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11

12 IN THE UNITED STATES DISTRICT COURT
13 FOR THE SOUTHERN DISTRICT OF CALIFORNIA
14
15

16 **PALA BAND OF MISSION**
17 **INDIANS,**

18 Plaintiff,

19 v.

20 **NICHOLAS MADUROS, in his**
21 **official capacity as the Director of the**
22 **California Department of Tax and**
23 **Fee Administration; THE**
CALIFORNIA DEPARTMENT OF
TAX AND FEE ADMINISTRATION,

24 Defendants.
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3:20-cv-01767-AJB-JLB

DEFENDANTS' REPLY IN
SUPPORT OF MOTION TO
DISMISS SECOND AMENDED
COMPLAINT

Date: April 1, 2021
Time: 2:00 p.m.
Courtroom: 4A
Judge: Hon. Anthony J. Battaglia
Trial Date: None set
Action Filed: Sept. 9, 2020

INTRODUCTION

Plaintiff Pala Band of Mission Indians (Pala Band or Tribe) concedes that this case comes down to one issue: whether the incidence of California’s use tax falls upon Pala Band. But, as confirmed by an assessment of the relevant use tax statutes and their effect, Pala Band is not the taxpayer and has a mere use tax collection duty. Instead, the imposition of the use tax is upon the consumer who retains the liability until the tax is paid to the State or unless he has received a receipt from a registered retailer showing that the retailer has collected the use tax from the consumer. Cal. Rev. & Tax. Code §§ 6202(a), 6203(a).¹ Pala Band is a transmittal agent upon whom the parties agree the legal incidence does not fall. Thus, Pala Band’s claims fail as a matter of law.

Notably, Pala Band does not dispute that California’s “collect and remit” scheme for use tax imposes at most a minimal burden upon Pala Band and thus, is constitutional under well-established case law. Pala Band’s reliance on the Hayden-Cartwright Act is misplaced. The Act does nothing helpful for Pala Band and, in any event, the Ninth Circuit has held that it does not apply to taxes imposed on Indian tribes.

THE SAC CHALLENGES ONLY CALIFORNIA’S SALES AND USE TAX

Despite Pala Band’s protestations (*see* Opp. at 1 n.1), its Second Amended Complaint (SAC) could not be clearer—Pala Band seeks a declaratory judgment declaring invalid and unlawful, as well as an injunction enjoining:

any California requirement for [Pala Band] to report, charge, collect, and/or remit to Defendants any California *sales and use taxes* based on motor vehicle fuel products distributed to, received by, and/or sold by the Plaintiff on the Reservation.

¹ Unless otherwise indicated, all statutory references are to the California Revenue and Taxation Code.

1 SAC, Prayer ¶¶ 1 & 2 (emphasis added). The SAC challenges only California's
2 sales and use taxes.²

3 As Defendants demonstrated and as Pala Band does not dispute, Pala Band is
4 exempt from California's sales tax (§ 6352; Cal. Code Regs., tit. 18,
5 § 1616(d)(3)(A)); however, Pala Band is required to collect and remit use tax on its
6 sales of fuel to nonexempt purchasers (*see* ECF No. 16-1 at 3:18-4:11; §§ 6202(a),
7 6203(a); Cal. Code Regs., tit. 18, §§ 1616(d)(3)(A), 1684(a), 1685(a)).

8 **THE LEGAL INCIDENCE OF THE USE TAX IS UPON CONSUMERS**

9 Without citing a single provision of the California Revenue and Taxation
10 Code or any other evidence, Pala Band repeatedly contends that "Defendants'
11 taxation scheme unlawfully places the legal incidence of the tax on the Plaintiff."
12 *Opp.* at 5:12-14; *see id.* at 1:10-11, 4:26-5:2, 6:21-23, 8:7-8, 10:5-7. The Supreme
13 Court has suggested that "'dispositive language' from the state legislature is
14 determinative of who bears the legal incidence" of state taxes and held that, in any
15 event, legal incidence is determined by a "fair interpretation of the taxing statute as
16 written and applied." *Wagon v. Prairie Band Potawatomi Nation*, 546 U.S. 95,
17 103 (2005) (citation and internal quotation marks omitted). Such an analysis, which
18 shows that the legal incidence of California's use tax is upon consumers, is exactly
19 what Defendants provided in their moving papers (ECF No. 16-1 at 8:3-26) and
20 Pala Band has done nothing to rebut that showing. Instead, the cases Pala Band
21 cites further illustrate that the legal incidence falls on consumers, not on Pala Band.

