SUPREME COURT COPY

In the Supreme Court of the State of California

FRANCHISE TAX BOARD,

Petitioner,

v.

THE SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO,

Respondent;

TOM GONZALES, as Personal Representative, etc.

Real Party in Interest and Respondent.

Case No. S176943

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

PETITIONER'S OPENING BRIEF ON THE MERITS

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STATEMENT

The Franchise Tax Board ("FTB") seeks reversal of a published opinion of the Court of Appeal, First Appellate District, Division Five, filed August 27, 2009, [1] upholding the trial court's denial of the FTB's motion to strike real party in interest and respondent's demand for a jury trial in his tax refund suit against the FTB. The Court of Appeal heard the matter pursuant to the FTB's petition for writ of mandate/prohibition.

1. Article I, section 16 of the California Constitution states that "[t]rial by jury is an inviolate right that shall be secured to all . . . ." It is settled that the scope of this right to a jury is limited to the right that existed at common law in 1850 when the State adopted its Constitution. (*Cornette v. Dept. of Transportation* (2001) 26 Cal.4th 63, 75-76.)

2. This case is a tax refund action under Revenue and Taxation Code section 19382 (hereinafter, section 19382), which permits a taxpayer to seek a refund of a tax that he has paid. In July 2006, under section 19382, real party in interest and respondent Tom Gonzales ("Gonzales"), as personal representative of the estate of Thomas J. Gonzales, II (deceased), sued the FTB to recover more than $15 million in state personal income tax[2] and interest. (Opn. at pp. 40-41.) The FTB cross-complained for the

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[1] The opinion was published in the California Appellate Reports at 177 Cal.App.4th 36. Citations herein to the opinion will be to the California Appellate Reports point page number in the form "Opn. at p. __."

[2] The tax at issue in this case is personal income tax under California's "Personal Income Tax Law." (Rev. & Tax. Code, § 17001 et seq.) The Personal Income Tax Law was enacted in 1935. (Stats. 1935, ch. 329, § 1, p. 1090.) Section 19382 was first enacted as former Revenue and Taxation Code section 19082. (Stats. 1943, ch. 659, § 1, p. 2407.) Former Revenue and Taxation Code section 19082 was based on former section 21 of the Personal Income Tax Law, enacted in 1935. (Stats. 1935, ch. 329, § 21, pp. 1114-1116.)

recovery of an additional $2.5 million, consisting of an accuracy-related penalty. (*Ibid.*)

In a November 2006 case management conference statement, Gonzales demanded a jury trial. (Opn. at p. 41.) In May 2008, the FTB moved to strike Gonzales' request for jury trial. (*Ibid.*) The trial court denied the motion in July 2008. (*Ibid.*)

3. The FTB then petitioned the First District Court of Appeal, contending the trial court had erred. The Court of Appeal issued an order to show cause and, after briefing and oral argument, determined that plaintiff had a right to jury trial in the refund action against the FTB but no right to jury trial in the FTB's cross action. The ruling regarding the cross-action is not at issue.

The facts relevant to this Court's review are undisputed: namely, that Gonzales sued the FTB for a refund of state personal income tax pursuant to section 19382 and demanded a jury trial.

ISSUE PRESENTED

Is there a right to a jury trial in a tax refund action brought pursuant to section 19382?

STANDARD OF REVIEW

The issue of whether Gonzales has a right to a jury trial with respect to his tax refund action is a pure question of law that is reviewed de novo. (*Caira v. Offner* (2005) 126 Cal.App.4th 12, 23-24.)

SUMMARY OF ARGUMENT

Gonzales does not have the right to a jury trial because a tax refund action against the State, pursuant to Revenue and Taxation Code section 19382 (hereinafter, section 19382), did not exist under the common law of 1850. The Legislature created this cause of action by statute long after 1850. Gonzales' refund action is, or is analogous to, a special proceeding.

There is no right to a jury trial in a special proceeding unless specifically provided by statute. No California statute grants Gonzales this right.

The FTB does not dispute that the common law allowed taxpayers to bring legal actions against tax collectors in limited circumstances. Taxpayers were permitted to sue individual tax collectors for the recovery of "involuntarily" paid taxes (i.e., illegal taxes paid under duress) and, in those cases, were entitled to jury trials.

