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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

GILBERT P. HYATT,
Plaintiff,

v.

JOHN CHIANG, JEROME E.
HORTON, and MICHAEL COHEN,
CALIFORNIA FRANCHISE TAX
BOARD MEMBERS; BETTY T. YEE,
GEORGE RUNNER, MICHELLE
STEEL, JEROME E. HORTON, and
JOHN CHIANG, CALIFORNIA STATE
BOARD OF EQUALIZATION
MEMBERS; and DOES 1 through
20,
Defendants.

No. 2:14-CV-00849-GEB-DAD

**ORDER GRANTING DEFENDANTS'
MOTIONS TO DISMISS FOR LACK OF
JURISDICTION**

18 Plaintiff asserts in his Complaint that the manner in
19 which Defendants are processing his California administrative tax
20 appeal violates his federal constitutional rights under the due
21 process and equal protection clauses, and seeks an injunction
22 "forbidding Defendants. . . from continuing the investigation and
23 administrative proceedings against" him and "forbidding
24 Defendants . . . from continuing to assess or threaten to assess
25 [Plaintiff], or collect or threaten to collect from [Plaintiff],
26 taxes, penalties or interest." (Compl. Prayer ¶¶ 1-2, ECF No. 2.)

27 Each defendant seeks dismissal of the Complaint
28 arguing, inter alia, that it should be dismissed with prejudice

1 for lack of subject matter jurisdiction under Federal Rule of
2 Civil Procedure ("Rule") 12(b)(1). Specifically Defendants argue
3 the federal Tax Injunction Act ("TIA") prevents Plaintiff from
4 challenging his California residency-based tax assessment in
5 federal court.

6 The TIA prescribes: "The district courts shall not
7 enjoin, suspend or restrain the assessment, levy or collection of
8 any tax under State law where a plain, speedy and efficient
9 remedy may be had in the courts of such State." 28 U.S.C. § 1341.

10 **I. FACTUAL BACKGROUND**

11 The following allegations in the Complaint concern the
12 pending dismissal motions. Plaintiff Gilbert Hyatt moved from
13 California to Nevada in 1991. (Compl. ¶ 2.) In 1993, the
14 California Franchise Tax Board ("FTB") commenced an audit to
15 determine whether Plaintiff owed additional California income
16 taxes for the 1991 tax year. (Id.) The FTB initiated a second
17 audit in 1996 to determine whether Plaintiff owed additional
18 California income taxes for the 1992 tax year. (Id.) "The FTB
19 asserts [Plaintiff] . . . became a Nevada resident on April 3,
20 1992" and owes the following unpaid California income taxes: \$1.8
21 million for the 1991 tax year and \$5.6 million for the 1992 tax
22 year. (Id. ¶¶ 11, 21.) For the last six years, Plaintiff's
23 administrative appeal has been pending before the California
24 State Board of Equalization ("SBE"). (Id. ¶ 3.) Neither the 1991
25 nor 1992 audit has concluded. (Id. ¶ 2.) Plaintiff alleges "the
26 delays . . . fall squarely and primarily at the feet of the FTB"
27 and the SBE. (Id. ¶¶ 23, 26.) Plaintiff further alleges that
28 Defendants "continue to threaten[] [him] with \$55 million plus of

1 unconstitutional exactions, specifically the assessed taxes and
2 penalties, for tax years 1991 and 1992.” (Id. ¶ 8.)

3 **II. LEGAL STANDARD**

4 Each dismissal motion contains a facial and factual
5 attack on the federal court’s jurisdiction under Rule 12(b)(1).
6 “A ‘facial’ attack asserts that a complaint’s allegations are
7 themselves insufficient to invoke jurisdiction, while a ‘factual’
8 attack asserts that the complaint’s allegations, though adequate
9 on their face to invoke jurisdiction, are untrue.” Courthouse
10 News Serv. v. Planet, 750 F.3d 776, 780 at n.3 (9th Cir. 2014).
11 Only the facial attacks are reached herein.

