monthly basis, the OTA will have multiple tax appeals panels, although the number of panels is not specified in the legislation. Each panel will consist of three administrative law judges ("ALJ"), with each ALJ designated to a particular panel by the director. Each ALJ must be an active member in the California Bar for at least five years immediately preceding his or her designation to a panel and must possess "knowledge and experience with regard to the administration and operation of the tax and fee laws of the United States" and of California. Further, each ALJ must subscribe to the California Code of Judicial Ethics for the conduct of judges.

Beginning on January 1, 2018, the OTA tax appeals panels will conduct and hear appeals. Under AB 102 and (as slightly modified by) AB 131, "appeals" broadly include: "a petition, including, but not limited to, a petition for redetermination, petition for reassessment, petition for reconsideration of successor liability, or petition for rehearing;" an administrative protest regarding a tax or fee administered by the CDTFA; a claim, including a claim for refund regarding a tax or fee administered by the CDTFA; an appeal from an action of the FTB; an application, "including, but not limited to, an application for
administrative hearing;" and "any other item that may be scheduled for a hearing, including, but not limited to, requests for relief of taxes, fees, interest, or penalties." Note here that a taxpayer is not required to pay or post a bond for any disputed amount prior to filing and pursuing an appeal to the OTA.

Under AB 102, a party to an appeal "may be represented on an appeal by any authorized person or persons, at least 18 years of age, of the person's choosing, including, but not limited to, an attorney, appraiser, accountant, bookkeeper, employee, business associate, or other person." Legislative intent for AB 102 supported the position that certified public accountants may practice before the OTA panels in the same manner as previously before the Board. However, AB 131 further clarified the ability of non-attorneys to practice before the OTA by stating the appeals panels and the appeals hearings conducted by these panels "shall not be construed to be, or to be conducted by, a tax court," and "certified public accountants" and "public accountants" are now expressly listed by statute as authorized persons who may represent a party on an appeal before the OTA. Language stating that a representative before the OTA was "independent in the performance of service in accordance with professional standards" was amended into AB 131 on September 6, 2017, but was then removed by amendments on September 8, 2017, and is not found in AB 131 as chaptered.

What will be the rules of practice and procedure for the OTA is far, far from clear. For example, neither AB 102 nor AB 131 provide statutory rules for pre-hearing matters, the briefing process, the conduct of hearings and the presentation of witnesses and evidence, admissibility, etc. Indeed, AB 102 directed the OTA to adopt regulations by January 1, 2018, as are necessary or appropriate to carry out the legislation, which may be adopted as emergency regulations. AB 102 stated the OTA generally will conduct all adjudicative hearings under the California Administrative Procedure Act ("APA"). AB 102 also provided that "to the extent possible," the OTA's regulations related to the qualifications of the ALJs shall be consistent with the Model State Administrative Tax Tribunal Act adopted by the American Bar Association in 2006 ("ABA Model Act").

AB 131 changes that approach with references to three different sets of rules as being the basis for the OTA's regulations. First, all appeals and hearings "shall be conducted" pursuant to the APA. Second, "[t]o the extent applicable and not in conflict," the former Rules for Tax Appeals for the Board "shall continue in force and apply to all appeals hearings and proceedings." Third, "[t]o the extent applicable and not in conflict," regulatory actions "shall be consistent with" the ABA Model Act. Further, OTS "shall adopt regulations regarding the presentation of evidence and preparation for hearings and proceedings before a tax appeals panel that do not require application of specialized knowledge."
These are competing directives for modeling the OTA's regulations under AB 131 because of its direction for the OTA to look to the APA, to the Board’s former Rules for Tax Appeals, and to the ABA Model Act. Examples abound of significant and serious inconsistencies between those three approaches, which presumably will be resolved in the OTA regulations by making choices between competing provisions. In any event, OTA regulations will be in effect as of January 1, 2018, when the OTA formally assumes its duties.

AB 131 provides that a person filing an appeal may request a closed hearing. The OTA shall establish objective criteria for determining whether to grant such a request. Moreover, a written decision shall be issued for each appeal decided, which will be published within 100 days after the date upon which a tax appeals panel's decision becomes final. The Board, in comparison, was only required by statute to issue a written decision in appeals where the amount in dispute was $500,000 or more. Whether all written OTA decisions shall be precedential is not specified in either AB 102 or AB 131. It is anticipated the OTA regulations will address and provide criteria for when its decisions will and will not be precedential.

A person who has sought relief from a tax appeals panel and disagrees with its decision may bring an action in superior court in accordance with the law imposing the tax or fee. Under AB 102, a person who filed the appeal to the OTA could file an "appeal" to the superior court where there would be a review de novo. Use of the terms "appeal" and "review" de novo in AB 102 raised questions regarding the nature and scope of the superior court proceeding and perhaps suggested the record of the case (i.e., the trial) only could be made before the OTA. In response, AB 131 amended the language in AB 102 to provide that a person who sought relief from a tax appeals panel and disagrees with its decision may bring "an action" in superior court in accordance with the law imposing the tax or fee for a "trial" de novo. Note, however, the California Constitution requires the payment of tax before filing a tax refund action in superior court.

