No. 19-1335

In the Supreme Court of the United States

TIMOTHY JAMES DUMMER,

Petitioner,

v.

CONTRACTORS' STATE LICENSE BOARD et al.,

Respondents.

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

PETITION FOR REHEARING

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PETITION FOR REHEARING

Pursuant to Rule 44.2, Petitioner respectfully moves this Court for an order (1) vacating its order of October 5th, 2020, which denied the petition for writ of certiorari filed on May 26th, 2020, and (2) granting the petition for writ of certiorari. The grounds for rehearing are stated as follows.

GROUNDS FOR REHEARING

I. At Least Seven New Federal Tax Court Cases Have Issued Rulings That Conflict With The Ruling In Petitioner's Case; And The IRS Issued A Brand New Memorandum on the Issue.

The original certiorari petition, filed by Petitioner Timothy Dummer ("Dummer"), presented an important due process question, namely; did the State violate Dummer's procedural due process when the State taxing agency (the Franchise Tax Board ("FTB")) ignored *mandatory supervisor approval* (and certified mailing requirements) when they issued income tax deficiency assessments under the jeopardy assessment statutes, but without following the taxpayer protection statutes therein, because Dummer's assessments were not in jeopardy. (It's undisputed that Dummer's assessments were not in jeopardy.)

The California Third District Court of Appeal ruled on December 30th, 2019, that the State *could* issue deficiency assessments *without* chief counsel approval and without certified mail, because the "proposed" deficiency assessments weren't actually "assessments", nor in jeopardy, and did not trigger the statutory safeguards of the jeopardy provisions (Schrödinger's cat?). The trial court found that regular mailing to the last known mailing address without supervisory approval

was sufficient, despite statutes specifically requiring certified mail and chief counsel approval. [1] (The Appellate Court ignored the issue).

Since the December 2019 appellate court ruling, no less than seven Federal Tax Court cases have ruled otherwise, finding that chief counsel approval must be satisfied where required by statute, prompting the IRS to even issuing a September 24th, 2020 Memorandum providing "specific guidance for supervisory approval" **(Attached)**.[2]

"[T]here is no evidence of its timely written approval. Accordingly, we conclude respondent has not met the burden of production for the determination." ***Minemyer v. Comm'r,*** T.C. Memo. 2020-99 (July 1, 2020).

"[Statute requires] determination of a penalty assessment be 'personally approved (in writing) by the immediate supervisor.'...signature on the Civil Penalty Approval Form is sufficient to satisfy the statutory requirements." ***Belair Woods, LLC,*** 154 T.C. No. 1 (2020).

"Held, further, the supervisory approval requirement of I.R.C. sec. 6751(b)(1) was satisfied when the revenue agent's immediate supervisor approved the penalties." ***Thompson,*** 155 T.C. No. 5 (8/31/20).

"IRS satisfied the [approval] requirements...*because* written supervisory approval...was secured." ***Chadwick,*** 154 T.C. No. 5 (2020).

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[1] California law requires assessments issued under article 5 (§ 19087) to be approved in writing by the chief counsel of the Franchise Tax Board. (Rev. & Tax. Code § 19084). California law requires deficiency assessments to be sent by certified mail. (Rev. & Tax. Code § 19050, 19086).

[2] "[W]here a California tax statute uses the same language as a federal statute, federal case law is persuasive on the proper interpretation to be given to the California statute. (Rihn v. Franchise Tax Board 893; Meanley v. McColgan 45; Scar (1955) 131 Cal.App.2d 356, 360 ; see also (1942) 49 Cal.App.2d 203, 209 [strong public policy favors interpreting similar statutes dealing with the same subject matter in the same way].)" *Wertin v. Franchise Tax Bd.*, 68 Cal.App.4th 961, 971 (Cal. Ct. App. 1998)

