

ORIGINAL

No. 19-1335

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In the Supreme Court of the United States

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TIMOTHY JAMES DUMMER,

Petitioner,

v.

CONTRACTORS' STATE LICENSE BOARD et al.,

Respondents.

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On Petition for a Writ of Certiorari to the Court of Appeal  
of the State of California, Third Appellate District

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**PETITION FOR WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED

In 1970, this Court ruled in *Goldberg v. Kelly*, 397 U.S. 254, that due process requires proper notice and a hearing before a professional license may be taken; yet in 2016 the State of California seized nonresident Petitioner's builder's license admittedly without one single hearing whatsoever.

California law requires taxpayers to request a hearing within 60 days of the mailing of the State's tax assessment notice; but the same law also requires supervisory approval (in writing) and that tax notices be sent by certified mail. The State admittedly failed to follow these two provisions. Petitioner never received notice and was thereby prevented from requesting a hearing.

**Question 1** – Where State law requires certified mail to be used for tax notices (that start a 60 day countdown to a government taking), is due process satisfied where the State instead only uses regular mail, which results in a taking without notice or hearing?

**Question 2** – Did Respondent (and the appellate court) deprive Petitioner of procedural due process by conflating two California tax statutes together, thus allowing the State to circumvent mandatory chief counsel approval and justify a government taking without any hearing?

## **PARTIES TO THE PROCEEDING**

Timothy James Dummer is the Petitioner here and was the Plaintiff - Appellant below. The California Contractors State License Board, and the California Franchise Tax Board are the Respondents here and were the Defendants - Appellees below.

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## INTRODUCTION

Despite the common mispronunciation of his last name, Petitioner Dummer (pronounced doomer) is the proverbial man of ordinary intelligence, who reads the words of the tax statutes plainly; by contrast, the State's reading admittedly requires us to ignore heading titles and skip over phrases such as "this article" and "no assessment." The trial judge *and* Respondents even admitting on the record that the State's interpretation is "confusing." In short, because nonresident Dummer failed to file California tax returns, the State was without authority to make State tax deficiency assessments. To combat this dilemma, the State opted to 'borrow' authority from the jeopardy assessment provisions, which allow an emergency assessment with or without filed tax returns; Dummer's assessments were not in jeopardy, hence the confusion in the courtroom. The jeopardy provisions require supervisory approval and certified mail, neither of which occurred.

The two lower courts justified the State's interpretation and subsequent taking, by egregiously ignoring this Court's rule in *Gould v. Gould*, 245 U.S. 151, 153 (1917), that "In the interpretation of taxing statutes it is the established rule not to extend their provisions, by implication" and ambiguity is "resolved against the government."

Dummer respects the statistical fact that this Supreme Court is less likely to grant *certiorari* to pro se litigants, but here, the issue is hornbook law. Petitioner welcomes *amicus curiae* if the Court finds further briefing advantageous; Petitioner respectfully submits the statutory interpretation is as plain as day, which *amici* can readily confirm.

Bad facts make bad law; so to prevent the court and the taxing agency from working together to create a path for an end-run around the legislatively mandated due process, *certiorari* is necessary.

## OPINIONS BELOW

The California Supreme Court denied review on March 25<sup>th</sup>, 2020, reprinted at [App. 1a]. The appellate court order denying rehearing and modifying the opinion is reprinted at [App. 2a]. The opinion of the Court of Appeal Third Appellate District is reported at *Dummer v. Contractors' State License Bd.*, C087240, (Cal. Ct. App. Dec. 30, 2019), and reprinted at [App. 4a]. The opinion of the trial court is reproduced at [App. 17a].

## JURISDICTION

The California Supreme Court denied review of the appellate court decision on March 25<sup>th</sup>, 2020. This Court has jurisdiction under 28 U.S.C. §1257(a).

## CONSTITUTIONAL PROVISIONS INVOLVED

The Constitution of the State of California, Article III, section 1, provides:<sup>1</sup>

“The State of California is an inseparable part of the United States of America, and the United States Constitution is the supreme law of the land.”

The Constitution for the United States of America, Article IV, section 2, provides:

“The Citizens of each state shall be entitled to all privileges and immunities of Citizens in the several states.”

