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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

ASHOK V. PARMAR et al., Plaintiffs, Cross-defendants and Appellants, v. BOARD OF EQUALIZATION, Defendant, Cross-complainant and Appellant.	B215789 (Los Angeles County Super. Ct. No. BC379013)

APPEALS from a judgment and postjudgment order of the Superior Court of Los Angeles County, Jane L. Johnson, Judge. The judgment is affirmed in part and reversed in part. The postjudgment order is affirmed in part, reversed in part and remanded.

Reed Smith, Margaret M. Grignon, Marty Dakessian and Zareh A. Jaltorossian, for Plaintiffs, Cross-defendants and Appellants.

Edmund G. Brown Jr., Kamala D. Harris, Attorneys General, Paul D. Gifford, Senior Assistant Attorney General, Felix E. Leatherwood and Ronald N. Ito, Deputy Attorneys General for Defendant, Cross-complainant and Appellant.

Ashok V. Parmar, Purnima A. Parmar and Mahinder Parmar (collectively the Parmars) sued the California State Board of Equalization (Board) for a refund of cigarette

* Pursuant to California Rules of Court, rules 8.1100 and 8.1110, this opinion is certified for publication with the exception of parts 3 and 4 of the discussion.

and tobacco taxes paid in part by them and in part on their behalf by their closely-held corporation, Santos Agency, Inc. (Santos). Following a bench trial, the trial court found the taxes had been unlawfully assessed against the Parmars individually and granted the Parmars' request for a refund of $69,762.95. The court also awarded the Parmars more than $600,000 in attorney fees under Code of Civil Procedure section 1021.5, finding the successful litigation had resulted in the enforcement of an important right affecting the public interest.

On appeal the Board primarily contends the Parmars lack standing to recover the taxes paid by Santos on their behalf. We agree. Pursuant to section 30407 of the Cigarette and Tobacco Products Tax Law (Rev. & Tax. Code, § 30001 et seq.), only the party who paid the tax can obtain a refund. Accordingly, we reverse the judgment to the extent it awards the Parmars more money than they actually paid in cigarette and tobacco taxes and affirm it in all other respects.

Both the Board and the Parmars also appeal from the postjudgment order awarding attorney fees. In the unpublished portion of our opinion we affirm the postjudgment order to the extent it finds attorney fees were authorized in this case, but remand to the trial court to reconsider the amount of fees awarded.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Parties*

Purnima and Mahinder Parmar are officers and shareholders of Santos. Ashok Parmar is a shareholder and a director of the company.[1] The Parmars established Santos in 1990 to import items from India and to distribute them to Indian grocery stores. Among the goods Santos imported and distributed were hand-rolled tobacco cigarettes called "beedies."

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1 Ashok and and Purnima Parmar are married. Mahinder Parmar is Ashok Parmar's brother.

The Board is a California agency authorized to administer the provisions of the Cigarette and Tobacco Products Tax Law (Rev. & Tax. Code, § 30001 et seq.),[2] which imposes a tax on distributors of cigarettes and tobacco products. (§ 30008.) The law requires a distributor to collect the tax from the purchaser of the cigarette or tobacco product and remit the tax collected to the Board. (§ 30108, subd. (a).)

2. *Santos's Suspension*

In October 1992 Santos's corporate status was suspended for failure to pay franchise taxes and to submit certain required forms. During the period of its suspension Santos continued to import and distribute tobacco products, including beedies, but did not collect cigarette and tobacco taxes from its customers or file distributor returns. The Parmars claim they were unaware of the suspension until late 1994 or early 1995, when their new accountant discovered it. With the assistance of their new accountant, the Parmars completed and filed all required forms for the years 1993 through early 1995, paid the delinquent franchise taxes, and on March 31, 1995 applied to the Secretary of State for a certificate of revivor. Santos's corporate status was revived on April 3, 1995. Since that date Santos has remained in good standing.

3. *The Tobacco Audits of Santos and the Notices of Determination*

Beginning in 1997 the Board conducted two cigarette and tobacco tax audits of Santos, one for the period December 19, 1993 through September 13, 1994; the second for the period December 19, 1994 through March 8, 1995. The Board's auditors determined that Ashok Parmar, as the principal operator of Santos during its suspension, owed $87,647 in cigarette and tobacco distribution taxes plus $41,549.96 in interest and $30,676.45 in penalties.[3] Accordingly, on October 7, 1998 the Board served a notice of determination on Ashok Parmar advising him of his personal liability for $159,873.41 in

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2 Statutory references are to the Revenue and Taxation Code unless otherwise indicated.

3 Section 30224 authorizes imposition of a 25 percent penalty if failure to pay tax is due to fraud or intent to evade the law or authorized use regulations.

cigarette and tobacco distribution taxes, inclusive of interest and penalties, for the period December 19, 1993 through March 8, 1995.

4. *Ashok Parmar's First Administrative Appeal of the Assessment*

On November 4, 1998 Ashok Parmar filed a petition for redetermination to appeal the October 7, 1998 notice of determination. He argued the Board's calculations were erroneous and the fraud and evasion penalties were unwarranted. In addition, at the administrative appeal conference, he argued the tax liability was unlawfully assessed against him individually, rather than against Santos, which had distributed the beedies during its suspension.

Following the administrative appeal conference, the Board issued a decision recommending a new audit. The Board also recommended that, following the new audit, new notices of determination be issued to each of the Parmars as individuals or as members of a de facto partnership since each of the Parmars had operated the business and had been responsible for distributing the taxable items during Santos's corporate suspension. In addition, the Board found the fraud and evasion penalties were justified.