"Held... *because* the written approval of the...supervisor came only after RA sent reports...approval was not timely...and the penalties are thus not sustained." ***Carter et al. v. Commissioner,*** T.C. Memo. 2020-21 (Feb. 3, 2020)

"Held...R satisfied his initial burden of producing evidence that his agent complied with I.R.C. sec. 6751(b)(1) [supervisory approval requirements]...by introducing a Civil Penalty Approval Form for that tax year signed before a formal communication to P of the penalty for that year." ***Frost,*** 154 T.C. No. 2 (2020).[3]

"Held, further, Appeals abused its discretion by summarily determining that the IRS had met 'any applicable law or administrative procedure' for purposes of I.R.C. sec. 6330(c)(1), since the IRS had failed to comply with I.R.C. sec. 6751(b)(1) because it obtained written supervisory approval for the I.R.C. sec. 6707A penalty only after the revenue agent issued to P the 30-day letter proposing to assert the penalty." ***Laidlaw's Harley Davidson Sales, Inc.***, 154 T.C. No. 4 (2020).

In Dummer's case, it's undisputed that *no* supervisory approval was ever made whatsoever. These seven tax cases and subsequent IRS memorandum, reveal the importance (and obvious misunderstanding) of supervisory approval where required by statute.

California Revenue and Taxation Code (RTC) § 19084(a)(1)(A) provides in relevant part. "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 [article 5]."

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[3] Section 6751(b)(1) requires the initial determination of certain penalties to be "personally approved (in writing) by the immediate supervisor of the individual making such determination". See Graev v. Commissioner, 149 T.C. at 492-493; see also Clay v. Commissioner, 152 T.C. 223, 248 (2019) (quoting section 6751(b)(1)).

It's undisputed that Dummer's assessments were *proposed* under article 5. The issue however, is that the appellate court failed to consider that assessments which are "proposed" under article 5 are also assessments "made" under article 5, which thereby triggers supervisory approval under RTC § 19084, and certified mailing requirements (19086). This discrepancy deserves review.

II. The Supreme Court May Re-Define "Assessment" This Term To Include Certain Pre-Assessment Activity and Create an Irreversible Conflict With the Appellate Court's Ruling in Petitioner's Case.

Dummer argued that the "proposed" *assessments* issued by the FTB were "assessments" as that term is used at RTC § 19084(a)(1)(A). The appellate court, on the other hand, indicated that a "proposed" assessment is merely pre-assessment activity and therefore not an actual "assessment" as that term is used at RTC § 19084.

Dummer argues that the language "no assessment shall be made" applies specifically to "proposed" assessments, because *all* assessments *begin* as "proposed" assessments before becoming final assessments after the expiration of 60 days without protest. A final assessment is not "made" without first being proposed. The chief counsel approval and certified mailing requirement would *have* to occur during the proposed assessment period, because the proposed assessment is what begins the 60 day clock for the assessment to become final. What protection would be offered where certified mailing and chief counsel approval of an emergency assessment wasn't required until after the protest period has expired?

It's undisputed that Dummer's assessments were "proposed" under article 5 RTC § 19087(a). Subdivision (b) of RTC § 19087 describes that *all* assessments begin as proposals, and subsequently become final only

after expiration or protest. This would mean that "proposed assessments" are "assessments" as that term is used in RTC § 19084(a)(1)(A).

RTC § 19087 Subdivision (b) provides:

> RTC § 19087(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 Franchise Tax Board's action on the protest; the taxpayer must proceed in the manner and within the time prescribed by Sections 19041 to 19048 , inclusive. (emphasis added)"

The appellate court concluded that when deficiency assessments are merely "proposed" under RTC § 19087(a), that subdivision (b) requires that a protestor "must proceed in the manner" prescribed by "article 3" (Sections 19041 to 19048). The appellate court ruling however ignores circumstances like Dummer's where "no protest was filed", and subdivision (b) is never triggered. The appellant ruling implies that Dummer's protests never became final, so the FTB was not required to obtain supervisory approval or use certified mail.

