S224476

In the Supreme Court of California

Williams & Fickett,

Plaintiff and Appellant,

v.

County of Fresno,

Defendant and Respondent.

Respondent's Reply Brief on the Merits

From the Opinion of the Court of Appeal,
Fifth Appellate District (Case No. F068652)

Appeal from Order of the Superior Court,
State of California, County of Fresno

Daniel C. Cederborg
Fresno County Counsel
State Bar No. 124260

Peter Wall, Deputy
State Bar No. 258677

2220 Tulare Street, Suite 500
Fresno, CA 93721-2128
Telephone: (559) 600-3479

Attorneys for Defendant and Respondent
County of Fresno

(Exempt from Filing Fee under Government Code § 6103)

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Introduction

For each of the tax years disputed in this case, the County Assessor made assessments of Appellant's personal property. Although the Assessor's work papers and audit reports necessarily itemize the property considered for each assessment, the actual assessments were aggregate values of personal property for each year, not separate values of individual items. (2 AA 172.) Under applicable law, if Appellant desired reductions in those aggregate personal property assessments, it was required to seek changed assessments at the Assessment Appeals Board (AAB).

But Appellant argues that taxpayers challenging personal property assessments may avoid that requirement simply by pleading their cause in a particularly artful way. Specifically, Appellant argues that a taxpayer may take a personal property assessment, carve out an amount of assessed value, attribute that value to certain items of its own choosing, and then assert that it did not own those things (or that they "did not exist as to it") on the lien date. According to Appellant, that means it is

challenging "void" assessments, not seeking reduced assessments.

But that is a fiction, invented by Appellant to fit its cause within a so-called "nullity" exception to the requirement that a taxpayer wishing to challenge property taxes first exhaust administrative remedies by applying to the AAB for a reduced assessment.

In reality, Appellant can only be seeking reduced personal property assessments. That is why its untimely applications to the AAB in 2007 included opinions of values that were less than the values on the tax rolls. And Appellant, despite its claims to the contrary, was a proper party to apply to the AAB. Appellant has the same direct economic interest as every other applicant to the AAB: it wishes to reduce its liability for the property taxes charged to it. But Appellant's applications to the AAB were untimely, which means Appellant failed to exhaust its administrative remedies.

Appellant also argues that a taxpayer may wait indefinitely—maybe many years—before deciding that it is finally convenient to pay property taxes and then dispute them.

But Appellant's contention is contrary to law. A taxpayer seeking a refund of property taxes must follow the procedures laid down by the Legislature. Those procedures include several time limits—for applications to the AAB, for refund claims, and for refund actions. Because a refund is only available after taxes are paid, and because taxpayers must pay first and litigate later, a taxpayer that wishes to keep its right to seek a refund must be diligent and actually pay the disputed taxes within the statutory period allowed for refund claims. A taxpayer like Appellant that waits more than a decade to apply to the local board of equalization, and then waits another half decade before paying the disputed taxes, has forfeited its right to seek a refund.

Argument

1. Appellant was required to apply to the AAB for changed assessments.

Appellant concedes in its Answer Brief on the Merits (ABM) that Revenue and Taxation Code[1] section 1603, subdivision (a), provides the general rule for applications to the

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[1] All further statutory references are to the Revenue and Taxation Code unless otherwise noted.

AAB: "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 showing the facts claimed to require the reduction and the applicant's opinion of the full value of the property." (Italics added.) (ABM 8, 51.)

But to avoid that requirement Appellant argues that it is not actually seeking a reduction in an assessment on the local roll (ABM 34–35); that it was not even *permitted* to apply to the AAB for relief (ABM 35–38); that the AAB had no jurisdiction to hear Appellant's applications (ABM 38–40); and that there are no disputed facts and the "nullity exception" excuses Appellant from needing to apply to the AAB (ABM 42–43).

All of those arguments fail. Appellant *is* seeking reductions in assessments on the local roll, it *was* permitted to apply to the AAB, which *did* have jurisdiction, and the so-called "nullity" exception does *not* apply. We address each of those points below.

A. Appellant really is seeking reductions in assessments on the local roll.

Appellant claims that, because it "does not own and has no taxable connection to the assessed property," it is "not protesting an erroneous valuation of its property or requesting 'reduction in an assessment on the local roll.'" (ABM 34.) But Appellant has been requesting reductions in its personal property assessments since its 2007 applications to the AAB. And Appellant may not disguise its requests for reduced assessments by carving out an amount of assessed value and attributing it to particular items.

