

## APPENDIX A-E

MAR 25 2020

Jorge Navarrete Clerk

Deputy

Court of Appeal, Third Appellate District - No. C087240

S260507

**IN THE SUPREME COURT OF CALIFORNIA**

**En Banc**

---

TIMOTHY JAMES DUMMER, Plaintiff and Appellant,

v.

CONTRACTORS' STATE LICENSE BOARD et al., Defendants and Respondents.

---

The petition for review is denied.

**CANTIL-SAKAUYE**

---

*Chief Justice*

2a.  
APPENDIX B

Filed 1/17/20 Dummer v. Contractors' State License Board CA3

NOT TO BE PUBLISHED

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
THIRD APPELLATE DISTRICT  
(Sacramento)

----

TIMOTHY JAMES DUMMER,

Plaintiff and Appellant,

v.

CONTRACTORS' STATE LICENSE BOARD et al.,

Defendants and Respondents.

C087240

(Super. Ct. No. 34-2016-  
00200378-CU-MC-GDS)

MODIFICATION OF  
OPINION AND DENIAL OF  
PETITION FOR  
REHEARING

[NO CHANGE IN  
JUDGMENT]

THE COURT:

Appellant filed a petition for rehearing with this court. It is hereby ordered that the petition for rehearing is denied.

It is also ordered that the opinion filed herein on December 30, 2019, be modified as follows:

1. Under Section B. on page 5, the word “proposed” is to be inserted in the third sentence. That sentence will now read:

Section 19087 establishes the FTB’s authority to issue a proposed deficiency assessment if a taxpayer fails to file a return, providing:

This modification does not change the judgment.

FOR THE COURT:

\_\_\_\_\_/s/  
Duarte, Acting P. J.

\_\_\_\_\_/s/  
Renner, J.

\_\_\_\_\_/s/  
Krause, J.

4a.  
APPENDIX C

Filed 12/30/19 Dummer v. Contractors' State License Board CA3 (unmodified opinion)

NOT TO BE PUBLISHED

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.
---

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
THIRD APPELLATE DISTRICT  
(Sacramento)

----

TIMOTHY JAMES DUMMER,

Plaintiff and Appellant,

v.

CONTRACTORS' STATE LICENSE BOARD et al.,

Defendants and Respondents.

C087240

(Super. Ct. No. 34-2016-  
00200378-CU-MC-GDS)

Plaintiff Timothy James Dummer appeals from a trial court judgment that the Franchise Tax Board (FTB) lawfully assessed taxes against him, the Contractors State License Board (CSLB) lawfully suspended his contractor's license due to his outstanding state tax liability, and he was not entitled to a pre-suspension hearing before the CSLB because he failed to protest the tax assessments before the FTB. On appeal, plaintiff claims that the trial court misinterpreted the statutory scheme under which the FTB assessed taxes against him. We disagree and affirm the judgment.

## FACTUAL AND PROCEDURAL BACKGROUND

### *Factual Background*

During tax years 2006, 2010, and 2011, plaintiff earned income from construction work performed in California, but did not file state income tax returns. The FTB issued proposed tax assessments for the relevant years using estimates of plaintiff's income from other sources. The FTB mailed notice of the proposed assessments to the address Dummer had on file with the CSLB. At trial, the court found that plaintiff received notice of the proposed assessments.

Plaintiff did not protest the FTB's proposed assessment for 2006 or 2011. Plaintiff responded to the FTB's proposed assessment for 2010, but the FTB did not recognize his response as a protest. The FTB sent a protest clarification letter stating that if plaintiff did not respond within 30 days, no hearing would occur and the proposed assessment would become final. Plaintiff did not respond to the FTB's clarification letter, and the assessments for 2006, 2010, and 2011 became final.

Plaintiff did not pay the assessed taxes. Per the FTB's request, the CSLB suspended plaintiff's contractor's license for failure to pay the assessed taxes.

### *Procedural Background*

Plaintiff filed a complaint seeking injunctive relief. He alleged the CSLB violated his right to due process by suspending his contractor's license without a hearing, and the FTB violated Revenue and Taxation Code section 19044,<sup>1</sup> which authorizes taxpayers to file written protests challenging the FTB's proposed assessments.

Defendants FTB and CSLB argued in a series of demurrers that the trial court lacked jurisdiction to consider plaintiff's claims and that plaintiff's allegations did not state a valid cause of action. (Code Civ. Proc., § 430.10, subs. (a), (e).) Defendants

---

<sup>1</sup> Further undesignated statutory references are to the Revenue and Taxation Code.

asserted plaintiff was required to file timely protests and pay the tax assessments and *then* he could seek a refund. (Cal. Const., art. XIII, § 32; § 19381.)

The trial court sustained with leave to amend defendants' demurrer to plaintiff's claim that he was entitled to a hearing before the CSLB suspended his contractor's license. The court determined that statutory law afforded plaintiff sufficient procedures to challenge the proposed tax assessment through the FTB such that due process did not necessitate a pre-suspension hearing before the CSLB.

The trial court also sustained with leave to amend defendants' demurrer to plaintiff's claim that the FTB did not comply with section 19044 due to plaintiff's failure to file a timely protest, which would have triggered the FTB's duty to reconsider the proposed tax assessment.

Plaintiff filed a first amended complaint that amended his due process claim to include allegations the FTB violated his due process rights by failing to properly serve him with notice of their intent to take his property, failing to set a hearing before an impartial body, and failing to adjudicate the matter. Defendants again demurred on the grounds that the trial court lacked jurisdiction to hear plaintiff's claims due to his failure to pay and protest. The court overruled defendants' demurrer, explaining that it could not resolve factual questions of whether the FTB provided adequate notice or ignored plaintiff's protests. The court also concluded that plaintiff had sufficiently alleged he was entitled to litigate the issue of his residency by claiming he properly protested the FTB's proposed assessments. Finally, the court again sustained with leave to amend defendants' demurrer to plaintiff's facial challenge to Business and Professions Code section 7145.5 (authorizing the CSLB to suspend his contractor's license), which plaintiff claimed unconstitutionally violated his right to due process.

