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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

MICAELA PASSERI,

Plaintiff and Appellant,

v.

STATE OF CALIFORNIA,

Defendant and Respondent.

B271821

(Los Angeles County
Super. Ct. No. BC591619)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael L. Stern, Judge. Affirmed.

Jenifer J. Anisman, for Plaintiff and Appellant.

Xavier Becerra, Attorney General, Diane S. Shaw,
Assistant Attorney General, Lisa W. Chao and Charles Tsai,
Deputy Attorneys General, for Defendant and Respondent.

It is a long established, constitutionally enshrined, and virtually impregnable rule that an unwilling taxpayer must pay any disputed tax before filing suit to challenge its validity. The rule is firmly rooted in public policy, and may not be circumvented by creative litigation ostensibly designed for other purposes. Here, Micaela Passeri sued the State Board of Equalization purportedly to vindicate her rights under the Harris-Katz California Taxpayers' Bill of Rights. (Rev. & Tax. Code, § 7080 et seq. (hereafter Taxpayers' Bill of Rights).)¹ However, because the only grievance of which she complains is subjection to a tax she has not paid and claims she does not owe, the trial court concluded the lawsuit was intended to circumvent the bar against prepayment tax disputes. It therefore sustained the state's demurrer without leave to amend and dismissed the action. We affirm.

BACKGROUND

We take the facts from the operative second amended complaint and from matters properly subject to judicial notice.

In 2008, Passeri signed and guaranteed a commercial lease for Maison Saint Marie, a clothing retailer owned by Anita Tabib. In return, she and Tabib agreed she would receive 10 percent of the retailer's monthly sales, less operating expenses up to \$20,000, and would be given the right to place her own line of merchandise in the store on consignment.

Three years later, Passeri began receiving delinquent notices from the State Board of Equalization (the board) regarding sales and use taxes owed by Maison Saint Marie. Passeri notified the board that she had taken no part in the

¹ Unless otherwise indicated, all statutory references are to the Revenue and Taxation Code.

business other than guaranteeing its lease, and was therefore not responsible for its taxes. She nevertheless negotiated a payment plan with the board, with Tabib making the payments. Tabib made some payments but then stopped.

In late 2013, Passeri and Tabib met with David Colvin, an employee of the board, to explain that Passeri was not responsible for Maison Saint Marie's taxes. However, Colvin allegedly represented falsely that Passeri was named as the retailer's owner on its seller's permit, although he knew the application for the permit had been forged. He allegedly concealed the forgery first by producing a permit application for an unrelated business Passeri owned, then falsely represented that he could not obtain the true application for Maison Saint Marie's seller's permit.

Passeri submitted a claim of exemption from levies imposed by the board, but Colvin allegedly refused to file the claim, then misplaced it, then requested a copy that he also lost. The board ignored Passeri's request for redetermination of her tax liability and several requests for a copy of her file, providing only portions of the file and omitting the most relevant documents, including anything filed by Maison Saint Marie or documentation supporting her tax liability.

In February 2014, Passeri discovered Tabib had forged her signature on applications for a seller's permit and fictitious business name and had been operating Maison Saint Marie under her name. She sued Tabib for fraud and obtained a judgment rescinding their partnership agreement.

Passeri three times appealed the board's actions to its Taxpayers' Rights Advocate, a position created in 1984 as part of the Taxpayers' Bill of Rights. (§ 7083.) However, after allegedly

ignoring Passeri's first two appeals, the advocate rejected her claim on January 7, 2015.

In March 2015, Passeri filed a claim with the Victim Compensation and Government Claims Board, which was rejected.

On March 3, 2015, Passeri sued the board for fraud and negligent misrepresentation. After the state's demurrer was sustained, Passeri filed a second amended complaint asserting one cause of action for violation of the Taxpayers' Bill of Rights. She alleged the above facts and asserted that "as a direct and proximate cause of the [board's conduct], she [was] damaged in an amount to be proved at time of trial, in a sum believed to be no less than twenty-five thousand and one dollars (\$25,001.00)." Passeri sought compensatory damages and such other relief as the court would deem proper.