5. *The Reaudit and the Second Administrative Appeal of the Assessment*

After the reaudit, in August 2000 the Board issued adjusted notices of determination on each of the Parmars as individuals and as "partners in Santos" and to Santos, "a partnership," notifying each of them of their liability for $69,147.00 in taxes (account number CR ET 02-001276), plus $46,935.13 in interest and $24,201.45 in penalties. Notices of determination were also issued to the Parmars as individuals and partners in Santos for $615.95 (account No. CP ET 50-001877), plus interest and penalties. The Board did not issue a notice of determination to Santos as a corporation.[4]

In September 2000 the Parmars filed a petition for redetermination appealing the August 2000 notices of determination. On February 18, 2004 the Board issued a decision and recommendation finding the August 2000 notices of determination correct and

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[4] The Board is now barred from issuing notices of determination to Santos for the disputed years by the statute of limitations. (See § 30207.)

properly served on the Parmars as individuals. The Board rejected the Parmars' contention Santos should have been assessed, not each of them.

On March 15, 2004 the Parmars requested an oral hearing before the Board. Following the August 24, 2004 hearing, the Board affirmed the February 18, 2004 decision, finding the adjusted August 2000 notices of determination were properly issued to the Parmars as individuals and as partners in a partnership even though Santos had been revived as a corporation at the time of the assessment. The Parmars' petition for rehearing was denied.

6. *Payment of the Taxes and the Board's Denial of a Refund*

From June 2005 through July 2006 Santos issued checks to the Board totaling $68,262.28, which the Board credited to the Parmars' tax liability as the Parmars had requested.[5] In addition, the Board levied on the Parmars' joint checking accounts in the amount of $1,500.08, which it also credited to the Parmars' tax account. Neither the Parmars nor Santos paid any of the interest or penalties assessed against the Parmars. The Parmars' administrative claims for a refund were denied as being without merit.

7. *The Instant Refund Action*

On October 11, 2007 the Parmars filed the instant action seeking a refund of the $69,762.95 in cigarette and tobacco taxes paid in part by them and in part by Santos and a declaratory judgment as to the amount of taxes, interest and penalties owed. The Board, for its part, filed a cross-complaint against the Parmars to recover unpaid interest and penalties. Santos was not a party to the action.

The Board and the Parmars filed cross-motions for summary judgment, or in the alternative, summary adjudication. The Board argued the Parmars lacked standing to recover any monies paid by Santos on their behalf pursuant to section 30407. The Parmars argued they had been improperly assessed; it was Santos, not each of them, that was responsible for the taxes. The court denied both motions. The court rejected the

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5 There is no dispute the monies paid by Santos came from its corporate account, and no evidence that they were the Parmars' personal, rather than corporate, funds.

Board's standing argument on the ground it was not supported by the language of section 30407. Moreover, the court ruled, the argument was "without merit" because the Board had credited the Parmars' account with Santos's payments. As for the Parmars' motion, the court appeared to agree that Santos, not the Parmars, was liable for all taxes incurred during its suspension, but ruled a triable issue of fact existed as to whether Santos was acting as a corporation when it distributed the tobacco products during its suspension or whether one or more of the Parmars were acting as individual distributors.

During the bench trial, the Board again argued the Parmars lacked standing to recover any amount paid by Santos on their behalf. The Parmars, on the other hand, maintained their standing to sue and argued they had been improperly assessed as individuals based on a 45-year-old illegal and unpublished internal Board policy of assessing individuals for taxes and fees incurred by their closely-held corporation during the corporation's suspension.

In a lengthy statement of decision, the court determined the Parmars, as the parties assessed, had standing to bring a refund action for the full amount of the taxes paid, including those paid by Santos, and, in any event, having credited Santos's payments to the Parmars' personal accounts, the Board was estopped from claiming otherwise. The court also found the Board had erred in assessing cigarette and tobacco taxes against the Parmars individually rather than against Santos, which had been revived and in good standing at the time of the tax assessments. In light of its ruling that the Parmars had been improperly assessed, the court dismissed the Board's cross-complaint for interest and penalties as moot.

8. *Attorney Fees*

The Parmars moved for $1,392,577.40 in attorney fees—actual fees of $773,643 with a 1.8 multiplier—pursuant to Code of Civil Procedure section 1021.5 on the ground the successful outcome of the case had resulted in the enforcement of an important right affecting the public interest, namely, the eradication of a long-standing and illegal Board policy of assessing individual shareholders of a revived closely-held corporation for taxes incurred while the corporation was suspended. The trial court agreed attorney fees were

authorized and appropriate under the circumstances and awarded the Parmars $627,796.74 in attorney fees.

DISCUSSION

1. *The Parmars Have Standing To Recover in a Refund Action Only the Amount They Actually Paid, Not the Amount Santos Paid on Their Behalf*

a. *Section 30407*

Section 30407 of the Cigarette and Tobacco Products Tax Law provides, "A judgment shall not be rendered in favor of the plaintiff in any action brought against the board to recover any amount paid when the action is brought by or in the name of an assignee of the person making the payment or by any person other than the person making the payment." The Parmars insist section 30407 simply prohibits the assignment of a refund action. That limited interpretation, however, is contradicted by the plain language of the statute. (See *Day v. City of Fontana* (2001) 25 Cal.4th 268, 272 [absent ambiguity in statute, "we presume the lawmakers meant what they said, and the plain meaning of the language governs"]; *People v. Lawrence* (2000) 24 Cal.4th 219, 230-231 [same].) If section 30407 simply prohibited the assignment of a refund action, the statute would have concluded with the prohibition against recovery by an assignee and would not have included the disjunctive "or" followed by additional language prohibiting recovery in a refund action "by any person other than the person making the payment." (See *Manufacturers Life Ins. Co. v. Superior Court* (1995) 10 Cal.4th 257, 274 [statutory interpretations that make terms meaningless or inoperative are to be avoided]; *Palos Verdes Faculty Assn. v. Palos Verdes Peninsula Unified School Dist.* (1978) 21 Cal.3d 650, 659 [same]; *Select Base Materials, Inc. v. Board of Equalization* (1959) 51 Cal.2d 640, 645 [effect should be given whenever possible to every word and phrase of a statute so that no part is left without meaning].)

