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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

EMPLOYMENT DEVELOPMENT DEPARTMENT, Plaintiff and Appellant, v. CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD, Defendant; SPHERION PACIFIC ENTERPRISES, LLC, et al., Real Parties in Interest.	C062504 (Super. Ct. No. 34200800018721CUWMGDS)

This appeal arises from a determination by appellant Employment Development Department (EDD) that real parties in interest -- Spherion Corporation and its subsidiaries Pacific Enterprises, LLC, Spherion Pacific Workforce, LLC, Spherion Pacific Operations, LLC, and Interim Services Pacific, LLC (collectively, Spherion) -- constituted a "unity of enterprise" and therefore were required to use a uniform rate for unemployment insurance (UI) tax liability (Unemp. Ins. Code, §§

100,[1] 135.1, 135.2), to prevent the companies with a higher UI tax rate from switching employee payroll to the company with the lowest tax rate. (§ 982 [tax rate depends upon various factors specific to employer].) In December 2003 and July 2004, EDD issued two "Notices of Assessment" (NOAs) assessing additional tax liability for (1) the first three quarters of 2003, and (2) the last quarter of 2003. Spherion claims EDD must give notice and opportunity for a hearing *before* assessing additional tax. Respondent California Unemployment Insurance Appeals Board (the Board) and the trial court agreed, thus effectively cancelling the two NOAs.

EDD appeals from the trial court's order denying EDD's petition for a traditional writ of mandate (Code Civ. Proc., § 1085) and administrative mandamus (Code Civ. Proc., § 1094.5).[2] We shall conclude (1) Spherion's challenge to the first NOA is barred as untimely, and (2) EDD's second NOA is barred as untimely. We therefore do not reach the merits and shall (1) reverse the judgment (order) cancelling the first NOA and (2)

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[1] Undesignated statutory references are to the Unemployment Insurance Code. Section 100 provides for the "compulsory setting aside of funds to be used for a system of unemployment insurance providing benefits for persons unemployed through no fault of their own . . . ."

[2] An order denying a writ petition is appealable even in the absence of a formal judgment. (*Public Defenders' Organization v. County of Riverside* (2003) 106 Cal.App.4th 1403, 1409.)

affirm the trial court's result (but not its reasoning) cancelling the second NOA.

FACTUAL AND PROCEDURAL BACKGROUND

Spherion Corporation is the parent of the four subsidiary companies and represents their interests in this case. All five companies share the same business office in Fort Lauderdale, Florida, and are part of the same business structure.

On December 22, 2003, EDD sent a "NOTICE OF DUPLICATE ACCOUNTS AND NOTIFICATION OF ASSESSMENT" to "Spherion Pacific Enterprises, LLC, etal," stating in part: "[W]e find that you were assigned duplicate employer account numbers. California law provides that a business enterprise may have only one account number for tax reporting purposes." The notice discontinued four of the five account numbers assigned to the five companies and advised that EDD was assessing an additional amount because "you utilized an incorrect account number with an incorrect UI rate for 2003 . . . ." The notice said the purpose of EDD's review was "to ensure that employers subject to the California Unemployment Insurance Code have properly reported their workers under the correct account number and UI Rate. This promotes a level playing field for business competition within the state. Unemployment insurance experience rates in California are calculated utilizing a formula based on the reserve account balance and average base payroll of the business. Switching payroll to lower rated accounts, for the purpose of lowering UI taxes is called State Unemployment Tax

Avoidance (SUTA dumping) and may constitute intent to evade or fraud under Section 1128(a)[3] of the California Unemployment Insurance Code."

The accompanying NOA -- which was addressed to "Spherion Pacific Enterprises, LLC et al" with an asterisk indicating the notice "also applie[d]" to the other four companies -- assessed $1,800,762 (including penalties and interest) for the first three quarters of 2003 (January 1 through September 30).[4] Under "EXPLANATION," the NOA said, "You have used multiple E.D.D. account numbers for the purpose of circumventing the California Unemployment Insurance rating system." The NOA said it was issued under section 1127.[5]

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[3] Section 1128, subdivision (a), states, "If the failure of the employing unit to file a return or report within the time required by this division and authorized regulations or if any part of the deficiency for which an assessment is made is due to fraud or an intent to evade this division or authorized regulations, a penalty of 50 percent of the amount of contributions assessed shall be added to the assessment. This penalty is in addition to the penalties provided [elsewhere]."