The state demurred to Passeri's second amended complaint on the grounds that (1) she failed to pay the disputed taxes before filing suit, (2) her claim was time-barred, (3) she failed to exhaust the requisite administrative remedies, and (4) she alleged no actual damages.

Characterizing Passeri's lawsuit as one "to resolve a tax dispute," the trial court found Passeri failed to allege she paid the disputed tax before filing suit, and at any rate failed to exhaust her administrative remedies. Accordingly, the court sustained the state's demurrer without leave to amend.

Passeri appealed from the resulting judgment of dismissal.

DISCUSSION

A. Standard of Review

On review of a trial court's order sustaining a demurrer we "examine the complaint de novo." (*McCall v. PacifiCare of*

California, Inc. (2001) 25 Cal.4th 412, 415.) “We give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] Further, we treat the demurrer as admitting all material facts properly pleaded, but do not assume the truth of contentions, deductions or conclusions of law. [Citations.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.] And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse.” (*City of Dinuba v. County of Tulare* (2007) 41 Cal.4th 859, 865.)

B. Restraints On Prepayment Tax Litigation

Passeri contends that because she had no material association with Maison Saint Marie she was not responsible for its tax obligations, and therefore should not be restricted to a post-payment refund action to contest the taxes wrongfully levied against her. We disagree.

Section 6051 imposes a sales tax “upon all retailers” for “the privilege of selling tangible personal property at retail,” at a rate determined as a percentage of gross receipts. (§ 6051.) A “use tax” in the same amount is imposed on the storage, use, or consumption in this state of tangible personal property acquired under circumstances where the sales tax would not be imposed, for example where property is purchased from outside the state. (§ 6201.) A “retailer” is any seller “who makes any retail sale or sales of tangible personal property.” (§ 6015, subd. (a)(1).) Any person desiring to engage in retail sales must apply to the board for a permit. (§ 6066.)

Sales and use taxes are administered by the board. (§ 7051.) A seller must file returns with and pay taxes to the board quarterly. (§§ 6451, 6452.) If the board is dissatisfied with a return or the amount of tax paid, it may compute and determine the amount of the deficiency. (§ 6481.) The amount of a deficiency determination bears interest and possible penalties. (§§ 6482, 6484, 6485.) The board may record tax liens, issue warrants to enforce the liens, and collect amounts due. (§ 6776; Gov. Code, §§ 7150.5, subd. (d), 7171, subd. (b).)

If the board erroneously or illegally collects any amount due, the taxpayer may file a claim for a refund. (§ 6901 et seq.) If the claim is denied, the taxpayer may file suit. (§ 6933.)

Article XIII, section 32 of the California Constitution prohibits a court from issuing any “legal or equitable process . . . against this State or any officer thereof to prevent or enjoin the collection of any tax,” and provides that “[a]fter payment of a tax claimed to be illegal,” an action may be brought to recover the tax paid. “Together, these two portions of section 32 establish that a taxpayer’s sole legal avenue for resolving a dispute over the legality of a tax is a postpayment refund action.” (*Woosley v. State of California* (1992) 3 Cal.4th 758, 789; *Garg v. People ex rel. State Bd. of Equalization* (1997) 53 Cal.App.4th 199, 208; see § 6931 [no legal action may “prevent or enjoin the collection . . . of any tax or any amount of tax required to be collected”].)

Thus, a “taxpayer may not go into court and obtain adjudication of the validity of a tax which is due but not yet paid. [¶] The important public policy behind this constitutional provision ‘is to allow revenue collection to continue during litigation so that essential public services dependent on the funds are not unnecessarily interrupted.’ [Citation.] ‘The fear that

persistent interference with the collection of public revenues, for whatever reason, will destroy the effectiveness of government has been expressed in many judicial opinions. [Citation.] As was said by Mr. Justice Field in *Dows v. City of Chicago*, 11 Wall. (78 U.S.) 108, 110 [20 L. Ed. 65], “Any delay in the proceedings of the officer, upon whom the duty is devolved of collecting the taxes, may derange the operations of government, and thereby cause serious detriment to the public.”’ [Citation.] [¶] ‘ “The prompt payment of taxes is always important to the public welfare. It may be vital to the existence of a government. The idea that every taxpayer is entitled to the delays of litigation is unreason.” ’” (*State Bd. of Equalization v. Superior Court* (1985) 39 Cal.3d 633, 638-639.)

