Case No. S241471

IN THE SUPREME COURT OF CALIFORNIA

Michael McClain, Avi Feigenblatt
and Gregory Fisher,
Plaintiffs, Appellants and Petitioners,
vs.
Sav-On Drugs, et al.,
Defendants and Respondents.

PETITIONERS' REPLY BRIEF ON THE MERITS

After a Decision of the Court of Appeal
Second Appellate District, Division 2
Case Nos. B265011 and B265029
Affirming a Judgment Of Dismissal Following
An Order Sustaining Demurrer Without Leave to Amend
Los Angeles County Superior Court, Case Nos. BC325272 and BC327216
Honorable John Shepard Wiley

Service on the Attorney General and the Los Angeles District Attorney
Required by Bus. & Prof. Code § 17209 and
Cal. Rules of Court, Rule 8.29(a), (b), and (c)(1)

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Petitioners submit this reply to the Answer Briefs on the Merits filed by Respondent Retailers and the California Department of Tax and Fee Administration ("CDTFA"). In this brief where a reference could be to either the CDTFA, the SBE, or both depending on the time frame at issue, they are sometimes referred to as "the State Agency" or "the State Agencies." Petitioners' Opening Brief on the Merits in this Court is cited as "OBOM." All citations to Respondents' briefs are to their Answer Briefs on the Merits in this Court unless otherwise indicated.

I. REPLY TO RESPONDENTS' ARGUMENTS REGARDING THE CONSTITUTIONALITY OF THE RULINGS BELOW.

Respondents relegate their constitutional arguments to the end of their Answer Briefs. (CDTFA at 43-50; Retailers at 53-57.) Petitioners will instead address the constitutional issues at the outset of this brief so they are clearly in mind when evaluating the parties' divergent interpretations of Civil Code §1656.1, Tax Code §6901.5, and *Javor v. State Bd. of Equalization* (1974) 12 Cal.3d 790 ("*Javor*").

A. By Rewriting Civil Code §1656.1's Rebuttable Presumption into an Irrebuttable Presumption, *McClain* and the Retailers' Arguments Would Make the Collection of All Sales Tax Reimbursement Unconstitutional.

By way of background, Petitioners argued in their Opening Brief on the Merits that the Court Of Appeal's decision (*McClain v. Sav-On Drugs*, (2017) 9 Cal. App. 5th 684 ("McClain')) would make the rebuttable presumption of Civil Code §1656.1 irrebuttable and would thereby destroy the consensual basis for sales tax reimbursement that this Court held was required in *National Ice & Cold Storage Co. v. Pacific Fruit Express Co.* (1938) 11 Cal.2d 283 ("*National Ice*"). (OBOM at 43.) The constitutionally-required consensual basis for retailer collection of sales tax

reimbursement was subsequently statutorily required as well by Civil Code §1656.1. (OBOM at 10-11.)

The Retailers' counter-argument is instructive. The Retailers' do not discuss or even cite this Court's decision in *National Ice* which was the progenitor of Civil Code §1656.1. Much less do the Retailers attempt to answer the question that troubled this Court in *National Ice*, which was "By what legal principle is it constitutional for the Tax Code to obligate a purchaser to reimburse a retailer for sales taxes that are legally levied upon the retailer alone?" (OBOM at 10.) *See, e.g., Oksner v. Superior Court of Los Angeles County* (1964) 229 Cal. App. 2d 672, 684 ("Due process forbids the seizure of one man's property for satisfaction of the debt of another.")

Instead, the only response of Respondents to this serious constitutional question is the following:

> Plaintiffs assert that dismissing their claim under section 1656.1 would render the entire tax system unconstitutional. (OBOM:43.) In fact, upholding Plaintiffs' contract claim would do so.
>
> * * * *
>
> Plaintiffs' contract claim under section 1656.1 would disrupt, not promote, the orderly tax collection process in California, thereby giving rise to an unconstitutional attempt to enjoin or interfere with the lawful collection of a tax.

(Retailers at 49-50.)

