

# Department of Finance and Administration

## Legislative Impact Statement

**Bill: SB865**

**Bill Subtitle: TO PROVIDE A RIGHT TO ATTORNEY'S FEES FOR TAXPAYERS SEEKING JUDICIAL RELIEF; AND TO AMEND THE TAXPAYER BILL OF RIGHTS TO INCLUDE A RIGHT TO REIMBURSEMENT OF FEES AND OTHER COSTS.**

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**Basic Change :** Sen. Sample

SB865 permits the award of reasonable attorney fees if the taxpayer is the prevailing party and the court finds that the final assessment or final determination of the hearing officer or director was without a reasonable basis in law or in fact or both. The bill provides that interest shall not be assessed on attorney fees. The bill also adds an additional section to the Taxpayer Procedure Act (TPA) to require DFA to reimburse taxpayers for fees and costs if an administrative law judge or the courts determine that DFA's legal position with regard to a tax assessment was not substantially justified.

**Revenue Impact :**

Unknown

**Taxpayer Impact :**

Taxpayers will have an incentive to challenge tax assessments as having no reasonable basis.

**Resources Required :**

None

**Time Required :**

Adequate time provided.

**Procedural Changes :**

None

**Legal Analysis :**

This bill will broaden the award of attorney fees and result in increased litigation. In addition, the attorney's fees provisions are unclear whether an award of fees and costs is discretionary. On page 2, line 25, the bill provides that a taxpayer may be reimbursed for fees and costs while lines 35-36 on page 2 and lines 1-5 on page 3 permits denial of such reimbursement only in very narrow circumstances. It is also unclear if this code section would apply to cases that are settled since it applies to any request for relief including the mere protest of an assessment or refund claim denial. Reimbursement of fees and costs is permitted if DFA's position is not substantially justified (as determined by a hearing officer or the director) and if the taxpayer prevails as to the predominant issues. The terms "substantially justified" and "predominant issues" are undefined in the TPA and in this bill and are subject to a variety of interpretations.

The bill also permits a taxpayer, after conclusion of an administrative proceeding, to present a list of fees and costs to the hearing officer or the director for review and a determination of the fees and costs to be awarded; however, this is outside the scope of a hearing officer's statutory authority under the provisions of the TPA (and is outside the scope of the authority of the director). The bill does not amend the statutory scope of authority provided to the director and to hearing officers under state law nor does it provide a mechanism to permit the Department to investigate or challenge the list of fees and costs other than through a request for revision. Also, this section caps fees and costs at the lesser of the amount spent or \$20,000 and any award of fees and costs are to be paid from funds appropriated to the Revenue Division for this purpose.

This bill could prevent the transparent and efficient administration of the tax system. The attorney fees and costs provisions create an incentive for the Department to settle with a taxpayer to avoid fees and

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costs. Such settlements would deter the issuance of administrative decisions which provide guidance to DFA auditors and staff regarding gray areas of the law. This section would therefore make it less likely that areas of sincere disagreement that could benefit from issuance of an administrative decision on the issues will receive the necessary attention to provide such guidance. Alternatively, this section of the bill also has the potential to discourage settlement for the express purpose of garnering attorney's fees.

It appears that Section 2 of this bill is intended to largely mirror 26 U.S.C. § 7430. However, it should be noted that, while this section largely mirrors the federal law, most provisions implemented at the federal level to control cost have been removed. Provisions that seek to control cost and that have been removed include: provisions that determine such awards to be discretionary, provisions that require taxpayers to exhaust administrative remedies, provisions that exclude litigation and administrative costs that are not allocable to the government but to some other party to the action, and provisions that exclude litigation and administrative costs for portions of administrative or court proceedings (rather than entire proceedings) that are unreasonably protracted by the prevailing party.

Lastly, this section is unnecessary as current administrative processes are already available to allow taxpayers to discuss issues with audit staff as well as DFA management throughout the administrative process from audit through appeal.