[4] EDD's counsel represented to the administrative law judge (ALJ) that all five companies were responsible for the assessment, that the five companies had acquired separate UI accounts with rates between 1.9 and 4.8 percent, that the companies with a higher rate had switched their payroll to an account with a lower rate, and that EDD determined there was a unity of enterprise, such that all five companies should report payroll under a uniform rate.

[5] Section 1127 provides: "If the director is not satisfied with any return or report made by any employing unit of the amount of employer or worker contributions, he or she may compute the amount required to be paid upon the basis of facts contained in the return or reports or may make an estimate upon the basis of

On February 12, 2004, the five companies submitted administrative appeals (petitions) of the first NOA (§ 1222).

On July 7, 2004, EDD sent the second NOA, assessing a total of $424,469 for the last quarter of 2003 (October 1 through December 31). On July 21, 2004, the five companies submitted petitions challenging the second NOA.

The 10 administrative appeals were consolidated.

Spherion asked the ALJ to dismiss or set aside the assessments as premature, on the ground that EDD's "Notice of Duplicate Accounts" was a "unity of enterprise" determination under sections 135.1[6] and 135.2[7] and, because sections 135.1 and 135.2 expressly state they are subject to *subdivision (d)* of

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any information in her or her possession or that may come into his or her possession and make an assessment of the amount of the deficiency. If any part of the deficiency is due to negligence or intentional disregard of this division or authorized regulations, a penalty of 10 percent of the amount of the deficiency shall be added to the assessment."

[6] Section 135.1 states in part: "(a) A new employing unit shall not be created when there is an acquisition or change in the form or organization of an existing business enterprise, or severable portion thereof, and there is a continuity of control of the business enterprise. . . . [¶] (f) This section shall be subject to subdivision (e) of Section 982 and subdivision (d) of Section 1127.5."

[7] Section 135.2 states in part: "If two or more business enterprises are united by factors of control, operation, and use, the director [of EDD] may determine that the business enterprises are one employing unit. [¶] . . . [¶] (b) This section shall be subject to subdivision (e) of Section 982 and subdivision (d) of Section 1127.5."

section 1127.5[8] (correct employer may be assessed for underpayment when EDD determination is final, subject to retroactivity limitation), unity of enterprise determinations are also subject to the *pre*-assessment administrative review afforded by section 1127.5, *subdivisions (a) through (c)* (fn. 8, *ante*). Spherion alternatively argued EDD effectively made an "incorrect employer" determination, which was directly subject to a pre-assessment hearing under section 1127.5, subdivision (c). Spherion also argued the second NOA was barred by the limitations period of section 1036, subdivision (b), which

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[8] Section 1127.5 provides in part: "(a) If [EDD] determines that an individual or entity that is reporting employee wages . . . is not the correct employer of the employees whose wages are reported, the director shall determine the correct employer and, subject to this section, shall apply the provisions of this code to the correct employer. [¶] (b) Upon a determination made under subdivision (a), [EDD] shall give notice of the determination . . . [¶] . . . [¶] . . . [with] a statement of the facts and circumstances upon which the determination was based. An individual or entity so noticed shall have the right to petition for review of the determination within 30 days of the notice, as provided in Section 1222. [¶] (c) During the pendency of a petition for review pursuant to subdivision (b), [a reporting entity seeking review shall continue to report employee wages, but if review is sought only by the entity identified by the director as the correct employer, the latter entity shall report the wages]. [¶] (d) When [EDD's] determination that an individual or entity is the correct employer of employees whose wages have been reported by another individual becomes final: [¶] (1) The individual or entity so determined to be the correct employer may be assessed for any underpayment of employer contributions pursuant to [§ 1126 et seq.]. No assessment shall be issued for any period prior to the effective date of this section [Sept. 15, 1986] based on which individual or entity is the correct employer, unless the correct employer committed fraud in violation of this part."

required EDD to assess all additional charges for 2003 within 180 days of the December 2003 notice of correction, and therefore the July 2004 NOA was too late. Spherion did *not* contend a "unity of enterprise" determination would be factually inaccurate. Rather, Spherion merely contended the NOAs were procedurally defective for failure to offer a pre-assessment hearing.

