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BY FACIMILE AND U.S. MAIL

Daniel G. Stone
Deputy Attorney General
Office of the Attorney General of California
P. O. Box 944255
Sacramento, CA 94244-2550

Re: Opinion No. 03-412

Dear Mr. Stone:

We write on behalf of the League of California Cities[1] in response to your solicitation of views of interested parties regarding Opinion No. 03-412.

Question Presented:

In accordance with Proposition 218, may the City of San Bernardino validly adopt and enforce a city ordinance in which the annual business license fee currently charged to each outdoor swap meet vendor is shifted from said vendors to the owner of the outdoor swap meet establishment, even if with said owner's permission?

Response:

This question asks whether a city may revise the methodology for its "business license fee" so that swap meet owners are responsible for remitting to the city the fee previously due to the city from each swap meet vendor. Such a revision might be accomplished by eliminating the fee upon swap meet vendors while increasing the fee upon swap meet owners. Alternatively the city might require the swap meet owners to assume the responsibility of collecting the existing fee from vendors and remitting the fee to the city. The apparent concern of the questioner is that provisions of the California Constitution, principally Proposition 218 (Articles XIIIC and XIID of the California Constitution), would require voter approval of such a revision.

[1] The League of California Cities is an association of 477 California cities united in promoting the general welfare of cities and their citizens.

As is discussed in more detail below, Proposition 218 does not require voter approval of the methodology change unless both (i) the fee is a tax and (ii) the methodology change causes an "increase" in that tax. Therefore, answering the question requires a fact-intensive, two-step, analysis. First, a determination must be made as to whether the business license fee is a tax subject to Proposition 218. Then, if the fee is, in fact, a tax, a determination must be made as to whether the change in methodology with respect to swap meets, would "increase" the tax.

It is quite possible that the methodology change which is the subject of the question would not require voter approval. This is because (1) a business license fee can be structured as a regulatory fee, rather than a tax and (2) while a shift of the "fee" burden from swap meet vendors to swap meet owners would increase the "fee," a shift in collection obligations may not.

1. Is the "Business License Fee" A Regulatory Fee Outside the Scope of Proposition 218?

A great many of the fees and levies that are commonly imposed by cities fall entirely outside the scope of Proposition 218. Indeed, the limitations of Proposition 218 are applicable only to three classes of levies: (i) assessments against real property[2], (ii) property-related fees[3], and (iii) taxes.

A business license fee is typically imposed upon businesses for the privilege of operating with a city. Some of the businesses, like the business of a swap meet owner, typically will involve the operation, management, or ownership of real property. However, because such a "fee" is charged to businesses, and not levied against real property, it is not an assessment against real property.[4] Furthermore, because a landowner is obligated to pay the "fee" only if it chooses to operate a business (and not as a landowner, per se) a typical business license fee would not be a property-related fee.[5]

Since a "business license fee" is not an assessment against real property or a property-related fee, it is only subject to the requirements of Proposition 218 if it is, in fact, a tax. Certainly some business license fees levied in California (or at least some portions of such fees), are taxes, levied for the purpose of raising revenue for general governmental purposes.[6] However, a fee "charged in connection with regulatory activities" is not a tax taxes unless it

[2] *See, Cal. Const. Art. XIIID, Sec 2(b)* ["'Assessment' means any levy or charge upon real property by an agency for a special benefit conferred upon the real property."].
[3] *See, Cal. Const. Art. XIIID, Sec 2(d)* ["'Fee' or 'charge' means any levy other than an ad valorem tax, a special tax, or an assessment, imposed by an agency upon a parcel or upon a person as an incident of property ownership…"].
[4] *See, Howard Jarvis Taxpayer's Assoc. v. City of San Diego* (1999) 72 Cal.App.4th 230 [assessment against businesses to "defray costs of services and programs" of benefit to the businesses not an assessment against real property].
[5] *See Apartment Ass'n of Los Angeles County v. City of Los Angeles* (2001) 24 Cal.4th 830, 832 [inspection fee imposed upon private landlords not a property-related fee].
[6] *See, e.g. Gov't Code Sec. 37101* [general law cities may levy business license taxes for regulatory purposes, revenue purposes, or both].