The question: "when does pre-assessment activity constitute an assessment", is to be answered this term in 19-930 CIC SERVICES, LLC, Petitioner, v. INTERNAL REVENUE SERVICE, ET AL., Respondent. (certiorari granted and set for argument Tuesday, December 1, 2020.)

There, although the issue really relates to the Anti-injunction act ("AIA"), it basically asks: at what point is pre-assessment activity an "assessment"? The IRS contends that information collection and determinations (pre-assessment activity) *are* "assessments" and therefore should bar Petitioner's suit under the AIA. Ironically, Dummer makes a similar argument, which is that a "proposed assessment", even though not yet final until 60 days later, is by

definition an "assessment". In Dummer's case, this would trigger taxpayer protections under Rev. and Tax. Code §§ 19084 & 19086. A "determination" is an assessment. *Scar v. C.I.R.*, 814 F.2d 1363, 1365-70 (9th Cir. 1987). *Wertin v. Franchise Tax Bd.* (1998) 68 Cal.App.4th 961, at 971. Alternatively, the State cannot have it both ways. If a proposed assessment is not an assessment, then the California anti-injunction act cannot prevent a suit challenging a mere "proposed" assessment.

III. The Appellate Court's Ruling Inadvertently Upsets the California Anti-Injunction Act By Treating "Proposed" Assessments as Something Different and Less Than "Assessments", Thus Creating an Unintended Consequence of Statewide Concern.

California's anti-injunction act, similar to the federal act, is found in the California Constitutional at Article XIII - Section 32 and 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."

Cal. Rev. & Tax. Code § 19381 echoes the Constitution, and provides in relevant part:

> § 19381 "No injunction or writ of mandate or other legal or equitable process shall issue in any suit, action, or proceeding in any court against this state or against any officer of this state to prevent or enjoin the **assessment or collection** of any tax under this part. (emphasis added)"

Collection cannot occur until after a final assessment.

The primary focus of Dummer's petition focused on the undisputed fact that Dummer's assessments were *proposed* (issued) under Section

19087, yet the conflicting language of the appellate court opinion 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].

The appellate court's phrase "or otherwise make due or payable", in addition to "issue an assessment" should not be ignored. It must be understood to mean that the court believes that section 19087 does not authorize *any* activity, in addition to issuing assessments, which may have the potential for creating any liability which may be due or payable. This conclusion is fundamentally flawed, especially in light of RTC § 19133, which provides in relevant part that "the Franchise Tax Board may add a penalty of 25 percent of the amount of tax determined pursuant to Section 19087". (Emphasis added).

Section 19133 conflicts with the appellate court ruling and admits that not only is tax determined under § 19087, but that a penalty can be added to the amount already made "due and payable" under § 19087. In other words, contrary to the appellate court ruling, section 19087(a) appears to not only authorize the issuance of an assessment, but also authorizes the FTB to make those amounts due and payable.

With the appellate court finding that "proposed assessments" are not "*assessments*", the court has opened the door for tax challenges of assessments which have been merely proposed, and thus not "assessed". Furthermore, the ruling held that such proposed assessments "*only*" become final by following the protest provisions of article 3.

> "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]. (Emphasis added).

Interestingly, the provisions of article 3, specifically RTC sections 19041 to 19048 mentioned by the appellate court, *only* apply where a tax return is filed. [4]

> RTC § 19043 (Article 3 "deficiency assessments")
> (a) For purposes of this part, **"deficiency" means** the amount by which the tax imposed by Part 10 (commencing with Section 17001) or Part 11 (commencing with Section 23001) exceeds the excess of--
> (1) The sum of--
> (A) The **amount shown** as the tax by the taxpayer **on an original or amended return**, if an original or amended return was filed, plus
> (B) The amounts previously assessed (or collected without assessment) as a deficiency, over--
> (2) The amount of rebates, as defined in paragraph (2) of subdivision (b), made. (Emphasis added).

