
No. S224476

IN THE
SUPREME COURT OF CALIFORNIA
WILLIAMS & FICKETT, a California General
Partnership,
Plaintiff and Appellant,

SUPREME COURT
FILED

vs.

MAR 06 2015

COUNTY OF FRESNO,
Defendant and Respondent

Frank A. McGuire Clerk

Deputy

After a Decision by the Court of Appeal of the State of California
Fifth Appellate District
Case No. F068652

On Appeal from the Superior Court of the County of Fresno
The Hon. Donald S. Black
Case No. 13 CE CG 00461 DSB

ANSWER TO PETITION FOR REVIEW

Ronald A. Henderson – No. 095116
DOWLING AARON INCORPORATED
8080 N. Palm Avenue, Third Floor
P.O. Box 28902
Fresno, California 93729-8902
Telephone: (559) 432-4500/Fax: (559) 432-4590

Attorneys for Plaintiff/Appellant
WILLIAMS & FICKETT, a California General Partnership

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INTRODUCTION

This is an action to recover personal property taxes paid under protest by Williams and Fickett (“Appellant”) on property it did not own, and otherwise had no taxable connection to, on the tax lien date. The Superior Court sustained a demurrer to Appellant’s complaint for refund without leave to amend. The Court of Appeal of the Fifth Appellate District overturned the decision of the trial court. The County of Fresno (“Fresno”) now petitions this Court for relief (the “Petition”).

QUESTION PRESENTED

Can an Assessor assess a personal property tax to a party that has no taxable connection to such personal property and use an alleged failure to exhaust administrative remedies to defeat a timely refund claim after payment of the tax?

Fresno asserts two issues to overturn the decision of the Court of Appeal— first: “Is a taxpayer required to exhaust the remedy of applying to the county board of equalization if the issue does not involve valuation of the property?”; and second, “May a taxpayer who files an application for changed assessment with a county board of equalization wait until longer than the period under Revenue and Taxation Code section 5097(a)(3)(A), after the conclusion of that proceeding, before paying the property taxes and seeking a refund?”

This case involves one of the most fundamental questions in any form of taxation — Who is the taxpayer? It also involves the interplay between requiring exhaustion of administrative remedies with the local Assessment Appeals Board (the “board”) and when the Assessor lacks jurisdiction over an assessee. Appellant and those assessees similarly situated will be denied *due process* if Fresno convinces this Court to uphold the trial court’s decision to sustain Fresno’s demurrer to the complaint.

Because this is an appeal from a sustained demurrer there are no factual questions, only legal issues. Appellant’s refund claim is to recover personal property taxes paid on property it did not own, claim, possess or control on the applicable tax lien dates.

DISCUSSION

A. There are No Grounds for Supreme Court Review

The Petition fails to show the necessity of this Court’s consideration of the decision from the Court of Appeal under Cal. Rules of Court, Rule 8.500(b)(1) other than expose the confusion surrounding the fundamental issue of jurisdiction of both an Assessor and the local board. The decision of the Court of Appeal is correct. The argument that all future taxpayers will fraudulently use the claim of non-ownership to avoid filing with the local board is specious. This only works if it is true and does not differ from using the existing nullity exceptions for void assessments to skip filing with the board. If a trial court finds a taxable connection of

ownership then failing to exhaust administrative remedies will bar the suit entirely, preventing the owner from contesting the validity or amount of the tax. This makes it a risky position to assert without reasonable grounds.

B. Review Should Be Denied, but if This Court Decides to Grant Review, It Should Address Several Issues That Arise at the Various Stages of Property Tax Controversies

When an Assessor audits a potential assessee and determines an escape assessment¹ of personal property tax is to be made, the starting point for every Assessor must be who is properly assessable for the tax on the property; generally a simple task based on ownership or some level of control of the taxable property. This case examines the results when the Assessor gets it wrong. The determination by the Court of Appeal to publish its decision confirms its view the case involves several significant issues: (i) *due process* in personal² property taxation, (ii) the existence of standing to file with the board, and, (iii) the ability of parties to skip such filing based on the existing Nullity exception to the requirement to exhaust administrative remedies.

¹ An escape assessment is a retroactive assessment intended to rectify an omission or error that caused taxable property to be underassessed (or not assessed at all).

