Case No. S224476

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

WILLIAMS & FICKETT,
Plaintiff and Appellant,

v.

COUNTY OF FRESNO,

Defendant and Respondent.

Fifth Appellate District, Case No. F068652
Fresno Superior Court Case No. 13CECG00461
Honorable Donald S. Black, Judge

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF OF THE CALIFORNIA STATE ASSOCIATION OF COUNTIES IN SUPPORT OF DEFENDANT AND RESPONDENT COUNTY OF FRESNO

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TO: PRESIDING JUSTICE CANTIL-SAKAUYE OF THE CALIFORNIA SUPREME COURT.

The California State Association of Counties ("CSAC")[1] seeks leave to file the attached amicus brief.

CSAC is a non-profit corporation. The membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties.

A threshold requirement in property tax assessment disputes is that an aggrieved taxpayer must exhaust administrative remedies prior to instituting litigation. The exhaustion requirement conserves judicial resources, facilitates development of a complete record and issues, and maintains comity between the courts and administrative agencies and officers.

The pending case puts at issue whether a potential remedy was available to Appellant at the Assessment Appeals Board ("AAB"). An

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[1] No party or counsel for a party authored the attached brief, in whole or in part. No one made a monetary contribution intended to fund the preparation or submission of this brief.

AAB has broad power to equalize property tax assessments. (Rev. & Tax. Code § 1610.8.) CSAC respectfully submits that a nullity exception is not applicable in view of the facts and procedural posture of this case.

Were a nullity exception recognized given these facts, it would introduce a significant exception to the exhaustion doctrine in a property tax context, and erode the well-established procedure for this type of challenge. (*See, e.g., El Tejon Cattle Co. v. County of San Diego* (1967) 252 Cal.App.2d 449, 456.)

CSAC further argues that Respondent's action was not timely filed, but that this issue need not be reached given Appellant's failure to exhaust administrative remedies before the AAB.

For the foregoing reasons, CSAC respectfully requests that this Court accept the accompanying amicus curiae brief.

DATED: September 9, 2015

Respectfully submitted,

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I.

Introduction

The trial court in this case sustained the demurrer of the County of Fresno to the First Amended Complaint for Refund of Property Taxes ("FAC"). Appellant Williams & Fickett ("Plaintiff") alleges in the FAC that it is entitled to a refund of $86,852., reflecting a claim to a portion of the property taxes it paid for assessment years 1996 through 2001. (2AA 175:24 – 176:5.)

The FAC alleges that the Fresno Assessor first audited Plaintiff's property for assessment years 1994 through 1997, and issued escape assessments for each of those years. (2AA 170, para. 3; 171, paras. 7, 9, 11, and 13.) The Assessor's escape assessment for these years was based upon an assessor's estimate pursuant to Revenue and Taxation Code section 501. (2AA 210; *Domenghini v. County of San Luis Obispo* (1974) 40 Cal.App.3d 689, 694-695, 699.)

The Fresno Assessor again audited the taxpayer's books and records for assessment years 1998 through 2001. The auditor-appraiser determined that the taxpayer did not keep formal accounting records and did not have sufficient and/or competent records to review and evaluate. (2AA 221.) The Assessor's auditor determined in consultation with her supervisor to carry forward the findings from the previous audit, with an adjustment to

reflect the assets deemed to be on hand on January 1, 2001. (2AA 221 [note date of audit summary]; 222.) The auditor confirmed on her audit checklist that in performing her audit she observed and inspected the subject machinery and equipment.

Plaintiff admits that it did not file an application for a reduction of its assessment with the AAB for any of the years in question. (2AA 171, para. 5.) It contends nonetheless that it is entitled to a refund of taxes as a portion of its assessment property "was never owned during the periods in question and some were disposed of after a time within the periods in question." (AA 173:4-5.)

Plaintiff's states that the justification for the $86,852.that it seeks in tax refund is reflected in its refund claim. (2AA 184-185.) Plaintiff's worksheet is found at 2AA 233 that reflects its analysis for assessment years 1994 through 1997.

II.

Argument

A. Plaintiff's Ultimate Claim is that it is Overassessed, and this is a Question within the AAB's Jurisdiction.

1. Overview

California business taxpayers are required to annually report their tangible business property to the local assessor of the county in which the property has situs. The reported property is itemized on a return that

reflects the firm's tangible personal property by property classification, year of acquisition, and original cost. The assessor then values the taxpayer's property beginning with original cost, and adjusts cost to reflect price level changes. (Title 18, Cal. Code of Regs. §6(b).) The adjusted cost is then reduced for depreciation which varies depending upon the property's classification. For instance, property classified as computer property will be provided a more rapid depreciation reduction than property classified as general machinery and equipment.