Notwithstanding uncertainty regarding the nature of the rules of practice to be adopted, the new appellate function within the OTA stands in marked contrast to that function as formerly held by the Board. Several notable points stand out. First, as discussed above, ex parte communications on the substance of pending appeal cases, which previously were expressly authorized by the Board's regulations, are now prohibited. Second, the adjudicatory officials are now ALJs, who are trained in the law and required to be active members of the California Bar, and are required to have some degree of tax expertise, none of which were qualifications to serve on the five-member Board. Third, the OTA will publish all its decisions compared to the former practice at the Board which resulted in only four written decisions in 2016.
franchise and income tax appeals and two written decisions in 2016 in business tax appeals.\textsuperscript{120} Fourth, the statutory directive that all appeals and hearings "shall be conducted" pursuant to the APA likely means some degree of formal discovery practice, whereas there was no formal discovery allowed to either party before the Board, and most certainly not by the tax agency.\textsuperscript{121}

Conclusion

While AB 102 and AB 131 did not completely demolish the Board or establish a California tax court, the legislation sufficiently altered California's tax landscape with the creation of the CDTFA and the OTA such that the effects of the legislation likely will not be fully known or appreciated for years to come. Regarding the OTA in particular, much still needs to be done and many questions still need to be answered before January 1, 2018. For example, on October 23, 2017, the OTA issued draft emergency regulations for appeals from actions of the FTB and for Business Tax Appeals (i.e., sales and use tax, fuel tax, tobacco products, etc.). OTA then held an "Informal Stakeholder Meeting" on November 6 to comment upon the draft emergency regulations. The emergency regulations will then need to be adopted, and the ALJs will need to be hired and assigned, by January 1, 2018.

\begin{itemize}
\item \textsuperscript{1} 1849 California Constitution Fact Sheet, California Secretary of State, available at http://www.sos.ca.gov/archives/collections/constitutions/1849-constitution-facts/. Drafters drew inspiration from the Constitutions of Iowa and New York. \textit{Id}.
\item \textsuperscript{2} \textit{Id}.
\item \textsuperscript{3} Cal. Stats. 1850, Ch. 52, p. 135. The first Legislature also petitioned Congress to admit California to the Union, which it was on September 9, 1850. 1849 California Constitution Fact Sheet, California Secretary of State.
\item \textsuperscript{4} Cal. Stats. 1870, Ch. CCCCLXXXIX, p. 714.
\item \textsuperscript{5} \textit{Id}.
\item \textsuperscript{6} \textit{Houghton v. Austin}, 47 Cal. 646 (1874) (invalidating former Political Code section 3696).
\item \textsuperscript{7} 1879 California Constitution, Art. XIII, sec. 9. Article XIII, sec. 9 was amended in 1884 to provide for four districts.
\item \textsuperscript{8} Cal. Stats. 1929, Ch. 13, sec. 22.
\item \textsuperscript{9} Cal. Stats. 1929, Ch. 13, sec. 25.
\item \textsuperscript{10} Cal. Stats. 1929, Ch. 13, sec. 25.
\end{itemize}
12 Cal. Stats. 1949, Ch. 1188, sec. 1.
16 Id., p. iv.
19 Board Member Jerome Horton subsequently called for reforms to the Board in lieu of establishing a "tax court." Letter from Board Member Jerome Horton to Governor Brown (June 2, 2017).
21 Subcommittee No. 4 Agenda, Oversight Hearing: Board of Equalization (March 20, 2017).
22 Options for Reforming the State Board of Equalization, Legislative Analyst's Office, presented to the Senate Budget and Fiscal Review Subcommittee No. 4 on State Administrative and General Government (April 20, 2017).
23 Id., p. 8.
26 Options for Reforming the State Board of Equalization, Legislative Analyst's Office, presented to the Assembly Budget Subcommittee No. 6 on Budget Process, Oversight, and Program Evaluation (June 7, 2017).
28 On June 19, 2017, SB 86 was re-referred to the Committee on Budget pursuant to Assembly Rule 97.
29 Cal. Stats. 2017, Ch. 16.


AB 102 Bill Analysis, Senate Committee of Budget and Fiscal Review (June 12, 2017), p. 6.

See, e.g., Adam Ashton, "Oil Companies, Unions—and Taco Trucks—in Fight to Save California's Tax Board," Sacramento Bee (June 15, 2017).


Like the original version of AB 102, AB 131 was introduced on January 10, 2017, and consisted of a single section and sentence: "SECTION 1. It is the intent of the Legislature to enact statutory changes relating to the Budget Act of 2017." The Senate also amended budget trailer bill Senate Bill 116, but this bill ultimately was ordered to the inactive file on September 15, 2017.

