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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

JAMES G. BARRETT, Petitioner and Appellant, v. CALIFORNIA DEPARTMENT OF TAX AND FEE ADMINISTRATION, et al., Respondents.	B276619 (Los Angeles County Super. Ct. No. BS155263)

APPEAL from a judgment of the Superior Court of Los Angeles County, Robert H. O'Brien, Judge. Affirmed.

James G. Barrett, in pro. per., for Petitioner and Appellant.

Xavier Becerra, Attorney General, Diane S. Shaw, Assistant Attorney General, Lisa W. Chao and Jane O'Donnell, Deputy Attorneys General, for Respondents.

In the present petition for writ of mandate, appellant James Barrett alleges that several state agencies and administrators (collectively, respondents) unlawfully failed to collect state sales and use taxes owed by an Indian tribe and corporation. The trial court sustained respondents' demurrer with leave to amend and, when Barrett failed to file an amended petition, dismissed the petition. Barrett appealed from the resulting judgment of dismissal.

We affirm. As we discuss, a writ of mandate may issue to compel performance of a *ministerial* duty, but may not command the exercise of *discretionary* powers in a particular manner. Because Barrett has not alleged either the failure to perform a ministerial duty or the unreasonable or arbitrary exercise of discretionary power, his petition failed to state a claim for relief in mandate. (Code Civ. Proc., § 1085.) Accordingly, the trial court properly sustained respondents' demurrer and entered judgment for respondents.

FACTUAL AND PROCEDURAL BACKGROUND

I.

Petition for Writ of Mandate

Barrett is a California resident who lives in Imperial County, California. In January 2015, he filed a petition for writ of mandate in Imperial County Superior Court against the California State Board of Equalization (the Board)[1], the

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[1] The Taxpayer Transparency and Fairness Act of 2017 created the California Department of Tax and Fee Administration (CDTFA), which by statute assumed most of the duties, powers, and responsibilities of the State Board of Equalization, its executive director, and its individual members. (Gov. Code, §§ 15570, 15570.22, 15570.24, subd. (b).) The act provides that an action to which the Board of Equalization is a

California State Controller's Office, the Office of the California Attorney General, and various government officials, seeking a writ of mandate to compel the Board to collect various sales and use taxes he claimed were owed by the Torres-Martinez Tribe of Desert Cahuilla Indians (the tribe) and Selnek-is Tem-Al (Selnek), a corporation formed under the tribe's corporate ordinance.[2]

Barrett filed a first amended petition for writ of mandate in March 2015, and in May 2015, following a motion to transfer venue, the matter was transferred to Los Angeles County Superior Court by stipulation of the parties approved by the court. As relevant, here, the operative petition alleges as follows:

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party "shall not abate by reason of this part but shall continue in the name of the department [i.e., the CDTFA], and the department shall be substituted for the State Board of Equalization by the court wherein the action is pending. The substitution shall in no way affect the rights of the parties to the action." (*Id.*, § 15570.24, subd. (b).)

On September 11, 2017, pursuant to respondents' motion, we ordered the CDTFA substituted for the Board, and the director of the CDTFA substituted for respondents Cynthia Bridges, George Runner, Fiona Ma, Jerome Horton, and Diane Harkey. Throughout this opinion, we will refer to the Board of Equalization and the CDTFA interchangeably as "the Board."

[2] The petition also named the California Department of Alcoholic Beverage Control and its director (collectively ABC). ABC was not a party to the June 2, 2016 judgment from which Barrett has appealed, and thus on August 1, 2017, we granted ABC's motion to dismiss Barrett's appeal as to it. Because ABC is not before us, we do not consider those portions of Barrett's opening brief that address alleged statutory violations by ABC.

Selnek operates the Torres-Martinez Travel Center (Travel Center), which is located on tribal land. The Travel Center sells fuel, alcoholic beverages, food, and general merchandise to the public. In May and June 2014, Barrett purchased fuel and an alcoholic beverage from the Travel Center; his receipts either reflected that no sales tax had been collected, or did not indicate whether or not a state sales tax had been collected.