“The constitutional provision has been construed broadly to bar not only injunctions but also a variety of prepayment judicial declarations or findings which would impede the prompt collection of a tax.” (*State Bd. of Equalization v. Superior Court, supra*, 39 Cal.3d at p. 639.) Thus, a taxpayer may not circumvent the restraint on prepayment tax litigation by seeking ostensibly only an “injunction or writ of mandate or other legal or equitable process” the effect of which would be to restrain collection of the tax. (§ 6931; *State Bd. of Equalization v. Superior Court*, at p. 642 [action for refund of partial payment barred where validity of the tax was challenged before full payment made]; *Modern Barber Col. v. Cal. Emp. Stab. Com.* (1948) 31 Cal.2d 720, 722 [prepayment mandamus proceeding to adjudicate whether petitioner fell within statutory definition of “taxpayer” was barred]; *Pacific Gas & Electric Co. v. State Board of Equalization* (1980) 27 Cal.3d 277, 279 [prepayment mandamus proceeding to

compel the board to adjust petitioner's real property assessment was barred].)

In her complaint, Passeri seeks neither an injunction against the sales tax imposed by the board nor a declaration that she does not owe it, but only compensatory damages pursuant to the Taxpayers' Bill of Rights. On its face therefore, the complaint does not fall afoul of the restraint on prepayment tax litigation.

But Passeri nowhere describes the nature of her damages. She alleges only that "as a direct and proximate cause of the [board's conduct], she [was] damaged in an amount to be proved at time of trial, in a sum believed to be no less than twenty-five thousand and one dollars (\$25,001.00)." She alleges nothing, for example, about incurring out-of-pocket expenses, consequential costs, or attorney fees, or suffering any other monetary or nonmonetary harm.

The board is entitled to be informed as to just what Passeri expects to show as elements of her damages. (See *Roger E. Smith v. SHN Consulting Eng'rs & Geologists* (2001) 89 Cal.App.4th 638, 651 ["uncertainty as to the fact of damage . . . negatives the existence of a cause of action"].) However, her vague pleading reveals neither how nor in what manner Passeri claims she was injured. She might very well intend to claim that her sole injury is her liability for the sales tax.

Although the restraint against a prepayment tax dispute clearly would preclude such a claim, Passeri's briefs on appeal reveal this is exactly what she proposes. Her sole claim of injury, repeatedly stated, is that she was injured to the extent she will be held "responsible for a tax which [the board] knew was not [her] burden, . . . as declared in the verified Second Amended Complaint."

To find Passeri was thus aggrieved the trial court would have to declare the tax is not due. But as discussed above, the court could make no such declaration until after the tax was paid. Therefore, the action is improper and the state's demurrer was properly sustained. Further, as Passeri in her second amended complaint alleged no facts materially different from those alleged in her first amended complaint, and admits on appeal that she cannot do so, instead persistently objecting only to the sales tax itself, leave to amend was properly denied.

Passeri argues the bar against a prepayment tax dispute does not apply because she does not dispute the tax itself, merely her status as the taxpayer, and does not seek to enjoin collection of the tax as against Maison Saint Marie, the true taxpayer.

The argument is without merit. A "tax" is a vectored obligation, an "enforced proportional contribution[] from persons and property." (Black's Law Dict. (10th ed. 2014).) A tax thus has two components—the amount charged and the person against whom it is charged, and its validity depends both on a correct amount and a proper assessee. To contest either is to dispute the validity of the "tax." Here, by contending Maison Saint Marie, not she, is the proper retailer, Passeri disputes the validity of the tax itself.