Obviously, the Retailers' counter-argument is not in any way a rebuttal to "Petitioners' assert[ion] that dismissing their claim under section 1656.1 would render the entire tax system unconstitutional." Rather, the Retailers' counter-argument is a transparent attempt to change the subject to a different constitutional argument that the CDTFA makes in its Answer Brief. (CDTFA at 38-39 ["Allowing such claims would undermine the

fundamental purpose of Section 32: to "avoid unnecessary disruption of public services that are dependent on that revenue."].)[1]

Thus, the Respondents have no answer to the most basic question in this case: *If not customer consent*, then by what legal principle is it constitutional for the Tax Code to obligate customers to reimburse retailers for sales taxes that are legally levied upon the retailers alone? This Court answered that question 80 years ago in *National Ice*: there simply is no such legal principle other than customer consent. (*See National Ice* at 292 ["such declaration of [unconstitutionality] is not intended to indicate the illegality of authority which may be lodged in a retailer to 'pass on' the tax to a purchaser with the latter's consent thereto, either expressly or impliedly given." (emphasis added)].) The Legislature reached the same conclusion 40 years ago when it adopted Civil Code §1656.1 ("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.) (Emphasis added.)

Perhaps realizing that the statutory scheme would indeed be unconstitutional if Petitioners were not allowed at least to pursue the Retailer Defendants pursuant to §1656.1, the Board itself has stated it takes no position on whether Petitioners can or cannot pursue the retailers for breach of contract pursuant to §1656.1:

> The Department addresses plaintiffs' sales tax reimbursement refund claim (Fifth Cause of Action), which names the Department and a set of retailers as defendants. Plaintiffs did not name the Department as a defendant to their breach of contract claim (First Cause of Action); the Department therefore leaves the

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[1] The CDFTA's argument under California Constitution, article XIII, section 32, is refuted at pp. 46-49, *infra.*

briefing on the viability of this claim largely to retailer defendants.

(CDTFA at n.2, p.15.)

B. By Denying Customers Any Recourse To Recover Excess Sales Tax Reimbursement From The State Agencies, *McClain* And Respondents' Arguments Would Make Tax Code §6901.5 Unconstitutional.

1. Reply to the CDFTA's Arguments Regarding the Takings Clause.

The CDTFA's entire argument for inapplicability of the Takings Clause to Tax Code §6901.5 is encapsulated in a single footnote on the last page of its brief:

> [A] State's exercise of its taxing power, standing alone, does not implicate the Takings Clause." (*Koontz v. St. Johns River Water Management Dist.* (2013) __ U.S. __, 133 S.Ct. 2586, 2600-2601 [collecting cases]; see also *Houck v. Little River Drainage Dist.* (1915) 239 U.S. 254, 264 ["the power of taxation should not be confused with the power of eminent domain"].)

(CDTFA at n. 31, p.50, emphasis added.)

The CDTFA's argument has a glaring omission. The CDTFA does not even attempt to establish that excess sales tax reimbursement remitted by retailers under Tax Code §6901.5 is a "tax." In fact, the opening phrase of Tax Code §6901.5 says the opposite:

> 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 . . .

(Tax Code §6901.5, emphasis added.)

How can a payment that is "computed upon an amount that is not taxable or is in excess of the taxable amount" possibly be a "tax"? The CDTFA's brief does not offer even a clue as to how that might be possible.

Additionally, under §6901.5 the excess sales tax reimbursement must be either "returned by the person [i.e. the retailer] to the customer" or "remitted by that person to this state." If Tax Code §6901.5 were designed to raise tax revenue, there would be no reason to provide retailers with the option of returning the excess sales tax reimbursement to customers, since that would defeat the goal of raising tax revenue. Indeed, CDTFA admits §6901.5 is designed to prevent unjust enrichment of retailers (an escheat function), rather to raise tax revenues:

> [S]ection 6901.5 ensures as a matter of equity that retailers do not in any circumstance retain and profit from monies collected from consumers as sales tax reimbursement with the representation and understanding that they would be paid over to the State.

(CDTFA at 45, emphasis added.)

