

# PUBLIC JUSTICE

RIGHTING WRONGS

April 22, 2013

Hon. Tani Cantil-Sakauye, Chief Justice  
Associate Justices  
Supreme Court of the State of California  
350 McAllister Street  
San Francisco, CA 94102-4797

SUPREME COURT  
FILED

APR 22 2013

Re: *Loeffler, et al. v. Target Corporation*  
Supreme Court No. S173972

Frank A. McGuire Clerk  

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Deputy

Dear Chief Justice Cantil-Sakauye and Associate Justices:

Pursuant to this Court's April 11, 2013 order and California Rule of Court 8.520(d), Plaintiffs-Appellants respectfully submit this letter brief to address the primary jurisdiction doctrine. Although the Court has not identified a specific issue or agency, Plaintiffs assume the Court wishes to assess the utility of referring to the Board of Equalization ("Board") the merits-related question of whether the transactions underlying Plaintiffs' claims are subject to sales tax.

## I. The primary jurisdiction doctrine is inappropriate in this case.

Under the doctrine of primary jurisdiction, a court has discretion to stay a case pending proceedings before an administrative agency on an issue within the agency's special expertise. *Jonathan Neil & Assocs. v. Jones* (2004) 33 Cal.4th 917, 931-32. Unlike exhaustion of administrative remedies, primary jurisdiction applies to claims that are "originally cognizable in the courts." *Id.* Once the agency proceeding is complete (or the agency fails to rule within a reasonable time), the case returns to court, whereupon the court "makes its own decision." *Id.* at 933 (citation omitted).

Since the doctrine is discretionary, courts can choose to invoke it where it would "enhance[] court decisionmaking and efficiency by allowing courts to take advantage of administrative expertise," and "help[] assure uniform application of regulatory laws." *Id.* at 932 (quoting *Farmers Ins. Exch. v. Super. Ct.* (1992) 2 Cal.4th 377, 391-92). Courts also have "considerable flexibility to avoid application of the doctrine" where agency involvement would be unworkable or would contravene "the interests of justice." *Id.* Although there is no categorical bar to applying primary jurisdiction here, it would be inappropriate for several reasons.

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**A. The policies underlying primary jurisdiction would not be served here.**

**1. Specialized administrative expertise is not needed because this case will turn on statutory interpretation, not technical facts.**

Courts typically resort to primary jurisdiction when they need guidance from an agency on factual issues of a “complex or technical nature beyond the usual competence of the judicial system.” *Farmers*, 2 Cal.4th at 399 (primary jurisdiction proper where resolution of claim would require “searching inquiry into the factual complexities of automobile insurance ratemaking and the conditions of that market”). But where a case does not involve “disputed facts of a technical nature [ ] or a voluminous record of conflicting evidence,” primary jurisdiction is inappropriate. *Southern Cal. Ch. of Assoc. Builders v. Cal. Apprentice Council* (1992) 4 Cal.4th 422, 454 (court did not need agency’s help evaluating relationship between federal law and state regulations); *Rojo v. Kilger* (1990), 52 Cal.3d 65, 88 (facts concerning alleged employment discrimination not too technical for court). Here, the factual development required to determine whether certain transactions are tax-exempt (e.g., establishing whether customers ordered coffee “to go” or drank it within the premises) is unlikely to be “complex or technical.”

Moreover, the legal questions in this case are matters of regulatory interpretation which courts routinely handle without agency input. For instance, in *People ex rel. Kennedy v. Beaumont Investment, Ltd.* (2003) 111 Cal.App.4th 102, the question was whether certain leases were exempt from a city rent-control ordinance. The court held that the trial court had properly exercised its discretion to adjudicate that issue rather than refer it to an agency under primary jurisdiction, because interpretation of the ordinance was “an inherently judicial function.” *Id.* at 126. This Court reached the same conclusion in *Southern California Builders*, where the question was “essentially one of law and is of the type daily determined by courts without resort to administrative expertise.” 4 Cal.4th at 454; *see also County of Alpine v. Tuolumne County* (1958) 49 Cal.2d 787, 798 (where dispute is due to “uncertainty or indefiniteness in the statutory description, primary jurisdiction is in the courts rather than the administrative agency”); *Elder v. Pacific Bell Tel. Co.* (2012) 205 Cal.App.4th 841, 855 (primary jurisdiction improper where consumer protection claims turned on statutory interpretation, “a matter with which courts have considerable expertise and which does not necessitate deferral to another agency”).