In his second amended complaint, plaintiff amended his challenge to Business and Professions Code section 7145.5 to label it "as applied." The trial court overruled the

demurrer because sustaining it would have required the court to review extrinsic evidence.

Following a bench trial on the second amended complaint, the trial court issued a Notice of Decision. The court found that the FTB's process for issuing assessments followed normal statutory procedures, which included estimating plaintiff's income. The court also found that the CSLB's suspension of plaintiff's contractor's license was valid and that he was not entitled to a pre-suspension hearing before the CSLB because he was afforded multiple opportunities to challenge the FTB's proposed assessments before they became final.

Plaintiff timely appeals from the ensuing judgment in defendants' favor.

## DISCUSSION

### I

#### *Statutory Framework*

##### *A. Introduction*

Everyone who owes California state income tax must file a return for the relevant tax year. (§ 18501.) If a taxpayer files a return the FTB determines is deficient, the FTB will issue a notice of proposed assessment for the additional tax owed. (§§ 19031-19036, 19043.) The taxpayer has the right to submit a written protest to the FTB within 60 days of the notice of the proposed assessment specifying the grounds on which the protest is based. (§ 19041.) If the FTB receives a response to a notice of proposed assessment that is deemed not to constitute a proper protest, the FTB may send a letter explaining that the response was not a proper protest and extend the protest deadline. Proper protests received before the extended deadline are treated like any other protest. If no protest is filed, the proposed deficiency assessment becomes final. (§ 19042.)

If a proper protest is filed, the FTB must reconsider the deficiency assessment and hold an oral hearing if the taxpayer so requests. (§ 19044.) If the taxpayer does not request a hearing, the FTB's action upon protest becomes final 30 days from the date the



FTB mails notice of its action to the taxpayer, unless the taxpayer appeals to the State Board of Equalization (SBE). (§§ 19045, 19046.) If the taxpayer appeals the FTB's decision to the SBE, the SBE hears the appeal and then notifies the parties of its determination. (§19047.) The taxpayer may petition the SBE for rehearing. (§ 19048.)

In some circumstances, the FTB may determine that an assessment and collection of tax will be jeopardized by delay. (§§ 19081-19086.) In those situations, which are relatively rare and often occur when the taxpayer is engaged in illegal activity, the FTB may issue a jeopardy assessment, which is a demand for immediate payment. (§§ 19081-19083.) (RT 80, 112) Because jeopardy assessments authorize the immediate seizure of property, they are subject to strict internal procedures, including securing the written consent of the FTB's chief counsel. (§ 19084.)

Sections 19031 through 19067 govern the procedures for deficiency assessments and are in article 3 (entitled Deficiency Assessments) of chapter 4 of part 10.2 of division 2 of the Revenue and Taxation code. The procedures related to jeopardy assessments are set forth in article 5 (entitled Jeopardy Assessments) of chapter 4 of part 10.2 of division 2 of the Revenue and Taxation Code.

#### *B. Section 19087*

Section 19087 is within article 5, entitled Jeopardy Assessments. The relevance of this placement is discussed at length *post*. Section 19087 establishes the FTB's authority to issue a deficiency assessment if a taxpayer fails to file a return, providing: "(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 [FTB], 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.

“(b) When any assessment is proposed under subdivision (a), the taxpayer shall have the right to protest the same and to have an oral hearing thereon if requested, and also to appeal to the board from the [FTB’s] action on the protest; the taxpayer must proceed in the manner and within the time prescribed by Sections 19041 to 19048, inclusive.” (Referring to the deficiency assessment protest provisions described, *ante*.)

## II

### *California Constitution Article XIII, Section 32: “Pay Now, Litigate Later”*

Plaintiff contests the trial court’s interpretation of the statutory framework, which authorized the FTB to issue tax assessments against him. Defendants respond that article XIII, section 32 of the California Constitution, known as the “pay now, litigate later” rule in tax cases, bars the challenge.<sup>2</sup> The rule, which is codified in sections 19381 and 19382, limits the ability of the courts to hear matters and issue relief that would interfere with the state’s collection of taxes. (*Western Oil & Gas Assn. v. State Bd. of Equalization* (1987) 44 Cal.3d 208, 213.) The rule’s prohibition on pre-payment litigation is intended “to allow revenue collection to continue during litigation so that essential public services dependent on the [taxes] are not unnecessarily interrupted. [Citation.]” (*Pacific Gas & Electric Co. v. State Bd. of Equalization* (1980) 27 Cal.3d 277, 283.) Accordingly, in determining whether the rule prohibits a taxpayer’s prepayment tax-related action, “ ‘[t]he relevant issue is whether granting the relief sought would have the effect of impeding the collection of a tax.’ ” (*Water Replenishment Dist. of Southern California v. City of Cerritos* (2013) 220 Cal.App.4th 1450, 1465.)

---

<sup>2</sup> Article XIII, section 32 provides: “No legal or equitable process shall issue in any proceeding in any court against this State or any officer thereof to prevent or enjoin the collection of any tax. After payment of a tax claimed to be illegal, an action may be maintained to recover the tax paid, with interest, in such manner as may be provided by the Legislature.” Although plaintiff did not respond to this argument in his reply brief because he claimed he did not receive defendants’ brief, he was permitted to argue this issue at oral argument.

