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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

BENJAMIN R. DU et al., Plaintiffs and Appellants, v. FRANCHISE TAX BOARD, Defendant and Respondent.	B213971 (Super. Ct. Nos. BC363822, BC391413, BC385197)

APPEAL from judgments of the Superior Court of Los Angeles County. Malcolm H. Mackey, Judge. Affirmed in part and reversed in part with directions.

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Hochman Salkin Rettig Toscher & Perez, Charles P. Rettig, Sharyn M. Fisk and George Deroy for Plaintiffs and Appellants.

Edmund G. Brown Jr., Attorney General, Paul D. Gifford, Assistant Attorney General, W. Dean Freeman and Leslie Branman Smith, Deputy Attorneys General, for Defendant and Respondent.

Silverstein & Pomerantz, Amy L. Silverstein, Edwin P. Antolin, Johanna W. Roberts and Charles E. Olson for Steven J. Goldman and Azita Etaati as Amici Curiae on behalf of Plaintiffs and Appellants.

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* Pursuant to California Rules of Court, rules 8.1100 and 8.1110, this opinion is certified for publication with the exception of Discussion, part II.

Three couples—Benjamin and Carmela Du, Edward and Annelise Shimmon, and Paul and Patricia Mickelsen—filed complaints for income tax refunds in the superior court. They contended that the Franchise Tax Board (FTB) had improperly charged them interest on delinquent tax payments for a period of time during which interest should have been suspended pursuant to section 19116 of the Revenue and Taxation Code.[1] The FTB demurred in one action, moved for judgment on the pleadings in the other two, and prevailed in all three. The court entered judgments of dismissal, and all six plaintiffs appealed.

We affirm as to the Dus and Shimmons because they expressly waived their right to seek a refund. We reverse as to the Mickelsens, however, because they did not waive their right to seek a refund and because the facts necessary to support the FTB's other arguments are neither contained in the Mickelsens' complaint nor judicially noticeable on the record before us.

BACKGROUND[2]

When the Shimmons filed their original 1999 individual California income tax return in 2000, they reported taxable income of $1,550,340. On or about March 10, 2004, the Shimmons filed an amended 1999 return pursuant to California's "voluntary compliance initiative" (VCI) under which taxpayers who had engaged in abusive tax shelter transactions in any tax year up to and including 2002 could avoid criminal prosecution and various other penalties if they filed amended returns and paid the resulting tax and interest no later than April 15, 2004. (See §§ 19751-19754.) Taxpayers participating in the VCI could elect either of two options. Under the first option (and

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1 All subsequent statutory references are to the Revenue and Taxation Code unless otherwise indicated.

2 The following summary omits various factual and procedural details that are unnecessary to our decision. In addition, having given the parties notice and an opportunity to brief the issue, on our own motion we judicially notice the amounts of taxable income reported on plaintiffs' original and amended 1999 individual California income tax returns. (Evid. Code, §§ 459, 452.) We also grant amici curiae's request for judicial notice.

subject to certain exceptions that are not at issue here), the FTB waived all penalties "attributable to the use of abusive tax avoidance transactions," the taxpayer would not be criminally prosecuted "with respect to issues for which the taxpayer voluntarily complies" under the VCI, and the taxpayer waived any "claim for refund for the amounts paid in connection with abusive tax avoidance transactions" under the VCI. (§ 19752, subd. (a) (hereafter "VCI option 1").) Under option 2 (and again subject to certain exceptions that are not at issue here), the FTB waived all penalties "except the accuracy related penalty," the taxpayer would not be criminally prosecuted "for each of the taxable years for which the taxpayer voluntarily complies" under the VCI, and the taxpayer retained the right to file a claim for a refund. (§ 19752, subd. (b) (hereafter "VCI option 2").)

The Shimmons chose VCI option 1 and filed an amended 1999 return reporting taxable income of $37,781,622. On or about March 10, 2005, the Shimmons filed an additional amended return, claiming that under the interest suspension provisions of section 19116 they were entitled to a refund of a portion of the interest they had paid on the tax liability reported in their previous amended return. The FTB rejected the refund claim, and the Shimmons filed suit. The FTB moved for judgment on the pleadings, arguing that the Shimmons' refund claim failed as a matter of law. The trial court agreed, granted the motion without leave to amend, and dismissed the complaint. The Shimmons timely appealed.