12 “The district court resolves a facial attack as it
13 would a motion to dismiss under Rule 12(b)(6): Accepting the
14 plaintiff’s allegations as true and drawing all reasonable
15 inferences in the plaintiff’s favor, the court determines whether
16 the allegations are sufficient as a legal matter to invoke the
17 court’s jurisdiction.” Leite v. Crane Co., 749 F.3d 1117, 1121
18 (9th Cir. 2014). However, “the tenant that a court must accept
19 as true all allegations contained in a complaint is inapplicable
20 to legal conclusions.” Ashcroft v. Iqbal, 556 U.S. 662, 678
21 (2009).

22 Federal courts are courts of limited
23 jurisdiction. They possess only that power
24 authorized by Constitution and statute, which
25 is not to be expanded by judicial decree. It
26 is to be presumed that a cause lies outside
this limited jurisdiction, and the burden of
establishing the contrary rests upon the
party asserting jurisdiction.

27 Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377
28 (1994).

1 **III. STATUTORY FRAMEWORK CONCERNING APPEAL OF A CALIFORNIA**
2 **RESIDENCY-BASED TAX ASSESSMENT**

3 Under California law, a taxpayer seeking to “prevent or
4 enjoin the assessment or collection of” a California residency-
5 based income tax may not file suit in state court without first
6 exhausting the administrative remedies in California Revenue and
7 Taxation Code. Cal. Rev. & Tax. Code § 19381.¹ Two separate
8 administrative processes may be utilized by a taxpayer to contest
9 a tax assessment: a postdeprivation “pay-then-protest” process or
10 a predeprivation process. Exhaustion of either process is a
11 prerequisite to judicial review in a California state court.

12 **A. Postdeprivation “Pay-Then-Protest” Process**

13 The “pay-then-protest” process requires the challenging
14 taxpayer to make “payment of the tax,” following which a refund
15 claim can be filed with the FTB. § 19382. If the FTB “fails to
16 mail notice of action on [the] . . . refund claim within six
17 months after the claim [is] filed, the taxpayer may ... bring an
18 action [in state court] against the [FTB]. . . on the grounds set
19 forth in the claim for the recovery of . . . [the] overpayment.”
20 § 19385. If the FTB acts on the challenger’s refund claim and
21 denies it, a taxpayer “claiming that the tax computed and
22 assessed is void . . . may bring an action [in state court],
23 upon the grounds set forth in that claim for refund . . . for the
24 recovery of the . . . amount paid” plus interest. §§ 19381,
25 19382.

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27 _____
28 ¹ Unless otherwise noted, all section references are to the California
Revenue and Taxation Code.

1 **B. Predeprivation Process**

2 A taxpayer challenging an assessment through the
3 predeprivation process must "file with the [FTB] . . . a written
4 protest against the proposed deficiency assessment, specifying in
5 the protest the grounds upon which it is based." § 19041. If the
6 protest is denied, the taxpayer may request that the FTB
7 "reconsider the assessment of the deficiency." § 19044. The
8 taxpayer may "appeal[] in writing from the action of the [FTB]...
9 to [the SBE]." § 19045. "The [SBE] . . . shall hear and
10 determine the appeal," and an unsuccessful taxpayer may "file[] a
11 petition for rehearing." §§ 19047-48. After rehearing before the
12 SBE, a taxpayer may seek review in a California state court. §
13 19381.

14 A taxpayer who initially challenges a residency-based
15 income tax assessment through the predeprivation process may
16 elect to use the "pay-then-protest" process at any point by
17 paying the disputed tax. § 19335.

18 Here, Plaintiff challenged his tax assessments using
19 the predeprivation process and has not used the "pay-then-
20 protest" process.

21 **IV. DISCUSSION**

22 The TIA "limit[s] drastically federal district court
23 jurisdiction to interfere with [the] . . . important . . . local
24 concern" of tax collection. Ark. v. Farm Credit Servs. of Cent.
25 Ark., 520 U.S. 821, 826 (1997). When passing the TIA, Congress
26 "expressed . . . concern regarding the increased costs that
27 states would bear if forced to defend the imposition of state
28 taxes in federal, rather than state courts." May Trucking Co. v.