On the other hand, taxpayers had no right whatsoever to bring an action for taxes "voluntarily" paid. Under the so-called "Voluntary Payment Doctrine," followed in California and most other states, it is settled that taxes voluntarily paid may not be recovered by a taxpayer in the absence of a statute permitting the refund thereof. In 1893, the Legislature enacted two statutes abrogating common law: a statute generally authorizing suits against the state; and a tax refund statute authorizing tax refund actions brought against the state for voluntarily paid taxes. As a result of the enactment of these two statutes, the Legislature first authorized California taxpayers to sue the state for a refund of taxes voluntarily paid in derogation of common law; namely, in derogation of the Voluntary Payment Doctrine and the doctrine of sovereign immunity.

Therefore, under California law, as of 1893, statutory tax refund actions have replaced the common law tax refund action. Numerous other states and the federal government have passed tax refund statutes abrogating the common law as to the Voluntary Payment Doctrine, and those jurisdictions' courts have held that a taxpayer's right to sue the government for a tax refund is a right based solely on statutory authority.

Accordingly, the Court of Appeal erred. The court reasoned that common law suits brought against tax collectors are sufficiently analogous to modern statutory tax refund actions to support its conclusion that Gonzales is entitled to a jury trial. However, the court overlooked the fact

that Gonzales' right to bring his tax refund action is entirely based on a tax refund statute which is in derogation of common law. Thus, in performing its analysis, the Court of Appeal: (i) erroneously treated statutory tax refund actions as modern counterparts to common law refund actions; (ii) inappropriately applied the legal/equitable (gist of the action) test; and (iii) relied upon inapposite case authorities.

Gonzales would not have had the right to bring his tax refund action under the common law of 1850 because no such right then existed. Thus, Gonzales does not have the right to a jury trial based on either article I, section 16 of the California Constitution or Code of Civil Procedure section 592.

ARGUMENT

I. THE CONSTITUTIONAL RIGHT TO A JURY TRIAL APPLIES ONLY TO A CIVIL ACTION AS IT EXISTED AT COMMON LAW IN 1850 WHEN THE CALIFORNIA CONSTITUTION WAS ADOPTED

The right to a jury trial guaranteed under the California Constitution is that right as it existed at common law, when the state Constitution was first adopted. (*Cornette v. Department of Transportation, supra,* 26 Cal.4th at pp. 75-76.) Consequently, the constitutional right to a jury trial does not apply to special proceedings (*id.* at p. 76), although the Legislature may provide for a jury trial in these proceedings by statute. (*Ibid.*; *Estate of Dolbeer* (1908) 153 Cal. 652, 657).

As argued below, Gonzales' right to bring his tax refund action pursuant to section 19382, is a right based solely upon Legislative authority first granted in 1893 and, accordingly, Gonzales would not have had the right to bring his statutory tax refund action under the common law of 1850, as no such right then existed. Because there is no statute expressly granting the right to a jury trial for Gonzales' tax refund action, Gonzales does not have the right to a jury trial. (See *Rankin v. Frebank Company*

(1975) 47 Cal.App.3d 75, 92 ["Since in the absence of a statute the California right to trial by jury extends only to those cases triable by a jury at common law as it existed in 1850, and since the courts could not dissolve a corporation on petition of a minority shareholder prior to 1931 [citation], it is clear that the right to trial by jury does not extend to an involuntary dissolution proceeding."].)

II. UNDER COMMON LAW THERE WAS NO ACTION FOR A TAX REFUND AGAINST THE SOVEREIGN FOR TAXES VOLUNTARILY PAID

At common law, there was no right of action against a sovereign. (*Galloway v. United States* (1943) 319 U.S. 372, 388.) Accordingly, there was no common law action for a tax refund against the sovereign enforceable by jury trial or otherwise. (*Mathes v. Commissioner* (5th Cir.1978) 576 F.2d 70, 71, cert. denied, (1979) 440 U.S. 911.)

However, under the common law of England, aggrieved taxpayers were entitled to bring actions at law against tax collectors for recovery of taxes, but only if the taxes were not paid voluntarily. (*Elliot v. Swartwout* (1836) 35 U.S. (10 Pet.) 137, 153-158.) In those cases, taxpayers were entitled to a trial by jury. (Kirst, *Administrative Penalties and Civil Jury* (1978) 126 U.Pa. 1281, 1313-1320, 1328-1331 (Kirst).)