The Du case follows a similar pattern. When the Dus filed their original 1999 individual California income tax return in 2000, they reported taxable income of $38,865,301. The Dus chose to participate in the VCI and elected VCI option 1. On or about February 9, 2004, the Dus filed an amended 1999 individual California income tax return pursuant to the VCI, reporting taxable income of $55,964,760. They then filed an additional amended return seeking, under section 19116, a partial refund of interest paid. The FTB denied the claim, and, after an unsuccessful appeal to the state Board of

Equalization (BOE), the Dus filed suit. The FTB demurred, the trial court sustained the demurrer without leave to amend and dismissed the complaint, and the Dus appealed.

When the Mickelsens filed their original 1999 individual California income tax return in 2000, they reported taxable income of $1,434,191. The Mickelsens chose to participate in the VCI and elected VCI option 2. On or about April 2, 2004, the Mickelsens filed an amended 1999 California return pursuant to the VCI, reporting taxable income of $31,307,290, and they paid the balance of the tax and interest in full by April 15, 2004. On their amended California return, the Mickelsens stated that they had not been advised that their original federal return had been, was being, or was going to be audited. Nonetheless, the amended California return reported an increase in the Mickelsens' federal adjusted gross income, from $2,374,002 to $32,191,441.

On or about March 10, 2005, the Mickelsens filed a second amended California return, reporting taxable income of $29,640,427. The second amended return further stated that the Mickelsens had been advised that their original federal return was audited and that they were filing the second amended California return to report a final federal determination dated October 18, 2004, which they said *increased* their federal tax by $5,744,244. At the same time, however, the second amended return reported a *decrease* in their federal adjusted gross income compared to what was reported in their first amended return, from $32,191,441 to $29,689,553.

On their second amended return the Mickelsens also claimed that under the interest suspension provisions of section 19116 they were entitled to a partial refund of interest they had paid with their first amended return. The FTB rejected the Mickelsens' claim, and, after an unsuccessful appeal to the BOE, the Mickelsens filed suit. The FTB moved for judgment on the pleadings, the trial court granted the motion without leave to amend and dismissed the complaint, and the Mickelsens appealed.

STANDARD OF REVIEW

"When reviewing a judgment dismissing a complaint after the granting of a demurrer without leave to amend, courts must assume the truth of the complaint's

properly pleaded or implied factual allegations. [Citation.] Courts must also consider judicially noticed matters. [Citation.] In addition, we give the complaint a reasonable interpretation, and read it in context. [Citation.] If the trial court has sustained the demurer, we determine whether the complaint states facts sufficient to state a cause of action. If the court sustained the demurrer without leave to amend, as here, we must decide whether there is a reasonable possibility the plaintiff could cure the defect with an amendment. [Citation.] If we find that an amendment could cure the defect, we conclude that the trial court abused its discretion and we reverse; if not, no abuse of discretion has occurred. [Citation.] The plaintiff has the burden of proving that an amendment would cure the defect. [Citation.]" (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.) We apply the same standard when reviewing a judgment of dismissal entered after a motion for judgment on the pleadings has been granted without leave to amend. (*Pang v. Beverly Hospital, Inc.* (2000) 79 Cal.App.4th 986, 989.)

DISCUSSION

I. VCI Option 1 Bars the Du and Shimmon Complaints

The Dus and Shimmons chose VCI option 1 and thereby expressly waived any claim for a refund. The Dus and the Shimmons argue nonetheless that their choice of VCI option 1 does not bar their complaints. We are not persuaded.

First, the Dus and the Shimmons argue that VCI option 1 only prohibits them from seeking a refund of taxes and interest that were *correctly* calculated, but it does not bar them from seeking a refund of an *overpayment*. We disagree. The statute expressly provides that taxpayers choosing VCI option 1 "may not file a claim for refund for the amounts paid in connection with abusive tax avoidance transactions" under the VCI. (§ 19752, subd. (a)(4).) The waiver of refund claims thus covers all "amounts paid," regardless of whether they were correctly calculated. Moreover, the Dus' and Shimmons' interpretation of the refund waiver would render it meaningless, because on their construction the waiver would apply only to claims for refunds of payments that were correctly calculated. There is no right to a refund of such amounts in the first

place—any refund claim must be based on an alleged overpayment. For all of these reasons, we reject the Dus' and Shimmons' first argument.