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25 ² Indeed, the lack of specificity in the First Amended Complaint concerning
26 which taxes Pala Band challenges, led to the parties' stipulation and the SAC. In
27 any event, Defendants have already shown that the legal incidence of California's
28 motor vehicle fuel and diesel fuel taxes falls upon the fuel supplier not the retailer.
ECF No. 4-1 at 3:20-7:3, 15:3-18:25. (N.B. All references to page numbers in
court-filed documents cited herein are to the documents own internal pagination,
not the pagination added by the ECF system.)

I. PALA BAND’S OWN CASES CONFIRM THAT THE LEGAL INCIDENCE OF THE USE TAX FALLS UPON THE CONSUMER

Pala Band correctly states that “a party does not bear the legal incidence of the tax if it is merely a transmittal agent for the state tax collector” but ignores that in this case Pala Band itself serves as a mere “transmittal agent” for the use tax paid by consumers. Opp. at 3:26-27. Pala Band goes on to quote, without applying them to this case, another court’s description of the factors the Supreme Court found determinative in *Chickasaw Nation* to find that the legal incidence of the Oklahoma fuel tax falls upon the Indian retailer. Opp. at 4:1-16 (citing *Okla. Tax Comm’n v. Chickasaw Nation*, 515 U.S. 450, 459 (1995) and quoting *Squaxin Island Tribe v. Stephens*, 400 F. Supp. 2d 1250, 1256 (W.D. Wash. 2005)). But actually applying those factors shows that the incidence of the California use tax falls on consumers:

First, “Oklahoma law required distributors to remit the fuel tax ‘on behalf of a licensed retailer,’ indicating that distributors were merely transmittal agents.” *Stephens*, 400 F. Supp. 2d at 1256. Here, California law imposes its use tax on consumers. § 6202(a) (“Every person storing, using, or otherwise consuming in this state tangible personal property purchased from a retailer is liable for the tax”). In addition, retailers like Pala Band are required to “collect the tax from the purchaser” and remit it to the state. § 6203(a). There is no clearer evidence that Pala Band is acting as a transmittal agent. Indeed, the Supreme Court has held that “where a State requires that its sales tax be passed on to the purchaser and be collected by the vendor from him, this establishes as a matter of law that the legal incidence of the tax falls upon the purchaser.” *United States v. Mississippi Tax Commission*, 421 U.S. 599, 608 (1975).

Second, “distributors were allowed to deduct taxes that were uncollectible from retailers, but retailers could not deduct taxes uncollectible from consumers.” *Stephens*, 400 F. Supp. 2d at 1256. Here, retailers like Pala Band are relieved of their duty to collect use tax from “worthless and charged off accounts” and, if they

1 have already paid the tax, may take “as a deduction the amount found worthless and
2 charged off.” § 6203.5(a). Thus, this factor also supports a finding that consumers,
3 not retailers, face the legal incidence of the use tax.

4 Third, “distributors were allowed to retain a small portion of the taxes as
5 reimbursement for their collection services but retailers were not.” *Stephens*, 400 F.
6 Supp. 2d at 1256. Here, no entity—whether supplier, distributor, or retailer—is
7 entitled to any form of “reimbursement for their collection services.” Thus, this
8 factor does not weigh in favor of the legal incidence falling upon any particular
9 entity.

