

There Are No Apologies in The World of Tax

Most tax disputes start with an audit long after your filing. It may involve number crunching, negotiating with the Internal Revenue Service or the Franchise Tax Board, letter writing or even court proceedings. Moreover, after all administrative remedies have been exhausted and all appeal periods have expired, there's often an entirely new scuffle or renegotiation with IRS or FTB collection personnel. After all, once the tax is finally determined, it must be collected.

But after 30 years as a tax lawyer, I always thought the bottom line was dollars and cents. True, fairness and policy considerations can sometimes push a client one way or the other in a tax dispute. But usually, for most of us, it's all about the money – but not for Keith Robert Caldwell.

Caldwell represented himself in Tax Court. In fact, he did it more than once. The IRS kept auditing him over pesky alimony issues. Along the way Caldwell would stir up what he could, once requesting the court to award him \$100,000 of litigation expenses because he claimed the IRS audits were unjustified. He also wanted the Tax Court to rule that this \$100,000 would be tax-free!

One problem was that Caldwell could not prove any such legal expenses. The Tax Court said he was just seeking compensation for the general distress of dealing with the auditors. In one pleading Caldwell asserted that if he was awarded the tax-free \$100,000, he wouldn't disclose the IRS' audit actions to the public. The court rejected his claim, and neither the IRS nor the Tax Court seemed concerned about whatever he was

threatening to disclose.

Besides, Caldwell didn't bring his requests for costs in the proper format, didn't prove a single penny of legal expense, and wouldn't agree to even the most basic procedures in his case. He had not even participated in an IRS Appeals Conference, where most tax disputes are resolved long before the Tax Court has to get involved. Caldwell, it seemed, was his own worst enemy.

Caldwell went to the Tax Court again recently over (you guessed it) the same old alimony issues. (*Caldwell v. Commissioner*, T.C. Summ. Op. 2009-169 (Nov. 18, 2009).) With battle fatigue, the IRS this time conceded that he could deduct the alimony he paid his ex-wife. The only remaining issues were Caldwell's request for legal fees (denied again), plus a new twist: Say you're sorry!

That's right, Caldwell wanted a written apology from the Commissioner of Internal Revenue, and a change to IRS procedures to protect him from what he called erroneous audits. An "I'm sorry, and I won't audit you again" signed by the Commissioner himself would do nicely, he said. The IRS filed responsive papers in Tax Court: You can't make us apologize.

The Tax Court had to agree with the IRS. Even if it wanted to, the Tax Court is a court of limited jurisdiction, and its powers don't extend to the apology department.

No one likes to go through an audit, and successive audits – what goaded Caldwell – can be maddening. Nevertheless, there are estab-



lished procedures to follow when a new audit comes on the heels of a prior audit. But to get out of jail free (so to speak), you must have received a "no change" letter.

If your return was examined for the same items in either of the two previous years and the IRS proposed no change, you may be able to get a pass. Still, you have to ask the IRS in the proper way. (See IRS Publication 556, <http://www.irs.gov/pub/irs-pdf/p556.pdf>.) If you didn't receive a "no change" letter, you're fair game, even if you were off only by a few dollars. That means you have to roll with the punches. Just produce your receipts and make the best of it.

Finally, if you want to fight over taxes, hire someone competent to do it. You won't have to say you're sorry.

This discussion is not intended as legal advice, and cannot be relied upon for any purpose without the services of a qualified professional.



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Proposition 65 on Steroids

The state that brought you Proposition 65, a law that has produced hundreds of lawsuits and millions of dollars for bounty hunters, is now implementing a bulked-up new law, benignly nominated the Green Chemistry Law. It grants unprecedented authority to a state agency to regulate the presence of chemicals in consumer products from cradle to cradle. In comparison to Proposition 65, the legal exposures and compliance burdens will be exponentially greater.

The California Legislature enacted the country's first comprehensive green chemistry law in 2008. Interestingly, several significant industry groups ultimately supported the legislation, AB 1879 and SB 509, with most business groups adopting a neutral position on the bills. The Legislature, during the past several years, had sought to ban or restrict the use of certain chemicals. The Green Chemistry legislation was seen by business as a way to dissuade the Legislature, motivated by politics, from setting chemical policy on a chemical-by-chemical basis.

