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SUPREME COURT
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IN THE SUPREME COURT OF CALIFORNIA

KIMBERLY LOEFFLER et al.,

~~*Petitioners,*~~ PLAINTIFFS AND APPELLANTS

v.

TARGET CORPORATION,

~~*Respondent.*~~ DEFENDANT AND RESPONDENT

****

PETITION FOR REVIEW

****

After Decision by the Court of Appeal of the State of California, Second Appellate District, Division Three, Case No. B199287, Affirming a Judgment of the Superior Court, Los Angeles County, Case No. BC30004, The Honorable Michael L. Stern

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PETITION

To the Honorable Chief Justice and the Honorable Associate Justices of the California Supreme Court:

Petitioners respectfully petition for review of the opinion by the Court of Appeal, Second Appellate District, Division Three (Kitching, J., with Klein, P.J. and Aldrich, J., conc.). The Court of Appeal's opinion, published at *Loeffler v. Target Corporation* (Ct. App. 2009) 93 Cal. Rptr. 515, affirmed the order sustaining Target's demurrer. A copy of the decision is attached as an exhibit to this petition.

ISSUES FOR REVIEW

1. Does article XIII, section 32 of the California Constitution bar consumers from filing lawsuits against retailers under California's Unfair Competition Law ("UCL") (Cal. Bus. & Prof. Code §§ 17200 *et seq.*) and Consumers Legal Remedies Act ("CLRA") (Cal. Civ. Code §§ 1750 *et seq.*) for charging sales tax reimbursement on transactions that are not taxable? (No.)

2. Does the California Revenue & Tax Code (Cal. Rev. & T. Code §§ 6001 *et seq.*) bar consumers from filing lawsuits against retailers for charging sales tax reimbursement on transactions that are not taxable? (No.)

INTRODUCTION

California Rule of Court 8.500(b) sets forth the grounds for review by this Court. Rule 8.500(b)(1) provides for review where it is "necessary to secure uniformity of decision or to settle an important rule of law." Both of these criteria are plainly present here.

First, this Court should grant review because the legal issues posed by this appeal are vitally important. Plaintiffs allege that Target violated the UCL and the CLRA by charging them for sales tax reimbursement on transactions that are tax-exempt under California's Tax Code. California's strong, wide-ranging consumer protection statutes were enacted to give consumers remedies when businesses commit unfair or illegal acts that take money from consumers. The UCL, for example, provides that courts may order restitution of "any money . . . which may have been acquired by means of such unfair competition." Bus. & Prof. Code § 17203. The statute refers to "any money," not "any money except for unfair or illegal charges relating to sales tax reimbursement."

It is black-letter law that these statutes are to be read broadly. As this Court said with respect to the UCL, "Its coverage is sweeping, embracing anything that can properly be called a business practice and that at the same time is forbidden by law." *Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co.* (1999) 20 Cal. 4th 163, 180, 83 Cal. Rptr. 2d 548.

The UCL not only covers illegal practices, it also covers *unfair* practices. *Cel-Tech*, 20 Cal. 4th at 180. The CLRA, similarly, is to be "liberally construed" to protect consumers "against unfair and deceptive business practices . . . ." Cal. Civ. Code § 1760.

Until the decision of the Court of Appeal below, no authority had suggested that either the UCL or the CLRA contains an exception to courts' broad authority to remedy and enjoin unlawful and deceptive practices for situations when businesses cheat consumers by falsely imposing "sales tax" where no such tax is due.

However, Target argued—and the Court of Appeal agreed—that a court lacks the power under these statutes to address Target's conduct because of an unrelated provision of the California Constitution. The actual text of that constitutional provision contains no language limiting the rights of consumers against companies that overcharge them. Instead, the provision simply limits the ability of courts to prevent or enjoin the state from collecting tax, and mandates that taxpayers may seek a tax refund only after paying the tax. *See* Cal. Const. art. XIII § 32. Here, Plaintiffs do not seek any injunction against the state, and an award of restitution, damages, or injunctive relief against Target for imposing unlawful charges on its customers would in no way prevent the state from collecting any tax. Nor do (or could) Plaintiffs seek a pre-payment tax refund in violation of section 32, since they are not taxpayers of sales tax. Indeed, prior to the

decision below, no published appellate decision had ever held that article XIII, section 32 was a bar to an action by a non-taxpayer against a private, non-governmental party.

The Attorney General of California has strongly sided with the Petitioners' position on this point. In its *amicus* brief in this case in the Court of Appeal, the Attorney General stated "If appellants can prove their allegations, the activities of the retailer may fall within the purview of California's Unfair Competition Law." A.G. Brief at 20.

Second, this Court should grant review because under the Court of Appeal's interpretation of the law, California consumers will be without any meaningful remedy and retailers will be exculpated from liability under the consumer protection statutes for a large category of deceptive practices. Under the Court of Appeal's holding, a consumer has no right to recover wrongfully charged sales tax reimbursement from a retailer unless ***the retailer*** first seeks a refund of overpaid sales tax from the State Board of Equalization ("SBE" or "Board"). However, even if one assumes (and Plaintiffs have not yet had an opportunity to learn if this is true in this case) that the retailer has paid all sums collected to the Board, the retailer still would have no incentive to sue the Board for a refund of overpaid tax because it would be required to turn over that money to its customers. In the instances where a retailer has charged consumers for sales tax reimbursement but has ***not*** actually paid any money to the state, the retailer

certainly would have no reason to urge the Board to determine whether it has been overcharging its customers in violation of the law.

Under the Court of Appeal's reasoning, therefore, even if a consumer has been wrongfully charged sales tax reimbursement, as a realistic matter such a consumer still would never be able to recover the overpayment. This outcome cannot be reconciled with this Court's holdings in *Javor v. State Bd. of Equalization* (1974) 12 Cal. 3d 790, 117 Cal. Rptr. 305, and *Decorative Carpets, Inc. v. State Bd. of Equalization* (1962) 58 Cal. 2d 252, 23 Cal. Rptr. 589, which established that consumers have a right to receive refunds of wrongfully charged sales tax reimbursement that is distinct from the rights of retailers.

Third, this Court's review is necessary to secure uniformity of decision. Prior to the decision below, courts throughout California had held that consumers may bring class action claims against retailers for wrongful sales tax reimbursement charges. *See, e.g., Dell, Inc. v. Super. Ct. (Mohan)* (Ct. App. 2008) 159 Cal. App. 4th 911, 71 Cal. Rptr. 3d 905. If the decision below stands, courts will effectively lose their ability to resolve disputes about sales tax reimbursement between customers and retailers. This result would eviscerate the long-standing rule that courts, not the SBE, have the ultimate authority to interpret the Tax Code. *See Yamaha Corp. of Am. v. State Bd. of Equalization* (1998) 19 Cal. 4th 1, 7–8, 78 Cal. Rptr. 2d

1 ("[I]t is the duty of this court . . . to state the true meaning of the statute finally and conclusively . . . .") (quotation omitted).

In sum, the Court should grant this Petition and hear this case because the radical holding of the Court of Appeal not only stands in opposition to the holdings of a number of previous California cases, but also because it creates a harmful new rule. If permitted to stand, the Court of Appeal's decision will gut the strong consumer protection statutes enacted by the Legislature, leave California consumers with no remedy against businesses that impose certain kinds of unfair and deceptive charges, and strip this state's courts of a longstanding and important responsibility.

STATEMENT OF THE CASE

A. Factual Background and Procedural History

Plaintiffs Kimberly Loeffler and Azucema Lemus allege that defendant Target imposed a 8.25% "sales tax" on their purchases of hot coffee drinks "to go" or for "take out" from Target stores in California, despite a provision in California's Tax Code that exempts these products from sales tax. They filed this putative class action on October 6, 2006, and filed a First Amended Complaint on November 28, 2006 and a Second Amended Complaint on March 2, 2007, seeking restitution, damages, and an injunction prohibiting Target from imposing the unlawful charges, on

their own behalf and on behalf of all other similarly-situated California residents.

Plaintiffs assert causes of action for (1) violation of California's Unfair Competition Law ("UCL") (Cal. Bus. & Prof. Code §§ 17200 *et seq.*); (2) violation of the Consumers Legal Remedies Act ("CLRA") (Cal. Civ. Code §§ 1750 *et seq.*); (3) violation of California Revenue and Tax Code § 6359; and (4) money had and received.[1] Significantly, there is no evidence in the record as to whether Target has retained the amounts it charged customers as "sales tax" or remitted them to the state.

Target demurred, and the demurrer was sustained by the Superior Court on April 9, 2007. In its oral ruling, the court stated:

> The question is . . . whether you're an appropriate complainant pursuant to the statutory [scheme]. . . .
>
> As far as I could determine, neither the statutory [scheme] nor any case authority allows you to go forward with this type of action unless there's been, at the very least . . . some request to the tax court, or probably the statute is silent on this action by the tax court allowing you to . . . file a taxpayer's action for . . . relief from this kind of tax.

RT B-2:3–18. The trial court entered judgment on April 9, 2007. Plaintiffs timely appealed on May 17, 2007.

The Court of Appeal affirmed the judgment of the Superior Court on May 12, 2009. The court acknowledged that, as consumers, Plaintiffs are

[1] Plaintiffs originally asserted additional causes of action for conversion and negligent misrepresentation, but did not appeal the dismissal of those claims.

not taxpayers of sales tax, and thus have no standing under the Tax Code to file a claim or a lawsuit against the Board for a refund of sales tax. *Loeffler*, 93 Cal. Rptr. at 524. The court then held, however, that consumers cannot obtain refunds of wrongly charged sales tax ***reimbursements*** by bringing a lawsuit against a ***retailer***.

First, the court held that Plaintiffs have no private right of action under the Tax Code against Target for imposing unlawful sales tax reimbursement charges, because only the Board has the power to determine whether a retailer has collected excess sales tax reimbursement. *Id.* at 524–25. The court held that a customer cannot recover for these charges unless the Board has made such a determination, either based on a retailer's claim for a refund of overpaid tax or its own review; or after a retailer prevails in a suit against the Board for a refund. *Id.* at 518. "Neither of these circumstances exists here," the court concluded. "Plaintiffs are therefore not entitled to a refund of alleged excess sales tax reimbursement collected by Target under the statutory scheme . . . ." *Id.* at 519.

Second, the court held that Plaintiffs' claims for restitution, damages, and injunctive relief under the UCL and CLRA, as well as their claim for money had and received, are barred by article XIII, section 32 of the California Constitution and section 6931 of the Tax Code, which preclude courts from enjoining the collection of tax. The court stated that Plaintiffs were not permitted to "seek an injunction, damages and

restitution without providing the Board with an opportunity to administratively determine the merits of Plaintiffs' interpretation of the sales tax laws." *Id.* at 529. The court admitted that "the Board's interpretation of the tax laws does not bind the courts," but concluded that permitting consumers to "circumvent the claims process" would undermine the policy of Tax Code section 6932, which is to "give the Board an opportunity to correct any mistakes." *Id.*

This Petition follows.

B. Overview of Sales Tax and Sales Tax Reimbursement

1. Sales Tax

The State of California imposes sales tax on all retailers "[f]or the privilege of selling tangible personal property at retail." Cal. Rev. & T. Code § 6051. In other words, sales tax is "imposed upon the seller, not the buyer." *Gen. Elec. Co. v. State Bd. of Equalization* (1952) 111 Cal. App. 2d 180, 185. Retailers, not their customers, are "taxpayers" for purposes of sales tax.

In the event a retailer has remitted sales tax to the SBE that was not owed, or has paid more sales tax than was owed (for example, if a retailer has remitted sales tax to the state based on sales of products that are not properly subject to sales tax), the retailer may seek a refund from the state. To seek such a refund, the retailer must first file an administrative claim with the Board under the provisions in Chapter 7, Article 1 of the Tax

Code. *See* Cal. Rev. & T. Code §§ 6901 *et seq.* If the Board denies the administrative claim, the retailer may bring a suit against the Board for a sales tax refund under Chapter 7, Article 2 of the Tax Code. *See* Cal. Rev. & T. Code § 6932.

