

NO. S173972

SUPREME COURT
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**IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA**

KIMBERLY LOEFFLER, ET AL,

Plaintiffs and Appellants,

v.

TARGET CORPORATION,

Defendant and Respondent.

Petition for Review of a Decision of the Court of Appeal,
Second Appellate District, Division Three, No. B199287

ANSWER BRIEF ON THE MERITS

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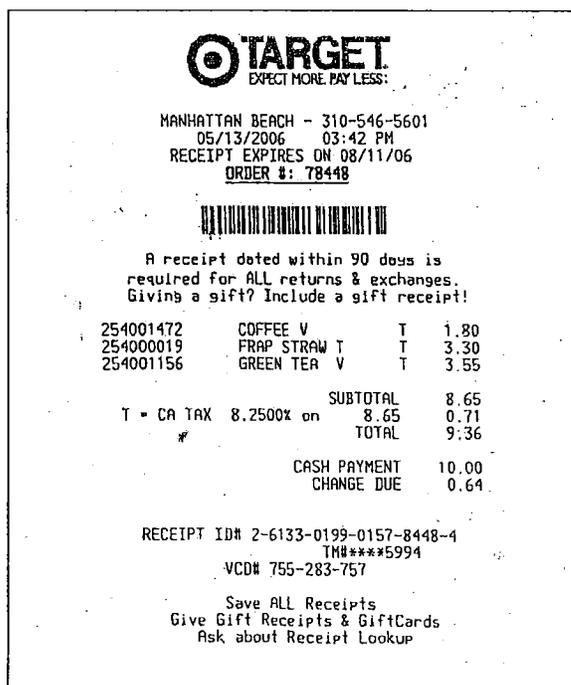
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INTRODUCTION

One picture is worth a thousand words, in this instance a picture of the receipt supposedly proving Plaintiffs' claims against Target:



What does this receipt show?

- That in accordance with a statutory presumption that all goods sold by a retailer are taxable (Rev. & Tax. Code, § 6091), Target charged sales tax reimbursement on three drinks, including 15¢ for one cup of hot coffee.
- That Target must pay 15¢ in sales taxes to the State Board of Equalization for the sale of the hot coffee (this receipt is proof of that obligation).

- That Target has absolutely nothing to gain from charging sales tax reimbursement on exempt goods — because under no circumstances could it keep the money or otherwise benefit from such a transaction.

According to Plaintiffs, Target Corporation has nevertheless violated the Unfair Competition Law and the Consumer Legal Remedies Act, and the Court of Appeal's decision — concluding that section 32 of article XIII of the California Constitution bars such suits — leaves Plaintiffs without a remedy for the grievous wrong they suffered. There are several fatal flaws in Plaintiffs' arguments.

First, the Court of Appeal got it right — this lawsuit is barred by the Constitution and by Revenue and Taxation Code section 6932.

Second, Plaintiffs *do* have a remedy — a complaint to the State Board of Equalization (Rev. & Tax. Code, § 6901.5; Cal. Code Regs., tit. 18 § 1700) which the Board has every incentive to pursue on their behalf.

Third, there is no need to twist a tortured construction out of the Constitution or the Revenue and Taxation Code to create a basis for Plaintiffs' right to sue under the Unfair Competition Law or the Consumer Legal Remedies Act — for the simple reason that Target has not engaged in any conduct forbidden by law and thus could not in any event be liable under the UCL or the CLRA.

Fourth, there is no logic to this lawsuit. What's in this supposed scam for Target? Nothing. Every penny collected by Target as reimbursement for sales tax appears as exactly that on its books and records, and is regularly paid over to the State Board of Equalization

(Plaintiffs do not allege otherwise). The Board, the entity charged with enforcing the sales tax law (Rev. & Tax. Code, §§ 7051-7060), has been aware of this lawsuit since it was filed in 2006 — and by now surely would have told Target to stop charging sales tax on hot coffee to go if, in fact, Target was misconstruing the regulations. With hot coffee to go as with all of its goods, Target would welcome a ruling that allowed it to sell tax-free hot coffee to go — because it would then have a win-win decision to make about whether to sell it for less (in which event it would possibly sell more) or, alternatively, to increase the price and pocket the extra money — something it most certainly cannot do when it charges sales tax reimbursement.

For all of these reasons and more, the Court of Appeal's decision should be affirmed.

STATEMENT OF THE ISSUE

Does article XIII, section 32 of the California Constitution or Revenue and Taxation Code section 6932 bar a consumer from filing a lawsuit against a retailer under the Unfair Competition Law (Bus. & Prof. Code, § 17200 et seq.) or the Consumers Legal Remedies Act (Civ. Code, § 1750 et seq.) alleging that the retailer charged sales tax on transactions that were not taxable?

SUMMARY OF THE PERTINENT FACTS

Plaintiffs' complaint, filed in October 2006 and twice amended, alleged that Target improperly collected sales tax reimbursement from its customers who purchased hot coffee drinks to go, and for this wrongdoing sought (for themselves and on behalf of a putative class) disgorgement of the impermissibly collected money and an injunction prohibiting the future

collection of sales tax reimbursement on hot coffee to go. (AA 13-23, 85-114.) Originally framed as six distinct causes of action, Plaintiffs' claims are now reduced to the two framed by this Court — violations of the Unfair Competition Law (Bus. & Prof. Code, § 17200 et seq.) and the California Consumer Legal Remedies Act (Civ. Code, § 1750 et seq.), both of which were resolved against Plaintiffs when the trial court sustained Target's demurrer without leave to amend. (AA 175-178.)

On Plaintiffs' appeal, Division Three of the Second Appellate District published a thoughtful and carefully crafted opinion. It explains the California Constitution's prohibition against suits that directly or indirectly implicate the collection of taxes and the Constitution's delegation of authority to the Legislature. And it explains the Legislature's creation of a comprehensive system for sales tax refunds and associated sales tax reimbursement refunds that does *not* authorize a private cause of action by a customer seeking a refund of sales tax reimbursement. (*Loeffler v. Target Corp.* (2009) 173 Cal.App.4th 1229; Slip Opn., pp. 8-13.)¹ The Court of Appeal found *nothing* in the statutes or regulations suggesting a legislative intent to authorize private action by a customer against a retailer (*id.* at p. 13), and concluded it would undermine the legislative scheme to permit a customer to unilaterally ascertain when excess sales tax had been collected (*id.* at p. 14).

The Court of Appeal rejected Plaintiffs' contention that, notwithstanding the constitutional and statutory prohibitions against this suit, they could pursue their UCL and CLRA claims because they seek to

¹ For the Court's convenience, a copy of the Slip Opinion is attached to this brief, and our citations to the opinion are to the pages of that version.

enjoin the collection of sales tax *reimbursement*, not the collection of sales taxes *qua* sales taxes. (Slip Opn., pp. 16-20.) As Division Three explained, its holding did not leave Plaintiffs without a remedy because a customer's complaint to the Board triggers an investigation and, when appropriate, an audit of the retailer's books and records. (*Id.* at p. 21.) In short, the Court of Appeal got it right.

LEGAL ARGUMENT

I. ARTICLE XIII, SECTION 32 OF THE CALIFORNIA CONSTITUTION BARS THIS LAWSUIT.

A. A Few Words About California's Sales Tax Law.

1. The Retailer Is Obligated To Pay Sales Tax And The Customer Is Obligated To Pay Sales Tax Reimbursement.²

California's sales tax is an excise tax imposed on retailers for the privilege of selling tangible personal property in this state. (Rev. & Tax. Code, § 6051; *City of Pomona v. State Board of Equalization* (1959) 53 Cal.2d 305, 309; *Livingston Rock & Gravel Company, Inc. v. De Salvo* (1955) 136 Cal.App.2d 156, 160.)³ Retailers must file quarterly sales tax returns and make quarterly payments to the state, and are subject to civil and criminal penalties for wrongfully evading sales taxes. (§§ 6451-6459, 7152-7155.)

² The application of constitutional provisions and statutes to undisputed facts presents a question of law for *de novo* review. (*McCall v. PacifiCare of Cal., Inc.* (2001) 25 Cal.4th 412, 415; *Chen v. Franchise Tax Bd.* (1998) 75 Cal.App.4th 1110, 1114.)

³ Subsequent undesignated statutory references are to the Revenue and Taxation Code.

Although a retailer's invoices and receipts commonly show a sales tax charged to the customer, in fact the sales tax is imposed on the seller, not the buyer (*General Electric Co. v. State Board of Equalization* (1952) 111 Cal.App.2d 180, 185), and the charge to the customer is actually for sales tax *reimbursement* as authorized by Civil Code section 1656.1, subdivision (a).⁴ (*Duffy v. State Bd. of Equalization* (1984) 152 Cal.App.3d 1156, 1165, fn. 4.) Thus, although the tax relationship is between the retailer and the state (*Livingston Rock & Gravel Co. v. De Salvo, supra*, 136 Cal.App.2d at p. 160), a receipt or other proof of sale charging sales tax reimbursement creates a presumption that the contract between the retailer and purchaser includes the purchaser's promise to reimburse the retailer for the sales tax the retailer must pay to the state. (Civ. Code, § 1656.1, subd. (a)(2).)

⁴ As relevant, Civil Code section 1656.1 provides: "(a) Whether a retailer may add sales tax reimbursement to the sales price of the tangible personal property sold at retail to a purchaser depends solely upon the terms of the agreement of sale. It shall be presumed that the parties agreed to the addition of sales tax reimbursement to the sales price of tangible personal property sold at retail to a purchaser if: [¶] (1) The agreement of sale expressly provides for such addition of sales tax reimbursement; [¶] (2) Sales tax reimbursement is shown on the sales check or other proof of sale; or [¶] (3) The retailer posts in his or her premises in a location visible to purchasers, or includes on a price tag or in an advertisement or other printed material directed to purchasers, a notice to the effect that reimbursement for sales tax will be added to the sales price of all items or certain items, whichever is applicable. [¶] (b) It shall be presumed that the property, the gross receipts from the sale of which is subject to the sales tax, is sold at a price which includes tax reimbursement if the retailer posts in his or her premises, or includes on a price tag or in an advertisement (whichever is applicable) one of the following notices: [¶] (1) 'All prices of taxable items include sales tax reimbursement computed to the nearest mill.' [¶] (2) 'The price of this item includes sales tax reimbursement computed to the nearest mill.'"

Until the tax-exempt nature of a particular sale is established by the Board, all gross receipts of a retailer are presumptively subject to the sales tax. (§ 6091.)⁵ It is undisputed that Target has at all relevant times paid all collected sales tax reimbursements to the Board — and, *a fortiori*, that it obtains no benefit from collecting sales taxes in excess of those required by statute.⁶

2. The State Board Of Equalization Enforces The Sales Tax Statutes, Including The System For Sales Tax Reimbursement Refunds.

As the Court of Appeal explained (Slip Opn., pp. 8-11), the State Board of Equalization is charged with administering and enforcing the sales tax statutes. (§§ 7051-7060.) Among other things, the Board enacts sales tax regulations (§ 7051), reviews sales tax returns and reports (§§ 6481, 7055), and audits retailers for compliance with the sales tax laws (§ 7054).

⁵ Section 6091 provides: “For the purpose of the proper administration of this part and to prevent evasion of the sales tax it shall be presumed that all gross receipts are subject to the tax until the contrary is established. The burden of proving that a sale of tangible personal property is not a sale at retail is upon the person who makes the sale unless he takes from the purchaser a certificate to the effect that the property is purchased for resale.”

⁶ Plaintiffs’ assertion that Target “has not argued in this case that it has remitted to the State the money it collected from Plaintiffs as sales tax reimbursement” (OB 42, fn. 11) is just plain wrong. The point was made in our Answer to the Attorney General’s Court of Appeal amicus brief (p. 5) and in our Answer to Plaintiffs’ Petition for Review by this Court (p. 1). The point was not raised in the trial court because the case was resolved by demurrer — but the critical fact is that Plaintiffs did not allege that Target failed to pay the equivalent of the tax reimbursement collected to the State as sales tax.