(1) *Appellant stated its opinions of reduced value in its 2007 applications to the AAB.*

In each and every one of its applications to the AAB in 2007, Appellant supplied an "Applicant's Opinion of Value" for its personal property, which represented a *reduction in value* for that property:

- For the 1994 escape assessment, Appellant requested a reduction in the value of its personal property from $1,352,560 to $238,794 (2 AA 339) (a reduction of $1,113,766);
- For the 1995 escape assessment, from $1,032,680 to $238,794 (2 AA 343) (a reduction of $793,886);

- For the 1996 escape assessment, from $495,660 to $0 (2 AA 347) (a reduction of $495,660);[2]
- For the 1997 escape assessment, from $300,190 to $0 (2 AA 351) (a reduction of $300,190);
- For the 1996–1997 assessment, from $1,170,290 to $238,794 (2 AA 355) (a reduction of $931,496);
- For the 1997–1998 assessment, from $1,170,290 to $169,259 (2 AA 359) (a reduction of $1,001,031);
- For the 1998–1999 assessment, from $1,170,290 to $169,259 (2 AA 363) (a reduction of $1,001,031);
- For the 1999–2000 assessment, from $1,170,290 to $169,259 (2 AA 367) (a reduction of $1,001,031); and
- For the 2000–2001 assessment, from $1,170,290 to $169,259 (2 AA 371) (a reduction of $1,001,031).

Despite clearly requesting those *reductions in the assessed value of its personal property*, however, Appellant asserted in its applications that it was entitled to relief under section 4986. (See, e.g., 2 AA 341.) It repeated that assertion in its Verified First Amended Complaint, where it described its applications to the AAB as applications under section 4986 to "cancel, not reduce, the assessment." (2 AA 175, underlining in original.)

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[2] Although Appellant sought reductions to $0 for the 1996 and 1997 *escape* assessments, it still offered opinions of nonzero values for the regular assessments those years.

But section 4986 expressly refers to cancellation "by the auditor," and would only relate to action by the AAB if that board had already reduced the assessed value of the property. (§ 4986, subd. (f).) And Appellant already knew how to direct a cancellation request to the proper official, as demonstrated by its 2006 letter to the County Auditor-Controller/Treasurer-Tax Collector (Auditor), which was signed by the same counsel that signed its applications to the AAB. (2 AA 325–326.)

In 2012, Appellant tried again to construe what it sought as something other than a reduced assessment. Appellant asserted that both of its refund claims were "based on the non-existence of property," so that no applications to the AAB were required. (2 AA 183, 242–243.) But Appellant contradicted that when it alleged in its Verified First Amended Complaint that the 2012 claims for refund sought a "reduction in the assessed taxes *due to the reduction in the assessed value* for all roll years." (2 AA 176, italics added.)

If it has been difficult for Appellant to construe its claims consistently over the years, it is because Appellant is trying to shoehorn a lost cause into procedures and legal theories that do

not fit. The substance of the matter is that, for each of the disputed tax years, Appellant is—and since 2007 has been—seeking "a reduction in an assessment on the local roll." Under section 1603, that requires a timely application to the AAB. But Appellant failed to make a timely application and now is barred from litigating the matter in court. Appellant still wants to get into court, however, so it disguises its cause with theories about the "non-existence of property" and denies that it seeks a reduction in an assessment. But there should be no confusion: Appellant seeks reductions in its personal property assessments on the local roll for the disputed tax years.

(2) ***Appellant may not disguise its requests for reduced assessments by carving out an amount of assessed value, attributing it to particular items, and calling assessments of those items "void."***

When personal property is assessed, the tax roll contains a total value for all personal property, but the specific items of personal property do not need to be enumerated. (§ 602, subds. (d) & (i).) That means a single assessment of all property generally described as personal property is legally sufficient. (*El Tejon Cattle Company* v. *San Diego County* (1967) 252

Cal.App.2d 449, 459.) When Appellant disputes its personal property assessments for the years in question, it challenges the assessment of the whole bundle of its taxable personal property on each of the relevant lien dates. That is why, in its 2007 applications to the AAB, Appellant sought *reductions* in its personal property assessments for the seven tax years in question. The Assessor did not make separate assessments against individual items of property, so separate challenges for individual items were not possible. All Appellant could do was challenge the *total* assessment, and seek to have it reduced by challenging the Assessor's methods. That is an issue for the AAB.

One of the cases cited by Appellant illustrates what is required to contest an assessment on a portion of the taxpayer's personal property without going to the local board of equalization—but the facts in that case are not like the facts here. In *Parrott & Co.* v. *City and County of San Francisco* (1955) 131 Cal.App.2d 332, the taxpayers were "importers from foreign countries of intoxicating liquors." (*Id.* at 333.) On the lien date, the taxpayers "owned and possessed in warehouses in San Francisco a designated quantity of liquor, that it had imported

from abroad," which they held "in identifiable and segregated lots separate from their other merchandise stored in the warehouses." (*Id.* at 333–334.) When the City and County of San Francisco assessed the taxpayers' personal property on that lien date, "[t]he imported liquor was separately listed, *and taxed separately from the other personal property of the taxpayers*." (*Id.* at 334, italics added.) The taxpayers challenged only the assessment on that imported liquor, on the ground that it was exempt from taxation. (*Ibid.*) They did not apply to the local board of equalization for relief, but went straight to court, where they prevailed. San Francisco appealed and argued, in part, that the taxpayers had failed to exhaust their administrative remedies. (*Id.* at 334–335, 341.)