Although the relevant language in section 30407 has not been addressed in any published appellate court decision, the Supreme Court interpreted nearly identical language in a similar tax statute in *Easton v. County of Alameda* (1937) 9 Cal.2d 301 (*Easton*). In *Easton* a real property owner brought a refund action to recover excess

property taxes paid by its tenant pursuant to a lease agreement. Like the Parmars, the property owner argued it had standing to proceed in a refund action because it was the party assessed and thus the one legally responsible for paying the tax. The Court disagreed. Relying on statutory language in former Political Code section 3804 prohibiting recovery in a refund action when the action is "brought by an assignee of the person paying the tax or by any person other than the person who has paid the tax,"[6] the Court concluded only the party who paid the tax could obtain a refund. The Court explained the language "show[s] a legislative intention to allow tax refunds only to those persons who pay the taxes claimed to have been erroneously assessed. The statute operates to benefit 'all persons who have paid taxes they are not legally bound to pay' [citation] but does not allow a recovery by a property owner whose taxes have been paid by someone else under a contract to do so. In that case, the property owner has parted with nothing and he has no valid claim for a refund." (*Easton,* at pp. 303-304.)[7]

Easton, supra, 9 Cal.2d 301 was decided more than two decades before the Legislature enacted section 30407 in 1959. "When legislation has been judicially construed and a subsequent statute on a similar subject uses identical or substantially similar language, the usual presumption is that the Legislature intended the same construction . . . ." (*People v. Lopez* (2003) 31 Cal.4th 1051, 1060; accord, *People ex rel. Gwinn v. Kothari* (2000) 83 Cal.App.4th 759, 769 ["the Legislature is deemed to have acted with knowledge of existing statutes and judicial decisions"]; *In re Jerry R.* (1994)

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6 Like section 30407, former Political Code section 3804 provided, "'In no case shall any judgment be rendered in favor of plaintiff in any action brought for the enforcement or allowance of any rights or claims under this section . . . if the said action be brought by an assignee of the person paying said tax, or by any person other than the person who has paid the tax . . . .'" (*Easton, supra,* 9 Cal.2d at pp. 302-303.)

7 At oral argument the Parmars emphasized that the tenant in *Easton, supra,* 9 Cal.2d 301 had paid the property tax pursuant to a provision in his lease agreement and attempted to distinguish a contractual obligation to pay the taxes of another from those situations in which the tax is paid gratuitously on another's behalf. As discussed, however, the holding in *Easton* pertains to *who* paid the tax, not the reason for the payment. (*Id.* at pp. 303-304.)

29 Cal.App.4th 1432, 1437; see *People v. Herrera* (1998) 67 Cal.App.4th 987, 993.) We presume the Legislature was aware of the *Easton's* interpretation of a substantially similar statute and intended the same construction for section 30407.

Our analysis is also reinforced by those judicial decisions construing section 5140,[8] the successor to the statute interpreted in *Easton*. (See, e.g., *Grotenhuis v. County of Santa Barbara* (2010) 182 Cal.App.4th 1158, 1165; *IBM Personal Pension Plan v. City and County of San Francisco* (2005) 131 Cal.App.4th 1291, 1305 (*IBM Personal*); *Mayhew Tech Center, Phase II v. County of Sacramento* (1992) 4 Cal.App.4th 497, 510.) In each case the appellate court followed *Easton* in holding that the person who paid the property tax has standing to recover in a refund action only the money he or she paid. (See, e.g., *Grotenhuis,* at p. 1165 [where excess property taxes were paid in part by the landlord and in part by the tenant, each only had standing to recover the amount it paid; "Grotenhuis may not sue to recover excess property taxes paid by someone else, such as his landlord, who pays the tax by design or mistake"]; *IBM Personal,* at p. 1305 [pension plan prohibited under § 5140 from recovering property tax refund because it was not the party who paid the tax]; *Mayhew Tech Center,* at p. 510 [state not entitled to refund of taxes paid to county by property owner because state did not pay the taxes, property owner did].)

The Parmars attempt to distinguish section 5140 and the judicial decisions interpreting it by claiming property tax is inherently different from the distribution taxes at issue in this case. Property tax, they explain, is assessed on the property, not the person: "Since the property assessed with the tax cannot seek a refund, multiple persons or entities could claim the right to a refund. [I]n contrast, cigarette and tobacco taxes are

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8 Section 5140, which applies to property tax cases, provides, "The person who paid the tax, his or her guardian or conservator, the executor of his or her will, or the administrator of his or her estate may bring an action only in the superior court . . . against a county or a city to recover a tax which the board of supervisors of the county or the city council of the city has refused to refund on a claim pursuant to Article 1 (commencing with Section 5096) of this chapter. No other person may bring such an action; but if another should do so, judgment shall not be rendered for the plaintiff."

assessed against a particular person, and thus it is the person assessed as the distributor that is entitled to a refund of the taxes paid. The possibility of multiple refund claims, which a property tax assessor would face, is not faced by the Board as to cigarette and tobacco product taxes."