10 Fourth, “Oklahoma law imposed no liability of any kind on a consumer for
11 purchasing, possessing, or using untaxed fuel.” *Stephens*, 400 F. Supp. 2d at 1256.
12 By contrast, California expressly imposes the liability for the use tax upon
13 consumers and “[h]is or her liability is not extinguished until the tax has been paid
14 to this state [or the consumer has received a receipt from a retailer registered with
15 CDTFA showing that the retailer has collected the use tax from the consumer].”
16 § 6202(a); Cal. Code Regs., tit. 18, § 1685(a) (providing, in some circumstances,
17 for direct payment of the use tax from consumers to CDTFA). Indeed, confirming
18 that the liability is upon the consumer when there has been an overpayment of use
19 tax, the refund is due to the purchaser, not the retailer. *See* § 6901; *see also* Cal.
20 Code Regs., tit. 18, § 1684(h) (“no refund of [use tax] . . . shall be made to the
21 retailer even though the retailer has paid the amounts so collected to the state . . .
22 any overpayment of use tax . . . [is] refunded only to the purchaser who made the
23 overpayment”).

24 Three of the four *Chickasaw Nation* factors favor placing the legal incidence
25 upon consumers and one is neutral. The case law *Pala Band* cites confirms that, as a
26 matter of law, the legal incidence of California’s use tax falls upon consumers.
27
28

II. LEGAL INCIDENCE IS DETERMINED BY ANALYZING THE STATUTES

Instead of engaging in the detailed statutory analysis required by the Supreme Court, Pala Band argues that the statutes Defendants cite are “merely pronouncements from the California Legislature and they do not conclusively establish the incidence of tax.” Opp. at 10:3-4. But Pala Band misconstrues *Coeur D’Alene Tribe of Idaho v. Hammond*, 384 F.3d 674 (9th Cir. 2004). In *Hammond*, the Ninth Circuit considered whether Idaho’s fuel tax was unconstitutional when applied to an Indian retailer. *Id.* at 678. The Idaho State Tax Commissioners argued that the legal incidence of the fuel tax did not fall on the Indian retailer but on the non-Indian distributor. *Id.* at 681. The Ninth Circuit held only that it would not automatically take the state’s word as to where the legal incidence falls. *Id.* at 685 (“[W]e conclude that we should not, under the circumstances of this case, automatically defer to the Idaho state legislature’s *mere say-so* about where the legal incidence of its motor fuels tax lies”) (emphasis added). Instead, the court analyzed the statutes themselves to determine the legal incidence. *Id.* (“We must evaluate the incidence of the Idaho Motor Fuels Tax in light of the state statutory scheme, an assessment of its effects, and the total circumstances germane to incidence.”) After completing that analysis, the court found that the Idaho fuel tax was very similar to the statute the Supreme Court analyzed in *Chickasaw Nation* and held that its legal incidence also fell on the Indian retailer. *Id.* at 685-88.

Pala Band cannot simply short-circuit that analysis and conclude that the legal incidence of California’s use tax falls upon it. As illustrated above and in Defendants’ moving papers, an examination of California’s use tax, an assessment of its effects, and the relevant circumstances as framed by the SAC, lead to the conclusion that the incidence of California’s use tax is imposed on consumers as a matter of law. *Cf. Direct Marketing Ass’n, Inc. v. Bennett*, 916 F.2d 1451, 1454 (9th Cir. 1990) (“California law makes clear that the retailer is not the taxpayer with respect to the use tax. The use tax, unlike the sales tax, is imposed upon the

1 *purchaser* rather than the retailer.”). Pala Band states nothing to alter that
 2 conclusion. The Court should grant Defendants’ motion to dismiss.

3 **THE HAYDEN-CARTWRIGHT ACT IS INAPPOSITE**

4 Pala Band argues that unless clearly authorized by Congress, “the Hayden-
 5 Cartwright Act prohibits the imposition of state taxes on motor vehicle fuel that is
 6 delivered to, received by, and/or sold by the Plaintiff on the Reservation.” Opp. at
 7 5:26-28. The Hayden-Cartwright Act contains no such prohibition. Indeed, the
 8 plain language of the Act suggests that states are authorized to tax fuel sold on
 9 Indian reservations:

10 All taxes levied by any State . . . upon, with respect to, or measured
 11 by, sales, purchases, storage, or use of gasoline or other motor vehicle
 12 fuels may be levied, in the same manner and to the same extent, with
 13 respect to such fuels when sold by or through . . . filling stations . . .
 located on United States military or other reservations, when such fuels
 are not for the exclusive use of the United States.

14 4 U.S.C. § 104(a).