The California Constitution bars courts from enjoining or preventing the state from collecting tax. Art. XIII, § 32. Therefore, a retailer may not contest the validity of sales tax in court unless the retailer has first remitted the tax to the state. *See State Bd. of Equalization v. Super. Ct. of Los Angeles (O'Hara & Kendall Aviation, Inc.)* (1985) 39 Cal. 3d 633, 639, 217 Cal. Rptr. 238.

2. Sales Tax Reimbursement

California law does not require retailers to charge their customers for sales tax. Retailers are permitted, however, to pass the costs of sales tax on to customers by imposing a "sales tax reimbursement" charge on taxable transactions. Whether a retailer may add a sales tax reimbursement charge to a particular transaction depends "solely upon the terms of agreement of sale" between the retailer and the customer (normally the purchase receipt). Cal. Civ. Code § 1656.1.

The Tax Code provides that if a retailer has imposed a sales tax reimbursement charge on a customer for an amount that is not taxable, that amount "shall be returned by the person [the retailer] to the customer upon notification by the Board of Equalization or by the customer that such

excess has been ascertained." Cal. Rev. & T. Code § 6901.5. If the retailer fails or refuses to return the amount to a customer who has paid it, the Tax Code provides that "the amount so paid, if knowingly or mistakenly computed by the person upon an amount that is not taxable . . . shall be remitted by that person to this state." *Id.*; *see also* Cal. Civ. Code Regs. § 1700 (providing procedure for retailers to refund excess sales tax reimbursement charges to customers if the retailer "has not already made sales tax reimbursement refunds to each customer but desires to do so, rather than incur an obligation to the state").

ARGUMENT

I. THE COURT OF APPEAL ERRED BY HOLDING CALIFORNIA'S CONSUMER PROTECTION STATUTES UNCONSTITUTIONAL AS APPLIED TO PLAINTIFFS' CLAIMS.

A. Courts Have Broad Authority Under California's Consumer Protection Statutes to Provide Restitution and Other Remedies to Consumers Who Are Unlawfully or Unfairly Charged Sums that They Do Not Rightfully Owe.

The plaintiffs in this case raise claims under two landmark California consumer protection laws: the CLRA and the UCL. Each of these statutes provides remedies for the wrongs alleged in this case, and neither of them has any exception for deceptive acts that relate to sales taxes.

Under the UCL, a plaintiff is entitled to injunctive relief and restitution where an "unlawful, unfair or fraudulent" business act or

practice has occurred. The sweeping nature of the UCL is clear from its extremely broad language. It specifically provides that courts may order restitution of "***any money*** . . . which may have been acquired by means of such unfair competition." Cal. Bus. & Prof. Code § 17203 (emphasis added). The UCL does not say "any money except for funds wrongfully charged for sales tax reimbursement" or contain any other such limitation. Instead, the statute uses the broadest term imaginable: "any."

As this Court has explained, "[b]ecause Business and Professions Code section 17200 is written in the disjunctive, it establishes three varieties of unfair competition—acts or practices which are unlawful, or unfair, or fraudulent. In other words, a practice is prohibited as 'unfair' or 'deceptive' even if not 'unlawful' and vice versa." *Cel-Tech Commc'ns*, 20 Cal. 4th at 180 (quotation omitted). In *Cel-Tech*, this Court set forth why the scope of the UCL has always been intended to be quite broad:

> [T]he unfair competition law's scope is broad. Unlike the Unfair Practices Act, it does not proscribe specific practices. Rather . . . it defines "unfair competition" to include "any unlawful, unfair or fraudulent business act or practice." Its coverage is sweeping, embracing anything that can properly be called a business practice and that at the same time is forbidden by law. It governs anti-competitive business practices as well as injuries to consumers, and has as a major purpose "the preservation of fair business competition."
>
> The unfair competition law . . . has a broader scope for a reason. The Legislature . . . intended by this sweeping language to permit tribunals to enjoin on-going wrongful business conduct in whatever context such activity might occur. Indeed, . . . the section was intentionally framed in its

> broad sweeping language, precisely to enable judicial tribunals to deal with the innumerable' new schemes which the fertility of man's invention would contrive.

Id. at 180–81 (internal citations and quotations omitted). A recent decision of this Court reaffirmed the importance of UCL actions:

> [C]onsumer class actions and representative UCL actions serve important roles in the enforcement of consumers' rights. [They] make it economically feasible to sue when individual claims are too small to justify the expense of litigation, and thereby encourage attorneys to undertake private enforcement actions. Through the UCL a plaintiff may obtain restitution and/or injunctive relief against unfair or unlawful practices in order to protect the public and restore to the parties in interest money or property taken by means of unfair competition. These actions supplement the efforts of law enforcement and regulatory agencies. This court has repeatedly recognized the importance of these private enforcement efforts.

In re Tobacco II Cases (May 18, 2009) --- Cal. Rptr. 3d ---, No. S147345, 2009 WL 1362556 at *6 (quotation omitted). Furthermore, "Class actions have often been the vehicle through which UCL actions have been brought." *Id.*

As set forth above, Petitioners here allege that Target falsely labeled and collected from Petitioners and other customers a charge for sales tax when no sales tax was owed. Seeking restitution of such wrongfully charged sums is a classic type of UCL claim.

The UCL "'borrows' from other laws, treating violations of those laws as unlawful practices independently actionable." *Rothschild v. Tyco Int'l (US), Inc.* (Ct. App. 2000) 83 Cal. App. 4th 488, 493–94, 99 Cal. Rptr.

2d 721. "Virtually any federal, State, or local law can serve as the predicate for an action under § 17200 based on unlawful business practices." *Gemisys Corp. v. Phoenix American, Inc.* (N.D. Cal. 1999) 186 F.R.D. 551, 564. There is no suggestion in the statute or any of the case law interpreting it—before the opinion issued below—that the phrase "virtually any law" would not include relief for consumers who are charged sales tax reimbursement for sums that are not properly owed.

There are many circumstances where the UCL creates causes of action for violations of statutes that do not do so themselves. *See Diaz v. Allstate Ins. Group* (C.D. Cal. 1998) 185 F.R.D. 581, 594 ("laws that have been enforced under § 17200's 'unlawful' prong include state anti-discrimination laws, environmental protection laws, state labor laws, and state vehicle laws"); *Haskell v. Time, Inc.* (E.D. Cal. 1997) 965 F. Supp. 1398, 1402 ("A private plaintiff may bring an action under §§ 17200 and 17204 to redress any unlawful business practice, including an unlawful practice that does not otherwise permit a private right of action, such as a criminal statute."). Moreover, the remedies under § 17200 are cumulative to other remedies. *Schnall v. Hertz Corp.* (Ct. App. 2000) 78 Cal. App. 4th 1144, 1152–53, 93 Cal. Rptr. 2d 439.

The foregoing authorities establish that the UCL has a broad scope, encompassing a wide range of unfair and illegal acts, and borrowing substance from so many different statutes that it has been described as

creating claims for "virtually any" statute. The Court of Appeal's invention of a major exception to this statute, without any serious discussion of the history or scope of the UCL, stands in sharp contrast to all of these cases.

The UCL empowers a court to make "such orders or judgments . . . as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of" unfair competition. Bus. & Prof. Code § 17203. The court's equitable imperative "is to restore the status quo by returning to the plaintiff funds in which he or she has an ownership interest." *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal. 4th 1134, 1149, 131 Cal. Rptr. 2d 29. Restitution under Section 17203 "is not solely intended to benefit the victims by the return of money, but instead is designed to penalize a defendant for past unlawful conduct and thereby deter future violations." *People ex rel. Kennedy v. Beaumont Investments* (Ct. App. 2003) 111 Cal. App. 4th 102, 135, 3 Cal. Rptr. 3d 429 (internal quotes and citations omitted); *see also Day v. AT&T Corp.* (Ct. App. 1998) 63 Cal. App. 4th 325, 329, 74 Cal. Rptr. 2d 55 (UCL's remedy provisions serve the purpose of "returning to the plaintiff funds in which he or she has an ownership interest")

The CLRA, likewise, is a broad remedial statute aimed at protecting consumers from deceptive business practices. As the preamble to it states:

> This title shall be liberally construed and applied to promote its underlying purposes, which are to protect consumers against unfair and deceptive business practices and to provide efficient and economical procedures to secure such protection.

Cal. Civ. Code § 1760; *see also Broughton v. Cigna Healthplans* (1999) 21 Cal. 4th 1066, 1077, 90 Cal. Rptr. 2d 334 ("The CLRA was enacted in an attempt to alleviate social and economic problems stemming from deceptive business practices."). The CLRA prohibits nearly twenty different deceptive practices, including misrepresenting the source, characteristics, use, benefits or status of goods and services, falsely advertising goods or services, etc. *See* Cal. Civ. Code § 1770.

The CLRA contains expansive liability and remedial provisions designed to broaden liability and impose comprehensive legal and equitable remedies for scores of separate types of misrepresentation. For example, it contains relaxed class certification provisions, as well as a prohibition against summary judgment motions. *See* Cal. Civ. Code § 1781. The remedies available under the CLRA include compensatory damages, punitive damages and special penalties, as well as injunctive relief and restitution. *See* Cal. Civ. Code § 1780; *Linder v. Thrifty Oil Co.* (2000) 23 Cal. 4th 429, 437–38, 97 Cal. Rptr. 2d 179.

The remedies of the CLRA are expressly "not exclusive" but rather are "in addition to any other procedures or remedies . . . in any other law." Cal. Civ. Code § 1752. The statute also includes a strong anti-waiver

provision. Civil Code section 1751 provides that "[a]ny waiver by a consumer of the provisions of this title is contrary to public policy and shall be unenforceable and void." The expanse of the CLRA is a large part of the reason courts have recognized that "California's consumer protection laws are among the strongest in the country." *Wershba v. Apple Computer, Inc.* (Ct. App. 2001) 91 Cal. App. 4th 224, 242, 110 Cal. Rptr. 2d 145.

B. The Constitution Does Not Bar Plaintiffs' Claims Because This is Not a Tax Refund Case and Would Not Enjoin or Prevent the State from Collecting Any Tax.

In spite of the breadth of California's consumer protection statutes, the court below held that they are unconstitutional as applied to Plaintiffs' claims, because the particular wrongful charges at issue here were imposed under the guise of sales tax reimbursement. The court created this new exception based on article XIII, section 32 of the California Constitution, which provides:

> No legal or equitable process shall issue in any proceeding in any court against this State or any officer thereof to prevent or enjoin the collection of any tax. After payment of a tax claimed to be illegal, an action may be maintained to recover the tax paid, with interest, in such a manner as may be provided by the Legislature.

Cal. Const. art XIII, § 32.[2] This constitutional bar is plainly inapplicable to Plaintiffs' claims.

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[2] Similar language in the Tax Code provides: "No injunction or writ of mandate or other legal or equitable process shall issue in any suit, action or proceeding in any court against this State or against any officer of the State to prevent or enjoin

First, by its terms, section 32 "applies only to actions against the ***state***." *Pacific Gas & Elec. Co. v. State Bd. of Equalization* (1980) 27 Cal. 3d 277, 281 n.6, 165 Cal. Rptr. 122 (emphasis added).[3] "When the language of a statute or constitutional provision is clear and unambiguous, judicial construction is not necessary and the court should not engage in it." *Agnew v. State Bd. of Equalization* (1999) 21 Cal. 4th 310, 323, 87 Cal. Rptr. 2d 423. Here, Plaintiffs have simply brought claims against a private corporation. They have no standing to file a tax refund claim or lawsuit against the state, since they are not taxpayers of sales tax, and the state is not a party to this action.

Second, section 32 is irrelevant here because it bars only actions that would "enjoin or prevent the collection of any tax" before that tax is paid. As this Court has explained, section 32 is intended to prohibit "prepayment judicial declarations or findings which would impede the prompt collection of a tax." *State Bd. of Equalization*, 39 Cal. 3d at 639. As such, "a ***taxpayer*** may not go into court and obtain adjudication of the validity of a tax which is due but not yet paid." *Id.* at 638 (emphasis added); *see also California Logistics, Inc. v. State* (Ct. App. 2008) 161 Cal. App. 4th 242,

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the collection under this part of any tax or any amount of tax required to be collected." Cal. Rev. & T. Code § 6931.

