

AMENDED IN SENATE MAY 4, 2011
AMENDED IN SENATE APRIL 25, 2011

SENATE BILL

No. 342

Introduced by Senator Wolk

February 15, 2011

An act to amend Section 19717 of, and to add Section 41 to, the Revenue and Taxation Code, relating to taxation.

LEGISLATIVE COUNSEL'S DIGEST

SB 342, as amended, Wolk. Taxation: administration: litigation: fees.

Existing law provides that a prevailing party in a court action may be awarded attorney's fee under specified circumstances, and laws governing the administration of franchise and income tax laws provide that a prevailing party may be awarded a judgment for reasonable litigation costs incurred, in the case of any civil proceeding brought by or against the State of California in a court of record of this state, in connection with the determination, collection, or refund of any tax, interest, or penalty under the Personal Income Tax Law and the Corporation Tax Law as specified.

This bill would make the provision of law governing the administration of franchise and income tax laws the exclusive means to award attorney's fees in any civil proceeding described above, and would prohibit attorney's fees from being awarded pursuant to any other statutory provision or common law doctrine regarding the award of attorney's fees. This bill also would prohibit a person from charging a contingent fee, as defined, for any matter involving a tax imposed under the Revenue and Taxation Code, and would impose a penalty, as provided, for failing to comply with this requirement. *This bill would authorize specified state agencies to request a written certification from*

those persons, filed under penalty of perjury, that a fee charged for those services does not include a contingent fee. By expanding the scope of the crime of perjury, the bill would impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority. Appropriation: no. Fiscal committee: yes.

State-mandated local program: ~~no~~-yes.

The people of the State of California do enact as follows:

1 SECTION 1. Section 41 is added to the Revenue and Taxation
2 Code, to read:

3 41. (a) Notwithstanding any other law, no person shall charge
4 a contingent fee for services rendered in connection with any matter
5 before the State Board of Equalization, Franchise Tax Board, any
6 assessment appeals board, or for any other matter involving a tax
7 imposed under this code.

8 (b) For purposes of this section, “contingent fee” means any fee
9 that is based, in whole or in part, on whether or not a position taken
10 on a tax return or other filing avoids challenge or is sustained either
11 by the State Board of Equalization, Franchise Tax Board, an
12 assessment appeals board, or in litigation. A contingent fee
13 includes, but is not limited to, a fee that is based on a percentage
14 of the refund reported on a return, a fee that is based on a
15 percentage of the taxes saved, or a fee that depends on the specific
16 tax result attained. A contingent fee also includes any fee
17 arrangement in which the party to whom services are rendered, or
18 a designee of the party to whom services are rendered, is
19 reimbursed or credited for all or a portion of the fee paid or agreed
20 to be paid if a position taken on a tax return or other filing is
21 challenged or is not sustained, whether pursuant to an indemnity
22 agreement, a guarantee, a right of rescission, or any other
23 arrangement with a similar effect.

24 ~~(c) Any person who fails to comply with subdivision (a) shall~~
25 ~~pay a penalty equal to the amount of the contingent fee charged~~

1 to the governmental entity responsible for administering the tax
2 for which the contingent fee arrangement was entered.

3 (c) A penalty shall be imposed under this section upon the
4 person rendering the services described in subdivision (a) for
5 charging a contingent fee in violation of subdivision (a). The
6 penalty for each violation shall be the greater of five thousand
7 dollars (\$5,000) or 100 percent of the contingent fee charged,
8 whether or not any contingent fee was actually paid or otherwise
9 received, directly or indirectly, by the service provider.

10 (d) (1) The penalty imposed under subdivision (c) shall be due
11 and payable upon notice and demand from the board for contingent
12 fees relating to tax and fee programs administered by that agency,
13 including property tax assessments, or the Franchise Tax Board
14 for contingent fees relating to taxes administered by the Franchise
15 Tax Board.

16 (2) Article 3 (commencing with Section 19031) of Part 10.2,
17 relating to deficiency assessments, shall not apply with respect to
18 the assessment or collection of any penalty imposed under
19 subdivision (c) under those provisions of this code administered
20 by the Franchise Tax Board.

