UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

PALA BAND OF MISSION INDIANS, Plaintiff v. NICHOLAS MADUROS, in his official capacity as the Director of the California Department of Tax and Fee Administration; THE CALIFORNIA DEPARTMENT OF TAX AND FEE ADMINISTRATION, Defendants.	Case No.: 3:20-cv-01767-AJB-JLB **ORDER GRANTING DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S SECOND AMENDED COMPLAINT** **(Doc. No. 16)**

Before the Court is Defendants Nicholas Maduros and the California Department of Tax and Fee Administration's ("CDTFA") (collectively "Defendants") motion to dismiss the Second Amended Complaint ("SAC") filed by the Pala Band of Mission Indians ("Plaintiff"). (Doc. No. 16.) For the reasons set forth below, the Court **GRANTS** Defendants' motion to dismiss.

I. BACKGROUND[1]

Plaintiff is a federally recognized Indian tribe, which maintains sovereign rights to land held in trust by the United States for Plaintiff's benefit ("Reservation"). (Doc. No. 15 at ¶ 3.) Plaintiff owns a retail gasoline station located on the Reservation at 11154 Highway 76, Pala, California 92059. (*Id.* at ¶ 15.) Since 2005, CDTFA and Nicholas Maduros, the CDTFA's director, have required Plaintiff to "report, charge, collect, and/or remit to the Defendants any California state sales and use taxes from the sale of motor vehicle fuel products delivered to, received by, and/or sold by the Plaintiff on the Reservation" in accordance with California state law. (*Id.* at ¶ 17.) To enforce this state use tax, Defendants have "undertaken collection activities" against Plaintiff such as "demands for immediate payment along with threats of property seizure, notices of lien, pre-intercept collection, collection fees, and late penalties." (*Id.* at ¶ 9.) Plaintiff brings this action, requesting the Court to invalidate and enjoin Defendants from enforcing the aforementioned use tax.

II. LEGAL STANDARD

A defendant may seek to dismiss a complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). A Rule 12(b)(6) motion to dismiss "tests the legal sufficiency of a claim." *Conservation Force v. Salazar*, 646 F.3d 1240, 1241–42 (9th Cir. 2011) (quoting *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001)). In evaluating the sufficiency of the claim, the court accepts all factual allegations as true and construes them in the light most favorable to the nonmoving party. *Knievel v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005).

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[1] The following facts are from Plaintiff's SAC. As an aside, the Court notes that Plaintiff's opposition brief refers to facts raised in the original complaint but not realleged in the SAC. (Doc. Nos. 1, 18.) The Court cannot and does not consider facts not alleged in the SAC because "[e]very pleading to which an amendment is permitted as a matter of right or has been allowed by court order, must be complete in itself without reference to the superseded pleading." S.D. Cal. Civ. R. 15.1. *See Ramirez v. Cty. of San Bernardino*, 806 F.3d 1002, 1008 (9th Cir. 2015) ("It is well-established in our circuit that an amended complaint supersedes the original, the latter being treated thereafter as non-existent.") (internal quotation marks and citation omitted).

To avoid dismissal under Rule 12(b)(6), the complaint must satisfy Rule 8(a)(2), which requires that the pleadings include "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Although detailed factual allegations are not required, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). "If the Court finds that the plaintiff did not allege sufficient facts 'to raise a right to relief above the speculative level' and support a cognizable legal theory, it may dismiss the complaint as a matter of law." *Great Minds v. Office Depot, Inc.*, 945 F.3d 1106, 1109 (9th Cir. 2019) (quoting *Twombly*, 550 U.S. at 555).

III. DISCUSSION

The parties agree that the dispositive issue on the instant motion to dismiss is whether the incidence of California's use tax for motor vehicle fuel falls on Plaintiff, a tribal retailer. (Doc. Nos. 18 at 4; 19 at 2.) As more fully discussed below, if the tax does not fall on Plaintiff, then the tax is likely permissible, and Plaintiff has failed to plausibly allege a right to relief.

Here, Defendants argue that based on the plain language of the relevant California Revenue & Taxation Code provisions, the legal incidence of the California use tax falls not on retailers like Plaintiff, but on consumers. (Doc. No. 16-1 at 13–15.) Plaintiff, on the other hand, maintains that pursuant to *Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450 (1995), the use tax impermissibly falls on tribal retailers. (Doc. No. 18 at 6–8.) Prior to evaluating the merits of the parties' arguments, the Court discusses the applicable law and statutes.