² While due process applies equally to real property taxes, the automatic lien on immovable real estate lessens any concern about identifying the correct owner and assessing the correct party for the taxes. See Revenue and Taxation Code section 2187.

These important issues arise at various stages of a property tax controversy and their resolution is essential to the statewide operation of the California property tax system.

1. **If This Court Decides to Grant Review, It Should Address Whether Assessors Have Jurisdiction to Assess Personal Property Taxes to a Party Who Possesses No Taxable Connection to the Property**

*Due process*³ establishes that the Assessor can only assess a party who has *some* minimal connection to the property sought to be taxed⁴. Section 405(a) of the California Revenue and Taxation Code identifies the required taxable connection between the property and the party to be charged with the tax⁵. Lacking such connection, the Assessor has no jurisdiction to assess the non-owner.

This limitation of a tax assessor's jurisdiction has a long history. The discussion in *McClean v. Jephson* (1919) 123 N. Y.142 is

³ California Constitution, Art. 1, § 7(a) : "A person may not be deprived of life, liberty, or property without *due process* of law..."

⁴ See *Miller Brothers Co v. Maryland*, 347 US 340, 344 (1954). "But the course of decisions does reflect at least consistent adherence to one time-honored concept: *due process requires that there be some minimum connection between a state and the person, property or transaction it seeks to tax.*" See also *MeadWestvaco Corp. v. Illinois Dept. of Revenue*, 553 U.S. 16 (2008) citing *Miller Brothers*.

⁵ Revenue and Taxation Code section 405(a). "Annually, the Assessor shall assess all the taxable property in his county, except state-assessed property, to the *persons owning, claiming, possessing, or controlling it on the lien date.*" Failure to possess any of the listed relationships is sometimes referred to in this Answer as "non-ownership" or the party as a "non-owner".

instructive, where in holding a tax assessment invalid, the court says: "The authority of its officers to exercise the power of taxation has uniformly been carefully scrutinized and limited to the express warrant of the statute and cannot be extended by implication or construction." The court further held assessors cannot acquire jurisdiction by deciding they have it: "...when their right to act depends on the existence of some fact which they erroneously determine to exist their acts are void". In short, an Assessor cannot bootstrap its way into jurisdiction.

2. **If This Court Decides to Grant Review, It Should Address Whether an Escape Assessment of a Party by the Assessor Makes That Party a "Party Affected" When He or She Had No Ownership Interest in the Property nor a Direct Economic Interest in Payment of the Property Taxes**

Turning next to the jurisdiction of the board, only the owner of the taxable property or a party contractually obligated to pay the taxes (the "party affected") possesses standing⁶, under Revenue and Taxation

⁶ Revenue and Taxation Code section 1603

(a) "A reduction in an assessment on the local roll shall not be made *unless the party affected or his or her agent* makes and files with the county board a verified, written application [...]"

[...]

(f) "The form provided for making an application pursuant to this section shall contain the following language in the signature block:

I certify (or declare) under penalty of perjury [...] I am (1) *the owner of the property or the person affected* (i.e., a person having a direct economic interest in the payment of the taxes on that property—"The Applicant," (2) *an agent* [...], or (3) *an attorney* [...] who has been retained by the applicant and has been authorized by that person to file this application."

Code section 1603(a), to file an Application for Changed Assessment with the board. If not a “party affected⁷”, the party cannot file with the local board and there can be no failure by the party to exhaust administrative remedies which are unavailable.

Appellant stated in its opening brief (AOB pp. 28 and 8) that Revenue and Taxation Code section 405 sets forth the required taxable connection needed to be a valid assessee⁸. Appellant also argued in its reply brief it was not a “party affected” because it had no direct economic interest in the payment of the taxes on property it did not own on the lien dates (ARB p. 10) and was not a party to an existing lease obligating it to pay such taxes.

The jurisdiction of the board to hear an application for reduction, and therefore the resolution of any requirement to exhaust remedies, will depend on the existence of a “direct economic interest” of a

⁷ Property Tax Rule 301(g). “Person affected” or “party affected” is any person or entity having a *direct economic interest in the payment of property taxes on the property for the valuation date* that is the subject of the proceedings under this subchapter, including the property owner, a lessee required by the property lease to pay the property taxes, and a property owner who acquires an ownership interest *after the lien date* if the new owner is also responsible for payment of property taxes *for the lien date* that is the subject of the application.”