21 (e) Contingent fees for services described under subdivision (a)
22 are against public policy, and any contract or arrangement that
23 provides for a contingent fee is void and unenforceable.

24 (f) A person rendering services in connection with any matter
25 before the board, the Franchise Tax Board, or the County
26 Assessment Appeals Board, or for any other tax imposed under
27 this code, may be required to provide, upon request of the board
28 or the Franchise Tax Board, written certification, under penalty
29 of perjury, that the fee for those services does not include, in whole
30 or in part, a contingent fee.

31 (g) (1) The board and the Franchise Tax Board may adopt
32 regulations, standards, criterion, procedures, determinations,
33 rules, notices, guidelines, forms, and instructions necessary to
34 carry out the purposes of this section, which is to prevent the use
35 of contingent fee arrangements under this code.

36 (2) Chapter 3.5 (commencing with Section 11340) of Part 1 of
37 Division 3 of Title 2 of the Government Code does not apply to
38 any standard, criterion, procedure, determination, rule, notice,
39 guideline, form, and instruction established or prescribed by the
40 board or the Franchise Tax Board pursuant to paragraph (1).

1 ~~(d)~~

2 (h) This section applies to all fee arrangements entered into on
3 or after the effective date of this act.

4 SEC. 2. Section 19717 of the Revenue and Taxation Code is
5 amended to read:

6 19717. (a) The prevailing party may be awarded a judgment
7 for reasonable litigation costs incurred, in the case of any civil
8 proceeding brought by or against the State of California in a court
9 of record of this state, in connection with the determination,
10 collection, or refund of any tax, interest, or penalty under this part.

11 (b) (1) A judgment for reasonable litigation costs shall not be
12 awarded under subdivision (a) unless the court determines that the
13 prevailing party has exhausted all administrative remedies available
14 to that party under this part, including the filing of an appeal as
15 provided in Section 19324. Any failure to agree to an extension
16 of the time for the assessment of any tax shall not be taken into
17 account for purposes of determining whether the prevailing party
18 meets the requirements of the preceding sentence.

19 (2) An award under subdivision (a) shall be made only for
20 reasonable litigation costs which are allocable to the State of
21 California and not to any other party to the action or proceeding.

22 (3) No award for reasonable litigation costs may be made under
23 subdivision (a) with respect to any portion of the civil proceeding
24 during which the prevailing party has unreasonably protracted that
25 proceeding.

26 (c) For purposes of this section:

27 (1) “Reasonable litigation costs” includes any of the following:

28 (A) Reasonable court costs.

29 (B) Based upon prevailing market rates for the kind or quality
30 of services furnished, any of the following:

31 (i) The reasonable expenses of expert witnesses in connection
32 with the civil proceeding, except that no expert witness shall be
33 compensated at a rate in excess of the highest rate of compensation
34 for expert witnesses paid by the State of California.

35 (ii) The reasonable cost of any study, analysis, engineering
36 report, test, or project which is found by the court to be necessary
37 for the preparation of the party’s case.

38 (iii) Reasonable fees paid or incurred for the services of
39 attorneys in connection with the civil proceeding, except that those
40 fees shall not be in excess of one hundred twenty-five dollars

1 (\$125) per hour unless the court determines that a special factor,
2 such as the limited availability of qualified attorneys for the
3 proceeding, the difficulty of the issues presented in the case, or
4 the local availability of tax expertise justifies a higher rate. In the
5 case of each calendar year beginning with calendar year 2001, the
6 Franchise Tax Board shall recompute the dollar amount referred
7 to in the preceding sentence. That computation shall be made by
8 increasing the amount in this clause by an amount equal to the
9 cost-of-living adjustment determined under subdivision (h) of
10 Section 17041. If any resulting dollar amount is not a multiple of
11 ten dollars (\$10), that dollar amount shall be rounded to the nearest
12 multiple of ten dollars (\$10).

13 (iv) The court may award reasonable attorney’s fees under
14 subdivision (a) in excess of the attorney’s fees paid or incurred if
15 the fees are less than the reasonable attorney’s fees because the
16 attorney is representing the prevailing party for no fee or for a fee
17 which, taking into account all the facts and circumstances, is no
18 more than a nominal fee. This clause shall apply only if the award
19 is paid to the attorney or the attorney’s employer.