[3] Notably, the court below recently extended section 32 beyond a claim against the state in another case, further demonstrating that this Court's review is warranted. *Ardon v. City of Los Angeles* (Ct. App. 2009) 94 Cal. Rptr. 3d 245, 2009 WL 1479168 at *9.

247, 73 Cal. Rptr. 3d 825 (section 32 effectively imposes a "pay first, litigate later" requirement on taxpayers). But no appellate court in California had previously held that section 32 bars a person who is indisputably not a taxpayer from gaining access to court.

To the extent that "[t]he policy behind section 32 is to allow revenue collection to continue during litigation so that essential public services depending on the funds are not unnecessarily interrupted," *Pacific Gas & Elec. Co. v. State Bd. of Equalization* (1980) 27 Cal. 3d 277, 283, 165 Cal. Rptr. 122, that policy is not undermined by this lawsuit. A determination of the merits of this case will not affect the SBE's ability to collect taxes owed by Target.

Finally, section 32 also does not apply because this case is not "an action . . . to recover the tax paid" by a taxpayer. Cal. Const. art. XIII § 32; *see also Woosley v. State of California* (1992) 3 Cal. 4th 758, 789, 13 Cal. Rptr. 2d 30 (explaining that section 32 "provides that actions for ***tax refunds*** must be brought in the manner prescribed by the Legislature") (emphasis added). Plaintiffs do not—and could not—seek a tax refund, because they are not taxpayers of sales tax. Thus, a court decision in favor of Plaintiffs would in no way "expand[] the methods for seeking ***tax refunds*** expressly provided by the Legislature." *Woosley*, 3 Cal. 4th at 792 (emphasis added).

In sum, a court decision enjoining Target from imposing wrongful charges or requiring Target to pay restitution and damages to customers whom it has wrongfully charged would not enjoin or prevent the state from collecting taxes nor expand the Legislature's remedies for tax refunds. Therefore, Plaintiffs' claims are in no way barred by the California Constitution or its corollary in Tax Code § 6931.[4] *See Agnew*, 21 Cal. 4th at 327 (Section 6931 does not bar claim not barred by Constitution).

C. The California Tax Code Does Not Bar Plaintiffs' Claims.

Nor does the Tax Code bar consumers from bringing claims against a retailer. The Tax Code governs the relationship between taxpayers and the state, and contains no language barring a consumer class action against a retailer. Nonetheless, the Court of Appeal held that permitting Plaintiffs' lawsuit against Target to proceed would be tantamount to "circumventing the claims process," which would "undermine[] the policy underlying section 6932, which is to give the Board an opportunity to correct any mistakes . . . ." *Loeffler*, 93 Cal. Rptr. 3d at 529.

As explained in the Statement of the Case, however, the "claims process" permits only a ***taxpayer***—here, the retailer—to file a claim for a refund of sales tax, and, if that is not successful, to bring a lawsuit against the SBE. There is no provision that even permits (let alone requires)

[4] By the same reasoning, Plaintiffs' claim for money had and received is not constitutionally barred.

consumers to file a claim directly with the SBE. Therefore, the requirement that the claims process be exhausted before a lawsuit can be filed only applies to parties who have a claims process to exhaust: the taxpayers. See *Agnew*, 21 Cal. 4th at 320 (challenge to tax policy that was not subject to review by Board through administrative refund procedure was properly reviewable by court in first instance).

Indeed, the code's only provision referencing sales tax reimbursements evidences a legislative intent to permit customers to recover these charges from a retailer. *See* Cal. Rev. & T. Code § 6901.5 (providing that such amounts "shall be returned by the person to the customer upon notification by the Board of Equalization or by the customer that such excess has been ascertained"); *see also Javor*, 12 Cal. 3d at 802 (holding under predecessor to § 6901.5 that in certain circumstances "a customer, who has erroneously paid an excessive sales tax reimbursement to his retailer who has in turn paid this money to the Board, may join the Board as a party to ***his suit for recovery against the retailer***.") (emphasis added).

II. THE COURT OF APPEAL'S HOLDING WOULD LEAVE CALIFORNIA CONSUMERS WITH NO REMEDY AGAINST RETAILERS THAT WRONGFULLY IMPOSE SALES TAX REIMBURSEMENT CHARGES.

As the court below recognized, because consumers are not taxpayers under the state sales Tax Code, there is no provision allowing them to file claims for a sales tax refund with the SBE. Likewise, because the filing of an administrative claim with the SBE is a prerequisite to bringing a suit against the SBE, consumers lack standing to bring such a suit. Thus, Plaintiffs are precluded from seeking relief directly from the state.

The Court of Appeal held, however, that consumers do not need to be able to seek relief from retailers, because they can obtain a refund of excess sales tax reimbursement under certain circumstances. Those circumstances, according to the court, are: (1) the Board determines, based on a retailer's claim for a refund of overpaid tax or its own review, that excess sales tax reimbursement has been collected; or (2) a retailer prevails in a suit against the Board for a refund of overpaid sales tax. *Loeffler*, 93 Cal. Rptr. at 518.

However, there is no evidence that either of these scenarios would provide any significant number of consumers a remedy.

A. Retailers Do Not Adequately Represent the Interests of Consumers.

The Court of Appeal suggests that consumers may recover from retailers if the retailers exhaust their administrative remedies by seeking a

refund of overpaid tax from the state. But this Court has recognized that there is a sharp conflict of interest between retailers and their customers when it comes to tax refunds.

In *Decorative Carpets*, a retailer filed a lawsuit against the SBE seeking a refund of sales taxes that it alleged it had overpaid to the state. 58 Cal. 2d at 253–54. Although it had charged its customers for the sales tax, the retailer admitted that it was "seeking the refund for itself only and d[id] not intend to pass it on to these customers." *Id.* at 254. The Court noted that the state was not obligated to "mak[e] refunds to the taxpayer's customers." *Id.* at 255. However, the Court explained:

> To allow plaintiff a refund without requiring it to repay its customers the amounts erroneously collected from them would sanction a misuse of the sales tax by a retailer for his private gain.

Id. Therefore, the Court directed that the retailer could only receive the refund of sales tax "if it submits proof satisfactory to the court that the refund will be returned to plaintiff's customers from whom the excess payments were erroneously collected." *Id.* at 256.

The Court again recognized that the interests of retailers in tax refund proceedings are adverse to their customers in *Javor v. State Board of Equalization*. In *Javor*, a consumer brought a class action against several automobile retailers and the SBE, alleging that the retailers had failed to credit their purchases for the portion of sales tax reimbursement they paid

on refunded federal excise taxes. 12 Cal. 3d at 793–94. As in the instant case, it was not known whether the retailers had "paid said sales tax to the Board, or have retained it, or owe it to the Board." *Id.* at 794. In holding that customers could enforce their rights by compelling retailers who had remitted the money to the state to claim refunds from the Board, the Court noted that the procedures in the Tax Code permitting retailers to seek refunds did not adequately represent the interests of consumers:

> Defendant retailers are under no statutory obligation to claim any refunds from the Board for the benefit of plaintiff and have no financial interest in doing so. Defendant Board is under no statutory obligation to voluntarily refund said taxes to plaintiff and has no financial interest in doing so.

Id. at 795. The Court further explained:

> Under the procedure set up by the Board the retailer is the only one who can obtain a refund from the Board; yet, since the retailer cannot retain the refund himself, but must pay it over to his customer, the retailer has no particular incentive to request the refund on his own.

Id. at 801. While *Javor* was addressing a provision of the Tax Code not at issue in this case, the Court's concern with consumers' rights is equally applicable here. It is clear from *Javor* and *Decorative Carpets* that consumers cannot rely on retailers to exhaust their administrative remedies and seek refunds on their behalf when those retailers have remitted unlawfully collected sales tax reimbursement to the state.

Furthermore, a retailer that has wrongly imposed sales tax on customers but has ***not*** remitted it to the state would have no claim for a

refund, and it is difficult to imagine that such a retailer would have any reason to voluntarily report its unlawful behavior to the SBE. Meanwhile, as long as the retailer is not underpaying sales tax, the SBE would have no reason to audit or investigate the retailer's relationships with its customers. Thus, under the Court of Appeal's holding, consumers would have no remedy even if a retailer intentionally charged customers non-existent "tax" and kept it for profit—a scenario which may very well be present here, as there is no evidence in the record as to what Target did with the funds it wrongfully collected.

B. The SBE Does Not Adequately Represent the Interests of Consumers.

The court below also assumed that a consumer may notify the SBE that she has been overcharged sales tax reimbursement, and that the SBE may then, on its own accord, decide to investigate the problem.[5] But even a cursory examination makes clear that this process is wholly inadequate to protect the rights of consumers.

First, in order for the court's assumption to be correct, a significant number of consumers would have to realize that they had been wrongly charged for sales tax reimbursement. Even if numerous customers

[5] In support of this speculation, the Court of Appeal cites two provisions of the Tax Code, neither of which obligate the SBE to consider whether a consumer is entitled to a refund from a retailer. *See* § 6481 (authorizing SBE to determine the proper amount of tax to be paid based on information other than the tax return); § 7054 (authorizing SBE to verify the accuracy of tax returns). *Loeffler*, 93 Cal. Rptr. at 518.

suspected that they had been wrongfully charged, it is unlikely that they would be able to determine whether they had a legal basis for this suspicion. It is even less likely that a significant number of these customers would be sufficiently motivated and informed that they would report the problem to the SBE. As this Court has recognized, when consumers suffer individually small losses, "[i]ndividual actions by each of the defrauded consumers is often impracticable because the amount of individual recovery would be insufficient to justify bringing a separate action." *Vasquez v. Superior Court* (1971) 4 Cal. 3d 800, 808, 94 Cal. Rptr. 796. As such, this Court has "affirmed the principle that defendants should not profit from their wrongdoing simply because their conduct harmed large numbers of people in small amounts instead of small numbers of people in large amounts." *Linder*, 23 Cal. 4th at 445.

Moreover, even if an occasional motivated consumer did contact the SBE, there is no evidence in the record that the SBE ever, let alone routinely, requires retailers to issue refunds to wrongfully charged customers. As this Court has recognized, the SBE "is under no statutory obligation to voluntarily refund said taxes to [non-taxpayers] and has no financial interest in doing so." *Javor*, 12 Cal. 3d at 795. And if the retailer has already remitted the wrongfully-charged sums to the SBE, there would be no reason for the SBE to audit or investigate that retailer's tax payments.

A similar system was criticized by this Court for failing to protect consumers' rights:

> The entire burden is upon the customer. . . . The Board has not required the retailer to notify his customer that the refund is due and owing, even though the retailer has all the necessary information. In short under the procedure which it has established, the Board is very likely to become enriched at the expense of the customer to whom the amount of the excessive tax belongs.

Javor, 12 Cal. 3d at 801–02.

The bottom line is that the Court of Appeal's decision leaves consumers with no realistic or effective remedy, even if they are charged sums for tax on an item for which no tax is owed and the retailer simply keeps the overcharge.

III. THE RULING OF THE COURT BELOW EFFECTIVELY DIVESTS COURTS OF THEIR LONGSTANDING AUTHORITY TO RESOLVE SALES TAX REIMBURSEMENT DISPUTES BETWEEN RETAILERS AND CONSUMERS.

A. This Court Has Long Held that Courts Have the Ultimate Authority to Interpret and Enforce the Tax Code.

As this Court has long recognized, the courts—not the SBE—have the ultimate authority to determine whether tax is owed with respect to any given item. As this Court stated in *Yamaha v. State Board of Equalization*:

> [I]t is the duty of this court . . . to state the true meaning of the statute finally and conclusively, even though this requires the overthrow of an earlier erroneous administrative construction. The ultimate interpretation of a statute is an exercise of the judicial power . . . conferred upon the courts by the Constitution . . . .