Our Supreme Court has recognized a narrow exception to the “pay first, litigate later” rule. “The ban on prepayment judicial review found in the state Constitution must yield . . . to the requirements of the federal Constitution [citation] . . .” (*Western Oil & Gas Assn. v. State Bd. of Equalization* (1987) 44 Cal.3d 208, 213 [as modified Mar. 10, 1988] (*Western Oil*) [superior court had jurisdiction to determine whether the SBE’s request for information offended the prohibition against unreasonable searches and seizures or violated the right of privacy or the privilege against self-incrimination].) “The court’s inquiry necessarily must be limited, however, to avoid undue interference with the collection of taxes.” (*Western Oil, supra*, 44 Cal.3d at p. 214.) For example, in *Western Oil*, our Supreme Court concluded, “The role of the court in assessing the propriety of a prepayment challenge to [an SBE] request for information is not to determine the ultimate validity of the assessment to which the [SBE’s] inquiry is directed; the exclusive remedy for that relief is the suit for refund after payment. [Citation.] The court at this preliminary stage may only examine the [SBE’s] authority to undertake the inquiry.” (*Ibid.*)

“[T]he appropriate standard for judicial intervention [is] that invoked under the similar anti-injunction statute for federal tax matters[;] . . . prepayment relief must be limited to those situations in which it is clear that ‘ “under no circumstances” can the government prevail.’ [Citation.] ‘Only if it is . . . apparent that, under the most liberal view of the law and the facts, the [government] cannot establish its claim, may the suit for an injunction be maintained.’ [Citation] Put another way, if the [SBE] has no conceivable basis in law or fact for assessing a tax on a given piece of property, then it cannot constitutionally demand information from a taxpayer that would be relevant only to such a tax.” (*Western Oil, supra*, 44 Cal.3d at p. 214, fn. omitted.)

Defendants appear to argue that we lack appellate jurisdiction to hear plaintiff’s appeal; they argue that plaintiff “should be required to pay the tax and complete the administrative process before this or any other court addresses his arguments.” But they

do not argue this appeal should be dismissed, nor do they explain why the general rule that an aggrieved party may appeal a final judgment does not apply here. (See Code Civ. Proc., § 904.1, subd. (a) [authorizing appeals from final judgments]; *Gibson v. Savings & Loan Commissioner* (1970) 6 Cal.App.3d 269, 271 [final judgment is “a judgment terminating the proceeding below and finally determining the rights of the parties therein”]; Code Civ. Proc., § 902 [party taking appeal must be “aggrieved”]; *County of Riverside v. Public Employment Relations Bd.* (2016) 246 Cal.App.4th 20, 27 [party against whom an appealable order or judgment is entered is an “aggrieved” party].) Indeed, defendants point us to *no* authority supporting their suggestion that plaintiff is prohibited from appealing the judgment here, thus any intended argument in that regard is forfeited. (*Ewald v. Nationstar Mortgage, LLC* (2017) 13 Cal.App.5th 947, 948 [“We repeatedly have held that the failure to provide legal authorities to support arguments forfeits contentions of error”].)

To the extent that defendants intended to argue that the *trial court* lacked jurisdiction to hear plaintiff’s claims, they do not make the only argument available without filing a cross appeal: that the trial court erred in overruling their demurrers. (See, e.g., *Casterson v. Superior Court* (2002) 101 Cal.App.4th 177, 182 [order overruling demurrer is not directly appealable but may be reviewed on appeal from the final judgment].) Defendants failed to explicitly state that argument, identify the applicable standard of review, or tailor their argument to that standard. (See, e.g., *Sonic Manufacturing Technologies, Inc. v. AAE Systems, Inc.* (2011) 196 Cal.App.4th 456, 465 [“ ‘Arguments should be tailored according to the applicable standard of appellate review’ ” and “[f]ailure to acknowledge the proper scope of review is a concession of a lack of merit”].) Indeed, defendants never articulate that argument.

Thus defendants have forfeited any arguments regarding jurisdiction and we next consider plaintiff’s claims on their merits.

## III

*Interpretation of Deficiency Assessment Statutes*

Plaintiff disputes defendants' and the trial court's interpretation of the legal framework governing the FTB's authority to issue assessments for deficient tax returns, tax returns not filed, and jeopardy assessments.

*A. Permissible Deficiency Assessments Pursuant to Section 19087*

Plaintiff first argues that the FTB may not issue a deficiency assessment under section 19087 where the assessment is not in jeopardy. He bases that argument on section 19087's placement in article 5 (Jeopardy Assessments), rather than article 3 (Deficiency Assessments).

The construction and interpretation of a statute is a question of law that we consider de novo on appeal. (*Burden v. Snowden* (1992) 2 Cal.4th 556, 562.) “ ‘ ‘ ‘[A]s with any statute, we strive to ascertain and effectuate the Legislature's intent.’ ” [Citations.] “Because statutory language ‘generally provide[s] the most reliable indicator’ of that intent [citations], we turn to the words themselves, giving them their ‘usual and ordinary meanings’ and construing them in context [citation].” [Citation.] If the language contains no ambiguity, we presume the Legislature meant what it said, and the plain meaning of the statute governs. [Citation.] If, however, the statutory language is susceptible of more than one reasonable construction, we can look to legislative history in aid of ascertaining legislative intent.’ ” (*People v. Allegheny Casualty Co.* (2007) 41 Cal.4th 704, 708-709.)

The plain language of section 19087 is unambiguous. Section 19087, subdivision (a) unequivocally authorizes the FTB “at any time” “[i]f any taxpayer fails to file a return” to “require a return or an amended return under penalties of perjury” or “make an estimate of the net income, from any available information,” and to use that information to “propose to assess the amount of tax, interest, and penalties due.” (§ 19087, subd. (a).) 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.) We presume the Legislature meant what it said, and we see no ambiguity or duplicity in the language of section 19087.

