S176943

SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

FRANCHISE TAX BOARD,	:	
Petitioner,	:	
v.	:	Case No. S176943
THE SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO,	:	
Respondent,	:	
TOM GONZALES, as Personal Representative, etc.,	:	
Real Party in Interest And Respondent.	:	

On Petition for Review From the Judgment of the California Court of Appeal, First Appellate District, Division Five
Case No. A122723
San Francisco County Superior Court
Case No. CGC-06-45497
The Honorable John K. Stewart, Judge

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Treatises

Constitutional Provisions

In this income tax refund suit brought by the Estate of Thomas J. Gonzales ("the Estate"), the Superior Court denied the Franchise Tax Board's motion to strike the Estate's demand for a jury trial. On the Franchise Tax Board's appeal, the Court of Appeal unanimously affirmed in a published opinion filed August 27, 2009. On or about October 6, 2009, Petitioner Franchise Tax Board ("FTB") filed a Petition for Review in this Court, seeking review of the opinion of the Court of Appeal, First Appellate District, Division Five. The FTB has not moved to stay the Superior Court action, now set for a jury trial on January 11, 2010, and has not filed a petition for rehearing in the Court of Appeal.

Question Presented

Whether the two courts below correctly held that under article I, section 16 of the California Constitution and the decisions of this Court, a taxpayer who sues the Franchise Tax Board under Section 19382 of the Revenue and Taxation Code for a refund of state income taxes paid under protest has the right to a trial by jury.

Statement

In this state income tax refund suit, the taxpayer, Thomas J. Gonzales, claimed a capital loss from an investment for the taxable year 2000. Thereafter,

the Estate of Thomas J. Gonzales[1] paid over $15 million to the State of California in connection with the California Voluntary Compliance Initiative (VCI). In making application under the VCI, the Estate reserved the right to seek a refund.

The complaint seeks a refund of the entire $15 million on the ground that the taxpayer was entitled to the capital loss claimed on his return.[2] In a November 2006 joint case management conference statement, the Estate demanded a jury trial. In May 2008, the FTB moved to strike the Estate's jury demand. By order dated July 22, 2008, the Superior Court (Hon. John K. Stewart) denied the FTB's motion to strike on consideration of the parties' briefs and oral argument and "based on the analysis in *United States v. New Mexico* (10th Cir. 1981) 642 F.2d 397, finding that a jury trial in tax cases is rooted in the common law prior to 1791."

The FTB thereafter sought review in the Court of Appeal for the First Appellate District. Prior to hearing oral argument, on January 30, 2009, the Court of Appeal requested that the parties file additional letter briefs answering three questions concerning the common law history of tax refund actions that existed as of the ratification of the California Constitution in 1850.

On August 27, 2009, the Court of Appeal issued its unanimous 24-page opinion certified for publication that affirmed the decision of the Superior Court.

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[1] Thomas J. Gonzales died in December 2001. The executor of his estate is his father, Tom Gonzales, the Real Party in Interest and Respondent in this proceeding.

[2] The FTB filed a cross-compliant seeking to recover from the Estate a penalty of almost $2.5 million.

The Court of Appeal correctly recognized that resolution of the question presented turned on whether an analogous action would have been cognizable in the common law courts in 1850 as of the ratification of the California Constitution. Its comprehensive review of the common law history demonstrated to the Court of Appeal that "before the adoption of our Constitution, taxpayers could sue tax collectors for a refund in a common law action for money had and received, and were provided the right to a jury" (emphasis in original). Based upon its thorough investigation of the pertinent common law history, the Court of Appeal concluded that "taxpayers should have the right to a jury trial in modern tax refund actions against the state, under section 19382." The Court of Appeal therefore ruled that the Superior Court properly denied a motion of the FTB to strike the jury demand of the Estate as to its tax refund claim.[3]

[3] The Court of Appeal, however, ruled that the Estate does not have the right to a jury trial on the FTB's cross-complaint to recover a penalty. We do not cross-petition to seek review of the penalty issue which arises in the context of a tax collection case.

ARGUMENT

THERE IS NO BASIS FOR FURTHER REVIEW OF THE DECISION BELOW WHICH CORRECTLY HELD THAT UNDER THE CALIFORNIA CONSTITUTION THE ESTATE IS ENTITLED TO A JURY TRIAL ON ITS TAX REFUND CLAIM

The two courts below correctly held that the Estate is entitled to a jury trial on its tax refund claim. There is no conflict among the courts of appeal or any other reason warranting further review by this Court.

Almost 160 years ago, the California Constitution of 1849, art. 1, § 7, guaranteed the right to a trial by jury. It broadly promised that "The right of trial by jury shall be secured to all, and remain inviolate." There is no question that the right to a jury trial extends to parties in a civil case. The expansive phrase "to all" would of itself establish the extended scope of the right. But the current version of the California Constitution explicitly confirms its applicability to civil cases. It provides that "Trial by jury is an inviolate right and shall be secured to all, but in a civil cause three-fourths of the jury may render a verdict (art. 1, § 16).

