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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIRST APPELLATE DISTRICT  
DIVISION TWO

CITY OF BRISBANE,  
Plaintiff and Appellant,  
v.  
CALIFORNIA STATE BOARD OF  
EQUALIZATION,  
Defendant and Appellant;  
CITY OF ALHAMBRA et al.,  
Intervenors and Appellants.

A137185

(San Francisco City and County  
Super. Ct. No. CPF-09-509232)

The City of Brisbane (Brisbane) filed a petition for writ of mandate against the State Board of Equalization (SBE) alleging that SBE should have imposed a local sales tax rather than a local use tax on transactions involving an Internet retailer located in Brisbane. SBE responded that the local tax law is the same as the state tax law and, under the state tax law, it imposes a state sales tax only when a California business participates in the sale and title to the property under the California Uniform Commercial Code (CUCC) passes to the customer in California. If these two conditions are not satisfied, SBE subjects the sale to a use tax. SBE asserted that the sales at issue did not meet either requirement for imposing a sales tax as title transferred to the consumer outside of California, and Brisbane employees did not participate in the sale.

The trial court heard Brisbane's case at the same time it considered two other petitions (City Petitioners) challenging SBE's determination that state and local sales and

use tax laws were the same. The trial court ruled that state and local tax laws were not identical and personal property warehoused outside of California and delivered to a California consumer pursuant to a shipping contract were subject simultaneously to a local sales tax and a state use tax whenever the sale was consummated at a California business. With regard to Brisbane's Internet retailer, the court found that Brisbane employees participated in the sale; the court awarded Brisbane partial retroactive relief.

SBE appealed from the Brisbane judgment and the City Petitioners' judgments. Prior to this appeal, we reversed the City Petitioners' judgments in *City of South San Francisco v. Board of Equalization* (2014) 232 Cal.App.4th 707 (*South San Francisco*). We held that SBE's interpretation of the statutes was correct; it properly imposed the sales tax only when a California business participated in the transaction and title to the goods passed in California.

The principal issue raised in this appeal of the Brisbane judgment is identical to the issue resolved in *South San Francisco*. This appeal, however, involves a factual dispute that did not exist in *South San Francisco*. In *South San Francisco*, it was undisputed that title for all of the sales at issue transferred to the consumer outside of California; here, the parties do not agree that title for all of the sales passed to the customer outside of California. This question is critical because we do not need to determine whether Brisbane employees participated in the sale or whether the relief granted was appropriate unless the transactions satisfy the sales tax requirement that title passed in California.

Since the trial court ruled that title was irrelevant to deciding whether to impose local sales or use taxes, it made no findings on this critical issue. Accordingly, we reverse the Brisbane judgment for the same reasons that we reversed in *South San Francisco*, and remand to the trial court for it to make the necessary findings regarding where title passed for all of the transactions at issue and to enter a new judgment consistent with this opinion and our holding in *South San Francisco*, 232 Cal.App.4th 707. We do not address SBE's appeal from the trial court's finding that Brisbane

employees participated in the sale because this issue needs to be decided only if, after remand, the lower court finds title passed in California for some of the transactions.

### **BACKGROUND**

Brisbane filed a local tax inquiry contending that SBE was improperly imposing a local use tax instead of a local sales tax on transactions involving an Internet retailer of goods that had its corporate headquarters in Brisbane.<sup>1</sup> As explained in *South San Francisco, supra*, 232 Cal.App.4th 707, “Whether SBE administers a local sales or use tax has significant consequences for cities and counties: *all local sales tax* revenue goes to the city where the sale was consummated while *local use tax* revenue is allocated to the county and *distributed* by the county to *its cities* out of a countywide pool.” (*Id.* at p. 728.)

According to letters written by the retailer and sent to SBE, the approximately 650 employees working in the Brisbane headquarters “carr[ie]d out the successful retail Internet consumer sales” of the retailer’s business.<sup>2</sup> The employees at the Brisbane location managed the retailer’s web page, which provided sales information and accepted Internet orders placed by customers inside and outside of California. There were no sales personnel at the Brisbane office, and the Internet sales were processed online with no direct human intervention. Independent contractors located in other states handled by email or telephone all questions related to purchase orders. Inventory was kept at various locations and two warehouses, which were added sometime after Brisbane filed its petition, were located in California, but not in Brisbane.