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.” (§ 6.) The Legislature included a similar provision in division 2, part 10 of the Revenue and Taxation Code, of which the statutory provisions relevant here are a part: “Division, part, chapter, article, section and subsection headings contained herein shall not be deemed to govern, limit, modify, or in any manner affect the scope, meaning, or intent of the provisions of this part.” (§ 17032.) The mere fact that section 19087 is located within an article entitled Jeopardy Assessments does not affect the meaning or intent of the section.<sup>3</sup>

---

<sup>3</sup> Because we conclude the plain language of section 19087 is unambiguous, we need not discuss the legislative history of section 19087.

The language of Jeopardy Assessment provisions found in sections 19081,<sup>4</sup> 19082,<sup>5</sup> and 19086 does not affect our analysis. Section 19086, for example, provides, “In any proceeding brought to enforce payment of taxes made due and payable by this article, the finding of the [FTB] 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.” Plaintiff contends that the language of section 19086 necessarily means that any assessment under section 19087 must be in jeopardy. But section 19087 does not authorize the FTB to issue an assessment or otherwise make due or payable payment of taxes. Rather, section 19087 authorizes the FTB to “*propose* to assess the amount of tax, interest, and penalties due.” (§ 19087, subd. (a), italics added.) 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.

*B. Issuing a Deficiency Assessment if no Tax Return is Filed*

Plaintiff next argues that the FTB lacks authority to issue a deficiency assessment where a taxpayer fails to file a tax return, relying on *Wertin v. Franchise Tax Bd.* (1998) 68 Cal.App.4th 961 (*Wertin*). We disagree.

---

<sup>4</sup> Section 19081 provides in relevant part: “If the [FTB] finds that the assessment or the collection of a tax or a deficiency for any year, current or past, will be jeopardized in whole or in part by delay, it may mail or issue notice of its findings to the taxpayer, . . . together with a demand for immediate payment of the tax or the deficiency declared to be in jeopardy . . . .”

<sup>5</sup> Section 19082 provides in relevant part: “In the case of a tax for a current period, if the [FTB] finds that the assessment or collection of the tax will be jeopardized in whole or in part by delay, the [FTB] may declare the taxable period of the taxpayer immediately terminated. The [FTB] shall mail or issue notice of its finding and declaration to the taxpayer, together with a demand for a return and immediate payment of the tax based on the period declared terminated, . . . and the tax shall be immediately due and payable whether or not the time otherwise allowed by law for filing the return and paying the tax has expired.”

In *Wertin*, the FTB issued an assessment based on federal adjustments to the Wertins' tax returns without reviewing the state return the Wertins filed. (*Wertin, supra*, 68 Cal.App.4th at pp. 965-966.) The Second Appellate District, Division Seven held that the assessment was invalid because the Wertins' return was available, and the FTB did not take reasonable steps to obtain it before preparing a proposed assessment. (*Id.* at pp. 966, 972, 975-976.) The court stated, "In summary, we hold where a taxpayer's return is available, the FTB may not assess or collect a deficiency without relying on the return." (*Id.* at p. 976.)

*Wertin* does not stand for the proposition that the FTB may not issue an assessment unless the taxpayer has filed a return. Rather, *Wertin* holds the FTB must review a taxpayer's return before it issues an assessment *if the return is available*. (*Wertin, supra*, 68 Cal.App.4th at p. 976.) Therefore, we disagree with plaintiff that the FTB may not issue an assessment under article 3 unless the taxpayer has filed a return. Indeed, section 19087 specifically permits the FTB to issue a proposed assessment where a taxpayer *failed to file a return*, which the taxpayer may then protest by following the procedures set out in article 3, sections 19041 to 19048.

### C. Compliance with Jeopardy Assessments

In the alternative, plaintiff argues that if the FTB is authorized to issue an assessment under section 19087, the FTB must comply with jeopardy assessment procedures set out in article 5.<sup>6</sup> But as discussed, *ante*, nothing in section 19087 suggests that it concerns jeopardy assessments or that the procedural protections related to jeopardy assessments apply where the FTB proposes a deficiency assessment under that section. Rather, section 19087 authorizes the FTB to propose an assessment any time a

---

<sup>6</sup> Section 19084 sets out procedural protections for taxpayers subject to jeopardy assessments.



taxpayer has failed to file a return, and it authorizes the taxpayer to appeal the proposed assessment according to the procedures set out in sections 19041 to 19048. (§ 19087.)

We conclude that section 19087 authorizes the FTB to issue a proposed assessment where a taxpayer has failed to file a return.

Having disagreed with each of defendant's contentions of error, we decline to disturb the trial court's decision after trial.

#### **DISPOSITION**

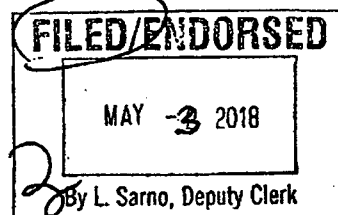
The judgment is affirmed.

\_\_\_\_\_  
/s/  
Duarte, Acting P. J.

We concur:

\_\_\_\_\_  
/s/  
Renner, J.

\_\_\_\_\_  
/s/  
Krause, J.



SUPERIOR COURT OF CALIFORNIA  
COUNTY OF SACRAMENTO

TIMOTHY JAMES DUMMER,

Plaintiff,

v.

CALIFORNIA CONTRACTORS STATE  
LICENSE BOARD; CALIFORNIA  
FRANCHISE TAX BOARD,

Defendants.

No. 34-2016-00200378

NOTICE OF DECISION

Trial Date: March 27, 2018

Dept.: 29

Judge Geoffrey A. Goodman

I. INTRODUCTION

This case came on for a short-cause trial on March 27, 2018, in Department 29 of the above-entitled Court, before the Honorable Geoffrey A. Goodman. Plaintiff, Timothy James Dummer appeared *pro per*. Defendants California Contractors State License Board ("CSLB") and the California Franchise Tax Board ("FTB") were represented by Deputy Attorney General Michael Sapoznikow. This matter is before the Court on Plaintiff's complaint for injunctive relief to compel the CSLB to reinstate his contractor license which was suspended for non-payment of state income taxes.