"Under the '[V]oluntary [P]ayment' [D]octrine followed in [California] and most other states, it is settled that taxes freely and voluntarily paid may not be recovered by a taxpayer in the absence of a statute permitting the refund thereof, and that this is so even if the taxes are illegally levied or collected." (*Sierra Investment Corporation v. County of Sacramento* (1967) 252 Cal.App.2d 339, 342, citing *Southern Service Company, Ltd. v. Los Angeles County* (1940) 15 Cal.2d 1 (*Southern*

Service).)[3] Under common law, only illegal taxes paid under duress, coercion or compulsion are considered to have been involuntarily paid and therefore recoverable. (*Southern Service*, *supra*, at p. 7.) The requisite duress, coercion or compulsion for a tax payment to be considered involuntary was described by this Court to be "some actual or threatened exercise of power possessed, or supposed to be possessed, by the party exacting or receiving the payment over the person or property of the party making the payment, from which the latter has no other means of immediate relief than by advancing the money." (*Id.* at p. 8, citing *Brumagim v. Tillinghast* (1861) 18 Cal. 265, 271.)

III. THE LEGISLATURE ABROGATED COMMON LAW TO PERMIT TAX REFUND ACTIONS TO BE BROUGHT AGAINST THE STATE WITHOUT REGARD TO THE VOLUNTARY PAYMENT DOCTRINE

In 1893, the Legislature enacted California's first statute authorizing suits against the state: "An act to authorize suits against the State, and regulating the procedure therein." Section 1 of that act provided: "All persons who have, or shall hereafter have, claims on contract or for negligence against the state not allowed by the state board of examiners, are hereby authorized, on the terms and conditions herein contained, to bring suit thereon against the state in any of the courts of this state of competent jurisdiction, and prosecute the same to final judgment. The rules of practice in civil cases shall apply to such suits, except as herein otherwise provided." (Stats. 1893, § 1, p. 57.)

Prior to 1893, no suit could be maintained against the State of California because the Legislature had not yet enacted any statute

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[3] The Court of Appeal recognized the existence of the common law basis for the Voluntary Payment Doctrine. (Opn. at p. 51 ["It is correct that, at common law, a voluntary payment could not be recovered in an action for money had and received."].)

authorizing such suits pursuant to article XI, section 11, of the Constitution of 1849 which provided: "Suits may be brought against the State in such manner, and in such courts, as shall be directed by law." (*Melvin v. State* (1898) 121 Cal. 16, 22, disapproved on another ground in *Guidi v. State* (1953) 41 Cal. 2d 623, 628.) Even after the enactment of the 1893 statute, aggrieved California taxpayers were precluded from bringing tax refund actions against the State of California unless the suit was brought pursuant to a statute specifically authorizing the refund action. (See *McClellan v. State* (1917) 35 Cal.App. 605, 606-607 ["There is not now, nor has there ever been, any statute of this state authorizing any one to institute against the state, or any of its officers, an action for the recovery of any fee or sum of money of the character here involved."].)

Therefore, in 1893, the first California tax refund statute, former Political Code section 3819, was also enacted, authorizing the recovery of property taxes.[4] (Stats. 1893, ch. 20, § 1, p. 32.) Section 3819 provided that taxes paid under protest would be deemed to be involuntarily paid: "And when so paid under protest, the *payment shall in no case be regarded as a voluntary payment*, and such owner may at any time within six months after such payment bring an action against the county, in the Superior Court, to recover back the tax so paid under protest . . . ." (Stats. 1893, ch.

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[4] The State of California's first source of revenue was derived from property taxation as authorized in the Constitution of 1849:

> Taxation shall be equal and uniform throughout the state. All property in this State shall be taxed in proportion to its value, to be ascertained as directed by law; but assessors and collectors of town, county, and State taxes shall be elected by the qualified electors of the district, county, or town in which the property taxed for State, county, or town purposes is situated.

(Cal. Const. of 1849, art. XI, § 13.)

20, § 1, p. 32 [emphasis added].) The enactment of Political Code section 3819 abrogated the common law tax refund action, so as to relieve taxpayers from the harshness of the application of the Voluntary Payment Doctrine. (*Hellman v. City of Los Angeles* (1905) 147 Cal. 653, 654-655 ["(Political Code section 3819) is in derogation of the general common-law rule as to voluntary payments, and is befitting to this more enlightened age."].)[5]

As a result of the enactment of the two 1893 statutes (Stats. 1893, § 1, p. 57 and Pol. Code, § 3819) common law was abrogated in two respects with regard to tax refund actions. Specifically, the Legislature granted authority to aggrieved taxpayers to (i) sue the state for a refund of taxes (ii) voluntarily paid.