The proffered distinction is not persuasive. Even assuming inherent differences between real property taxes and the instant distribution tax, the question in any refund action is not the nature of the property, but the person who paid the tax. The difficulty in sorting out who may be entitled to the refund is the reason numerous tax statutes, like section 30407, prohibit assignment of a refund action as well as limit who may recover.[9] As the court explained in *IBM Personal, supra,* 131 Cal.App.4th at page 1305, highlighting section 30407 among other tax statutes, "The reason these tax statutes impose such a restrictive standing requirement is evident. This limitation frees the taxing authority from the burden . . . of untangling a web of agreements and/or accounts in order to ascertain who is the proper recipient of any refund due." Property tax is not unique in this aspect. As the instant case attests, competing claims may arise any time someone pays the tax on behalf of the assessed party, regardless of the nature of the property taxed.[10]

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9 In *IBM Personal, supra,* 131 Cal.App.4th at page 1305, the court identified 16 statutes in addition to section 5140, including section 30407, that limit standing to recover in a tax or fee refund action to those who paid the tax: Sections 6937 (sales and use tax), 8152 (motor vehicle fuel license tax), 9175 (use fuel tax), 11577 (private railroad car tax), 13108 (insurance tax), 32418 (alcoholic beverage tax), 38617 (timber yield tax), 30407 (cigarette and tobacco distribution tax), 40131 (energy resources surcharge), 41114 (emergency telephone users surcharge), 43478 (hazardous substances tax), 45708 (integrated waste management fee), 46258 (oil spill response, prevention and administration fees), 50149 (underground storage tank maintenance fee), 55248 (fee payer), and 60548 (diesel fuel tax).)

10 In this way, the standing limitation in the tax statutes are exceptions to the ordinary rules authorizing a cause of action to be brought "in the name of the real party in interest, except as otherwise provided by statute." (Code Civ. Proc., § 367; see *IBM Personal, supra,* 131 Cal.App.3d at p. 1305 ["[a]lthough the Plan may be the real party in

Similarly without merit is the Parmars' attempt to distinguish between section 5140 and 30407 on the ground the former specifies who can sue for a refund, while the latter merely limits recovery in the action to those persons who paid the tax. Whether the issue is framed as one of standing to prosecute a refund action or as one authorizing recovery in the action, the effect is the same: Only those persons who paid the disputed tax may recover their excess payments in a refund action. (*Easton, supra,* 9 Cal.2d at p. 303; see *IBM Personal, supra,* 131 Cal.App.4th at p. 1304 [citing § 30407 as similar to § 5140 in limiting recovery in refund action to those persons who paid the tax]; *Mayhew Tech Center, Phase II v. County of Sacramento, supra,* 4 Cal.App.4th at p. 510.)

Our opinion in *Lincoln National Life Insurance Co. v. State Board of Equalization* (1994) 30 Cal.App.4th 1411 (*Lincoln*) is not to the contrary. In *Lincoln* an insurance company that managed an employer's self-insured benefit plan brought an action for a refund of franchise taxes it had paid after being assessed insurance taxes based on gross premiums collected. The employer filed a complaint in intervention supporting the insurance company's claim for a tax refund. The trial court found the insurance company had been improperly assessed and was entitled to a refund of the taxes it had paid. In addition, the trial court awarded costs to both the insurance company and the employer as the prevailing parties in the action. We reversed the award of costs to the employer, holding that the employer, who had not paid the tax, was prohibited from recovering a judgment in its favor under section 13108. (*Lincoln,* at p. 1424, citing § 13108, subd. (a) ["'[a] judgment shall not be rendered in favor of the plaintiff when the action is brought by or in the name of an assignee of the insurer paying the tax, interest, or penalties, or by any person other than the insurer that has paid the tax, interest, or penalties'"].)

Seizing on the observation in *Lincoln, supra,* 30 Cal.App.4th at page 1424 that the employer, "which was not the party against whom the tax was assessed or the insurer who actually paid the required taxes, is barred from winning a judgment herein," the

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interest as to the taxes and penalties paid by Chase, the Plan's failure to pay the taxes barred it from bringing this refund action"].)

Parmars contend *Lincoln* stands for the proposition that a party has standing to recover in a refund action if it was either assessed or paid the taxes. We held no such thing. In a case in which there was no issue whether assessment alone was sufficient to confer standing to obtain a refund, we simply commented the employer was not even the entity against whom the taxes had been assessed, let alone the party that had paid the tax. (See *Golden Gateway Center v. Golden Gateway Tenants Assn.* (2001) 26 Cal.4th 1013, 1029 [decision "'is not authority for everything said in the . . . opinion but only "for the points actually involved and actually decided"'"]; *Santisas v. Goodin* (1998) 17 Cal.4th 599, 620 [same]; *Hills v. Superior Court* (1929) 207 Cal. 666, 670 [statements or conclusions not necessary to the decision are not to be regarded as authority].)