After affirming the judgment of the trial court that the imported, segregated liquor was not subject to taxation, the Court of Appeal held that, because "there was no mingling of the tax exempt imports with the taxable property of the taxpayers[, t]here was nothing for the administrative board to adjudicate." (*Parrott, supra,* 131 Cal.App.2d at 342.) The Court of Appeal concluded: "The taxpayers claim, and properly so, that this *total*

assessment [of segregated, separately assessed imported liquor] was a nullity—beyond the power of the taxing officials to impose. In such a case there is no question of valuation that must be presented to the Board of Equalization for correction before judicial review may be sought. " (*Ibid.*)

Unlike the taxpayer in *Parrott*, Appellant is not challenging assessments on specifically identified personal property that was *separately* taxed, or alleging that each *total assessment* is a nullity, as the taxpayers in *Parrott* did. Rather, Appellant is unilaterally carving out a *portion* of each personal property assessment for the disputed tax years and attributing that portion of value to particular property—which it says did not exist (or "did not exist as to it"), or that it did not own, claim, possess, or control, or that it had no "taxable connection" to, on the relevant lien dates. And Appellant does not allege that the value of the portion that Appellant has carved out, or that the specific items of property that it identifies, were identified on the tax rolls. Instead, Appellant bases those allegations on its own interpretation of various letters, work papers, and audit reports provided by the Assessor's office after several audits of

Appellant's personal property. (2 AA 170, 173, 174, 208ff, 220ff, 323.) But while those documents may be evidence of how the Assessor determined the assessments, they are not the assessments themselves.

That is, even though individual items of personal property were *not* separately assessed, Appellant treats particular items as though they *were* separately assessed, and then says those separate assessments were "void." But that is a fiction, invented by Appellant to disguise its requests for reduced assessments as something else.

If Appellant had timely applied to the AAB for a reduction of its personal property assessments for the disputed tax years, then the AAB could have considered the bundle of personal property owned, claimed, controlled, or possessed by Appellant on the relevant lien dates. Based on the evidence that could have been presented, assuming the truth of Appellant's allegations, the AAB might have determined that certain items of personal property were assessed to Appellant, but should not have been. Then, after establishing Appellant's total bundle of personal property on the relevant lien dates, the AAB might have reduced

the total assessments of personal property for the corresponding tax years.

It is true that determining whether Appellant owned, claimed, possessed, or controlled certain property on a particular lien date does not involve choosing and applying an appraisal method, or otherwise establishing the value of something. But that determination would not occur in isolation; it would be a component in the larger determination of Appellant's *total assessment* of personal property. And that larger determination of whether to reduce a personal property assessment on the local roll is *equalization.*

In the course of equalization, local boards of equalization also properly make several other determinations that are not "valuation" questions: they determine their own jurisdiction (*County of Sacramento* v. *Assessment Appeals Board No. 2* (1973) 32 Cal.App.3d 654, 663); they classify different kinds of property (see, e.g., *Security-First National Bank* v. *Los Angeles County* (1950) 35 Cal.2d 319, 321("*Security First*")); and they determine when ownership of real property has changed (§ 1605.5). If there are other questions of fact entailed by, or precedent to, a

determination of value—like whether the applicant owned particular pieces of personal property on the lien date—the AAB can decide those, too.

"In the end," wrote the trial court in this case, "this is a case about property valuation and the timing of when certain transfers of property were made." (3 AA 443.) This Court should see the same thing, reverse the Court of Appeal, and affirm the trial court.

B. Appellant was permitted to apply to the AAB for reduced assessments.

Appellant claims that it was not "permitted" to file its 2007 applications to the AAB because it had no "direct economic interest in the payment of the taxes on the property." (ABM 37.) But Appellant has exactly the same direct economic interest as every other assessee that disputes an assessment: reducing its obligation to pay taxes. That makes Appellant a party of interest.

Appellant also claims that someone in its circumstances cannot have had an opinion about the value of the personal property in question. (ABM 35–36.) Except that Appellant *actually did* have an opinion about the value of that property, as

described above. If there are circumstances where a "party affected" seeking a reduction in a personal property assessment on the local roll could not possibly have an opinion about the value of the property, they are not presented in this case.

C. The AAB had jurisdiction to hear timely applications by Appellant for reduced assessments in the disputed tax years.

The plain statutory language in section 1603, subdivision (a), is broad: any "party affected" seeking a "reduction in an assessment on the local roll" must apply to the local board of equalization for relief. The rule makes no distinction between different factual circumstances, or different theories of relief. For any "party affected" that desires a reduction in its local roll assessment, the administrative remedy lies at the local board of equalization.