20 (2) (A) “Prevailing party” means any party to any proceeding
21 described in subdivision (a) (other than the State of California or
22 any creditor of the taxpayer involved) that meets either of the
23 following criteria:

24 (i) Has substantially prevailed with respect to the amount in
25 controversy.

26 (ii) Has substantially prevailed with respect to the most
27 significant issue or set of issues presented.

28 (B) (i) A party shall not be treated as the prevailing party in a
29 proceeding to which subdivision (a) applies if the State of
30 California establishes that its position in the proceeding was
31 substantially justified.

32 (ii) For purposes of clause (i), the position of the State of
33 California shall be presumed not to be substantially justified if the
34 Franchise Tax Board did not follow its applicable published
35 guidance in the administrative proceeding. This presumption may
36 be rebutted.

37 (iii) For purposes of clause (ii), the term “applicable published
38 guidance” means either of the following:

39 (I) A regulation, legal ruling, notice, information release, or
40 announcement.

1 (II) Any chief counsel ruling or determination letter issued to
2 the taxpayer.

3 (iv) For purposes of clause (i), in determining whether the
4 position of the Franchise Tax Board was substantially justified,
5 the court shall take into account whether the Franchise Tax Board
6 has lost in any California Court of Appeal in another district on
7 substantially similar issues, as reflected in a decision certified for
8 publication.

9 (C) Any determination under this paragraph as to whether a
10 party is a prevailing party shall be made by either of the following:

11 (i) The court.

12 (ii) An agreement of the parties.

13 (3) The term “civil proceeding” includes a civil action.

14 (d) For purposes of this section, in the case of multiple actions
15 which could have been joined or consolidated, or a case or cases
16 involving a return or returns of the same taxpayer, including joint
17 returns of married individuals, which could have been joined in a
18 single proceeding in the same court, the actions or cases shall be
19 treated as one civil proceeding regardless of whether the joinder
20 or consolidation actually occurs, unless the court in which the
21 action is brought determines, in its discretion, that it would be
22 inappropriate to treat the actions or cases as joined or consolidated
23 for purposes of this section.

24 (e) An order granting or denying an award for reasonable
25 litigation costs under subdivision (a), in whole or in part, shall be
26 incorporated as a part of the decision or judgment in the case and
27 shall be subject to appeal in the same manner as the decision or
28 judgment.

29 (f) For purposes of this section, “position of the State of
30 California” includes either of the following:

31 (1) The position taken by the State of California in the civil
32 proceeding.

33 (2) Any administrative action or inaction by the Franchise Tax
34 Board (and all subsequent administrative action or inaction) upon
35 which that proceeding is based.

36 (g) The amendments made by Chapter 931 of the Statutes of
37 1999 are effective for costs incurred and services performed more
38 than 180 days after the effective date of Chapter 931 of the Statutes
39 of 1999.

1 (h) Notwithstanding any other law, this section shall be the
2 exclusive means to award attorney’s fees in any civil proceeding
3 described in subdivision (a), and attorney’s fees may not be
4 awarded pursuant to any other statutory provision or common law
5 doctrine regarding the award of attorney’s fees.

6 SEC. 3. (a) The amendments made to Section 19717 of the
7 Revenue and Taxation Code by Section 2 of this act shall be
8 applied to any court proceeding brought on or after the effective
9 date of this act.

10 (b) It is the intent of the Legislature that no inference be drawn
11 from the amendments made to Section 19717 of the Revenue and
12 Taxation Code by Section 2 of this act for any court proceeding
13 brought before the effective date of this act.

14 *SEC. 4. No reimbursement is required by this act pursuant to*
15 *Section 6 of Article XIII B of the California Constitution because*
16 *the only costs that may be incurred by a local agency or school*
17 *district will be incurred because this act creates a new crime or*
18 *infraction, eliminates a crime or infraction, or changes the penalty*
19 *for a crime or infraction, within the meaning of Section 17556 of*
20 *the Government Code, or changes the definition of a crime within*
21 *the meaning of Section 6 of Article XIII B of the California*
22 *Constitution.*