The Parmars protest it elevates form over substance to look to the source of the funds as the basis to decide standing to recover in a refund action. After all, they argue, "the corporation may have provided the funds to the Parmars to pay their individual tax liability but it unquestionably did not pay the tax assessed—the Parmars did." It appears the Parmars want it both ways. They insist on differentiating between themselves and the corporation when determining the proper party assessed, but not when determining the proper party to bring the refund action. In the latter case, they assert, they and Santos are "one and the same." We reject such a dubious proposition. Absent any evidence the Parmars were the alter egos of Santos—a proposition the Parmars firmly dispute and for which the trial court found no supporting evidence—the Parmars may only recover the amount they paid. (§ 30407; see *Grotenhuis v. County of Santa Barbara*, *supra*, 182 Cal.App.4th at p. 1165 [absent evidence that Grotenhuis was alter ego of corporation, "Grotenhuis lacked standing to seek the refund of [property] taxes paid by corporation"].)

b. *Equitable estoppel*

The Parmars argued, and the trial court agreed, the Board is equitably estopped from raising the Parmars' lack of standing to recover in a refund action the monies Santos paid on its behalf. To establish equitable estoppel it must be shown: (1) The party to be estopped was apprised of the facts and intended his or her conduct to be acted upon or so acted in a way that the party asserting the estoppel had a right to believe it was so

intended; (2) the other party was ignorant of the true state of facts; and (3) he or she relied on the conduct to his or her injury. (*Strong v. County of Santa Cruz* (1975) 15 Cal.3d 720, 725.)

"The government may be bound by an equitable estoppel in the same manner as a private party when the elements requisite to such an estoppel against a private party are present and, in the considered view of equity, the injustice which would result from a failure to uphold an estoppel is of sufficient dimension to justify any effect upon public interest or policy which would result from the raising of an estoppel." (*City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 496-497; accord, *J.H. McKnight Ranch, Inc. v. Franchise Tax Bd.* (2003) 110 Cal.App.4th 978, 991.) Still, "'[t]he general rule is that estoppels will not be invoked against the government or its agencies except in rare and unusual circumstances.'" (*City of Santa Cruz v. Pacific Gas & Elec. Co.* (2000) 82 Cal.App.4th 1167, 1177.) Indeed, "it is the unusual case in which estoppel will be applied in tax cases; the case must be clear and the injustice great . . . ." (*U.S. Fidelity & Guaranty Co. v. State Bd. of Equalization* (1956) 47 Cal.2d 384, 389.)

The Parmars argue estoppel is appropriate because the Board never raised the standing issue in the administrative proceedings. That argument is one of forfeiture, not estoppel. (See *In re S.B.* (2004) 32 Cal.4th 1287, 1293 [failure to raise issue at earliest opportunity results in forfeiture of question in later proceedings]; *Doers v. Golden Gate Bridge etc. Dist.* (1979) 23 Cal.3d 180, 184-185, fn. 1 [same].) Even if forfeiture, which generally applies to the taxpayer (§ 30403 [claimant may bring action for refund based on "grounds set forth in the [administrative] claim"]), were also extended to positions taken by the Board to deny recovery, the doctrine need not be applied here, where the claim involves the legal interpretation of section 30407 based on undisputed facts. (See *Fox v. State Personnel Bd.* (1996) 49 Cal.App.4th 1034, 1039 [forfeiture doctrine not applied when question involves pure question of law such as statutory interpretation based on undisputed facts]; cf. *Parr-Richmond Industrial Corp. v. Boyd* (1954) 43 Cal.2d 157, 165 [distinguishing between exhaustion requirements when claim involves agency's valuation of property rather than legality of assessment].)

Second, the Parmars contend the Board is estopped from raising its standing to recover monies paid by Santos because the Board accepted the payment and credited the Parmars' tax account. Contrary to the Parmars' contention, nothing prohibits the Board from accepting payment of taxes from someone other than the responsible party nor does crediting the taxpayer's account with monies paid by someone else on the taxpayer's behalf preclude the Board from relying on section 30407's standing requirements. Moreover, although no notice of determination was issued to Santos as a corporation, there is no dispute by either the Board or Santos that the corporation should have been the entity assessed and, if properly assessed, owed the money it paid. This is not, therefore, the "rare or unusual" case in which equity demands application of an estoppel against a government agency.

c. *Section 30361*

Section 30361 provides, "If the board determines that any amount not required to be paid under this part has been paid by any person, the board shall set forth that fact in its records and certify the amount collected in excess of the amount legally due and the person from whom it was collected or by whom it was paid. The excess amount collected or paid shall be credited by the board on any amounts then due and payable from the person from whom the excess amount was collected or by whom it was paid under this part, and the balance shall be refunded to the person, or his or her successors, administrators, or executors. . . ."

The trial court found section 30361 "permits a refund to the persons who accounts were credited, in this case, [the Parmars]." The Parmars cited section 30361 in the trial court for this proposition, but have abandoned that argument on appeal, and for good reason. Section 30361 requires the Board to credit the person or entity who paid the tax with any excess or overpayment. It does not permit the refund of money to any person (other than the taxpayer's successor, administrators or executors) who did not pay the tax. Nothing in section 30361 undermines section 30407 or transforms the Board's decision to credit the Parmars' individual accounts to an authorization permitting the Parmars to recover in a refund action monies they did not pay.

2. *The Parmars Were Properly Awarded a Refund of the Monies They Paid*

The trial court found Santos was responsible for the disputed cigarette and tobacco taxes based on its distribution of tobacco products during its suspension. The court explained Santos's status as a suspended corporation did not relieve it of its tax liability and that it, not its principals, remained responsible for actions undertaken during its suspension. The court relied on *U.S. v. Standard Beauty Supply Stores, Inc.* (9th Cir. 1977) 561 F.2d 774, 776-777, which held the suspension of the corporation under section 23301 for failure to pay its franchise taxes does not operate to make its principals liable for its tax obligations incurred during its suspension: "It should be emphasized that, while section 23301 suspends the corporation's powers, the corporation continues to exist. Actions that would have been considered those of the corporation before the suspension should ordinarily continue to be viewed as actions of the corporations. If the corporation acts, it is the corporation, not its agent, officers, or shareholders, who should be held privately responsible for such actions." (*Standard Beauty Supply*, at pp. 776-777.) The court also relied on section 23303, which makes clear that "any corporation that transacts business or receives income within the period of its suspension or forfeiture shall be subject to tax under the provisions of this chapter."