It is well settled that permanent escheats are subject to the Takings Clause. (*See, e.g., Hodel v. Irving,* (1987) 481 U.S. 704, 706, 717 ("*Hodel*") ["The question presented is whether the original version of the 'escheat' provision of the Indian Land Consolidation Act of 1983 [citation omitted] effected a 'taking' of appellees' decedents' property without just compensation . . . . Since the escheatable interests are not, as the United States argues, necessarily *de minimis*. . . a total abrogation of these rights cannot be upheld."]; *Webb's Fabulous Pharms. v. Beckwith*, 449 U.S. 155 (U.S. 1980) ("Webb's") [Florida statute providing that interest accruing on interpleader monies deposited with the clerk shall be deemed income of the clerk's office violates the Takings Clause]; *Cerajeski v. Zoeller* (2013) 735

F.3d 577 (7th Cir. , Posner J.) ("*Cerajeski*") [Indiana's escheat of interest on a small bank savings account violates the Takings Clause].)

The CDTFA argues, however, that the "tax system will still operate to the public benefit" by "reading *Javor* narrowly" so as to "foreclose[] consumer class action refund suits challenging retailers' routine, day-to-day decisions about the application of conditional sales tax exemptions." (CDTFA at 29.) Indeed, "foreclose[ing] . . . refund suits" has been the State Agencies' strategy for decades.

Although the CDTFA admits that "information from customers could cause the Department to conduct an audit . . . [a]nd it can require a retailer to return already collected excess sales tax reimbursement to those consumers who paid it" (*id.* at 41), the State Agencies never do so. For example, for decades the State Agencies did not voluntarily conduct an audit and rule on the taxability issues in *Javor*, *Loeffler,* the instant case, nor — to the best of Petitioners' knowledge – on any other customer claim for refund of excess sales tax reimbursement.

Instead, the State Agencies wait for retailers to file tax refund claims, which retailers never do owing to an "incentive problem" — a phrase which the CDTFA coined and acknowledges to exist. (*See* CDTFA at 14 and 33 ["The Court in *Javor* stepped in only to correct an "incentive" problem; some percentage of retailers had failed to submit claims to the Department for refunds clearly due, because they would not be entitled to retain the benefits of their efforts."]

This case is a perfect example of the State Agencies' refusal to address overcharges of sales tax reimbursement on legally tax exempt transactions. The SBE was brought into this case in February 2006 on Cross-Complaints filed by the Retailers on order of the Superior Court. (Retailers at 29.) It is now twelve years later, and the CDTFA admits that (1) neither the Paliani letter nor its restrictive conditions for tax exemption

have ever been considered by the Board, nor has the Board ever disagreed with Petitioners' claim that all pharmacy sales of test strips and lancets are exempt from the sales tax. (OBOM at 18-19.) Yet the State Agencies have never initiated an audit to examine the legality of Paliani conditions, instead preferring to expend enormous resources to defend Petitioners' *Javor* claim (which seeks to compel the State Agencies to perform their job and make a taxability determination).

The CDTFA's brief attempts to excuse the State Agencies' misfeasance by stating that they favor means for securing the "public benefit" other than refunds of excess sales tax reimbursement, such as by "operating a competitive marketplace" so that consumers can "exercise[e] their purchasing power." (CDTFA at 29.) Apparently the CDFTA is unaware that the State Agencies' admitted practice of "reading *Javor* narrowly" so as to "foreclose[] consumer class-action refund suits" is a *per se* violation of the Takings Clause. The "taking" of excess sales tax reimbursement under R&TC §6901.5 operates as a "physical taking" because the State ends up with physical possession of the money (rather than a "regulatory taking" such as enacting a land use regulation). Under *Brown v. Legal Foundation* (2003) 538 U.S. 216, 233-234 ("*Brown*"), physical takings amount to a *per se* taking for which victims are entitled to just compensation without "complex factual assessments of the purposes and economic effects of government actions." (Emphasis added.)

In other words, as to physical takings, there is no balancing of the "public benefit" of the State paying "just compensation" versus other approaches such as the State Agencies "operating a competitive marketplace." Rather, the express language of the Takings Clause — "nor shall private property be taken for public use, without just compensation" — is strictly enforced with respect physical takings. *See Koontz v. St. Johns River Water Management Dist.* (2013) __ U.S. __, 133 S.Ct. 2586 at

2600 ["We are not here concerned with whether it would be 'arbitrary or unfair' for respondent to order a landowner to make improvements to public lands that are nearby. . . . Whatever the wisdom of such a policy, it would . . . amount to a *per se* taking similar to the taking of an easement or a lien."].