Trial was completed within one day. Testimony was taken from Plaintiff Timothy Dummer, Greg Heninger of the FTB and Nicole Newman of the CSLB. Documentary evidence was received.

II. DECISION

The undisputed facts establish that during the tax years 2006, 2010 and 2011 Plaintiff earned money from construction work he performed in California but failed to file state income

1 tax returns or pay income taxes assessed by FTB. This failure to satisfy his tax obligation  
2 resulted in CSLB suspending his license.

3 Plaintiff alleges that he was denied procedural due process by not being granted a hearing  
4 before the suspension took effect. His complaint is without merit.

5 A. FTB Lawfully Assessed Taxes against Plaintiff

6 FTB's assessments of taxes in 2006, 2010 and 2011 followed normal statutory procedures.  
7 Since Plaintiff failed to file returns, FTB assessed tax based upon estimates, or reported income  
8 Plaintiff had received in California.<sup>1</sup>

9 At trial, Plaintiff contended that the assessments were unlawful because no assessment could  
10 be issued in absence of a tax return, citing *Wertin v. Franchise Tax Board* (1999) 68 Cal. App.  
11 4th 961. In *Wertin*, however, the taxpayer had filed a return. The Court in *Wertin* stated: "[i]n  
12 summary, we hold *where a taxpayer's return is available*, the FTB may not assess or collect a  
13 deficiency without relying on the return." 68 Cal. App. 4th at 976, emphasis added.  
14 Plaintiff acknowledged he never filed a return; moreover, Revenue and Taxation Code section  
15 19087 specifically authorizes an assessment based upon estimates if a taxpayer refuses to file a  
16 return.<sup>2</sup>

16 Plaintiff next disputes the validity of the assessments since he did not receive notice of each  
17 of the assessments. The evidence proved that communications involving each assessment,  
18 which included an invitation to file a protest if the taxpayer disputed the assessment, were mailed  
19 to Plaintiff at the address he then had on file with the CSLB, his last known address. The  
20 mailings thus complied with Revenue and Taxation Code section 18416. This mail was  
21 presumably received. Evidence Code section 641. Plaintiff's self-serving testimony denying he  
22 received the mail is unpersuasive. To the extent he did not receive it, it was because of his  
23 negligence in reading his mail and in keeping FTB advised of his whereabouts.

24 Assessments for the tax years of 2006 and 2011 became final in 2008 and 2013, respectively,  
25 when Plaintiff failed to protest the assessments. Correspondence for the 2010 tax year was sent  
26 in 2012. Plaintiff received the notice of proposed assessment and wrote to FTB that he rejected  
27 the assessment and noted that it was without his consent. He referred to previous unidentified

28 <sup>1</sup> FTB also issued assessments for tax years 2007, 2008, 20012 and 2013. At trial FTB indicated it was  
withdrawing its assessments for those years and proceeded only on tax years 2006, 2010 and 2011.

<sup>2</sup> Plaintiff also contends that since this section falls within the Article entitled Jeopardy Assessments, all of the  
procedural requirements related to jeopardy assessments must be followed. However, the evidence established that  
the assessments in this case were not jeopardy assessments, and may be considered assessments under section  
19033. See Rev. and Tax Code section 19081.

1 correspondence and offered various definitions of "income". He asked to be contacted if FTB  
2 needed further information and signed his name "from without the United States."

3 FTB promptly sent a letter requesting clarification if Plaintiff was protesting the assessment,  
4 listing required information and indicating that if he did not respond in 30 days no hearing would  
5 be held and the assessment would become final. Plaintiff did not respond and the assessment  
6 became final in 2013.

7 In January 2016, FTB sent Plaintiff a Collection Status Notice which informed him that he  
8 owed taxes for multiple tax years and that if the delinquent taxes were not paid FTB would  
9 commence collection actions outlined in the notice. This initiated an exchange of  
10 correspondence and conversations with Plaintiff in which he indicated he would pay the amount  
11 owed if FTB met 13 conditions, characterizing himself as "natural born state citizen of the  
12 Michigan Republic" among other things.

13 **B. CSLB License Suspension Was Valid**

14 Business and Professions Code section 7145.5 permits the CSLB to suspend the license of a  
15 contractor who has not resolved all outstanding state tax liabilities. On June 3, 2016 FTB send a  
16 request to the CSLB to suspend Plaintiff's license advising that he had not paid his outstanding  
17 final tax liability. The CSLB then sent its own notice to Plaintiff indicating that if he did not  
18 satisfy his tax liability within two months his license would be suspended. At trial, the CSLB  
19 representative indicated they routinely do so when FTB advises a licensee has an unpaid tax  
20 liability.

21 Plaintiff demanded a hearing with the CSLB in order to contest his tax liability. CSLB  
22 responded that he would have to address any issues regarding tax liability with the FTB,  
23 indicating it was basing its action on his failure to pay taxes FTB determined were owed. When  
24 the notice period elapsed, CSLB suspended Plaintiff's license and Plaintiff filed this action.

25 **C. No Pre-Suspension Hearing Was Required**

26 In his request for a hearing before the CSLB Plaintiff sought to dispute was his asserted tax  
27 liability. However, Plaintiff had full opportunity to protest assessments before they became final  
28 and chose not to do so. Plaintiff also had available administrative actions for refunds that he  
could have sought after paying disputed taxes. Since Plaintiff failed to take advantage of these

1 administrative remedies he is barred from relief in this action. *Aronoff v. Franchise Tax Bd.*  
 2 (1963) 60 Cal. 2d 177, 180.