Interpretation and application of the Tax Code, in particular, is within the province of courts. *See Yamaha Corp. v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 7; Pls.’ Reply 20-22. Consistent with this, the court in *City of Industry v. City of Fillmore* (2011) 198 Cal.App.4th 191, 211, declined to seek the Board’s input where the issues were “predominantly legal rather than technical” and thus did not “implicate the regulatory authority and expertise of the SBE to such a degree . . . that a prior administrative determination [was] indispensable to a judicial determination.” *See also City of Fillmore*

*v. State Bd. of Equalization* (2011) 194 Cal.App.4th 716, 729 (“judicial intervention at this time would not deprive us of the benefit of the SBE’s administrative expertise,” given that interpretation of administrative regulations was a “purely legal question”).

To the extent administrative expertise *would* be helpful here, the Board has already provided it by promulgating regulations and educational materials. *See* Reply 27-29; Resp. to *Amici* 25-26 (explaining that the relevant regulations are clear); *Farley Transp. Co. v. Santa Fe Trail Transp. Co.* (9th Cir. 1985) 778 F.2d 1365, 1370 (primary jurisdiction not applicable where agency “has already construed” the relevant regulation). In sum, the trial court should have no trouble resolving the merits of this case without the Board’s input.

## **2. Agency involvement would not promote uniformity.**

Nor is primary jurisdiction necessary in order to ensure uniformity in the application of any laws or regulations. In cases that turn on questions of statutory interpretation, courts have recognized that “neither uniformity nor efficiency would be enhanced by ‘administrative expertise.’” *Elder*, 205 Cal.App.4th at 855 (citations omitted). This makes particular sense here, given this Court’s repeated teaching that Board interpretations are “not binding or even necessarily authoritative.” *Preston v. State Bd. of Equalization* (2001) 25 Cal.4th 197, 219 n.6; *cf. Southern California Builders*, 4 Cal.4th at 455 (initial ruling from agency would not further uniformity because agency “would not have the final word . . . even if the doctrine of primary jurisdiction is invoked”). The same reasoning applies here.

### **B. There is no available or pending process for agency resolution of the issue.**

In every published California appellate case where primary jurisdiction was applied, the court identified either (1) an administrative process available to the plaintiff; or (2) a pending investigation or proceeding in which the agency was already considering (or planning to consider) the issue. This makes sense—referral of an issue to an agency is pointless unless the court has some indication that the agency will resolve it.

Thus, in *Farmers* and *Jonathan Neil*, this Court found that primary jurisdiction was appropriate because the Insurance Commissioner had a “pervasive and self-contained system of administrative procedure to deal with the precise questions” at issue, under which “any person aggrieved” could initiate proceedings, *Farmers*, 2 Cal.4th at 384, 396, and receive a “binding” decision, *Jonathan Neil*, 33 Cal.4th at 934. *See also E.B. Ackerman Importing Co. v. City of Los Angeles* (1964) 61 Cal.2d 595, 601-02 & n.7 (primary jurisdiction proper where law contained specific “procedure whereby an aggrieved person” could obtain a determination); *Reiter v. Cooper* (1993) 507 U.S. 258, 269 n.3 (“referral” by court of an issue to an agency means staying proceedings to enable

plaintiff to seek ruling from the agency). Likewise, primary jurisdiction may be proper where there is a “currently pending investigation.” *Pac. Bell v. Super. Ct.* (1986) 187 Cal.App.3d 137, 141; *see also Wise v. PG&E* (1999) 77 Cal.App.4th 287, 298 (complaint raising same issue had already been lodged before the agency).

In contrast, courts decline to invoke primary jurisdiction where the agency does not have a procedure for assessing or preventing the wrongdoing alleged in the case. *See Rojo*, 52 Cal.3d at 87; *Sanders v. Choice Mfg. Co.* (N.D. Cal. 2011) 2011 WL 6002639, \*4 (“The Court is reluctant to stay this action pending a determination by the DOI since there is no indication that the DOI has taken up or will take up the issue. Nor is it clear how Plaintiff or the Court could possibly bring the matter before the DOI.”). Vague authority over a subject is not a substitute for an actual process that can be invoked. *See Rosenfield v. Malcolm* (1967) 65 Cal.2d 559, 165-66 (“general investigative power does not rise to the dignity of an ‘administrative remedy’ which a[n aggrieved] party must exhaust before approaching the courts”).