EDD opposed the motions to dismiss or set aside the assessments, arguing (1) the February 12, 2004, administrative appeal of the December 22, 2003, assessments was untimely because it was not filed within 40 days (or by January 31, 2004) as required by statute (§§ 1222[9] [30 days after service of the NOA] and 1206 and Code Civ. Proc., § 1013 [plus 10 days for service by mail to another state]), and there was no good cause to extend that time, as authorized by section 1222; (2) the NOAs were based on a "unity of enterprise" determination by EDD, not an "incorrect employer" determination; (3) the ALJ had no authority to dismiss or set aside assessments without a full evidentiary hearing on the merits of unity of enterprise; (4) a unity of enterprise determination does not require a pre-

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[9] Section 1222 provides in part: "Within 30 days of service of any notice of assessment . . . , any employing unit . . . may file a petition for review or reassessment with an [ALJ]. The [ALJ] may for good cause grant an additional 30 days for the filing of the petition. If a petition for reassessment is not filed within the 30-day period, or within the additional period granted by the [ALJ], an assessment is final at the expiration of the period."

assessment hearing; and (5) the second assessment was timely under section 1132.[10]

On August 6, 2007, an administrative hearing took place before an ALJ.

EDD presented evidence that the first NOA was sent by certified mail to Spherion's Florida address on December 22, 2003. A Spherion mailroom clerk signed for it on December 24, 2003. Spherion's tax director, Randal Atkinson, testified he did not become aware of the NOA until early February 2004, when he received a call from Spherion's third party consultant (Deloitte and Touche), who saw the NOA posted on an internal website by another of Spherion's third party administrators (ADP) which handled preparation of Spherion's state payroll tax returns. Atkinson looked into it, located the NOA, and submitted the administrative appeals on February 11, 2004. Atkinson's inquiry revealed that Spherion's mailroom directed the December 2003 NOA to Spherion's Payroll Tax Department, which received it on January 17, 2004. Atkinson did not know why it took so long. The payroll department faxed a copy to ADP which prepared Spherion's state payroll tax returns (but which

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[10] Section 1132 states that, except in cases of fraud or intent to evade, "every notice of assessment shall be made within three years after the last day of the month following the close of the calendar quarter during which the contribution liability included in the assessment accrued or within three years after the deficient return or report is filed, or was due, whichever period expires the later. An employing unit may waive this limitation period or may consent to its extension."

was not responsible for responding to NOAs). No one from Spherion followed up on the NOA after transmitting it to ADP.

Deloitte and Touche had also contacted Atkinson in early January 2004 to ask if Spherion had received any NOAs for duplicate accounts, because the consultant's other clients had received such NOAs. Atkinson asked his payroll tax manager and another third party consultant, TALX (which is Spherion's SUTA tax rate manager), and both were unaware of any NOA. A TALX employee said she would contact "the Department" (presumably EDD), then later said she inquired but nothing showed up.

At the administrative hearing, the parties argued the merits of whether the NOAs were defective for failure to give a pre-assessment notice and hearing.

On September 14, 2007, the ALJ issued a separate but substantively identical decision for each of the five companies with respect to each of the two assessments.

As to the *first* NOA, the ALJ decision dismissed Spherion's five petitions as untimely, with no good cause for an extension. They were filed February 11, 2004, which was not within the 40 days allowed for administrative appeal (§§ 1222, 1206 [30 days after the December 22, 2003, NOA plus 10 days for NOAs mailed to another state]). The ALJ found Spherion operates a number of businesses out of the same facility, using the same mailroom. They report taxes to most of the 50 states and the federal government. At the time in question, the mailroom "did not have a methodology for documenting when documents were received. The

assessment had found its way to the payroll department which had forwarded it to the agent as part of normal ministerial correspondence handled by the payroll agent. [Spherion] did not have a methodology in place for identifying more serious matters that should be referred to the Director of Taxes, rather than the normal payroll agent. [Spherion] did not appear to have a system in place in the mailroom for identifying correspondence which required special treatment."

The ALJ cited one of the Board's Precedential Tax Decisions[11] that "good cause" imports "something more than a mere excuse. It must be a substantial reason that affords a legal excuse accompanied by that degree of diligence which persons of ordinary prudence would have used under similar circumstances." (*In re Control Supply Company* (1968) P-T-23, p. 5.) Citing another Board Precedential Tax Decision, *In re Matter of Avery International Corporation* (1986) P-T-449, which involved "good cause" for delayed remittances (triggering interest liability), the ALJ said, "If the employer's procedures for filing returns are not reliable and therefore it is reasonably foreseeable that the return or payment will not be made on time, then the employer will be at fault for the late filing and will not have good cause for the delay." The ALJ said Spherion "routinely

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[11] The Board may designate significant decisions as "precedent decisions," which are published for public reference and are binding on all ALJs, except as modified by judicial review. (§ 409; *American Federation of Labor v. Unemployment Ins. Appeals Bd.* (1996) 13 Cal.4th 1017, 1025.)