But the rule is not without limits, and it certainly does not mean, as Appellant suggests, that local boards of equalization are administrative courts of "general jurisdiction" with authority "to hear and decide any and all factual disputes, regardless of whether the dispute relates in some way to equalization." (ABM 40.) To the contrary, the rule expressly limits the jurisdiction of

local boards of equalization to claims by "parties affected" that seek a *reduction in an assessment on the local roll.* And, as discussed above, Appellant's claims are well within those limits here, because Appellant is a party affected and it seeks a reduction in an assessment on the local roll.

The question is not whether any other statute *allowed* the AAB to hear Appellant's claims here—section 1603 does that. The question is whether any judicial precedents *excuse* Appellant from exhausting its administrative remedies by applying to the AAB. We address that question in the next section.

D. The so-called "nullity" exception does not apply.

Appellant argues that the facts are undisputed and that a "nullity exception" applies, which would excuse it from the requirement to make timely applications to the AAB. (ABM 42–43.) We discussed in our Opening Brief on the Merits why the so-called "nullity" exception only applies to matters presenting pure questions of law with undisputed facts. (OBM, 29–35.) Here we will address Appellant's contention that the facts are undisputed and its misplaced reliance on *Parr-Richmond Industrial Corporation* v. *Boyd* (1954) 43 Cal.2d 157.

(1) *The record contradicts Appellant's claim that the facts are undisputed.*

If allegations in the complaint conflict with the exhibits, the Court must "rely on and accept as true the contents of the exhibits." (*SC Manufactured Homes, Inc.* v. *Liebert* (2008) 162 Cal.App.4th 68, 83.)

Appellant asserts that the facts are undisputed: "In any event, there is no dispute in this case that [Appellant] was not the owner of the property. In a subsequent audit, the assessor determined that [Appellant] had disposed of the nine pieces of farm equipment and did not own or possess the equipment for the tax years in question." (ABM 42.) To support that assertion, appellant cites four pages of the record, which include two pages of the Verified First Amended Complaint and two documents from its exhibits: a September 23, 2003 letter from the Assessor's office, and a February 28, 2005 letter from the Assessor's office. The letters do not support the allegation in the pleading.

The 2003 letter only states that there was an "overassessment" for the 2001 tax year, which included $284,700

for "Off[ice] Furn[iture] & Equip[ment]."[3] The letter does not say anything about the "nine pieces of farm equipment" that Appellant refers to in its brief, and it does not refer to any prior tax years. Moreover, the audit report that is included with that letter in the record (2 AA 311–321) includes a list of property for the 2001 lien date (2 AA 321). Every item that Appellant claims it did not own on the disputed lien dates (or which "did not exist as to it" on those dates) appears on that list.[4] (2 AA 182, 321.) So the allegation in the Verified First Amended Complaint that the Assessor's office "agreed that those items did not exist for the year 2001" (2 AA 174) is contradicted by the documents provided by Appellant in its claim for relief.

The 2005 letter says nothing about the relevant tax years (it covers only 2002 through 2005), does not enumerate any

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[3] The letter states that the "overassessment" information would be "forwarded to the Fresno County Auditor-Controller," which would "process a refund check." (2 AA 310.) The record does not specify the date or amount of that check.

[4] There is one apparent discrepancy that can be resolved. The items Appellant says it did not own include four "9965 Cotton Pickers," but the list of property for the 2001 lien date only lists "9965 JD Cotton Picker" without a quantity. We note, however, that the value Appellant assigns to the four "9965 Cotton Pickers" that it says it did not own is identical to the value of the "9965 JD Cotton Picker" on the list for the 2001 lien date: $745,630. The two "non-existent" items appear to be the same, despite the quantity discrepancy. (2 AA 243, 321.)

particular items of property, and does not include an audit report as the 2003 letter did. (2 AA 323.)

What the record instead shows is that, as late as 2006, Appellant was unable to convince County officials that its assessments should have been reduced for the disputed tax years. Appellant's counsel at that time had discussions with both the Assessor's office and the Auditor's office (2 AA 325–326, 328–330), but failed to demonstrate "that the County Assessor's findings and conclusions for the recent audit of certain specific tax years (i.e., 2001 to 2004) would be the same for prior tax years in question (i.e., 1996 to 2000), as that would be speculative." (2 AA 330.)

Moreover, even assuming the record showed what Appellant claims it does, it does not show that the facts were undisputed *at the relevant time*. Appellant would have needed to apply to the AAB for disputed tax years during the period from 1997 through 2001, when the disputed assessments were made. (§§ 1603, subd. (b), 1605, subd. (b).) But that was *before* September 2003, when Appellant alleges that the Assessor's office "agreed" that certain items of personal property "did not

exist" for the relevant lien dates. (2 AA 173–174) So even *if* the Assessor's office later changed its position and the facts became undisputed (and the County does not concede that it did), Appellant has neither pleaded nor shown that the facts were undisputed at the relevant times. As the Auditor put it in 2006, Appellant makes only "speculative" allegations. Because the record already contradicts Appellant's allegations on that point, there is no way for Appellant to further amend its pleadings to state a cause of action.