A. Legal Incidence in Indian Tax Cases

As for the applicable law, "[t]he Constitution vests the Federal Government with exclusive authority over relations with Indian tribes . . . and in recognition of the sovereignty retained by Indian tribes even after formation of the United States, Indian tribes and individuals generally are exempt from state taxation within their own territory."

Chickasaw Nation, 515 U.S. at 455 (quoting *Montana v. Blackfeet Tribe*, 471 U.S. 759, 764 (1985)). As such, the issue of where the legal incidence of a tax falls is "'frequently [the] dispositive question in Indian tax cases,' because '[i]f the legal incidence of an excise tax rests on a tribe or on tribal members for sales made inside Indian country, the tax cannot be enforced absent clear congressional authorization.'" *Coeur d'Alene Tribe of Idaho v. Hammond*, 384 F.3d 674, 681 (9th Cir. 2004) (quoting *Chickasaw Nation*, 515 U.S. at 458–59). However, if the legal incidence does not rest on a tribe, the state may impose the tax and place "minimal burdens" upon the tribe in collecting the tax so long as "the balance of federal, state, and tribal interests favors the [s]tate, and federal law is not to the contrary." *Confederated Tribes & Bands of the Yakama Indian Nation v. Gregoire*, 658 F.3d 1078, 1084 (9th Cir. 2011) (quoting *Chickasaw Nation*, 515 U.S. at 459).

"The 'legal incidence' of an excise tax refers to determining which entity or person bears the ultimate legal obligation to pay the tax to the taxing authority." *Id.* "Identifying legal incidence requires a court to analyze the taxing statute and its implementation to determine which entities or individuals will likely face detrimental legal consequences if the tax is not paid." *Id*. In conducting this analysis, the Ninth Circuit has considered various factors, including (1) express statements of legislative intent, (2) whether the statute includes an "explicit 'pass through' which moves incidence down the distribution chain," (3) whether an entity is compensated for collecting and remitting the tax on behalf of the state, (4) what invoices show regarding payment of the tax, (5) whether a retailer may recoup tax paid for unsold products, (6) whether a retailer is refunded when a consumer fails to pay the tax, and (7) who the statute penalizes for nonpayment of the tax. *Id.* at 1086 (citing first *Hammond*, 384 F.3d at 684–88; then *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 103 (2005); then *Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 482 (1976)). The court must interpret the taxing statute fairly both as written and as applied. *Cal. Bd. of Equalization v. Chemehuevi Tribe*, 474 U.S. 9, 11 (1985) (per curiam).

B. The California Use Tax

As for the relevant statute, the California Sales and Use Tax Law, Cal. Rev. & Tax. Code § 6001 et seq., is a comprehensive system crafted to ensure that "all tangible personal[property] sold or utilized in California is taxed once for the support of the state government." *Woosley v. California*, 3 Cal. 4th 758, 771 (1992). The use tax "imposes an excise on the consumer at the same rate [as the sales tax] for the storage, use or other consumption in the state of such property when purchased from any retailer." *Id.* Property exempted, excluded, or otherwise not covered by the sales tax is subject to the use tax. *Am. Airlines, Inc. v. State Bd. of Equalization*, 216 Cal. App. 2d 180, 190 (1963) (citing *In re L.A. Lumber Prods. Co.*, 45 F. Supp. 77, 86 (S.D. Cal. 1942). Sales of tangible personal property conducted on a reservation by Indian retailers to non-Indians or Indians not residing on-reservation are exempt from sales tax. Cal. Code Regs. tit. 18, § 1616(d)(3)(A)(2). Because all goods exempt from sale tax are subject to the use tax, Indian retailers are required to collect use tax from purchasers in such sales. *Id.*

The use tax requires that "[e]very person storing, using, or otherwise consuming in this state tangible personal property purchased from a retailer is liable for the tax." Cal. Rev. & Tax. Code § 6202(a).[2] That liability is not extinguished until the tax is paid to the state or provided to a retailer who is authorized by the state to collect the tax. *Id.* Every retailer engaged in business in California who sells tangible personal property for storage, use, or consumption in the state must "collect the [use] tax from the purchaser and give to the purchaser a receipt therefor." § 6203(a).

1. Analysis of the California Use Tax

Upon consideration of the applicable factors, including the tax code's explicit identification that the consumer is liable for the use tax, its "pass through" requirement, its refund protocol for overpayment, its protection of retailers from worthless accounts, and

[2] Unless otherwise provided, all subsequent references to statutes are to the California Revenue and Taxation Code, not the California Code of Regulations.

its required accounting measures, the Court finds that the legal incidence of the California use tax falls upon consumers.