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<sup>1</sup> Dummer submits that the California Constitution Article III, section 1, incorporated the Bill of Rights to the State, therefore Dummer does not seek protection under the 14<sup>th</sup> Amendment. *Slaughter-House Cases*, 83 U.S. 36, 74 (1872). To the extent this Court would only recognize Dummer's rights under 14<sup>th</sup> Amendment protection, then as an alternative argument Dummer cites the incorporation of the 14th Amendment to the Constitution for the United States of America.

The Constitution for the United States of America, Fifth Amendment provides in relevant part:

“No person shall be...deprived of life, liberty, or property, without due process of law”.

## STATUTORY PROVISIONS INVOLVED

California Revenue and Taxation Code (Article 5, “Jeopardy Assessments”), section 19084(a)(1)(A) provides:

“Unless the Chief Counsel of the Franchise Tax Board (or the chief counsel’s delegate) personally approves (in writing) the assessment or levy, no assessment shall be made under this article and no levy shall be issued less than 30 days after either of the following:”

California Revenue and Taxation Code (Article 5, “Jeopardy Assessments”), section 19086 provides:

“In any proceeding brought to enforce payment of taxes made due and payable by this article, the finding of the Franchise Tax Board under Section 19081, whether made after notice to the taxpayer or not, is for all purposes presumptive evidence that the assessment or collection of the tax or the deficiency was in jeopardy. A certificate of the Franchise Tax Board of the mailing or issuing of the notices specified in this article is presumptive evidence that the notices were mailed or issued.”

California Revenue and Taxation Code (Article 5, “Jeopardy Assessments”), section 19087(a) provides:

“If any taxpayer fails to file a return, or files a false or fraudulent return with intent to evade the tax, for any taxable year, the Franchise Tax Board, at any time, may require a return or an amended return under penalties of perjury or may make an estimate of the net income, from any available information, and may propose to assess the amount of tax, interest, and penalties due. All the provisions of this part relative to delinquent taxes shall be applicable to the tax, interest, and penalties computed hereunder.”

## STATEMENT OF THE CASE

1. In 2016 the State of California suspended Dummer's builder's license based on deficiency tax assessments for seven tax years. In an exchange of letters, Dummer informed the agencies that he had never received notice and he subsequently requested hearings with the Contractors State License Board (CLSB), and the Franchise Tax Board (FTB).

After being denied a hearing by both agencies, Dummer, as a nonresident of California, brought this due process suit of first impression against them for the suspension of his California builder's license without notice and hearing. Dummer's initial Complaint for preliminary and permanent injunction was predicated on the "failure of defendants to provide Plaintiff the constitutionally required notice and hearing..." [Dummer's Complaint for Preliminary and Permanent Injunctions, pg. 1]. Dummer's First Cause of Action in that Complaint was for "Violation of Due Process of Law". [Id. Pg. 5]. [See also (California Civil Case Cover Sheet "Violation of Due Process")].

2. At trial, the FTB withdrew four of the seven tax years after Dummer provided indisputable evidence that the FTB sent tax assessment notices for those years to vacant lots in Florida and other bad addresses. The court proceeded on just three tax years, 2006, '10, '11. Dummer testified that he only received the 2010 notice of deficiency assessment because he was in Michigan for several months when the 2011 assessment notice was allegedly sent, and the 2006 assessment notice was sent to a very old address.<sup>2</sup> Dummer argued

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<sup>2</sup> Instead of proceeding on the three tax years that Dummer admits the FTB used the correct address (2008, '10, '11), the FTB (and court) instead proceeded on two tax years that were sent to the correct address, (2010, '11), (Dummer never received 2011) and a third year sent to an old address (2006) (Dummer never received). Dummer sent protests only for the two years that he received NPAs, 2008 and 2010 tax years.

that all of the notices were required to be approved by the chief counsel of the FTB, and that statute required the notices to be sent by certified mail.

The trial court found that Dummer's assessments were not approved by the chief counsel, nor were they sent by certified mail. Still the trial court found the assessments were valid and that the FTB satisfied due process.