3 When a license is suspended based on an existing tax liability and the taxpayer is afforded  
 4 due process to challenge the underlying tax liability as Plaintiff was here, due process does not  
 5 require a second, pre-suspension hearing. See *DeOrio v. Yee* (9th Cir. Apr 11, 2018, No. 16-  
 6 56337 2018 U.S. App. LEXIS 9057, unpublished; *Franceschi v. Yee* (9th Cir. Apr. 11, 2018,  
 7 No. 14-56493, 2018 U.S. App. LEXIS 9038 (upholding denial of separate hearing on medical  
 8 license and driver's license suspensions respectively based on being on list of top tax cheats).

### 9 III. CONCLUSION AND PROPOSED JUDGMENT

10 The Court finds that Plaintiff has failed to prove he was denied due process or that he is  
 11 entitled to the relief requested. The trial of this case was concluded within one day and neither  
 12 party requested a statement of decision before the case was submitted. Therefore, pursuant to  
 13 Civil Procedure Code section 632, no formal statement of decision is required, and this Notice of  
 14 Decision shall constitute the decision of the Court. Defendants are ordered to prepare, serve and  
 15 submit a proposed judgment pursuant to the Civil Procedure Code and California Rules of Court.  
 16 Such proposed judgment shall be submitted to this Court no later than twenty court days from  
 17 service of this Notice of Decision.

18 **IT IS SO ORDERED**

19 Dated: May 3, 2018



20 HON. GEOFFREY A. GOODMAN  
 21 JUDGE OF THE SUPERIOR COURT  
 22  
 23  
 24  
 25  
 26  
 27  
 28

09:27:47

1 an hour. I'll also move the admission of Mr. Saviano's  
2 deposition.

3 Throughout that testimony the witnesses will talk  
4 about documents. The most important documents in this case  
5 are the correspondence between the agencies and Mr. Dummer.  
6 Via Builders also submitted some business records, and there  
7 are Mr. Dummer's discovery responses.

8 This is the first reason defendants should prevail.  
9 Article 13, Section 32, takes the jurisdiction of this  
10 action away from this Court. And in any proceeding to  
11 enjoin the collection of any tax, it says that the taxpayer  
12 must follow the statutory procedures. Mr. Dummer has not  
13 followed the statutory procedures.

14 Those would involve the administrative claim -- first  
15 he has to pay the tax. Then he has to ask the agency for a  
16 refund with a claim for refunding the agency. And if that  
17 fails, then he must bring a claim for a refund from this  
18 Court. That's the process for challenging a tax assessment.  
19 And you'll hear from the FTB witness, Greg Heninger, that  
20 Section 7145.5 is absolutely a collection tool.

21 I'm going to go to the merits next. As I said, there  
22 are two elements. One is whether the tax was properly  
23 finalized. The second is the suspension. I'm going to go  
24 through three of the tax years in detail and explain why  
25 these were properly finalized. And the rest of the tax is  
26 at issue because the FTB started that process over.

27 So FTB has recognized those tax years are not final.  
28 Those are the three final taxes. The other three, there

10:15:31 1 plaintiff that plaintiff characterizes as protest are proper  
2 protests under the Revenue and Taxation Code. FTB has  
3 nevertheless responded to plaintiff's communications. FTB  
4 admits that none of its responses to those communications is  
5 expressly titled, quote, Notice of Action, end quote. And  
6 FTB denies the remainder of the request.

7 So you're not objecting to that admission coming in,  
8 correct?

9 MR. SAPOZNIKOW: As -- we're not admitting more than  
10 that. We're not objecting to the admission to request.

11 THE COURT: Let me just get my notes on this. So  
12 this is Exhibit 119.

13 So of Exhibits 119, we are admitting into evidence  
14 without objection the admissions in number 5 and number 21,  
15 correct?

16 MR. DUMMER: Correct.

17 MR. SAPOZNIKOW: Yes, Your Honor.

18 THE COURT: All right.

19 MR. DUMMER: And with regards to Exhibit 120, which I  
20 would like to introduce, I'm only concerned with introducing  
21 the response to admission for 21, which is the same response  
22 as the Franchise Tax Board.

23 MR. SAPOZNIKOW: I have no objection. And I'll  
24 disagree that it is the same, but what it is, I have no  
25 problem with that.

26 THE COURT: So these are RFAs to the Contractor's  
27 State License Board, as opposed to the Franchise Tax Board,  
28 right?

13:42:42 1 filing what?

2 THE WITNESS: Enforcement.

3 THE COURT: Enforcement and assessments from audits?

4 THE WITNESS: Yes.

5 THE COURT: Okay.

6 Q. (By Mr. Dummer) Now, with regard to a jeopardy  
7 assessment, is that something that's used under either rare  
8 or particular circumstances?

9 A. Yes. I think it's unusual.

10 Q. And what would occur that would require you to issue  
11 somebody a jeopardy assessment?

12 A. From my understanding, it's when we feel there may be  
13 a possibility that if we issue an assessment, it would be  
14 very difficult to collect from that person. So we can  
15 attach their bank account, garnish their wages quickly  
16 without having to go through some of the procedural due  
17 process that for the other assessments that we go through.

18 Q. Now, I've researched jeopardy assessment a little,  
19 and is it accurate to say that they are typically used when  
20 there is a jeopardy of a person leaving the United States?

21 A. I would -- I don't know. I don't know that.

22 Q. When preparing an assessment, are there different  
23 rules for those making, say, \$30,000 a year versus  
24 \$300,000 a year?

25 A. No.

26 Q. So the amount of money somebody makes doesn't affect  
27 the procedures within those parameters?

28 A. It affects whether or not we issue an assessment



13:44:18 1 sometimes. But as far as whether the assessment's made,  
2 there should be no difference.