19 Cal. 4th at 7 (*quoting Bodingson Mfg. Co. v. California Emp. Com.* (1941) 17 Cal. 2d 321) (holding that the SBE's annotations of tax consequences were not dispositive of whether a retailer owed sales tax to the state on particular transactions); *Preston v. State Bd. of Equalization* (2001) 25 Cal. 4th 197, 219 n. 6, 105 Cal. Rptr. 2d 407 ("agency interpretations are not binding or necessarily even authoritative") (citation omitted); *Borders Online, LLC v. State Bd. of Equalization* (Ct. App. 2005) 129 Cal. App. 4th 1179, 1193, 29 Cal. Rptr. 3d 176 ("court independently determines the meaning of a statute"); *Sea World, Inc. v. County of San Diego* (Ct. App. 1994) 27 Cal. App. 4th 1390, 1406, 33 Cal. Rptr. 2d 194 ("[a]lthough the [SBE] letters also arguably provide some support . . ., it is our duty and not that of the SBE to construe the true meaning of [the statute]").

Thus, this Court has not hesitated to reject the SBE's interpretation of a sales tax exemption where "a consideration of but one of the consequences of the Board's interpretation of the sales tax laws . . . demonstrates the unsound and arbitrary nature of that interpretation." *Ontario Community Found., Inc. v. State Bd. of Equalization* (1984) 35 Cal. 3d 811, 822, 201 Cal. Rptr. 165.

B. Under the Court of Appeal's Holding, Few If Any Disputes Between Retailers and Customers About Sales Tax Reimbursements Would Ever Reach the Courts.

As set forth in Part II above, if the Court of Appeal's decision stands as the law in California, it will have the practical effect of eviscerating consumers' ability to bring challenges to wrongfully imposed sales tax reimbursement charges. While many disputes (as cited above) are between retailers and the SBE, in many other cases the only truly aggrieved party will be the consumer. The ruling of the court below would strip the majority of these cases out of the court system.

In this respect, the decision below is a significant change from the past practice in California. In a number of cases, courts applying California law have exercised jurisdiction over claims by consumers against retailers in order to interpret the Tax Code. For example, in *Dell Inc. v. Superior Court*, consumers filed a putative class action under the UCL and CLRA alleging that Dell had improperly charged them sales tax on optional service contracts sold with computers. 159 Cal. App. 4th at 916. Like Plaintiffs here, they sought restitution, damages, attorneys' fees, and an order enjoining the retailer from continuing to impose the charges. *Id.* at 920. Despite the fact that Dell had not, prior to the lawsuit, sought any determination by the SBE as to whether its tax was proper, the Superior Court assumed jurisdiction and concluded that Dell's sales of service contracts were not subject to tax. *Id.* at 917. On appeal, after analyzing the

Tax Code, the Court of Appeal affirmed that "the proper approach under California law is to tax the computer (tangible personal property) and not the service contract (service or intangible property)." *Id.* at 930.

Likewise, in *Laster v. T-Mobile USA, Inc.* (S.D. Cal. Aug. 11, 2008) No. 05cv1167 DMS (AJB), 2008 WL 5216255, the court held that consumers could bring claims under the UCL and CLRA against a retailer who had deceptively imposed a sales tax reimbursement charges. In *Laster*, the plaintiffs alleged that a retailer engaged in an unfair and deceptive practice when it charged customers a "sales tax" on the full retail cost of cell phones that were advertised as "free" or discounted. 2008 WL 5216255 at *1. The retailer moved to dismiss the claims, arguing that the Tax Code permitted this conduct. The court declined to dismiss the claims. *Id.* at *16; *see also Livingston Rock & Gravel Co. v. De Salvo* (Ct. App. 1955) 136 Cal. App. 2d 156 (in dispute between retailer and customer, holding that customer was not contractually obligated to pay retailer sales tax reimbursement); *Botney v. Sperry & Hutchinson Co.* (Ct. App. 1976) 55 Cal. App. 3d 49, 127 Cal. Rptr. 263 (in consumer class action against retailer to recover sales tax reimbursement, determining that retailer's conduct was lawful).

In short, the Court of Appeal's decision effectively blocks what has, until now, been the primary, if not the only, way for customers to seek redress for these kinds of claims.

CONCLUSION

For the foregoing reasons, this Court should grant review of this Petition and reverse the decision of the Court of Appeal.

Dated: June 19, 2009

Respectfully Submitted,

By: _____

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CERTIFICATE OF WORD COUNT

Pursuant to Rules of Court 8.204(c) and 8.500(d)(1), the undersigned counsel hereby certifies that the foregoing PETITION FOR REVIEW is double-spaced, printed in Times New Roman 13 point text, and contains 7,529 words. The above word count was determined using the Word Count function of the Microsoft Word program, and excludes words in the Table of Contents and Table of Authorities.

Dated: June 19, 2009

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C

Court of Appeal, Second District, Division 3, California.
Kimberly LOEFFLER and Azucena Lemus, Plaintiffs and Appellants,
v.
TARGET CORPORATION, Defendant and Respondent.
No. B199287.

May 12, 2009.

Background: Customers brought putative class action against retailer for refund of excess sales tax reimbursement, money had and received, and violations of Unfair Competition Law (UCL) and Consumers Legal Remedies Act (CLRA). The Superior Court, Los Angeles County, No. BC360004,Michael L. Stern, J., sustained demurrer without leave to amend. Customers appealed.

Holdings: The Court of Appeal, Kitching, J., held that:
(1) retail customers who pay sales tax reimbursement lack standing to maintain a suit for a sales tax refund;
(2) statute authorizing administrative claims for refunds of excess sales tax reimbursement does not authorize private action against retailer to challenge validity of tax;
(3) constitution prohibited injunction against retailer's collection of sales tax reimbursement; and
(4) constitution barred claim for damages or restitution for retailer's collection of sales tax reimbursement.

Affirmed.

West Headnotes

[1] Taxation 371 ⚿3700

371 Taxation
371IX Sales, Use, Service, and Gross Receipts Taxes
371IX(H) Payment
371k3699 Refunding Taxes Paid
371k3700 k. In General. Most Cited Cases

Taxation 371 ⚿3710

371 Taxation
371IX Sales, Use, Service, and Gross Receipts Taxes
371IX(I) Collection and Enforcement
371k3710 k. Remedies for Wrongful Enforcement. Most Cited Cases
Purpose of constitutional provision prohibiting injunctions against the collection of state taxes and providing that refunds of taxes may only be recovered in a manner provided by the Legislature is to ensure that governmental entities may engage in fiscal planning so that essential public services are not unnecessarily interrupted. West's Ann.Cal. Const. Art. 13, § 32.

[2] Taxation 371 ⚿3661

371 Taxation
371IX Sales, Use, Service, and Gross Receipts Taxes
371IX(D) Persons Subject to or Liable for Tax
371k3661 k. Buyer's or Seller's Liability. Most Cited Cases
The California sales tax is imposed on the retailer, not upon the buyer. West's Ann.Cal.Rev. & T.Code § 6051.

[3] Taxation 371 ⚿3661

371 Taxation
371IX Sales, Use, Service, and Gross Receipts Taxes
371IX(D) Persons Subject to or Liable for Tax
371k3661 k. Buyer's or Seller's Liability. Most Cited Cases

The California use tax is levied upon the purchaser of the taxed personal property. West's Ann.Cal.Rev. & T.Code § 6202.

[4] Taxation 371 ⚿3700

371 Taxation
371IX Sales, Use, Service, and Gross Receipts Taxes
371IX(H) Payment
371k3699 Refunding Taxes Paid
371k3700 k. In General. Most Cited Cases

Filing a claim with the State Board of Equalization is a prerequisite to maintaining a suit for a refund of sales taxes. West's Ann.Cal.Rev. & T.Code § 6932.

[5] Taxation 371 ⚿3700

371 Taxation
371IX Sales, Use, Service, and Gross Receipts Taxes
371IX(H) Payment
371k3699 Refunding Taxes Paid
371k3700 k. In General. Most Cited Cases

Purpose of statute requiring a taxpayer to file a claim with the State Board of Equalization before commencing a tax refund lawsuit is to give the Board an opportunity to correct any mistakes, which helps the parties and the courts avoid unnecessary litigation, and delineates and restricts the issues to be considered in a taxpayer's refund action. West's Ann.Cal.Rev. & T.Code § 6932.

[6] Taxation 371 ⚿3704

371 Taxation
371IX Sales, Use, Service, and Gross Receipts Taxes
371IX(H) Payment
371k3702 Recovery of Taxes Paid
371k3704 k. Actions. Most Cited Cases

Constitutional provision stating that an action may be maintained to recover overpaid tax "in such manner as may be provided by the Legislature" precludes courts from expanding the methods for seeking tax refunds expressly provided by the Legislature. West's Ann.Cal. Const. Art. 13, § 32.

[7] Taxation 371 ⚿3704

371 Taxation
371IX Sales, Use, Service, and Gross Receipts Taxes
371IX(H) Payment
371k3702 Recovery of Taxes Paid
371k3704 k. Actions. Most Cited Cases

The sole legal avenue for resolving tax disputes is a postpayment refund action. West's Ann.Cal. Const. Art. 13, § 32.

[8] Taxation 371 ⚿3700

371 Taxation
371IX Sales, Use, Service, and Gross Receipts Taxes
371IX(H) Payment
371k3699 Refunding Taxes Paid
371k3700 k. In General. Most Cited Cases

Retail customers who pay sales tax reimbursement lack standing to assert a claim with the State Board of Equalization for a determination of excess collection of sales tax, since the customers are not the taxpayers. West's Ann.Cal.Rev. & T.Code §§ 6901, 6902.

[9] Taxation 371 ⚿3704

371 Taxation
371IX Sales, Use, Service, and Gross Receipts Taxes
371IX(H) Payment
371k3702 Recovery of Taxes Paid
371k3704 k. Actions. Most Cited Cases

Retail customers who pay sales tax reimbursement lack standing to maintain a suit for a sales tax re-

fund, because the filing of a claim with the State Board of Equalization is a prerequisite to such a suit, and only the taxpayers may file such a claim. West's Ann.Cal.Rev. & T.Code §§ 6901, 6902.

[10] Action 13 ⚿3

13 Action
13I Grounds and Conditions Precedent
13k3 k. Statutory Rights of Action. Most Cited Cases
A statute creates a private right of action only if the enacting body so intended.

[11] Action 13 ⚿3

13 Action
13I Grounds and Conditions Precedent
13k3 k. Statutory Rights of Action. Most Cited Cases
For a statute to create a private right of action, its intent to do so need not necessarily be expressed explicitly, but if not it must be strongly implied.

[12] Action 13 ⚿3

13 Action
13I Grounds and Conditions Precedent
13k3 k. Statutory Rights of Action. Most Cited Cases
When regulatory statutes provide a comprehensive scheme for enforcement by an administrative agency, the courts ordinarily conclude that the Legislature intended the administrative remedy to be exclusive unless the statutory language or legislative history clearly indicates an intent to create a private right of action.

[13] Taxation 371 ⚿3704

371 Taxation
371IX Sales, Use, Service, and Gross Receipts Taxes
371IX(H) Payment
371k3702 Recovery of Taxes Paid
371k3704 k. Actions. Most Cited Cases
Statute authorizing administrative claims for refunds of excess sales tax reimbursement payments does not authorize a private action by a customer against a retailer for such reimbursement without a determination by the State Board of Equalization of whether excess sales tax reimbursement must be refunded. West's Ann.Cal.Rev. & T.Code § 6901.5; 18 CCR § 1700.
See Cal. Jur. 3d, Sales and Use Taxes, §§ 12, 43, 81; 9 Witkin, Summary of Cal. Law (10th ed. 2005) Taxation, § 376.

[14] Taxation 371 ⚿3700

371 Taxation
371IX Sales, Use, Service, and Gross Receipts Taxes
371IX(H) Payment
371k3699 Refunding Taxes Paid
371k3700 k. In General. Most Cited Cases
Only the State Board of Equalization, not the taxpayer's customer, may "ascertain" overpayment of a sales tax reimbursement, as would support administrative claim for refund. West's Ann.Cal.Rev. & T.Code § 6901.5; 18 CCR § 1700.

[15] Taxation 371 ⚿3710

371 Taxation
371IX Sales, Use, Service, and Gross Receipts Taxes
371IX(I) Collection and Enforcement
371k3710 k. Remedies for Wrongful Enforcement. Most Cited Cases
Constitutional and statutory prohibitions on injunctions against collection of taxes prohibited customers from obtaining injunctions against a retailer's collection of sales tax reimbursement, pursuant to the Unfair Competition Law (UCL) or the Consumers Legal Remedies Act (CLRA). West's Ann.Cal. Const. Art. 13, § 32; West's Ann.Cal.Rev. & T.Code § 6931; West's Ann.Cal.Civ.Code § 1750 et seq.