More specifically, the Board enforces the Legislature's comprehensive system for seeking sales tax refunds and associated sales tax reimbursement refunds. (§§ 6901-6907, 6931-6937.) To begin the process, a retailer (the taxpayer) must file a sales tax refund claim with the Board (§§ 6901-6908, 6932; Cal. Code Regs., tit. 18, § 5230 et seq.)⁷ as a prerequisite to maintaining a suit for a refund of sales taxes (§ 6932; *A&M Records, Inc. v. State Bd. of Equalization* (1988) 204 Cal.App.3d 358, 367, disapproved on another ground in *Preston v. State Bd. of Equalization* (2001) 25 Cal.4th 197, 220, fn. 7).⁸ The claim-filing requirement gives the Board an opportunity to correct any mistakes and thus avoid unnecessary litigation (*id.* at p. 206) while at the same time delineating and restricting the issues to be considered in a taxpayer's refund action. (*Atari Inc. v. State Bd. of Equalization* (1985) 170 Cal.App.3d 665, 672; *A&M Records, Inc. v. State Bd. of Equalization, supra*, 204 Cal.App.3d at p. 367 [a refund suit is confined to the grounds set forth in the claim].) No suit may be brought until the Board determines the propriety of the particular sales tax at issue. (§§ 6932, 6933, 6901 et seq.; and see 9 Witkin, Summary of Cal. Law (10th ed. 2005) Tax, § 372, p. 544 [the "claim for refund is an essential condition of an action to recover the tax"].)

As part of this refund process, the Legislature provided the means for customers to obtain refunds of improperly collected sales tax

⁷ Subsequent references to "Regs." followed by a section number are to regulations found in Title 18 of the California Code of Regulations.

⁸ Section 6932 provides: "No suit or proceeding shall be maintained in any court for the recovery of any amount alleged to have been erroneously or illegally determined or collected unless a claim for refund or credit has been duly filed [as provided elsewhere in the Revenue and Taxation Code]."

reimbursement. A retailer who has collected excess sales tax reimbursement must return the money to the customer who paid it or remit the funds to the state. (§ 6901.5)⁹ When the Board ascertains that a retailer has collected excess tax reimbursement *which has not yet been paid to the state*, the retailer is afforded an opportunity to refund the excess to the customers from whom it was collected when the identity of those customers can be ascertained; when they cannot be identified, the money is paid to the state. (Regs., § 1700(b)(2).) When the Board ascertains that a retailer has collected excess tax reimbursement that *has already been paid to the state*, the Board will refund the excess to the retailer when the customers who paid the excess reimbursement can be identified, but otherwise will pay the excess amount to the state. (§ 6901.5.)

⁹ Section 6901.5 provides: “When an amount represented by a [retailer] to a customer as constituting reimbursement for taxes due under this part is computed upon an amount that is not taxable or is in excess of the taxable amount and is actually paid by the customer to the [retailer], the amount so paid shall be returned by the [retailer] to the customer upon notification by the Board of Equalization or by the customer *that such excess has been ascertained*. In the event of [the retailer’s] failure or refusal to do so, the amount so paid, if knowingly or mistakenly computed by the [retailer] upon an amount that is not taxable or is in excess of the taxable amount, shall be remitted by that [retailer] to this state.” (Italics added.) The italicized words make it clear that the Board, not the customer, decides whether the customer has paid excess sales tax reimbursement, and that the customer’s right to seek reimbursement from the retailer must be preceded by the Board’s ascertainment that an excess amount was charged. (See also Regs., § 1700(b)(2) [a customer has paid “excess tax reimbursement” when, among other things, “an amount represented by a [retailer] to a customer as constituting reimbursement for sales tax is computed upon an amount that is not taxable”].)

B. Article XIII, Section 32 Prohibits Suits to Prevent Or Enjoin The Collection Of Any Tax and Vests The Legislature (And Only The Legislature) With The Authority To Regulate Suits For Tax Refunds.

Section 32 of article XIII of the California Constitution 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.”¹⁰ In the context of this case, article XIII, section 32 means that if a retailer erroneously or illegally collects sales taxes from consumers, the *only* remedy is that which is provided by the Legislature.¹¹

This Court has said that section 32 of article XIII means what it says — that the first sentence bars injunctions against the collection of state taxes, and that the second sentence prevents the courts from expanding the methods for seeking tax refunds expressly provided by the Legislature. (*Woosley v. State of California* (1992) 3 Cal.4th 758, 792.) Read together, the two provisions “establish that the sole legal avenue for resolving tax

¹⁰ Similarly, section 6931 provides: “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 the State to prevent or enjoin the collection under this part of any tax or any amount of tax required to be collected.”

¹¹ Article XIII, section 32, is derived from former article XIII, section 15, which was adopted in 1926, and former article XIII, section 14, which was adopted in 1910. Its principles were incorporated into the Sales Tax Law when the Sales Tax Act was enacted. (Stats. 1933, ch. 1060, § 31; *Third & Broadway Building Co. v. County of Los Angeles* (1934) 220 Cal. 660, 665-666.)

disputes is a postpayment refund action.” (*State Bd. of Equalization v. Superior Court* (1985) 39 Cal.3d 633, 638.)

The important public policy behind this constitutional provision is to allow revenue collection to continue so that essential public services dependent on the funds are not unnecessarily interrupted. (*State Bd. of Equalization v. Superior Court, supra*, 39 Cal.3d at pp. 638-639; see also *Woosley v. State of California, supra*, 3 Cal.4th at p. 789 [provision is based on the premise that strict legislative control over the manner in which tax refunds may be sought is necessary so that governmental entities may engage in fiscal planning based on expected tax revenues]; *Pacific Gas & Electric Co. v. State Bd. of Equalization* (1980) 27 Cal.3d 277, 283 [any delay in the collection of taxes “may derange the operations of government, and thereby cause serious detriment to the public”].)

C. Because An Action To Recover Sales Tax Reimbursement Is Substantively Indistinguishable From An Action To Recover The Tax Paid, This Constitutional Protection Must Be Afforded To Retailers Collecting Sales Tax Reimbursement From Their Customers.

The relevant inquiry regarding the application of this constitutional provision is “whether granting the relief sought would have the effect of impeding the collection of a tax.” (*California Logistics, Inc. v. State of California* (2008) 161 Cal.App.4th 242, 248; and see *Modern Barber Colleges, Inc. v. California Employment Stabilization Board* (1948) 31 Cal.2d 720, 724.) Granting the relief requested in this lawsuit would do precisely that.

Article XIII, section 32, is “construed broadly” in light of the paramount policies underlying that constitutional provision. (*State Bd. of Equalization v. Superior Court*, *supra*, 39 Cal.3d at p. 639; *Western Oil & Gas Assn. v. State Bd. of Equalization* (1987) 44 Cal.3d 208, 213 [“Section 32 broadly limits in the first instance the power of the courts to intervene in tax collection matters; it does not merely make unavailable a particular remedy or preclude actions challenging the ultimate validity of a tax assessment”].)

Because the collection of *sales tax by the state* from a retailer and the collection of *sales tax reimbursement by a retailer* from a customer are inextricably intertwined (§ 6901.5; Civ. Code, § 1656.1; Regs., § 1700; *De Aryan v. Akers* (1939) 12 Cal.2d 781, 786-787 [few businesses could endure if tax burdens could not be passed on to consumers]), an injunction against the collection of sales tax reimbursement or a judicially compelled refund of sales tax reimbursement may affect the state’s sales tax revenues. (*State Bd. of Equalization v. Superior Court*, *supra*, 39 Cal.3d at p. 640 [since the net result of the relief prayed for would be to restrain the collection of the tax allegedly due, the action must be treated as one having that purpose]; *Pacific Gas & Electric Co. v. State Bd. of Equalization*, *supra*, 27 Cal.3d at p. 280; *California Logistics, Inc. v. State of California*, *supra*, 161 Cal.App.4th at p. 248 [the “relevant issue is whether granting the relief sought would have the effect of impeding the collection of a tax”]; *Western Oil & Gas Assn. v. State Bd. of Equalization* (1987) 44 Cal.3d 208, 213; *Brennan v. Southwest Airlines Co.* (9th Cir. 1998) 134 F.3d 1405, 1410;¹² and see *Batt v. City and County of San Francisco* (2007)

¹² *Brennan v. Southwest Airlines Co.*, *supra*, 134 F.3d 1405, 1410, although not binding, is nonetheless instructive. There, the Ninth Circuit
(Footnote continues on next page.)

155 Cal.App.4th 65, 85 [rejecting the idea that a taxpayer can sue for common law reimbursement based on principles of restitution and constructive trust without complying with administrative claim requirements].)

Likewise, by seeking restitution of sales tax reimbursement already paid to the state *and* an injunction prohibiting Target from collecting sales tax reimbursement on a presumptively taxable commodity, Plaintiffs are attempting to circumvent the bar of article XIII, section 32, and section 6931 in a manner that, if allowed, will wreak havoc on California's retail businesses. Consider the whipsawed retailer if this case results in findings that Target must refund "excess" sales tax reimbursement to Plaintiffs and the members of their putative class *and* stop collecting sales tax reimbursement on hot coffee to go:

- Could Target stop paying sales tax on hot coffee to go? No. Because the Board is not a party to this action, the rules of res judicata and collateral estoppel would not apply (7 Witkin, Cal. Procedure (5th ed. 2008) Judgment, § 452 et seq.), and the Board would not be bound by the findings made in this case. And a legitimate argument could be made that the Board would be derelict in its duties to the state if it voluntarily refunded the tax already paid or stopped collecting it in the future.

(Footnote continued from previous page.)

rejected an interpretation of federal tax law that would allow the plaintiffs to evade the strictures of 26 U.S.C. § 7422(a), a statute similar to section 6932's claim-filing requirement. The plaintiffs in *Brennan*, who had been charged an unauthorized excise tax, did not file the refund claim required by federal law but instead sued the airline for unlawful business practices and other claims. In that context, the Ninth Circuit rejected the plaintiffs' attempt to use the consumer remedy laws to adjudicate what in reality was a tax refund action. (*Id.* at pp. 1408-1410.)

- It is no answer to say that Target could file a claim for a refund, then challenge the Board's adverse decision in court — because the odds are overwhelming that a court deciding the issue with the benefit of the Board's administrative expertise would affirm the Board's decision that the item is not exempt — particularly given the retailer's construction of the regulations to require the payment of sales tax on hot coffee to go. (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 7, 11 [although the Board's interpretation of tax laws is not binding on a court reviewing that interpretation, the Board's determination is entitled to consideration and respect].)

- The conflict cannot be resolved by dragging the Board into this lawsuit because neither Plaintiffs nor Target can sue the Board for a refund of erroneously collected sales tax or sales tax reimbursement. (Cal. Const. art. XIII, § 32; § 6931.) No claim was filed. (*Batt v. City and County of San Francisco, supra*, 155 Cal.App.4th at p. 85 [not even the retailer, as taxpayer, can maintain a common law reimbursement action unless it has first complied with the claim statute]; *Direct Marketing Association, Inc. v. Bennett* (9th Cir. 1990) 916 F.2d 1451, 1453-1454 [in California, the sole legal remedy for resolving tax disputes is a post-payment refund action].)

- Even if Target had a claim against the Board for reimbursement, and even if the Board accepted the decision in this case, Target could not possibly recover the entire amount at issue here. The statute of limitations governing a retailer's right to seek a refund from the state is only three years (§ 6902, subd. (a)(1)) whereas the period of limitations governing a UCL claim is four years (Bus. & Prof. Code, § 17208). Customers could recover a refund of payments made to Target for the 12 months between

three and four years before filing their lawsuit, notwithstanding that Target's claim against the state for that period would be time-barred.

- What about the different procedural rules? Class actions under the UCL and the CLRA differ substantially from the class claims authorized by section 6904;¹³ and attorneys fees recoverable under the UCL pursuant to section 1021.5 of the Code of Civil Procedure are generally not recoverable under section 7156.