Cal. Stats. 2017, Ch. 252.

Gov't Code § 15600. The Board also retained the duty to adjust the rate of California's motor vehicle fuel tax for another fiscal year. Gov't Code § 15600(c).

Gov't Code §§ 15570-15570.100.

Gov't Code §§ 15670-15680.


Gov't Code § 15600(d)(1).

Gov't Code § 15600(d)(2).


Gov't Code § 15609.5(b).

18 Cal. Code of Regs. § 5523.8 (emphasis added).
Gov't Code § 15609.5(b); see also Gov't Code §§ 11430.10 et seq.

Gov't Code § 15600(b)(1); Cal. Const. Art. XIII, sec. 11.

Gov't Code § 15600(b)(2); Cal. Const. Art. XIII, sec. 18.


Gov't Code § 15600(b)(5); Cal. Const. Art. XX, sec. 22.

Gov't Code § 15600(c).

Gov't Code § 15600(f). As discussed below, AB 131 was enacted after AB 102 and effectively amended the language of certain provisions added to the Government Code by AB 102. Accordingly, all citations to the Government Code herein reflect the changes made by AB 131 for ease of reference.

Gov't Code § 15600(g).

BOE Organizational Chart, available at http://www.cdtfa.ca.gov/docs/BOE-org-chart-7-1-17-Final-JL-6-30.pdf. This chart shows 20 positions in the Board Proceedings Division, but workload and staffing for that unit will be reviewed to determine who will move to the OTA on January 1, 2018. Id.


Gov't Code § 15570(a).

Gov't Code § 15570.22.

Id.

Gov't Code § 15570.24(a).

Gov't Code § 15570.24(c).


Id.

See 18 Cal. Code of Regs. §§ 5260 et seq.


Gov't Code § 15570.50.

Gov't Code § 15570.52.

Gov't Code § 15570.54.

Gov't Code § 15570(a), (b). The appointment of the director is subject to Senate confirmation. Gov't Code § 15570(b).
Gov't Code § 15570.26(a).


Id.

Gov't Code § 15570(b).


Id. Previously, Botelho held various positions at the California Department of Finance and the California Department of Health Care Services. Id. Botelho’s appointment as acting director was not subject to Senate confirmation. Id.


Id.


Id. Egawa’s experience includes serving as Assistant Commissioner of Legal Affairs at the California Bureau of Real Estate and as a California Deputy Attorney General. Egawa also worked for several law firms prior to joining state government in 2009. Id.

Gov’t Code § 15674.

Gov’t Code § 15673.

Gov’t Code § 15670(b)(1).

Id.


Id.

Gov’t Code § 15670(b)(2).

Id.

Gov’t Code § 15670(c).

Id.

Gov’t Code § 15670(c)(1).

Gov’t Code § 15670(c)(2).

Gov’t Code § 15674(a)(1).

Questions arose under AB 102 whether a “protest” from an FTB proposed assessment could be filed directly with the OTA rather than with the FTB. AB 131 clarified that only a “protest” from an action of the CDTFA (not the FTB) qualified as an “appeal” to the OTA.

Gov’t Code § 15671(a).
103 Gov't Code § 15676.

104 See Letter from Phil Ting to Chief Clerk of the Assembly, Legislative Intent, Assembly Bill No. 102 and Senate Bill No. 86, Letter, No. 1 (June 15, 2017), printed in June 15, 2017 Assembly Journal, p. 2229. As discussed below, the Legislature specifically addressed this concern in passing AB 131.

105 Gov't Code §§ 15672(b), 15676.


108 Gov't Code § 15679(a)(3)(C); see also Gov't Code § 15670(c)(2).

109 Gov't Code § 15679.5(a).

110 Id.

111 Gov't Code § 15679.5(b)(3).

112 Gov't Code § 15679.5(b)(2).

113 Gov't Code § 15676.5.

114 Gov't Code §§ 15674(a)(2), 15675.


116 Gov't Code § 15677.

117 Id. See discussion regarding the subsequent clarification to this standard under AB 131.

118 Gov't Code § 15677.

119 Art. 13, sec. 32 of the California Constitution states: "No legal or equitable process shall issue in any proceeding in any court against this State or any officer thereof to prevent or enjoin the collection of any tax. After payment of a tax claimed to be illegal, an action may be maintained to recover the tax paid, with interest, in such manner as may be provided by the Legislature." See also Agnew v. Board of Equalization, 21 Cal. 4th 310 (1999); Nast v. Board of Equalization, 46 Cal. App. 4th 343 (1996); Chen v. Franchise Tax Board, 75 Cal. App. 4th 110 (1999).


121 The Board, however, did have limited subpoena power. See, e.g., 18 Cal. Code of Regs. § 5523.5(b). In the authors’ experience, such power was used on exceedingly rare occasions in practice.