In December 2005, an SBE hearing officer issued a Decision and Recommendation rejecting Brisbane’s contentions. Brisbane had asserted, according to the Decision and Recommendation, that “the disputed sales delivered into California

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<sup>1</sup> The facts and procedure are set forth in detail in *South San Francisco, supra*, 232 Cal.App.4th 707, and only those facts relevant to the issues remaining in this appeal are specified here.

<sup>2</sup> The facts are from SBE’s Decision and Recommendation regarding Brisbane’s petition for reallocation of local taxes and from letters written by the Internet retailer to SBE.

from out-of-state inventories occurred in California because the products were delivered by common carrier F.O.B. to the California destination.”<sup>3</sup> SBE agreed that destination contracts are subject to a local sales tax, but SBE concluded that “the goods were *not* shipped F.O.B. destination.” Brisbane’s contention was based on the retailer’s return policy, which allowed a return within 90 days, and SBE stated that a return policy “is *wholly* separate from shipping terms” and does not support a finding that these were F.O.B. destination agreements. SBE reviewed the return policy posted on the Internet retailer’s website and searched the Internet retailer’s entire web site and “found no discussion that there are any explicit F.O.B. provisions whatsoever with respect to the retailer’s shipments . . . .” It concluded that the evidence did not support a finding that these were F.O.B. destination agreements and therefore the sales occurred outside California and there was no basis for reallocation.

The Decision and Recommendation stated that even if the sales had occurred in California, Brisbane had not participated in the sales as required by California Code of Regulations, title 18, section 1620, subdivision (a)(2)(A).<sup>4</sup> It found that none of the employees at the Brisbane headquarters had any direct contact with customers regarding specific sales.

In September 2007, SBE denied Brisbane’s petition for reallocation. SBE issued its final order denying rehearing in February 2008.

Brisbane filed a petition for writ of mandate on February 20, 2009, and an amended pleading on April 21, 2009. It alleged, among other things, that SBE was improperly interpreting the statutes and applying a local use tax to sales that should be subject to a local sales tax. City Petitioners also filed two petitions for writ of mandate challenging SBE’s determination of when to apply the local use or sales tax.

All of the cities and counties in California received notice of Brisbane’s petition and City Petitioners’ two petitions. The City of El Segundo filed a complaint in

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<sup>3</sup> F.O.B. “means ‘free on board[.]’ ” (CUCC, § 2319, subd. (1).)

<sup>4</sup> All references to Regulations are to title 18 of the California Code of Regulations.

intervention in support of the petitioners and the City of Alhambra and just fewer than 90 other jurisdictions intervened on the side of SBE.

Prior to trial, sometime in 2011, the Internet retailer relocated from Brisbane to the City of San Bruno (San Bruno).

Brisbane and City Petitioners' cases were heard together in a bench trial. The parties stipulated to the material facts. The trial court heard testimony of one witness on the issue of applying retroactive relief.

The superior court filed its 78-page Final Statement of Decision on July 31, 2012. The court stated that “[t]he parties have stipulated that there are no facts in dispute” and the court’s task was to rule as a matter of law. When ruling on the issues specific to Brisbane, the court reiterated that its ruling was based on “undisputed facts.”

The trial court invalidated Regulations section 1803, which states that the retail sale of personal property is subject to a local sales tax whenever the state sales tax applies and subjects such a sale to a local use tax whenever the state use tax applies. It ruled that the local sales and use tax law (Rev. & Tax. Code, § 7200 et seq.)<sup>5</sup> was inconsistent with section 6001 et seq. of the California Sales and Use Tax Law because, under the local tax law, a local sales tax applies to any transaction consummated at a California business even if the item sold is located in an out-of-state warehouse. The court also found that Brisbane participated in the sale under Regulations section 1620, subdivision (a)(2)(A).