- Will retailers facing the prospect of suits such as this one err on the side of finding more rather than fewer exemptions? Will there be more delinquent sales tax payments to the state, particularly by small retailers concerned that they may otherwise pay twice, once to the consumers, again to the state?

It is for these reasons that here, as in all efforts to encroach upon the Board's right to enforce California's tax laws, article XIII, section 32 must be strictly construed. (*Brennan v. Southwest Airlines Co.*, *supra*, 134 F.3d at p. 1410 [prohibiting suit under UCL or CLRA because it would "evade the strictures" of the refund statute]; *Cod Gas & Oil Co. v. State Bd. of Equalization* (1997) 59 Cal.App.4th 756, 759 [it is a state constitutional requirement that actions for refund of allegedly illegal taxes be brought only in the manner prescribed by the Legislature]; *Batt v. City and County*

¹³ Section 6904 provides: "(a) Every claim shall be in writing and shall state the specific grounds upon which the claim is founded. [¶] (b) A claim filed for or on behalf of a class of taxpayers shall do all of the following: [¶] (1) Be accompanied by written authorization from each taxpayer sought to be included in the class. [¶] (2) Be signed by each taxpayer or taxpayer's authorized representative. [¶] (3) State the specific grounds on which the claim is founded."

of *San Francisco, supra*, 155 Cal.App.4th at p. 85 [in the absence of compliance with claim statute, prohibiting common law reimbursement action based on principles of restitution and constructive trust].)¹⁴

In short, no court may issue any decision or take any action that would directly or indirectly affect the Board's collection of sales taxes. (*State Bd. of Equalization v. Superior Court, supra*, 39 Cal.3d at p. 640 [action cannot proceed when the "net result of the relief prayed for" would be "to restrain the collection of the tax allegedly due"]; *Rossi v. Brown* (1995) 9 Cal.4th 688, 722, dissenting opn. of Mosk, J. [reciting the "well-known principle that the courts will not permit a party to do indirectly what the Constitution prohibits doing directly"].)¹⁵

¹⁴ Plaintiffs' contention that article XIII, section 32 does not bar this lawsuit because it protects only the state and its officers and not a private party (OB 27-30) begs the question. Target's point is that its collection of sales tax reimbursement is an inextricable part of the state's collection of sales tax, and that suits against retailers ultimately impede the state's collection of taxes.

¹⁵ This conclusion cannot be ignored by claiming (as the Attorney General did in the Court of Appeal) that Target's sales tax liability is not at issue here because the Board is not a party to this action and has not previously determined that the sales tax reimbursement collected from Plaintiffs was improper or illegal, or that Target in fact collected excess tax reimbursement from Plaintiffs. (Attorney General's Court of Appeal ACB, p. 10.) This is pure sophistry. For Plaintiffs to prevail on their claims for restitution and injunctive relief (AA 88, 94), they would have to prove that Target had in fact collected sales tax reimbursement in error or illegally, because otherwise Target would have nothing to disgorge to its customers, and there would be no illegal practice to enjoin.

D. The Court Of Appeal Got It Right.

The Court of Appeal correctly concluded that, to the extent a retailer erroneously collects tax reimbursement, the customer's remedy is restricted by article XIII, section 32, to "such a manner as may be provided by the Legislature." Because the Legislature did not provide for the type of suit brought by Plaintiffs (Part II, *post*), it follows that this case is barred by section 32 of article XIII.

II. THERE IS NO LEGISLATIVE AUTHORITY FOR THIS LAWSUIT.

A. The Legislature Has Not Provided A Private Cause Of Action For Customers To Seek A Refund Of Sales Tax Reimbursement.

The Legislature, empowered by section 32 of article XIII, has declared that it is the retailer (not the consumer) who may seek a refund from the Board, and that the retailer must file an administrative claim with the Board (§§ 6902, 6904), after which the Board ascertains whether there was an overpayment and, if so, the amount thereof (§§ 6901, 6901.5, 6902, 6932, 6933). If the Board determines that a retailer erroneously or illegally collected taxes from a customer, the Board refunds the overpayment to the retailer who in turn refunds the overpayment to its customer or, if the customer cannot be identified, to the State of California (§ 6901.5).

But until the claim has been filed, "[n]o suit or proceeding shall be maintained in any court for the recovery of any amount alleged to have been erroneously or illegally determined or collected" (§ 6932; *Barnes v. State Bd. of Equalization* (1981) 118 Cal.App.3d 994, 1001 [failure to exhaust administrative remedies is a jurisdictional defect barring court action].)

Significantly, section 6932 doesn't say that the *retailer* can't sue until the claim is filed — it says, quite plainly, that “*no suit or proceeding shall be*” maintained until a claim has been filed — a legislative bear hug embracing not just retailers but customers and anyone else who might think about suing for a refund. (*Woosley v. State of California, supra*, 3 Cal.4th at p. 792 [courts may not expand the legislatively approved methods for seeking tax refunds]; *Cod Gas & Oil Co. v. State Bd. of Equalization* (1997) 59 Cal.App.4th 756, 759.)

B. Section 6901 Does Not Authorize A Private Right Of Action By A Customer Against A Retailer.

Section 6901.5 compels a retailer who has collected excess sales tax reimbursement to return the money to the customer who paid it or, if the customer cannot be identified, to remit the funds to the state.¹⁶ Where (as here) the funds have already been remitted to the state, the consumer's remedy is to complain to the State Board of Equalization — which has every reason to act on a legitimate complaint, and no reason at all to ignore it. (Part III.A, *post.*)¹⁷

¹⁶ Section 6901.5 states: “When an amount represented by a person to a customer as constituting reimbursement for taxes due under this part is computed upon an amount that is not taxable or is in excess of the taxable amount and is actually paid by the customer to the person, the amount so paid shall be returned by the person to the customer upon notification by the Board of Equalization or by the customer that such excess has been ascertained. In the event of his or her failure or refusal to do so, the amount so paid, if knowingly or mistakenly computed by the person upon an amount that is not taxable or is in excess of the taxable amount, shall be remitted by that person to this state.”

¹⁷ It is undisputed that customers (who are not taxpayers) have no standing to seek a sales tax refund from the *Board*. (§§ 6901, 6902; *State*
(Footnote continues on next page.)

As Plaintiffs concede (OB 13, fn. 4), the Court of Appeal correctly concluded that nothing in section 6901 expressly or impliedly authorizes a private cause of action by a customer against a retailer to recover unlawfully collected sales tax reimbursement. Indeed, a statute creates a private right of action only if the Legislature so intended (*Peterson v. Cellco Partnership* (2008) 164 Cal.App.4th 1583, 1595; *Moradi-Shalal v. Fireman's Fund Ins. Companies* (1988) 46 Cal.3d 287, 305; *Crusader Ins. Co. v. Scottsdale Ins. Co.* (1997) 54 Cal.App.4th 121, 131), and only if the statutory language or legislative history affirmatively indicates such an intent. (*Vikco Ins. Services, Inc. v. Ohio Indemnity Co.* (1999) 70 Cal.App.4th 55, 62; *Crusader Ins. Co. v. Scottsdale Ins. Co.*, *supra*, 54 Cal.App.4th at pp. 132-133, 135-137.) If not expressed explicitly, such intent must be strongly implied. (*Id.* at p. 133; *Vikco Ins. Services, Inc. v. Ohio Indemnity Co.*, *supra*, 70 Cal.App.4th at p. 62.)

Particularly where (as here) a regulatory statute provides a comprehensive scheme for enforcement by an administrative agency, and where (as here) neither the statutory scheme or its history suggest an intent to create a private right of action, courts ordinarily conclude that the Legislature intended the administrative remedy to be exclusive. (*Farmers Ins. Exchange v. Superior Court* (2006) 137 Cal.App.4th 842, 850.)

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Bd. of Equalization v. Superior Court (1980) 111 Cal.App.3d 568, 570 [purchaser cannot sue Board for overpayment of sales tax]; *Decorative Carpets, Inc. v. State Bd. of Equalization* (1962) 58 Cal.2d 252, 255 [the orderly administration of the tax laws requires adherence to the statutory procedures and precludes imposed on the Board the burden of making refunds to the retailer's customers]; and see *De Aryan v. Akers*, *supra*, 12 Cal.2d at p. 785 [purchaser lacks standing to sue retailer for refund of difference between tax charged to customer and lesser amount remitted to state].)

Because nothing in the language of section 6901 or the related statutes and regulations suggests a legislative intent to authorize a private action by a customer against a retailer — indeed, the statute and its ancillary regulations suggest just the opposite by requiring a retailer to refund sales tax reimbursements to customers only after an overpayment has been “ascertained” by the Board, not unilaterally determined by the self-interested customer (§ 6901.5; Regs., § 1700(b)(2) [“Whenever the board ascertains that a [retailer] has collected excess tax reimbursement, the [retailer] will be afforded an opportunity to refund the excess collections to the customers from whom they were collected”]) — it follows that a lawsuit under the UCL or the CLRA cannot be reconciled with the sales tax statutory scheme.

C. Only The Board May Enforce The Tax Statutes.

Only the Board has authority to enforce sales tax statutes (*Associated Beverage Co. v. Board of Equalization* (1990) 224 Cal.App.3d 192, 201; *City of Gilroy v. State Bd. of Equalization* (1989) 212 Cal.App.3d 589, 605), and it would undermine the legislative scheme to interpret section 6901.5 or any part of the tax laws to permit self-interested customers to unilaterally ascertain when excess sales tax reimbursement has been collected by a retailer, then to sue the retailer for reimbursement of funds already paid to the Board. Indeed, this would disrupt administration of the sales tax laws and allow customers to usurp the authority of the Board to determine the application of the law in the first instance. (Slip Opn., p. 14.)

Plaintiffs’ reliance on *Javor v. State Bd. of Equalization* (1974) 12 Cal.3d 790, 797 is misplaced. The plaintiff in *Javor* sued on behalf of a class of purchasers to recover an *undisputed* overpayment of sales on

certain motor vehicles — the Board *admitted* its obligation to refund the overpayment to the retailers, and the dispute was about the predecessor statute to section 6901.5 and the mechanism for ensuring a refund to the customers. (*Id.* at pp. 801-802.) Under the “unique circumstances” of that case, this Court understandably “fashion[ed] an appropriate remedy to effect the customers’ right to their refund” and directed the Board to pay the refunds owed to retailers into court for the benefit of the class. (*Id.* at pp. 800, 802.) There are no unique circumstances about this case. Here, by contrast, the Board has not had an opportunity to assess whether hot coffee to go is taxable — that is, there has been no ascertainment, let alone an admission, that an excess sales tax was charged. *Javor* has nothing to do with the price of tomatoes.

Plaintiffs’ reliance on *Decorative Carpets, Inc. v. State Bd. of Equalization*, *supra*, 58 Cal.2d 252 and *Livingston Rock & Gravel Co. v. De Salvo*, *supra*, 136 Cal.App.2d 156 is similarly misplaced. *Decorative Carpets* was a refund action by a retailer against the Board in which the retailer conceded that it had no intention of paying the recovered refund to its customers. (*Decorative Carpets, Inc. v. State Bd. of Equalization*, *supra*, 58 Cal.2d at p. 256.) The retailer in *Livingston* conceded that it owed sales tax to the Board, and the issue was whether the customer owed the retailer sales tax reimbursement under the parties’ contract (the court held that the contract did not require reimbursement by the customer). (*Livingston Rock & Gravel Co. v. De Salvo*, *supra*, 136 Cal.App.2d at pp. 159, 163.) These cases are entirely irrelevant to the issues now before this Court.