Here, however, the CDTFA admits that the State Agencies' strategy has been to "foreclose [] consumer class-action refund suits" in favor of other methods to secure the "public benefit." (CDFTA at29.) That is a *per se* violation of the Takings Clause that can only be cured by this Court reversing the Court of Appeal and adopting a robust interpretation of the *Javor* remedy. To be constitutional, such interpretation must enable Petitioners to obtain a determination of the legality and enforceability of the Paliani conditions, first from the CDTFA and, if necessary, from the courts under Tax Code §§6933-6934.

2. Reply to the Retailers' Arguments Regarding the Takings Clause.

The Retailers attempt to rebut applicability of the Takings Clause on the ground that that there is "no state action." (Retailers at 55-57.) Tellingly, the State itself does not argue that there has been "no state action."

The Retailers cite three cases in support of their "state action" argument. (Retailers at 56.) Those cases, at most, hold that a Takings Clause claim requires "state action" and cannot be asserted against private parties. But here, Petitioners only argue that the State would be liable under the Takings Clause, and there is abundant proof of "state action" by the State Agencies.

The mere fact that the State has escheated the funds and is unjustly enriched thereby is sufficient "state action", as shown by all of the escheat cases cited in Petitioners' Opening Brief on the Merits. Moreover, there is

abundant evidence of other forms of "state action" here. The State enacted an escheat statute — Tax Code §6091.5 — without providing a statutory procedure by which customers who are charged excess sales tax reimbursement can make a claim for return their property. Through issuance of the Paliani letter in contravention of the Administrative Procedure Act ("APA") and without authority from the Board, the SBE staff commanded 13,000 retailers to employ pointless and burdensome new conditions to the tax exemption for test strips and lancets. Since the SBE never articulated any public policy reason for applying new conditions to test strips and lancets (but not to insulin and insulin syringes) , it appears that the new conditions were mandated for the sole purpose of discouraging retailers from honoring the tax exemption. And for fifteen years thereafter and counting, the State Agencies have accepted sales tax reimbursement without notifying California pharmacies and diabetics that the conditions for tax exemption stated in Paliani letter were unauthorized by the Board and void for lack of compliance with the APA. As a result, the State has been unjustly enriched by tens of millions of dollars per year. It is difficult to imagine a deprivation of property without due process of law and a taking without just compensation that has more "state actions" than is present here.

3. Reply to Respondents' Arguments Regarding The Due Process Clause.

As previously discussed, the CDTFA argues that Tax Code §6901.5 imposes a "tax" rather than an escheat, and that the Takings Clause does not apply to taxes. (*See* pp.4-5, *supra.*) Even if the CDTFA were correct that Tax Code §6901.5 imposes a "tax" rather than an escheat, that would not help the CDTFA here. Tax Code §6901.5 would still be unconstitutional under the Due Process clause because the State does not

afford "meaningful backward looking relief to rectify an unconstitutional deprivation." (*See* OBOM at 33-35 and cases cited therein).

The CDTFA responds:

> Plaintiffs state that they too must be provided with "'meaningful backward-looking relief'" . . . . even though the Legislature (in section 6901.5) did not provide for this remedy. (OBM at pp. 33-35.) Due process does not require this result.

(CDFTA at 45, emphasis added.)

The CDTFA fails to recognize that the State Legislature does not determine the confines of Fifth Amendment Due Process, the Constitution does. The Due Process Clause ("No person shall... be deprived of life, liberty, or property, without due process of law") is not limited to "taxpayers" but runs to "persons" with respect to their "property:" Here, no one contends that customers are not "persons" or that excess sales tax reimbursement does not belong to them. (*See Loeffler* at 1115 quoting *Javor* at 802 ["We observed that the Board 'is very likely to become enriched at the expense of the customer to whom the amount of the excessive tax actually belongs.'"] (Emphasis added).)

The CDTFA next argues that as "nontaxpayers" under the Tax Code, Petitioners would have no standing to assert a Due Process challenge to Tax Code §6901.5. (CDFTA at 46.) Of course, it is Respondents who wants to characterize excess sales tax reimbursement as a "tax" rather than an escheat. But even if that characterization were true, Petitioners would have standing to bring a Due Process challenge to §6901.5 for failing to afford them any "meaningful backward looking relief." That is because §6901.5 itself expressly recognizes that customers have an ownership interest in excess sales tax reimbursement:

> 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.