Second, the Dus and Shimmons argue that the FTB "warned" them that failure to pay the full amount of interest calculated by the FTB "would be a basis upon which VCI relief could be denied." On that basis, the Dus and Shimmons conclude that they should not be held to their refund waiver, because they "were forced by [the FTB] to overpay deficiency interest with their VCI amended returns." We disagree. Nothing forced the Dus and Shimmons to choose VCI option 1 rather than VCI option 2. Had they elected VCI option 2, they could have paid all of the interest calculated by the FTB and then sought a refund, as the Mickelsens have done. Instead, they chose VCI option 1, thereby waiving any refund claims in exchange for the FTB's waiver of the accuracy related penalty (which the FTB does not waive under VCI option 2). (See § 19752, subds. (a), (b).) There is no reason why the Dus and Shimmons should not be held to the bargain they struck with the FTB by choosing VCI option 1.

For all of the foregoing reasons, we conclude that the trial court correctly sustained without leave to amend the demurrer to the Du and Shimmon complaints, because the Dus and Shimmons elected VCI option 1.[3]

II. The Motion for Judgment on the Pleadings on the Mickelsen Complaint Should Have Been Denied

The Mickelsens elected VCI option 2, so they retained their right to seek a refund. The FTB argues, however, that the Mickelsens' complaint still fails as a matter of law for two independent reasons. We are not persuaded, because each of the FTB's arguments is

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3 In their reply brief, the Dus and Shimmons argue that they should have been granted leave to amend. We reject the argument for two reasons. First, arguments raised for the first time in the reply brief will not be considered unless good cause is shown for failing to raise them earlier. (*Campos v. Anderson* (1997) 57 Cal.App.4th 784, 794, fn. 3.) The Dus and Shimmons have not shown good cause for failing to raise the argument in their opening brief. Second, the Dus and Shimmons have not shown that they could cure the defects in their complaints if granted leave to amend. They have therefore failed to carry their burden of showing that the trial court abused its discretion by denying them leave to amend. (*Schifando v. City of Los Angeles*, *supra*, 31 Cal.4th at p. 1081.)

based on facts that go beyond the allegations in the Mickelsens' complaint and that are not judicially noticeable on the record before us. We therefore reverse.

Our discussion of the FTB's arguments necessarily begins with a description of the statutory framework for the Mickelsens' refund claim. Section 19101 expressly requires the payment of interest on income tax that is not timely paid. For "any amount of tax" that "is not paid on or before the last date prescribed for payment," the taxpayer is liable for "interest on that amount . . . for the period from that last date to the date paid." (§ 19101, subd. (a).)

Section 19116, however, provides for the suspension of interest for a limited period of time under specified circumstances.[4] Omitting certain details that are unnecessary to our opinion, if the FTB "does not provide a notice to the taxpayer specifically stating the taxpayer's liability and the basis of the liability before the close of the notification period," then the FTB "shall suspend the imposition of any interest . . . with respect to any failure relating to the return which is computed by reference to the period of time the failure continues to exist and which is properly allocable to the suspension period." (§ 19116, subd. (a).) The conditions for suspending interest are thus defined in terms of the "notification period" and the "suspension period."

Section 19116 contains definitions of both of those periods. The statute provides that "[e]xcept as provided in subdivision (e)," the "notification period" is "the 18-month period beginning on the later of either" "[t]he date on which the return is filed" or "[t]he due date of the return without regard to extensions." (§ 19116, subd. (b)(1).) That is, subject to the exception in subdivision (e), the notification period is the 18-month period beginning with the return's filing date or unextended due date, whichever is later.

The exception in subdivision (e) is not as straightforward. Subdivision (e) extends the notification period for taxpayers who are required by subdivision (a) of section 18622 to report federal tax adjustments to the FTB. (§ 19116, subd. (e).) Under section 18622,

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4 Section 19116 is similar but not identical to Internal Revenue Code section 6404, subdivision (g).

if a taxpayer's federal tax return "is changed or corrected by the Commissioner of Internal Revenue or other officer of the United States or other competent authority" in a manner that would increase the taxpayer's California tax, then the taxpayer must report the federal change or correction to the FTB within six months of the "final federal determination." (§ 18622, subd. (a).) If such a taxpayer (or the Internal Revenue Service) notifies the FTB of the federal change or correction within that six-month period, then the "notification period" for purposes of interest suspension under section 19116 ends one year after the FTB receives the notice of the federal change or correction. (§ 19116, subd. (e)(1)(A).) If the taxpayer (or the Internal Revenue Service) notifies the FTB of the federal change or correction after the six-month period specified in section 18622, then the "notification period" for purposes of interest suspension under section 19116 ends two years after the FTB receives the notice of the federal change or correction. (§ 19116, subd. (e)(1)(B).) In sum: If a taxpayer's federal return is changed by a federal official or other competent authority, and the change increases the taxpayer's California tax liability, then the taxpayer must report the change to the FTB within six months of the final federal determination. If the taxpayer complies with that deadline, then the notification period (for purposes of interest suspension under section 19116) is extended for one year after the FTB receives notice of the federal change. If the taxpayer does not report the federal change to the FTB until more than six months after the final federal determination, then the notification period is extended two years rather than one.