[16] Antitrust and Trade Regulation 29T ⚿283

29T Antitrust and Trade Regulation
29TIII Statutory Unfair Trade Practices and Consumer Protection
29TIII(E) Enforcement and Remedies
29TIII(E)1 In General
29Tk281 Exclusive and Concurrent Remedies or Laws
29Tk283 k. Judicial Remedies Prior to or Pending Administrative Proceedings. Most Cited Cases

Taxation 371 ⚿3704

371 Taxation
371IX Sales, Use, Service, and Gross Receipts Taxes
371IX(H) Payment
371k3702 Recovery of Taxes Paid
371k3704 k. Actions. Most Cited Cases

Customers could not assert Unfair Competition Law (UCL), Consumers Legal Remedies Act (CLRA), or money had and received claims against retailer for damages or restitution for retailer's collection of allegedly excessive sales tax reimbursement, since doing so would circumvent the state constitution's limitation on remedies for allegedly illegal taxes and the statutory procedure for challenges to sales taxes, where the State Board of Equalization had not administratively determined the applicability of the tax; circumventing the administrative process could involve the Board, retailers, and customers in unnecessary litigation. West's Ann.Cal. Const. Art. 13, § 32; West's Ann.Cal.Rev. & T.Code §§ 6931, 6932; West's Ann.Cal.Civ.Code § 1750 et seq.

[17] Statutes 361 ⚿219(10)

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k213 Extrinsic Aids to Construction
361k219 Executive Construction
361k219(9) Particular State Statutes
361k219(10) k. Licenses and Taxes. Most Cited Cases

Although the State Board of Equalization's interpretation of the sales tax laws does not bind the courts, the Board has expertise regarding sales tax issues that is entitled to consideration and respect. West's Ann.Cal.Rev. & T.Code § 6901 et seq.

[18] Taxation 371 ⚿3700

371 Taxation
371IX Sales, Use, Service, and Gross Receipts Taxes
371IX(H) Payment
371k3699 Refunding Taxes Paid
371k3700 k. In General. Most Cited Cases

Taxation 371 ⚿3704

371 Taxation
371IX Sales, Use, Service, and Gross Receipts Taxes
371IX(H) Payment
371k3702 Recovery of Taxes Paid
371k3704 k. Actions. Most Cited Cases

If a retailer, after exhausting its administrative remedies, prevails in a sales tax refund action against the State Board of Equalization, the retailer must refund associated sales tax reimbursement to customers.

[19] Taxation 371 ⚿3623

371 Taxation
371IX Sales, Use, Service, and Gross Receipts Taxes
371IX(B) Regulations
371k3622 Statutory Provisions and Ordinances
371k3623 k. In General. Most Cited Cases

The sales tax law employs relatively artificial, relatively self-contained, concepts, and thus does not lend itself to interpretation with the use of concepts and policies from other, distinct areas of law.

West's Ann.Cal.Rev. & T.Code § 6901 et seq.

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KITCHING, J.

INTRODUCTION

In California, retailers are obligated to pay sales taxes to the state on their gross receipts, subject to certain exemptions. Retailers may, however, seek sales tax reimbursement from their customers. In this case, plaintiffs and appellants Kimberly **Loeffler** and Azucena Lemus contend that defendant and respondent **Target** Corporation (**Target**) was not entitled to collect sales tax reimbursement on purchases of hot coffee "to go" because sales tax was allegedly not due on such purchases.

Plaintiffs seek a refund of sales tax reimbursement from Target on their own behalf and on behalf of the class they purport to represent. They also seek an injunction prohibiting Target from collecting sales tax reimbursement on purchases of hot coffee "to go." The trial court sustained without leave to amend Target's demurrers to plaintiffs' pleadings and entered judgment in favor of Target on the ground, among others, that article XIII, section 32 of the California Constitution (article XIII, section 32) bars plaintiffs' action. We affirm.

[1] Article XIII, section 32 prohibits injunctions against the collection of state taxes and provides that refunds of taxes may only be recovered in a manner provided by the Legislature. As our Supreme Court explained in *Woosley v. State of California* (1992) 3 Cal.4th 758, 792, 13 Cal.Rptr.2d 30, 838 P.2d 758 (*Woosley*), under Article XIII, section 32, the courts cannot expand the methods for seeking tax refunds expressly provided by the Legislature. The purpose of this constitutional provision is to ensure that governmental entities may engage in fiscal planning so that essential public services are not unnecessarily interrupted.

The Legislature has enacted a statutory scheme for sales tax and associated sales tax reimbursement refunds. The only way to litigate a sales tax refund dispute under this scheme is for the retailer, as the taxpayer, to pay the tax, exhaust its administrative remedies by filing a claim for a refund with the State Board of Equalization (Board), and if the claim is denied or not acted upon, to file a suit for a sales tax refund. Because they are not the taxpayers, plaintiffs cannot file a *claim* for a sales tax refund and thus cannot file a *suit* for a sales tax refund. In other words, plaintiffs do not have standing to commence a sales tax refund suit.

Customers like plaintiffs, however, may obtain a refund of excess sales tax reimbursement collected by a retailer. Under Revenue and Taxation Code section 6901.5 [FN1] and a related regulation (Cal.Code Regs., tit. 18, § 1700), retailers must refund excess sales tax reimbursement if (1) the Board ascertains, in response to a claim filed by a retailer (§ 6904) or as a result of an audit (§ 7054) or other review (e.g., § 6481) by the Board, that excess sales tax re-

imbursement was collected, or (2) the retailer prevails in a suit against the Board for a refund of overpaid sales taxes (§ 6933). Neither of these circumstances exists here. Plaintiffs therefore are not entitled to a refund of alleged excess sales tax reimbursement collected ***519** by Target under the statutory scheme enacted by the Legislature.

> FN1. Except as otherwise indicated, all references to sections are to the Revenue and Taxation Code.

Plaintiffs contend that they have a private right of action against Target for a refund of sales tax reimbursement pursuant to section 6901.5, without giving the Board an opportunity to resolve the sales tax issue presented here. We reject this argument. Section 6901.5 provides for a refund of sales tax reimbursement *after the Board ascertains that such a refund is due.* In this case, the Board has not ascertained whether or not sales tax was due on purchases of hot coffee "to go" at Target, nor has it determined that a sales tax reimbursement refund is due. Section 6901.5 therefore does not support plaintiffs' claims against Target.

The complaint also alleges causes of action under unfair business practices and consumer protection statutes and a cause of action for money had and received. Plaintiffs seek damages, restitution and injunctive relief pursuant to these causes of action. However, plaintiffs are attempting to resolve a sales tax dispute by using consumer and common law remedies rather than the procedure set forth by the Legislature. This they cannot do under article XIII, section 32.

Plaintiffs argue that they are not violating article XIII, section 32, because they do not seek to enjoin the state from collecting sales taxes. Rather, plaintiffs contend, they seek to enjoin a private company from collecting sales tax reimbursement. Plaintiffs further contend that article XIII, section 32 is not implicated because they only seek a refund of sales tax reimbursement, not a refund of sales taxes.

We reject plaintiffs' argument and find that a court may not *directly or indirectly* enjoin or prevent the collection of a sales tax. As we will explain, the statutory scheme for sales taxes and sales tax reimbursement is intertwined. A determination by a court that sales tax is not due on "to go" hot coffee purchases from Target, and an injunction against the collection of sales tax reimbursement by Target on such purchases, is effectively an injunction against the collection of sales tax by the state. Further, under article XIII, section 32, plaintiffs cannot circumvent the statutory scheme for sales tax reimbursement refunds by asserting causes of action not contemplated by that scheme. We therefore affirm the judgment and hold that plaintiffs' action is barred by article XIII, section 32 and the sales tax statutes in the Revenue and Taxation Code.

PROCEDURAL AND FACTUAL BACKGROUND

1. *Procedural History*

Plaintiffs commenced this action in October 2006, and in November 2006 filed a First Amended Complaint (FAC) for six causes of action. In February 2007, the trial court sustained Target's demurrer to plaintiffs' fourth cause of action for money had and received without leave to amend. In addition, the court granted plaintiffs' request to add the Board as a new defendant.

In March 2007, plaintiffs filed a second amended complaint (SAC) for (1) violation of the Unfair Competition Law (UCL) (Bus. & Prof.Code, § 17200 et seq.), (2) violation of the Consumers Legal Remedies Act (CLRA) (Civ.Code, § 1750 et seq.), and (3) violation of section 6359 [FN2] and ***520** California Code of Regulations, title 18, section 1603 (regulation 1603).[FN3] The second amended complaint did not name the Board as a defendant.

> FN2. Section 6359, subdivision (a) provides a sales tax exemption for "the

gross receipts from the sale of, and the storage, use, or other consumption in this state of, food products for human consumption." This exemption, however, does not apply when "the food products are served as meals on or off the premises of the retailer" (§ 6359, subd. (d)(1)) or when "the food products are sold as hot prepared food products."(§ 6359, subd. (d)(7).) The exemption also does not apply when "the food products sold are furnished in a form suitable for consumption on the seller's premises, and both of the following apply: [¶] (A) Over 80 percent of the seller's gross receipts are from the sale of food products. [¶] (B) Over 80 percent of the seller's retail sales of food products are sales subject to tax pursuant to paragraph (1), (2), (3), or (7)." (§ 6359, subd. (d)(6).)

FN3. Regulation 1603 sets forth specific rules regarding the application of sales tax to the sale of food products. We do not decide whether the sale of hot coffee "to go" at Target violated section 6359 or regulation 1603.

In April 2007, the court sustained Target's demurrer to all causes of action of the SAC without leave to amend, and entered judgment in favor of Target. Plaintiffs filed a timely notice of appeal.

2. *Allegations in Plaintiffs' Pleadings*

Plaintiffs bring this action on behalf of themselves and "all persons who are California residents who paid sales tax" to Target "for the purchase of hot coffee drinks 'to go' or for 'take-out' " (the class). In their FAC and SAC, plaintiffs made the following allegations.[FN4]

FN4. For purposes of this appeal, we assume that the material facts in plaintiffs' FAC and SAC are true. (*Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 43, 96 Cal.Rptr.2d 354 (*Rakestraw*).)

Target "charged and collected sales tax" on purchases of "to go" and "take-out" hot coffee. These charges were prohibited by California law, specifically section 6359 and regulation 1603. As a result, plaintiffs suffered monetary loss. For example, in May 2006, plaintiff Azucena Lemus purchased hot coffee "to go" from a Target store located in Manhattan Beach, California. On that occasion, Target unlawfully charged Ms. Lemus "$0.71 in sales taxes."

A. *Allegations Regarding Money Had and Received*

Target "exacted" money from plaintiffs it "had no legal right" to receive. The money was "intended to be used for the benefit" of plaintiffs but was not used for plaintiffs' benefit. Further, Target has not given the money back to plaintiffs, thereby causing plaintiffs damage.

B. *Allegations Regarding Unfair Competition Law*

Target is engaged in "unfair" and "unlawful" business acts or practices. By imposing sales tax on the purchase of hot coffee "to go" or for "take-out," Target "unfairly and unlawfully increased the costs to Class members in direct contradiction to law." Plaintiffs seek to enjoin Target from "improperly charging sales taxes to consumers who purchase hot coffee drinks 'to go' and for 'take-out'," and "restitution of any monies wrongfully acquired or retained" by Target as a result of its "ill-gotten gains" obtained by "unfair practices."

C. *Allegations Regarding Consumers Legal Remedies Act*

The coffee purchased by plaintiffs and class members constituted goods purchased primarily for personal, family or household purposes. Target violated Civil Code section 1770, subdivisions (a)(2),

(a)(3), and (a)(14) by misrepresenting that it had the legal right to charge consumers "sales taxes" on coffee purchased "to go" ***521** or for "take-out." It also violated Civil Code section 1770, subdivision (a)(19) when it inserted "an unconscionable provision into contracts" by improperly charging sales tax on certain coffee purchases.

