

Update on the Law of Public Revenues

Annual Conference
League of California Cities
San Diego, CA
Sept. 6-9, 2006

MICHAEL G. COLANTUONO

Colantuono & Levin, P.C.

11406 Pleasant Valley Road

Penn Valley, CA 95946-9024

(530) 432-7359 (voice)

(530) 432-7356 (fax)

mcolantuono@cllaw.us

www.cllaw.us

Utility Users Taxes

- Palo Alto v. Verizon (Sta. Clara Superior Court)
 - FET exemption for flat monthly packages amounts to exemption under League model UUT ordinance
 - Appeal to 6th DCA likely
- Verizon Wireless v. LA (2nd DCA)
 - Trial court found post-Mobile Telecommunications Sourcing Act application of UUT to call portion of cell phone bill to require voter approval
 - Appeal to 2nd DCA pending

Utility Users Taxes (Cont.)

- IRS Notice 2006-50
 - Acquiesced in cases cited in Palo Alto case to abandon FET on long distance not billed by time and distance and package plans
 - UUT agencies should de-couple their taxes from the FET
 - Advisable to update taxes with voter approval

Bed Tax Legislation

- AB 1916 (Maddox, R-Costa Mesa)
 - Hotel buyer gets tax certificate
 - City can audit seller first
 - Required form for gov't exemption
 - 4-year statute of limitations unless local ordinance provides otherwise under GC 935

Pension Override Taxes

- *HJTA v. County of Orange*, 110 Cal.App.4th 1375 (2003) held property tax override limited to benefits approved by voters before 1978
- 88 *Ops. Cal. AG* 1 (2005) states benefits approved pre-1978 but awarded thereafter can be basis of tax and “any reasonable accounting method may be used [to] determin[e]” amount of override

Sales & Use Taxes

- *Borders Online, LLC v. State Board of Equalization*, 129 Cal.App.4th 1179 (2005)
 - Borders' online activities sufficiently linked to California bricks-and-mortar stores to create use tax jurisdiction

Tax Legislation

- ACA 7 – special taxes on 55% vote
- SCA 8 – school parcel taxes on 55% vote
- AB 385 – senior and low-income exemptions from school parcel taxes (GC 50079)
- AB 1030 AB 2873 – possessory use tax exemption for conventions of 7 days or less in public convention center

Tax Legislation (Cont.)

- AB 2873 – authorize SF and Counties to impose ¼-cent sales tax for transportation with ⅔-voter approval

911 Fees

- San Francisco adopted post-Loma Prieta
- More recent adopters have faced litigation
 - Union City (general law)
 - Stockton (charter)
 - Santa Cruz (county)

911 Fees (Cont.)

- *Mancini v. County of Santa Cruz*, 6th DCA Case No. H023434 upheld County's fee (review and publication denied)
- Union City: summary judgment for phone carriers on appeal to 1st DCA

911 Fees (Cont.)

- Stockton: *Andal v. City of Stockton*, 137 Cal.App.4th 86 (2006) – no duty to exhaust administrative refund remedy before seeking declaratory relief that 911 Fee was illegal tax
- Three consolidated cases to be tried in March 2007

Prop. 218 & Utility Rates

- *Apartment Ass'n v. LA* (2001) & *HJTA v. LA* (2000) held that utility rates based on metered consumption were not subject to Prop. 218
- *Richmond v. Shasta CSD* (2004) raised questions on this issue
- *HJTA v. Fresno* (2005) ruled metered water, sewer and trash rates subject to 218

Bighorn-Desert View Water Agency v. Verjil

- Metered rates for consumption of water (and likely sewer and gov't-provided trash) are property related fees subject to Prop. 218
- Art. 13D, 6(a) requires 45-day notice of old-fashioned majority protest in which silence equals consent
- Art. 13D, 6(c) exempts water, sewer and trash fees from majority-property-owner election or $\frac{2}{3}$ -voter election required of other property related fees

Bighorn-Desert View Water Agency v. Verjil

- No discussion of *Apartment Ass'n v. City of Los Angeles*, 24 Cal.4th 830 (2001)
- *HJTA v. Los Angeles*, 85 Cal.App.4th 79 (2000) expressly overruled

Implications of Bighorn

- The decision is “retroactive” in the sense that it tells us what 218’s property related fee provisions have required since their 7/1/97 effective date
- Statute of limitations – CCP 338(a) for declaratory relief under HJTA v La Habra, 1-year for refunds under a properly drawn claiming ordinance under GC 935

Implications of Bighorn (Cont.)