3 Q. I'm asking if there is a statute that's authorizing  
4 you to create an assessment at a certain level of income.

5 A. We have our threshold for tax liabilities, and once  
6 the tax resulting from the income reaches that threshold, we  
7 would then issue assessments.

8 Q. That makes sense.

9 But you don't, say, have a different procedure for  
10 people making 80,000 than for somebody making 280,000 by  
11 statute?

12 A. No.

13 Q. Do you know where the authority exists for the  
14 proposed assessments that were issued in my case?

15 A. Yes.

16 Q. Could you tell the Court what section of the code?

17 A. Revenue and Taxation Code, section 19087.

18 Q. Do you happen to know if 19087 is under Article 5?

19 A. No.

20 MR. DUMMER: Your Honor, may I approach the witness?

21 THE COURT: Well, what is he being called for? Is he  
22 some sort of expert in the law. I mean, I'm the expert in  
23 the law. I decide what the law is. So whether he knows  
24 what chapter it's in, what's the point?

25 MR. DUMMER: I'm just trying to pin point that we  
26 have a dispute as to where the authority --

27 THE COURT: Yeah. But is this witness called -- how  
28 is this witness relevant to me resolving what law applies?

13:51:19 1 Q. (By Mr. Dummer) Just so you know what this is, this  
2 is a printout of everything under Article 5 entitled  
3 jeopardy assessments. And then on page 2 is 19084, and the  
4 authority you cited is on page 3, 19087. It's just that  
5 first section there.

6 A. Okay.

7 (The witness reads.)

8 Q. Does that make sense to you at all? I mean, have you  
9 been in situations where you've seen the chief counsel say,  
10 hey, we've got a jeopardy assessment; we need this approved  
11 in writing?

12 A. No. And not for a case like yours. This doesn't  
13 apply to your assessments. 19084 doesn't apply.

14 Q. Can you explain why?

15 A. Because I can see now that it applies to jeopardy  
16 assessments, and that's not the kind of assessment that we  
17 issued against you.

18 Q. So I need to touch on that.

19 When you cited the authority of RTC 19087, which is  
20 in that jeopardy assessment section, was -- is that a  
21 correct statement or an incorrect statement?

22 MR. SAPOZNIKOW: I'll object to characterizing that  
23 section as a jeopardy assessment section.

24 THE COURT: Sustained.

25 He's stated that he doesn't believe the section  
26 applies. You have a believable argument that it does, but I  
27 don't -- he's stated what his belief is.

28 Q. (By Mr. Dummer) I'll cut to the chase. I think that

13:52:56 1 these assessments are just authorized under a different  
2 section, is all I was trying to establish. I can move on.

3 THE COURT: Which assessments?

4 MR. DUMMER: My deficiency assessments?

5 THE COURT: So why don't you ask him about those  
6 sections?

7 MR. DUMMER: I will.

8 Q. (By Mr. Dummer) When you hear the term "return  
9 data," what does that mean to you basically -- generally?

10 A. It means to me much of the information that is  
11 uploaded into our computer system from a return. So it  
12 doesn't have all details but some details of the return.

13 Q. By statute, can there be returned data if there is no  
14 return filed?

15 A. No. Yeah. That doesn't make sense. No.

16 Q. Are you familiar with Section 19033?

17 A. I have an inkling what it is, but not off the top of  
18 my head. I believe it's for deficiencies, but I'm not quite  
19 sure.

20 Q. Do you mind if I show you Section 19033 and see --

21 THE COURT: You may approach.

22 Q. (By Mr. Dummer) Do you recognize this as perhaps the  
23 statute that authorized the assessments?

24 Just to show you here, this is Article 3, deficiency  
25 assessment, and 19033 starts there.

26 A. No. 19087 is a statute that authorizes the  
27 assessments against you.

28 Q. So to make sure I have that clear, 19087, which is

14:23:29 1 addresses, could they come up with a vacant lot as an  
2 address?

3 A. Yes.

4 Q. Can you think of any reason, in your experience, of  
5 why the Franchise Tax Board would send five letters to five  
6 different addresses -- I'm sorry; five letters to three  
7 different addresses?

8 MR. SAPOZNIKOW: I'll object. Again, it's an  
9 incomplete hypothetical. He needs to know more for that  
10 question.

11 THE COURT: What's incomplete about it?

12 MR. SAPOZNIKOW: I guess if the question was, can you  
13 think of any reason why that might happen, I'll withdraw the  
14 objection.

15 THE COURT: You can answer.

16 THE WITNESS: Can you repeat that?

17 Q. (By Mr. Dummer) Can you think of a -- I'll start  
18 with this.

19 Can you think of any reasonable reason that the  
20 Franchise Tax Board would begin mailing letters  
21 consecutively, five of them here, to three different  
22 addresses?

23 A. Returned mail.

24 Q. So it's possible that that 2013 NPA to the correct  
25 address was returned, and they went on a search for  
26 addresses?

27 A. It's possible.

28 Q. Would you go beyond possible and say that's probable?

14:32:43 1 Q. Have you seen improvements since then?

2 A. Oh, yes.

3 Q. There was some confusion about the different kinds of  
4 assessments. I'm going to lead a little because I'm going  
5 to refer to previous testimony, but I'm -- so we mentioned  
6 jeopardy assessments, filing enforcement assessments, and  
7 audit assessments.

8 Those were all mentioned, right?

9 A. Yes.

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

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

15 Q. What's the typical fact pattern for the most common  
16 deficiency assessment?

17 A. Deficiency assessments usually come after a return is  
18 filed, and we do an audit and find that adjustments should  
19 be made which increase the tax liability.