The other cases relied on by Plaintiffs — *Botney v. Sperry & Hutchinson Co.* (1976) 55 Cal.App.3d 49 (no jurisdictional objection of any kind was raised), *Dell, Inc. v. Superior Court* (2008) 159 Cal.App.4th 911

(no jurisdictional objection of any kind was raised), *Laster v. T-Mobile USA, Inc.* (S.D. Cal. 2008, No. 05cv1167 DMS) 2009 U.S. Dist. LEXIS 116228, 2008 WL 5216255 (the defendant claimed the dispute was subject to arbitration), and *Sav-On Drugs v. Superior Court* (1975) 15 Cal.3d 1 (no jurisdictional objection of any kind was raised) — are inapposite for the simple reason that no one in any of these cases objected to the courts' jurisdiction on the ground that the claims were barred by article XIII, section 32, or by section 6931. It is axiomatic that cases are not authority for propositions not considered. (*In re Marriage of Cornejo* (1996) 13 Cal.4th 381, 388.)

It follows that an action under the UCL or the CLRA cannot be reconciled with the Legislative determination that only the Board has the right to determine whether an excess amount of sales tax reimbursement has been charged and, if so, that the remedies are limited to those provided in section 6901.5.

III. IN THE CONTEXT OF THIS CASE, THERE IS NO NEED FOR A CONSUMER PROTECTION STATUTE.

Plaintiffs contend that, notwithstanding the bar imposed by article XIII, section 32, and section 6931, their suit against Target for a refund of sales tax reimbursement and to enjoin the collection of such reimbursement in the future can proceed under the UCL and the CLRA because it is not a suit against the state to enjoin the collection of a tax. As explained above (Part I.C., *ante*), there is no substantive distinction between a private action against a retailer to recover sales tax *reimbursement* and an action against the state to recover the sales tax itself. Both interfere with the statutory scheme and, more importantly, with the unimpeded flow of tax revenue to

the state. As we explain here, neither the UCL nor the CLRA can trump the constitutional prohibition against this lawsuit.

A. Consumers Already Have The Only Remedy They Need — The Right To Complain To The State Board Of Equalization.

Where (as here) the funds have already been remitted to the state, consumers who believe they have paid excess sales tax reimbursement may complain to the State Board of Equalization and obtain refunds without the need for litigation. (“Consumer Sales and Use Tax Questions,” Publication 53-A, <http://www.boe.ca.gov/pdf/pub53a.pdf> [as of 12/26/09].)¹⁸ In response to such complaints (or on its own initiative), the Board determines whether the item is taxable, examines the retailer’s tax returns, conducts an audit of the retailer’s books and records, and does everything necessary to fully investigate the claim. (§§ 6481 [if the Board is not satisfied with the return or the amount of tax required to be paid, it may determine the amount to be paid on the basis of the facts contained in the return or on the basis of any information within its possession or that may come into its possession], 7054 [the Board may examine the books, papers, records, and equipment of any retailer and may investigate the character of the business to verify the accuracy of any return made]; Regs., § 1700(b)(3)(A); *Riley B’s, Inc. v. State Bd. of Equalization* (1976) 61 Cal.App.3d 610, 615.)

¹⁸ In addition to the on-line consumer pamphlet cited in the text, the Board’s website, www.boe.ca.gov, provides consumers with various forms of contact information (toll free telephone numbers, the addresses of district offices throughout the state, the ability to make on-line appointments, and so on) for specific questions and complaints. The Board audits retailers based on informant tips. (“Audit Manual” (Aug. 2007) § 0101.20 [one purpose of the audit process is to promote accuracy in self-assessments, another is to assure all citizens that sales tax is being enforced uniformly].)

If the Board finds that excess sales tax reimbursement was collected, the Board determines whether the customers can be identified and, if so, refunds the excess amount to the retailer with directions to refund it to the customers; if the customers cannot be identified, the state retains the money — but in no event does the retailer get to keep it. (§ 6901.5; Regs., § 1700.)

It is this point above all others that shows the error in the arguments advanced by those who exalt the rubric of “consumer remedies” over common sense. In his July 6, 2009 amicus letter in support of review in this case, the Attorney General insists the Court of Appeal’s decision “opens a loophole that would allow *unscrupulous businesses* to take advantage of consumers and collect greater sums from them than the consumers actually owe, free from the worry that they can be held accountable under California’s consumer protection statutes and subject to the remedies provided by these laws.” (Italics added.) Noticeably absent from this screed is any explanation of the benefit (the so-called “advantage”) to these supposedly unscrupulous businesses. *Target doesn’t get to keep any portion of the sales tax reimbursement it collects on hot coffee to go, and there is no allegation that it has done so.* There is no benefit. There is no advantage. There is no unscrupulous conduct.

A business is unscrupulous when its dastardly conduct gives it an economic advantage, not where (as here) it is compelled to charge *more* for the benefit of a taxing agency, not for itself. When a business charges sales tax reimbursement on a presumptively taxable sale and remits the tax to the Board, there is no unscrupulous conduct. There is no loophole in the consumer protection laws. There is no wrong without a remedy because there is no wrong. Target is not, as the Attorney General suggests, the

“perpetrator of [an] illegal scheme[.]” There are no “ill-gotten gains” for Target to keep. Target has not, as Plaintiffs suggest, “cheated” them in any manner. (OB at p. 39.) With respect, it appears as though Plaintiffs and the Attorney General have in mind some other lawsuit, not this one.¹⁹

In conclusory terms and without any facts or law to back to up their arguments, Plaintiffs nevertheless insist that their right to complain to the Board is not an adequate remedy because the Board may not pursue the complaint or, if it does, it may conduct an inadequate investigation. Nonsense.²⁰ The Board has every reason to respond to consumer complaints and the law presumes that a governmental agency complies with

¹⁹ In their July 10, 2009 amicus letter in support of review (p. 6), Michael McClain, Avi Feigenblatt and Gregory Fisher, plaintiffs in a similar case pending in the trial court (*McClain v. Sav-On Drugs, et al.*, Los Angeles Superior Court Case No. BC 325272), offer essentially the same conclusory assertions as those made by the Attorney General, adding a claim that, by “collecting unlawful sales tax reimbursement on non-taxable purchases, dishonest retailers *can increase their profit margins by 8.25%*, not only harming consumers but also *giving themselves an unfair advantage over honest retailers . . .*” (Italics added.) They do not explain how it is competitively advantageous for a retailer to charge *more* than its competitors, nor do they explain how “dishonest retailers increase their profit margins” by any amount when every penny charged for sales tax reimbursement is directly related to another penny paid to the state to satisfy the retailer’s tax obligation. There is no “profit.”

²⁰ Plaintiffs suggest that section 1700(b)(6) of the Regulations [“The provisions of this regulation with respect to offsets do not necessarily limit the rights of customers to pursue refunds from persons who collected tax reimbursement from them in excess of the amount due”] somehow deprives them of their right to complain to the Board because the regulations do not state specifically how they are to obtain a refund of excess sales tax reimbursement. (OB 11.) They are mistaken. As explained in the text, the Board’s website tells consumers everything they need to know about how to lodge a complaint.

its legislative mandate. (Civ. Code, § 3529; and see *Board of Permit Appeals v. Central Permit Bureau* (1960) 186 Cal.App.2d 633, 642.) There is also the fact that this argument is one properly made to the Legislature, not the courts, because article XIII, section 32 of the California Constitution prohibits the courts from expanding the remedies provided by the Legislature for sales tax refunds and associated sales tax reimbursements. (*Woosley v. State of California, supra*, 3 Cal.4th at p. 792.)

The State Board of Equalization is the agency charged by the Legislature with administering and maintaining the integrity and uniformity of the sales tax system. (§ 6001 et seq.; *Decorative Carpets, Inc. v. State Bd. of Equalization, supra*, 58 Cal.2d at p. 255.) The Board has the expertise to apply the relatively artificial and self-contained concepts spelled out in the Revenue and Taxation Code, and there is no reason to assume that, given the opportunity to respond to a complaint, it will do nothing. In any event, speculation about the Board's presumed hostility to consumer complaints cannot justify a decision imposing "will-o'-the-wisp" definitions, concepts, and distinctions shaped by the UCL or the CLRA to serve social and economic factors unrelated to the laws the Legislature enacted to govern sales taxes. (Cf. *King v. State Bd. of Equalization* (1972) 22 Cal.App.3d 1006, 1010-1011.)

**B. On These Facts, There Is No Cause Of
Action Under The UCL Or The CLRA.**

The UCL and the CLRA prohibit any unlawful, unfair or fraudulent business act or practice and afford equitable remedies (injunction and restitution) to injured consumers. (*In re Tobacco II Cases* (2009) 46 Cal.4th 298, 311; *Buckland v. Threshold Enterprises, Ltd.* (2007)

155 Cal.App.4th 798, 809.) To state the obvious, where there is no act or practice forbidden by law — that is, no act that is either unfair, or unlawful, or fraudulent — there is no need for a remedy. (*Budrow v. Dave & Buster's of California, Inc.* (2009) 171 Cal.App.4th 875, 884 [where the conduct alleged is not illegal or otherwise wrongful, it follows as a matter of law that there is no claim under the UCL]; cf. *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Company* (1999) 20 Cal.4th 163, 180; *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal.4th 553, 561.)²¹

Of course, as Division Three held, there is also the fact that consumers cannot — and should not be permitted to — plead around article XIII, section 32, and section 6931 by recasting their causes of action as violations of the UCL and the CLRA. (Slip Opn., p. 19, fn. 11; and see *King v. State Bd. of Equalization, supra*, 22 Cal.App.3d at pp. 1010-1011 [“the sales tax law employs relatively artificial, relatively self-contained concepts” and thus does not lend itself to the application of concepts and policies developed in other, distinct areas of the law].)

And as this Court put it in *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co., supra*, 20 Cal.4th page 180, when the

²¹ Although it appears an “unfair” practice may violate the UCL even if it is not unlawful (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co., supra*, 20 Cal.4th at p. 180), there is nothing even arguably “unfair” about Target’s collection of sales tax reimbursement on presumptively taxable goods when the amounts collected are remitted to the State of California. If there is any unfairness, it is in the incomprehensible morass of the Revenue and Taxation Code and its regulations that force retailers to resort to the presumption favoring taxability when faced with conflicting provisions about what is taxable and what isn’t.

Legislature has permitted certain conduct or considered a situation and concluded that no action should lie, courts may not override that determination — in short, when specific legislation provides a “safe harbor,” plaintiffs may not use the general unfair competition law to assault that harbor. Under the “safe harbor” doctrine, a plaintiff may not, “in effect, ‘plead around’ absolute barriers to relief by relabeling the nature of the action as one brought under the unfair competition statute.’ [Citation.] A bar against an action ‘may not be circumvented by recasting the action as one under Business and Professions Code section 17200.’ [Citation].” (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.*, *supra*, 20 Cal.4th at p. 180.)

For example, when supposedly wrongful conduct alleged in a complaint is absolutely immune from civil tort liability under Civil Code section 47, subdivision (b), that immunity would be undermined if the courts permitted the same acts to be the subject of an injunctive relief proceeding brought under the unfair competition statute. “If the policies underlying [the immunity statute] are sufficiently strong to support an absolute privilege, the resulting immunity should not evaporate merely because the plaintiff discovers a conveniently different label for pleading what is in substance an identical grievance arising from identical conduct as that protected by section 47(b).” (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.*, *supra*, 20 Cal.4th at pp. 180-182, discussing *Rubin v. Green* (1993) 4 Cal.4th 1187, 1202-1203.)

The same is true here only more so — because both article XIII, section 32, and section 6931 provide an absolute bar to suits for the recovery of sales taxes and sales tax reimbursement, and because section

6091 creates a presumption that all of Target's retail sales are subject to sales tax, there can be no suit under the UCL or the CLRA.²²

²² In the event the Court is curious, Target charges sales tax on hot coffee to go because everything Target sells is presumptively taxable and the regulations on this specific item are far from a model of clarity. Regulation 1602(a) defines "Food products" to include "*coffee and coffee substitutes.*" (Emphasis added.) Regulation 1602(a) provides that the sales tax "does not apply to sales of food products for human consumption except as provided in Regulations 1503, 1574, and 1603. (*Grocers, in particular, should note that tax applies to sales of 'hot prepared food products' as provided in Regulation 1603(e).*)" (Emphasis added; under Regulation 1602.5(B)(1)(b), Target appears to be a "grocer" for certain reporting requirements.)

