

RECEIVED APR 30 2013

**VIA UPS NEXT DAY DELIVERY**

April 24, 2013

Chief Justice Tani Gorre Cantil-Sakauye  
and Associate Justices  
SUPREME COURT OF CALIFORNIA  
350 McAllister Street  
San Francisco, California 94102-4797

Re: *Loeffler v. Target Corporation*  
No. S173972

Dear Chief Justice Cantil-Sakauye and Associate Justices:

On behalf of Target Corporation, this letter responds to Plaintiffs' April 22, 2013 letter-brief regarding the doctrine of primary jurisdiction.

**1. The parties agree — the primary jurisdiction doctrine does not apply here.**

Although for somewhat different reasons, the parties agree that the primary jurisdiction doctrine does not apply to this case. In Target's view, section 32 of article XIII of the California Constitution deprives the courts of jurisdiction over tax issues except as to those matters for which the Legislature expressly creates a judicial remedy.<sup>1</sup> Because the Legislature has not created a judicial a remedy for the claims asserted in this case, there is no claim cognizable in the courts. And because the

---

<sup>1</sup> In Revenue and Taxation Code section 6932, the Legislature stated unequivocally that "[n]o suit or proceeding shall be maintained in any court for the recovery of any amount alleged to have been erroneously or illegally determined or collected unless a claim for refund or credit has been duly filed pursuant to Article I (commencing with Section 6901)." Because the collection of sales tax reimbursement is inextricably intertwined with the retailer's payment of sales tax, section 6932 must be read to apply to the plaintiffs in this case as well as to retailer-taxpayers.

Chief Justice Tani Gorre Cantil-Sakauye  
and Associate Justices  
SUPREME COURT OF CALIFORNIA  
April 24, 2013  
Page Two

primary jurisdiction doctrine can apply only where there is *secondary* jurisdiction in the courts (that is, after the regulatory agency has spoken), it is clear that the doctrine does not apply here. In Plaintiffs' view, the doctrine should not be applied for various policy reasons — but at the end of the day, the result is the same.

**2. The parties agree — the issues pending before this Court should be decided first.**

Target has maintained throughout these proceedings that section 32 of article XIII of the California Constitution deprives the courts of jurisdiction over the tax issues at the heart of Plaintiffs' claims. The trial court agreed with Target and so did the Court of Appeal. Plaintiffs disagree, but recognize that even where the doctrine of primary jurisdiction applies, its function is to enhance, not replace, judicial decision-making and that, ultimately, this Court will have to determine the constitutional issue. Whatever differences there are in our reasoning, the result again is the same — the primary jurisdiction doctrine should not be used to derail the current proceedings.

**3. If this Court disagrees and pursues the primary jurisdiction doctrine, it is important to recognize that there is indeed a “mechanism” for Plaintiffs to obtain a decision by the State Board of Equalization.**

As we explained in our April 22 letter-brief, if this Court decides there is or might be a “claim originally cognizable in the courts” for a refund of sales tax reimbursement collected by a retailer and paid over to the State Board of Equalization, that “claim” unquestionably would be within the special competence of the State Board of Equalization. The Board, and only the Board, is authorized to determine the propriety of the particular sales tax at issue.


As the Board itself pointed out in the amicus brief filed in this Court on April 15, 2010, there are remedies Plaintiffs could have pursued with the Board. “First, the Legislature . . . has committed to [the Board] responsibility for maintaining the integrity of the sales and use tax system. The law presumes [the Board] will fulfill that duty. (Civ. Code, § 3529.) Second, . . . ‘The mission of the State Board of Equalization is to serve the public through fair, effective, and efficient tax administration.’ [Citation.]” (SBE Amicus Brief, pp. 42-43.)

Chief Justice Tani Gorre Cantil-Sakauye  
and Associate Justices  
SUPREME COURT OF CALIFORNIA  
April 24, 2013  
Page Three

In addition, said the Board, under “Government Code section 11340.6, interested persons may petition [the Board] to either amend its regulations or promulgate new ones. Thus, [Plaintiffs] could have asked [the Board] to address their issues in the form of a rulemaking proceeding. Had [Plaintiffs] done so, [the Board] would have been required to either reject the petition or initiate a rulemaking proceeding. . . . [¶] Also, Government Code section 11350 permits interested parties to contest the facial validity of existing [Board] regulations by bringing an action for declaratory relief. [Plaintiffs] could have brought a declaratory relief action to determine if the provisions of Regulation 16-3 regarding to-go sales comported with Section 6359. . . .” (SBE Amicus Brief, p. 43.)

One way or the other, Plaintiffs could obtain an opinion from the Board about whether Target was and is entitled to collect sales tax reimbursement for hot coffee to-go.

Respectfully submitted,



Miriam A. Vogel

cc: Per attached proof of service.

## AMENDED PROOF OF SERVICE

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

I further declare that on April 25, 2013, I served a copy of:

### **TARGET CORPORATION'S RESPONSE TO PLAINTIFFS' APRIL 22, 2013 LETTER-BRIEF REGARDING THE DOCTRINE OF PRIMARY JURISDICTION**

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

I am readily familiar with Morrison & Foerster LLP's practice for collection and processing of correspondence for mailing with the United States Postal Service, and know that in the ordinary course of Morrison & Foerster LLP's business practice the document(s) described above will be deposited with the United States Postal Service on the same date that it (they) is (are) placed at Morrison & Foerster LLP with postage thereon fully prepaid for collection and mailing.

Joseph J. M. Lange  
Lange & Koncius, LLP  
222 North Sepulveda Boulevard, Suite 1560  
El Segundo, CA 90245

*Attorneys for Plaintiff and Appellant*  
Kimberly Loeffler, et al.

Jeffrey Alan Koncius  
Lange & Koncius, LLP  
8648 Wilshire Boulevard  
Beverly Hills, CA 90211

*Attorneys for Plaintiff and Appellant*  
Kimberly Loeffler, et al.

Leslie A. Bailey  
Public Justice, P.C.  
555 Twelfth Street, Suite 1620  
Oakland, CA 94607

*Attorneys for Plaintiff and Appellant*  
Kimberly Loeffler, et al.

Arthur H. Bryant  
Trial Lawyers for Public Justice  
555 Twelfth Street, Suite 1620  
Oakland, CA 94607

*Attorneys for Plaintiff and Appellant*  
Kimberly Loeffler, et al.

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

Executed at Los Angeles, California, April 25, 2013.

C. Bibeau  
(typed)

(signature)

la-1207056