either (i) exceeds "the reasonable cost of providing services necessary to the activity for which the fee is charged" or (ii) is "levied for unrelated revenue purposes."[7]

Many "business license fees" are imposed to fund the cost of business inspections, consumer education programs, business license program administration, license fee collection activities, and similar activities and services. Such fees are regulatory fees, charged to businesses for the purpose of mitigating the actual or anticipated adverse effects of their operations. As such, their imposition is not limited by the restrictions of Proposition 218.

2. Does the Methodology Change Merely Implement or Collect a Previously Approved Tax?

Even an existing business license fee is a tax, Proposition 218 only requires voter approval of actions that extend or increase that tax.[8] The methodology change proposed with respect to swap meets would not "extend" the business license fee because, the change would not "extend the stated effective period" of the fee.[9] The key question, then, is whether the modification with respect to swap meets would "increase" the business license fee. If it does (assuming that the "fee" is in fact a "tax"), then it must be approved by the voters. Otherwise, the modification does not required voter approval.

An action that revises the methodology by which a tax is calculated "increases" the tax if that revision either increases the rate of the tax or results in an increased amount being levied on any person.[10] Presumably, the business license fee at issue here is currently imposed upon both swap meet owners and swap meet vendors. The owner owes one tax (for operating the swap meet) and each vendor also owes a tax (for operating their retail businesses). Were the city to change the methodology of its tax so that the tax upon vendors would be eliminated, while the tax upon owners would be increased, that change would increase the amount of the levy against each swap meet owner, and therefore would require voter approval.

A different result obtains if the city does not increase the business license fee upon swap meet owners, but instead revises the collection methodology for the fee by requiring swap meet owners to collect the existing fee against swap meet vendors from their tenant vendors. Requiring businesses to collect taxes on behalf of a taxing entity is not unusual in California. State law specifically authorizes local governments to require utilities to collect a utility users tax

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[7] *Sinclair Paint Co. v. State Bd. of Equalization* (1997) 15 Cal.4th 866, 876.

[8] Most "business license fees" that are taxes are general taxes, imposed for general government purposes. Therefore, the applicable voter approval requirement is the requirement contained in Section 2(b) of Article XIIIC of the Constitution: "No local government may impose, extend, or increase any general tax unless and until that tax is submitted to the electorate and approved by a majority vote." However, even if a "business license fee" were a special tax, the voter approval requirement only applies to actions that impose, extend, or increase the special tax. *See, Cal. Const. Art. XIIIC, Sec 2(d).*

[9] *See, Gov't Code, Sec. 53750(e)* ["'Extended', when applied to an existing tax…, means a decision by an agency to extend the stated effective period for the tax…, including, but not limited to, amendment or removal of a sunset provision or expiration date."].

[10] *See, Gov't Code, Sec. 53750(h)(1)(B).*

from ratepayers.[11] Similarly many local governments require hotels to collect transient occupancy taxes from their guests.[12] Requiring swap meet owners to collect business license fees from their tenants would be a similar collection methodology to these examples.

Taxes are not increased by actions that "implement or collect a previously approved tax" but neither increases the tax rate nor result in an increase in the amount levied against any person.[13] Requiring swap meet vendors to pay their business license fees to their landlords (rather than directly to the City) would not cause any person to pay an increased tax. Therefore, the imposition of such a requirement, with respect to an existing tax, would not be a tax increase and would not require voter approval.

Thank you for the opportunity to comment on this question. Should you have any questions about our response, please do not hesitate to contact me at the above telephone number.

Very truly yours,

Mark E. Mandell

[11] *Rev & Tax Code, Sec. 7284.2.*
[12] *See, e.g. Patel v. City of Gilroy* (2003) 97 Cal.App.4th 483.
[13] *Gov't Code, Sec. 53750(h)(2)(B).*