received large bills in its mailroom that had to be received, documented and delivered to the correct responsible party in the employer's organization. The employer did not have a system for keeping track of the receipt of that correspondence or referring it to the correct staff member for handling. As a result, it was reasonably foreseeable that [Spherion] would not be able to respond promptly to a bill or assessment of more than $1 million and therefore the late filing of the petition in this matter is the fault of the employer. Because the late filing is the fault of the employer, the employer did not have a substantial reason that affords the legal excuse for filing its petition late. [¶] The Director of Taxes did show a high degree of diligence when he asked his agent to look for any assessment issued against his organization and when he in fact did receive the assessment and promptly filed his petition. But, in P-T-23 there must be both a legal excuse and the appropriate degree of diligence. In this matter, there was not a sufficient legal excuse and in fact, if proper procedures had been set up by [Spherion], the diligence of the Director of Taxes would have been more productive. As a result, [Spherion] does not have good cause for the late filing of its petition . . . ." The ALJ added that review was still available to Spherion by paying the assessment and filing for a refund under section 1178. The five companies appealed the question of good cause to the Board (§ 1224).

As to the *second* NOA, the ALJ granted Spherion's petitions for reassessment, on the ground that EDD had to give notice and

opportunity for hearing before making an assessment for unity of enterprise. EDD appealed to the Board.

On February 7, 2008, without hearing any additional evidence, the Board issued its decision. Reversing the ALJ in part, the Board found good cause to extend the time for Spherion to file the administrative appeal from the first NOA. The Board agreed with the standard applied by the ALJ but said Spherion "acted reasonably diligently. The assessments were received over the Christmas holidays. By mid-January, they were routed to one of [Spherion's] tax offices. It was immediately forwarded to ADP, the entity that takes care of payroll taxes for [Spherion]. At the time that this took place the deadline to respond had not run. [Spherion] reasonably believed that ADP would respond within the applicable time limits. When [Spherion] learned that ADP did not respond, [Spherion] appealed right away. The steps taken and the timing of these steps were consistent with the degree of diligence, which persons of ordinary prudence would have used under similar circumstances. Further, EDD was not prejudiced by the late appeal. Thus, there was good cause for the late appeal."

The Board agreed with the ALJ, however, that a unity of enterprise determination requires a pre-assessment notice and hearing under section 1127.5.

In August 2008, EDD filed in the trial court a petition for traditional and administrative mandamus under Code of Civil Procedure, sections 1085 and 1094.5.

In May 2009, the trial court denied EDD's writ petition, disagreeing with the Board's reasoning but agreeing with the Board's result (cancellation of both NOAs). "The Court finds that [the ALJ] had the authority to decide the case through a motion to dismiss. [The] Board's ruling that there was good cause for the untimely filing of the . . . first petition for reassessment is not supported by substantial evidence. Notwithstanding the late filing, however, the first petition for assessment (like the second) raised a jurisdictional issue, i.e., whether EDD's assessments were premature, that the Board was required to address. The Court finds that the Board correctly ruled that both assessments were premature, because EDD made a correct employer determination under Unemployment Code section 1127.5 [rather than a unity of enterprise determination] and did not comply with the procedural requirements of the statute. The petition for writ of mandate accordingly is denied."

Thus, the trial court concluded that this was not a unity of enterprise case at all, but rather a straight "incorrect employer" matter directly triggering the pre-assessment hearing requirements of section 1127.5, subdivisions (a) through (c).

EDD appeals from the trial court's order denying EDD's petition for writ of mandate.

DISCUSSION

I. Standard of Review

This case is complicated by the circumstance that each successive decision maker agreed in part and disagreed in part with the preceding decision maker, sometimes agreeing with the result but not the reasoning. To summarize:

The ALJ

1. Dismissed as untimely Spherion's petitions for reassessment as to the first NOA.

2. Granted Spherion's petitions for reassessment as to the second NOA on the ground that all of section 1127.5, including a pre-assessment notice and hearing, applies to section 135.1 SUTA-dumping NOAs.

Thus, the ALJ left in place the first NOA but canceled the second NOA.

The Board

1. Reversed the ALJ and found Spherion's challenges to the first NOA were timely because there was good cause to extend the deadline.

2. Agreed with the ALJ that section 1127.5's pre-assessment notice/hearing applies to section 135.1 NOAs.

Thus, the Board canceled both NOAs.