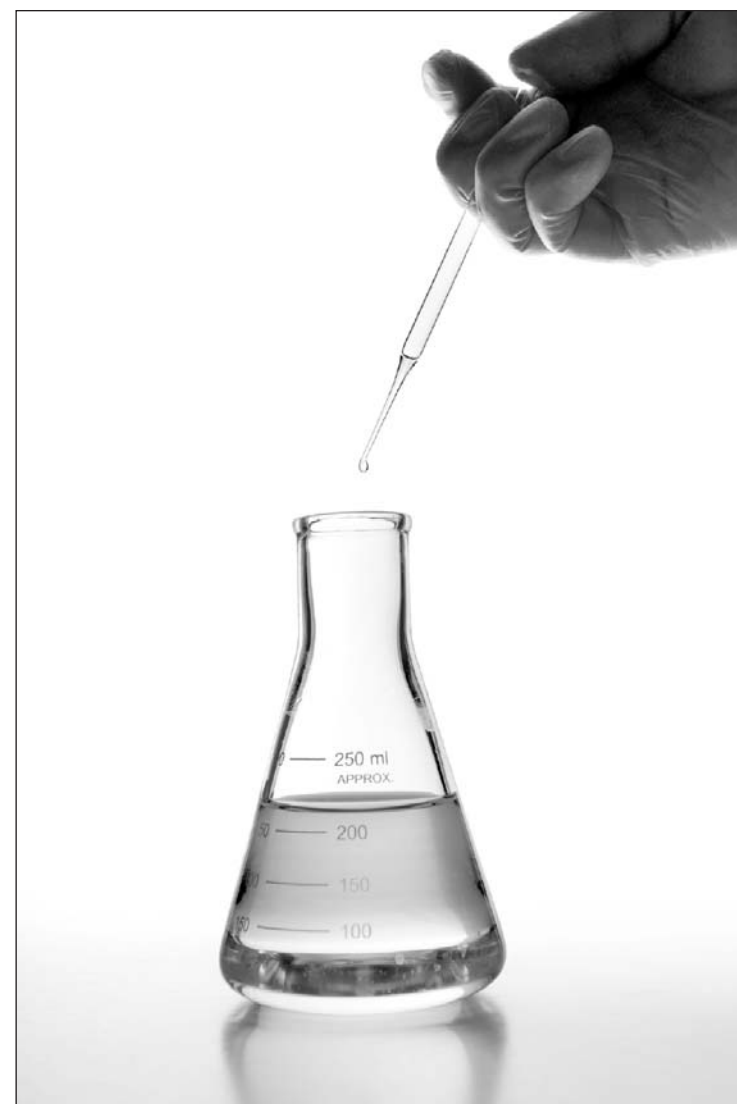
SB 509 contains most of the operative definitions for the new law. "Consumer product" is comprehensively defined to mean "a product

or part of a product that is used, bought, or leased for use by a person for any purpose." The law exempts from the definition dangerous drugs, medical devices, dental restorative materials, the packaging for the previous products, food, pesticides, and mercury-containing lights. The latter is exempt only until Dec. 31, 2011.

AB 1879 confers extremely broad authority on the state Department of Toxic Substance Control. DTSC must adopt implementing regulations by Jan. 1, 2011. The regulations must establish a process to identify and prioritize chemicals or chemical ingredients in consumer products that may be considered as chemicals of concern. This prioritization must take into account the volume of the chemical in California, the potential for exposure, and the potential effects on sensitive populations, infants and children, in the identification and prioritization process. The regulations must establish another process for evaluating chemicals of concern and their potential alternatives to limit exposure or reduce the level of hazard. This alternatives analysis must consider factors such as product function or performance; useful life; materials and resource consumption; water, air, energy, disposal, public health, and economic impacts. The regulations also must specify a range of regulatory responses from no action to product and chemical bans.