IV. GONZALES' RIGHT TO BRING HIS TAX REFUND ACTION IS PURELY STATUTORILY BASED AND DID NOT EXIST AT COMMON LAW

This Court has held that "[a] right to a credit or refund of taxes is purely statutory." (*Southern Service, supra*, 15 Cal.2d at p. 11.) Indeed, Gonzales' tax refund action brought pursuant to section 19382, as in the case of all other tax refund actions brought pursuant to other authorizing statutes, takes the place of a common law tax refund action (*Aalwyn's Law Institute v. City and County of San Francisco* (1919) 39 Cal.App. 414, 416-417 [refund action pursuant to Pol. Code, § 3819]), as a matter of legislative grace (*People v. Union Oil Company of California* (1957) 48 Cal.2d 476, 481, citing *Southern Service, supra*, at pp. 11-12, 97).

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[5] Although prior to the enactment of Political Code section 3819 in 1893 aggrieved California taxpayers could not bring tax refund actions against the State of California, they were entitled to bring common law actions against individual tax collectors for recovery of taxes involuntarily paid or seized by the tax collector. (See *Brumagim v. Tillinghast, supra,* 18 Cal. at pp. 269, 271.)

In *Southern Service,* the plaintiff sued, pursuant to Political Code section 3804, to recover taxes alleged to have been illegally collected regarding an excessive tax rate adopted by a county board of supervisors for the tax year 1933-1934 and recovered judgment. While the case was on appeal, the Legislature amended the Political Code by adding new section 3804.1 which prohibited refunds for any taxes voluntarily paid which were levied prior to January 1, 1939 and claimed to be erroneous or illegal because of errors in preparing the budget of governmental subdivisions. Defendants sought to dismiss the appeal and sought an order for a direction to the trial court to dismiss the action because of the amendment. Plaintiff resisted, claiming that section 3804.1 violated the constitutional guarantees of due process and equal protection and the prohibition against the enactment of laws impairing contract and vested rights. (*Southern Service*, *supra*, 15 Cal.2d at pp. 1-7.)

The *Southern Service* defendants prevailed on their motions. In holding for the defendants, this Court explained that the plaintiff's right to recover a tax refund in that case was not vested, as it was purely statutory in nature. (*Southern Service*, *supra*, 15 Cal.2d at pp. 7, 11-12 ["The foregoing discussion and review lead to the conclusion that the plaintiff possessed no right or remedy pursuant to section 3804 of the Political Code which existed apart from the statute itself and which the legislature could not cut off by repeal."].)

According to at least thirteen other states' decisional law, under common law, a taxpayer does not have the right to recover voluntarily paid tax unless such right is authorized by statute. Other states' decisional law is relevant here for determining 1850 common law. "[D]ecisions of sister states constitute evidence of what the common law is, even if contra to the English decisions." (*Callet v. Alioto* (1930) 210 Cal. 65, 68-69.) These thirteen states are: Iowa; New Hampshire; Kentucky; Texas; Florida;

Pennsylvania; Arkansas; Maryland; Arizona; Alabama; Virginia; Colorado; and Missouri.[6] Federal decisional law similarly holds that a taxpayer's