The trial court noted that the Internet retailer was no longer in Brisbane and therefore prospective relief would not benefit Brisbane. The court acknowledged that the statutes provide SBE with discretion to decide whether to reallocate misallocated revenues (§ 7209), but determined that the court had the authority “to allocate local taxes in accordance with the law, at least as to taxes that have been misallocated while the matter is pending before the court.” The trial court granted Brisbane reallocation relief from the date it filed its lawsuit, but denied its request for relief for the transactions prior

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<sup>5</sup> All further unspecified code sections refer to the Revenue and Taxation Code.

to the filing of the lawsuit. The court thus ordered relief from February 20, 2009, until sometime in 2011, when the Internet retailer had moved to San Bruno.

Finally, the trial court addressed SBE's argument that the writ was moot because Brisbane was entitled to prospective relief only and the Internet retailer no longer had its headquarters in Brisbane. The court rejected this contention under *City of Dinuba v. County of Tulare* (2007) 41 Cal.4th 859, 868-869 (*Dinuba*).

SBE and 86 intervenors<sup>6</sup> filed a timely notice of appeal from the judgment. Brisbane filed a timely notice of appeal and argued that it should have received retroactive relief that included the period between 2000 and February 20, 2009.

### **DISCUSSION**

This appeal concerns the sales from 2000 until sometime in 2011 by one Internet retailer in Brisbane. SBE subjected these sales to a local use tax rather than a local sales tax for two independent reasons: (1) It determined that title did not transfer to the California consumer in any of the transactions at issue; and (2) Brisbane employees had not participated in any of the sales as required by Regulations section 1620, subdivision (a)(2)(A). As noted, the trial court rejected both of SBE's reasons for imposing a local use tax.

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<sup>6</sup> A few cities/counties did not join in the appeal. The following cities and counties intervened on the side of SBE and appealed the judgment: the Cities of Alhambra, Aliso Viejo, Anderson, Apple Valley, Arcadia, Azusa, Baldwin Park, Banning, Bell Gardens, Bellflower, Benicia, Burbank, Calimesa, Carson, Cathedral City, Cerritos, Claremont, Colton, Commerce, Corona, Costa Mesa, Covina, Dublin, El Centro, Elk Grove, Fountain Valley, Gonzales, Huron, Imperial Beach, Industry, Irwindale, Laguna Hills, Laguna Niguel, La Habra, La Palma, Lake Forest, Lakewood, Livermore, Loma Linda, Marina, Merced, Montclair, Moreno Valley, Morro Bay, Mountain View, Napa, Oakley, Oceanside, Oxnard, Pacifica, Paramount, Patterson, Pinole, Placentia, Placerville, Pleasant Hill, Pleasanton, Rancho Cucamonga, Rancho Mirage, Rancho Santa Margarita, Redlands, Redondo Beach, Riverside, Rosemead, San Carlos, San Dimas, San Francisco, San Joaquin, San Luis Obispo, San Pablo, San Rafael, Seaside, Signal Hill, Solana Beach, South Lake Tahoe, Sunnysvale, Taft, Temple City, Upland, Vacaville, Vallejo, Yorba Linda, and Yreka and the Counties of Placer, San Francisco, Riverside, and San Mateo.

Only the first issue, the requirement that title transfer in California, was before us in *South San Francisco, supra*, 232 Cal.App.4th 707. In *South San Francisco*, we reversed the trial court’s ruling and held that SBE was correctly interpreting state and local tax law as being consistent with each other. Under the state tax law, a “ ‘sale’ ” is “[a]ny transfer of title . . . for a consideration” (§ 6006, subd. (a)), and the place of the sale is where the property is physically located at the time of sale (§ 6010.5). We concluded that SBE did not abuse its discretion by using section 2401, subdivision (2), of the CUCC to determine when title transfers. Under the holding of *South San Francisco*, title must transfer to the customer in California for the transaction to be subject to the sales tax; otherwise, the transaction is subject to the use tax. After filing *South San Francisco*, we requested supplemental briefing from the parties to address whether title transferred from the retailer to the consumer in California for any of the transactions at issue in this appeal.