3. Dummer timely appealed to the California Third District Court of Appeal in Sacramento. Dummer's appeal provided in part:

"This is a due process case. The essence of Appellant's argument at trial was that all of Respondents' assessments were invalid (on their face) because they were made without reviewing a tax return as required by law. Moreover, if the correct statute were applied, the Trial Court would have found Respondents violated it by failing to give notice and hearing (due process) prior to taking property from Appellant (a resident of the State of Michigan)." [Dummer's Brief on Appeal, pg. 3.]

The appellate court ruled in favor of the State, but without explanation they abandoned the trial court reasoning, and departed from the factual findings and expert witness testimony of the trial court. The appellate court issued an opinion that contradicted the trial court, and even itself, finding both that "section 19087 does" and "does not" authorize the FTB to issue deficiency assessments.

4. Dummer petitioned the appellate court for a rehearing, pointing out the contradiction. The appellate court denied a rehearing, but modified the opinion by adding one word, "proposed".

5. Dummer Petitioned the Supreme Court of the State of California to review the case, but the Court declined review.

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As such, the trial court (and appellate court) only found that Dummer sent one protest for the three tax years now involved.

## REASONS FOR GRANTING THIS PETITION

### A. The FTB's Failure to Follow the Mandatory Tax Provisions Deprived Dummer of Procedural Due Process or any Opportunity to be Heard.

#### 1. Certified Mail is Mandatory, Respondents Used Regular Mail.

The FTB argued at trial that regular mailing of Dummer's notices to his last known mailing address was sufficient, citing Revenue and Taxation Code (RTC) § 18416(a), that section provides:

“Unless expressly otherwise provided in this part, any notice may be given by first-class mail postage prepaid. [emphasis added]”

At trial, FTB's tax expert witness Mr. Heninger testified that Dummer's assessments were issued under RTC § 19087.

[Question by Dummer] ‘Do you know where the authority exists for the proposed assessments that were issued in my case,’ [Mr. Heninger] “Yes, Revenue and Taxation Code, section 19087.” [App. 24a. Lines 13-17].

Dummer again asked:

“Do you recognize this [section 19033] as perhaps the statute that authorized the assessments?” [Mr. Heninger] “No. 19087 is a statute that authorizes the assessments against you.” [App. 26a. Lines 22-27].

Section 19087 is in Article 5 entitled jeopardy assessments. The mailing requirements for assessments made under Article 5 is found in RTC § 19086 and requires the FTB to use certified mail in order to prove their claim that the assessments were mailed or issued. Section 19086 provides in relevant part:

“A certificate of the Franchise Tax Board of the mailing or issuing of the notices specified in this article is presumptive evidence that the notices were mailed or issued.”

Although Respondents had no “presumptive evidence” by failing to provide certificates of mailing for *any* of the notices to Dummer, the trial court gave the taxing agency the benefit of the doubt. Without

the required certificates of mailing, *Gould, supra*, required the trial court to conclude in favor of Citizen Dummer, that notice was defective.

To be fair, section 19087 is in Article 5 entitled “jeopardy assessments” (discussed *post*) and everyone agreed: “[T]he assessments in this case were not jeopardy assessments.” [App. 18a. Fn. 2]. Article 3 entitled “deficiency assessments” governs the assessments like Dummer’s. But either way, section 19050, in Article 3, still provides:

“A certificate by the Franchise Tax Board or of the board, as the case may be, of the mailing of the notices specified in this article is *prima facie* evidence of the assessment of the deficiency and of the giving of the notices.”

Because California tax law *only* offers a hearing before a taking *if* the taxpayer responds to the notice of assessment within 60 days with a hearing request; it is imperative that actual notice be ensured in order to satisfy due process. Otherwise, the State can mail important notices to bad addresses, such as vacant lots in Florida, wait 60 days, and simply take taxpayers’ property, as happened here. (The FTB withdrew four tax years *at trial* for this exact reason.)

At trial, Dummer’s evidence showed that important notices were returned to the FTB as undeliverable. Dummer asked FTB’s tax expert witness Mr. Heninger if he could “think of any reasonable reason that the Franchise Tax Board would begin mailing letters consecutively, five of them here, to three different addresses?” Mr. Heninger simply replied, “Returned mail.” [App. 27a. Lines 19-23].

During discovery, Dummer had found that the FTB sent dozens of letters that he had never received, several to a vacant lot in Florida, others to an unknown address in Michigan, and others to an address where Dummer had not lived for several years. Relevant here was a tax assessment notice for tax year 2006, a tax assessment notice for

tax year 2011, and a protest clarification letter for Dummer's 2010 protest.