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[6] These states' Supreme Courts' decisions supporting the proposition that a taxpayer does not have the right to recover voluntarily paid tax unless such right is authorized by statute are: *Slimmer v. Chicksaw County* (Iowa 1908) 118 N.W. 779, 780 [at common law an action to recover taxes voluntarily paid did not exist – any such right of action would only exist by reason of a statute]; *Private Truck Council of America, Inc. v. New Hampshire* (N.H. 1986) 517 A.2d 1150, 1156 ["In order to recover under a common law refund theory, the plaintiffs must prove that they paid the tax involuntarily . . . ."]; *Maximum Machine Co., inc. v. City of Shepherdsville* (Ky. 2000) 17 S.W.3d 890, 892 [common law authorizes a tax refund when the tax payments were submitted involuntarily]; *Bullock v. Amoco Production Co.* (Tex. 1980) 608 S.W.2d 899, 901 [franchise tax refund statute created right not existing under common law]; *Johnson v. Atkins* (Fla. 1902) 32 So. 879, 881 ["[I]f voluntarily paid by the dealer, he could not recover it, even while it remained in the hands of the collector, for the principle is well settled that taxes voluntarily paid cannot be recovered."]; *Royal McBee Corporation v. City of Pittsburgh* (Pa. 1958) 143 A.2d 393, 395 ["At common law a voluntary payment of taxes, erroneously made, could not, in the absence of a statute, be recovered."]; *Elzea v. Perry* (Ark. 2000) 12 S.W.3d 213, 215 ["Arkansas has consistently followed the common-law rule that prohibits the recovery of voluntarily paid taxes, except where a recovery is authorized by a statute without regard to whether the payment is voluntary or compulsory."]; *Bowman v. Goad* (Md. 1997) 703 A.2d 144, 145 ["The general rule in Maryland is that no common law action lies for the recovery of taxes or governmental fees which the plaintiff has voluntarily paid under a mistake of law, and that any statutorily prescribed refund remedy is exclusive."]; *Maricopa County v. Arizona Citrus Land Co.* (Ariz. 1940) 100 P.2d 587, 588 ["It is agreed by both parties that the general rule of common law is, and always has been, that taxes voluntarily paid without protest, and not under duress, cannot be recovered by the taxpayer."]; *Home Insurance Co. v. City of Birmingham* (Ala. 1938) 180 So. 783, 784 ["Claims for the recovery of money paid as taxes, not within the influence of this section of the Code, and claims falling within the exception--money paid to the state or the general fund of the county as taxes--rest upon the principles of the common law, and if voluntarily paid are not recoverable."]; *Barrow v. Prince Edward County* (Va. 1917) 92 S.E. 910 ["The taxes in question were voluntarily paid, and it is well settled at common law that such payments cannot be recovered."];

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right to bring a tax refund action is based solely upon Congressional authority.[7] (*Nichols v. United States* (1868) 74 U.S. 122, 128 [voluntary payment of duties precluded plaintiff's suit against the government absent a statute authorizing suit].)

Based upon the foregoing, Gonzales' right to bring his tax refund action pursuant to section 19382, is a right based solely upon Legislative authority first granted in 1893. Accordingly, Gonzales would not have had the right to bring his tax refund action under the common law of 1850 because no such right then existed.

V. GONZALES DOES NOT HAVE THE RIGHT TO A JURY TRIAL BECAUSE HIS RIGHT TO BRING HIS TAX REFUND ACTION IS UNKNOWN TO THE COMMON LAW OF 1850 AND NO STATUTE GRANTS HIM THE RIGHT TO A JURY TRIAL

"[T]here will be no *constitutional* right to jury trial in special proceedings unknown to the common law of 1850." (*Crouchman v. Superior Court* (1988) 45 Cal.3d 1167, 1174 [emphasis in original] (*Crouchman*).) Special proceedings[8] unknown to the common law of 1850,

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(...continued)
Union Pacific Railroad Co. v. Colorado (Colo. 1968) 443 P.2d 375, 378 [taxpayer had no common-law right to refund on ground that it should have claimed a larger charitable deduction in its state income tax return; the right must arise by statute]; and *Ring v. Metropolitan St. Louis Sewer District* (Mo. 1998) 969 S.W.2d 716, 718 ["Though it shocks the equitable conscience, the general rule is well-settled that the sovereign need not refund taxes voluntarily paid, but illegally collected."].

[7] Under federal law, taxpayers are only entitled to a jury trial for a tax refund action if the action is brought in a United States District Court pursuant to sections 1346(a)(1) and 2402 of title 28 of the United States Code. (*Mathes v. Commissioner*, *supra*, 576 F.2d at p. 71.)

[8] The term "special proceeding" is not generally defined by statute, except in the negative, nor does it have a well-established meaning. (*Boggs v. North American B. & M. Co.* (1937) 20 Cal.App.2d 316, 319.) In *Tide Water Assoc. Oil Co. v. Superior Court* (1955) 43 Cal.2d 815, this Court set out the generally accepted definition of the term. "As a general rule, a

(continued...)