- Notice to ratepayers, property owners, or both?
 - 13D, 6(a)(2) says property owners
 - 13D, 2(g) says “property ownership” includes tenant ratepayers
 - Gov’t Code 53750(j) defines record owner as that listed on tax role
 - Gov’t Code 53750(i) allows notice to be included with bill

Implications of Bighorn (Cont.)

- Notice to whom?
 - Conservative practice is to give notice to both property owners and rate payers
 - Defensible argument can be made that notice to rate payers alone will suffice
 - LCC, ACWA and others are considering clarifying legislation

Implications of Bighorn (Cont.)

Solid waste services

- Gov't services are treated like water & sewer
- Private services should be exempt
 - Who provides service?
 - Who bills for the service?
 - Does agency set or merely regulate rates?

Capital Component of Water Rate Charged Other Governments

- Problem created by *San Marcos Water Dist. v. San Marcos Unified School Dist.*, 190 Cal.App.3d 1083 (1987)
- AB 2951 (Goldberg, D-LA) would permit non-discriminatory capital component and capital facilities fee

General Fund Transfers

- Cost Allocation, Debt Repayment Raise No Questions, Transfer due to infrastructure impacts allowed by *Roseville & Fresno*
- Prior to Prop. 218, *Hansen v. Ventura* (1986) allowed return on investment
- *HJTA v. Roseville* (2002) said that Prop. 218 prohibits this for fees it governs
- *Bighorn* clarifies *Hansen* not applicable to 218 fees

Storm water & NPDES

- General & special taxes w/ voter approval
- Assessments if special benefit can be shown
- Property-related fees with Prop. 218 compliance
- Non-property related fees
- Transfers from utility funds?
- But cf. *HJTA v. Salinas* (2002) (property-tax-roll fee was subject to Prop. 218)

Storm water & NPDES (Cont.)

- ACA 13 would add “flood control and storm and surface water drainage” to 13D, 6(c)
- AB 1546 allowed \$4 license plate fee for San Mateo agencies to fund roads and associated drainage improvements
- ACA 30 would allow fee for maintenance of pre-218 levies on old-fashioned majority protest

Regulatory Fees

- *County Sanitation District No. 2 of Los Angeles County v. County of Kern*, 127 Cal.App.4th 1544 (2005)
 - Regulatory fee could not include component for use of public roadways

Open Space Assessments

- Does regional open space provide special benefit to justify assessing private property?
- *BadTax v. MRCA* – trial court victory, appeal abandoned
- *Silicon Valley Taxpayers Ass'n v. Santa Clara County Open Space Authority* –victory, in 6th DCA, S. Ct. granted review, briefing underway

Business Improvement District Assessments

- *Dahms v. Downtown Pomona Property & Business Improvement Dist.*
 - Upheld exemption for non-profits, giving main street foot frontage greater weight than side and rear frontage, and assumed that PBID services provided special benefit because above level of general city services
 - Supreme Court grant and hold pending Silicon Valley decision

Prop. 218 Initiatives

- *Bighorn-Desert View Water Agency v. Beringson*
 - 13C initiative applies to all 13D property related fees and perhaps more
 - Legislature may not delegate rate-setting to legislative body alone in defiance of 13C
 - No discussion of impairment of essential government function
 - Cannot set voter-approval standard different from that stated by Prop. 218

Open Initiative Questions

- Bighorn reserved whether initiative rate-setting subject to statutory mandate that fees cover cost of safe & adequate water supply
- Can initiatives raise rates?
- How can local government set new rates in teeth of an initiative rate reduction?
- Impact of rate covenants to bond holders

Fiscal Elections

- 88 Ops. Cal. AG 46 (2005)
 - Public funds may be used to conduct polls to advise framing of measure
 - Public funds cannot be used to develop strategy to build support for a measure
 - Private funding must be used for “yes” efforts

Questions?