There is no definition defining "deficiency" for deficiency assessments without reference to tax returns. Any conclusion that the definition of "deficiency" *also* refers to instances like Dummer's where there are no tax returns, would violate the well settled rule that tax statutes may not be extended to embrace matters by implication. *Gould v. Gould*, 245 U.S. 151 (1917).

As such, in circumstances like Dummer's, where no tax return was filed, the appellate courts mandatory referral to sections 19041 to 19048, which undoubtedly includes the definition of deficiency in section 19043, prevents a "proposed" "deficiency" assessment *from ever becoming a "final deficiency assessment."* (Court ruling "proposed assessment **only** becomes a final assessment pursuant to the procedures set out in sections 19041 to 19048").

Without becoming a final deficiency "assessment", the State can never begin collection activity, and the California Anti-Injunction Act

[4] The federal system likewise defines a deficiency in terms of the taxpayer's return. (26 U.S.C. § 6211.)

can never prevent a suit to enjoin the "assessment or collection", depending on the redefining of "assessment" in CIC SYSTEMS, *supra.*

The appellate court ruling declares that Dummer's "deficiency" assessments can "only" become final by adhering to the provisions of the tax code sections 19041 to 19048. *Wertin, supra,* at 973-74 supports Dummer's conclusion that the definition of "deficiency" at section 19043 mandates review of a tax return, providing:

> "The California statutory scheme, like the federal scheme, requires the taxing agency to consult the taxpayer's return prior to issuing a deficiency notice. The plain language of the **California statutes** compels this result; indeed, they **are more explicit than the federal scheme in their reference to tax returns.** Former section 18583 stated, "[i]f the Franchise Tax Board determines that the tax disclosed by the original return is less than the tax disclosed by its examination ..." (italics added) it may issue a deficiency notice. **The definition of deficiency requires reference to a tax return if one was prepared:** "(a) For purposes of this part, the term **'deficiency' means** the amount by which the tax imposed by this part exceeds the excess of- [¶] (1) The sum of- [¶] (A) The **amount shown** as the tax by the taxpayer **upon his return**, if a return was made by the taxpayer and an amount was shown as the tax by the taxpayer thereon, plus ...." (Former [68 Cal. App. 4th 974] § 18591.1, italics added.) fn. 7 **The rationale for such a definitional constraint is to provide some grounding for the FTB's calculation of the taxpayer's tax liabilities, and the plain meaning of these statutes is to build the taxpayer's tax return into the definition of deficiency** to prevent the kind of haphazard resort to arbitrary outside sources and inaccurate deficiency computations, as in this case and in Scar (emphasis added)."

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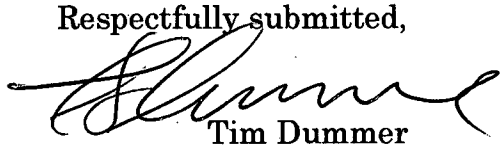
CONCLUSION

For the reasons stated above, for the reasons stated in the petition for writ of certiorari, and in the interest of justice for the public at large in California; petitioner prays that this Court grant rehearing of the order of denial, vacate the order, and grant the petition for writ of certiorari, and review the judgment.

Respectfully submitted,



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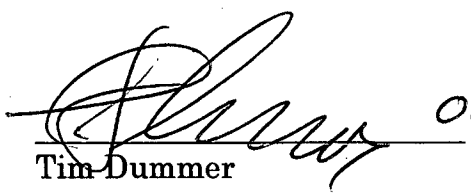
October 14th, 2020

44.2 CERTIFICATE OF PETITIONER

As petitioner, I hereby certify that this petition for rehearing is presented in good faith and not for delay, and that this petition is limited to the grounds specified in Rule 44.2.



OCT 14, 2020

Tim Dummer

Additional material from this filing is available in the Clerk's Office.