In their supplemental briefs, SBE argues that title to all of the transactions by the Brisbane retailer occurred out of state; Brisbane asserts that title passed in California for some of the transactions. In particular, Brisbane claims that SBE’s Decision and Recommendation acknowledged that inventory was kept at two warehouses in California. It also argues that some of the transactions were F.O.B. destination agreements; that is, contracts that specify title does not pass until the goods are delivered.

With regard to items warehoused in California, it is undisputed that Brisbane’s Internet retailer acquired two California warehouses after Brisbane filed its petition for reallocation with SBE. The Decision and Recommendation states: “The [Brisbane Internet] retailer maintains inventory at various locations throughout the country from which sales orders are fulfilled. Two of those warehouses are located in California, but not in Brisbane, and *were added sometime after the filing* of the petitioner’s local tax inquiry.” (Italics added.) The Decision and Recommendation stated, “Only the orders fulfilled from the out-of-state inventories are at issue.” Thus, shipments from the California warehouses were not considered in this decision.

Brisbane, in its first amended petition for writ of mandate, alleged that SBE refused to pay local sales tax revenues to Brisbane pertaining to the Internet retailer “even where the goods sold by it are shipped from unaffiliated third-party warehouses located within the State of California and title to and ownership of the goods are clearly transferred in California.” In its answer, SBE provided a general denial of this allegation.

Brisbane maintains that SBE has forfeited any argument that sales involving California warehouses were not part of the record because it never argued in the trial court that these transactions were not part of the record. Brisbane asserts that these transactions were at issue when the trial court decided that Brisbane had participated in the sales. We disagree that SBE has forfeited this issue. The trial court made it clear that its ruling was based on the stipulated facts and Brisbane has not pointed to any place in the record where SBE agreed that the transactions involving the California warehouses were part of the trial court’s record. Indeed, the trial court never considered whether title passed in California for any of the transactions because it ruled that title was irrelevant under the local sales and use tax law.

In addition to these shipments from California warehouses, Brisbane maintains that title transferred in California for some of the shipments from out-of-state warehouses because they were F.O.B. destination agreements.<sup>7</sup> An agreement using the term F.O.B. seller’s place of business is a shipment contract; a contract using the term F.O.B. place of destination is referred to as a destination contract. For shipment contracts, title passes to the buyer at the time and place of shipment; title passes at the place of delivery for destination contracts. (C.U.C.C., § 2401, subd. (2); see Regs., § 1620, subd. (a)(2)(A).)

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<sup>7</sup> “Unless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods, despite any reservation of a security interest and even though a document of title is to be delivered at a different time or place; and in particular and despite any reservation of a security interest by the bill of lading. [¶] (a) If the contract requires or authorizes the seller to send the goods to the buyer but does not require him to deliver them at destination, title passes to the buyer at the time and place of shipment; but [¶] (b) If the contract requires delivery at destination, title passes on tender there.” (C.U.C.C., § 2401, subd. (2); see Regs., § 1620, subd. (a)(2)(A).)

“The general rule is that a contract containing neither an F.O.B. term nor any other term explicitly allocating loss is a shipment contract.” (*Wilson v. Brawn of California, Inc.* (2005) 132 Cal.App.4th 549, 556, fn. 4.) Brisbane acknowledges that none of the contracts included F.O.B. terms, or any other reference to when title passes. Brisbane maintains that they were destination contracts based on statements on the Internet retailer’s website informing customers that they could return items for any reason; Brisbane maintains these statements establish that the customer was not liable for the product while it was in transit. Brisbane also refers to statements by the tax manager of the Internet retailer that he believed the retailer was not entitled to the sale price until after delivery. Whether the contracts, declarations by the tax manager, or statements on the Internet retailer’s website “explicitly” set forth terms to establish destination agreements is an issue of fact. (See CUCC, § 2401, subd. (2).)