Selnek "is . . . liable for the collection of use tax on non-food and fuel purchases occurring at [the Travel Center]," but it "has not fulfilled its legal obligations under the sales/use tax laws of California, and accordingly[] is delinquent in its sales/use tax liabilities" to the state. Barrett informed the Board of Selnek's tax delinquency, but the Board responded "that because of the difficulty of enforcing sales/use taxes against tribal corporations, . . . [the Board] has . . . declined to even attempt to apply and enforce sales/use tax statutes against Selnek."

Barrett asserts that the failure to collect sales and use taxes from the tribe and Selnek violates mandatory duties imposed by statute on respondents. Barrett therefore seeks a writ of mandate compelling respondents to calculate and collect delinquent taxes and penalties owed by the tribe, Selnek, and "other similarly situated retailers."

II.

Respondents' Demurrer and Motion to Dismiss

Respondents demurred to the petition. They asserted: (1) they did not have a mandatory duty to collect sales and use taxes from Indian tribes; (2) Selnek and the tribe were indispensable parties, but could not be joined because they enjoy sovereign immunity; and (3) Barrett lacked standing to bring the present action.

Barrett opposed the demurrer. He asserted that respondents had an absolute right to collect state taxes owed by tribal corporations; Selnek and the tribe need not be joined; and Barrett had standing because he owed sales and use taxes.

The trial court sustained the demurrer with leave to amend. It found: (1) the statutes on which Barrett relied imposed discretionary, not mandatory, duties, and thus were not a proper subject of a mandamus action; (2) Selnek was both a necessary and indispensible party, but was not subject to suit unless the tribe waived its sovereign immunity; and (3) Barrett had not properly pled standing under Code of Civil Procedure section 526a. The court granted leave to amend as to the Board only.

Barrett did not file an amended pleading, and thus respondents filed a motion to dismiss pursuant to Code of Civil Procedure section 581, subdivision (f)(2).[3] On May 4, 2016, the trial court granted the motion, and on June 2, 2016, it entered a judgment of dismissal in favor of respondents. Notice of entry of judgment was served on June 10, 2016.

Barrett timely appealed from the judgment.

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[3] Code of Civil Procedure section 581, subdivision (f)(2) provides that a court may dismiss a complaint "after a demurrer to the complaint is sustained with leave to amend, the plaintiff fails to amend it within the time allowed by the court and either party moves for dismissal."

DISCUSSION

I.

The Judgment of Dismissal Is Not Void

We begin by addressing Barrett's contentions that the judgment of dismissal in respondents' favor is void, and that he was entitled to entry of a default judgment against all respondents. In brief, Barrett contends that he filed his amended petition in Imperial County Superior Court one court-day *before* respondents demurred to the original petition. As a result, he urges, the demurrer to the original petition was inoperative because the original petition had been superseded by the first amended petition. Moreover, he contends, because respondents neither demurred to nor answered the amended petition, he was entitled to entry of default as to all respondents.

Barrett's contentions are without merit. On March 20, 2015, three days *before* Barrett purported to file the amended petition, respondents filed a motion to transfer venue. The filing of the motion to transfer venue had the effect of suspending the proceedings in Imperial County Superior Court pending the court's determination of the motion. (*Pfefferle v. Lastreto* (1962) 206 Cal.App.2d 575, 580 ["[A]s a general rule, when a notice of motion for change of venue has been filed the court ought not to rule upon any matters which should properly be determined by the court of ultimate venue. . . . 'The reason for the suspension of such powers of the court is that if a defendant is entitled to have his motion for change of venue granted, he is entitled to have such matters heard before the court of the county of his residence; also, in respect to the pleadings, the motion for transfer must be decided upon the basis of their status as of the date of the filing of notice of the motion.' "].)

The amended petition was filed in Los Angeles Superior Court on May 14, 2015, and respondents filed a demurrer on June 30, 2015. Although the demurrer referred to "the petition," the trial court construed it as a demurrer to the "*amended* petition," which was then the operative pleading. The court sustained the demurrer and, subsequently, dismissed the amended petition and entered judgment for respondents. Once the court did so, there was no operative pleading for respondents to answer; and because Barrett declined to file an amended pleading, the judgment of dismissal was proper.