created by statute without the grant of the right to a jury trial include: a small claims action at law (*Crouchman, supra*, 45 Cal.3d at p. 1178); a will contest (*Estate of Beach* (1975) 15 Cal.3d 623, 642); a judicial proceeding to collect taxes (*Sonleitner v. Superior Court* (1958) 158 Cal.App.2d 258, 262-263); an action under Welfare and Institutions Code section 11350 to determine paternity (*County of Butte v. Superior Court* (1989) 210 Cal.App.3d 555, 557-560); a conservatorship proceeding (*Conservatorship of Maldonado v. Maldonado* (1985) 173 Cal.App.3d 144, 147; an action for an involuntary dissolution of a corporation (*Rankin v. Frebank Company, supra*, 47 Cal.App.3d at p. 92); a receivership or liquidation proceeding (*Kinder v. Superior Court* (1978) 78 Cal.App.3d 574, 581); and a suit for divorce (*Cassidy v. Sullivan* (1883) 64 Cal. 266, 267).

Here, as in the special proceedings mentioned above, Gonzales' right to bring his tax refund action did not exist at common law, as such right was granted by statute after 1850. Additionally, there is no California statute that grants Gonzales the right to a jury trial for his refund action, including Code of Civil Procedure section 592. Section 592 applies only to common law actions and does not confer the right to a jury trial with respect to any action which did not previously exist. Thus, section 592, like article I, section 16, of the California Constitution, is historically based, and

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special proceeding is confined to the type of case which was not, under the common law or equity practice, either an action at law or a suit in equity." (*Id.* at p. 822.) The two chief characteristics of special proceedings are: (a) they are established by statute, and (b) the statutes usually (though not invariably) create new remedies unknown to the common law or equity courts. (3 Witkin, California Procedure (5th ed 2008) Actions, § 64, p. 135, citing *Carpenter v. Pacific Mut. Life Ins. Co. of Calif.* (1937) 10 Cal.2d 307, 327.)

does not expand the jury trial right beyond its common law scope. (*Crouchman, supra*, 45 Cal.3d at p. 1178.)[9]

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[9] Additionally, the Supreme Courts of the following states have held that there is no common law (i.e., constitutional) right to a jury trial in tax cases: Tennessee (*Jernigan v. Jackson* (Tenn. 1986) 704 S.W.2d 308, 309-310 ["We have not found a single state that authorizes jury trial upon demand in litigation involving the collection or refund of revenue due a state."]); South Carolina (*Matthews Contracting Co., Inc. v. South Carolina Tax Commission* (S.C. 1976) 230 S.E.2d 223, 225-226 ["The right to recover taxes from the State was created by statute, and was created after the adoption of our constitution".]); Idaho (*Coeur D'Alene Lakeshore Owners and Taxpayers, Inc. v. Kootenai County* (Idaho 1983) 661 P.2d 756, 762-763 ["We have been cited to no authority and have found none indicating that a right to jury trial in taxpayers' refund actions has ever existed at common law in Idaho or elsewhere, just as there is no federal constitutional right to a jury trial for tax refunds."]); Utah (*Jensen v. State Tax Commission* (Utah 1992) 835 P.2d 965, 969 ["The Commission's procedures here are solely creatures of statute and were not cognizable as civil actions at common law."]); Vermont (*Department of Taxes v. Tri-State Industrial Laundries, Inc.* (Vt. 1980) 415 A.2d 216, 220 ["Therefore, this provision does not apply to an appeal from a determination of the Commissioner of Taxes, because such an action was unknown at common law."]); and Minnesota (*Ewert v. City of Winthrop* (Minn. 1979) 278 N.W.2d 545, 550 ["[T]he right to appeal from an assessment is a right established by statute and not a right existing at common law."]).

As to federal law, the Supreme Court of the United States has stated that a taxpayer's right to a jury trial in a tax refund action is not based upon the Seventh Amendment, but rather, is based upon the Congressional grant of such right. (*Wickwire v. Reinecke* (1927) 275 U.S. 101, 105.) With the exception of the Tenth Circuit Court of Appeals' decision in *United States v. New Mexico* (10th Cir.1981) 642 F.2d 397, the United States Courts of Appeals have consistently held that no common law right to a trial by jury exists in federal tax cases. (See *Masat v. Commissioner* (5th Cir.1986) 784 F.2d 573, 575 [Tax Court]; *Parker v. Commissioner* (5th Cir.1984) 724 F.2d 469, 472 [no constitutional right to jury; right only exists if statute so provides]; *Bagur v. Commissioner* (5th Cir.1979) 603 F.2d 491, 500, fn. 11 [no constitutional right to jury trial in refund cases in either Tax Court or District Court]; *Martin v. Commissioner* (6th Cir.1985) 756 F.2d 38, 40 [Tax Court]; *Blackburn v. Commissioner* (6th Cir.1982) 681 F.2d 461, 462

(continued...)