A. Taxpayers Had a Right At Common Law As of 1850 to a Jury Trial in a Tax Refund Suit

In ruling that the Estate was entitled to a jury trial on its tax refund claim, the Court of Appeal properly applied the standard established by this Court almost

60 years ago in *People v. One 1941 Chevrolet Coupe* (1951) 37 Cal.2d 283, 231 P.2d 832, a controlling authority which the Petition for Review fails to challenge, or even refer to in any manner. There, this Court examined the common law history of forfeiture proceedings and held that a forfeiture case involving an automobile must be tried to a jury.

The Court of Appeal below correctly recognized (Pet. App. 3-6, 18-19) that two essential points emerge from the *Chevrolet Coupe* case. First, when it comes to the vindication of the constitutional right to a jury trial, artificial labels are to be disregarded. Hence, calling an action a special proceeding which is equitable in nature cannot extinguish the constitutional right to a jury trial -- artificial labels are to be disregarded. As this Court wisely observed, "If this could be done, the Legislature, by providing new remedies and new judgments and decrees in forms equitable, would in all cases dispense with jury trials, and thus defeat the provision of the Constitution . . .. In determining whether the action was one triable by a jury at common law, the court is not bound by the form of the action but rather by the nature of the rights involved and the facts of the particular case – the gist of the action. A jury trial must be granted where the gist of the action is legal, where the action is in reality cognizable at law" (*id.* at 299).

Secondly, the fact that the forfeiture statute was enacted after the California Constitution was adopted does not mean that the proceeding is not within the right to a jury trial. As this Court stated in the *Chevrolet Coupe* case, "the constitutional right to a jury trial is not to be narrowly construed. It is not limited to those cases

in which it existed before the adoption of the Constitution but is extended to cases of like nature as may afterwards arise" (*id.* at 300).[4]

Here, the Court of Appeal (Pet. App. 6-14) meticulously examined the common law history of tax refund suits, as it existed in 1850. It found that refund suits brought by protesting taxpayers against tax collectors were tried before juries both in England and in America at the dawn of this Nation's independence. The gist of these actions is unquestionably legal, insofar as the protesting taxpayer seeks a monetary judgment against the tax collector who had collected an excessive amount of tax.

Moreover, the Court of Appeal correctly recognized that it has long been settled that a tax refund suit is in the nature of an action for money had and received. Such an action is a classic example of the ancient common law writ of assumpsit which could be filed in the English law courts and in which the plaintiff had a right to a jury trial. *See Lewis v. Reynolds* (1932) 284 U.S. 281, 283.[5]

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[4] In *United States v. New Mexico* (10th Cir. 1981) 642 F.2d 397, upon which the Superior Court relied, the Tenth Circuit likewise ruled that "the right of a taxpayer to a jury trial in refund cases is rooted in the common law and was preserved by the Seventh Amendment." (*id.* at 401). The Court of Appeal similarly expressed agreement with the Tenth Circuit's ruling, and the Tenth Circuit's further observation that the legislative history accompanying the enactment of the statute authorizing federal tax refund suits (28 U.S.C. § 1346) made it clear that jury trials had always been permitted in actions brought against appropriate revenue collectors. *See* Pet. App. 7-9.

[5] *See* also *Stone v. White* (1937) 301 U.S. 532, 534. There, the Supreme Court recognized that an action to recover a tax erroneously paid is "the lineal successor of the common count of indebitatus assumpsit for money had and received." The Latin phrase is properly translated as "having become indebted, [the defendant] took up [responsibility for] the debt."

Indeed, as the Court of Appeal properly observed (Pet. App. 11-12), the United States Supreme Court in *Elliot v. Swartwout* (1836) 35 U.S.(10 Pet.) 137, upheld a suit in assumpsit brought before a jury by an importer to recover an overpayment of duties. Since the *Swartwout* case was decided before the adoption of the California Constitution, the Court of Appeal correctly regarded it as part of the common law jurisprudence that existed upon the entry of California into the Union.[6]

Finally, the Court of Appeal correctly rejected as "a misplaced analogy" (Pet. App. 15) the FTB's reliance, renewed here (Pet. 6), upon the decisional law denying the right to a jury trial in a tax collection case. The Court of Appeal correctly recognized that the common law history of tax collection cases is different from that of tax refund suits. As the Court of Appeal concluded (Pet. App. 15, n.7), the ground of the decisions in tax collection cases was the courts' recognition that jury trials in tax collection proceeding would cause interference and delay in tax collection to the detriment of the public welfare. *See Sonleitner v. Superior Court* (1958) 158 Cal. App. 2d 258, 260-261. This consideration has no application to a tax refund suit such as this case in which the state holds the