Plaintiffs notified Target of their violations of the CLRA and demanded that Target remedy its violations. Target failed to do so within 30 days. As a result of Target's violations of the CLRA, plaintiffs and class members have suffered damages in "the amount of sales taxes wrongfully collected" by Target from plaintiffs and other class members for the purchase of hot coffee "to go" or for "take-out."

D. *Allegations Regarding Revenue and Taxation Code Section 6359 and Regulation 1603*

Target violated section 6359 and regulation 1603 "by charging the general public sales taxes for the sale of hot coffee drinks 'to go' or for 'take-out'...."Section 6901.5"provides a private right of action for consumers to bring suit against retailers such as Target to recover illegally imposed sales taxes...."

Plaintiffs pray for, inter alia, restitution and damages in unspecified amounts, an injunction prohibiting Target from continuing its violations of the UCL and CRLA, and an award of attorney's fees and costs.

CONTENTIONS

Plaintiffs contend that the trial court erroneously sustained Target's demurrer to their cause of action for money had and received in their FAC and their three causes of action in their SAC. They contend that they can pursue a cause of action against Target under section 6901.5, and that article XIII, section 32 does not bar their UCL, CLRA, and money had and received causes of action.

DISCUSSION

1. *Standard of Review*

"A demurrer tests the legal sufficiency of factual allegations in a complaint." (*Rakestraw, supra,* 81 Cal.App.4th at p. 42, 96 Cal.Rptr.2d 354.) "On appeal, a plaintiff bears the burden of demonstrating that the trial court erroneously sustained the demurrer as a matter of law. This court thus reviews the complaint de novo to determine whether it alleges facts stating a cause of action under any legal theory." (*Id.* at p. 43, 96 Cal.Rptr.2d 354.)

2. *Overview of the California Sales Tax*

A. *The Retailer's Obligation to Pay Sales Tax and Ability to Obtain Reimbursement From Its Customers*

The California sales tax is an excise tax imposed on retailers for the privilege of selling tangible personal property in this state. (§ 6051; *City of Pomona v. State Bd. of Equalization* (1959) 53 Cal.2d 305, 309, 1 Cal.Rptr. 489, 347 P.2d 904.) It is presumed that all of a retailer's gross receipts are subject to the sales tax unless the retailer establishes that purchases fall under one of many specified exemptions. (§ 6091, § 6351 et seq.) Retailers are required to file quarterly sales tax returns and make quarterly payments to the state. (§§ 6451-6459.) If a retailer wrongfully evades sales taxes, it is subject to civil and criminal penalties. (§§ 7152-7155.)

[2][3] Although retailers commonly refer to "sales tax" on their invoices to customers, it is important to keep in mind that "[t]he sales tax is imposed on the ***522** seller, not upon the buyer." (*Gen. Elec. Co. v. State Bd. of Equalization* (1952) 111 Cal.App.2d 180, 185, 244 P.2d 427.) [FN5] In other words, "[t]he tax relationship is between the retailer only and the state; and is a direct obligation of the former." (*Livingston Rock & Gravel Co. v. De Salvo* (1955) 136 Cal.App.2d 156, 160, 288 P.2d 317 (*Livingston*).)

FN5. By contrast, the use tax is levied upon the *purchaser*. (*Bank of America v. State Bd. of Equal.*(1962) 209 Cal.App.2d 780, 799, 26 Cal.Rptr. 348; § 6202.) A use tax is an excise tax imposed on tangible personal property purchased from any retailer for storage, use or other consumption in California. (§ 6201.) Property subject to sales tax is exempt from use tax. (§ 6401.)

A retailer, however, may seek sales tax reimbursement from a purchaser. "Whether a retailer may add sales tax reimbursement to the sales price of the tangible personal property sold at retail to a purchaser depends solely upon the terms of the agreement of sale." (Civ.Code, § 1656.1, subd. (a).) Under certain circumstances, it is presumed that the purchaser agreed to pay the retailer sales tax reimbursement. For example, if sales tax reimbursement is shown on the sales check or other proof of sale, it is presumed that the contract between the retailer and the purchaser provides that the purchaser will reimburse the retailer for the sales tax the retailer must pay the state. (*Id.* at § 1656.1, subd. (a)(2).)

B. *The Board is Charged With Administrating and Enforcing the Sales Tax Statutes*

The Board is charged with administrating and enforcing the sales tax statutes. (See §§ 7051-7060.) Among other duties, the Board enacts sales tax regulations (§ 7051), reviews sales tax returns and reports by retailers and others (§§ 6481, 7055), and conducts audits of retailers (§ 7054).

C. *The Legislature Has Created a Comprehensive System for Sales Tax and Sales Tax Reimbursement Refunds*

The Legislature has created a comprehensive system for seeking sales tax refunds and associated sales tax reimbursement refunds. Sections 6901 to 6908 set forth the provisions for filing a claim with the Board. Sections 6931 to 6937 set forth the provisions for filing a lawsuit for sales tax refunds. Under this statutory scheme, a *retailer,* as the taxpayer, can file a sales tax refund claim with the Board. (See §§ 6901-6908, 6932.) There are certain statutory requirements for and limitations on claims with the Board. For instance, a claim filed for or on behalf of a class of taxpayers must, inter alia, be "accompanied by written authorization from each taxpayer sought to be included in the class."(§ 6904, subd. (b)(1).)

The Board has promulgated regulations governing claims for tax refunds with the Board, including claims for refunds of erroneously collected sales tax. (See Cal.Code Regs., tit. 18, § 5230 et seq.) These regulations specify the means by which retailers, as taxpayers, may file a claim with the Board for overpaid sales taxes.

[4] The Legislature has provided that filing a claim with the Board is a prerequisite to maintaining a suit for a refund of sales taxes. (*A & M Records, Inc. v. State Bd. of Equalization* (1988) 204 Cal.App.3d 358, 367, 250 Cal.Rptr. 915 (*A & M Records*), disapproved on another ground in ***523***Preston v. State Bd. Of Equalization* (2001) 25 Cal.4th 197, 220, fn. 7, 105 Cal.Rptr.2d 407, 19 P.3d 1148 (*Preston*).) Section 6932 states: "No suit or proceeding shall be maintained in any court for the recovery of any amount alleged to have been erroneously or illegally determined or collected unless a claim for refund or credit has been duly filed pursuant to Article 1 (commencing with Section 6901.)"

[5] The purpose of requiring a taxpayer to file a claim with the Board before commencing a tax refund lawsuit is to give the Board an opportunity to correct any mistakes. (*Preston, supra,* 25 Cal.4th at p. 206, 105 Cal.Rptr.2d 407, 19 P.3d 1148.) This, in turn, helps the parties and the courts avoid unnecessary litigation (*ibid.*), and "delineates and restricts the issues to be considered in a taxpayer's refund action." (*Atari Inc. v. State Bd. of Equalization* (1985) 170 Cal.App.3d 665, 672, 216 Cal.Rptr. 267; see also *A & M Records, supra,* 204 Cal.App.3d at p. 367, 250 Cal.Rptr. 915 [a refund

suit is "confined to the grounds set forth" in the claim with the Board].)

As part of its comprehensive scheme, the Legislature has provided a means for customers such as plaintiffs to obtain a refund of collected sales tax reimbursement. Section 6901.5 provides that a retailer who has collected excess sales tax reimbursement from a customer must return the money to the customer who paid it or remit the funds to the state. Specifically, section 6901.5 states: "When an amount represented by a person [retailer] to a customer as constituting reimbursement for taxes due under this part is computed upon an amount that is not taxable or is in excess of the taxable amount and is actually paid by the customer to the person [retailer], the amount so paid shall be returned by the person [retailer] to the customer upon notification by the Board of Equalization or by the customer that such excess has been ascertained. In the event of his or her failure or refusal to do so, the amount so paid, if knowingly or mistakenly computed by the person [retailer] upon an amount that is not taxable or is in excess of the taxable amount, shall be remitted by that person [retailer] to this state."

The Board has promulgated California Code of Regulations, title 18, section 1700 (regulation 1700) relating to the administration and enforcement of section 6901.5. Under regulation 1700, a customer has paid "excess tax reimbursement" when, inter alia, "an amount represented by a person [retailer] to a customer as constituting reimbursement for sales tax is computed upon an amount that is not taxable...." (Cal.Code Regs., tit. 18, § 1700, subd. (b)(1).) That is precisely the situation plaintiffs claim exists here.

Regulation 1700 further provides, inter alia: "Whenever the board ascertains that a person [retailer] has collected excess tax reimbursement, the person [retailer] will be afforded an opportunity to refund the excess collections to the customers from whom they were collected. In the event of failure or refusal of the person [retailer] to make such refunds, the board will make a determination against the person [retailer] for the amount of the excess tax reimbursement collected and not previously paid to the state, plus applicable interest and penalty." (Cal.Code Regs., tit. 18, § 1700, subd. (b)(2).)

3. *Article XIII, Section 32 and Its Underlying Policies*

Article XIII, section 32 states: "No legal or equitable process shall issue in any proceeding in any court against this State or any officer thereof to prevent or enjoin the collection of any tax. After payment of a tax claimed to be illegal, an action may be maintained to recover the tax paid, with interest, in such manner as may be provided by the Legislature."

***524** [6][7] The first sentence of article XIII, section 32 bars injunctions against the collection of state taxes. The second sentence of article XIII, section 32 precludes, inter alia, courts "from expanding the methods for seeking tax refunds expressly provided by the Legislature." (*Woosley, supra,* 3 Cal.4th at p. 792, 13 Cal.Rptr.2d 30, 838 P.2d 758.) The two provisions together "establish that the sole legal avenue for resolving tax disputes is a postpayment refund action." (*State Bd. of Equalization v. Superior Court* (1985) 39 Cal.3d 633, 638, 217 Cal.Rptr. 238, 703 P.2d 1131.)

The underlying policy behind article XIII, section 32 is that "strict legislative control over the manner in which tax refunds may be sought is necessary so that government entities may engage in fiscal planning based on expected tax revenues." (*Woosley, supra,* 3 Cal.4th at p. 789, 13 Cal.Rptr.2d 30, 838 P.2d 758.) The state needs to engage in such planning and revenue collection even during litigation "so that essential public services dependent on the funds are not unnecessarily interrupted. [Citation.] 'Any delay in the proceedings of the officers, upon whom the duty is devolved of collecting the taxes, may derange the operations of government, and

thereby cause serious detriment to the public.' " (*Pacific Gas & Electric Co. v. State Bd. of Equalization* (1980) 27 Cal.3d 277, 283, 165 Cal.Rptr. 122, 611 P.2d 463 (*Pacific Gas & Electric*).)

" ' "The prompt payment of taxes is always important to the public welfare. It may be vital to the existence of a government. The idea that every taxpayer is entitled to the delays of litigation is unreason." [Citations.]' " (*State Bd. of Equalization v. Superior Court, supra,* 39 Cal.3d at p. 639, 217 Cal.Rptr. 238, 703 P.2d 1131.)

4. *Plaintiffs Cannot Seek a Refund of Sales Taxes or Associated Sales Tax Reimbursement Under the Sales Tax Statutes*

A. *Plaintiffs Have No Standing to Seek a Sales Tax Refund*

[8][9] There is no statutory or regulatory provision allowing purchasers like plaintiffs to file a claim for a sales tax refund with the Board. Since only taxpayers may file a claim for refund and plaintiffs are not taxpayers, they have no standing to assert a claim with the Board. (See §§ 6901, 6902.) Consequently, plaintiffs cannot maintain a suit for a sales tax refund because the filing of a claim with the Board is a prerequisite to such a suit. (See § 6932; *State Bd. of Equalization v. Superior Court* (1980) 111 Cal.App.3d 568, 570, 169 Cal.Rptr. 3 [purchaser could not maintain action against Board for overpayment of sales tax]; *Decorative Carpets, Inc. v. State Board of Equalization* (1962) 58 Cal.2d 252, 255, 23 Cal.Rptr. 589, 373 P.2d 637 (*Decorative Carpets*) ["the orderly administration of the tax laws requires adherence to the statutory procedures and precludes imposing on defendant [Board] the burden of making refunds to the taxpayer's [retailer's] customers"]; see also *De Aryan v. Akers* (1939) 12 Cal.2d 781, 785, 87 P.2d 695 [purchaser had no standing to sue retailer].)