In sum, Gonzales is not entitled to a jury trial for his statutory tax refund action because his right to bring that action is unknown to the common law of 1850 and no California statute grants him the right to a jury trial for that action.

VI. BECAUSE GONZALES' RIGHT TO BRING HIS TAX REFUND ACTION IS PURELY STATUTORILY BASED AND DID NOT EXIST AT COMMON LAW, THE COURT OF APPEAL'S OPINION IS ERRONEOUS

According to the Court of Appeal, common law suits against tax collectors are sufficiently analogous to modern statutory tax refund actions to support its conclusion that Gonzales is entitled to a jury trial: "Our review of the relevant common law history demonstrates that, before 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. Thus, taxpayers should have the right to a jury in modern tax refund actions against the state, under section 19382." (Opn. at p. 40.)

However, the Court of Appeal's opinion is fundamentally flawed because the court failed to acknowledge that Gonzales' right to bring his statutory tax refund action was granted by the Legislature in derogation of common law. (See argument, § III, *supra.*) Thus, in performing its analysis, the Court of Appeal: (i) erroneously treated statutory tax refund actions as modern counterparts to common law refund actions; (ii) inappropriately applied the legal/equitable (gist of the action) test; and (iii) relied upon inapposite case authorities.

(...continued)
[Tax Court]; *Funk v. Commissioner* (8th Cir.1982) 687 F.2d 264, 266 [no right of action at common law against sovereign; no statutory right granted in Tax Court]; and *Mathes v. Commissioner*, *supra*, 576 F.2d at p. 71.)

A. The Gist of the Action Test Is Irrelevant in This Case Because Gonzales' Statutory Tax Refund Action Is Unknown to the Common Law of 1850

Here, as in *Crouchman, supra*, 45 Cal.3d at p. 1167, the traditional legal/equitable analysis for determining the constitutional right to a jury trial is irrelevant. "The historical analysis of the common law right to jury often relies on the traditional distinction between courts at law, in which a jury sat, and courts of equity, in which there was no jury. When analyzing whether there is a constitutional entitlement to a jury in a small claims case, however, [the court] must look beyond the legal/equitable dichotomy, because that distinction was irrelevant, at common law, to the provision of a jury for a small monetary claim." (*Id.* at p. 1175.) The legal/equitable dichotomy is irrelevant here because Gonzales' right to bring his section 19382 refund action is a right granted by statute, unknown at common law. Accordingly, the Court of Appeal's reliance upon the case authorities cited in its opinion characterizing a tax refund action as being a legal action, analogous to an action for money had and received, is misplaced.

Similarly, *Jefferson v. County of Kern* (2002) 98 Cal.App.4th 606 (see opn. at p. 54), is inapposite. In *Jefferson*, the plaintiff sued the County of Kern for medical malpractice and fraud; namely, common law tort claims. (*Id.* at p. 609.) The Fifth District Court of Appeal, therefore, appropriately applied the gist of the action test in rejecting the county's contention that there was no constitutional right to a jury trial regarding the dates for the accrual of the plaintiff's claims simply because the plaintiff was suing under a tort claims statute enacted after 1850. (*Id.* at p. 614.)

Here, unlike the defendant county in *Jefferson*, the FTB does not contend that Gonzales is not entitled to a jury trial simply because section 19382 was enacted after 1850. Rather, the FTB contends there is no right to a jury trial in this case because Gonzales' right to bring his statutory

refund action for recovery of tax voluntarily paid was first granted by statute in 1893 in derogation of common law. (See argument, § III, *supra.)*

B. Whether Gonzales' Payment of the Tax At Issue Is Voluntary or Not Is Legally Irrelevant To The Right To Jury Trial Issue Because Gonzales Has Not Brought and Cannot Bring a Common Law Action

The FTB does not dispute that under common law aggrieved taxpayers were entitled to bring legal actions against tax collectors for the recovery of involuntarily paid taxes and, in those cases, were entitled to jury trials. However, as argued above, this is not an action brought under a common law theory of recovery and, accordingly, the issue of whether the tax payment at issue was voluntary or not is irrelevant to the determination of the right to jury trial issue. Whether the tax payment at issue was voluntary or not would only be relevant if Gonzales had actually brought a common law action against the FTB.[10]