1 Or. Dep't of Transp., 388 F.3d 1261, 1266 (9th Cir. 2004)
2 (citation omitted). One of Congress' main objectives in enacting
3 the TIA was "to stop taxpayers, with the aid of a federal
4 injunction, from withholding large sums [from the states],
5 thereby disrupting state government finances." Hibbs v. Winn, 542
6 U.S. 88, 104 (2004) (citation omitted). However, the TIA's limit
7 on federal court jurisdiction has "a narrow exception." Redding
8 Ford v. Cal. State Bd. of Equalization, 722 F.2d 496, 497 (9th
9 Cir. 1983). Congress vested federal courts with jurisdiction to
10 "enjoin, suspend or restrain the assessment, levy or collection
11 of [a] tax under State law where a plain, speedy and efficient
12 remedy may [not] be had in the courts of [the] State." 28 U.S.C.
13 § 1341.

14 Defendants argue the Supreme Court has held
15 California's "pay-then-protest" process is "a plain, speedy, and
16 efficient remedy." (Not. Mot. & Mot. Dismiss ("SBE Mot.") 9:17-
17 18, ECF No. 15; FTB Mem. P. & A. ISO Mot. Dismiss ("FTB Mot.")
18 12:6-7, ECF No. 17-1 (citing Franchise Tax Bd. v. Alcan Aluminum,
19 493 U.S. 331, 338-39 (1990) ("California's refund procedures
20 constitute a plain, speedy, and efficient remedy") and Cal. v.
21 Grace Brethren Church, 457 U.S. 393, 417 (1982) ("Because the
22 appellees could seek a refund of their state unemployment
23 insurance taxes, and thereby obtain state judicial review of
24 their constitutional claims, we hold that their remedy under
25 state law was 'plain, speedy, and efficient' within the meaning
26 of the [TIA], and consequently, that the District Court had no
27 jurisdiction to issue injunctive or declaratory relief.")).

28 "It has consistently been held . . . that the refund

1 action provided by California Personal Income Tax law is a
2 'plain, speedy and efficient remedy' such as to invoke the
3 restraints of [the TIA]." Arnoff v. Franchise Tax Bd. of the
4 State of Cal., 348 F.2d 9, 11 (9th Cir. 1965). As the Supreme
5 Court stated in Alcan Aluminum Ltd., 493 U.S. at 338: "To the
6 extent they are available, California's refund procedures
7 constitute a plain, speedy, and efficient remedy."

8 Plaintiff rejoins even if the "pay-then-protest"
9 process is "plain, speedy and efficient" on its face, the process
10 will not provide him a plain, speedy and efficient remedy.
11 (Pl.'s Mem. P. & A. ISO Consolid. Opp'n Defs.' MTD ("Opp'n")
12 15:24-16:3, ECF No. 22.)

13 **A. Bait and Switch**

14 Plaintiff contends that the precedent on which
15 Defendants rely is distinguishable from his situation because
16 "[n]one of those cases . . . involves a . . . [tax] assessment in
17 which the taxpayer . . . followed the prepayment administrative
18 process," and California cannot now force him to "forgo" the
19 predeprivation administrative statutory option he chose by
20 requiring him to use the "pay-then-protest" process before he can
21 "pursue a constitutional claim." (Opp'n 25:21-23; 26:1-3.)
22 Plaintiff argues forcing him to change from the predeprivation
23 process to the "pay-then-protest" process amounts to a "bait and
24 switch" tactic, which the Supreme Court held illegal in Reich v.
25 Collins, 513 U.S. 106 (1994) and Newsweek v. Florida Dep't of
26 Revenue, 522 U.S. 442 (1998). (Opp'n 23:10-12.)

27 Defendants reply that Plaintiff has not been subjected
28 to the "bait and switch" tactic involved in Reich and Newsweek

1 because "this is not a case where [California's] . . . statutory
2 scheme has changed midstream." (FTB Reply ISO Mot. Dismiss "FTB
3 Reply" 6:5, ECF No. 27). Defendants contend both Reich and
4 Newsweek "concern[:] (1) taxpayers who had paid their taxes, (2)
5 a subsequent finding that the tax was unconstitutional, [and] (3)
6 efforts by the state courts after the tax was paid and found
7 unconstitutional to restrict the application of a previously
8 generally applicable refund statute." (SBE Reply ISO Mot. Dismiss
9 ("SBE Reply") 4:8-12, ECF No. 26.)