Section 19116 defines the "suspension period" as "the period beginning on the day after the close of the notification period and ending on the date which is 15 days after the date on which notice described in subdivision (a) is provided by the [FTB]." (§ 19116, subd. (b)(2).) The definition of the suspension period is the same regardless of whether the notification period is extended, under subdivision (e), on the basis of required reporting of federal adjustments. (§ 19116, subd. (e)(2).) Either way, the suspension period begins the day after the notification period ends.

All together, those provisions operate as follows: If the FTB does not notify the taxpayer of a deficiency during the notification period (including any extensions thereof under subdivision (e) of section 19116), but the FTB *does* later notify the taxpayer of a deficiency, then interest is suspended from the end of the notification period until 15 days after the deficiency notice (the suspension period).

Before we turn to the FTB's arguments, there is one further feature of the interest suspension framework that is necessary for understanding the Mickelsens' refund claim. One potential source of apparent unfairness in the framework as described above relates to amended returns filed in the absence of a deficiency notice from the FTB. If the FTB *never* sends a deficiency notice, but after the notification period the taxpayer voluntarily files an amended return reporting and paying additional tax, then it might seem only fair that the taxpayer should get the benefit of interest suspension from the end of the notification period until 15 days after the amended return is filed, just as under section 19116 interest is suspended from the end of the notification period until 15 days after the deficiency notice. That is, for purposes of interest suspension under section 19116, it would seem fair to treat the filing of an amended return the same as a deficiency notice from the FTB. But section 19116 does not expressly so provide. Rather, without a deficiency notice from the FTB there appears to be no suspension period and hence no suspension under section 19116.[5]

To address that issue, on September 27, 2005, the FTB issued FTB Notice 2005-4, which sets forth the conditions under which amended returns will be treated as deficiency

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5 Amici curiae argue that interest is suspended under section 19116, subdivision (a), even if the FTB never sends a notice, but they fail to explain how their position can be reconciled with the statutory language. Subdivision (a) of section 19116 suspends only interest that is "properly allocable to the suspension period." (§ 19116, subd. (a).) The suspension period is defined in terms of a notice from the FTB. (§ 19116, subd. (b)(2).) Thus, if there is no notice, then there appears to be no suspension period, no interest allocable to the suspension period, and hence no interest suspension under section 19116.

notices for purposes of interest suspension under section 19116.[6] Under the specified conditions, "interest will be suspended . . . from eighteen months from the later of the date the original return was filed or the due date for the original return (without extension), until fifteen days after the amended return is filed." (FTB Notice 2005-4.) That is, the filing of the amended return will be treated as a deficiency notice and thus will trigger the end of the suspension period under section 19116.

The Mickelsens' refund claim depends upon both the statutes and FTB Notice 2005-4. As far as we can determine from the record, the FTB never sent the Mickelsens a deficiency notice within the meaning of subdivision (a) of section 19116. Thus, in the absence of FTB Notice 2005-4, there was no suspension period and hence no interest suspension. But under FTB Notice 2005-4, the Mickelsens' first amended return is treated as a deficiency notice under subdivision (a) of section 19116. Thus, according to the Mickelsens, the first amended return was filed after the notification period and consequently makes them eligible for interest suspension under section 19116 for any interest properly allocable to the suspension period, namely, the period from the end of the notification period until 15 days after they filed their first amended return.