Later in the assessment process, business taxpayers with sufficient assets will be audited to ensure proper reporting. (Rev. & Tax. Code § 469.) In the pending case, Plaintiff was audited and its accounting records were determined to be to be inadequate. (2AA 209 [". . . Records adequate for audit; No; Insufficient information"].)

Plaintiff's books and records were audited for assessment years 1994 through 1997. Based upon a review of the taxpayer's books, the Auditor estimated that for each of the four years being audited, equipment in the amount of approximately $295,855. was in the taxpayer's possession that was not posted in its records. (2AA 211.) In addition, in the opinion of the auditor, the taxpayer had leased equipment in its possession or control in the amounts of $1,235,623. for 1997, and in the amount of $1,265,172. for each of the years 1994 through 1996, that again was not reflected in the taxpayer's books and records. The amount estimated as related to

capitalized lease equipment is properly attributable to Plaintiff. (Rev. & Tax. Code section 405.)

The Auditor estimated the original cost of Plaintiff's equipment acquisitions for each of the audited years, by year of acquisition. (2AA 211.) He then applied a depreciation factor based upon the estimated year of acquisition, and derived an overall opinion of value Plaintiff's machinery and equipment for assessment year 1994 in the amount of $1,685,500., for 1995 in the amount of $1,631,100; for assessment year 1996 in the amount of $1,497,500., and for 1997 in the amount of $1,319,800. (See Total, FCV [Full Cash Value], at the bottom of 2AA 211.)

These figures tie to the audit summary on 2AA 210 as the full cash value found by the Auditor-Appraiser, Mr. James Aleru, and the difference between the audit value, and the amount contained on the taxpayer's business property statement yielded the amount of escaped assessment

The amount enrolled by the Auditor as an escape assessment was based upon an assessor estimate in light of Plaintiff's inadequate accounting records. (Rev. & Tax. section 501.) An additional ten percent penalty was added to the amount of the escape assessment pursuant to Rev. & Tax. Code section 463 for underreporting.

Plaintiff was notified of its escape assessment in November 1997, and did not take an appeal. (2AA 208.)

2. Plaintiff Alleges Overassessment.

Plaintiff asserts that it was assessed on non-existent property, and on that basis urges that it is entitled to bypass the AAB and proceed to court to seek a refund of a portion of its property tax assessment. (2AA 174:19-23.)

Each of the auditor-appraisers for the two audits that are at the heart of this case made independent professional judgments. Mr. Aleru determined that Plaintiff's books and records were insufficient as a reliable basis to assess the subject property, and consequently made an express estimate of the value of Plaintiff's machinery and equipment. (2AA 210; reference to Rev. & Tax. § 501.)

Plaintiff's theory is that it can return to these tax years more than ten years later, and challenge whether particular items of machinery and equipment were indeed in the taxpayer's possession as of that date. This misses the nature of the assessment.

The Assessor's deputy made an estimate of the entire body of machinery and equipment in Plaintiff's control on the lien date. The property was assessed collectively, based on an estimate, and was ultimately a professional judgment. The applicable presumption is that the assessor properly performed his duty, and the sole remedy for the taxpayer to dispute this valuation judgment was to take a timely appeal. (Rev. & Tax. Code § 469.)

Plaintiff urges that it can challenge the Assessor's judgment of the collective value of its machinery and equipment, years after the fact, on the basis of its own reconstruction of books and records. Plaintiff's effort is too late. At bottom, Plaintiff is arguing that the assessor's value of its machinery and equipment on the lien dates in question was too high. Instead, its remedy was a timely appeal to the AAB, and the Board had full authority at that time to correct the challenged assessment. (Rev. & Tax. Code § 1610.8.)

The second audit again found that Plaintiff's books and records were inadequate as a basis for assessing its property. The auditor-appraiser made a professional judgment to carry over the previous estimates, with an adjustment for what seemed appropriate and verifiable as of January 1, 2001. (2AA 222.) Ms. Houlihan's judgment was reasonable, and Plaintiff had the opportunity to appeal its business property assessments had it felt they were excessive.

3. Plaintiff's Claim Falls Within the Board's Jurisdiction.

The AAB has the jurisdiction to equalize Plaintiff's claim. Revenue and Taxation Code section 1610.8 provides in relevant part:

> . . . the county board shall equalize the assessment of property on the local roll by determining the full value of an individual property, by assessing any taxable property that

has escaped assessment, correcting the amount, number, quantity, or description of property on the local roll, canceling improper assessments, and by reducing or increasing an individual assessment, as provided in this section. . . .