10 In Reich and Newsweek, the taxpayer challengers paid
11 the assessed taxes and then challenged the tax through a refund
12 action; however, after payment, the states changed their laws to
13 prevent the taxpayers from seeking refunds for the already paid
14 taxes. The Supreme Court held that states are not permitted to
15 "reconfigure [their] scheme[s], unfairly, in midcourse—to 'bait
16 and switch'" taxpayers. Reich, 513 U.S. at 111. The Supreme Court
17 further stated: "While [states] may be free to require taxpayers
18 to litigate first and pay [the tax] later, due process prevents
19 [them] from applying this requirement to taxpayers . . . who
20 reasonably relied on the apparent availability of a postpayment
21 refund when paying the [disputed] tax." Newsweek, 522 U.S. at
22 445.

23 Plaintiff has not shown that the reasoning of Reich and
24 Newsweek supports his jurisdiction argument; these decisions
25 concern taxpayers who challenged their tax assessment after
26 making payment and then were prevented from seeking a refund by
27 intervening changes in state law.

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1 **B. Access to a "Speedy" Remedy**

2 Plaintiff also rejoins the "pay-then-protest" process
3 does not provide him a "speedy" remedy because it "would return
4 [him] to the FTB and its administrative process" before he is
5 able to seek relief in the state court. He contends that if the
6 FTB's investigation lasts longer than six months, and Plaintiff
7 elects to proceed with a state-court refund action [before the
8 FTB investigation concludes], he risks having the state court
9 find that he failed to exhaust the administrative remedies
10 available," and refuse to consider his claims as happened to the
11 plaintiff in Barnes v. State Bd. of Equalization, 118 Cal. App.
12 3d 994 (1981). (Opp'n 30:1-12.) However, the plaintiff in Barnes
13 did not file suit in state court until after the SBE denied his
14 claim, and the court did not find his claim waived because the
15 plaintiff filed suit in state court before the administrative
16 process had closed. 118 Cal. App. 3d at 1002 (stating that "the
17 board properly refused and denied the [taxpayer's] claim. . . .
18 Plaintiff then approached the superior court") (emphasis added).

19 Defendants reply that "the longest [Plaintiff] . . .
20 would have to wait [in order to bring his claim in state court]
21 after switching to the 'pay-then-protest' [process] . . . would
22 be six months," and a six month waiting period does not call into
23 question whether the remedy is speedy. (SBE Reply 8:15-17.)

24 "Speedy" is a "relative concept." Rosewell v. LaSalle
25 Nat'l Bank, 450 U.S. 503, 518 (1981). A state remedy is "'speedy'
26 if it does not entail a significantly greater delay than a
27 corresponding federal procedure." U.S. West, Inc. v. Nelson, 146
28 F.3d 718, 725 (9th Cir. 1998) (interpreting an identical

1 exception to 28 U.S.C. § 1342 (public utility rate-payer suits)).
2 "The state remedy need not be the best of all possible remedies,
3 [and] [a]lthough delay in reviewing a taxpayer's claim
4 may be troubling, . . . nowhere in the [TIA] . . . did Congress
5 suggest that the remedy must be the speediest." Colonial Pipeline
6 Co. v. Morgan, 474 F.3d 211, 218-19 (6th Cir. 2007).

7 The "pay-then-protest" process requires a taxpayer to
8 file a claim with the FTB "for refund" and "[i]f the FTB fails to
9 mail notice of an action . . . within six months . . . , the
10 taxpayer may . . . bring an action against the FTB" in state
11 court. §§ 19382, 19385.

12 Plaintiff has not shown how, if he elected to use the
13 "pay-then-protest" process, its timetable "entails a
14 significantly greater delay than a corresponding federal
15 procedure." U.S. West, Inc., 146 F.3d at 725. Therefore,
16 Plaintiff does not prevail on this portion of his jurisdiction
17 argument.

18 **C. Uncertainty**

19 Further, Plaintiff argues the federal court has
20 jurisdiction over his constitutional claims because it is
21 uncertain whether these claims could be presented through the
22 "pay-then-protest" process, and this uncertainty prevents
23 California's state court remedy from being "plain," as the term
24 is used in the TIA. (Opp'n 14:19-24.)