(2) *Parr-Richmond did not "announce" a "nullity exception" to the exhaustion doctrine and is not applicable here.*

Appellant says the disputed assessments are "illegal and void as a matter of law," and argues that allegation places it "squarely within the nullity exception as announced by this Court in *Parr-Richmond*." (ABM 35.) Appellant even says that its circumstances here are "exactly what happened" in that case. (ABM 34.) But *Parr-Richmond* is substantially distinguishable from this case, does not hold for the proposition that Appellant asserts, and provides no guidance here.

In *Parr-Richmond*, the plaintiff purchased some real property from the United States government. But the process used for the purchase resulted in the plaintiff taking possession of the property about 18 months before it received title. During that period before the plaintiff took title, there were two lien dates on which the City of Richmond and the County of Contra Costa assessed the entire fee interest in the property to plaintiff, and charged property taxes based on that value. (*Parr-Richmond, supra*, 43 Cal. at 159–162.) The plaintiff timely applied to the local boards of equalization for the City of Richmond and the County of Contra Costa for each of the two tax years that it disputed. (*Id.* at 164.) In those applications to the local boards, the plaintiff raised "a claim of illegality against the assessments in toto," but was denied each time. (*Ibid.*)

The problem appears to have been that the plaintiff's claim in its applications to the local boards did not quite match the facts it alleged, which was "that all it had on the respective tax dates was, as the trial court found, 'a qualified and contingent possessory interest in the form of a gratuitous and revocable right to possession'; [and] that the assessment should have been

made only against such possessory right, and not as if [the plaintiff] held the whole beneficial interest." (*Parr-Richmond, supra*, 43 Cal.2d at 159.) That is, while the plaintiff consistently alleged facts that should have resulted in *reduced* assessments for the tax years in question, it claimed to the local board of equalization that the assessment was totally illegal.

Given those facts, the trial court held that the plaintiff should have been taxed only on its possessory right to the property, and entered judgment against the government defendants to reduce the assessments accordingly. (*Parr-Richmond, supra*, 43 Cal.2d at 159.)

On appeal, the government defendants asserted that the lawsuit "rais[ed] a question of valuation which should have been presented to the board of equalization before a judicial review was sought." (*Parr-Richmond, supra*, 43 Cal.2d at 164.) Against that assertion, the Court held that the particular "theory of relief' by which plaintiff prevailed did not need to be presented to the local board of equalization as a condition of the lawsuit. (*Id.* at 165.) The Supreme Court affirmed the judgment of the trial court.

That means *Parr-Richmond* does not stand for excusing taxpayers from applying to their local board of equalization for relief, as Appellant contends, because the taxpayer in that case actually applied for relief at the local board. Instead *Parr-Richmond* holds that a taxpayer who makes consistent factual allegations need not maintain the same *theory* of relief between its application to the local board and its refund action. And that holding has no bearing on the issue before this Court, which is whether Appellant was required to apply to the AAB for reduced assessments.

In fact, although Appellant refers to "the nullity exception as announced by this Court in *Parr-Richmond*" (ABM 35), the word "nullity" appears nowhere in the majority opinion in that case. Only in the dissenting opinion by Justice Carter is there any reference to an exception like the one that Appellant mentions, and there only to say that he would *not* have applied any such exception, but would have followed *Security-First* and remanded the matter to the local board for further proceedings. (*Parr-Richmond, supra,* 43 Cal.2d at 171–172, dis. opn. of Carter, J.)

(3) *The other cases Appellant cites also do not support its interpretation of the so-called "nullity" exception.*

Appellant cites a litany of cases (ABM 14–22) in support of its argument that "a taxpayer who claims an assessment is erroneous, illegal, or void is not required to file an application for reduction with the local board of equalization" (ABM 13). We have already cited or discussed all of those cases in our Opening Brief or above in this brief, with one exception: *Los Angeles Shipbuilding and Dry Dock Corp.* v. *County of Los Angeles* (1937) 22 Cal.App.2d 418 (*"Los Angeles"*).[5]

Los Angeles is distinguishable on its facts, but still consistent with our analysis. In that case, the Court of Appeal affirmed a judgment against the taxpayer, which was based on a sustained demurrer favoring the county defendant. (*Los Angeles*, *supra*, 22 Cal.App.2d at 419.) The property in question was a leasehold interest in real property. Ordinarily, if the annual rent under such a lease exceeded the "proper" amount according to a particular formula, the county assessor would have assessed the

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[5] We also note that in *Associated Oil Co.* v. *Orange County* (1935) 4 Cal.App.2d 5, "[t]he facts [were] undisputed, and the question presented [was] entirely one of law," which is consistent with our analysis of the exception in our Opening Brief.