(Tax Code §6901.5, emphasis added.)

Indeed, out of the three categories of involved parties (customers, retailers, and the State) it is only retailers who are forbidden by §6901.5 from retaining any excess sales tax reimbursement. (CDFTA at 45 ["[S]ection 6901.5 ensures as a matter of equity that retailers do not in any circumstance retain and profit from monies collected from consumers sales tax reimbursement."].) As the only real-parties-in-interest, customers therefore have standing to assert a Due Process challenge to Tax Code §6901.5.

The CDTFA also argues that there is no Due Process violation because Tax Code §6905.1 does not create or recognize "a vested property interest held by consumers." (CDTFA at 44-45.) That argument is contrary to the CDTFA own admission. (CDTFA at 45 ["Of course, once it has been conclusively ascertained through the processes established in the tax code that a retailer has paid excess sales tax . .[t]he Department will ensure that refunded tax payments are in turn passed back to the consumers who paid sales tax reimbursement."].) It is also contrary to the Retailers acknowledgment that the excess tales tax reimbursement "rightfully belongs" to customers. (Retailers at 22 ["this Court allowed the [Javor] suit to proceed—as it was unwilling to leave the Board with the excess revenue that rightfully belonged to the purchasers."].)

The CDFTA apparently wants to draw a distinction between that which "rightfully belongs" to customers and that in which they have "a

vested property interest." But in doing so, the CDTFA merely assumes its own conclusion: that it can keep excess sales tax reimbursement without providing due process to customers to whom it rightfully belongs. Not surprisingly, the CDTFA cites no authority that supports such a circular argument.

The Retailers' argument is equally circular. They argue that:

> [R]etailers, as the taxpayers, are afforded the opportunity to file refund claims with the Board and, thus, are clearly afforded the constitutionally-mandated procedural due process. (*Loeffler, supra*, 58 Cal.4th at pp. 1107-1108 [retailers are permitted to file refund claims with the Board].) Therefore, Plaintiffs do not derive any right to be heard from a statutory scheme that does not directly affect them. (*Doyle v. Oklahoma Bar Ass'n* (10th Cir. 1993) 998 F.2d 1559, 1567 [parties do not have due process interest merely because government's taking of another's substantive right may have a derivative impact on them].)

(Retailers at 52, emphasis added.)

The Retailers' argument assumes that only retailers are "afforded the constitutionally-mandated procedural due process" with respect to their "substantive right" to file a tax refund claim, so customers have no "due process interest" in rights which "merely... may have a derivative impact on them." That is the same argument as made by the CDTFA, just substituting the term "substantive right" for "vested right." It assumes its own conclusion that customers have no "substantive right" to either due process or the excess sales tax reimbursement of which they were deprived.

If, by contrast, one accepts that the rightful owners of escheated property have a "substantive right" to due process (as was held by this Court in *State v. Savings Union Bank & Trust Co.* (1921) 186 Cal.294 ("*State v. Savings*")) and "just compensation" under the Takings Clause (as was held in cases such as *Hodel*, *Webb's*, and *Cerajeski*), then the

Retailers' circular argument unwinds. Because the rightful owners of escheated property have a Constitutional "substantive right" to procedures for the recovery of such property, the impact of a "statutory scheme" [Tax Code §6901.5] that confiscate such property does have a direct "impact on them" (rather than a "derivative impact on them" as the Retailers contend).

The Retailers also argue that "Plaintiffs voluntarily paid sales tax reimbursement to the Retailers as a matter of implied contract, which does not implicate due process." That is a straw man argument. Petitioners do not claim that their payment of sales tax reimbursement to the retailers gives rise to any claim other than their First Cause of Action against the Retailers for breach of the contract specified in Civil Code §1656.1, including breach of the duty of good faith and fair dealing.