Now Dummer realized why he never had a hearing; he never received six of the seven notices, and for the 2010 notice Dummer *did* receive, Dummer protested it, and the FTB responded with a "protest clarification" letter that Dummer never received.

The trial court erred when it sided with the State instead of Dummer. The appellate court refused to consider the issue.

**2. Chief Counsel Approval is Mandatory for Tax Assessments Made Under Section 19087, Respondents Failed to Get Approval.**

Despite the undisputed fact that Dummer's assessments were *not* in jeopardy, the FTB argued, and the trial court agreed, that Dummer's assessments were issued under Article 5 entitled "jeopardy assessments" (§§ 19081 – 19093). In the jeopardy provisions there's a "California Taxpayer Bill of Rights" statute which forbids the FTB from making 'any assessment' under section 19087 (or any Article 5 statute) without the chief counsel of the FTB first approving it in writing.<sup>3</sup> Section 19084(a)(1)(A) provides:

"Unless the Chief Counsel of the Franchise Tax Board (or the chief counsel's delegate) personally approves (in writing) the assessment or levy, no assessment shall be made under this article and no levy shall be issued less than 30 days after either of the following. [Emphasis added]."

To a man of ordinary intelligence, the plain language of this taxpayer protection statute is clear; no assessment shall be made under article 5 unless the chief counsel approves it in writing.

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<sup>3</sup> On its website, the FTB explains the "Taxpayer Bill of Rights" as follows: "As a California taxpayer, your rights are protected. The California Taxpayers' Bill of Rights requires us to adequately protect the rights, privacy, and property of all California taxpayers when we assess or collect tax."

Respondents asked the trial court to ignore the phrase “no assessment” and substitute it for “no jeopardy assessment.” The trial court obliged.

The trial court and appellate court again ignored the rule in *Gould, supra*, and added the word “jeopardy” to section 19084(a)(1)(A) where the legislature left it out, and thereby extended the tax statutes beyond the clear import of the language used.

**3. State Law Forbids the FTB From Issuing Assessments Under Section 19087 Unless the Assessments are Actually in Jeopardy, Dummer’s Were Not in Jeopardy.**

When Respondents suspended Dummer’s builder’s license for unpaid tax assessments, under Business and Professions Code (BPC) § 7145.5, they admittedly did so “to enforce payment of taxes” which were “made due and payable” by Article 5, section 19087. Respondents admit: “Section 7145.5 is absolutely a collection tool.” [App. 21a. Line 20].

Whereas section 19084 (above) protects the taxpayer from arbitrary assessments being made under Article 5, by mandating chief counsel approval; section 19086 protects the taxpayer from the FTB using Article 5 authority where there is no jeopardy. It appears the California Legislature had a real concern about Article 5 authority being extended to non-jeopardy assessments like Dummer’s. Section 19086 provides in relevant part:

“In any proceeding brought to enforce payment of taxes made due and payable by this article, the finding of the Franchise Tax Board under Section 19081, whether made after notice to the taxpayer or not, is *for all purposes* presumptive evidence that the assessment or collection of the tax or the deficiency was in jeopardy. [Emphasis added].”

To review. The FTB made Dummer’s assessments under the alleged authority of Article 5 section 19087. Section 19084 required

the chief counsel to approve such assessments in writing, and the FTB never got approval. Section 19086 required the FTB to send the notices by certified mail, but the FTB used regular mail. The FTB suspended Dummer's builder's license without any hearing because Dummer never requested a hearing within 60 days of the notices. The FTB suspended Dummer's license based entirely on assessments made under Article 5. The FTB admits that the suspension of Dummer's license was "absolutely a collection tool." The FTB admits that Dummer's assessments were not in jeopardy. Section 19086 forbids the FTB from making assessments, and collecting on those assessments, unless a jeopardy exists.

Despite all of this, both the trial court and appellate court found that the FTB satisfied due process.