With all of that background in place, we can now explain and evaluate the FTB's arguments. First, the FTB contends that because the federal tax changes reported on the Mickelsens' first amended return increased the Mickelsens' California tax liability, section 18622 required the Mickelsens to report those federal changes to the FTB. The Mickelsens' notification period was therefore extended under subdivision (e) of section 19116 for one year after the FTB received notice of the changes by receiving the Mickelsens' first amended return. Thus, because interest suspension under section 19116 does not begin until after the notification period, the Mickelsens could not be entitled to

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6 FTB Notice 2005-4 states that its purpose is "to announce that the [FTB] will follow IRS Revenue Ruling 2005-4, as applicable under California law." The federal ruling "held that the interest suspension period of [Internal Revenue Code section 6404, subdivision (g)] applies not only to deficiency notices but also to self-assessed amounts shown on amended returns filed by the taxpayer." (FTB Notice 2005-4.)

any interest suspension until one year after they filed their first amended return. But the Mickelsens paid their taxes in full within weeks of filing their first amended return. The FTB concludes that by the time the notification period ended there was no tax deficiency, no interest thereon, and hence no interest to suspend.

In opposition to the FTB's argument, the Mickelsens contend that (1) there was no final federal determination of adjustments to their federal taxes until after they filed their first amended California return, and (2) when there was a final federal determination, it actually *reduced* their California tax liability below what they reported in their first amended California return (though it was higher than what they had reported in their original California return). Accordingly, the Mickelsens conclude that they were never required to report any federal adjustments under section 18622, because there was no final federal determination at all when they filed their first amended return, and the final federal determination that occurred after their first amended return actually lowered their California taxes.

We conclude that the factual allegations of the complaint and the facts that are judicially noticeable on this record are insufficient to resolve the conflict between the parties' positions. In essence, the problem is as follows: If (1) there was no past, pending, or contemplated federal audit when the Mickelsens filed their first amended California return, so the Mickelsens were voluntarily filing the return to report an increase in their California tax (based on a self-reported increase in their federal adjusted gross income), and (2) there was later a federal audit that confirmed that self-reported increase (in whole or in part) but it did not further increase the Mickelsens' California tax, then (3) there would arguably be no federal adjustments that the Mickelsens were required to report under section 18622, and it would arguably be fair to give the Mickelsens the benefit of interest suspension under FTB Notice 2005-4. Indeed, that would seem to be exactly the kind of scenario to which FTB Notice 2005-4 was intended to apply, namely, the self-reporting of increased California tax by voluntarily filing an amended California return.

If, however, (1) there was already a pending federal audit when the Mickelsens filed their first amended California return, and (2) both the FTB and the Mickelsens knew about the federal audit, so the FTB agreed to postpone its own audit until the federal audit was completed, and (3) the Mickelsens filed their first amended California return in April 2004, before the federal audit was complete, merely because they had to file at that time in order to meet the deadline for participating in the VCI, then (4) it would arguably be fair to give the FTB the benefit of the extended notification period under subdivision (e) of section 19116. Otherwise, any taxpayer subject to a federal audit could always defeat application of subdivision (e) by waiting until the outcome of the federal audit was reasonably clear and then quickly filing an amended California return reporting the federal changes before they became final.

We cannot determine from the factual allegations of the Mickelsens' complaint which of those scenarios (or perhaps some other) actually took place. The judicially noticeable facts do not resolve the conflict either, because the record actually contains some factual support for each scenario. On the one hand, in their first amended California return the Mickelsens stated under penalty of perjury that they were not aware of any previous, ongoing, or impending audit of their federal return. That suggests that they should get the benefit of FTB Notice 2005-4 and be entitled to interest suspension.

On the other hand, the BOE opinion in the Mickelsens' unsuccessful appeal states the following: "On April 1, 2003, [the FTB] notified appellants that it had selected their 1999 return for an audit that would focus on potentially abusive tax shelter issues. The parties agreed to defer the audit pending the outcome of a federal audit on similar issues." That suggests the FTB should get the benefit of the extended notification period under section 19116, subdivision (e), so there should be no interest suspension.

The FTB argues that we can judicially notice the facts stated in the BOE opinion. The FTB cites no cases supporting that proposition, however. Instead, the FTB cites cases holding that we may judicially notice the truth of factual statements in prior appellate *judicial* opinions, though the FTB acknowledges there is a split of authority on

that point. (Compare *Weiner v. Mitchell, Silberberg & Knupp* (1980) 114 Cal.App.3d 39, 45-46 with *Sosinsky v. Grant* (1992) 6 Cal.App.4th 1548, 1565-1569.) But the FTB cites no cases holding that we may judicially notice the truth of factual statements in prior *agency* opinions, and the FTB's only argument for that proposition consists of the assertion that in deciding an appeal the BOE "is acting in a judicial capacity." In the absence of any legal authority or developed legal argument supporting the FTB's position, we decline to take judicial notice of the truth of the factual statements in the BOE opinion.[7] (See, e.g., *Dabney v. Dabney* (2002) 104 Cal.App.4th 379, 384 ["We need not consider an argument for which no authority is furnished"].)