⁸ See fn. 5, *supra*.

party at a specific time. Property Tax Rule 301(g)⁹ states it is solely by the taxable connection *as of the lien date* or by a contractual obligation to pay such taxes.

Fresno's contrary position is that any person or party named by the Assessor as the assessee of a personal property tax will become a "party affected" years later when the escape assessment¹⁰ is made since such person or party must pay the taxes prior to contesting the void assessment and recovering a refund. Fresno's argument implies that when the Assessor erroneously assumes the fact of ownership of property by the party it has the power to create its own jurisdiction to assess such party.

Due process is compromised, along with the intent and structure of the Revenue and Taxation Code, if an assessment by the Assessor can make someone, with no taxable connection, a "party affected".

3. **In The Event That Appellant is found to be a Party Affected, the Court Should Address Whether Appellant Qualifies for the Nullity Exception to the Exhaustion Requirement**

A "party affected", who qualifies for the nullity exception to the exhaustion requirement, is not required to file with the board and

⁹ See fn. 7, *supra*.

¹⁰ It is axiomatic that a party will never self-report such property on the annual property tax statement if it believes it has no taxable connection to the personal property.

therefore not barred by failing to exhaust if he chooses not to file. *Stenocord Corp. v. City and County of San Francisco* (1970) 2 Cal.3d 984 and *Star-Kist Foods, Inc. v. Quinn* (1960) 54 Cal.2d 507. While the correct result was reached, it is unclear from the opinion of the Court of Appeal if it found the Appellant, not being an “affected party”, had no standing to file with the board or if the nullity exception applied or both.

To an unexplored degree, the nullity exception to exhaustion and failing to qualify as a “party affected” are two sides of the same coin regarding the board. Except possibly for determining if property is tax exempt (where the board specifically lack jurisdiction to decide¹¹), the definition of a “party affected” mimics the nullity exception¹² because the other two nullity elements, outside-of-the-jurisdiction property and non-existent¹³ property, likewise lack a necessary “party affected” since the assessed party in those cases will lack any taxable connection to such property.¹⁴

¹¹ Property Tax Rule 302(b). “Except as provided in subdivision (a)(4), the board has no jurisdiction to grant or deny exemptions or to consider allegations that claims for exemption from property taxes have been improperly denied.”

¹² Property that is tax exempt, outside of the jurisdiction, or non-existent.

¹³ It is unclear if “non-existent” mean fictitious property or personal property that once existed but was destroyed, or covers broader ground.

¹⁴ Query: Assuming he becomes aware of the assessment, is the actual owner of the personal property a “party affected” who can file the [continued]

It appears Fresno believes this Court either overturned its judicially created nullity exception in *Steinhart v. County of Los Angeles* (2010) 47 Cal.4th 1298 or that the 1993 amendment to Revenue and Taxation Code §5142 was intended to statutorily eliminated the nullity exception, requiring all valuation and non-valuation questions to go first to the board. The Court of Appeal neglected to clarify this most important issue: whether or not non-ownership is included within a (still) extant nullity exception, whether an additional nullity exception was added due to its status as a “void” assessment, or, as discussed above, if the lack of a “party affected” controls. See *Parr-Richmond Industrial Corp. v. Boyd* (1954) 43 Cal.2d 157, 164-165.

Based on the language and holding in *Steinhart*, it does not appear this Court intended to overturn the entire nullity exception but simply to find the Legislature eliminated change-in-ownership¹⁵ questions as a possible nullity exception by adding Revenue and Taxation Code section 1605.1(a).

This Court has not addressed previously the intersection of the judicial nullity exception with the statutory definition of a “party affected”. Maybe the question is whether an administrative review board

application with the board based on what was void assessment of the wrong person, or is it a void assessment for all purposes?

¹⁵ Revenue and Taxation Code section 60.

has or should have jurisdiction to review if the government agency had jurisdiction itself to take the action contested. Granted, an appeals board, as a quasi-judicial body, may pass on its own jurisdiction¹⁶; however, the board's determination of the Assessor's jurisdiction to tax is a different matter since that leads right back to the void assessment/nullity issue.