B. *The Legislature Has Not Provided A Private Cause of Action for Customers To Seek A Refund of Sales Tax Reimbursement*

[10][11][12] Plaintiffs claim that section 6901.5 provides that a customer has a private cause of action against a retailer to recover unlawfully collected sales tax reimbursement. A statute, however, "creates a private right of action only if the enacting body so intended." ***525**(*Farmers Ins. Exchange v. Superior Court* (2006) 137 Cal.App.4th 842, 849, 40 Cal.Rptr.3d 653.) The Courts of Appeal "have held that a statute creates a private right of action only if the statutory language or legislative history affirmatively indicates such an intent. [Citations.] That intent need not necessarily be expressed explicitly, but if not it must be strongly implied. [Citations.] Particularly when regulatory statutes provide a comprehensive scheme for enforcement by an administrative agency, the courts ordinarily conclude that the Legislature intended the administrative remedy to be exclusive unless the statutory language or legislative history clearly indicates an intent to create a private right of action." (*Id.* at p. 850, 40 Cal.Rptr.3d 653.)

[13] Applying these principles to this case, we reject plaintiffs' position.[FN6] Nothing in the language of section 6901.5 or related statutes and regulations affirmatively indicates the intent of the Legislature to authorize a private action by a customer against a retailer. Indeed, section 6901.5 has nothing to do with a sales tax refund *lawsuit.* Rather, the statute relates to a *claim* with the Board. This is clear because section 6901.5 is located in article 1 of chapter 7 of part 1 of division 2 of the Revenue and Taxation Code, which deals with claims with the Board, and not in article 2 of the same chapter, which deals with sales tax refund lawsuits. If the Legislature intended section 6901.5 to create a private right of action against retailers, without the need to file a claim with the Board, as plaintiffs contend, it would have placed the statute in article 2.

FN6. Plaintiffs have not cited any legislative history, and we have none, that supports plaintiffs' position.

[14] By its terms; moreover, section 6901.5 requires a retailer to refund sales tax reimbursements to customers only after an overpayment of sales tax reimbursement has been "ascertained." Plaintiffs argue that a customer can "ascertain" that excess sales tax reimbursement should be refunded. Under the plain language of regulation 1700, however, *the Board* ascertains the overpayment of sales tax reimbursement. (See Cal.Code Regs., tit. 18, § 1700, subd. (b)(2) [FN7]; see also §§ 6901, 6902.)

> FN7. This provision of regulation 1700 provides: "Whenever *the board* ascertains that a person has collected excess tax reimbursement, the person will be afforded an opportunity to refund the excess collections to the customers from whom they were collected." (Italics added.)

In addition, as we have explained, the Legislature has vested the Board with the authority to enforce the sales tax statutes. (*Associated Beverage Co. v. Board of Equalization* (1990) 224 Cal.App.3d 192, 201, 273 Cal.Rptr. 639.) Thus it would undermine the legislative scheme to interpret section 6901.5 to permit the customer to unilaterally "ascertain" when excess sales tax reimbursement has been collected by a retailer. This interpretation would disrupt the administration of the sales tax laws because it would allow customers to usurp the authority of the Board to determine the application of the law in the first instance.

Section 6901.5 thus does not, as plaintiffs contend, authorize customers to file suits against retailers without a determination by the Board of whether excess sales tax reimbursement must be refunded. Instead, the statute sets forth how a retailer must distribute excess sales tax reimbursements after the Board has determined that a refund is due. Here, plaintiffs have not alleged that the Board has made such a determination. Plaintiffs therefore do not have a right to a sales tax reimbursement refund under section 6901.5.

***526** Plaintiffs argue that *Javor v. State Board of Equalization* (1974) 12 Cal.3d 790, 797, 117 Cal.Rptr. 305, 527 P.2d 1153 (*Javor*) supports their purported section 6901.5 cause of action. In *Javor,* the plaintiff brought a class action on behalf of purchasers of certain motor vehicles to recover the overpayment of sales tax. The Board admitted that it owed retailers sales tax refunds. Under the predecessor statute to section 6901.5, however, retailers had no incentive to file refund claims because any refunds they obtained had to be passed on to customers like the plaintiff. (*Javor,* at pp. 801-802, 117 Cal.Rptr. 305, 527 P.2d 1153.) The Supreme Court held that under the "unique circumstances" of that case, it needed to "fashion an appropriate remedy to effect the customers' right to their refund...." (*Id.* at 800, 802, 117 Cal.Rptr. 305, 527 P.2d 1153.) The court thus held that the plaintiff could join the Board as a party in order to require the defendant retailers to make refund applications to the Board. (*Id.* at p. 802, 117 Cal.Rptr. 305, 527 P.2d 1153.) The court also held that the Board was required to pay refunds owed retailers into court for the benefit of class members. (*Ibid.*)

Plaintiffs' reliance on *Javor* is misplaced because this case does not have the "unique circumstances" of the *Javor* case. In *Javor,* the customers' right to a refund was undisputed. In addition, the customers were not entitled to seek refunds directly from retailers and were not allowed to pursue their suit without retailers first filing claims with the Board. In this case, by contrast, the Board has not had an opportunity to assess whether sales tax was due on purchases of hot coffee "to go" at Target, and Target has not conceded the issue. Thus the right of plaintiffs to a refund of sales tax reimbursement is not undisputed. Plaintiffs, moreover, seek the refund from Target itself without any involvement of the Board. This case is thus distinguishable from *Javor.*

Plaintiffs' reliance on *Decorative Carpets* is equally misplaced. There, a retailer sought a sales tax refund from the Board even though it conceded it had no intention of paying over the recovered refund to

its customers. The Court of Appeal directed the trial court to enter judgment for the retailer "only if it submits proof satisfactory to the court that the refund will be returned to plaintiff's [retailer's] customers from whom the excess payments were erroneously collected." (*Decorative Carpets, supra,* 58 Cal.2d at p. 256, 23 Cal.Rptr. 589, 373 P.2d 637.) Here, by contrast, there is no allegation that Target submitted a claim to the Board, much less filed a lawsuit against the Board. *Decorative Carpets* thus lends no support to plaintiffs' suit.

Plaintiffs also mistakenly rely on *Livingston.* In *Livingston,* it was undisputed that a retailer owed the state sales tax on the sale of certain equipment. The issue was whether the customer owed the retailer sales tax reimbursement under the contract between the parties. (See *Livingston, supra,* 136 Cal.App.2d. at p. 159, 288 P.2d 317.) The court held that under that contract, the retailer was not entitled to collect sales tax reimbursement from the customer. (*Id.* at p. 163, 288 P.2d 317.) Here, by contrast, plaintiffs have not alleged that they and Target entered into a similar contract. *Livingston* therefore does not support plaintiffs' claims.

5. Plaintiffs Cannot Circumvent Article XIII, Section 32 and the Sales Tax Statutes By Seeking an Injunction, Damages, and Restitution Pursuant to Their ULA, CLRA and Money Had and Received Causes of Action

[15][16] Article XIII, section 32 prohibits injunctions against the collection of *any****527** state taxes. In addition, section 6931 specifically precludes an injunction against the state or any officer thereof to prevent the collection of sales and use taxes.[FN8] As we will explain, Article XIII, section 32 and section 6931 preclude plaintiffs from obtaining the injunction they seek here.

> FN8. Section 6931 states: "No injunction or writ of mandate or other legal or equitable process shall issue in any suit, action, or proceeding in any court against this State or against any officer of the State to prevent or enjoin the collection under this part of any tax or any amount of tax required to be collected."

Plaintiffs contend that they may obtain an injunction against Target pursuant to the UCL and CLRA[FN9] irrespective of article XIII, section 32 and section 6931, because they do not seek to enjoin the collection of sales taxes, but rather seek to enjoin the collection of sales tax reimbursement. They further contend that article XIII, section 32 and the sales tax statutes do not bar their UCL, CLRA and money had and received claims for restitution and damages because they do not seek a sales tax refund from the state, but rather seek a refund of sales tax reimbursement from a private company.

> FN9. Plaintiffs do not contend that they may obtain an injunction pursuant to section 6091.5 or pursuant to their common law cause of action for money had and received.

Our Supreme Court, however, has "construed broadly" article XIII, section 32, in light of the paramount policies underlying that constitutional provision. (*State Bd. of Equalization v. Superior Court, supra,* 39 Cal.3d at p. 639, 217 Cal.Rptr. 238, 703 P.2d 1131; see also *Western Oil & Gas Assn. v. State Bd. of Equalization* (1987) 44 Cal.3d 208, 213, 242 Cal.Rptr. 334, 745 P.2d 1360 (*Western Oil & Gas*) ["Section 32 broadly limits in the first instance the power of the courts to intervene in tax collection matters; it does not merely make unavailable a particular remedy or preclude actions challenging the ultimate validity of a tax assessment"].) Because the collection of sales tax by the state from a retailer and the collection of sales tax reimbursement by a retailer from a customer are intertwined (see § 6901.5; Civ.Code, § 1656.1; Cal.Code Regs., tit. 18, § 1700), an injunction against the collection of sales tax reimbursement or a refund of sales tax reimbursement may affect the state's sales tax revenues. We therefore will review not only the direct relief plaintiffs seek, but also the

indirect effect of that relief on the collection of taxes by the state. (See *State Bd. of Equalization v. Superior Court, supra,* 39 Cal.3d at p. 640, 217 Cal.Rptr. 238, 703 P.2d 1131, citing *Modern Barber Col. v. Cal. Emp. Stab. Com.* (1948) 31 Cal.2d 720, 723, 192 P.2d 916 ["Since the net result of the relief prayed for ... would be to restrain the collection of the tax allegedly due, the action must be treated as one having that purpose"].)

In *Pacific Gas & Electric Co.,* our Supreme Court took a similar approach. There, the plaintiffs filed an action for mandamus and declaratory relief to compel the Board to adjust the assessment of their property taxes. The court, however, held that article XIII, section 32 barred the action. In reaching its decision, the court rejected the plaintiffs' attempt to "circumvent" article XIII, section 32's "restraints on prepayment tax litigation by seeking only declaratory relief." (*Pacific Gas & Electric, supra,* 27 Cal.3d at p. 280, 165 Cal.Rptr. 122, 611 P.2d 463; see also *California Logistics, Inc. v. State of California* (2008) 161 Cal.App.4th 242, 248, 73 Cal.Rptr.3d 825 (*California Logistics*) ["The relevant issue is whether granting ***528** the relief sought would have the effect of impeding the collection of a tax"].)

In *Western Oil & Gas,* our Supreme Court again broadly interpreted article XIII, section 32. The plaintiffs in that case sought to prevent the Board from requiring them to furnish information concerning the land and rights of way on which certain pipelines were located. (*Western Oil & Gas, supra,* 44 Cal.3d at p. 211, 242 Cal.Rptr. 334, 745 P.2d 1360.) The Board sought the information in order to assess the plaintiffs' tax liability. The trial court found article XIII, section 32 was "inapplicable" to the case, reasoning that the plaintiffs "were not seeking to prevent assessment but only to prevent being compelled to furnish certain information." (*Western Oil & Gas,* at p. 213, 242 Cal.Rptr. 334, 745 P.2d 1360.) The Court of Appeal affirmed the trial court's order granting the plaintiffs a writ of mandate and injunctive and declaratory relief. (*Id.* at p. 212, 242 Cal.Rptr. 334, 745 P.2d 1360.) The Supreme Court reversed. The court reasoned: "[Article XIII, section 32] applies if the prepayment judicial determination sought would impede tax collection. [Citations.] That an action turns on a challenge to the Board's demands for information does not alone lift the constitutional bar." (*Id.* at p. 213, 242 Cal.Rptr. 334, 745 P.2d 1360.)