First, the language of the California use tax statutes expressly identifies that the incidence falls on consumers, not retailers. Section 6202(a) states that liability for the use tax is on "every person storing, using or otherwise consuming" applicable property "purchased from a retailer." § 6202(a). The retailer's corresponding responsibility to collect and remit the consumer's tax payment constitutes a "debt," not a tax. § 6204; *see Montgomery Ward & Co. v. State Bd. of Equalization,* 272 Cal. App. 2d 728, 743 (1969), cert. denied, 396 U.S. 1040 (1970) (comparing the retailer's position to that of a "collection agent" because "the retailer is merely paying the debt of another"). The individual consumer's tax liability is not extinguished until the tax is paid to the state or provided to a retailer authorized to collect and remit the tax to the state. § 6202(a). As such, Plaintiff is "merely a transmittal agent for the state tax collector," and does not bear the legal incidence because, in the event of nonpayment, its legal liability depends on either another's failure to pay the transmittal agent or the transmittal agent's withholding of collected taxes. *Gregoire,* 658 F.3d at 1084 (citing *Hammond*, 384 F.3d at 681). Thus, the statute's placement of tax liability upon the consumer and debt for transmission of collected tax upon the retailer favors a finding that consumers bear the legal incidence.

Second, the statute requires the incidence of the tax to "pass through" retailers to be placed upon consumers. Retailers are prohibited from absorbing the tax themselves by excluding the tax in their prices and from refunding consumers for paying the tax. § 6205. The explicit prohibition on retailers from shifting the legal incidence to themselves also favors a finding that the legal incidence is placed on consumers. Importantly, these first two factors distinguish the statute at issue from that analyzed in *Chickasaw Nation*. *See* 515 U.S. at 461. In *Chickasaw Nation*, the Oklahoma legislation neither "expressly identif[ied]" who bore the legal incidence nor included a "pass through" provision. *Id.* In contrast, the California legislation expressly included "such dispositive language" in the tax code, demonstrating that the legal incidence of the tax falls to consumers. *See id.*

Because the California tax code is not silent as to on whom the legal incidence falls, *Chickasaw Nation* is distinguishable, and Plaintiff's reliance on it is unavailing.

Third, the tax code's system of refunds and liability relief also places the incidence on the consumer. For instance, refunds for overpayment are provided directly to the consumer. § 6901. In cases of underpayment, retailers are relieved from liability to collect use tax where an account is deemed "worthless." § 6203.5(a). In these circumstances, the retailer can "charge[] off [the collection] for income tax purposes." *Id.* As such, the statute protects retailers from shouldering the tax burden when the consumer should have, but failed to, pay the use tax. Thus, the system of refunds and liability evinces that the use tax falls on consumers, and not retailers.

Fourth, the statute's accounting measures further demonstrate that the tax falls on the consumer. Upon collection of the use tax, retailers must provide the consumer a receipt, sales check, or proof of sale that displays the tax separate from the advertised or marked price. §§ 6203, 6206. Consequently, the retailers' required recordkeeping further indicates that the incidence lies with the consumer.

Finally, other factors are either neutral or not applicable. For instance, neither distributors nor retailers are compensated for collection and remittance duties. *Cf. Chickasaw Nation*, 515 U.S. at 461–62 (determining that compensation for tax collection indicates an entity does not bear the burden of the tax).

Accordingly, based on the foregoing, the Court finds that the legal incidence of the California use tax falls upon consumers, not retailers such as Plaintiff.

2. Burden of Collection and Remittance Duties

As the legal incidence of the tax falls on consumers, the remaining question is whether requiring Plaintiff to collect and remit the tax constitutes a valid "minimal burden" on tribal sovereignty, considering the interests of the federal, state, and tribal governments. *Gregoire*, 658 F.3d at 1084. In Defendants' view, requiring Plaintiff to collect, remit, and report the state use tax validly imposed on non-Indians and Indians who live off reservation places a "minimal burden" on Plaintiff. (Doc. No. 16-1 at 15 (citing first *Washington v.*

Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 151 (1980); then *Moe*, 425 U.S. at 483; then *Gregoire*, 658 F.3d at 1084).)