Since the nullity exception to exhaustion is a long standing judicially exception created by this Court, its total elimination by the Legislature would be a change in the law of significant interest to all taxpayers and Assessors in California.

Such violation of the right to *due process* would outrage any California citizen assessed taxes on personal property that lacked any taxable connection to the citizen. The Court of Appeal is enforcing an important right affecting the general public and conferring a significant benefit on all California residents.

C. The Argument about the Application of the Statute of Limitations is Without Merit

Fresno's argument is logically unsound, asserting that the statute of limitations (applicable to a claim for refund) expired prior to the required jurisdictional payment being made. Assuming a valid Application for Changed Assessment had been permissible and filed, Revenue and

¹⁶ *County of Sacramento v. Assessment Appeals Board No. 2* (1973) 32 Cal.App.3d 654.

Taxation Code section 5097(a)(3)(A) is still subject to subdivision (a)(2), not the other way around. Implicit in subdivision (a)(2) is the assumption that the party has already paid the property taxes being challenged. The intent of the statute is to shorten what was a four year statute of limitations *after payment* to a one year or six month period after the board determination *where payment has been made*. To hold otherwise, any party assessed taxes for large amounts of personal property it did not own, and did not have the funds to pay within the one year after a Board's determination of liability, would be barred from seeking a refund of the after-paid taxes. If taxes must be paid prior to submitting a refund claim, the four year (or shorter under subdivision (3)(A)) post-payment rule provides the needed *due process*¹⁷.


¹⁷ See *McKesson Corporation v. Division of Alcoholic Beverages and Tobacco, Department Of Business Regulation of Florida, Et Al.* (1990), 496 U.S. 18. "Our precedents establish that if a State [...] requir(es) them to pay first and obtain review of the tax's validity later in a refund action, the Due Process Clause requires the State to afford taxpayers a meaningful opportunity to secure *postpayment relief* for taxes already paid..."

CONCLUSION

Appellant respectfully submits that the Court of Appeal was correct to overturn the trial court decision.

Dated: March 5, 2015

DOWLING AARON INCORPORATED

By 

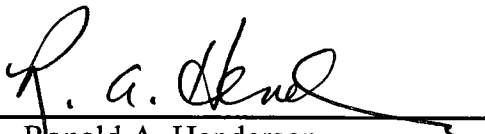
Ronald A. Henderson
Attorneys for Plaintiff/Appellant
WILLIAMS & FICKETT, a
California General Partnership

CERTIFICATE OF WORD COUNT

The text in this Appellant's Reply Brief is proportionally spaced. The typeface is Times New Roman, 13 point. The word count generated by the Microsoft Word© word processing program used to prepare this Opening Brief, for the portions subject to the restrictions of California Rules of Court, Rule 8.204(c), is 3,548.

Dated: March 5, 2015

DOWLING AARON INCORPORATED

By 
Ronald A. Henderson
Attorneys for Plaintiff/Appellant
WILLIAMS & FICKETT, a
California General Partnership

PROOF OF SERVICE

STATE OF CALIFORNIA)
) SS
COUNTY OF FRESNO)

I am a citizen of the United States and a resident of the County aforesaid; I am over the age of eighteen (18) years and not a party to the within-entitled action. My business address is 8080 North Palm Avenue, Third Floor, Fresno, CA 93711. On March 5, 2015, I served the within document(s):


ANSWER TO PETITION FOR REVIEW

BY MAIL: By placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Fresno, California, addressed.

Daniel C. Cederborg, County Counsel Michael R. Linden, Deputy County Counsel Fresno County Counsel 2220 Tulare Street, 5th Floor Fresno, CA 93721 Telephone: (559) 600-3479 Facsimile: (559) 600-3480 <i>Attorneys for Defendant/Fresno County of Fresno</i>	Hon. Donald S. Black Fresno County Superior Court Department 502 1130 "O" Street Fresno, CA 93721
Court of Appeal Fifth Appellate District <i>(via e-service pursuant to California Rules of Court, Rule 8.212, by e-submission to Court of Appeal, Fifth District)</i>	

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on March 5, 2015, at Fresno, California.


Helen L. Walton