II.
The Petition Fails to State a Claim for Mandamus; Thus, the Trial Court Properly Sustained the Demurrer

A. Standard of Review

" 'Because this case comes to us on a demurrer for failure to state a cause of action, we accept as true the well-pleaded allegations in [the petition]. " 'We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed." [Citation.] Further, we give the [petition] a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.]" ' [Citation.] . . . ' " 'A demurrer tests the legal sufficiency of the [petition]. . . .' [Citations.] On appeal from a dismissal after an order sustaining a demurrer, we review the order de novo, exercising our independent judgment about whether the [petition] states a cause of action as a matter of law. [Citations.]" (*Chiatello v. City and County of San Francisco* (2010) 189 Cal.App.4th 472, 480.)

B. The Petition Fails to State a Mandamus Claim

A writ of mandate "may be issued by any court . . . to compel the performance of an act which the law specifically enjoins, as a duty resulting from an office, trust, or station. . . ." (Code Civ. Proc., § 1085, subd. (a).) To be entitled to mandamus, therefore, a petitioner "must demonstrate the public official or entity had a *ministerial duty* to perform, and the petitioner had a clear and beneficial right to performance. [Citations.]" (*AIDS Healthcare Foundation v. Los Angeles County Dept. of Public Health* (2011) 197 Cal.App.4th 693, 700, italics added (*AIDS Healthcare Foundation*).) Stated differently, " 'mandamus is available to compel a public agency's performance or to correct an agency's abuse of discretion when the action being compelled or corrected is *ministerial*. [Citation.] "A ministerial act is an act that a public officer is required to perform in a prescribed manner in obedience to the mandate of legal authority and without regard to his [or her] own judgment or opinion concerning such act's propriety or impropriety, when a given state of facts exists. Discretion . . . is the power conferred on public functionaries to act officially according to the dictates of their own judgment. [Citation.]" [Citations.] Mandamus does not lie to compel a public agency to exercise discretionary powers in a particular manner, only to compel it to exercise its discretion in some manner. [Citation.]' (*AIDS Healthcare Foundation*, *supra*, 197 Cal.App.4th at p. 700–701, 128 Cal.Rptr.3d 292.) 'Mandamus may also issue to correct the exercise of discretionary . . . power, but only where the action amounts to an abuse of discretion as a matter of law because it is so palpably unreasonable and arbitrary. [Citation.]' [Citation.]" (*California*

Public Records Research, Inc. v. County of Yolo (2016) 4 Cal.App.5th 150, 177 (*California Public Records Research*).)

Barrett alleges that respondents' failure to collect sales and use taxes from the tribe and Selnek violates mandatory duties imposed on the Board by Revenue and Taxation Code[4] sections 6511 and 6515; on the Controller by Government Code section 12418; and on the Attorney General by Business and Professions Code section 25619. He therefore seeks a writ of mandate compelling respondents to calculate the delinquent taxes and penalties owed by Selnek, the tribe, and other similarly situated retailers. As we now discuss, Barrett's petition fails to state a viable cause of action for mandamus because it does not allege either the failure to perform a ministerial act or an abuse of discretionary power. Accordingly, the demurrer was properly sustained against all respondents.

1. The Petition Fails to Allege a Failure to Perform a Ministerial Duty

Whether the statutes on which Barrett relies impose ministerial or discretionary obligations is a question of statutory interpretation. (*AIDS Healthcare Foundation*, *supra*, 197 Cal.App.4th at p. 701.) We therefore examine the " ' "language, function and apparent purpose" ' " of the relevant statutes. (*Ibid.*)

Revenue and Taxation Code sections 6511 and 6515. Section 6511[5] states that if any person fails "to make a return,"

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[4] All subsequent undesignated statutory references are to the Revenue and Taxation Code.

[5] Section 6511 provides in full: "If any person fails to make a return, the board shall make an estimate of the amount of the gross receipts of the person, or, as the case may be, of the amount

the Board shall estimate the person's gross receipts or sales and "shall compute and determine the amount of tax or other amount required to be paid to the state, adding to the sum thus arrived at a penalty equal to 10 percent thereof." Section 6515 provides that "[p]romptly after making its determination the board shall give to the person written notice of the estimate, determination, and penalty, the notice to be served personally or by mail in the manner prescribed for service of notice of a deficiency determination."