**B. The FTB Has Knowingly Usurped Assessment Authority in Violation of California Tax Law; Abandoning its Original Claim of Authority.**

The FTB first responded to Dummer's Complaint with an Opposition to Plaintiff's Motion for Preliminary Injunction. In that opposition, the FTB argued *exclusively* that their sole authority for issuing Dummer's deficiency assessments came from Article 3 (§§ 19031-19067), appropriately entitled "Deficiency Assessments".

"Sections 19031 *et. seq.* govern the process by which FTB makes deficiency assessments of personal income tax." [Defendants' Opposition to Plaintiff's Motion For a Preliminary Injunction pg. 6.].

In fact, the FTB never even mentioned Article 5, and only ever cited Article 3 authority for Dummer's deficiency assessments in every single filing until Dummer's Motion for Summary Judgment. [See FTB's Demurrer to Dummer's Complaint, Demurrer to FAC, Demurrer to SAC].

*(WHY THE CHANGE?)*

California's deficiency assessment statutes, similar to the federal statutes, forbid the FTB from issuing deficiency assessments unless a "determination" is made. A lawful determination requires the FTB to review information from some source and compare it to the information on a "tax return".

Because Dummer never filed tax returns in California for the years involved, he argued that the FTB could not issue valid deficiency assessments under the deficiency assessment statutes. Dummer, in his Motion for Summary Judgment, introduced *Scar v. C.I.R.*, 814 F.2d 1363 (9th Cir. 1987), and the California case which applied Scar to the State, *Wertin v. Franchise Tax Bd.* (1998) 68 Cal.App.4th 961. Both cases providing that deficiency assessments (like Dummer's) issued without reviewing a tax return are "invalid." *Wertin* providing that California deficiency assessment statutes are even "more explicit than the federal scheme in their reference to tax returns." *Id.* at 973.

The FTB finally agreed.

*(BUT THEN WHAT?)*

Instead of returning Dummer's builder's license and abandoning its collections, the FTB sought out a new authority. Despite admitting that Dummer's assessments were not in jeopardy, the FTB now relied on the jeopardy provisions of Article 5, arguing that section 19087, smack dab in the middle of Article 5 (19081-19093), was a "stand-alone statute."

At first glance, § 19087 may appear to be applicable to Dummer, because for the tax years involved, Dummer did not file California tax returns. RTC § 19087(a) provides:

"(a) If any taxpayer fails to file a return, or files a false or fraudulent return with intent to evade the tax, for any taxable year, the Franchise Tax Board, at any time, may require a return or an amended return under penalties of

perjury or may make an estimate of the net income, from any available information, and may propose to assess the amount of tax, interest, and penalties due. All the provisions of this part relative to delinquent taxes shall be applicable to the tax, interest, and penalties computed hereunder."

At trial, tax expert witness Mr. Heninger testified that jeopardy assessments are "used in cases for drug dealers where we feel that we need to attach their bank account quickly." [App. 28a. Lines 23-25]. Mr. Heninger providing that jeopardy authority is used "So we can attach their bank account, garnish their wages quickly without having to go through some of the procedural due process that [we need to] for the other assessments that we go through." [App. 23a. lines 14-17].

But the FTB argued that although § 19087 *is* in Article 5, and Article 5 *is* entitled "Jeopardy Assessments", this placement is insignificant. Dummer on the other hand argued that § 19087's placement in Article 5 was intentional, as indicated by all of the statutory safeguards in Article 5, such as §§ 19084 & 19086.

In other words, the FTB says: although Article 3 entitled "deficiency assessments", and Article 5 entitled "jeopardy assessments" were added to the tax code in the same act, and taxpayer protection statutes in Article 5 prevent Article 5 from being used for nonjeopardy assessments, section 19087 in Article 5 is a stand-alone statute, just accidentally placed in Article 5.

The courts again violated *Gould*, when they sided with the State.

**C. The Trial Judge, the Tax Expert Witness, and Even Respondents Attorney All Admit That Using Jeopardy Assessment Authority for Assessments That Are Not in Jeopardy Was Confusing.**

At trial, the FTB argued its case, that although Dummer's assessments were not in jeopardy, the FTB still has authority under the jeopardy provisions to issue deficiency assessments if a tax return

is not filed. The FTB also argued that, even though Dummer's assessments were issued under Article 5, none of the safeguards in Article 5 apply to nonjeopardy assessments. As you can imagine, this led to confusion in the trial court; but its who admitted this confusion that was surprising and significant.