C. The Court of Appeal's Reliance On *United States v. New Mexico* Is Misplaced

In *United States v. New Mexico* (10th Cir.1981) 642 F.2d 397 (*New Mexico*), the United States sued the State of New Mexico for declaratory and injunctive relief and restitution because the state had assessed and collected an allegedly unauthorized tax against a private contractor, working for the United States, who ultimately passed the tax on to the federal government. (*Id.* at pp. 398-400.) The State of New Mexico requested a jury trial and the trial court denied the request. (*Id.* at p. 399.)

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[10] In any event, Gonzales cannot successfully bring such a common law action. Specifically, Gonzales cannot plead and prove that: (i) his payment of the tax at issue was a result of the requisite duress, coercion or compulsion, as described in *Southern Service*, *supra*, 15 Cal.2d at pp. 7-9; and (ii) he has complied with the necessary procedural prerequisites under the Government Claims Act (Gov. Code, § 900 et seq.) for bringing such an action against the state.

On appeal, the Tenth Circuit held that the suit was in effect an action for a tax refund and found that the taxpayer had an historical right to a jury trial in such an action, stating: "[w]e are persuaded 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 p 401.)

The Tenth Circuit's decision in *New Mexico* relies solely upon Kirst, *supra*, 126 U.Pa. at p. 1281. (*New Mexico*, *supra*, 642 F.2d at pp. 400-401.) The thrust of Kirst is criticism of the United States Supreme Court's decision in *Atlas Roofing Co. v. Occupational Safety & Health Review Commission* (1977) 430 U.S. 442. Specifically, the article contends that the *Atlas* court, in holding that there is no right to a jury in administrative public rights enforcement proceedings (i.e., a public rights exception), failed to examine common law earlier than 1856 in order to determine the correct interpretation of the Seventh Amendment. (Kirst at pp. 1281-1283.) The Kirst article argues that common law actions against tax collectors support the proposition that there was no public rights exception under the common law. (*Id.* at pp. 1311-1338.)

Because Kirst is not concerned with the right to a jury trial in a statutory tax refund action, the article's legal authority and analysis is limited to actions under common law. Again, the FTB does not dispute that under common law aggrieved taxpayers were entitled to bring legal actions against tax collectors for recovery of involuntarily paid taxes and, in those cases, were entitled to jury trials. Because this case is a statutory tax refund action, unknown at common law, *New Mexico* and Kirst are inapposite and of no help in performing the appropriate analysis regarding whether Gonzales is entitled to a jury trial for his section 19382 refund action.

CONCLUSION

For the reasons stated, this Court should reverse the Court of Appeal and hold that Gonzales is not entitled to a jury trial for his tax refund suit pursuant to section 19382.

Dated: February 2, 2010

Respectfully submitted,

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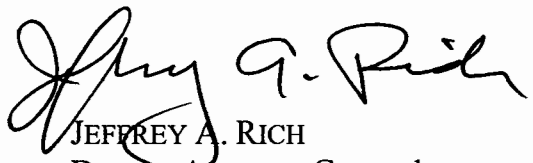

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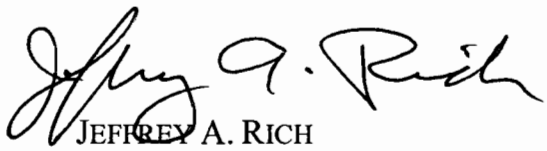
CERTIFICATE OF COMPLIANCE

I certify that the attached Petitioner's Opening Brief on the Merits uses a 13 point Times New Roman font and contains 5,807 words.

Dated: February 2, 2010

EDMUND G. BROWN JR.
Attorney General of California



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DECLARATION OF SERVICE BY OVERNIGHT COURIER

Case Name: **Franchise Tax Board v. The Superior Court of the City and County of San Francisco**

Tom Gonzales, as Personal Representative, etc. (Real Party in Interest and Respondent)

Supreme Court of the State of California Case No. S176943

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is: 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550.

On February 2, 2010, I served the attached **PETITIONER'S OPENING BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope with the **Golden State Overnight Courier**, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on February 2, 2010, at Sacramento, California.

Lisa J. Talani
Declarant

Lisa J. Talani
Signature

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