25 "[U]ncertainty' surrounding a state-court remedy"
26 prevents it from being plain and "lifts the [TIA's] bar to
27 federal-court jurisdiction." Rosewell, 450 U.S. at 516. The
28 Supreme Court "has not hesitated to declare a state refund

1 provision inadequate to bar federal relief if the taxpayer's
2 opportunity to raise his constitutional claims in the state
3 proceedings is uncertain." Grace Brethren Church, 457 U.S. at 414
4 n.31.

5 **1. Uncertainty Whether A Claim To Enjoin A Tax Is A**
6 **Claim To Void A Tax**

7 Plaintiff argues "[b]y its terms. . . [the "pay-then-
8 protest" process only] permits a state-court action for a
9 'taxpayer claiming that the tax computed and assessed is void,'"
10 and it is unclear whether Plaintiff's attempt to enjoin
11 collection of the taxes assessed against him is an action to void
12 the taxes. (Opp'n 26:20-21) (emphasis added).

13 Defendants reply that Plaintiff plainly seeks to void
14 the taxes assessed against him since Plaintiff alleges the tax
15 assessments are unconstitutional as applied to him and "a tax
16 assessment that is unconstitutional as applied is every bit as
17 'void' as an assessment that is unconstitutional on its face."
18 (FTB Reply 8:16-17.)

19 It is evident that Plaintiff seeks to void the tax or
20 taxes assessed against him. Therefore, Plaintiff has not met his
21 burden of demonstrating that the "pay-then-protest" process fails
22 to provide him a plain remedy.

23 **2. Raising Claims in State Court That Were Not**
24 **Presented to the SBE**

25 Plaintiff also argues it is uncertain whether the "pay-
26 then-protest" process permits him to raise in state court the
27 constitutional claims he alleges in his federal Complaint because
28 he did present those claims to the SBE, and the Revenue and

1 Taxation Code prevents a taxpayer from raising claims in state
2 court that were not included in an SBE appeal. (Opp'n 29:4-16.)

3 Defendants rejoin that even assuming Plaintiff is
4 correct, the TIA still prevents the federal court from exercising
5 jurisdiction over Plaintiff's constitutional claims where a
6 plain, speedy, and efficient remedy was available in state court
7 "at some time" even if the chance to utilize it has been lost
8 because of the taxpayer's own action or inaction. (SBE Reply 2:2-
9 4; 3:1-3.)

10 Application of the TIA "depends on whether a state
11 remedy was available to the taxpayer[,] and the taxpayer's
12 failure . . . to use the remedy . . . does not negate the
13 existence of the remedy." Sacks Bros. Loan Co. Inc. v.
14 Cunningham, 578 F.2d 172, 175 (7th Cir. 1978). "A number of
15 courts have . . . unanimously concluded that failure to utilize a
16 remedy does not render that remedy insufficient under [the TIA]."
17 Aluminum Co. of Am. v. Dep't of Treasury of State of Mich., 522
18 F.2d 1120, 1125 (6th Cir. 1975). When a plaintiff's own actions
19 foreclose an otherwise "plain, speedy and efficient remedy," the
20 TIA precludes federal court jurisdiction over the claims. See
21 Jerron West, Inc. v. State of Cal., State Bd. of Equalization,
22 129 F.3d 1334, 1338 (9th Cir. 1997) (declining to exercise
23 jurisdiction in the face of an "as applied" challenge to TIA's
24 application because "[t]he Taxpayers' failure . . . d[id] not
25 render the[] state remedies ineffective"); Wood v. Sargeant, 694
26 F.2d 1159, 1160 (9th Cir. 1982) (holding an "inability to pay the
27 tax [to initiate a refund action] does not avoid the [TIA's]
28 jurisdictional bar"). Therefore, even if Plaintiff failed to

1 present his constitutional claims during the state administrative
2 proceeding, that failure has not been shown to justify the
3 federal court exercising jurisdiction over Plaintiff's
4 constitutional claims.

5 **V. CONCLUSION**

6 For the stated reasons, Plaintiff's Complaint is
7 dismissed for lack of subject matter jurisdiction without leave
8 to amend. Further, the Clerk of Court shall close this action.

9 Dated: February 9, 2015

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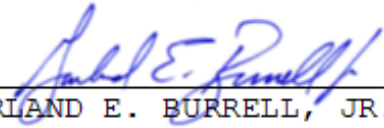
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GARIAND E. BURRELL, JR.
Senior United States District Judge