Regulation 1503 applies only to hospitals and other medical service facilities. Regulation 1574 applies only to vending machine operators. Regulation 1603(a) applies to sales of food products at restaurants, hotels, boarding houses, soda fountains, and similar establishments. Regulation 1603(b) applies to sales of food products at drive-ins.

Regulation 1603(c) applies to cold food sold on a "take-out" order and provides, in part, that "[w]hen a seller meets both criteria of the 80-80 rule as explained in subdivision (c)(3) below, tax applies to sales of cold food products (including sales for a separate price of hot bakery goods and *hot beverages such as coffee*) in a form suitable for consumption on the seller's premises even though such food products are sold on a 'take-out' or 'to go' order. . . ." (Emphasis added.)

Regulation 1603(d) applies to sales of food at places where admission is charged. Regulation 1603(e) applies to sales of "hot prepared food products" as follows: "Tax applies to all sales of hot prepared food products unless otherwise exempt. 'Hot prepared food products' means those products, items, or components which have been prepared for sale in a heated condition and which are sold at any temperature which is higher than the air temperature of the room or place where they are sold. The mere heating of a food product constitutes preparation of a hot prepared food product, e.g., grilling a sandwich, dipping a sandwich bun in hot gravy, using infra-red lights, steam tables, etc. If the sale is intended to be of a hot food product, such sale is of a hot food product regardless of

(Footnote continues on next page.)

The simple and direct answer to Plaintiffs' argument, of course, is that the UCL and the CLRA are trumped by article XIII, section 32, of the California Constitution. (*Pacific Gas & Electric Co. v. State Board of Equalization*, *supra*, 27 Cal.3d at p. 284 [section 32 of article XIII means

(Footnote continued from previous page.)

cooling which incidentally occurs. For example, the sale of a toasted sandwich intended to be in a heated condition when sold, such as a fried ham sandwich on toast, is a sale of a hot prepared food product even though it may have cooled due to delay. On the other hand, the sale of a toasted sandwich which is not intended to be in a heated condition when sold, such as a cold tuna sandwich on toast, is not a sale of a hot prepared food product. [¶] When a single price has been established for a combination of hot and cold food items, such as a meal or dinner which includes cold components or side items, tax applies to the entire established price regardless of itemization on the sales check. The inclusion of any hot food product in an otherwise cold combination of food products sold for a single established price results in the tax applying to the entire established price, e.g., *hot coffee* served with a meal consisting of cold food products, when the coffee is included in the established price of the meal. If a single price for the combination of hot and cold food items is listed on a menu, wall sign or is otherwise advertised, a single price has been established. Except as otherwise provided in (b), (c), (d) or (f) of this regulation, or in Regulation 1574, tax does not apply to the sale for a separate price of bakery goods, beverages classed as food products, or cold or frozen food products. Hot bakery goods and *hot beverages such as coffee are hot prepared food products but their sale for a separate price is exempt unless taxable as provided in (b), (c), (d) or (f) of this regulation, or in Regulation 1574*. Tax does apply if a hot beverage and a bakery product or cold food product are sold as a combination for a single price. Hot soup, bouillon, or consommé is a hot prepared food product, which is not a beverage." (Emphasis added.)

Regulation 1603(f) applies to sales of "food for consumption at facilities provided by the retailer" and provides as relevant that: "Tax applies to sales of sandwiches, ice cream, and other foods sold in a form for consumption at tables, chairs, or counters or from trays, glasses, dishes, or other tableware provided by the retailer or by a person with whom the retailer contracts to furnish, prepare, or serve food products to others. . . ."

what it says and it is immaterial that the remedy at law may be inadequate].)

Not to put too fine a point on it, but the *raison d'être* of this lawsuit is attorneys fees.

Target recognizes this Court's general support of legitimate UCL and CLRA actions but suggests this case is nothing of the kind. To the contrary, this is a case in which the trial court and Court of Appeal saw *no* beneficial purpose, only a substantial danger of injustice where a defendant bound to follow one law was sued by two people who paid sales tax reimbursement on allegedly exempt drinks. Since Target has done nothing deserving of punishment and since the plaintiffs have essentially nothing to gain even if they win, the only possible beneficiaries of this lawsuit are the plaintiffs' lawyers.

As this Court put in the context of a class action in which the recovery to the individuals could at best be *de minimus*, "when the individual's interests are no longer served by group action, the principal — if not the sole — beneficiary then becomes the class action attorney. To allow this is 'to sacrifice the goal for the going,' burdening if not abusing our crowded courts with actions lacking proper purpose." (*Blue Chip Stamps v. Superior Court* (1976) 18 Cal.3d 381, 386; and see *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435.)

CONCLUSION

For all the reasons explained above, Target submits that this lawsuit is entirely lacking in merit, that the trial court correctly sustained Target's demurrers, and that the Court of Appeal correctly concluded that Plaintiffs'

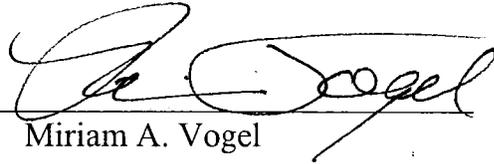
claims under the UCL and the CLRA are barred by article XIII, section 32,
of the California Constitution.

Dated: January 8, 2010

Respectfully submitted,

Morrison & Foerster LLP

By:

A handwritten signature in black ink, appearing to read "M. A. Vogel", written over a horizontal line.

Miriam A. Vogel

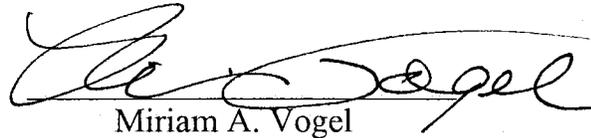
*Attorneys for Defendant and
Respondent, Target
Corporation*

CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 8.204(c), the undersigned counsel certifies that according to the word-processing system used in preparing it, this brief, exclusive of face sheet, certificates, and tables of contents and authorities, is 9,602 words in length.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 8th day of January, 2010, at Los Angeles, California.



Miriam A. Vogel

Filed 5/12/09

CERTIFIED FOR PUBLICATION
IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

KIMBERLY LOEFFLER and AZUCENA
LEMUS,

Plaintiffs and Appellants,

v.

TARGET CORPORATION,

Defendant and Respondent.

B199287

(Los Angeles County
Super. Ct. No. BC360004)

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

Lange & Koncius, Joseph J. M. Lange and Jeffrey A. Koncius for Plaintiffs and
Appellants.

The Kick Law Firm, Taras Kick and G. James Strenio for Michael McClain, Avi
Feigenblatt and Gregory Fisher as Amici Curiae on behalf of Plaintiffs and Appellants.

Morrison & Foerster, Miriam A. Vogel, David F. McDowell, and Samantha P.
Goodman for Defendant and Respondent.

Alston & Bird, Andrew E. Paris, Ethan D. Millar and Joann M. Wakana for The
Directv Group, Inc. as Amicus Curiae on behalf of Defendant and Respondent.

Edmund G. Brown Jr., Attorney General, David S. Chaney and Matt Rodriguez, Chief Assistant Attorneys General, and Al Shelden, Assistant Deputy Attorney General, as Amicus Curiae.

Kristine Cazadd, Robert W. Lambert and John L. Waid for California State Board of Equalization as Amicus Curiae.

INTRODUCTION

In California, retailers are obligated to pay sales taxes to the state on their gross receipts, subject to certain exemptions. Retailers may, however, seek sales tax reimbursement from their customers. In this case, plaintiffs and appellants Kimberly Loeffler and Azucena Lemus contend that defendant and respondent Target Corporation (Target) was not entitled to collect sales tax reimbursement on purchases of hot coffee “to go” because sales tax was allegedly not due on such purchases.

Plaintiffs seek a refund of sales tax reimbursement from Target on their own behalf and on behalf of the class they purport to represent. They also seek an injunction prohibiting Target from collecting sales tax reimbursement on purchases of hot coffee “to go.” The trial court sustained without leave to amend Target’s demurrers to plaintiffs’ pleadings and entered judgment in favor of Target on the ground, among others, that article XIII, section 32 of the California Constitution (article XIII, section 32) bars plaintiffs’ action. We affirm.

Article XIII, section 32 prohibits injunctions against the collection of state taxes and provides that refunds of taxes may only be recovered in a manner provided by the Legislature. As our Supreme Court explained in *Woosley v. State of California* (1992) 3 Cal.4th 758, 792 (*Woosley*), under Article XIII, section 32, the courts cannot expand the methods for seeking tax refunds expressly provided by the Legislature. The purpose of this constitutional provision is to ensure that governmental entities may engage in fiscal planning so that essential public services are not unnecessarily interrupted.

The Legislature has enacted a statutory scheme for sales tax and associated sales tax reimbursement refunds. The only way to litigate a sales tax refund dispute under this scheme is for the retailer, as the taxpayer, to pay the tax, exhaust its administrative remedies by filing a claim for a refund with the State Board of Equalization (Board), and if the claim is denied or not acted upon, to file a suit for a sales tax refund. Because they are not the taxpayers, plaintiffs cannot file a *claim* for a sales tax refund and thus cannot file a *suit* for a sales tax refund. In other words, plaintiffs do not have standing to commence a sales tax refund suit.

Customers like plaintiffs, however, may obtain a refund of excess sales tax reimbursement collected by a retailer. Under Revenue and Taxation Code section 6901.5¹ and a related regulation (Cal. Code Regs., tit. 18, § 1700), retailers must refund excess sales tax reimbursement if (1) the Board ascertains, in response to a claim filed by a retailer (§ 6904) or as a result of an audit (§ 7054) or other review (e.g., § 6481) by the Board, that excess sales tax reimbursement was collected, or (2) the retailer prevails in a suit against the Board for a refund of overpaid sales taxes (§ 6933). Neither of these circumstances exists here. Plaintiffs therefore are not entitled to a refund of alleged excess sales tax reimbursement collected by Target under the statutory scheme enacted by the Legislature.

Plaintiffs contend that they have a private right of action against Target for a refund of sales tax reimbursement pursuant to section 6901.5, without giving the Board an opportunity to resolve the sales tax issue presented here. We reject this argument. Section 6901.5 provides for a refund of sales tax reimbursement *after the Board ascertains that such a refund is due*. In this case, the Board has not ascertained whether or not sales tax was due on purchases of hot coffee “to go” at Target, nor has it determined that a sales tax reimbursement refund is due. Section 6901.5 therefore does not support plaintiffs’ claims against Target.

¹ Except as otherwise indicated, all references to sections are to the Revenue and Taxation Code.

The complaint also alleges causes of action under unfair business practices and consumer protection statutes and a cause of action for money had and received. Plaintiffs seek damages, restitution and injunctive relief pursuant to these causes of action. However, plaintiffs are attempting to resolve a sales tax dispute by using consumer and common law remedies rather than the procedure set forth by the Legislature. This they cannot do under article XIII, section 32.

Plaintiffs argue that they are not violating article XIII, section 32, because they do not seek to enjoin the state from collecting sales taxes. Rather, plaintiffs contend, they seek to enjoin a private company from collecting sales tax reimbursement. Plaintiffs further contend that article XIII, section 32 is not implicated because they only seek a refund of sales tax reimbursement, not a refund of sales taxes.

We reject plaintiffs' argument and find that a court may not *directly or indirectly* enjoin or prevent the collection of a sales tax. As we will explain, the statutory scheme for sales taxes and sales tax reimbursement is intertwined. A determination by a court that sales tax is not due on "to go" hot coffee purchases from Target, and an injunction against the collection of sales tax reimbursement by Target on such purchases, is effectively an injunction against the collection of sales tax by the state. Further, under article XIII, section 32, plaintiffs cannot circumvent the statutory scheme for sales tax reimbursement refunds by asserting causes of action not contemplated by that scheme. We therefore affirm the judgment and hold that plaintiffs' action is barred by article XIII, section 32 and the sales tax statutes in the Revenue and Taxation Code.