20 Q. The typical fact pattern, and I know you said  
21 jeopardy assessments are rare, but what's a typical  
22 situation where that might get used?

23 A. I've heard of it being used in cases for drug dealers  
24 where we feel that we need to attach their bank account  
25 quickly. So a lot of -- the ones that I can remember are  
26 illegal activity cases.

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

14:34:23 1 A. That's when no return is filed. And so that's why I  
2 got confused a little bit about whether or not that was a  
3 deficiency because it seems to me -- and I -- that  
4 deficiency statute requires a return.

5 Q. I was staring at the statutes yesterday trying to  
6 figure out the same thing. I'm not sure I came to the  
7 correct conclusion as a lawyer.

8 You mentioned audit assessments. Are those always in  
9 a deficiency context?

10 A. Yes.

11 THE COURT: What's the difference? You just kind of  
12 described -- when you said the most common deficiency  
13 assessment was after a return is filed, and an audit  
14 suggests adjustments need to be made. So is there a  
15 difference between that and an audit assessment?

16 THE WITNESS: No.

17 THE COURT: Same thing?

18 THE WITNESS: Yes.

19 Q. (By Mr. Sapoznikow) Are there any deficiency  
20 assessments where no audit is conducted?

21 A. I don't think so. But so audit -- what is -- you  
22 know, audit -- so filing enforcement assessments have a kind  
23 of an audit, in that we look at the income. But there is no  
24 return to audit. So it's kind of, you know, more -- I don't  
25 know -- more semantics, I guess.

26 Q. Right. And I'm really looking more for how those  
27 words are used within the building of FTB than the statutes.  
28 That will be general -- what I mean by general is I'm asking

16:07:40 1 under Article 3.

2 So that language, No assessment shall be made under  
3 this article, doesn't apply to the end result of 087 because  
4 that is not an assessment.

5 And this makes sense. Let me step back to what the  
6 legislature was trying to do. With jeopardy assessments,  
7 there's a situation where there is a time pressure. And  
8 because there is time pressure, you are going to have a very  
9 limited due process, at least predeprivation due process.  
10 So that's why you either give them the 30 days in 084, or  
11 you get the Franchise Tax Board's general counsel to sign  
12 off on doing it faster.

13 Because it's important when due process is at issue.  
14 If you are going to reduce due process, somebody better  
15 swear that there is a good reason to do that. That's  
16 important with jeopardy assessments.

17 It's not the case with filing enforcement. There's  
18 no reason to take everybody who fails to file a tax return,  
19 take their file to a general counsel, and have them sign a  
20 document about it. You might do that with jeopardy  
21 assessments because of the nature of the activity. So the  
22 legal framework here makes sense.

23 THE COURT: You would concede that it's a little  
24 confusing by sticking that in Article 5 -- referring to  
25 Article 5 and entitling Article 5 as jeopardy assessments?

26 MR. SAPOZNIKOW: I think the legislature would have  
27 done us a service that if they are going to title a section  
28 jeopardy assessments, only put jeopardy assessment material

16:09:15 1 there, but that's not what they did. And we know that the  
2 titles are not dispositive.

3 THE COURT: Yes; but specific references to pursuant  
4 to this article are dispositive, but your point is that the  
5 final assessment is not being done pursuant to that article.

6 MR. SAPOZNIKOW: Correct.

7 THE COURT: But wouldn't a jeopardy assessment also  
8 refer back to the prior string of citations, 19031, because  
9 can't you have a jeopardy assessment where there was a tax  
10 return filed?

11 MR. SAPOZNIKOW: That can occur, but if you're going  
12 to do a jeopardy assessment, you have to follow the  
13 procedure of 081 through 086. And that has a separate  
14 assessment procedure independent of the one that is in the  
15 040s.

16 THE COURT: So you're saying the article does  
17 actually -- Article 5 does set forth a specific assessment  
18 procedure that jeopardy assessments have to follow, but your  
19 argument is 19087 for nonjeopardy assessments refers you  
20 back to a specific assessment process that's set forth in  
21 19031 et seq.

22 MR. SAPOZNIKOW: Correct.

23 THE COURT: I think I at least understand your  
24 argument.

25 MR. SAPOZNIKOW: Thank you.

26 MR. DUMMER: May I add --

27 THE COURT: Before you sit down, I don't know that  
28 you bothered to put on any evidence of this. We did hear



6:14:03 1 way that you wouldn't use a traffic ticket to charge  
2 somebody with murder, you wouldn't use a proposed assessment  
3 to bring somebody in, in some capacity, who hasn't filed a  
4 tax return. Going back real quick --

5 THE COURT: No, no, no. You used that analogy  
6 before, the ticket; and now you talk about murder, but  
7 before I thought it was a little more persuasive, that you  
8 wouldn't say that if somebody -- it was going to the clean  
9 hands argument. That if somebody just failed to renew their  
10 license or something, and they drove once, you wouldn't bar  
11 them from ever getting a license again. I get that.

12 But, again, putting aside the contractor license  
13 piece -- and I totally get that that's why we're here, but  
14 are you really asking me -- because doesn't my decision  
15 depend on adopting your position that basically says the  
16 current tax laws in the State of California basically  
17 prevent the State taxing authority from assessing any taxes?

18 I mean, the way you get out of paying taxes in the  
19 State of California is simply don't file a tax return, and  
20 therefore the federal taxing authority is without any  
21 procedure to lawfully finally assess any amount owing.

22 MR. DUMMER: I think you misunderstand my analogy.  
23 I'm not saying that -- I wasn't doing the clean hands. I'm  
24 saying that there is a procedure when somebody commits a  
25 murder or a crime, there is a procedure that is followed to  
26 bring them in and charge them. If somebody used a traffic  
27 ticket for that, somebody might argue and say the traffic  
28 ticket isn't the right thing. You should have done this.