Plaintiff's property was assessed as a single assessment. (*See, e.g., El Tejon Cattle Co. v. County of San Diego* (1967) 252 Cal.App.2d 449, 459.)

Plaintiff's theory, on the other hand, is that it is entitled to bypass the AAB and have the trial court cancel a portion of its assessment on the grounds of "non-existent" property. In effect, Plaintiff would have a court revisit its assessments, hold a trial, and recalculate its tax liability in light of evidence that should have first been presented to the AAB. Plaintiff's claim is ultimately a valuation challenge.

Plaintiff argues in effect that the assessor's estimate of Assessor's Deputy Aleru was excessive, and should be reduced to reflect the true value of its property subject to the audit. Mr. Aleru's estimate was carried over for years 1998 through 2001, and was the basis for these assessments, subject to an adjustment for the 2001 year. Plaintiff's assessments for the years in question can again only be adjusted by revisiting Mr. Aleru's original valuation estimate. This prerogative, however, is reserved to the AAB, and Plaintiff's action is barred for failure to first exhaust its

administrative remedy before the Board. (*Norby Lumber Co. v. County of Madera* (1988) 202 Cal.App.3d 1352, 1362.)

B. Plaintiff Does Not Qualify for a Nullity Exception to the Exhaustion Doctrine.

Plaintiff asserts that it is entitled to bypass the AAB and proceed directly to court on the basis of a nullity exception to the exhaustion doctrine. This Court in *Stenocord v. San Francisco* (1970) 2 Cal.3d 984, defined the element of this narrow exception:

> Ordinarily a taxpayer seeking relief from an erroneous assessment must exhaust available administrative remedies before resorting to the courts. [Citations omitted.] An exception is made when the assessment is a nullity as a matter of law because, for example, the property is tax exempt, nonexistent or outside the jurisdiction [Citations omitted.], and no factual questions exist regarding the valuation of the property which, upon review by the board of equalization, might be resolved in the taxpayer's favor, thereby making further litigation unnecessary [Citations omitted.].

(*Id.*, at p. 987.)

Plaintiff argues that it falls within the scope of the exception and that it had "no interest of any kind in the farm equipment on the applicable lien dates." (Appellant's Answer Brief on the Merits, p. 34.)

The fact is, however, that Plaintiff possessed assessable business property on each of the lien dates that is the subject of this proceeding. Plaintiff's property was the subject of a single assessment for each of the assessment years in question. (Cf., *El Tejon Cattle Co. v. County of San Diego* (1967) 252 Cal.App.2d 449, 459.)

Plaintiff has a direct economic interest in the amount of its business property assessment, and indeed this is the reason it pursues this litigation.

Plaintiff's approach is to focus solely on certain property that it says was not in its possession for the relevant lien dates, but contends was considered by the Fresno Assessor in their audit of its property. Starting from this premise, it maintains that it was assessed on non-existent property. This was the same contention that was raised and rejected in the *El Tejon* case.

Even if Deputy Assessor's Aleru and Houlihan erroneously considered property that should not have been encompassed in their assessment, this would have been the result of the Plaintiff not keeping adequate accounting records. Assuming for sake of argument that the Assessor made such an error, it was incumbent upon Plaintiff to take a timely appeal to the AAB. This would then have presented a valuation

question concerning what the appropriate assessment should have been of Plaintiff's property as correctly described. (Rev. & Tax. § 1610.8.

Plaintiff's nullity argument fails both elements of the *Stenocord* test. It indeed owned assessable property on each of the relevant lien dates, and its claim of overassessment raises valuation issues that are within the exclusive jurisdiction of the AAB.

C. The Issue of the Timeliness of the Refund Claim Need Not be Reached.

Exhaustion of administrative remedies is a condition precedent to suit. (*Westinghouse Elec. Corp. v. County of Los Angeles* (1974) 42 Cal.App.3d 32, 38.) ". . . [F]or purposes of the exhaustion requirement, the filing of a refund claim under section 5097 generally does *not* excuse a taxpayer's failure *first* to file with the local board of equalization an application for assessment reduction under section 1603 ." (*Steinhart v. County of Los Angeles* (2010) 47 Cal.4th 1298, 1308; emphasis in original, footnote omitted.)

It is respectfully submitted that in view of Plaintiff's admitted failure to timely exhaust its remedy at the AAB, and its ownership of assessable business property for each of the years in question, the Court need not reach the issue of the statute of limitations to file a claim for a tax refund.