PROCEDURAL AND FACTUAL BACKGROUND

1. *Procedural History*

Plaintiffs commenced this action in October 2006, and in November 2006 filed a First Amended Complaint (FAC) for six causes of action. In February 2007, the trial court sustained Target's demurrer to plaintiffs' fourth cause of action for money had and received without leave to amend. In addition, the court granted plaintiffs' request to add the Board as a new defendant.

In March 2007, plaintiffs filed a second amended complaint (SAC) for (1) violation of the Unfair Competition Law (UCL) (Bus. & Prof. Code, § 17200 et seq.), (2) violation of the Consumers Legal Remedies Act (CLRA) (Civ. Code, § 1750 et seq.), and (3) violation of section 6359² and California Code of Regulations, title 18, section 1603 (regulation 1603).³ The second amended complaint did not name the Board as a defendant.

In April 2007, the court sustained Target's demurrer to all causes of action of the SAC without leave to amend, and entered judgment in favor of Target. Plaintiffs filed a timely notice of appeal.

2. *Allegations in Plaintiffs' Pleadings*

Plaintiffs bring this action on behalf of themselves and "all persons who are California residents who paid sales tax" to Target "for the purchase of hot coffee drinks 'to go' or for 'take-out'" (the class). In their FAC and SAC, plaintiffs made the following allegations.⁴

² Section 6359, subdivision (a) provides a sales tax exemption for "the gross receipts from the sale of, and the storage, use, or other consumption in this state of, food products for human consumption." This exemption, however, does not apply when "the food products are served as meals on or off the premises of the retailer" (§ 6359, subd. (d)(1)) or when "the food products are sold as hot prepared food products." (§ 6359, subd. (d)(7).) The exemption also does not apply when "the food products sold are furnished in a form suitable for consumption on the seller's premises, and both of the following apply: [¶] (A) Over 80 percent of the seller's gross receipts are from the sale of food products. [¶] (B) Over 80 percent of the seller's retail sales of food products are sales subject to tax pursuant to paragraph (1), (2), (3), or (7)." (§ 6359, subd. (d)(6).)

³ Regulation 1603 sets forth specific rules regarding the application of sales tax to the sale of food products. We do not decide whether the sale of hot coffee "to go" at Target violated section 6359 or regulation 1603.

⁴ For purposes of this appeal, we assume that the material facts in plaintiffs' FAC and SAC are true. (*Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 43 (*Rakestraw*)).

Target “charged and collected sales tax” on purchases of “to go” and “take-out” hot coffee. These charges were prohibited by California law, specifically section 6359 and regulation 1603. As a result, plaintiffs suffered monetary loss. For example, in May 2006, plaintiff Azucena Lemus purchased hot coffee “to go” from a Target store located in Manhattan Beach, California. On that occasion, Target unlawfully charged Ms. Lemus “\$0.71 in sales taxes.”

A. *Allegations Regarding Money Had and Received*

Target “exacted” money from plaintiffs it “had no legal right” to receive. The money was “intended to be used for the benefit” of plaintiffs but was not used for plaintiffs’ benefit. Further, Target has not given the money back to plaintiffs, thereby causing plaintiffs damage.

B. *Allegations Regarding Unfair Competition Law*

Target is engaged in “unfair” and “unlawful” business acts or practices. By imposing sales tax on the purchase of hot coffee “to go” or for “take-out,” Target “unfairly and unlawfully increased the costs to Class members in direct contradiction to law.” Plaintiffs seek to enjoin Target from “improperly charging sales taxes to consumers who purchase hot coffee drinks ‘to go’ and for ‘take-out,’” and “restitution of any monies wrongfully acquired or retained” by Target as a result of its “ill-gotten gains” obtained by “unfair practices.”

C. *Allegations Regarding Consumers Legal Remedies Act*

The coffee purchased by plaintiffs and class members constituted goods purchased primarily for personal, family or household purposes. Target violated Civil Code section 1770, subdivisions (a)(2), (a)(3), and (a)(14) by misrepresenting that it had the legal right to charge consumers “sales taxes” on coffee purchased “to go” or for “take-out.” It also violated Civil Code section 1770, subdivision (a)(19) when it inserted “an unconscionable provision into contracts” by improperly charging sales tax on certain coffee purchases.

Plaintiffs notified Target of their violations of the CLRA and demanded that Target remedy its violations. Target failed to do so within 30 days. As a result of Target's violations of the CLRA, plaintiffs and class members have suffered damages in "the amount of sales taxes wrongfully collected" by Target from plaintiffs and other class members for the purchase of hot coffee "to go" or for "take-out."

D. *Allegations Regarding Revenue and Taxation Code Section 6359 and Regulation 1603*

Target violated section 6359 and regulation 1603 "by charging the general public sales taxes for the sale of hot coffee drinks 'to go' or for 'take-out'" Section 6901.5 "provides a private right of action for consumers to bring suit against retailers such as Target to recover illegally imposed sales taxes"

Plaintiffs pray for, inter alia, restitution and damages in unspecified amounts, an injunction prohibiting Target from continuing its violations of the UCL and CRLA, and an award of attorney's fees and costs.

CONTENTIONS

Plaintiffs contend that the trial court erroneously sustained Target's demurrer to their cause of action for money had and received in their FAC and their three causes of action in their SAC. They contend that they can pursue a cause of action against Target under section 6901.5, and that article XIII, section 32 does not bar their UCL, CLRA, and money had and received causes of action.

DISCUSSION

1. *Standard of Review*

"A demurrer tests the legal sufficiency of factual allegations in a complaint." (*Rakestraw, supra*, 81 Cal.App.4th at p. 42.) "On appeal, a plaintiff bears the burden of demonstrating that the trial court erroneously sustained the demurrer as a matter of law. This court thus reviews the complaint de novo to determine whether it alleges facts stating a cause of action under any legal theory." (*Id.* at p. 43.)

2. *Overview of the California Sales Tax*

A. *The Retailer's Obligation to Pay Sales Tax and Ability to Obtain Reimbursement From Its Customers*

The California sales tax is an excise tax imposed on retailers for the privilege of selling tangible personal property in this state. (§ 6051; *City of Pomona v. State Bd. of Equalization* (1959) 53 Cal.2d 305, 309.) It is presumed that all of a retailer's gross receipts are subject to the sales tax unless the retailer establishes that purchases fall under one of many specified exemptions. (§ 6091, § 6351 et seq.) Retailers are required to file quarterly sales tax returns and make quarterly payments to the state. (§§ 6451-6459.) If a retailer wrongfully evades sales taxes, it is subject to civil and criminal penalties. (§§ 7152-7155.)

Although retailers commonly refer to "sales tax" on their invoices to customers, it is important to keep in mind that "[t]he sales tax is imposed on the seller, not upon the buyer." (*Gen. Elec. Co. v. State Bd. of Equalization* (1952) 111 Cal.App.2d 180, 185.)⁵ In other words, "[t]he tax relationship is between the retailer only and the state; and is a direct obligation of the former." (*Livingston Rock & Gravel Co. v. De Salvo* (1955) 136 Cal.App.2d 156, 160 (*Livingston*).

A retailer, however, may seek sales tax reimbursement from a purchaser. "Whether a retailer may add sales tax reimbursement to the sales price of the tangible personal property sold at retail to a purchaser depends solely upon the terms of the agreement of sale." (Civ. Code, § 1656.1, subd. (a).) Under certain circumstances, it is presumed that the purchaser agreed to pay the retailer sales tax reimbursement. For example, if sales tax reimbursement is shown on the sales check or other proof of sale, it is presumed that the contract between the retailer and the purchaser provides that the

⁵ By contrast, the use tax is levied upon the *purchaser*. (*Bank of America v. State Bd. of Equal.* (1962) 209 Cal.App.2d 780, 799; § 6202.) A use tax is an excise tax imposed on tangible personal property purchased from any retailer for storage, use or other consumption in California. (§ 6201.) Property subject to sales tax is exempt from use tax. (§ 6401.)

purchaser will reimburse the retailer for the sales tax the retailer must pay the state.

(*Id.* at § 1656.1, subd. (a)(2).)

B. *The Board is Charged With Administrating and Enforcing the Sales Tax Statutes*

The Board is charged with administrating and enforcing the sales tax statutes. (See §§ 7051-7060.) Among other duties, the Board enacts sales tax regulations (§ 7051), reviews sales tax returns and reports by retailers and others (§§ 6481, 7055), and conducts audits of retailers (§ 7054).

C. *The Legislature Has Created a Comprehensive System for Sales Tax and Sales Tax Reimbursement Refunds*

The Legislature has created a comprehensive system for seeking sales tax refunds and associated sales tax reimbursement refunds. Sections 6901 to 6908 set forth the provisions for filing a claim with the Board. Sections 6931 to 6937 set forth the provisions for filing a lawsuit for sales tax refunds.

Under this statutory scheme, a *retailer*, as the taxpayer, can file a sales tax refund claim with the Board. (See §§ 6901-6908, 6932.) There are certain statutory requirements for and limitations on claims with the Board. For instance, a claim filed for or on behalf of a class of taxpayers must, inter alia, be “accompanied by written authorization from each taxpayer sought to be included in the class.” (§ 6904, subd. (b)(1).)

The Board has promulgated regulations governing claims for tax refunds with the Board, including claims for refunds of erroneously collected sales tax. (See Cal. Code Regs., tit. 18, § 5230 et seq.) These regulations specify the means by which retailers, as taxpayers, may file a claim with the Board for overpaid sales taxes.

The Legislature has provided that filing a claim with the Board is a prerequisite to maintaining a suit for a refund of sales taxes. (*A&M Records, Inc. v. State Bd. of Equalization* (1988) 204 Cal.App.3d 358, 367 (*A&M Records*), disapproved on another ground in *Preston v. State Bd. Of Equalization* (2001) 25 Cal.4th 197, 220, fn. 7 (*Preston*).) Section 6932 states: “No suit or proceeding shall be maintained in any court

for the recovery of any amount alleged to have been erroneously or illegally determined or collected unless a claim for refund or credit has been duly filed pursuant to Article 1 (commencing with Section 6901.)”

The purpose of requiring a taxpayer to file a claim with the Board before commencing a tax refund lawsuit is to give the Board an opportunity to correct any mistakes. (*Preston, supra*, 25 Cal.4th at p. 206.) This, in turn, helps the parties and the courts avoid unnecessary litigation (*ibid.*), and “delineates and restricts the issues to be considered in a taxpayer’s refund action.” (*Atari Inc. v. State Bd. of Equalization* (1985) 170 Cal.App.3d 665, 672; see also *A&M Records, supra*, 204 Cal.App.3d at p. 367 [a refund suit is “confined to the grounds set forth” in the claim with the Board].)

As part of its comprehensive scheme, the Legislature has provided a means for customers such as plaintiffs to obtain a refund of collected sales tax reimbursement. Section 6901.5 provides that a retailer who has collected excess sales tax reimbursement from a customer must return the money to the customer who paid it or remit the funds to the state. Specifically, section 6901.5 states: “When an amount represented by a person [retailer] to a customer as constituting reimbursement for taxes due under this part is computed upon an amount that is not taxable or is in excess of the taxable amount and is actually paid by the customer to the person [retailer], the amount so paid shall be returned by the person [retailer] to the customer upon notification by the Board of Equalization or by the customer that such excess has been ascertained. In the event of his or her failure or refusal to do so, the amount so paid, if knowingly or mistakenly computed by the person [retailer] upon an amount that is not taxable or is in excess of the taxable amount, shall be remitted by that person [retailer] to this state.”

The Board has promulgated California Code of Regulations, title 18, section 1700 (regulation 1700) relating to the administration and enforcement of section 6901.5. Under regulation 1700, a customer has paid “excess tax reimbursement” when, inter alia, “an amount represented by a person [retailer] to a customer as constituting reimbursement for sales tax is computed upon an amount that is not taxable”

(Cal. Code Regs., tit. 18, § 1700, subd. (b)(1).) That is precisely the situation plaintiffs claim exists here.

