

Alert | State & Local Tax (SALT)



February 2023

California Office of Tax Appeals – Significant Changes May Be On the Horizon

California’s youngest tax agency, the Office of Tax Appeals (OTA), may be in for some significant changes based on **proposed amendments** (Proposed Amendments) to Title 18, Chapter 4.1 of the California Code of Regulations, which were issued by the OTA February 2023. The proposed regulatory changes are specifically in response to legislative changes enacted by Senate Bill 189, which, among other things, allows non-attorneys to act as panel members for OTA hearings alongside administrative law judges (ALJs). The Proposed Amendments include amendments that would implement the Senate Bill 189 changes, would add specificity to some definitional terms, and would redefine the jurisdictional scope of cases that may be heard at the OTA.

The OTA will hold an **interested parties meeting (IPM)** on **March 20, 2023**, to discuss the Proposed Amendments.

1. Quick History Lesson – Birth of the OTA to Now

For a California tax agency, the OTA is still in its infancy. The agency arose after the Taxpayer Transparency and Fairness Act of 2017 reduced the State Board of Equalization (SBE) to its California Constitutionally mandated powers and transferred to the OTA the power to hear income/franchise tax and business tax appeals.

Since its inception the OTA has gone through several regulatory changes. The initial emergency regulations promulgated in 2017 largely mirrored the regulations in place for the SBE; over the last five years the OTA has made several modifications to its regulations, largely clarifying its role for tax appeals.

2. Jurisdictional Changes in Proposed Amendments May Prove to be Consequential for Taxpayers

Although the Proposed Amendments make various clean-up changes to the existing OTA regulations, many of which are inconsequential to most taxpayers, there are several amendments that are substantive. One of the most significant changes in the Proposed Amendments is to Section 30104, which discusses the jurisdictional limitations of the OTA. Specifically, the Proposed Amendments to Section 30104 would limit the OTA's ability to opine on the validity or enforceability of a regulation, unless a federal or California appellate court has already made such determination. Furthermore, the Proposed Amendments provide that the OTA cannot "refuse to follow" a regulation if the regulation conflicts with a statute or another regulation.

These changes are a significant departure from both the SBE and OTA's ability to consider certain issues of importance to taxpayers. The SBE's historical jurisdictional regulations provided that the SBE may consider all issues that relate to the correct determination of tax except if the issue dealt with invalidating a statute or regulation solely under the federal or California Constitutions. Indeed, the SBE exercised its jurisdictional powers in *Appeal of Save Mart*, 2002-SBE-02 (February 6, 2002) when it invalidated a regulation because it directly conflicted with a statute. The subsequent OTA jurisdictional regulations, which borrowed heavily from the SBE's historic regulations, provided the OTA with more power than the SBE, namely that the OTA was only limited from invalidating a statute (not a regulation) or under the federal or California Constitutions, unless if a federal or California appellate court has already made such determination.

The Proposed Amendments appear to scale back the OTA's jurisdictional power to be even less than that of the SBE. While the California Constitution prevents state agencies from invalidating statutes on constitutional grounds, the inability for the OTA to decide between two conflicting regulations or a regulation and a statute hampers its ability to hear cases where unique facts may straddle one or more laws.

3. What's Next?

The Proposed Amendments are partly in response to Senate Bill 189, which provides that the OTA hearing panel may include non-attorneys. Presumably, the Proposed Amendments address concerns that non-attorneys are opining on the validity of a regulation or statute. Senate Bill 189 provides specific qualifications for panel members, namely experience in tax law. In contrast, the SBE panels were made up of elected officials, without a statutorily specified criteria for qualifications to hear tax appeals. Nonetheless, the SBE was able to opine on validity or enforceability of a regulation or statute as long as the decision was not based on constitutional grounds. Thus, it seems a bit surprising that non-attorneys who are well-versed in tax law cannot opine on similar issues as the SBE.

The IPM scheduled for March 20, 2023, may provide taxpayers with a bit more information as to why the OTA is going down this route and also provide a forum for taxpayers to voice concerns with the Proposed Amendments.