III.

Conclusion

Plaintiff seeks a statutory remedy pursuant to Revenue and Taxation Code section 5140, but asserts a right to bypass the AAB. It is mistaken. "The rule is that where a right is given and a remedy provided by statute, the remedy so provided must ordinarily be pursued." (*Rojo v. Kliger* (1990) 52 Cal.3d 65, 83; citing *People v. Craycroft* (1852) 2 Cal. 243, 244.)

> . . . In cases appropriate for administrative resolution, the exhaustion requirement serves the important policy interests embodied in the act of resolving disputes and eliminating unlawful employment practices by conciliation [citation omitted], as well as the salutory goals of easing the burden on the court system, maximizing the use of administrative agency expertise and capability to order and monitor corrective measures, and providing a more economical and less formal means of resolving the dispute [citation omitted]. .
>
> . .
>
> (*Rojo v. Kliger, supra,* 52 Cal.3d 65, 83; *see also Wright v. State of California* (2004) 122 Cal.App.4th 659, 666.)

Plaintiff's effort to bypass the AAB on the grounds that its assessment is nullity is ineffective. (*Plaza Hollister Ltd. Partnership v.*

County of San Benito (1999) 72 Cal.App.4th 1, 33 ["[A] claim for refund is an adequate substitute for a request for equalization only in those cases wherein the assessment is totally void as an attempt to tax property not subject to taxation, rather than merely an inaccurate assessment of the value of taxable property. [Citations.]" citing *Stenocord v. City etc. of San Francisco* (1970) 2 Cal.3d 984, 990.)

Plaintiff's assertion that it is entitled to bypass the AAB on the implied ground that its issue raises a question of law is similarly flawed. ". . . exhaustion is not excused merely "because the ultimate legal issues … are better suited for determination by the courts." (*McAllister v. County of Monterey* (2007) 147 Cal.App.4th 253, 276, citing *Department of Personnel Administration v. Superior Court* (1992) 5 Cal.App.4th 155, 169.) Please see also *Sacramento County Deputy Sheriff's Assn. v. County of Sacramento* (1990) 220 Cal.App.3d 280, 287 ("This leaves the trial court's ultimate resolution of the exhaustion question, in essence stating that it might as well rule on the issue because the issue is simply a legal one. [. . .] Such an exception could quickly swallow the rule of exhaustion, given the frequency with which administrative agencies merely apply principles of law laid down by the courts.")

Plaintiffs have an administrative remedy, and they may not proceed to court until such remedy has been properly exhausted. An additional rationale for this doctrine concerns "comity between coequal branches of government." (*Mercury Casualty Co. v. SBE* (1986) 179 Cal.App.3d 34, 39-40, citing *Patane v. Kiddoo* (1985) 167 Cal.App.3d 1207, 1214; *see also, Lund v. Cal. Resources Agency* (1991) 1 Cal.App.4th 1140, 1150.)

Property tax assessment is a responsibility of the executive branch of government. (*Domenghini v. County of San Luis Obispo* (1974) 40

Cal.App.3d 689, 696-697.) It is appropriate that Plaintiff be required to fully exhaust its remedies at the AAB prior to resorting to court.

DATED: September 8, 2015

Respectfully submitted,

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CERTIFICATE OF WORD COUNT PURSUANT TO RULE 8.360

The text of this document consists of 3,045 words as counted by the Microsoft Office Word 2010 program used to generate this document.

DATED: September 8, 2015

Respectfully submitted,

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DECLARATION OF SERVICE

STATE OF CALIFORNIA, County of Los Angeles:

Maria Vong states: I am and at all times herein mentioned have been a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen years and not a party to nor interested in the within action; that my business address is 648 Kenneth Hahn Hall of Administration, 500 West Temple Street, County of Los Angeles, State of California; that I am readily familiar with the business practice of the Los Angeles County Counsel for collection and processing of correspondence for mailing with the United States Postal Service; and that the correspondence would be deposited within the United States Postal Service that same day in the ordinary course of business.

That on September 8, 2015, I served the attached:

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF OF THE CALIFORNIA STATE ASSOCIATION OF COUNTIES IN SUPPORT OF DEFENDANT AND RESPONDENT COUNTY OF FRESNO

upon Interested Parties by depositing copies thereof, enclosed in a sealed envelope and placed for collection and mailing on that date following ordinary business practices in the United States Postal Service, addressed as stated below and on the following page:

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I declare under penalty of perjury that the foregoing is true and correct. Executed on September 8, 2015, at Los Angeles, California

M. Vong

Maria Vong