Regulation 1700 further provides, inter alia: “Whenever the board ascertains that a person [retailer] has collected excess tax reimbursement, the person [retailer] will be afforded an opportunity to refund the excess collections to the customers from whom they were collected. In the event of failure or refusal of the person [retailer] to make such refunds, the board will make a determination against the person [retailer] for the amount of the excess tax reimbursement collected and not previously paid to the state, plus applicable interest and penalty.” (Cal. Code Regs., tit. 18, § 1700, subd. (b)(2).)

3. *Article XIII, Section 32 and Its Underlying Policies*

Article XIII, section 32 states: “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.”

The first sentence of article XIII, section 32 bars injunctions against the collection of state taxes. The second sentence of article XIII, section 32 precludes, inter alia, courts “from expanding the methods for seeking tax refunds expressly provided by the Legislature.” (*Woosley, supra*, 3 Cal.4th at p. 792.) The two provisions together “establish that the sole legal avenue for resolving tax disputes is a postpayment refund action.” (*State Bd. of Equalization v. Superior Court* (1985) 39 Cal.3d 633, 638.)

The underlying policy behind article XIII, section 32 is that “strict legislative control over the manner in which tax refunds may be sought is necessary so that government entities may engage in fiscal planning based on expected tax revenues.” (*Woosley, supra*, 3 Cal.4th at p. 789.) The state needs to engage in such planning and revenue collection even during litigation “so that essential public services dependent on the funds are not unnecessarily interrupted. [Citation.] ‘Any delay in the proceedings of the officers, upon whom the duty is devolved of collecting the taxes, may derange the operations of government, and thereby cause serious detriment to the public.’ ” (*Pacific*

Gas & Electric Co. v. State Bd. of Equalization (1980) 27 Cal.3d 277, 283 (*Pacific Gas & Electric*.)

“ “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.” [Citations.]’ ” (*State Bd. of Equalization v. Superior Court, supra*, 39 Cal.3d at p. 639.)

4. *Plaintiffs Cannot Seek a Refund of Sales Taxes or Associated Sales Tax Reimbursement Under the Sales Tax Statutes*

A. *Plaintiffs Have No Standing to Seek a Sales Tax Refund*

There is no statutory or regulatory provision allowing purchasers like plaintiffs to file a claim for a sales tax refund with the Board. Since only taxpayers may file a claim for refund and plaintiffs are not taxpayers, they have no standing to assert a claim with the Board. (See §§ 6901, 6902.) Consequently, plaintiffs cannot maintain a suit for a sales tax refund because the filing of a claim with the Board is a prerequisite to such a suit. (See § 6932; *State Bd. of Equalization v. Superior Court* (1980) 111 Cal.App.3d 568, 570 [purchaser could not maintain action against Board for overpayment of sales tax]; *Decorative Carpets, Inc. v. State Board of Equalization* (1962) 58 Cal.2d 252, 255 (*Decorative Carpets*) [“the orderly administration of the tax laws requires adherence to the statutory procedures and precludes imposing on defendant [Board] the burden of making refunds to the taxpayer’s [retailer’s] customers”]; see also *De Aryan v. Akers* (1939) 12 Cal.2d 781, 785 [purchaser had no standing to sue retailer].)

B. *The Legislature Has Not Provided A Private Cause of Action for Customers To Seek A Refund of Sales Tax Reimbursement*

Plaintiffs claim that section 6901.5 provides that a customer has a private cause of action against a retailer to recover unlawfully collected sales tax reimbursement. A statute, however, “creates a private right of action only if the enacting body so intended.” (*Farmers Ins. Exchange v. Superior Court* (2006) 137 Cal.App.4th 842, 849.) The Courts of Appeal “have held that a statute creates a private right of action only if the statutory language or legislative history affirmatively indicates such an intent.

[Citations.] That intent need not necessarily be expressed explicitly, but if not it must be strongly implied. [Citations.] Particularly when regulatory statutes provide a comprehensive scheme for enforcement by an administrative agency, the courts ordinarily conclude that the Legislature intended the administrative remedy to be exclusive unless the statutory language or legislative history clearly indicates an intent to create a private right of action.” (*Id.* at p. 850.)

Applying these principles to this case, we reject plaintiffs’ position. Nothing in the language⁶ of section 6901.5 or related statutes and regulations affirmatively indicates the intent of the Legislature to authorize a private action by a customer against a retailer. Indeed, section 6901.5 has nothing to do with a sales tax refund *lawsuit*. Rather, the statute relates to a *claim* with the Board. This is clear because section 6901.5 is located in article 1 of chapter 7 of part 1 of division 2 of the Revenue and Taxation Code, which deals with claims with the Board, and not in article 2 of the same chapter, which deals with sales tax refund lawsuits. If the Legislature intended section 6901.5 to create a private right of action against retailers, without the need to file a claim with the Board, as plaintiffs contend, it would have placed the statute in article 2.

By its terms, moreover, section 6901.5 requires a retailer to refund sales tax reimbursements to customers only after an overpayment of sales tax reimbursement has been “ascertained.” Plaintiffs argue that a customer can “ascertain” that excess sales tax reimbursement should be refunded. Under the plain language of regulation 1700, however, *the Board* ascertains the overpayment of sales tax reimbursement. (See Cal. Code Regs., tit. 18, § 1700, subd. (b)(2)⁷; see also §§ 6901, 6902.)

⁶ Plaintiffs have not cited any legislative history, and we have none, that supports plaintiffs’ position.

⁷ This provision of regulation 1700 provides: “Whenever *the board* ascertains that a person has collected excess tax reimbursement, the person will be afforded an opportunity to refund the excess collections to the customers from whom they were collected.” (Italics added.)

In addition, as we have explained, the Legislature has vested the Board with the authority to enforce the sales tax statutes. (*Associated Beverage Co. v. Board of Equalization* (1990) 224 Cal.App.3d 192, 201.) Thus it would undermine the legislative scheme to interpret section 6901.5 to permit the customer to unilaterally “ascertain” when excess sales tax reimbursement has been collected by a retailer. This interpretation would disrupt the administration of the sales tax laws because it would allow customers to usurp the authority of the Board to determine the application of the law in the first instance.

Section 6901.5 thus does not, as plaintiffs contend, authorize customers to file suits against retailers without a determination by the Board of whether excess sales tax reimbursement must be refunded. Instead, the statute sets forth how a retailer must distribute excess sales tax reimbursements after the Board has determined that a refund is due. Here, plaintiffs have not alleged that the Board has made such a determination. Plaintiffs therefore do not have a right to a sales tax reimbursement refund under section 6901.5.

Plaintiffs argue that *Javor v. State Board of Equalization* (1974) 12 Cal.3d 790, 797 (*Javor*) supports their purported section 6901.5 cause of action. In *Javor*, the plaintiff brought a class action on behalf of purchasers of certain motor vehicles to recover the overpayment of sales tax. The Board admitted that it owed retailers sales tax refunds. Under the predecessor statute to section 6901.5, however, retailers had no incentive to file refund claims because any refunds they obtained had to be passed on to customers like the plaintiff. (*Javor*, at pp. 801-802.) The Supreme Court held that under the “unique circumstances” of that case, it needed to “fashion an appropriate remedy to effect the customers’ right to their refund” (*Id.* at 800, 802.) The court thus held that the plaintiff could join the Board as a party in order to require the defendant retailers to make refund applications to the Board. (*Id.* at p. 802.) The court also held that the Board was required to pay refunds owed retailers into court for the benefit of class members. (*Ibid.*)

Plaintiffs' reliance on *Javor* is misplaced because this case does not have the "unique circumstances" of the *Javor* case. In *Javor*, the customers' right to a refund was undisputed. In addition, the customers were not entitled to seek refunds directly from retailers and were not allowed to pursue their suit without retailers first filing claims with the Board. In this case, by contrast, the Board has not had an opportunity to assess whether sales tax was due on purchases of hot coffee "to go" at Target, and Target has not conceded the issue. Thus the right of plaintiffs to a refund of sales tax reimbursement is not undisputed. Plaintiffs, moreover, seek the refund from Target itself without any involvement of the Board. This case is thus distinguishable from *Javor*.

Plaintiffs' reliance on *Decorative Carpets* is equally misplaced. There, a retailer sought a sales tax refund from the Board even though it conceded it had no intention of paying over the recovered refund to its customers. The Court of Appeal directed the trial court to enter judgment for the retailer "only if it submits proof satisfactory to the court that the refund will be returned to plaintiff's [retailer's] customers from whom the excess payments were erroneously collected." (*Decorative Carpets, supra*, 58 Cal.2d at p. 256.) Here, by contrast, there is no allegation that Target submitted a claim to the Board, much less filed a lawsuit against the Board. *Decorative Carpets* thus lends no support to plaintiffs' suit.

Plaintiffs also mistakenly rely on *Livingston*. In *Livingston*, it was undisputed that a retailer owed the state sales tax on the sale of certain equipment. The issue was whether the customer owed the retailer sales tax reimbursement under the contract between the parties. (See *Livingston, supra*, 136 Cal.App.2d. at p. 159.) The court held that under that contract, the retailer was not entitled to collect sales tax reimbursement from the customer. (*Id.* at p. 163.) Here, by contrast, plaintiffs have not alleged that they and Target entered into a similar contract. *Livingston* therefore does not support plaintiffs' claims.

5. *Plaintiffs Cannot Circumvent Article XIII, Section 32 and the Sales Tax Statutes By Seeking an Injunction, Damages, and Restitution Pursuant to Their ULA, CLRA and Money Had and Received Causes of Action*

Article XIII, section 32 prohibits injunctions against the collection of *any* state taxes. In addition, section 6931 specifically precludes an injunction against the state or any officer thereof to prevent the collection of sales and use taxes.⁸ As we will explain, Article XIII, section 32 and section 6931 preclude plaintiffs from obtaining the injunction they seek here.

Plaintiffs contend that they may obtain an injunction against Target pursuant to the UCL and CLRA⁹ irrespective of article XIII, section 32 and section 6931, because they do not seek to enjoin the collection of sales taxes, but rather seek to enjoin the collection of sales tax reimbursement. They further contend that article XIII, section 32 and the sales tax statutes do not bar their UCL, CLRA and money had and received claims for restitution and damages because they do not seek a sales tax refund from the state, but rather seek a refund of sales tax reimbursement from a private company.

Our Supreme Court, however, has “construed broadly” article XIII, section 32, in light of the paramount policies underlying that constitutional provision. (*State Bd. of Equalization v. Superior Court, supra*, 39 Cal.3d at p. 639; see also *Western Oil & Gas Assn. v. State Bd. of Equalization* (1987) 44 Cal.3d 208, 213 (*Western Oil & Gas*) [“Section 32 broadly limits in the first instance the power of the courts to intervene in tax collection matters; it does not merely make unavailable a particular remedy or preclude actions challenging the ultimate validity of a tax assessment”] .) Because the collection of sales tax by the state from a retailer and the collection of sales tax reimbursement by a retailer from a customer are intertwined (see § 6901.5; Civ. Code, § 1656.1; Cal. Code

⁸ Section 6931 states: “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 the State to prevent or enjoin the collection under this part of any tax or any amount of tax required to be collected.”

⁹ Plaintiffs do not contend that they may obtain an injunction pursuant to section 6091.5 or pursuant to their common law cause of action for money had and received.

Regs., tit. 18, § 1700), an injunction against the collection of sales tax reimbursement or a refund of sales tax reimbursement may affect the state's sales tax revenues. We therefore will review not only the direct relief plaintiffs seek, but also the indirect effect of that relief on the collection of taxes by the state. (See *State Bd. of Equalization v. Superior Court*, *supra*, 39 Cal.3d at p. 640, citing *Modern Barber Col. v. Cal. Emp. Stab. Com.* (1948) 31 Cal.2d 720, 723 ["Since the net result of the relief prayed for . . . would be to restrain the collection of the tax allegedly due, the action must be treated as one having that purpose"].)