In *Modern Barber Colleges v. California Employment Stabilization Commission*, *supra*, 31 Cal.2d 720, the taxpayer sought mandamus to compel the California Employment Stabilization Commission to vacate its finding that he was an employer of several persons within the meaning of the Unemployment Insurance Act, and to cancel charges made against him pursuant to that finding. The Unemployment Insurance Act, in language virtually identical to that of article

XIII, section 32 of the California Constitution, prohibited prepayment judicial review of a commission assessment, and the taxpayer admitted he had not paid contributions which the commission claimed were due.

In finding for the commission, the Supreme Court stated: “We may at the outset dispose of the suggestion by petitioner that this proceeding is not one to ‘prevent or enjoin’ the collection of a contribution because the only relief prayed for is the vacation of the findings of the existence of the employer-employee relationship It is obvious that a judgment directing the commission to vacate its findings would in effect amount to a declaration by the court that the relationship did not exist[, and] the commission after such a judgment could not ‘properly undertake to enforce [the] tax’” (*Modern Barber Col. v. Cal. Emp. Stab. Com.*, *supra*, 31 Cal.2d at p. 723.)

Similarly here, Passeri cannot before paying the disputed tax contend she was not the true taxpayer, because a judicial finding to that effect would amount to a declaration that no tax is due, which would prevent collection.

C. The Taxpayers’ Bill of Rights

Passeri argues the bar against prepayment tax litigation does not preclude a lawsuit brought under the Taxpayers’ Bill of Rights. We agree in the abstract, but when such a lawsuit constitutes a prepayment attempt to prevent or enjoin collection, the bar applies.

“The Taxpayers’ Bill of Rights sets forth a legislative finding that ‘. . . there is a delicate balance between revenue collection and freedom from government oppression.’ (§ 7081.) The intent of the Legislature in enacting the Taxpayers’ Bill of Rights was twofold: (1) ‘to place guarantees in California law to

ensure that the rights, privacy, and property of California taxpayers are adequately protected during the process of the assessment and collection of taxes,’ and (2) ‘to promote improved voluntary taxpayer compliance. . . .’ (*Ibid.*)” (*Garg v. People ex rel. State Bd. of Equalization*, *supra*, 53 Cal.App.4th at p. 207.)

Section 7099 of the Taxpayers’ Bill of Rights permits a taxpayer to bring an action for damages against the state when the taxpayer has been “aggrieved” by any board officer or employee recklessly disregarding “board-published procedures.” In any such action, the taxpayer may seek “[a]ctual and direct monetary damages sustained . . . as a result of the actions or omissions,” and reasonable litigation costs. (§ 7099, subd. (b).) However, “[w]henever it appears to the court that the taxpayer’s position in the proceedings . . . is frivolous, the court may impose a penalty against the plaintiff in an amount not to exceed ten thousand dollars (\$10,000).” (§ 7099, subd. (d).) (The state does not seek such a penalty here.)

Although Passeri alleges the board recklessly failed to abide by published board protocols (which she does not identify), she nowhere describes how she was aggrieved by this failure or what damages she sustained apart from tax liability.² When a lawsuit, even one brought under the aegis of the Taxpayers’ Bill of Rights, would have the net result of restraining collection of a tax allegedly due, “the action must be treated as one having that purpose.” (*Modern Barber Col. v. Cal. Emp. Stab. Com.*, *supra*, 31 Cal.2d at p. 723.) Passeri’s failure to identify any damages

² We grant Passeri’s request for judicial notice of two documents she claims are published board protocols. (Evid. Code, § 452, subd. (c).) They do not change our analysis.

apart from tax liability deprived the trial court of jurisdiction to adjudicate the validity of the tax in this prepayment action.

Given this conclusion, we need not decide whether Passeri failed to exhaust administrative remedies or timely filed her claims.

DISPOSITION

The judgment is affirmed. Respondent is to recover its costs on appeal.

NOT TO BE PUBLISHED.

CHANNEY, J.

We concur:

ROTHSCHILD, P. J.

JOHNSON, J.