NO. S173972

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

KIMBERLY LOEFFLER, ET AL.,

Plaintiffs and Appellants,

v.

TARGET CORPORATION,

Defendant and Respondent.

Petition for Review of a Decision of the Court of Appeal,
Second Appellate District, Division Three, No. B199287

CONSOLIDATED ANSWER TO AMICUS CURIAE BRIEFS

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INTRODUCTION

Plaintiffs' amici exalt the rubric of "consumer remedies" over common sense, urging this Court to endorse unfair competition class actions to prevent the supposedly illegal and unscrupulous practice of charging sales tax reimbursement when (according to Plaintiffs and their amici) none is due.

But Plaintiffs' amici, like Plaintiffs, ignore the obvious — that Target's retail sales are presumptively taxable, that the regulations governing what is and what isn't taxable are far from a model of clarity, that a retailer has nothing to gain (but does have customers to lose) if it charges *more* than its competitors — and that, by charging sales tax reimbursement qua sales tax reimbursement (and reflecting that charge on every receipt), Target creates a record for the State Board of Equalization to audit to make sure Target pays every cent charged for sales tax to the state. No one — not Plaintiffs in their Reply Brief or Plaintiffs' amici in their briefs — has answered Target's question. What's in it for Target? Nothing.

Viewed from a legal rather than pragmatic perspective, the result is the same. This suit cannot go forward because the sales tax statutes and the sales tax reimbursement statute are so intertwined that an action to enjoin the former is barred by the same constitutional and statutory prohibitions forbidding a suit to enjoin collection of the tax itself.

The Court of Appeal got it right.

LEGAL ARGUMENT

I. THIS SALES TAX REIMBURSEMENT ACTION MOST ASSUREDLY *IS* BARRED BY ARTICLE XIII, SECTION 32 OF THE CALIFORNIA CONSTITUTION.

The Attorney General contends this sales tax reimbursement action is not prohibited by article XIII, section 32, of the California Constitution (AG ACB 7),[1] but he doesn't say who — in the context of a consumer class action against a retailer — decides whether the items for which sales tax reimbursement is charged are in fact taxable, or how that determination could possibly be made without the participation of the State Board of Equalization. How does the Attorney General reconcile his position with the statutes and cases vesting the Board with the right to make these decisions? He doesn't. He can't.

A. The Retailer Is Obligated To Pay Sales Tax And The Customer Is Obligated To Pay Sales Tax Reimbursement.

Although a retailer's invoices and receipts commonly show a sales tax charged to the customer, in fact the sales tax is imposed on the seller, not the buyer (*General Electric Co. v. State Board of Equalization* (1952) 111 Cal.App.2d 180, 185), and the charge to the customer is actually for sales tax *reimbursement* as authorized by Civil Code section 1656.1, subdivision (a). (*Duffy v. State Bd. of Equalization* (1984) 152 Cal.App.3d 1156, 1165, fn. 4.) No one disputes this.

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[1] Our references to "AG ACB" are to the Attorney General's amicus curiae brief filed on behalf of Plaintiffs.

Although the tax relationship is between the retailer and the state (*Livingston Rock & Gravel Co. v. De Salvo* (1955) 136 Cal.App.2d 156, 160), a receipt or other proof of sale charging sales tax reimbursement creates a presumption that the contract between the retailer and purchaser includes the purchaser's promise to reimburse the retailer for the sales tax the retailer must pay to the state. (Civ. Code, § 1656.1, subd. (a)(2).) No one disputes this either.

But Plaintiffs, the Attorney General, and Plaintiffs' other amici conveniently ignore the rule that, until the tax-exempt nature of a particular sale is established by the Board, *all gross receipts of a retailer are presumptively subject to the sales tax.* (Rev. & Tax. Code, § 6091.)[2] They also ignore the undisputed fact that Target has at all relevant times paid all collected sales tax reimbursements to the Board — and, *a fortiori*, that it obtains no benefit from collecting sales taxes. Given these concessions, the Attorney General's assertion that the mere fact that a charge is "labeled a 'tax' does not automatically trigger the prohibitions of article XIII, section 32" simply misses the point. (AG ACB 8.)[3]

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[2] Subsequent undesignated statutory references are to the Revenue and Taxation Code. Section 6091 provides: "For the purpose of the proper administration of this part and to prevent evasion of the sales tax it shall be presumed that all gross receipts are subject to the tax until the contrary is established. The burden of proving that a sale of tangible personal property is not a sale at retail is upon the person who makes the sale unless he takes from the purchaser a certificate to the effect that the property is purchased for resale."