[6] The Court of Appeal likewise rejected the FTB's reliance (Pet. 5) upon *Wickwire v. Reinecke* (1927) 275 U.S. 101, 105 as dictum (see Pet. App. 17-18), that has no controlling effect on this question of California law.

amount of the asserted overpayment throughout the duration of the proceeding. See also Cooley, Taxation, (2d et. 1886) pp. 49-50.[7]

B. The Estate's Right to a Jury Trial Is Not Barred By the Doctrine of Sovereign Immunity

The FTB also claims (Pet. 7) that the Estate has no right to a jury trial because the Legislature did not specify such a right in Section 19382, the statute authorizing tax refund suits. From this premise, the FTB concludes that the right to a jury trial is barred by the doctrine of sovereign immunity.

Bu the Court of Appeal soundly rejected this argument as without merit. As it properly stated (Pet. App. 21-23), it can be presumed under the California decisional law that the Legislature knew, when it enacted Section 19382, that the right to a jury trial existed with respect to tax refund claims. Accordingly, if the Legislature intended to deny that fundamental right, the Court of Appeal properly inferred that the Legislature would have done so expressly. Moreover, under the default rule of Section 592 of the Code of Civil Procedure, the Court of Appeal correctly determined that this tax refund suit is contractual in nature and falls within the scope of the statute, which mirrors the scope of the common law right to a jury trial. Hence, there is no basis for the FTB's claim of sovereign immunity.

[7] *Crouchman v. Superior Court* (1988) 45 Cal. 3d 1167, upon which the FTB relies (Pet. 6), is likewise inapposite. There, this Court held that a plaintiff did not have the right to a jury trial in a small claims action. Such actions were, of course, not cognizable in the common law courts.

C. There is Nothing in the Record to Support the FTB's Claim that Jury Trials in Tax Refund Suits Would Increase the Costs of Tax Disputes

Finally, apart from its legal arguments which the Court of Appeal correctly rejected, the FTB asserts (Pet. 2) that this Court should review this "important issue of law" because jury trials in tax refund suits would increase the costs and risks of tax disputes and the burdens on the parties and the courts.

Suffice it to say that the FTB never advanced this claim in the courts below. Hence, under California Rules of Court, Rule 8.500(c)(1), this newly-advanced assertion cannot be the basis of review by this Court. Moreover, there is no reliable evidence in the record that would support the notion, even if it could be considered, that jury trials would increase the costs of tax disputes.

At all events, there is no empirical data or logic that lends credence to the FTB's unsupported claim of additional expense. The availability of the right to jury trial will undoubtedly result in some jury trials of tax refund actions but the right to a jury trial simply gives taxpayers an additional option in litigation. Even if a cost-benefit analysis could be imposed on the exercise of the fundamental constitutional right to a jury trial, an exercise which is dubious at best, there is no reliable data that jury trials will dramatically change the litigation process, any more than it has done so in the federal tax system. As the Court of Appeal below correctly observed in reviewing the jurisprudence of this Court (Pet. App. 4), "The right to a trial by jury is fundamental and 'should be zealously guarded by the

courts.' [Citations.] In case of doubt . . ., the issue should be resolved in favor of preserving a litigant's right to trial by jury . . .' [Citation.]" (*Blanton v. Womancare, Inc.* (1985) 38 Cal. 3d 396, 411.)

CONCLUSION

For the reasons stated, the Petition for review should be denied.

Dated: October 22, 2009

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the above Respondent's Brief in Opposition to Petition for Review uses 13-point Times New Roman font and contains 2,494 words.

Dated: October 22, 2009

Respectfully submitted,

MARTIN A. SCHAINBAUM
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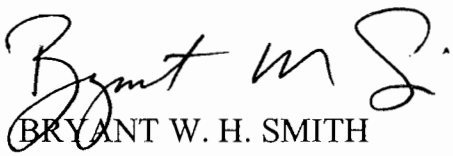

BRYANT W. H. SMITH

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DECLARATION OF SERVICE BY OVERNIGHT COURIER

Case Name: **Tom Gonzales, as Personal Representative of the Estate of Thomas J. Gonzales II v. Franchise Tax Board**

Case No.: San Francisco Superior Court No.: **CGC-06-454297;**
California Court of Appeal, First Appellate Dist., Div. Five No.: **A122723**

I declare:

That I am employed by MARTIN A. SCHAINBAUM, A Professional Law Corporation, 351 California Street, San Francisco, California 94104-2406. I am 18 years of age and older and not a party to this matter. My business address is: 351 California Street, Suite 800, San Francisco, California 94104-2406.

On October 22, 2009, I served the attached **RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR REVIEW** by placing a true copy thereof enclosed in a sealed envelope with **Federal Express Courier Service**, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on October 22, 2009, at San Francisco, California.

Cheryl M. Wong, Declarant