The Trial Court

1. Reversed the Board's finding of good cause, agreeing with ALJ that there was no good cause to extend Spherion's deadline to challenge the first NOA, but

1a. Concluded the deadline was inapplicable because the first NOA was void for EDD's failure to allow a pre-assessment hearing and thus was subject to attack at any time.

2. Affirmed the Board's and the ALJ's result (that Spherion was entitled to a pre-assessment notice/hearing) but for a different reason, i.e., the trial court concluded the NOAs were not based on section 135.1 SUTA dumping, but rather on an "incorrect employer" determination under section 1127.5, making directly applicable the pre-assessment hearing provisions of section 1127.5.

Thus, the trial court upheld the Board's cancellation of both NOAs.

The pleading in the trial court sought both traditional and administrative mandamus. Administrative mandamus was the appropriate claim. Thus, a petition for a writ of administrative mandamus is appropriate to challenge an administrative decision "made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested in the inferior tribunal . . . ." (Code Civ. Proc., § 1094.5, subd. (a).) Here, section 1223 provides in part: "If any petition is filed under this article within the time and meeting requirements prescribed, an [ALJ] shall review the matter and, if requested by the petitioner, shall grant a hearing."

"The inquiry in [an administrative mandamus case] shall extend to the questions whether the respondent has proceeded without or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence." (Code Civ. Proc., § 1094.5, subd. (b).) "Where it is claimed that the findings are not supported by the evidence, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence. In all other cases, abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record." (Code Civ. Proc., § 1094.5, subd. (c).)

Here, the trial court applied a substantial evidence test to the factual question whether good cause existed to extend the time for Spherion's filing of the administrative appeal, but the court said it would reach the same result (that there was no good cause) under an independent judgment standard. We believe independent judgment was the proper standard for the trial court's review of this particular Board decision (*Interstate Brands v. Unemployment Ins. Appeals Bd.* (1980) 26 Cal.3d 770, 774-782 (*Interstate Brands*) [employer is entitled to independent

judicial review of the evidence when a decision of the Board affects employer's fundamental vested right to be free of erroneous charges to its unemployment insurance account]). But it does not matter, because we would reach the same result under either standard. The trial court, in exercising independent judgment, must presume correctness of the administrative findings but may substitute its own findings if the party challenging the administrative decision shows the administrative findings are contrary to the weight of the evidence. (*Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 817-818.)

In reviewing the trial court's independent judgment, we affirm if the trial court's findings are supported by substantial evidence in the record. (*Bixby v. Pierno* (1971) 4 Cal.3d 130, 143, fn. 10.) When an administrative decision is supported by undisputed facts, but the undisputed facts are subject to conflicting inferences, a trial court exercising independent judgment may draw its own inferences from the evidence in the record, and if the inferences so drawn are supported by substantial evidence, they are binding on the reviewing court. (*Interstate Brands, supra*, 26 Cal.3d 770, 774, fn. 2.)

In cases where the trial court applies the substantial evidence test to the administrative findings, appellate review similarly examines whether substantial evidence supports the administrative findings. (*Bixby v. Pierno, supra*, 4 Cal.3d at p. 149; *Desmond v. County of Contra Costa* (1993) 21 Cal.App.4th

330; 1 Cal. Administrative Mandamus (Cont.Ed.Bar 3d ed. 2010) § 6.173, p. 299.)

Although interpretation of a statute is a judicial function, when an administrative agency is charged with enforcing a particular statute, its interpretation of the statute is entitled to consideration and respect by the courts. (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 7; *Dept. of Corrections & Rehabilitation v. Workers' Comp. Appeals Bd.* (2008) 166 Cal.App.4th 911, 917.)

II. The First NOA

We first explain that Spherion forfeited the challenge to the first NOA of December 2003, by failing to file a timely administrative appeal. We agree with the trial court that no substantial evidence supports the Board's finding of good cause to extend the time for administrative appeal. However, the trial court erred as a matter of law in concluding that the alleged procedural defect of the first NOA could be raised at any time.

No substantial evidence supports the Board's finding that Spherion "reasonably believed that ADP would respond within the applicable time limits." It was not ADP's job to respond to the NOA. Spherion's tax director testified at the administrative hearing that handling a petition for reassessment "would not have been a normal activity for ADP." Thus, Spherion made a mistake by faxing the NOA to ADP. It would not be reasonable for Spherion to assume that a third party who mistakenly

received misdirected correspondence would discover Spherion's mistake and notify Spherion of its mistake before the document's deadline expired. It was Spherion's responsibility to calendar the deadline and follow up, yet Spherion inexplicably failed to do so.