Although the Board vigorously argued at trial the legality of its policy of assessing principals of a closely-held corporation for tax liabilities incurred by the corporation during its suspension, the Board has expressly abandoned that argument on appeal.[11]

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11 In response to the Parmars' request for judicial notice of Assembly Bill No. 2676 (Reg. Sess. 2010), which, had it been enacted, would have made principals personally liable for the distribution of taxable items by their suspended closely-held corporation, the Board states, "[I]n this appeal there is no issue raised regarding whether or not the law permits personal liability for cigarette and tobacco products tax, or any other special tax or fee, to be based solely on continued distribution of cigarettes and tobacco products during corporate suspension. Therefore, in this appeal, the proposed sales and use tax amendments to Revenue and Taxation Code section 6829 in [Assembly Bill] 2676 are not relevant to that purported issue."

In light of the Board's concession concerning the illegality of its former internal policy authorizing the assessment of individuals for the conduct of their suspended

Instead, it asserts reversal of the entire judgment is required because the trial court improperly shifted the burden to it to establish the tobacco products had been distributed by the Parmars in their individual capacities, instead of leaving the burden to prove entitlement to a refund with the Parmars as required. (See *El Dorado Oil Works v. McColgan* (1950) 34 Cal.2d 731, 744-745 [in tax refund action, taxpayer has burden of proving all facts necessary to establish its right to a refund]; *Jimmy Swaggart Ministries v. State Bd. of Equalization* (1988) 204 Cal.App.3d 1269, 1276.) The record shows otherwise.

The trial court considered whether a corporation could be held liable for the distribution of taxable items during its suspension. After concluding it could, the court next considered whether Santos distributed the items while acting as a corporation and found it had.[12] Finally, it addressed the Board's arguments that the Parmars were essentially the corporation, an argument resting largely on the allegation they had failed to observe corporate formalities. The court construed these arguments by the Board as alter ego allegations and, citing affirmative evidence provided by the Parmars, found the Parmars were not the alter egos of Santos. On this record, we have little difficulty concluding the court properly placed the burden on the Parmars to show their entitlement to a refund on the ground it was Santos that had distributed the taxable items during the relevant period.[13]

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closely-held corporations, we deny the Parmars' request for judicial notice on the ground the materials provided are not of substantial consequence to the determination of the action. (Evid. Code, §§ 452, 453, 459.)

12 All imports and purchases of the tobacco products were in Santos's name; all shipments and payments were in Santos's name. There was no evidence any of the Parmars were acting in their individual capacity in connection with the importation and distribution of the cigarette and tobacco products.

13 Because the Parmars owed no taxes for the distribution of tobacco products, the Board's claim they owe interest and penalties on their tax obligation is moot.

3. *The Trial Court Did Not Abuse Its Discretion in Awarding the Parmars Attorney Fees under the Private Attorney General Doctrine*

a. *Governing law*

Code of Civil Procedure section 1021.5 provides for an award of attorney fees "to a successful party . . . in any action which has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement, or of enforcement by one public entity against another public entity, are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any."

Code of Civil Procedure Section 1021.5 is a codification of the private attorney general doctrine, an exception to the American rule that parties are ordinarily required to pay their own attorney fees. (See *Serrano v. Unruh* (1982) 32 Cal.3d 621, 627.) The fundamental objective of the doctrine is to encourage suits effectuating a strong public policy by awarding substantial attorney fees to those who successfully bring such suits and thereby benefit a broad class of citizens. (*Woodland Hills Residents Assn., Inc. v. City Council* (1979) 23 Cal.3d 917, 933; *Consumer Cause, Inc. v. Mrs. Gooch's Natural Food Markets, Inc*. (2005) 127 Cal.App.4th 387, 400.) The doctrine's justification """rests upon the recognition that privately initiated lawsuits are often essential to the effectuation of the fundamental public policies embodied in constitutional or statutory provisions, and that, without some mechanism authorizing the award of attorney fees, private actions to enforce such important public policies will as a practical matter frequently be infeasible."""" (*Graham v. DaimlerChrysler Corp*. (2004) 34 Cal.4th 553, 565 (*Graham*).)

When, as here, the attorney fee award under Code of Civil Procedure section 1021.5 does not involve statutory construction, the trial court's decision is reviewed for abuse of discretion. (*Conservatorship of Whitley* (2010) 50 Cal.4th 1206, 1214.)

b. *The trial court did not abuse its discretion in finding the litigation had resulted in a benefit to a large class of persons*

The Board contends this litigation conferred a small benefit to the Parmars' own economic interests, but did not confer a significant benefit on the public or large class of persons. (See *DiPirro v. Bondo Corp.* (2007) 153 Cal.App.4th 150, 199-200 [""Because the public always has a significant interest in seeing that laws are enforced, it always derives some benefit when illegal private or public conduct is rectified. Nevertheless, the Legislature did not intend to authorize an award of fees under [Code Civ. Proc., §] 1021.5 in every lawsuit enforcing a constitutional or statutory right. [Citations.] The statute specifically provides for an award only when the lawsuit has conferred 'a significant benefit' on 'the general public or a large class of persons.' The trial court must determine the significance of the benefit and the size of the class receiving that benefit by realistically assessing the gains that have resulted in a particular case.'"]; *Pacific Mutual Life Ins. Co. v. State Bd. of Equalization* (1996) 41 Cal.App.4th 1153, 1165 [attorney fees not justified under Code Civ. Proc., § 1201.5 if the "public benefit gained" and the "important public right enforced" are "coincidental" to the monetary or other personal gain realized by the party seeking fees]; *Flannery v. California Highway Patrol* (1998) 61 Cal.App.4th 629, 635 [same].)