leasehold with zero value. (*Id.* at 420.) But the assessor made an error and stated the annual rent at a nominal amount, which resulted in an assessed value of about half a million dollars for the taxpayer's leasehold. (*Ibid.*) The taxpayer argued—much as Appellant has argued here—that "in the absence of statute authorizing it to do so, a Board of Equalization has no power to cancel or strike out an assessment under any circumstances, and any order to that effect is a nullity, and hence, since its property had no taxable value, the board of equalization would have been powerless to give it relief." (*Id.* at 422.) But the Court of Appeal rejected that argument, calling it "more ingenious than persuasive": "If the property is the proper subject of taxation, as here, but not taxable because it possesses no taxable value, an appeal to the board of equalization would still lie even though the board might reduce its assessed value to zero. The question would still be, 'What is the taxable value?' and not, 'Is the property of a class which is not subject to taxation?'" (*Ibid.*, internal quotation marks and citation omitted.) That is, the *Los Angeles* court was concerned with the distinction between taxable and non-taxable property. But the question here is whether

Appellant owned, claimed, possessed, or controlled certain equipment on the relevant lien dates, not whether that equipment was properly the subject of taxation.

Moreover, *Los Angeles* court noted that "the courts should be, as they have been, slow to extend the cases in which recourse to the board of equalization is not made a prerequisite to the recovery of taxes paid." (*Los Angeles, supra,* 22 Cal.App.2d at 422.) That is consistent with our analysis of the cases in our Opening Brief, where we observed that, in the last half century, there are only a handful of cases where courts have excused taxpayers from exhausting administrative remedies at the local board of equalization. And in each of those cases, unlike in this one, the taxpayer presented a pure question of law with undisputed facts. (OBM 30–32.)

2. Appellant was required to pay the disputed taxes within the time stated in Revenue and Taxation Code § 5097(a)(3)(A)(ii), or within a reasonable time after assessment, but failed to do so, and has lost its right to claim a refund.

Appellant says there is "no statute of limitations to pay property taxes." (ABM 43, 46.) But that is not the issue here. The issue in this case whether a taxpayer *loses the right to claim a*

refund if it waits too long to pay the taxes. As we discuss below, it is possible for a taxpayer to wait too long before payment and lose its right to challenge the tax—and that is what happened here.

Below we also discuss two other arguments that Appellant makes. First, According to Appellant, "[t]he language of section 5097 is clear" that "the statute of limitations to file a claim for a tax refund begins to run only after the taxpayer has paid the disputed taxes." (ABM 43.) To support the argument, Appellant cites *Singer Co.* v. *County of Kings* (1975) 46 Cal.App.3d 852. (ABM 46–47.) But *Singer* provides no help here because it was decided based on an earlier version of section 5097 that did not include the critical clause.

Second, Appellant relies on legislative history without first demonstrating that section 5097 is ambiguous, contrary to established rules of statutory construction. (ABM 48–51.)

A. *Singer* is not applicable here because it was decided under an earlier version of Revenue and Taxation Code § 5097.

When *Singer* was decided, section 5097 provided, in relevant part: "No order for a refund under this article shall be made except on a claim: . . . (b) Filed within three years after

making of the payment sought to be refunded or within one year after mailing of notice as prescribed in Section 2635, whichever is later." (*Singer*, *supra*, 45 Cal.App.3d at 866.) Section 5097 now includes a prefatory clause, "Except as provided in paragraph (3)," which was not before the *Singer* court, or part of the dispute in that case.

Singer is also distinguishable on an important fact: the taxpayer in that case paid all of the disputed taxes *timely*. (*Singer,* supra, 45 Cal.App.3d at 865–866.) Appellant cites no cases, and we find none, in which a taxpayer waited a decade before paying the disputed taxes, as Appellant did here.

B. There is no reason to turn to legislative history because Revenue and Taxation Code § 5097 is unambiguous on its face.

When construing a statute, the Court must "begin with the statutory language because it is generally the most reliable indication of legislative intent." (*Shirk* v. *Vista Unified School District* (2007) 42 Cal.4th 201, 211.) "If the statutory language is unambiguous, [the Court] presume[s] the Legislature meant what it said, and the plain meaning of the statute controls. [Citation.] But if the statutory language may reasonably be given

more than one interpretation, courts may consider various extrinsic aids, including the purpose of the statute, the evils to be remedied, the legislative history, public policy, and the statutory scheme encompassing the statute." (*Ibid.*, internal quotation marks omitted.)

Appellant urges the Court to consider the legislative history of section 5097. But Appellant fails to demonstrate that the language of that section is ambiguous. Appellant simply asserts that the prefatory clause of subdivision (a)(2) of that section—"Except as provided in paragraph (3)"—cannot possibly be "intended to modify all the refund limitations periods otherwise set out in subdivision (a)(2)." (ABM 48–49.) Then, without any explanation of how that language might have more than one *reasonable* interpretation, Appellant launches into legislative history.

But the only reasonable interpretation of the prefatory clause in section 5097, subdivision (a)(2), is that it makes the shorter limitation periods in paragraph (3) applicable when the circumstances in those paragraphs occur. In fact, Appellant does not even suggest a different interpretation—it just asserts that

"[n]othing in the legislative history of the amendments to section 5097 suggests the Legislature intended to alter or affect the *four-year* statute of limitations." (ABM 51.) Even if that were true, Appellant does not offer a reasonable interpretation of what the prefatory clause of subdivision (a)(2) *does* mean, or when it *would* apply.