We thus conclude Spherion's administrative appeal of the first NOA was untimely.

Spherion claims the untimeliness is immaterial because "a valid notice of assessment is required to vest jurisdiction" in the Board, and EDD's notice was void due to its failure to follow section 1127.5's procedure of a pre-assessment notice and hearing, and a challenge to subject matter jurisdiction may be raised at any time. Spherion says that, in order for the Board to have jurisdiction to entertain the merits of an assessment, the assessment must be valid. Citing decisions involving the federal Internal Revenue Service (IRS), title 26 of the United States Code, section 6201 et seq. (assessments) and the federal Tax Court allowing untimely challenges to invalid tax deficiency notices, Spherion says there is extensive federal tax law holding that jurisdiction may be challenged by an untimely petition, and such law should be applied here.

However, Spherion is confusing a fundamental lack of jurisdiction over the subject matter, which may be raised at any time, and acts in excess of jurisdiction, which must be timely challenged. (*Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 286-296.) The California Supreme Court in *Abelleira*

held it had the power to restrain this court from interfering with a referee's determination that employees were entitled to unemployment benefits, where the employer had failed to exhaust administrative remedies which were a prerequisite to judicial review. "Lack of jurisdiction in its most fundamental or strict sense means an entire absence of power to hear or determine the case, an absence of authority over the subject matter or the parties." (*Id.* at p. 288.) In contrast, "when a statute authorizes prescribed procedure, and the court acts contrary to the authority thus conferred, it has exceeded its jurisdiction . . . . 'The difficulty arises from the different shades of meaning which the word "jurisdiction" has. As sometimes used, it means simply authority over the subject matter or question presented. In this sense the [unemployment] commission undoubtedly had jurisdiction in this case, and its award was not without jurisdiction on its part. But the word is frequently used as meaning authority to do the particular thing done, or, putting it conversely, a want of jurisdiction frequently means a want of authority to exercise in a particular manner a power which the board or tribunal has, the doing of something in excess of the authority possessed.' [Citations.]" (*Id.* at p. 290.) "The concept of jurisdiction embraces a large number of ideas of similar character, some fundamental to the nature of any judicial system, some derived from the requirement of due process, some determined by the constitutional or statutory structure of a particular court, and some based upon mere

procedural rules originally devised for convenience and efficiency, and by precedent made mandatory and jurisdictional. Speaking generally, any acts which exceed the defined power of a court in any instance, whether that power be defined by constitutional provision, express statutory declaration, or rules developed by the courts and followed under the doctrine of *stare decisis*, are in excess of jurisdiction, in so far as that term is used to indicate that those acts may be restrained by prohibition or annulled on *certiorari*." (*Id.* at p. 291; but see *Mokler v. County of Orange* (2007) 157 Cal.App.4th 121, 133-138 [county could not raise for the first time on appeal the jurisdictional issue of failure to exhaust administrative remedies].)

Here, the alleged procedural defect (the absence of a pre-assessment notice and hearing) did not deprive the ALJ, the Board, or the court, of fundamental jurisdiction to reject as untimely Spherion's challenge to the first NOA. Nor did the alleged procedural defect require or allow the ALJ, the Board, or the court to invalidate the NOA. Thus, section 1127[12]

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[12] Section 1127 provides: "If the [EDD] director is not satisfied with any return or report made by any employing unit of the amount of employer or worker contributions, he or she may compute the amount required to be paid upon the basis of facts contained in the return or reports or may make an estimate upon the basis of any information in his or her possession or that may come into his or her possession and make an assessment of the amount of the deficiency. If any part of the deficiency is due to negligence or intentional disregard of this division or

authorized EDD to issue the NOA. Section 1222 says, "If a petition for reassessment is not filed within the 30-day period, or within the additional period [if] granted by the [ALJ], an assessment is final at the expiration of the period." Section 1223 says, "If any petition is filed under this article *within the time and meeting requirements prescribed*, an [ALJ] shall review the matter and, if requested by the petitioner, shall grant a hearing." Section 1224 authorizes an appeal of the ALJ decision to the Board.