The trial court considered the extent of the benefit—a judgment declaring the Board's unwritten administrative policy illegal—and found it significant.[14] The court found the termination of a long-standing and illegal internal Board policy would affect

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14 In concluding a significant public benefit had been achieved as a result of the litigation, the trial court explained, "At its heart, this case was about challenging [the Board]'s [longstanding and] improper practice of charging individuals for taxes not paid by their suspended corporations. The Court ruled that the practice was illegal. There are 240,000 corporations subject to the tax at issue, and it defies logic to believe that none of them have been subject to the practices at issue in this lawsuit, particularly since this 'policy' has been in effect since 1965. At the very least, the nonpecuniary 'significant benefit of the disclosure of secret law and correlative interest in the disclosure of an agency's working law' has been accomplished in this lawsuit. The lawsuit therefore benefits the public at large, or a large class of persons."

not only the Parmars, but also more than 240,000 closely-held corporations subject to the cigarette and tobacco products distribution tax and 24 other similar tax and fee programs.

The Board asserts it is misleading to posit 240,000 closely-held corporations as benefitting from the trial court's ruling in this case, contending the relevant question is not the number of closely-held corporations subject to various tax and special fee programs, but the number of principals who have been improperly assessed for nonpayment of taxes after their closely-held corporations were suspended. In that regard, the Board proffered declarations from the managers of several other Board departments who directed investigations into the number of times in the last eight years[15] individuals had been assessed for the actions of their suspended closely-held corporations. Those declarations indicated only two other instances had occurred in the cigarette and tobacco products distribution context and several others in other tax programs. The Board contends the trial court erred in failing to consider those declarations; had it done so, it would have found the alleged public benefit illusory.

Although the trial court found the declarations inadmissible on the ground the declarants lacked personal knowledge of the research results presented,[16] the court also indicated it would have reached the same conclusion even if the declarations had been properly considered: "Even if the evidence were considered, at most it shows that [the Board] has been unable to locate more than two situations where individuals have been charged for taxes when their corporations were suspended; the evidence does not show that other situations do not exist." The court also found compelling the fact that the Board policy authorizing individual assessments in this context had been in effect for 45 years and concluded the invalidation of an illegal policy adopted in violation of the

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15 It appears the eight-year time frame was selected because of the eight-year statute of limitations on assessments (§ 30207), a fact highlighting the Board's position that any benefit from the decision could only inure to those who could still have been assessed within the limitations period.

16 The declarants stated only that the research cited had been conducted under their direction.

Administrative Procedures Act (Gov. Code, § 11340 et seq.) had conferred a significant nonpecuniary benefit to the public at large. (Cf. *State Bd. of Equalization v. Superior Court* (1992) 10 Cal.App.4th 1177, 1185-1186 ["[t]here is a manifest public interest in the avoidance of secret law and a correlative interest in the disclosure of an agency's working law"].)

We need not decide whether the trial court erred in sustaining the Parmars' objections to the declarations. The court's finding of a public benefit, even considering those declarations, is amply supported by evidence that the litigation resulted in the cessation of a decades-long, illegal policy. (See *Northwest Energetic Services, LLC v. California Franchise Tax Bd.* (2008) 159 Cal.App.4th 841, 878 [plaintiffs' tax refund action, which resulted in a judgment invalidating statute allowing Franchise Tax Board to levy a tax on limited liability companies registered to do business in the state regardless of income derived from state, conferred a benefit on 3,000 corporations, sufficient to warrant attorney fee award under Code Civ. Proc., § 1021.5].) On this record, we simply cannot say that the trial court's finding of a public benefit to a large class of persons was an abuse of its discretion.

4. *Remand Is Required for the Trial Court To Resolve the Contradictions in Its Findings and Calculation of the Amount of Fees To Be Awarded*

The determination of the amount of fees to be awarded under Code of Civil Procedure section 1021.5 is based on the "lodestar" method addressed in *Serrano v. Priest* (1977) 20 Cal.3d 25, 49. (*Rogel v. Lynwood Redevelopment Agency* (2011) 194 Cal.App.4th 1319, 1329.) The lodestar is the basic fee for comparable legal services in the community. (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1132.) It is determined by calculating the time spent and the reasonably hourly rate of each attorney involved in the litigation. (*Ibid.; Rogel,* at p. 1329.) That amount then may be augmented or enhanced for the purpose of compensating the attorney for contingent risk, exceptional skill or other factors. (*Ketchum,* at pp. 1131-1132.)

The Parmars sought to recover $1,392,577.40 in attorney fees—actual fees of $773,643 for 2,192.7 hours of attorney time, with a 1.8 multiplier that they alleged was

justified based upon the novel nature of the issues and the assumption by the Parmars' attorneys of a contingent risk in litigating the case. In support of their motion, the Parmars submitted the declaration of their attorney, Marty Dakessian, an experienced tax lawyer, attesting to his standard rate of $525 per hour, as well as copies of all of the attorney fee bills in the action. Dakessian also attested to the fact that attorney fees in this refund case were capped, by agreement with the Parmars, at $32,000.