In *Pacific Gas & Electric Co.*, our Supreme Court took a similar approach. There, the plaintiffs filed an action for mandamus and declaratory relief to compel the Board to adjust the assessment of their property taxes. The court, however, held that article XIII, section 32 barred the action. In reaching its decision, the court rejected the plaintiffs' attempt to "circumvent" article XIII, section 32's "restraints on prepayment tax litigation by seeking only declaratory relief." (*Pacific Gas & Electric*, *supra*, 27 Cal.3d at p. 280; see also *California Logistics, Inc. v. State of California* (2008) 161 Cal.App.4th 242, 248 (*California Logistics*) ["The relevant issue is whether granting the relief sought would have the effect of impeding the collection of a tax"].)

In *Western Oil & Gas*, our Supreme Court again broadly interpreted article XIII, section 32. The plaintiffs in that case sought to prevent the Board from requiring them to furnish information concerning the land and rights of way on which certain pipelines were located. (*Western Oil & Gas*, *supra*, 44 Cal.3d at p. 211.) The Board sought the information in order to assess the plaintiffs' tax liability. The trial court found article XIII, section 32 was "inapplicable" to the case, reasoning that the plaintiffs "were not seeking to prevent assessment but only to prevent being compelled to furnish certain information." (*Western Oil & Gas*, at p. 213.) The Court of Appeal affirmed the trial court's order granting the plaintiffs a writ of mandate and injunctive and declaratory relief. (*Id.* at p. 212.) The Supreme Court reversed. The court reasoned: "[Article XIII, section 32] applies if the prepayment judicial determination sought would impede tax

collection. [Citations.] That an action turns on a challenge to the Board's demands for information does not alone lift the constitutional bar." (*Id.* at p. 213.)

Similarly, in *Brennan v. Southwest Airlines Co.* (9th Cir. 1998) 134 F.3d 1405, 1410 (*Brennan*), the Ninth Circuit rejected an interpretation of federal tax law that would allow plaintiffs to "evade the strictures" of section 7422(a) of title 26 of the United States Code, a statute similar to section 6932.¹⁰ (*Brennan*, at p. 1410.) There, the defendant airlines collected from plaintiffs an excise tax which Congress did not authorize. Rather than filing a claim for a refund with the Internal Revenue Service (IRS) before filing suit, as federal tax law required, plaintiffs filed suit in state court against the airlines for unlawful business practices, breach of contract, declaratory relief and an accounting. (*Id.* at p. 1408.)

Defendants removed the case to federal district court on the grounds that plaintiffs were effectively pursuing a refund of federal taxes, which raised an issue of federal law. Plaintiffs moved to remand the case on the grounds that they had not filed a federal tax refund suit and thus the district court did not have subject matter jurisdiction over their state-law claims. The Ninth Circuit thus was required to determine whether plaintiffs filed a tax refund suit, as defendants contended. (*Brennan, supra*, 134 F.3d at p. 1409.)

The Ninth Circuit answered that question in the affirmative, and affirmed the district court's denial of plaintiffs' motion to remand the case. In so doing, the court rejected the plaintiffs' attempt to use consumer remedy laws to adjudicate what the court concluded was in reality a tax refund case. The court noted that the Internal Revenue Code provided the exclusive remedy in tax refund suits and thus preempted state-law claims that sought tax refunds. (*Brennan, supra*, 134 F.3d at p. 1409.) The court further

¹⁰ The federal statute provided in part: "No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof." (26 U.S.C. § 7422(a).)

stated that accepting plaintiffs' argument would allow a taxpayer to avoid the tax refund statute every time a citizen who sought a tax refund alleged the tax was collected without authority. (*Id.* at p. 1410.) The court reasoned that plaintiffs' arguments militated against one of the distinct purposes of the tax refund statute in that plaintiffs' theory would not " 'afford the Internal Revenue Service an opportunity to investigate tax claims and resolve them without the time and expense of litigation.' (Citation)." (*Id.* at p. 1411; see also *Batt v. City and County of San Francisco* (2007) 155 Cal.App.4th 65, 85 [rejecting the "idea that a taxpayer can 'maintain a common law reimbursement action based on principles of restitution and constructive trust without complying with statutory conditions, specifically . . . administrative claim requirements.' "].)

Likewise, in this case, by seeking an injunction prohibiting Target from collecting sales tax reimbursement from customers, plaintiffs are attempting to circumvent the prohibition of injunctions against the collection of sales taxes in article XIII, section 32 and section 6931. For example, if the trial court concluded that sales tax was not due on purchases of hot coffee "to go" at Target and enjoined Target from collecting sales tax reimbursement on such purchases, Target might rely on the court's decision to stop paying sales tax on these purchases. Accordingly, the net result of an injunction against Target would be a restraint on collection of sales tax by the state, which is precisely what is prohibited by article XIII, section 32, its underlying policies, and section 6931.¹¹

Further, just as the plaintiffs in *Brennan* sought to evade IRS review of their claims, plaintiffs here seek an injunction, damages and restitution without providing the Board with an opportunity to administratively determine the merits of plaintiffs' interpretation of the sales tax laws. This is not permitted by the sales tax statutes and their underlying policies. Although the Board's interpretation of the tax laws does not bind the courts, the Board has expertise regarding sales tax issues that is entitled to

¹¹ Plaintiffs cannot plead around article XIII, section 32 and section 6931 by recasting their causes of action as violations of the UCL and the CRLA. (See *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 182 ["A plaintiff may not 'plead around' an 'absolute bar to relief' simply 'by recasting the cause of action as one for unfair competition.' "].)

consideration and respect. (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 7, 11.) Further, circumventing the claims process could result in involving the Board, retailers and customers in unnecessary litigation. This undermines the policy underlying section 6932, which is to give the Board an opportunity to correct any mistakes, thereby avoiding the cost of litigation and the consumption of judicial resources. (See *Preston, supra*, 25 Cal.4th at p. 206.)

In addition, allowing suits such as plaintiffs' might lead to situations in which a retailer would be required to refund sales tax reimbursements to customers but could not recover associated sales taxes from the government. (See *Brennan, supra*, 134 F.3d at p. 1411.) For example, the statute of limitations for a UCL action is four years (Bus. & Prof. Code, § 17208), while the statute of limitations for a claim with the Board is three years. (§ 6902, subd. (a)(1).) Customers therefore could recover a refund of payments they made to Target between three and four years prior to commencing their action, even if Target passed those payments on to the state, and even though Target would be time-barred from recovering those payments from the state.

Moreover, excluding the Board from sales tax disputes could lead to inconsistent results. For instance, the trial court here could determine that sales tax is not due on purchases of hot coffee "to go" at Target. However, another court might come to the opposite conclusion in a lawsuit filed by Target or a similarly situated retailer against the Board. Because the Board is not a party to this action, it would not be bound by the principles of res judicata and collateral estoppel in subsequent actions by Target or similarly situated retailers. (See 7 Witkin, Cal. Procedure (5th ed. 2008) Judgment, § 452 et seq.) Therefore, requiring customers to seek refunds of sales tax reimbursement only in the manner provided by the sales tax statutes will reduce the likelihood of inconsistent rulings by the courts.

Article XIII, section 32 and the "orderly administration of the tax laws" (*Decorative Carpets, supra*, 58 Cal.2d at p. 255) require strict adherence to statutory procedures for the administration of the sales tax law. Plaintiffs therefore may not

circumvent the means set forth by the Legislature to resolve sales tax disputes by pursuing UCL, CLRA, and money had and received causes of action.

6. *Plaintiffs and Other Customers Have Remedies to Recover Excess Sales Tax Reimbursement Paid to Retailers*

Plaintiffs argue that our decision leaves customers without a remedy when they pay excess sales reimbursement to retailers. This is not true. If a retailer, after exhausting its administrative remedies, prevails in a sales tax refund action against the Board, the retailer must refund associated sales tax reimbursement to customers. (*Decorative Carpets, supra*, 58 Cal.2d at p. 256.)

Customers may also obtain a refund of excess sales tax reimbursement paid to retailers without litigation. The Board may review whether a customer paid excess sales tax reimbursement in the course of responding to a claim filed by a retailer. It may also on its own initiative, or in response to a complaint by a customer, examine a retailer's tax returns or conduct an audit of the retailer's books and records. (See §§ 6481, 7054; Cal. Code Regs., tit. 18, § 1700, subd. (b)(3)(A); *Riley B's, Inc. v. State Bd. of Equalization* (1976) 61 Cal.App.3d 610, 615 [Board conducting audit].)¹² As we have explained, if the Board concludes that excess sales tax reimbursement was collected, the retailer is required to make a refund to its customers (or to the state if it is not refunded to the customer). (§ 6901.5; Cal. Code Regs., tit. 18, § 1700.)

Plaintiffs argue that these remedies are insufficient because, for a variety of reasons, retailers may choose not to file a claim with the Board, or the Board may choose not to conduct a review or an audit, or the Board may make an incorrect decision that is not challenged in court by a retailer. These arguments are better suited for the Legislature than the courts. Article XIII, section 32, prohibits the courts from expanding the remedies expressly provided by the Legislature for sales tax refunds and associated sales tax reimbursement. (See *Woosley, supra*, 3 Cal.4th at p. 792.)

¹² Plaintiffs do not deny that they may contact the Board to request an audit, but do not allege that they have done so.

Plaintiffs and supporting amici curiae argue that the court should take into account the policies underlying the UCL and the CRLA. A similar issue was addressed in *California Logistics*. There the state made a determination that delivery drivers used by the plaintiff were employees and not independent contractors, which resulted in additional tax liability for the plaintiff. (*California Logistics, supra*, 161 Cal.App.4th at p. 245.) The plaintiff alleged that the state had previously unsuccessfully challenged the independent contractor status of the drivers in administrative and judicial proceedings. (*Id.* at pp. 245-246.) Based on this allegation, the plaintiff sought declaratory and injunctive relief regarding its tax liability on the ground that the state was collaterally estopped from asserting that the plaintiff's delivery drivers were employees. (*Id.* at p. 246.)

The court, however, held that article XIII, section 32 barred the plaintiff's action. After acknowledging the important policies promoted by the doctrine of collateral estoppel (*California Logistics, supra*, 161 Cal.App.4th at p. 249), the court stated: "The California Constitution is 'the supreme law of our state' [Citation], subject only to the supremacy of the United States Constitution (Cal. Const., art. III, § 1.) The doctrine of collateral estoppel cannot take precedence over [article XIII,] section 32 and require the courts to provide relief which the Constitution specifically prohibits." (*Id.* at p. 250.)

Similarly, in this case, the UCL and CRLA and the policies they promote cannot take precedence over article XIII, section 32. Further, "the sales tax law employs relatively artificial, relatively self-contained, concepts," and thus does not lend itself to interpretation with the use of concepts and policies from other, distinct areas of law. (*King v. State Bd. of Equalization* (1972) 22 Cal.App.3d 1006, 1010-1011.)

Our Supreme Court has broadly construed article XIII, section 32 in light of the overriding policies behind that provision. Article XIII, section 32 and the policies which it represents bar plaintiffs' action against Target.

DISPOSITION

The judgment is affirmed. Target is awarded costs on appeal.

CERTIFIED FOR PUBLICATION

KITCHING, J.

We concur:

KLEIN, P. J.

ALDRICH, J.

PROOF OF SERVICE
(Code Civ. Proc. secs. 1013(a), 2015.5)

I declare that I am employed with the law firm of Morrison & Foerster LLP, whose address is 555 West Fifth Street, Los Angeles, California 90013-1024. I am not a party to the within cause, and I am over the age of eighteen years.

I further declare that on January 8, 2010, I served a copy of:

ANSWER BRIEF ON THE MERITS

- BY U.S. MAIL [Code Civ. Proc sec. 1013(a)]** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, addressed as follows, for collection and mailing at Morrison & Foerster LLP, 555 West Fifth Street, Los Angeles, California 90013-1024 in accordance with Morrison & Foerster LLP's ordinary business practices.

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed at Los Angeles, California, on January 8, 2010.


Joan MacNeil