What Appellant *implies*, however, is that, under section 5097, when a taxpayer that applies to the AAB, and the AAB fails to hear evidence or make a determination within two years of the application, the taxpayer may simply wait as long as it wishes to pay the taxes, and then have another four years to file a claim for refund. That is not a *reasonable* interpretation of section 5097, because it makes the reference to "paragraph (3)" inoperative.

(1) *Even if the Court considers the legislative history of Revenue and Taxation Code § 5097, that history favors the County here.*

If the amendment of section 5097 by A.B. 2411 was only intended to fix a problem arising when a county tax collector failed to give notice of overpayment under section 2635 after the local board of equalization failed to act, the fix was to provide a *default* limitation period in those circumstances, under

subdivision (a)(3)(A)(ii). And that is the period that should apply here.

As the legislative analysis quoted by Appellant in its brief says, section 2635 was never supposed to be "a means to file a long dormant refund claim" anyway. (ABM 50.) If the filing of long dormant refund claims was the evil to be remedied by A.B. 2411, then it is curious that Appellant believes it should be allowed by the amended law to revive its own dormant refund claims.

We argued in our Opening Brief on the Merits that the Legislature not only established three procedural steps for a property tax refund—application to the AAB, claim for refund, and action for refund—"it knitted them together by a series of time limits." (OBM 45.) What A.B. 2411 did was to *tighten* the Legislature's knitting together of those procedures. Appellant, after its many long delays, cannot benefit from that change in the law. To the contrary, the change in the law favors the County by reinforcing the legislative intent to require diligence by taxpayers that wish to challenge their property taxes.

C. Even if Revenue and Taxation Code § 5097(a)(2) provided the applicable limitation period, Appellant's action is still barred because it waited unreasonably long to pay the disputed taxes.

If subdivision (a)(3)(A)(ii) of section 5097 does not apply, as Appellant contends, then subdivision (a)(2) of that section would be the applicable limitation period for Appellant's property tax refund claim. Subdivision (a)(2) provides that a refund claim must be "filed within four years after making the payment sought to be refunded."

Even assuming that limitation period of four years after payment, Appellant is mistaken when it asserts that taxpayers are not required to pay taxes "anytime soon," but may wait "years" before paying. (ABM 43–44.) A taxpayer that wishes to retain its right to claim a refund, and to file an action for refund, must pay the disputed taxes timely, or within a reasonable time.

Appellant does not cite any statutes providing, or any cases holding, that a taxpayer may wait as long as Appellant did here before paying property taxes, and then still dispute them. We have found no such statutes or cases, either.

For more than a century, this Court has held that a plaintiff may not indefinitely delay the performance of an act upon which its right of action depends. "The rule is well settled that when the plaintiff's right of action depends upon some act which he has to perform preliminarily to commencing suit, and he is under no restraint or disability in the performance of such act, he cannot suspend indefinitely the running of the statute of limitations by a delay in performing such preliminary act, and that if the time within which such act is to be performed is indefinite or not specified, a reasonable time will be allowed therefor, and the statute will begin to run after the lapse of such reasonable time." (*Bass* v. *Hueter* (1928) 205 Cal. 284, 287.) "What is a reasonable time will depend upon the circumstances of each case. A party cannot by his own negligence, or for his own convenience, stop the running of the statute. [Citations.] The rule rests upon the principle that the plaintiff has it in his power at all times to do the act which fixes his right of action." (*Williams* v. *Bergin* (1897) 116 Cal. 56, 61.) This Court has also held that a reasonable time to perform an act upon which the right of action depends is "a period coincident with that provided in the statute

of limitations for barring the action." (*Thomas* v. *Pacific Beach Co.* (1896) 115 Cal. 136, 143.)

Bass involved a 1903 promissory note that went unenforced for nearly two decades. The note provided that, beginning one year after the date of the note, the holder could give a notice to the payor. Upon that notice, payment was due within three months. (*Bass*, *supra*, 205 Cal. at 286.) The original holder died less than a year after she received the note. (*Ibid.*) Shortly before her death, however, she mentioned the note to her daughter, who failed to find it among her mother's things. (*Id.* at 289.) The daughter then spoke to the maker of the note, who said: "Show me the papers. If you will produce any papers showing that I owe you any money, I will pay it." (*Ibid.*) "No effort was thereafter made by [the daughter] or by any one else, so far as the record discloses, to obtain the payment of said indebtedness during the lifetime of [the maker of the note]." (*Ibid.*) Even so, the Court noted that the daughter had been "actively engaged in the settlement of her mother's estate in 1904 and 1904, with notice of a claimed indebtedness in favor of her mother's estate . . . but did nothing . . . to ascertain the status of the claim other than as

above outlined." (*Id.* at 290.) In December 1923, the daughter found the note. (*Id.* at 289.) Finally, in April 1924, notice was given under the note, "nearly 20 years after it could have been given." (*Id.* at 287.) By that time, the maker had died, and the notice was given to his estate. (*Id.* at 286.) The executors of his estate asserted the statute of limitations as a complete bar to relief and the trial court granted their motion for nonsuit. (*Ibid.*) This Court affirmed, leaving the holders unable to collect on the note.