Here, as we have explained in prior briefing, there is no mechanism by which Plaintiffs may initiate an administrative proceeding before the Board. *See Resp. to Amici* 32-35. There is also no ongoing Board proceeding that will resolve the question, and no evidence that Target has sought an administrative ruling. Invoking primary jurisdiction under these circumstances would be unprecedented in California.

**C. The interests of justice militate against invoking primary jurisdiction here.**

In assessing whether primary jurisdiction would serve the “interests of justice,” courts should consider “factors affecting litigants” such as delay, the “inadequacy of administrative remedies,” and futility. *Farmers*, 2 Cal.4th at 392 n.9.

Because there is no procedure to invoke, the Board may well not act at all—let alone within a reasonable time. After all, the Board has been aware of this case since 2008, yet has done nothing to address the allegations that a retailer is imposing unlawful sales tax reimbursement charges on customers. *See Builders*, 4 Cal.4th at 455 (declining to apply primary jurisdiction where agency had notice of issue but “apparently decided not to take any action . . . pending the outcome of this litigation”); *Cundiff v. GTE California Inc.* (2002) 101 Cal.App.4th 1395, 1413 (“We are unimpressed with defendants’ argument that the commission has initiated proceedings to establish rules for protecting consumers’ rights. . . . [H]ow long should plaintiffs have to wait[?]”). Odds are that here, halting judicial proceedings pending Board action would send the case into a regulatory black hole and delay its resolution indefinitely.

Primary jurisdiction is improper here for the additional reason that “further proceedings within th[e] agency would be futile.” *Jonathan Neil*, 33 Cal.4th at 936.

Agency review is futile where it is already known “what the administrative agency’s decision in this particular case would be.” *Ogo Assocs. v. City of Torrance* (1974) 37 Cal.App.3d 830, 834; *see also Vernon Fire Fighters v. City of Vernon* (1980) 107 Cal.App.3d 802, 828 (“[w]here an administrative agency has made it clear what its ruling would be, idle pursuit of further administrative remedies is not required”). Here, the Board has stated that, in its view, retailers are free to disregard the exemptions in the Tax Code for their own convenience, even though the sales tax reimbursement charges Target imposed on Plaintiffs were “likely” unlawful. Bd. *Amicus* Brief 13-14; Pls.’ Resp. to *Amici* 26. Given its stated viewpoint on the merits of this case, staying this case pending proceedings before the Board would be both unnecessary and futile.

Finally, Target has not raised primary jurisdiction since it (improperly) sought dismissal on that ground in the trial court. AA050-051. Under these circumstances, the argument “could be treated as waived.” *Krumme v. Mercury Ins. Co.* (2004) 123 Cal. App. 4th 924, 938; *see also Tenderloin Hous. Clinic, Inc. v. Astoria Hotel, Inc.* (2000) 83 Cal.App.4th 139, 142 (rejecting primary jurisdiction where the defendant “never sought an administrative ruling”).

**II. Article XII, section 32 would not be implicated by referral of a question to the Board under primary jurisdiction.**

While there are many reasons primary jurisdiction is inappropriate here, risk of running afoul of the Constitution is not one of them. As we have explained previously, section 32 bars only claims against the State or to recover a tax paid. If the trial court were to stay proceedings pending the Board’s input on a limited tax question, that would not convert this case into an action that is barred by section 32. *See* Pls.’ Opening Br. 5-11, 13-22; Reply 27-30.

**III. The issues on appeal should be decided first to determine whether a court has jurisdiction over the matter at all.**

Target claims that section 32 is a complete defense to this action, and that it deprives a court entirely of jurisdiction over the matter. In order for this Court to remand the case with instructions to stay the case pending Board review of a merits-related question, the Court must find that the trial court had jurisdiction over the case in the first place. *See Farmers*, 2 Cal.4th at 393 (primary jurisdiction only applies when “the trial court ha[s] authority to . . . entertain a civil action”). This makes sense, because, as explained above, the purpose of primary jurisdiction is to enhance—not replace—judicial decisionmaking. Put another way, invoking primary jurisdiction makes sense only if the trial court may, after the agency answers the question, “make[] its own decision.” *Jonathan Neil*, 33 Cal.4th at 933. If the trial court may not, the doctrine has no utility. For this reason alone, this Court should resolve the constitutional issue in this appeal before it reaches the primary jurisdiction issue.