Petitioners' constitutional arguments, by contrast, arise from the State escheating under Tax Code §6901.5 the excess sales tax reimbursement from the Retailers' custody and retaining such amounts without providing any procedures by which the rightful owners — the customers – can reclaim the property belonging to them. (*See, e.g. State v, Savings, Hodel, Webb's*, and *Cerajeski.*)

In the category of "no harm, no foul," the Retailers argue that "(e)ven if retailers opted not to collect sales tax reimbursement, but merely chose to increase the cost of the products to account for the sales tax paid, the economic effect would be the same on the consumer." (Retailers at 51, emphasis added.) That argument is true if the Retailers "assumed" the "sales tax paid" and raised their prices by a corresponding amount. But here the sales of test strips and lancets were legally tax exempt, so there was no need for the Retailers to pay sales tax, and therefore no need to raise prices. Indeed, the Retailers' argument demonstrates how diabetics have been damaged by the Retailers collecting sales tax reimbursement on tax-exempt sales of test strips and lancets.

II. PETITIONERS FIRST CAUSE OF ACTION ALLEGES AN ACTIONABLE CLAIM AGAINST THE RETAILERS FOR BREACH OF THE CONTRACT SPECIFIED IN CIVIL CODE §1656.1.

The Retailers' brief addresses Petitioners' First Cause of Action by paraphrasing at p. 46 three arguments from the Court of Appeal's opinion: *i.e.* that the First Cause of Action (1) is "premised on the claimed existence of an unwaivable exemption" (*See* Op. at 701), (2) would "have a court make taxability determinations in the first instance" (*See* Op. at 701) and (3) is "based upon unstated intent" of customers. (*See* Op. at 705).

The substance of each of those arguments is rebutted in the sections below. More generally, the consequence of Respondents' position would be that the Board could defeat any suit seeking to utilize Javor by adopting a contrived position that manufactured a dispute as to "taxability," or by stating that it has not considered the issue. And that is what the Board is, in fact, trying to do here. Specifically, despite convincing the trial court that the issue of taxability was "hotly disputed" by the Board, the Board later admitted in its Respondent's Brief before the appellate court that this was not true at all; that despite knowing about this issue at least since 2005, meaning for over 12 years, it still has not decided it:

> Appellants interpret Regulation 1591.1 to mean that all sales of glucose test strips or skin puncture lancets are exempt from sales tax. However, there has been no binding determination by the Board that Appellants' interpretation is correct. The Board could well come to a different conclusion, ruling that sales of skin puncture lancets and glucose test strips are nontaxable only if the products are furnished by an individual registered pharmacist (and not picked up off the shelf or dispensed by an employee who is not a registered pharmacist) and only if the customer presents documentation to show that the products are purchased pursuant to the instructions of a physician to control diabetes (such as a prescription or a copy of the written

> instructions). Because the taxability issue in this case has not been decided by the Board, the Superior Court properly dismissed the lawsuit."

(SBE's Respondent's Brief Before Appellate Court, p. 34)

Respondents now argue before this Court that they can continue to collect millions of dollars in unauthorized sales tax "reimbursement" from diabetic consumers, and that there is nothing consumers or the courts can do about it, so long as the Board never decides "taxability in the first instance." This cannot be the law.

A. Reply to the Retailers' Argument That Petitioners' Breach of Contract Cause of Action "Is Premised on the Claimed Existence of an Unwaivable Exemption."

The Retailers and the Court of Appeal contend that "plaintiffs' breach of contract cause of action is premised on the claimed existence of an unwaivable exemption." (Retailers at 46, Op. at 701.) On the contrary, Petitioners acknowledge that retailers can waive the tax exemption, but that does not mean that retailers can both waive the tax exemption and charge customers excess sales tax reimbursement. As pointed out by this Court in *Loeffler,* the Legislature in adopting 1978 Senate Bill 472

> added Civil Code section 1656.1 ..., permitting but not requiring the addition of reimbursement charges, designating the charges as a matter for a contractual agreement between seller and buyer, and permitting the retailer to absorb the tax.

(*Loeffler* at 1117, emphasis added.)

Thus, whether purchasers can be saddled with the cost of such a waiver is "a matter for a contractual agreement between seller and buyer." Absent an agreement from the buyer, the retailer must "absorb the tax."

Indeed, the SBE's Respondent's Brief in the Court of Appeal admits (1) that the presumed agreement for customer reimbursement of the sales