[3] The relevant inquiry regarding the application of this constitutional provision is "whether granting the relief sought would have the effect of impeding the collection of a tax." (*California Logistics, Inc. v. State of California* (2008) 161 Cal.App.4th 242, 248; and see *Modern Barber*

(Footnote continues on next page.)

B. Because Only The State Board Of Equalization Can Determine Whether An Item Is Taxable, A Consumer Class Action Against A Retailer Alleging That Sales Tax Was Charged On Non-Taxable Items Necessarily Implicates The Ban Against Suits For Tax Reimbursements.

The State Board of Equalization enacts sales tax regulations (§ 7051), reviews sales tax returns and reports (§§ 6481, 7055), audits retailers for compliance with the sales tax laws (§ 7054), and enforces the Legislature's comprehensive system for seeking sales tax refunds and associated sales tax reimbursement refunds. (§§ 6901-6907, 6931-6937.) After payment of a tax claimed to be illegal, an action may be maintained to recover it "in such manner as may be provided by the Legislature," but in no event may suit be brought to prevent or enjoin the collection of any tax. (Cal. Const., art. XIII, § 32; and see § 6931 [same].)

This Court has already held that section 32 means what it says. (*Pacific Gas & Electric Co. v. State Board of Equalization* (1980) 27 Cal.3d 277, 284; and see SBE ACB 8-9.)[4] Where, as here, the "net result of the relief prayed for" would be to restrain the collection of sales tax — by making a retailer the subject of a tug-of-war between class action plaintiffs and the Board — the action must be treated as one prohibited by article XIII, section 32. (*Woosley v. State of California* (1992) 3 Cal.4th 758, 792;

(Footnote continued from previous page.)

Colleges, Inc. v. California Employment Stabilization Commission (1948) 31 Cal.2d 720, 724.) Granting the relief requested in this lawsuit would do precisely that.

[4] Our references to "SBE ACB" are to the State Board of Equalization's amicus curiae brief filed on behalf of Target.

State Bd. of Equalization v. Superior Court (1985) 39 Cal.3d 633, 639-640.)

As explained by the Board in its amicus brief, an attempt to interfere with the collection of sales tax under the guise of a consumer class action has the effect of restraining the collection of the tax itself — and thus is barred by section 32. (SBE ACB 9, 11-12, 25-32.) No matter how hard Plaintiffs' amici try to separate the two, the simple fact is that 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 inextricably intertwined. (§ 6901.5; Civ. Code, § 1656.1; Cal. Code Regs., tit. 18, § 1700; *De Aryan v. Akers* (1939) 12 Cal.2d 781, 786-787 [few businesses could endure if tax burdens could not be passed on to consumers]; and see *United States v. California State Board of Equalization* (9th Cir. 1981) 650 F.2d 1127, 1129-1132.)

It follows necessarily that the result sought by Plaintiffs and the Attorney General would impermissibly give consumers a mechanism for accomplishing indirectly that which they cannot obtain directly. (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 182 [a plaintiff may not plead around an absolute bar to relief simply by recasting the cause of action as one for unfair competition].)

C. The Relief Sought Under The UCL And The CLRA Cannot Be Granted Without Violating Article XIII, Section 32, Of The California Constitution.

By their request for this Court's imprimatur on lawsuits seeking restitution of sales tax reimbursement already paid to the state *and* injunctive relief prohibiting retailers from collecting sales tax reimbursement on presumptively taxable commodities, Plaintiffs' amici are

attempting to circumvent the bar of article XIII, section 32, and section 6931 in a manner that, if allowed, will wreak havoc on California's retail businesses. If retailers must refund "excess" sales tax reimbursement to customers *and* stop collecting sales tax reimbursement on presumptively taxable goods, then someone must answer these questions:

• If a jury determines an item isn't taxable, is that finding binding on the State Board of Equalization? Probably not. The Board is not a party to this action and is not in privity with the retailer, so the rules of res judicata and collateral estoppel would not apply. (7 Witkin, Cal. Procedure (5th ed. 2008) Judgment, § 452 et seq.) The retailer could be stuck with conflicting decisions requiring it to pay sales tax to the state but unable to seek reimbursement from its customers.