15 Thus, in *Hammond*, the Idaho State Tax Commissioners argued that, *even if*
 16 *the legal incidence of Idaho’s fuel tax was on reservation Indians*, Congress had
 17 expressly allowed such taxation. 384 F.3d at 690. The Ninth Circuit reasoned that
 18 “[u]nder federal law, *it is unlawful to place the legal incidence of the tax on tribal*
 19 *retailers* absent ‘clear congressional authorization’ for the Idaho state taxation of
 20 the Tribes.” *Id.* at 688 (emphasis added). The Ninth Circuit held that the Hayden-
 21 Cartwright Act did not provide such a “clear congressional authorization.” *Id.* at
 22 691-92, 695. Thus, because the Ninth Circuit held that the Idaho fuel tax placed the
 23 legal incidence on the Indian retailer and no clear congressional authorization
 24 existed for such a tax, the Idaho fuel tax was unconstitutional. *Id.* at 696.

25 Here, Defendants do not argue that California is allowed to place the legal
 26 incidence of its use tax upon Pala Band by express congressional authorization.
 27 Instead, they show that California places the legal incidence of its use tax upon
 28

1 consumers. *See, e.g.*, §§ 6202(a), 6203(a); Cal. Code Regs., tit. 18, §§
 2 1616(d)(3)(A), 1684(a), 1685(a); *Bank of America v. State Board of Equalization*,
 3 209 Cal. App. 2d 780, 799 (“[T]he use tax is a tax levied upon the purchaser. It is
 4 not a tax on the retailer; nor does it shift to him because he has a duty to collect it
 5 from the consumer”). Pala Band has failed to show otherwise. The Hayden-
 6 Cartwright Act is simply not at issue in this case.

7 **BECAUSE COLLECTING, REMITTING, AND REPORTING VALID**
 8 **STATE TAX IS A “MINIMAL BURDEN,” PALA BAND’S CLAIMS FAIL**
 9 **AS A MATTER OF LAW**

10 Pala Band does not like that, as a result of operating a gas station, California
 11 requires it to collect use tax from non-exempt fuel purchasers. Opp. at 2:27-28
 12 (“CDTFA has . . . conscripted the Plaintiff to serve as a tax collector”); *see id.* at
 13 11:20-22 (Pala Band argues “there is no mechanism whereby the State of California
 14 can or will collect a ‘sales tax’ or ‘use tax’ on the sale of motor vehicle fuels other
 15 than by imposing that tax [collection] burden on the retailer”). However, California
 16 does employ other mechanisms of collection including imposing the liability for the
 17 use tax on consumers and providing for CDTFA’s direct collection from
 18 consumers, including penalties for failure to make timely payments. §§ 6202(a),
 19 6591(a); Cal. Code Regs., tit. 18, §1685(a).

20 But more importantly, as Defendants established in their moving papers, the
 21 burden of tax collection does not shift the legal incidence from the entity liable for
 22 paying the tax to the entity with the duty of collecting it. ECF No. 16-1 at 9:10-
 23 10:11; *Confederated Tribes & Bands of the Yakama Indian Nation v. Gregoire*, 658
 24 F.3d 1078, 1089 (9th Cir. 2011) (“The precollection obligation is a minimal burden
 25 on the Tribes and their retailers and does not change the legal incidence
 26 calculation.”) Indeed, Pala Band appears to concede as much. Opp. at 3:26-27 (“a
 27 party does not bear the legal incidence of the tax if it is merely a transmittal agent”).
 28

Although Pala Band also appears to concede that California imposes only a minimal burden on the Tribe, it argues that whether “the burden is minimal or overwhelming” “does not matter.” Opp. at 3:1-13. Pala Band thus attempts to escape a string of Supreme Court and federal appellate rulings which consistently hold that states may impose minimal burdens on Indian tribes “reasonably tailored to the collection of valid taxes” from nonexempt purchasers—and which upheld the very types of collection, reporting, and remitting burdens of which the Tribe complains. *Dep’t of Tax. & Fin. of N.Y. v. Milhelm Attea & Bros.*, 512 U.S. 61, 73 (1994); *see, e.g., Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 483 (1976) (upholding requirement that on-reservation tribal retailer collect state cigarette excise tax from non-Indian purchasers); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 151, 159 (1980) (upholding “simple collection burden” as well as requirement that tribal retailers maintain “detailed records” of sales); *Kaul v. Stephan*, 83 F.3d 1208, 1213-14 (10th Cir. 1996) (“[W]ell established Supreme Court precedent permits states to require that Indian retailers on reservations collect and remit sales tax earned on sales made to non-Indians or to Indians who are not members of the tribe governing the reservation.”).