The Court faced an analogous situation in *State Board of Equalization v. Superior Court (O'Hara)* (1985) 39 Cal. 3d 633. The Board sought dismissal on two alternative grounds—that the taxpayer plaintiff failed to exhaust its administrative remedies before the Board, and that section 32 precluded the lawsuit. The Court decided the section 32 issue without addressing exhaustion, despite the fact that the plaintiff's failure to exhaust its remedies was also arguably a complete defense. *Id.* at 643 n.11. *O'Hara* makes clear that the Court is well within its discretion to decide the section 32 issue now.

Lastly, a decision to defer resolution of the constitutional question will only prolong the confusion among the lower courts and will almost certainly result in re-litigation of the section 32 defense on remand in this case. A ruling by this Court on the section 32 issue, on the other hand, will serve the interest of judicial economy by either disposing of the defense or terminating the case.

**IV. If the Court determines that primary jurisdiction is appropriate, then the trial court's order dismissing the case should be reversed so that it may retain the case on its docket and stay proceedings.**

The primary jurisdiction doctrine “applies where a claim is originally cognizable in the courts.” *Farmers*, 2 Cal.4th at 394. Thus, “if a court decides to invoke the doctrine of primary jurisdiction, the proper procedure is not to dismiss the action, but to stay it.” *Aicco, Inc. v. Ins. Co. of North Am.* (2001) 90 Cal.App.4th 579, 594; *see also Farmers*, 2 Cal.4th at 401-02 (trial court instructed to “stay judicial proceedings in the case and retain the matter on the court's docket pending proceedings” before the agency). Once “the administrative process has been invoked and completed,” the case would return to the trial court, whereupon that court “makes its own decision” on the merits of the case.<sup>1</sup> *Jonathan Neil*, 33 Cal.4th at 933 (citations omitted); *see also Wright*, 33 Fed. Prac. & Proc. § 8400 (1st ed.) (“even upon the exercise of primary jurisdiction by the agency, one is entitled to *de novo* judicial consideration”).

Here, the trial court *dismissed* Plaintiffs' case, and the Court of Appeal affirmed. AA177-78, 187-88. In order for the trial court to be able to stay proceedings under the

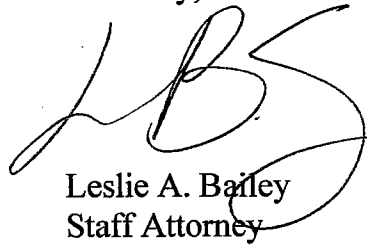
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<sup>1</sup> Alternatively, the Court could direct the trial court to decide the primary jurisdiction issue in the first instance. *See, e.g., City of Fillmore*, 198 Cal.App.4th at 211 n.14. While the trial court did not indicate the legal basis for its ruling, apparently it thought it had no choice but to dismiss Plaintiffs' claims, since no party argued for a stay. RT B-2:3-18; *cf. Miller v. Super Ct.* (1996) 50 Cal.App.4th 1665, 1669. It may be preferable to leave primary jurisdiction to the lower court's discretion if the Board's input is not needed now, but may be useful at the merits phase. *See Cellular Plus Inc. v. Super. Ct.* (1993) 14 Cal.App.1224, 1248 (“We instruct the court to consider, before [damages phase of trial], whether and at what point it is necessary to obtain [agency] determination . . .”).

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primary jurisdiction doctrine, then, the trial court order dismissing Plaintiffs' claims must be reversed. *See South Bay Creditors Trust v. Gen. Motors Acceptance Corp.* (1999) 69 Cal.App.4th 1068, 1076 (vacating dismissal so that trial court's order referring question to agency could take effect); *Ackerman*, 61 Cal.2d at 601-02 (reversing grant of summary judgment to defendant, remanding to trial court to stay); *Wise*, 77 Cal.App.4th at 293 (same).

Sincerely,

A handwritten signature in black ink, appearing to read 'LBA', written over the typed name 'Leslie A. Bailey'.

Leslie A. Bailey  
Staff Attorney  
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Counsel for Plaintiffs/Appellants

## PROOF OF SERVICE

I, Kathleen Morris, declare as follows:

I am employed in the County of Alameda, State of California. I am over the age of eighteen and not a party to the within action. My business address is 555 12<sup>th</sup> Street, Suite 1230, Oakland, California, 94607.

On April 22, 2013, I served the foregoing document described as: Letter Brief Addressing the Primary Jurisdiction Doctrine on the interested parties in this action as follows:

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**[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 Oakland, 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 US Postal Service on the same day with postage thereon fully prepaid at Oakland, 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. CCP § 1013a(3).

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on April 22, 2013, at Oakland, California.

  
\_\_\_\_\_  
Kathleen Morris