Barrett urges that the Board's duty to calculate and notify a taxpayer of delinquent taxes is mandatory because sections 6511 and 6515 use the word "shall," not "may." Not so. Although the Revenue and Taxation Code defines "shall" as mandatory (§ 16 [" '[s]hall' is mandatory and 'may' is permissive"]), "this term does not necessarily create a mandatory duty." (*AIDS Healthcare Foundation*, *supra*, 197 Cal.App.4th at p. 701;

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of the total sales price of tangible personal property sold or purchased by the person, the storage, use, or other consumption of which in this state is subject to the use tax. The estimate shall be made for the period or periods in respect to which the person failed to make a return and shall be based upon any information which is in the board's possession or may come in its possession. Upon the basis of this estimate the board shall compute and determine the amount of tax or other amount required to be paid to the state, adding to the sum thus arrived at a penalty equal to 10 percent thereof. One or more determinations may be made for one or for more than one period. When a business is discontinued a determination may be made at any time thereafter, within the periods specified in Section 6487, as to liability arising out of that business, irrespective of whether the determination is issued prior to the due date of the liability as otherwise specified in this part."

California Public Records Research, *supra*, 4 Cal.App.5th at p. 178.) To the contrary, " '[e]ven if mandatory language appears in [a] statute creating a duty, the duty is discretionary if the [public entity] must exercise significant discretion to perform the duty.' [Citations.]" (*California Public Records Research, supra*, at p. 178.) Thus, "in addition to examining the statutory language, we must examine the entire statutory scheme to determine whether the [public entity] has discretion to perform a mandatory duty." (*Ibid*.)

As relevant here, although sections 6511 and 6515 require the Board to notify persons who have failed to file "returns" of the taxes due to the state, these sections neither define "returns" nor identify the persons who must file them. That information is provided in section 6452, subdivision (b), which says that a sales tax return shall be filed by "every person who is liable for the sales tax under this part," and a use tax return shall be filed "by every retailer engaged in business in this state and by every person purchasing tangible personal property, the storage, use, or consumption of which is subject to the use tax, who has not paid the use tax due to a retailer required to collect the tax." Considered together, therefore, sections 6511, 6515, and 6452 provide that the Board shall notify a taxpayer that unpaid taxes are owed if the Board determines that the taxpayer (1) is "liable for . . . sales tax under this part" (and thus is required to file sales tax returns), or (2) is "engaged in business in this state" or is a "person purchasing tangible personal property . . . subject to the use tax" (and thus required to file use tax returns). These determinations are, by their nature, discretionary, not ministerial, because they require the Board to " 'act officially according to the dictates of their *own judgment*' " (*California*

Public Records Research, *supra*, 4 Cal.App.5th at p. 177, italics added)—that is, to exercise judgment in determining how the tax laws apply to a taxpayer's particular circumstances and, therefore, in deciding whether taxes are owed and in what amount. As such, the duties imposed by this section are not enforceable by a writ of mandate. (See *id*. at p. 178 [although statute required Board of Supervisors to set fees to be charged for copies of official records, "the Board must exercise significant discretion in deciding how much to charge" because statute did not require Board to set fees in any particular amount]; see also *AIDS Healthcare Foundation*, *supra*, 197 Cal.App.4th at p. 702 [although statutes required Department of Public Health to take measures to prevent the transmission of infectious venereal diseases, such statutes were not ministerial because they gave health officers discretion to act depending on the circumstances].)

We find additional support for our conclusion in sections of the Revenue and Taxation Code that describe the Board's power to determine and prosecute tax delinquencies. Section 6481 provides that "[i]f the board *is not satisfied* with the return or returns of the tax or the amount of tax, or other amount, required to be paid to the state by any person, it *may* compute and determine the amount required to be paid . . . ." (Italics added.) Similarly, section 6711 says the Board "*may* bring an action in the courts of this state, of any other state, or of the United States in the name of the people of the State of California to collect the amount delinquent together with penalties and interest." (Italics added.) The Board's power to determine whether a taxpayer's return is "satisfactory" is inherently discretionary, as is its right to bring, or not to bring, a delinquency action.