Spherion cites no California authority supporting its contention that the alleged procedural defect of the NOA (in failing to give pre-assessment notice and hearing) renders the NOA void and subject to attack at any time. Spherion cites *Wertin v. Franchise Tax Board* (FTB) (1998) 68 Cal.App.4th 961, but fails to discuss it or explain how it helps. *Wertin* held invalid a notice of proposed assessment that FTB issued without reviewing the taxpayers' tax return. *Wertin* did not involve an *untimely* challenge to an assessment, never mentioned jurisdiction, and therefore does not provide any support for Spherion's argument that it may attack the validity of the NOA despite untimeliness of its challenge. That *Wertin* relied on analogous federal tax law to construe California tax law does not help Spherion, because *Wertin* involved a state tax statute

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authorized regulations, a penalty of 10 percent of the amount of the deficiency shall be added to the assessment."

which used the same language as a federal tax statute. (*Id*. at p. 971.) Here, Spherion fails to cite any analogous statutes.

Spherion cites (but does not discuss) a precedential Board decision, *In re Beltran* (1969) P-B-46, for the proposition that, in order for the Board to have jurisdiction to entertain the merits of an assessment, such assessment must be valid, but the Board has jurisdiction to determine jurisdiction, and subject matter jurisdiction may be raised at any time. However, the cited case involved rejection of a claim for job training allowances under a federal program, where the claimant had enrolled in his job training course on his own rather than by referral by the federal program. The Board said the question of denial of allowances was never before the referee, who should have been concerned only with the denial of a referral, which was not appealable. (*Id*. at p. 3.) The Board thus set aside the administrative decision and dismissed the appeal to the Board. (*Id*. at p. 6.) No such issue appears in the case before us, and Spherion fails to cite any authority that the Board lacked subject matter jurisdiction over the NOA.

As to Spherion's reliance on federal tax law, it is unavailing. Spherion cites numerous federal cases, most from the federal Tax Court, holding the Tax Court lacks subject matter jurisdiction over invalid deficiency notices of the IRS, and therefore the Tax Court, in dismissing a taxpayer's challenge as untimely, could also dismiss the case for lack of jurisdiction precluding the IRS from collecting on the invalid

notice. (E.g., *Monge v. Commissioner* (1989) 93 T.C. 22.) Spherion argues *Monge* is very similar to this case. We disagree. In *Monge*, the mailing of an IRS deficiency notice triggered the time for the taxpayer to petition for redetermination, but the IRS sent the notice of deficiency to the wrong address. Pursuant to federal statutes and Tax Court Rules, a valid notice of deficiency and a timely petition were both essential to the Tax Court's jurisdiction. (*Id.* at pp. 26-27.) Dismissal for lack of jurisdiction based on the invalid notice might prohibit the IRS from making an assessment based on the invalid notice. (*Ibid.*) The Tax Court concluded the notice sent to the wrong address was without legal effect. (*Id.* at p. 29.)

Thus, *Monge* was concerned with a constitutional matter of due process. Here, there is no question that Spherion received the first NOA two days after it was mailed. Nor does Spherion show any due process deprivation. We observe that, in the context of taxes, the usual rule is "pay now, litigate later." (*California Logistics, Inc. v. State of California* (2008) 161 Cal.App.4th 242, 247 [under California Constitution, the sole legal avenue for resolving tax disputes is a postpayment refund action].) Thus, even assuming for the sake of argument that a section 1127.5 pre-assessment notice and hearing was required in this case, the statutory requirement would not implicate constitutional due process. Spherion does not dispute the ALJ's

finding that Spherion retains the remedy of paying the assessment and then suing for a refund under section 1178.

Spherion fails to discuss any of the federal statutes or federal Tax Court Rules that drove the decisions in the cited federal cases (E.g., *Monge, supra*, 93 T.C. at p. 27 [citing 26 U.S.C. §§ 6212, 6213, 6214]; *Billingsley v. Commissioner* (9th Cir. 1989) 868 F.2d 1081, 1085 [citing Tax Court Rule 13]), and Spherion fails to show any similarity between such federal statutes/rules and any California statutes or rules.

We conclude the Board and the trial court erred in allowing Spherion's untimely challenge to the December 2003 assessment. The challenge was untimely because it was not filed within 40 days and, as a matter of law, there was no good cause for extension. Spherion forfeited the challenge to the December 2003 assessment. Accordingly, the trial court erred in denying EDD's petition for a writ of mandate directing the Board to vacate its decision that the administrative appeal of the first NOA was timely, to dismiss the administrative appeal of the first NOA as untimely, and to reinstate the first NOA.

III. <u>The Second NOA</u>

As to the second NOA of July 2004, we shall affirm the trial court's denial of EDD's petition for writ of mandate, but not for the reason given by the trial court. (*Davey v. Southern Pacific Co*. (1897) 116 Cal. 325, 329-330 [appellate court reviews the judgment, not the reasoning, and therefore may affirm judgment for reasons different from trial court].)