Thus, on this record, and on appeal from a judgment entered after a motion for judgment on the pleadings was granted without leave to amend, it is impossible for us to determine whether subdivision (e) of section 19116 should apply. We therefore must reject the FTB's first argument, though on remand the FTB remains free both to pursue the argument and to attempt to supplement the record in a way that will warrant judicial notice of any necessary facts.

The FTB's second argument fails for similar reasons. The FTB points out that section 19116 provides for the following exception to interest suspension: "For notices sent after January 1, 2004, this section does not apply to taxpayers with taxable income greater than two hundred thousand dollars ($200,000) that have been contacted by the [FTB] regarding the use of a potentially abusive tax shelter . . . ." (§ 19116, subd. (f).) According to the FTB, the Mickelsens satisfy all of the conditions for the exception, so they are not entitled to interest suspension.

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[7] The FTB's citations to subdivisions (a) and (d) of Evidence Code section 452 are similarly unavailing. The records of California courts are judicially noticeable (Evid. Code, § 452, subd. (d)), but it does not follow that the truth of factual statements in the opinions of California agencies is judicially noticeable. And the decisional law of California is judicially noticeable (Evid. Code, § 452, subd. (a)), but it does not follow that the truth of factual statements in appellate decisions of California agencies is judicially noticeable. Again, the FTB supplies no argument for bridging the gap between those statutory provisions and the matters that the FTB asks us to judicially notice.

The problem again is that at least one of the necessary facts is neither contained in the Mickelsens' complaint nor judicially noticeable on this record. The FTB does not dispute the first point: The Mickelsens' complaint does not allege that the FTB contacted the Mickelsens regarding the use of a potentially abusive tax shelter.

The FTB does, however, dispute the second point. The FTB has submitted evidence that in December 2003 and March 2004 it sent letters to the Mickelsens at their last known address, inviting them to participate in the VCI. According to the FTB, we can judicially notice the sending of those letters to the Mickelsens at that address under Evidence Code section 452, subdivisions (c) and (h). In addition, the BOE opinion in the Mickelsens' unsuccessful appeal states that "[o]n April 1, 2003, [the FTB] notified appellants that it had selected their 1999 return for an audit that would focus on potentially abusive tax shelter issues."

Again, however, we are not persuaded that we can judicially notice the necessary facts. We have already explained why we will not take judicial notice of the truth of factual statements in the BOE opinion. As for the FTB's other evidence, we are not persuaded that the cited provisions of the Evidence Code apply. Subdivision (c) of Evidence Code section 452 allows judicial notice of the "[o]fficial acts of the legislative, executive, and judicial departments of the United States and of any state of the United States." It allows us to take judicial notice of official reports and publications of government agencies (*Carleton v. Tortosa* (1993) 14 Cal.App.4th 745, 753, fn. 1), for example, but it does not authorize us to judicially notice that an agency sent a particular letter to a particular address on a particular date. Subdivision (h) of Evidence Code section 452 allows judicial notice of "[f]acts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy." It allows us to take judicial notice that Puebla, Mexico is more than 150 miles from Los Angeles (*Monroy v. City of Los Angeles* (2008) 164 Cal.App.4th 248, 264), for example, but it too does not authorize us to

judicially notice that a government agency sent a particular letter to a particular address on a particular date.

For all of the foregoing reasons, we conclude that the motion for judgment on the pleadings as to the Mickelsens should have been denied. We do not, however, mean to suggest that the Mickelsen case must proceed to trial. It is possible, for example, that the facts we have declined to judicially notice would be judicially noticeable on a different record, could be resolved through requests for admission, or would be undisputed for purposes of summary judgment. We hold only that the facts necessary to support the FTB's arguments are neither contained in the Mickelsens' complaint nor judicially noticeable on the record before us.

DISPOSITION

The judgments as to the Dus and Shimmons are affirmed. The judgment as to the Mickelsens is reversed, and the superior court is directed to enter a new and different order denying without prejudice the motion for judgment on the pleadings. Respondent shall recover its costs of the Dus' and Shimmons' appeals, and the Mickelsens shall recover their costs of their appeal.

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ROTHSCHILD, J.

We concur:

MALLANO, P. J.

CHANEY, J.