• The conflict cannot be resolved by dragging the Board into these lawsuits because it cannot be sued for a refund of erroneously collected sales tax or sales tax reimbursement where, as here, no claim for a refund was timely filed. (Cal. Const., art. XIII, § 32; § 6931; *Batt v. City and County of San Francisco* (2007) 155 Cal.App.4th 65, 85 [not even the retailer, as taxpayer, can maintain a common law reimbursement action unless it has first complied with the claim statute]; *Direct Marketing Association, Inc. v. Bennett* (9th Cir. 1990) 916 F.2d 1451, 1453-1454 [in California, the sole legal remedy for resolving tax disputes is a post-payment refund action]; and see *Yamaha Corp. of America v. State Bd. of Equalization* (1999) 73 Cal.App.4th 338, 351 [the validity of a tax assessment can be settled only in tax refund litigation].)

• But even assuming the retailer had a claim against the Board for reimbursement, and assuming further that the Board would accept a jury's

decision about what is taxable, the retailer could not be made whole because the statute of limitations governing a retailer's right to seek a refund from the state is only three years (§ 6902, subd. (a)(1)) whereas the period of limitations governing UCL and CLRA claims is four years (Bus. & Prof. Code, § 17208; Civ. Code, § 1783).

There is no need to open this can of worms — particularly since there is no wrongful act to avenge.[5]

II. IMPLICIT IN THE ARGUMENTS ADVANCED BY PLAINTIFFS' AMICI IS THE ERRONEOUS NOTION THAT RETAILERS ARE OBLIGATED, REGARDLESS OF THE ATTENDANT OVERHEAD, TO DETERMINE THE AVAILABILITY OF EVERY POTENTIAL EXEMPTION *AND* TO INTERPRET THE SALES TAX LAWS IN THE MANNER MOST ADVANTAGEOUS TO CUSTOMERS.

The Attorney General insists there is a need for consumer class-action remedies because hot coffee to go is not taxable, which means the "disputed charge was *not* actually a tax," and that the money obtained by Target for sales tax reimbursement was "obtained through deception by a

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[5] Consumer Watchdog's amicus brief (at p. 2) asserts without authority that because neither the Constitution nor the Revenue and Taxation Code "explicitly prohibit [Plaintiffs'] UCL and CLRA claims, the claims must stand." Consumer Watchdog is wrong — there can be no UCL or CLRA action without wrongful conduct. (*Budrow v. Dave & Buster's of California, Inc.* (2009) 171 Cal.App.4th 875, 884.) As explained in Target's Answer Brief, every penny of sales tax reimbursement collected is paid to the state (ABOM 1-3, 7, fn. 6) and it has not in any event done anything wrong (ABOM 22-31; and see Part III, *post*).

private retailer." (AG ACB 1.)[6] Implicit in this argument is an assumption that, notwithstanding the statutory presumption that all goods sold at retail are taxable (§ 6091), a retailer is obligated to claim every conceivable exemption, notwithstanding the costs the retailer would incur in keeping the kind of detailed records required to support each exemption. (*Paine v. State Board of Equalization* (1982) 137 Cal.App.3d 438, 441-444 [retailer is not entitled to an exemption merely because it says it is; it must offer some credible evidence of entitlement, without which the exemption is waived].)

The regulations distinguish hot and cold foods, hot and cold drinks, a hot drink sold with food and by itself, drinks and foods sold for consumption on the retailer's premises, and drinks and foods sold as take-out — some are taxable, others are not. (Cal. Code Regs., tit. 18, §§ 1503, 1574, 1602, 1603; *Treasure Island Catering Co. v. State Board of Equalization* (1941) 19 Cal.2d 181, 184-185; *Hart's Drive-In Corp. v. State Board of Equalization* (1956) 145 Cal.App.2d 657, 658-659; and see Target's ABOM 29-30, fn. 22.)[7] "Morass" doesn't begin to describe it.

Under the Attorney General's approach to the sales tax law, retailers would be required to distinguish sales of coffee where a customer leaves the store immediately after the purchase is made, from sales where the customer buys the coffee and continues to shop, and from sales where the

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[6] Substantially the same claim is made in all the amicus briefs filed on behalf of Plaintiffs. (Consumer Watchdog ACB 2; McClain Plaintiffs' ACB 2, 9-10); Concerned Taxpayers ACB 3, 6, 13; Bagley/Keene ACB 2-5, 19-20; Frisch ACB 6, 13.)