Similarly, in *Brennan v. Southwest Airlines Co.* (9th Cir.1998) 134 F.3d 1405, 1410 (*Brennan*), the Ninth Circuit rejected an interpretation of federal tax law that would allow plaintiffs to "evade the strictures" of section 7422(a) of title 26 of the United States Code, a statute similar to section 6932.[FN10] (*Brennan,* at p. 1410.) There, the defendant airlines collected from plaintiffs an excise tax which Congress did not authorize. Rather than filing a claim for a refund with the Internal Revenue Service (IRS) before filing suit, as federal tax law required, plaintiffs filed suit in state court against the airlines for unlawful business practices, breach of contract, declaratory relief and an accounting. (*Id.* at p. 1408.)

> FN10. The federal statute provided in part: "No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof." (26 U.S.C. § 7422(a).)

Defendants removed the case to federal district court on the grounds that plaintiffs were effectively pursuing a refund of federal taxes, which raised an issue of federal law. Plaintiffs moved to remand the case on the grounds that they had not filed a federal tax refund suit and thus the district court did not

have subject matter jurisdiction over their state-law claims. The Ninth Circuit thus was required to determine whether plaintiffs filed a tax refund suit, as defendants contended. (*Brennan, supra,* 134 F.3d at p. 1409.)

The Ninth Circuit answered that question in the affirmative, and affirmed the district court's denial of plaintiffs' motion to remand the case. In so doing, the court rejected the plaintiffs' attempt to use consumer remedy laws to adjudicate what the court concluded was in reality a tax refund case. The court noted that the Internal Revenue Code provided the exclusive remedy in tax refund suits and thus preempted state-law claims that sought tax refunds. (*Brennan, supra,* 134 F.3d at p. 1409.) The court further stated that accepting plaintiffs' argument would allow a taxpayer to avoid the tax refund statute ***529** every time a citizen who sought a tax refund alleged the tax was collected without authority. (*Id.* at p. 1410.) The court reasoned that plaintiffs' arguments militated against one of the distinct purposes of the tax refund statute in that plaintiffs' theory would not " 'afford the Internal Revenue Service an opportunity to investigate tax claims and resolve them without the time and expense of litigation.' (Citation)." (*Id.* at p. 1411; see also *Batt v. City and County of San Francisco* (2007) 155 Cal.App.4th 65, 85, 65 Cal.Rptr.3d 716 [rejecting the "idea that a taxpayer can 'maintain a common law reimbursement action based on principles of restitution and constructive trust without complying with statutory conditions, specifically ... administrative claim requirements.' "].)

Likewise, in this case, by seeking an injunction prohibiting Target from collecting sales tax reimbursement from customers, plaintiffs are attempting to circumvent the prohibition of injunctions against the collection of sales taxes in article XIII, section 32 and section 6931. For example, if the trial court concluded that sales tax was not due on purchases of hot coffee "to go" at Target and enjoined Target from collecting sales tax reimbursement on such purchases, Target might rely on the court's decision to stop paying sales tax on these purchases. Accordingly, the net result of an injunction against Target would be a restraint on collection of sales tax by the state, which is precisely what is prohibited by article XIII, section 32, its underlying policies, and section 6931.[FN11]

> FN11. Plaintiffs cannot plead around article XIII, section 32 and section 6931 by recasting their causes of action as violations of the UCL and the CRLA. (See *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 182, 83 Cal.Rptr.2d 548, 973 P.2d 527 ["A plaintiff may not 'plead around' an 'absolute bar to relief' simply 'by recasting the cause of action as one for unfair competition.' "].)

[17] Further, just as the plaintiffs in *Brennan* sought to evade IRS review of their claims, plaintiffs here seek an injunction, damages and restitution without providing the Board with an opportunity to administratively determine the merits of plaintiffs' interpretation of the sales tax laws. This is not permitted by the sales tax statutes and their underlying policies. Although the Board's interpretation of the tax laws does not bind the courts, the Board has expertise regarding sales tax issues that is entitled to consideration and respect. (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 7, 11, 78 Cal.Rptr.2d 1, 960 P.2d 1031.) Further, circumventing the claims process could result in involving the Board, retailers and customers in unnecessary litigation. This undermines the policy underlying section 6932, which is to give the Board an opportunity to correct any mistakes, thereby avoiding the cost of litigation and the consumption of judicial resources. (See *Preston, supra,* 25 Cal.4th at p. 206, 105 Cal.Rptr.2d 407, 19 P.3d 1148.)

In addition, allowing suits such as plaintiffs' might lead to situations in which a retailer would be required to refund sales tax reimbursements to customers but could not recover associated sales taxes

from the government. (See *Brennan, supra,* 134 F.3d at p. 1411.) For example, the statute of limitations for a UCL action is four years (Bus. & Prof.Code, § 17208), while the statute of limitations for a claim with the Board is three years. (§ 6902, subd. (a)(1).) Customers therefore could recover a refund of payments they made to Target between three and four years prior to commencing their action, even if Target passed those payments on to the state, and even though Target would be time-barred ***530** from recovering those payments from the state.

Moreover, excluding the Board from sales tax disputes could lead to inconsistent results. For instance, the trial court here could determine that sales tax is not due on purchases of hot coffee "to go" at Target. However, another court might come to the opposite conclusion in a lawsuit filed by Target or a similarly situated retailer against the Board. Because the Board is not a party to this action, it would not be bound by the principles of res judicata and collateral estoppel in subsequent actions by Target or similarly situated retailers. (See 7 Witkin, Cal. Procedure (5th ed. 2008) Judgment, § 452 et seq.) Therefore, requiring customers to seek refunds of sales tax reimbursement only in the manner provided by the sales tax statutes will reduce the likelihood of inconsistent rulings by the courts.

Article XIII, section 32 and the "orderly administration of the tax laws" (*Decorative Carpets, supra,* 58 Cal.2d at p. 255, 23 Cal.Rptr. 589, 373 P.2d 637) require strict adherence to statutory procedures for the administration of the sales tax law. Plaintiffs therefore may not circumvent the means set forth by the Legislature to resolve sales tax disputes by pursuing UCL, CLRA, and money had and received causes of action.

6. *Plaintiffs and Other Customers Have Remedies to Recover Excess Sales Tax Reimbursement Paid to Retailers*

[18] Plaintiffs argue that our decision leaves customers without a remedy when they pay excess sales reimbursement to retailers. This is not true. If a retailer, after exhausting its administrative remedies, prevails in a sales tax refund action against the Board, the retailer must refund associated sales tax reimbursement to customers. (*Decorative Carpets, supra,* 58 Cal.2d at p. 256, 23 Cal.Rptr. 589, 373 P.2d 637.)

Customers may also obtain a refund of excess sales tax reimbursement paid to retailers without litigation. The Board may review whether a customer paid excess sales tax reimbursement in the course of responding to a claim filed by a retailer. It may also on its own initiative, or in response to a complaint by a customer, examine a retailer's tax returns or conduct an audit of the retailer's books and records. (See §§ 6481, 7054; Cal.Code Regs., tit. 18, § 1700, subd. (b)(3)(A); *Riley B's, Inc. v. State Bd. of Equalization* (1976) 61 Cal.App.3d 610, 615, 132 Cal.Rptr. 520 [Board conducting audit].) FN12 As we have explained, if the Board concludes that excess sales tax reimbursement was collected, the retailer is required to make a refund to its customers (or to the state if it is not refunded to the customer). (§ 6901.5; Cal.Code Regs., tit. 18, § 1700.)

> FN12. Plaintiffs do not deny that they may contact the Board to request an audit, but do not allege that they have done so.

Plaintiffs argue that these remedies are insufficient because, for a variety of reasons, retailers may choose not to file a claim with the Board, or the Board may choose not to conduct a review or an audit, or the Board may make an incorrect decision that is not challenged in court by a retailer. These arguments are better suited for the Legislature than the courts. Article XIII, section 32, prohibits the courts from expanding the remedies expressly provided by the Legislature for sales tax refunds and associated sales tax reimbursement. (See ***531** *Woosley, supra,* 3 Cal.4th at p. 792, 13 Cal.Rptr.2d 30, 838 P.2d 758.)

Plaintiffs and supporting amici curiae argue that the

court should take into account the policies underlying the UCL and the CRLA. A similar issue was addressed in *California Logistics*. There the state made a determination that delivery drivers used by the plaintiff were employees and not independent contractors, which resulted in additional tax liability for the plaintiff. (*California Logistics, supra,* 161 Cal.App.4th at p. 245, 73 Cal.Rptr.3d 825.) The plaintiff alleged that the state had previously unsuccessfully challenged the independent contractor status of the drivers in administrative and judicial proceedings. (*Id.* at pp. 245-246, 73 Cal.Rptr.3d 825.) Based on this allegation, the plaintiff sought declaratory and injunctive relief regarding its tax liability on the ground that the state was collaterally estopped from asserting that the plaintiff's delivery drivers were employees. (*Id.* at p. 246, 73 Cal.Rptr.3d 825.)

The court, however, held that article XIII, section 32 barred the plaintiff's action. After acknowledging the important policies promoted by the doctrine of collateral estoppel (*California Logistics, supra,* 161 Cal.App.4th at p. 249, 73 Cal.Rptr.3d 825), the court stated: "The California Constitution is 'the supreme law of our state' [Citation], subject only to the supremacy of the United States Constitution (Cal. Const., art. III, § 1.) The doctrine of collateral estoppel cannot take precedence over [article XIII,] section 32 and require the courts to provide relief which the Constitution specifically prohibits." (*Id.* at p. 250, 73 Cal.Rptr.3d 825.)

[19] Similarly, in this case, the UCL and CRLA and the policies they promote cannot take precedence over article XIII, section 32. Further, "the sales tax law employs relatively artificial, relatively self-contained, concepts," and thus does not lend itself to interpretation with the use of concepts and policies from other, distinct areas of law. (*King v. State Bd. of Equalization* (1972) 22 Cal.App.3d 1006, 1010-1011, 99 Cal.Rptr. 802.)

Our Supreme Court has broadly construed article XIII, section 32 in light of the overriding policies behind that provision. Article XIII, section 32 and the policies which it represents bar plaintiffs' action against Target.

DISPOSITION

The judgment is affirmed. Target is awarded costs on appeal.

We concur: KLEIN, P.J., and ALDRICH, J.
Cal.App. 2 Dist.,2009.
Loeffler v. Target Corp.
93 Cal.Rptr.3d 515, 09 Cal. Daily Op. Serv. 5834, 2009 Daily Journal D.A.R. 6875

END OF DOCUMENT

PROOF OF SERVICE

I, **Joseph J. M. Lange**, declare as follows:

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen and not a party to the within action. My business address is 222 North Sepulveda Boulevard, Suite 2000, El Segundo, California 90245.

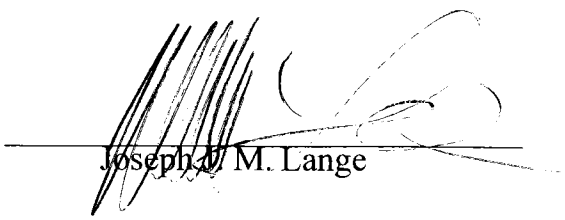
On June 19, 2009, I served the foregoing document described as **PETITION FOR REVIEW** on the interested parties in this action as follows:

David McDowell Samantha Goodman MORRISON FOERSTER 555 West Fifth Street Los Angeles, California 90013 *Attorneys for Respondent Target Corporation*	Ronald A. Reiter Supervising Deputy Attorney General Office of the Attorney General Consumer Law Section 455 Golden Gate Ave., Ste. 11000 San Francisco, CA 94102-7004
Steve Cooley District Attorney's Office County of Los Angeles 210 West Temple Street, Suite 18000 Los Angeles, CA 90012-3210	Clerk Court of Appeal Second District, Division Three 300 S. Spring Street Los Angeles, CA 90013
Clerk of the Superior Court 111 North Hill Street Los Angeles, CA 90012	

[X] **BY MAIL:** By placing a true copy thereof enclosed in a sealed envelope addressed as above, with postage thereon fully prepaid in the United States mail, at El Segundo, California. I am readily familiar with the firm's practice for collection and processing of correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on the same day with postage thereon fully prepaid at El Segundo, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after the date of deposit for mailing contained in this affidavit. C.C.P. §1013a(3).

[X] [State] I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on June 19, 2009, at Manhattan Beach, California.



Joseph J. M. Lange