Pala Band argues that the minimal-burdens line of cases does not apply because this case is governed by the Hayden-Cartwright Act. Opp. at 8:11-13. But the Ninth Circuit has held that the Hayden-Cartwright Act does not apply to taxes imposed on Indian tribes. *Hammond*, 384 F.3d at 693-96. Indeed, if that Act “govern[ed] the sale of motor vehicle fuel on reservations” (Opp. at 7:24-25), it would defeat Pala Band’s claims because it would authorize taxation of Indian retailers on their land. 4 U.S.C. § 104(a) (allowing state taxation of fuel sales on “military or other reservations” when not for the sole use of the United States).

Pala Band further argues that cases governing the taxation of tobacco products do not apply to the Tribe’s challenge to its duty to collect use tax imposed on fuel

1 consumers. First, that argument ignores that the minimal-burdens analysis springs
 2 from the same principles that govern all cases involving taxation of tribal purchases
 3 and sales—the “who” and the “where” of a challenged tax. *Wagnon*, 546 U.S. at
 4 101-02; *compare* ECF No. 4-1 at 15:5-19:22 (discussing legal incidence of fuel
 5 excise tax) *with* ECF No. 16-1 at 7:17-9:7 (discussing legal incidence of use tax).
 6 Second, the minimal-burdens analysis has been applied to taxation of various on-
 7 reservation purchases, not just tobacco. *E.g.*, *Barona Band of Mission Indians v.*
 8 *Yee*, 528 F.3d 1184, 1190-91 (9th Cir. 2008) (relying on *Colville* to hold that non-
 9 Indian contractor could not avoid sales tax on construction materials for Indian
 10 casino by arranging on-reservation delivery); *Salt River Pima-Maricopa Indian*
 11 *Cmty. v. State of Ariz.*, 50 F.3d 734, 737 (9th Cir. 1995) (relying on *Colville* to
 12 uphold state sales tax applied to sales by non-Indian retailers subleasing space from
 13 non-Indian developer in on-reservation shopping mall). The minimal-burdens
 14 analysis thus unquestionably governs Pala Band’s collecting, reporting, and
 15 remitting of use taxes on fuel.

16 Governing Supreme Court precedent provides that California has only
 17 imposed a constitutional, minimal burden in requiring Pala Band to collect use tax.

18 **THE SAC SHOULD BE DISMISSED WITHOUT LEAVE TO AMEND**

19 Even though this is the first motion to dismiss the Court will hear, this is Pala
 20 Band’s third pleading. In addition, Pala Band concedes that “[t]he case now before
 21 the Court comes down to one issue”—legal incidence. *Opp.* at 1:3-10. A district
 22 court is well within discretion to deny leave to amend where such an amendment
 23 would be futile, that is, “when no set of facts can be proved under the amendment
 24 to the pleadings that would constitute a valid and sufficient claim.” *Mo. ex rel.*
 25 *Koster v. Harris*, 847 F.3d 646, 656 (9th Cir. 2017) (citation and internal quotation
 26 marks omitted). Here, Pala Band does not suggest any additional facts that would
 27 change the legal incidence analysis. Indeed, the use tax statutes and their effect are
 28 clear: Pala Band has a duty to collect the use tax, which is imposed on the

1 consumer. *See, e.g.*, §§ 6202(a), 6203(a); Cal. Code Regs, tit. 18, §§ 1684(a),
 2 1685(a). The legal incidence falls upon consumers as a matter of law and Pala Band
 3 cannot allege anything that will change that conclusion.

4 CONCLUSION

5 Because Pala Band's claims fail on the merits as a matter of law, Defendants
 6 CDTFA and Director Nicolas Maduros respectfully request that the Court dismiss
 7 Pala Band's Second Amended Complaint without leave to amend.

8
 9 Dated: February 12, 2021

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