In the present case, the trial court made no factual findings; nor does it indicate what evidence was actually before it. When Brisbane filed its original request for reallocation, the Internet retailer did not have any California warehouses and SBE’s Decision and Recommendation did not consider transactions involving later-acquired California warehouses. The parties have not cited any ruling by the trial court indicating this evidence was or was not properly before the trial record.

If title transferred to the California consumer outside of California for all of the transactions at issue in this appeal, then SBE correctly applied the local use tax and we need not consider whether Brisbane participated in the sales and Brisbane would not be entitled to any relief. “ ‘[I]t is the province of the trial court to decide questions of fact and of the appellate court to decide questions of law . . . .’ ” (*In re Zeth S.* (2003) 31 Cal.4th 396, 405.) “Although appellate courts are authorized to make findings of fact on appeal . . . , the authority should be exercised sparingly. [Citation.] Absent exceptional circumstances, no such findings should be made.” (*Ibid.*)

No such exceptional circumstances exist in the present situation and we remand for the trial court to make the requisite factual findings. The court should determine

whether the record before it included sales from California warehouses<sup>8</sup> and whether the evidence establishes that any of the transactions were F.O.B. destination contracts. The question whether Brisbane employees participated in the sales needs to be addressed only if the trial court finds title transferred in California for any of the transactions at issue in this appeal. Accordingly, we are not reaching this issue in this opinion.

Finally, we consider SBE's argument that Brisbane's writ of mandate is moot since the Internet retailer has relocated to San Bruno. SBE insists that Brisbane does not have a clear and present right.

A party may seek a writ of mandate "to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station . . . ." (Code Civ. Proc., § 1085, subd. (a).) In order to obtain writ relief, a party must establish " '(1) A clear, present and usually ministerial duty on the part of the respondent . . . ; and (2) a clear, present and beneficial right in the petitioner to the performance of that duty . . . .' " (*Santa Clara County Counsel Attys. Assn. v. Woodside* (1994) 7 Cal.4th 525, 539-540, superseded on another issue by statute.)

The court in *Dinuba, supra*, 41 Cal.4th 859, held that the county could be compelled by mandamus to pay misallocated tax funds to the redevelopment agency, which had an undisputed statutory right to funds. (*Id.* at pp. 862, 868; see also *California Assn. for Health Services at Home v. State Dept. of Health Services* (2007) 204 Cal.App.4th 676, 689-690 [mandate would issue to compel state agency to conduct retroactive review of certain Medi-Cal reimbursement rates].) The *Dinuba* court stated that the plaintiffs had a beneficial right in the defendants' correctly calculating and distributing the tax revenue. (*Dinuba*, at p. 868.) Similarly, here, Brisbane has a clear and present right in SBE's correct allocation of the local sales and use tax.

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<sup>8</sup> Additionally, Brisbane would be entitled to a local sales tax only if Brisbane employees participated in the sale and Brisbane, rather than the city where the warehouse was located, was the place of sale under section 7205, subdivision (a). (See *South San Francisco, supra*, 232 Cal.App.4th 707.)

SBE contends that it has discretion under the statutes to determine whether to reallocate tax and therefore a writ of mandate is improper. We need not address the court's authority to order retroactive relief since, as already pointed out, no reallocation or remedy will need to be considered if the trial court finds none of the transactions in the record should be subject to a local sales tax. (See *Hiser v. Bell Helicopter Textron Inc.* (2003) 111 Cal.App.4th 640, 655 [appellate courts generally “decline to decide questions not necessary to the decision”].)

### **DISPOSITION**

The judgment is reversed as to the finding that invalidated Regulations section 1803. We do not reach the question whether Brisbane participated in the sales as defined in Regulations section 1620, subdivision (a)(2)(A). The matter is remanded for a determination whether title transferred in California for any of the sales at issue in this appeal. The parties are to bear their own costs of appeal.

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Kline, P.J.

We concur:

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Richman, J.

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Siggins, J.\*

\*Associate Justice of the Court of Appeal, First Appellate District, Division Three, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.