Author

This GT Alert was prepared by:

- Shail P. Shah | +1 415.655.1300 | Shail.Shah@gtlaw.com

Greenberg Traurig's State and Local Tax (SALT) Team:

- Lawrence H. Brenman | +1 312.456.8437 | brenmanl@gtlaw.com
- Bradley R. Marsh | +1 415.655.1252 | Bradley.Marsh@gtlaw.com
- Nikki E. Dobay | +1 916.868.0616 | Nikki.Dobay@gtlaw.com
- G. Michelle Ferreira | +1 415.655.1305 | ferreiram@gtlaw.com
- Scott E. Fink | +1 212.801.6955 | finks@gtlaw.com
- Colin W. Fraser | +1 949.732.6663 | frasercw@gtlaw.com
- Brian Gaudet | +1 617.310.6000 | gaudetb@gtlaw.com
- Courtney A. Hopley | +1 415.655.1314 | hopleyc@gtlaw.com
- Barbara T. Kaplan | +1 212.801.9250 | kaplanb@gtlaw.com
- Marvin A. Kirsner | +1 954.768.8224 | kirsnerm@gtlaw.com
- Ivy J. Lapidés | +1 212.801.9208 | lapidesi@gtlaw.com
- Martin L. Lepelstat | +1 973.443.3501 | lepelstatm@gtlaw.com
- Jonathan I. Lessner | +1 302.661.7363 | lessnerj@gtlaw.com
- Natalie Mackary | +1 949.732.6540 | mackaryn@gtlaw.com
- Joel D. Maser | +1 954.765.0500 | maserj@gtlaw.com
- Richard J. Melnick | +1 703.903.7505 | melnickr@gtlaw.com
- Marc J. Musyl | +1 303.572.6585 | musylm@gtlaw.com
- Glenn Newman | +1 212.801.3190 | newmang@gtlaw.com
- Neil Oberfeld | +1 303.685.7414 | oberfeldn@gtlaw.com
- Cris K. O'Neill | +1 949.732.6610 | oneallc@gtlaw.com
- Shira Peleg | +1 212.801.6754 | pelegs@gtlaw.com
- Josh Prywes | +1 214.665.3626 | prywesj@gtlaw.com
- James P. Redding | +1 617.310.6061 | reddingj@gtlaw.com
- Andrew P. Rubin | +1 303.572.6552 | rubina@gtlaw.com
- Ruben Sislyan | +1 310.586.7765 | sislyanr@gtlaw.com
- Jake B. Smith | +1 602.445.8334 | smithjake@gtlaw.com
- James T. Smith | +1 415.590.5104 | James.Smith@gtlaw.com
- Jennifer A. Vincent | +1 415.655.1249 | vincentj@gtlaw.com

Albany. Amsterdam. Atlanta. Austin. Berlin. ~ Boston. Charlotte. Chicago. Dallas. Delaware. Denver. Fort Lauderdale. Houston. Las Vegas. London.* Long Island. Los Angeles. Mexico City.+ Miami. Milan.» Minneapolis. New Jersey. New York. Northern Virginia. Orange County. Orlando. Philadelphia. Phoenix. Portland. Sacramento. Salt Lake City. San Diego. San Francisco. Seoul.∞ Shanghai. Silicon Valley. Tallahassee. Tampa. Tel Aviv.^ Tokyo.‡ Warsaw.~ Washington, D.C.. West Palm Beach. Westchester County.

*This Greenberg Traurig Alert is issued for informational purposes only and is not intended to be construed or used as general legal advice nor as a solicitation of any type. Please contact the author(s) or your Greenberg Traurig contact if you have questions regarding the currency of this information. The hiring of a lawyer is an important decision. Before you decide, ask for written information about the lawyer's legal qualifications and experience. Greenberg Traurig is a service mark and trade name of Greenberg Traurig, LLP and Greenberg Traurig, P.A. ~Greenberg Traurig's Berlin office is operated by Greenberg Traurig Germany, an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. *Operates as a separate UK registered legal entity. +Greenberg Traurig's Mexico City office is operated by Greenberg Traurig, S.C., an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. »Greenberg Traurig's Milan office is operated by Greenberg Traurig Santa Maria, an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. ∞Operates as Greenberg Traurig LLP Foreign Legal Consultant Office. ^Greenberg Traurig's Tel Aviv office is a branch of Greenberg Traurig, P.A., Florida, USA. ‡Greenberg Traurig's Tokyo Office is operated by GT Tokyo Horitsu Jimusho and Greenberg Traurig Gaikokuhojimbengoshi Jimusho, affiliates of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. ~Greenberg Traurig's Warsaw office is operated by GREENBERG TRAURIG Nowakowska-Zimoch Wysokiński sp.k., an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. Certain partners in GREENBERG TRAURIG Nowakowska-Zimoch Wysokiński sp.k. are also shareholders in Greenberg Traurig, P.A. Images in this advertisement do not depict Greenberg Traurig attorneys, clients, staff or facilities. No aspect of this advertisement has been approved by the Supreme Court of New Jersey. ©2023 Greenberg Traurig, LLP. All rights reserved.*