FTB counsel questioned tax expert witness about assessment authority:

Q. (By FTB Counsel) There was some confusion about the different kinds of assessments...so we mentioned jeopardy assessments, filing enforcement assessments, and audit assessments. Those were all mentioned, right?

A. (Tax expert witness Mr. Heninger) Yes.

Q. And I think you said those are all examples of deficiency assessments. Did I get that right?

A. Yeah. But – and I'm thinking about it. I'm not sure the answer was entirely accurate, when I think about the statute for deficiencies.

Q. What's a typical situation for a filing enforcement assessment?

A. That's when no return is filed. And so that's why I got confused a little bit about whether or not that was a deficiency because it seems to me -- and I – that deficiency statute requires a return. [App. 28a. Lines 3-28, App. 29a. Lines 1-4].

FTB counsel replied:

"I was staring at the statutes yesterday trying to figure out the same thing. I'm not sure I came to the correct conclusion as a lawyer [Emphasis added]." [App. 29a. Lines 5-7].

The trial judge recognizing the absurdity of applying jeopardy authority to nonjeopardy assessments asked FTB counsel:

"You would concede that it's a little confusing by sticking that in Article 5, referring to Article 5, and entitling Article 5 as jeopardy assessments?" [App. 30a. Lines 23-25].

FTB counsel argued that heading titles “are not dispositive”, to which the trial judge responded: “specific references to ‘pursuant to this article’ are dispositive...” [App. 31a. Lines 3-4]).

There’s a long line of precedent from this Court holding that this type of confusion involving tax statutes should have been resolved in Dummer’s favor; and the California Supreme Court has echoed this rule: “[T]ax laws should be construed strictly in favor of the property holder.” *Estate of Potter*, 188 Cal. 55, 96 (Cal. 1922).

Here, the lower courts instead chose a path of judicial activism, whereby the actions of the FTB were justified by treating Dummer’s assessments as Schrödinger’s Cat; Dummer’s assessments were simultaneously “issued under Article 5” and “not issued under Article 5”, depending on which party was benefitted.

D. The Appellate Court Departed From Expert Testimony, Abandoned the Trial Court Reasoning, Ignored the Certified Mail Question, Issued an Opinion That Contradicts Itself, Contradicts the Trial Court, and Even Contradicts the Tax Code, and Still Found that Section 19087 was Unambiguous.

**1. Expert Testimony.**

At trial, FTB’s tax expert witness testified that Dummer’s assessments were issued under RTC § 19087. The trial court decision provides that Dummer’s assessments were issued under RTC § 19087. The appellate court opinion however departs from this factual finding and contradicts expert testimony and provides:

“[S]ection 19087 does not authorize the FTB to issue an assessment or otherwise make due or payable payment of taxes. [Emphasis added.]” *Dummer, supra* at pg. 11. [App 14a. ¶1].

Just this contradictory finding alone by the appellate court should have meant a victory for Dummer.

## 2. Trial Court Reasoning.

Next, the appellate court abandoned the trial court reasoning. The trial court reasoned that the FTB had authority under Article 5 to issue deficiency assessments, because RTC § 19081 provides in part: “Any assessment issued under this article shall also be an assessment issued pursuant to Section 19033...” The trial court misconstrued the phrase “pursuant to”, in 19081, to mean that all assessments issued under Article 5 “may be considered assessments under 19033” [App. 18a. Fn. 2].

The more logical interpretation of § 19081, is that “pursuant to” simply means in accordance with. If the trial court interpretation is correct, then any reference to “assessments made under Article 5” becomes meaningless, as all assessments made under Article 5 can simply be called Article 3 assessments to avoid the safeguards of section 19084 and 19086.

The appellate court correctly departed from this faulty logic, but unfortunately made a similar erroneous conclusion of its own, also misconstruing the phrase “pursuant to”.