[7] Subsequent references to "Regs." are to title 18 of the California Code of Regulations.

customer buys the coffee along with something to eat and sits down to consume his food and drink in the area where the food is sold. (Regs., §1603(c) .) The attendant expense is obvious — more employee time spent monitoring customers rather than selling goods plus more paper work — and it is the customers who will ultimately be charged for those expenses. It is in Target's interest to charge *less* than its competitors, not more, and it is the customers who benefit when Target can charge less, not more. Only the lawyers can benefit from the proposals made in this lawsuit. [8]

Because a retailer is entitled to rely on the presumption that the goods it sells are taxable (§ 6091), and is equally entitled to seek sales tax reimbursement from its customers (Civ. Code, § 1656.1; *People v. Ventura Refining Co.* (1928) 204 Cal. 286, 295), it follows ineluctably that Target is not engaging in unfair competition or a deceptive trade practice or anything else that is wrong when it charges sales tax reimbursement on hot coffee to go. It cannot be compelled by Plaintiffs to claim every exemption. (*Buck v. American Airlines, Inc.* (1st Cir. 2007) 476 F.3d 29, 36 ["It is freshman-year economics that higher prices mean lower demand, and that consumers

[8] The point is made perfectly by the State Board of Equalization: "For example, sales of food products to students through vending machines at a school are exempt from tax, but sales to teachers from the same machines are not. (Regs. 1574(b)(2)(D).) The vending machine operator has no way of knowing if a particular sale is to a teacher or a student, so all sales include tax reimbursement." (SBE ACB 31, fn. 8.) Is the school acting wrongfully or unscrupulously by charging the students sales tax reimbursement on exempt food? Of course not — because the school is entitled to rely on the presumption that all foods are taxable.

are sensitive to the full price that they must pay, not just the portion of the price that will stay in the seller's coffers"].)[9]

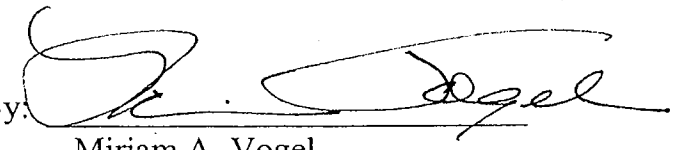
CONCLUSION

For all the reasons explained in Target's Answer Brief on the Merits and above, Target submits that this lawsuit is entirely lacking in merit, that the trial court correctly sustained Target's demurrers, and that the Court of Appeal correctly concluded that Plaintiffs' claims under the UCL and the CLRA are barred by article XIII, section 32, of the California Constitution. The judgment of the Court of Appeal should be affirmed.

Dated: May 3, 2010

Respectfully submitted,

MORRISON & FOERSTER LLP

By: 

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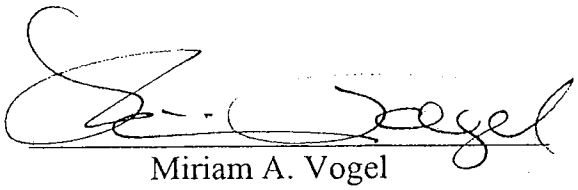
[9] Because the presumption that goods sold by a retailer are taxable means that Target's conduct is not wrongful *and* because Target's collection of sales tax reimbursement cannot be enjoined without running afoul of section 32 of article XIII, Target is entitled to the benefit of the "safe harbor" doctrine developed by this Court in *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Company*, *supra*, 20 Cal.4th 163. (ABOM 28-31; and see Rite Aid ACB 12-28.)

CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that pursuant to rule 8.204(c)(1) of the California Rules of Court, the text of this brief was produced using 13 point Roman type and contains 2,707 words. Counsel relies on the word count of the computer program used to prepare this brief.

May 3, 2010



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PROOF OF SERVICE

I declare that I am employed with the law firm of Morrison & Foerster LLP, whose address is 555 West Fifth Street, Los Angeles, California 90013-1024. I am not a party to the within cause, and I am over the age of eighteen years.

I further declare that on May 4, 2010, I served a copy of:

CONSOLIDATED ANSWER TO AMICUS CURIAE BRIEFS

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed at Los Angeles, California, on May 4, 2010.

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