The Board opposed the motion, arguing, among other things, the requested fees were unreasonable. The Board submitted the declaration of attorney Garry Greenfield, founder of a consulting firm that analyzes legal and expert witness fees. Greenfield noted that Dakessian's hourly rate had been $300 before he had changed law firms in the middle of the case and that the employment change had resulted in a substantial increase in fees. Greefield opined the $300 per hour rate was the reasonable market rate, particularly in light of the fact that Dakessian had never tried a case before and had less experience than other lawyers working on the case. After making several adjustments to the total sought by the Parmars, including deductions for block-billing, motions fees and a reduced hourly rate for Dakessian of $300 per hour, Greenfield opined the reasonable fees for the Parmars' attorneys should be no more than $418,531.16.

In addition to proffering Greenfield's declaration the Board argued the billing rates of the nine other persons who had worked on the case, attorneys and non-attorneys, were not supported by sufficient evidence.

The trial court expressly found the appropriate rate for Dakessian was $450 per hour. Yet, notwithstanding this finding, it also adopted as the lodestar the $418,531.16 amount suggested by Greenfield, which was predicated on a $300 hourly rate for Dakessian. In addition, the court expressly agreed with the Board the Parmars had provided insufficient evidence to support the billing rates for the other individuals who

had worked on the case,[17] yet the $418,531.16 adopted by the court as the lodestar includes sums based on those rates.

Not surprisingly, both the Board and the Parmars challenge the fees awarded. The Board contends the amount must be significantly reduced, noting the initial request by the Parmars for $776,343 included $489,473.00 in attorney fees the trial court found were not supported by sufficient evidence. The Parmars, for their part, contend the court made a calculation error: The court found Dakessian's hourly rate to be $450 per hour, but adopted a lodestar figure proffered by the Board's expert that calculated that rate at $300 per hour.

Our starting point in reviewing the attorney fee award is to identify the trial court's reasoning. The "'experienced trial judge is the best judge of the value of professional services render in his [or her] court" and his or her determination will not be set aside absent an abuse of the court's broad discretion in such matters. (*Serrano v. Priest*, *supra*, 20 Cal.3d at p. 49; *PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095.) In this case, however, the inconsistencies and contradictions in the order make it impossible to identify the basis for the court's adoption of $418,531.16 as the lodestar amount (absent the multiplier). Accordingly, remand is necessary for the trial court to clarify its reasoning and, if necessary, redo its calculations. On remand, the trial court may also consider what effect, if any, our decision reducing the amount awarded to the Parmars based on their limited standing has on its determination of the proper amount of attorney fees to be awarded. (See *Chavez v. City of Los Angeles* (2010) 47 Cal.4th 970, 989 ["[a]lthough fees are not reduced when a plaintiff prevails on only one of several factually related and closely intertwined claims, [citation] 'under state law as well as federal law, a reduced fee award is appropriate when a claimant achieves only limited

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17 In its order awarding fees, the court stated, "[The Board] also correctly contends that there are no facts set forth in the moving papers to support the billing rates of the various other attorneys who worked on the case. Exhibit A lists nine other persons who worked on the case, at rates varying between $75/hour and $475/hour. There is no evidence in the moving papers to support these rates."

success'"]; *Environmental Protection Information Center v. Dept. of Forestry & Fire Protection* (2010) 190 Cal.App.4th 217, 238 [same]; see also *Sokolow v. County of San Mateo* (1989) 213 Cal.App.3d 231, 249 [trial court may reduce amount of fee award "where a prevailing party plaintiff is actually unsuccessful with regard to certain objectives of its lawsuit"].)

The Board also disputes the propriety of enhancing attorney fees with a 1.5 multiplier in this case.[18] The Board contends a multiplier is unwarranted because the issue was not particularly novel; the skill or expertise of the attorneys is already encompassed by the hourly rate; and the burden of the attorney fee award will fall on the taxpayers. (See *Serrano v. Priest, supra*, 20 Cal.3d at p. 49 [identifying each of those factors as properly considered in deciding whether to adjust lodestar with a multiplier to fairly compensate attorney]; *Ketchum v. Moses, supra*, 24 Cal.4th at p. 1132 ["purpose of such adjustment is to fix a fee at the fair market value for a particular action"].) While nothing in the abstract suggests applying a 1.5 multiplier would be an abuse of discretion, we need not reach that issue. Whether to apply a multiplier to upwardly adjust the lodestar must be based on the court's determination of the amount of fees justified in the case. On remand to clarify its ruling and to recalculate the fee award, if necessary, the trial court must also decide whether a multiplier is still appropriate in the case.[19]

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18 In adjusting the lodestar with a multiplier, the trial court explained the issues were "novel, difficult, hard fought and time consuming. Plaintiffs' attorneys could not possibly have pursued this case successfully had they only been able to rely on the $32,000 cap the Plaintiffs agreed to pay. Taking those factors into consideration, but being mindful of the fact that the award against the state would ultimately fall upon the taxpayers, the court reduced the requested multiplier to 1.5."

19 In light of the trial court's finding the case achieved significant nonpecuniary objectives, a finding unaffected by our reduction of the amount of compensatory damages awarded, the trial court's intention to award substantial attorney fees in the case would seem clear. Thus, it appears the parties would do well to resolve their dispute over the amount of fees without an additional evidentiary hearing, which would require further expenditure of attorney fees and resources.

DISPOSITION

The judgment is reversed to the extent it awards the Parmars more than the $1,500.08 they paid in taxes. In all other respects, the judgment is affirmed. The postjudgment order is reversed and remanded to the trial court to clarify its findings and recalculate the attorney fee award, if appropriate. The parties are to bear their own costs on appeal.

PERLUSS, P. J.

We concur:

ZELON, J.

JACKSON, J.