Government Code section 12418. Government Code section 12418 provides that the Controller "shall direct and superintend the collection of all money due the State, and institute suits in its name: [¶] (a) For all official delinquencies in relation to the assessment, collection, and payment of the revenue. [¶] (b) Against persons who by any means have become possessed of public money or property and fail to pay it over or deliver it. [¶] (c) Against all debtors of the State." Barrett suggests that this section imposes a mandatory duty on the Controller to collect all funds due to the state. We disagree: Government Code section 12433 gives the Controller explicit statutory authority to discharge any debt owed the state, including tax debt, "if the debt is uncollectible or the amount of the debt does not justify the cost of its collection." The Controller's power to collect money due the state, therefore, is discretionary, not ministerial, and as such is not a proper subject of mandamus. (*Westly v. Board of Administration* (2003) 105 Cal.App.4th 1095, 1107 [Controller's authority is ministerial when the amount of an expenditure is set by law, but "discretionary . . . when the facts must be determined as necessary to establish the validity of a claim"].)

Business and Professions Code section 25619. Business and Professions Code section 25619 provides: "Every peace officer and every district attorney in this State shall enforce the provisions of this division and shall inform against and diligently prosecute persons whom they have reasonable cause to believe offenders against the provisions of this division." Barrett contends that this section imposes on the Attorney General a mandatory duty to prosecute Selnek for tax delinquency. For all the reasons discussed above, we conclude that the obligations

imposed by this section are discretionary, not ministerial, and thus will not support a mandamus action.

2. The Petition Fails to Allege an Unreasonable or Arbitrary Exercise of Discretion

Having concluded that respondents' power to enforce the tax laws carries with it a significant element of discretion, we may direct the issuance of a writ of mandate only if we conclude that respondents' decision not to pursue a collection action against the tribe and Selnek " 'amounts to an abuse of discretion as a matter of law because it is so palpably unreasonable and arbitrary. [Citation.]' [Citation.]" (*California Public Records Research*, *supra*, 4 Cal.App.5th at p. 177.) For the reasons that follow, respondents' decision is neither unreasonable nor arbitrary.

In *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe* (1991) 498 U.S. 505, 507 (*Oklahoma Tax Comm'n*)), the United State Supreme Court considered whether a state may validly tax sales of goods on Indian land. The court concluded that states may collect taxes on sales to nonmembers of the tribe (but not to tribal members), but it held that states cannot sue Indian tribes to collect past unpaid taxes because suits against Indian tribes "are . . . barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation." (*Id*. at p. 508, 509.)[6]

As evidenced by an exhibit to Barrett's petition, respondents believe "that an Indian tribe's retail sale of fuel on a

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[6] The court acknowledged Oklahoma's complaint that the court's holding gave states "a right without any remedy." (*Oklahoma Tax Comm'n*, *supra*, 498 U.S. at p. 514.)

reservation to a non-Indian is subject to use tax." However, respondents have elected not to pursue enforcement action against the tribe and Selnek because, pursuant to *Oklahoma Tax Comm'n*, the state "has no effective means of collecting the tax owed if the Indian tribe chooses not to self-report and pay these taxes to the Board. In order to bring suit against the Indian tribe, the Board would have to receive tribal or Congressional consent, and this has not yet occurred."

Barrett urges that Selnek is subject to suit because the tribe waived its sovereign immunity through Selnek's corporate charter. Whatever the merits of this contention, they are beside the point because the question before us is not the tribe's sovereign immunity, but rather the reasonableness of respondents' decision not to expend their limited resources to attempt to collect taxes arguably beyond their reach. Under the current state of the law, respondents' decision in this regard manifestly is not " 'an abuse of discretion as a matter of law.' " (*California Public Records Research*, *supra*, 4 Cal.App.5th at p. 177.) Accordingly, the trial court correctly concluded that the petition did not state a claim against respondents for mandate.[7]

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[7] Because we conclude the petition fails to state a valid mandamus claim, we need not address respondents' arguments that the tribe and Selnek are indispensable parties and that Barrett lacks standing to bring the present claim.

DISPOSITION

The judgment is affirmed. Respondents are awarded their appellate costs.

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EDMON, P. J.

We concur:

LAVIN, J.

EGERTON, J.