In a convoluted twist, the appellate court, while acknowledging that Dummer never protested the assessments, attempted to justify Dummer’s assessments being made under Article 5, by pointing out that when a taxpayer *does protest* an Article 5 assessment, they are required to follow Article 3 procedures, the court writes:

“If the FTB proposes an assessment under section 19087 subdivision (a), subdivision (b) provides that the taxpayer has the right to protest the proposed assessment and request a hearing and requires the taxpayer to ‘proceed in the manner and within the time prescribed by Sections 19041 to 19048, inclusive.’ (§ 19087, subd. (b).) ‘Sections 19041 to

19048, inclusive,’ unequivocally refer to the deficiency assessment protest, hearing, and appeal procedures set out in article 3. (§§ 19041-19048.)”...“Such a proposed assessment only becomes a final assessment pursuant to the procedures set out in sections 19041 to 19048, which are in article 3.” *Dummer, supra* at pgs. 9-10. [App 12a-13a. ¶4-1].

There are two important takeaways from this finding by the appellate court: 1) Dummer never protested the assessments so subdivision (b) was never triggered, and 2) Even if Dummer did protest the assessments, the appellate court’s logic is flawed. The fact that subdivision (b) requires a protest to be made in the same manner as a protest to an assessments issued under Article 3, does not magically convert an Article 5 assessment to an Article 3 assessment. Such an interpretation would render §§ 19084 & 19086 meaningless.

### 3. Certified Mail Issue.

Perhaps the most important issue, the certified mail requirement, was merely ignored by the appellate court. This despite both the deficiency assessment statutes and the jeopardy assessment statutes requiring certified mail. In other words, even though the appellate court treated Dummer’s assessments as Schrödinger’s Cat (issued under Article 5 while simultaneously not issued under Article 5), Article 3 also requires certified mail for deficiency assessments.

### 4. The Contradictions of the Appellate Court Opinion.

#### a. The Opinion Contradicts Itself

Where it benefits the State, and in order to justify Dummer’s assessments made under Article 5, the appellate court provides:

“Section 19087 establishes the FTB’s authority to issue a deficiency assessment if a taxpayer fails to file a return.” *Dummer, supra* at pg. 5. [App 8a. ¶4].

Where taxpayer protection statutes are triggered by assessments being issued (or made) under Article 5, the appellate court provides the opposite:

“[S]ection 19087 does *not* authorize the FTB to issue an assessment or otherwise make due or payable payment of taxes. [Emphasis added.]” *Dummer, supra* at pg. 11. [App 14a. ¶1].

This absurd conclusion is the epitome of the court’s treatment of Dummer throughout this case, especially considering the well-established rule that tax statutes be construed in favor of the Citizen.

**b. The Opinion Even Contradicts the California Revenue and Taxation Code.**

The appellate court opinion not only contradicts itself and the trial decision, but also contradicts the tax code. RTC § 19133 provides in relevant part:

“[T]he Franchise Tax Board may add a penalty of 25 percent of the amount of tax determined pursuant to Section 19087...[Emphasis added]”

An assessment *is* a “determination” *Scar, supra*, 814 F.2d at 1365-70; *Wertin, supra*, 68 Cal.App.4th at 971. If, as the appellate court says, section 19087 does *not* make due or payable any tax, or authorize the FTB to assess any amount under 19087, then the appellate court ruling renders RTC § 19133 meaningless. Contrary to the appellate court’s conclusion, Section 19133 clearly allows the FTB to add a penalty to an amount assessed or made due or payable by section 19087.

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5. Among All of the Confusion, The Appellate Court Somehow Still Finds That Section 19087 is Unambiguous.

At trial, the tax expert witness, FTB's counsel, and even the trial judge all found section 19087 confusing. The appellate court departed from the factual findings and expert testimony of the trial court, admittedly ignored the title heading of Article 5, issued an opinion that contradicts itself and the tax code; yet the appellate court still finds that "The plain language of section 19087 is unambiguous." *Dummer, supra* at pg. 9. [App 12a. ¶4].

The Appellate court then writes:

"Contrary to plaintiff's assertion, section 19087's placement in article 5, rather than article 3, does not create ambiguity in the language of the statute. The general provisions of the Revenue and Taxation Code provide: 'Division, part, chapter, article, and section headings do not in any manner affect the scope, meaning, or intent of the provisions in this code.'" (RTC § 6.) *Dummer, supra* at pg. 10. [App 13a. ¶2].

The appellate court's reliance on the general provision RTC § 6, is misplaced. One section earlier, RTC § 5 provides:

"Unless the context otherwise requires, the general provisions hereinafter set forth govern the construction of this code."