Early in 2009, DTSC began work to develop regulations to implement AB 1879. It set up a Wiki on its Web site inviting responses to several questions it posed. DTSC envisioned an electronic town hall type of debate. It also conducted workshops with breakout sessions focusing on various aspects of the AB 1879 charge. It appointed a Green Ribbon Science Panel and sought advice from it. It extended a general invitation to interested parties to meet with Department staff to explore methods to implement the law.

Business, committed to the principles of sustainability, coalesced, seeking a rational, scientific-based process. It proposed regulatory language that established the processes, prioritization and evaluation criteria, and enforcement standards.



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In the fall of 2009, business' hope for a rationally implemented program was dashed when DTSC released what it called its Second Straw Proposal. The Straw Proposal was an amalgamation of ideas expressed to DTSC at workshops and in private meetings.

The Straw Proposal would result in the identification of thousands of chemicals used in hundreds of thousands of consumer products. Manufacturers would be required to conduct alternative assessments for any product containing any of these chemicals at any concentration. The Straw Proposal ignored specific statutory standards for prioritizing chemicals and products. Moreover, it essentially called for banning all products containing a chemical of concern in two to 20 years. It ignored the stated purpose of AB 1879 to "limit exposure or reduce the level of hazard" – a purpose that recognizes incremental progress.

The outcry against the Straw Proposal was swift, strong, and widespread. Even environmental organizations expressed concern. The sheer mass of the proposed implementation threatened to crush the program under its own weight.

DTSC announced that it was backing away from much of the Straw Proposal, but initially it did not describe what it was moving toward. The early indication was that it intended to adopt a regulation that fully complies with the law, but no details were provided.

Recently, DTSC issued a flowchart that describes conceptually the steps involved in identifying and prioritizing chemicals of concern, the products containing such chemicals, the products that must undergo an alternatives assessment, that is, a search for a safer alternative, and the range of regulatory responses that may be imposed.

At this point, only a few clues have been provided about the process for identifying chemicals of concern. It is now known that chemicals meeting certain hazard traits will be selected, but little information has been provided about what hazard traits will be used. No information has been provided about the process that will be instituted to identify which consumer products contain chemicals of concern. The factors that will be used for determining which products will be subject to an alternatives assessment have been identified, but no weight has been assigned to glean the likely priority outcome for any product.

For example, the flowchart lists exposure as a priority or balancing factor for selecting a product, but is it any exposure or an exposure that poses a risk? Will a product be selected because it contains an incidental contaminant that is a chemical of concern, or does it have to be an

intentionally added chemical, present above a de minimus level? If the standard contains a de minimus level, how is that to be defined?

An obviously critical issue is the methodology for conducting the assessment of alternatives. What factors have to be considered? What is the depth of data required to evaluate these factors? Who conducts the assessment? What, if any, review of the assessment is to be conducted? How does the assessment tie in with the range of regulatory response actions?

Also, DTSC has provided few clues about when it will impose certain enforcement actions. The flowchart sets out the range of regulatory responses specified in AB 1879 from no action to developing additional information to assessing chemicals and potential alternatives, labeling, restrictions on use, prohibiting use, controlling access to or limiting exposure, managing end of life, and funding grants to seek safer alternatives. The circumstances that will result in these or potentially other responses remain an open question.

The flowchart has focused attention on these questions, but no answers have yet been provided. DTSC expects to release a detailed outline of the implementing regulation any day now. The time to respond to that outline is expected to be short; however, responses are critical because DTSC intends to move from the outline to a draft regulation only a few weeks later.

When the draft regulation is released, businesses will have to complete an expedited review of the regulation to determine what impact the regulation will have on them, identify provisions that impose an unreasonable burden, and be prepared to engage DTSC and the rest of the California political apparatus to seek changes to the regulation. The Administration is committed to having this regulation in place by the end of 2010, the end of the current Administration. To meet its statutory deadline, it will have to notice formally the adoption of the regulations in early summer at the latest. Businesses need to move at once to prepare for what will be a fast-moving target in the next few weeks.

Businesses will still have an opportunity to influence the regulatory provisions even after the regulation is noticed. However, the provisions will become increasingly less malleable as DTSC proceeds with the rule-making procedure. Accordingly, it is important for businesses to be actively involved now to obtain rationality in the green chemistry program.

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