

Total Recall?

How the Events of 2021 Have Impacted the California Tax Landscape So Far

September 15, 2021

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AGENDA

- What Happened?
- Legislation
- State Tax Agencies
 - Franchise Tax Board
 - Department of Tax and Fee Administration
 - Office of Tax Appeals
 - Board of Equalization
- Litigation
- Local Taxes

WHAT HAPPENED?

WHAT HAPPENED?

Governor Newsom Survives Recall

- 2021 Recall Election
 - Overview of Process
 - Results
 - Now what?
- Recently-signed 2021-2022 budget: \$47B General Fund surplus

Legislation

LEGISLATION

2021 Bills

- AB 71: tax on GILTI and IRC 965 repatriated income for water's-edge taxpayers (without corresponding factor representation)
- AB 593: exclude certain biotech companies from NOL suspension
- AB 150: SALT cap work-around for pass-through entities
- AB 1402: marketplace facilitator fee collection requirements
- SB 792: reporting requirement for online retailers
- SB 144: extended period for motion picture credits

LEGISLATION

2021 Bills (Cont.)

- SB 539: Prop 19 implementation bill
- AB 879: Sales/Use, PIT, and Corporate Tax amnesty program from 2/1/2022 to 3/31/2022
- AB 310: Wealth Tax for residents, former residents and temporary residents
- AB 1253: increase California's top PIT rate to 16.8%
- No FCA bill
- Open questions
 - Impact of election?
 - Appetite for new taxes?

State Tax Agencies: FTB

FTB

2021 Activity

- Ongoing regulation project: FTB Reg. 25136-2
 - Market sourcing regulation
 - Held sixth IPM in July
 - Received approval from three-member Board on Sept. 9 to begin formal regulation process
- Alternative apportionment
 - Two 25137 petition hearings before three-member Board
 - FTB Reg. 25137 in formal regulation process
- Administrative Guidance
 - Chief Counsel Ruling 2021-01 (disposition of insurance company stock)

State Tax Agencies: CDTFA

CDTFA

2021 Activity

- Annual Report to Legislature (FY 2019-2020, released August 2021)
 - Sales and use tax revenue dropped just 0.7% from prior year
 - Three highest areas of taxpayer noncompliance by revenue:
 - Out-of-state vendor purchases (failure to collect use tax) (#3 prior year)
 - Unreported sales (sales on books not on tax return) (#2 prior year)
 - Unreported sales due to inadequate records (failure to maintain and keep adequate sales records) (not listed prior year)
 - Appeals volume up slightly again (just over 1,000)
 - Fewer settlements reached (579 cases down from 653 – 11%)
- Regulatory activity
 - Movement on technology transfer agreements – CDTFA Reg. 1507?
- What's going on at Settlement?

State Tax Agencies: OTA

OTA

2021 Decisions

- *Appeal of Waterford Irrigation Supply, Inc.*, 2021-OTA-261P (Pending precedential)
 - Detrimental reliance on erroneous information posted on CDTFA website not grounds for relief

- *Appeals of LA Hotel Investments #3, #2 LLC*, 2021-OTA-218P (Precedential)
 - Property interest = doing business
 - How to value property for factor-presence threshold test?

- *Appeal of Cornerstone Compounding Pharmacy, Inc.*, 2021-OTA-196P (Precedential)
 - Revival of suspended corporation retroactively validates refund claim if statute open when revivor issued

OTA

2021 Decisions (Cont.)

- *Appeal of Mauritzson*, 2021-OTA-198P (Precedential)
 - Reliance on tax preparation software not reasonable cause to abate late filing penalty unless software had programming flaw/instructional error
- *Appeals of Darling*, 2021-OTA-173 (Nonprecedential)
 - Language in FTB regulation prevails over examples in the regulation
- *Appeal of Jacqueline Mairghread Patterson Trust*, 2021-OTA-187P (Precedential)
 - OTA has limited jurisdiction over claims that FTB violated Taxpayer Bill of Rights
- *Appeal of Bracamonte*, 2021-OTA-156P (Precedential)
 - Taxpayers remained California residents where did not establish new domicile in Nevada and had strongest connections with California during disputed period

State Tax Agencies: BOE

BOE

2021 Activity

- Implement Prop 19
 - BOE backing county assessors' legislation
- Calamity claims?
- Prop 8 decline in value claims
 - Temporary reduction when market value falls below base value as of January 1 lien date
 - Owner provides data to support a lower value

Litigation

LITIGATION

2021 Cases

- *Jacks v. City of Santa Barbara*, B299297 (Aug. 19, 2021) (unpublished) (2% charge for franchise rights a valid franchise fee and not a “tax” requiring voter approval)
- *BNSF Railway Co. v. County of Alameda*, 9th Cir., No. 20-15896 (Aug. 5, 2021) (affirmed lower court injunction because taxing railroad property at a higher rate than rate applicable to commercial and industrial property in the same jurisdiction may violate the 4-R Act)
- *Castellanos et al v. California*, Case No. RG21088725 (2021) (Alameda trial court held ballot measure classifying certain drivers as independent contractors (Prop 22) held to be unconstitutional)

LITIGATION

2021 Cases (Cont.)

- *Bekkerman v. CDTFA*, Case No. 34-2015-80002242 (2020) (Sacramento trial court held CDTFA Reg. 1585 invalid as applied to carrier-retailers; issued prohibitory writ of mandate)
- *Outfront Media LLC v. City of Los Angeles*, B304025, B306624 (Aug. 13, 2021) (unpublished) (writ of mandate unavailable where adequate legal remedy – i.e., tax refund action – exists)

LITIGATION

2021 Docket

— FTB

- *One Technologies, LLC v. FTB* (ballot proposition implementing single sales factor apportionment invalid under CA Constitution)
- *2009 Metropolous Family Trust v. FTB* (sourcing sale of goodwill)
- *Handelman-CEG v. FTB* (research credit case)
- *My Residence, LLC v. FTB* (“doing business” case)
- Residency cases
- Penalty cases

— CDTFA: *EMA Design Automation v. CDTFA* (reliance on prior written advice)

Local Taxes

LOCAL TAXES

2021 Activity

- Majority vs. super-majority vote requirement cases
 - 0-4 at Court of Appeal (Case No. 5 pending in First District)
 - CA Supreme Court has declined review thus far
- Increasingly aggressive localities
 - Driven by third-party auditors?
 - Expand tax base
 - Apply current taxes to new businesses/industries
 - Examples: apply communications users tax definition of “telecommunications service” to software, security services, streaming/OTT, and other services



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