Section 6, relied on by the court, is a 'general provision' which is 'set forth' after section 5. As such, section 6 only "govern[s] the construction" of the code if the *context* otherwise allows it.

Context was never considered by the appellate court, as they conveniently provide: "Because we conclude the plain language of section 19087 is unambiguous, we need not discuss the legislative history of section 19087." [*Dummer, supra* at pg. 10. [App 13a. Fn. 3].

In reality, context was crucial.

The California Legislature, in 1993, added Article 3 entitled “Deficiency Assessments” and Article 5 entitled “Jeopardy Assessments” on the exact same day, and within the exact same act.

Article 5 uses the phrase “this article” five times, and Article 5 references Article 3 repeatedly; indicating that the legislature purposely created two separate articles.

As tax expert witness Mr. Heninger testified, jeopardy authority is: “used in cases for drug dealers where we feel that we need to attach their bank account quickly.” [App. 28a. Lines 23-25]. And: “so we can attach their bank account, garnish their wages quickly without having to go through some of the procedural due process that [we need to] for the other assessments that we go through. [Emphasis added]” [App. 23a. Lines 1417].

A “deficiency” assessment on the other hand, is merely an accounting question for ordinary American Citizens.

Because jeopardy assessments allow the State to circumvent due process, because of the emergency nature involved, the legislature created a separate Article to be used for assessments that are in jeopardy. This is evidenced by not only the title heading “Jeopardy Assessments”, but also by § 19084 which forbids *any* assessment from being made under Article 5 without chief counsel approval, and § 19086 which requires that Article 5 assessments be in jeopardy.

This context, coupled with the admitted confusion in the trial court, indicates a need to consider the heading title to determine legislative intent. “[C]hapter and section headings [of an act] may properly be considered in determining legislative intent” (*Bowland v. Municipal Court* (1976) 18 Cal. 3d 479, 489), and are entitled to considerable weight. (*Gonzales v. Superior Court* (1935) 3 Cal. 2d 260).” *American Federation of Teachers v. Board of Education* (1980) 107 Cal.App.3d 829, 836.

**E. Dummer Has Been Denied Due Process Every Step of the Way; A Summary of A – D Above.**

It's so well settled that tax statutes must be construed in favor of the Citizen and against the taxing authority, that it's unnecessary to list the other authorities like *Gould*, especially in a due process taking case like this.

But when it came to certified mail, and whether or not Dummer received the notices, the State was given the benefit of the doubt, despite RTC §§ 19050 and 19086 both requiring certified mail.

When it came for chief counsel approval being required, the State was given the benefit of the doubt. This despite RTC § 19084 clearly and unequivocally stating that "no assessment" shall be made under Article 5 without chief counsel approval.

When it came to the confusion, and the heading title of Article 5, "Jeopardy Assessments", the State was given the benefit of the doubt. This despite Article 3 and Article 5 being added to the code at the same time in the very same act, and California courts providing that heading titles are entitled to "considerable weight." *American Federation, supra.*

When it came to the other four tax years in this case that were withdrawn at trial, the State was given the benefit of the doubt. The FTB simply "withdrew" them at trial, and they disappeared. No punishment of any kind came to the FTB for this admitted due process deprivation.

When it came to a hearing, the State was given the benefit of the doubt. This despite the long and well settled rule that a person may not be deprived of a property interest without some type of hearing.

Dummer simply wanted the FTB to follow the law as written, and provide the required due process. This means sending important notices by certified mail as required by statute, to ensure the taxpayer

has the opportunity to protest and request a hearing. This means getting chief counsel approval for any assessment issued under Article 5. And this means keeping Article 5 authority reserved for assessments that are actually in jeopardy.

The modified opinion by the appellate court, adding the word "proposed" changes nothing. Section 19084 mentions assessments "made" and section 19086 refers to assessments "issued" or "mailed". When the FTB mailed a "proposed" assessment, made under the authority in Article 5, the protections of §§ 19084 & 19086 were triggered.

Unlike Schrödinger's Experiment, tax statutes require a definitive answer; and if the answer is ambiguous in *any* way, the answer must be resolved in Dummer's favor.

## CONCLUSION

This Court should grant the petition.

Respectfully submitted,



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