Like the plaintiffs in *Bass* who failed for 20 years to give notice under their note, Appellant failed for many years to pay the taxes that it ultimately wished to dispute. Assuming the limitation period under subdivision (a)(2) of section 5097 applies (and County does not concede that it does), so that Appellant had four years from payment of the disputed taxes in which to file its claim for refund, then the rule articulated in *Bass* means that Appellant was required to make that payment within a reasonable time after the disputed assessments.

The period of time Appellant waited here before paying its taxes is patently unreasonable. The earliest disputed assessment

was made in 1997, and the earliest payment occurred in 2011, a period of about 14 years. The latest disputed assessment was made in 2001, and the latest payment occurred in 2012, a period of about 11 years. (2 AA 170–172, 175.) Appellant alleges no facts that would excuse those delays. And even if this Court were to hold that Appellant had "a period coincident with that provided in the statute of limitations" (*Thomas*, *supra*, 115 Cal. at 143) in which to make its payment and start the four-year limitation period running, that would only give Appellant four years to pay the taxes, and another four to file a refund claim. Appellant waited substantially longer than that period, and that delay is unreasonable.

Even if this Court were to hold that the four-year period in section 5097, subdivision (a)(2), is applicable here, the result should be the same as under subdivision (a)(3) of that section: Appellant waited too long to pay the taxes and its action is barred.

Conclusion

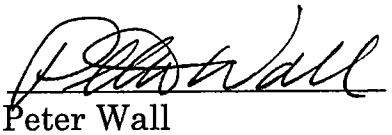
Appellant attempts to make personal property assessments into something divisible at the discretion of the taxpayer, so taxpayers can carve out a piece of an assessment at will and call it void for non-ownership (or "non-existence"). Why? Because Appellant apparently believes that presenting its case that way will bring it within the so-called "nullity" exception to the requirement that plaintiffs exhaust administrative remedies. But those arguments do not change the nature of what Appellant seeks: reduced personal property assessments. That means Appellant was required to apply to the AAB for reduced assessments. It failed to do so, and now its action is barred for failure to exhaust administrative remedies.

Appellant also failed to observe the limits on how long taxpayers may wait to pay property taxes and still preserve the right to dispute those taxes. The law requires taxpayers to be diligent. Regardless of the time limit in question, Appellant simply waited too long, and has lost the right to challenge these taxes.

For those reasons, and for all of the reasons argued above, this Court should reverse the Court of Appeal and affirm the judgment of the Superior Court.

Dated: August 7, 2015 Respectfully submitted,

Daniel C. Cederborg
Fresno County Counsel

By: 
Peter Wall
Deputy County Counsel
Attorneys for Petitioner

Certificate Regarding Length of Brief
(Rule 8.204(c)(1))

I, Peter Wall, Deputy County Counsel, certify under penalty of perjury that, according to the computer program on which this brief was produced, this brief contains approximately 7,470 words.

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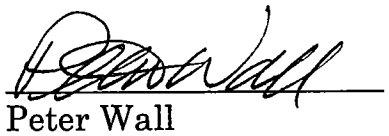


Peter Wall

Proof of Service

I, Rachel Morales, declare that I am a citizen of the United States of America and a resident of the County of Fresno, State of California; I am over the age of eighteen years and not a party to the within action; my business address is 2220 Tulare Street, Suite 500, Fresno, California 93721-2128.

On August 10, 2015, I served a copy of the attached

Respondent's Reply Brief on the Merits

by first-class mail on the following interested parties in said action:

Ronald A. Henderson, Esq.
Lynne Thaxter Brown, Esq.
Dowling Aaron Incorporated
8080 N. Palm Avenue, 3rd Floor
Fresno, CA 93729

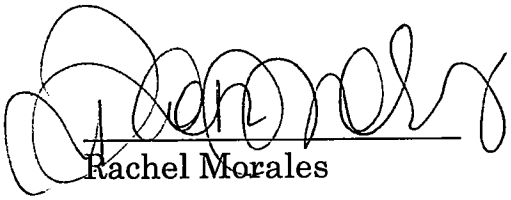
Fresno County Superior Court
Appeals Department
1100 Van Ness Avenue
Fresno, CA 93724

Fifth District Court of Appeal
2424 Ventura Street
Fresno, CA 93721

by placing the document listed above for mailing in the United States mail at Fresno, California in accordance with my employer's ordinary practice for collection and processing of mail, and addressed as set forth above.

I hereby certify under penalty of perjury under the law of the State of California that the above is a true and correct statement.

Executed at Fresno, California on August 10, 2015.



Rachel Morales