Rather than directly contest Defendants' view, Plaintiff asserts that the "minimal burden" analysis is "inapplicable."[3] (Doc. No. 18 at 5–6, 10–11.) By focusing solely on the argument that the legal incidence of the tax impermissibly falls on the tribe, Plaintiff has appeared to concede that the collection and remittance duties are a minimal burden. (*See id.* at 4.) Indeed, at the motion hearing, the Court specifically asked Plaintiff to address the minimal burden issue, yet Plaintiff still failed to argue or explain how the duties imposed were more than a minimal burden.

Regardless, like the Supreme Court found in *Moe*, the Court finds that "[t]he State's requirement that the Indian tribal seller collect a tax validly imposed on non-Indians is a minimal burden designed to avoid the likelihood that in its absence non-Indians purchasing from the tribal seller will avoid payment of a concededly lawful tax." 425 U.S. at 483. Similar collection and remittance duties have been repeatedly upheld as a minimal burden on tribal sovereignty that is "reasonably necessary as a means of preventing fraudulent transactions." *Colville*, 447 U.S. at 160. Thus, the Court finds the collection and remittance duties placed on Plaintiff are a minimal burden.

Accordingly, because the legal incidence of the use tax falls on consumers and the collection and remittance duties placed on Plaintiff are a minimal burden, Plaintiff has failed to raise a right to relief supported by a cognizable legal theory. *See Great Minds*, 945 F.3d at 1109. Consequently, the Court **GRANTS** Defendants' motion to dismiss.

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[3] Relying on the Ninth Circuit's interpretation of the Hayden-Cartwright Act in *Coeur d'Alene Tribe of Idaho v. Hammond*, 384 F.3d 674 (9th Cir. 2004), Plaintiff argues that California does not have authority to place the legal incidence of a tax upon tribal retailers on reservation land because Congress has not provided "unmistakably clear" authorization to abrogate the tax immunities of federally recognized sovereign Indian tribes. (Doc. No. 15 at ¶¶ 23, 27–28; Doc. No. 18 at 8–9.) Defendants, however, explicitly reject that they are arguing that California has the authority to place the legal incidence of the use tax on Plaintiff. (Doc. No. 19 at 7.) Nevertheless, because the Court has found the legal incidence is not placed upon retailers like Plaintiff, the Hayden-Cartwright Act and the *Hammond* court's analysis do not apply to the present case. Accordingly, the Court need not address whether Congress has abrogated Plaintiff's sovereign tax immunity.

C. Leave to Amend

The district court has discretion to grant or deny leave to amend. *Foman v. Davis*, 371 U.S. 178, 182 (1962). "[I]n dismissing for failure to state a claim under Rule 12(b)(6), 'a district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts.'" *Schmitt v. Kaiser Found. Health Plan of Wash.*, 965 F.3d 945, 960 (9th Cir. 2020) (quoting *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (en banc)). In such cases, leave to amend is considered futile. *See Hartmann v. Cal. Dep't of Corr. & Rehab.*, 707 F.3d 1114, 1130 (9th Cir. 2013) ("A district court may deny leave to amend when amendment would be futile.").

The Court acknowledges that during the motion hearing, Plaintiff raised multiple facts not alleged in its SAC to support its position that the California use tax as-applied places the legal incidence on retailers. Specifically, Plaintiff argued that tax bills and notices of penalties are sent to the Tribe and that the Tribe files tax returns to transmit the collected tax to the State. However, even if the Court considered these facts, the outcome would not change. The analysis of the statutory provisions clearly places the incidence of tax on consumers, not retailers. The examples provided by Plaintiff at the hearing demonstrate routine logistical requirements attendant to its collection and remittance duties; they do not demonstrate that the incidence of tax falls on Plaintiff. As the Supreme Court has upheld such duties as a minimal burden, these facts do not change the Court's analysis. *See, e.g., Dep't of Taxation v. Milhelm Attea & Bros.*, 512 U.S. 61, 73–75 (1994); *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 US. 505, 512–13 (1991); *Moe*, 425 U.S. at 482–83. Consequently, the Court finds that further amendment would be futile. Accordingly, the Court **DISMISSES** Plaintiff's SAC **WITHOUT LEAVE TO AMEND**.

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IV. CONCLUSION

For the foregoing reasons, the Court **GRANTS** Defendants' motion to dismiss, (Doc. No. 16), and Plaintiff's SAC is **DISMISSED WITHOUT LEAVE TO AMEND**. The Clerk is directed to close this case.

IT IS SO ORDERED.

Dated: April 15, 2021

Hon. Anthony J. Battaglia
United States District Judge