We do not reach EDD's contentions about the merits of the second NOA of July 2004, because Spherion correctly points out on appeal to this court (as it did in the administrative appeal and in the trial court) that the second NOA was untimely under section 1036,[13] which requires that any additional amount must be assessed within 180 days from the postmarked date of a notice of correction. Though not cited by the parties, California Code of Regulations, title 22, section 1036-2[14] expressly makes section

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[13] Section 1036 provides in part: "(a) The director shall give notice, pursuant to Section 1206, to the employer of the correction of any error which the director finds in any statement of account or statement of charges. Except in the case where fraud, intent to evade, misrepresentation, or willful nondisclosure is found, the notice of correction shall be issued prior to the expiration of the rating period to which a statement relates. [¶] (b) *Any additional amount of contributions resulting from an increased contribution rate caused by the correction of any error that the director finds in any statement of reserve account or statement of charges shall be assessed within 180 days from the postmarked date of the notice of correction.* These assessments shall be issued in accordance with Article 8 (commencing with Section 1126." (Italics added.)

[14] California Code of Regulations, title 22, section 1036-2, which is titled "Correction of Duplicate Accounts," states: "If an employer has reported wages and paid contributions under two or more accounts with separate contribution rates, the department shall combine the accounts, compute the corrected contribution rate, and give notice of the correction to the employer, pursuant to Section 1036 of the code, prior to the expiration of the rating period to which the corrected contribution rate applies. The contribution rates for rating periods which have expired are final. If contributions are due with respect to additional unreported wages for rating periods which have expired, the contributions shall be paid at the rate applicable to the expired rating period. No refund, credit, or assessment with respect to wages previously reported for the

1036 applicable to a notice of duplicate accounts. (Cal. Code Regs., tit. 22, § 1036-2.)

Here, the notice of correction (labeled "NOTICE OF DUPLICATE ACCOUNTS"), together with the *first* NOA for the first three quarters of 2003, was postmarked December 22, 2003. The *second* NOA, for the final quarter of 2003, did not issue until July 7, 2004 -- 197 days after the notice of correction. Thus, it did not issue within the 180 days allowed by section 1036 and was untimely.

Spherion raised this point in the administrative appeal and in the trial court, but it was not addressed by the ALJ or the Board, and the trial court stated in a footnote that it need not decide the issue in light of the court's ruling that the NOA was invalid for other reasons. Since the point presents a question of law, we can decide it without remand. (*Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 884-885.)

EDD argues section 1036 does not apply, because its notice of duplicate accounts was not a notice of correction within the meaning of section 1036.

However, EDD's position is directly contradicted by EDD regulation 1036-2, footnote 14, *ante*, which expressly states that a notice of duplicate accounts (which is the label EDD itself placed on the notice at issue in this case) is a notice of correction subject to section 1036.

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expired rating periods shall be based solely on the employer's use of two or more accounts with separate contribution rates." (Cal. Code Regs., tit. 22, § 1036-2.)

We observe application of section 1036's 180-day limit does not impede EDD from making an assessment where an employer's fraud results in delayed discovery by EDD. Thus, in cases of fraud, subdivision (a) of section 1036 (as amended by Stats. 2004, ch. 827, § 6) allows a notice of correction to issue after expiration of the rating period to which it relates. Nevertheless, once EDD discovers the fraud and issues the notice of correction (as EDD did in this case in December 2003), section 1036, subdivision (b), requires that any *additional* assessment must come within 180 days of the notice of correction. Here, the December 2003 notice of correction and first NOA issued before expiration of the 2003 rating period, but the second NOA (July 2004) did not come within 180 days of the notice of correction.

We conclude the judgment denying EDD's writ petition regarding the second NOA was correct, though not for the reason given by the trial court.

DISPOSITION

The judgment (order) is reversed with respect to the first NOA but is affirmed with respect to the second NOA. Upon remand, the trial court shall enter a new judgment (order):

(1) issuing a peremptory writ of mandate directing the Board (a) to set aside its determination that good cause rendered Spherion's administrative appeal of the first NOA timely, (b) to dismiss as untimely Spherion's challenge to the first NOA, and (c) to reinstate the first NOA; and

(2) reinstating its denial of EDD's writ petition as to the second NOA.

The parties shall bear their own costs on appeal. (Cal. Rules of Court, rule 8.278(a)(3).)

SIMS, J.

We concur:

SCOTLAND, Acting P. J.*

ROBIE, J.

* Retired Presiding Justice of the Court of Appeal, Third Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.