

Update on the Law of Public Revenues

Sacramento County Bar
Assn Public Law Section

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Taxes

- Many proposals to amend Prop. 13 to allow some or all special taxes on 55% rather than 2/3 vote
 - ACA 3 police and fire services and facilities, SCA 4 & 8 transportation, SCA 7 libraries, SCA 9 economic development, SCA 11 for all special taxes
 - SCA 7, 9, and 11 passed committee, pending in Senate Appropriations as of 2/16/14

Utility Users Taxes

- *McWilliams v. Long Beach* (Cal. S. Ct. 2013)
 - Gov't Claims Act preempts local claiming ordinances
 - Legislative fix possible

Utility Users Taxes (Cont.)

- *Sipple v. City of Hayward & 134 other UUT Agencies*
 - AT&T / New Cingular Wireless settled consumer class action in Illinois, agreeing to refund taxes on wireless packages that included internet due to preemption by Internet Tax Freedom Act of 2009
 - AT&T sued all California UUT; lost on standing and claiming compliance
 - To be argued March 20, 2014

Utility Users Taxes (Cont.)

- *J2 Global Communications, Inc. v. City of LA* (2013) 2nd DCA
 - E-fax service is not “internet access” for purposes of tax exemption required by the federal Internet Tax Freedom Act (ITFA)

Utility Users Taxes (cont.)

- Wireless Tax Fairness Act of 2013
 - 5-year Bar on New or Amended Cell Taxes above 1%
 - HR 2309 (Lofgren, D-San Jose) (219 co-sponsors); S 1235 (Wyden, D-OR) (16 co-sponsors)
 - Exempt taxes “imposed and actually enforced on mobile services ... prior to the date of enactment of this Act.”
 - Exempt “a local jurisdiction tax that may not be imposed without voter approval, provides for at least 90 days’ prior notice to mobile service providers, and is required by law to be collected from mobile service customers.”

Utility Users Taxes (Cont.)

- S. 31 (Ayotte, R-NH), S. 1431 (Wyden, D-OR), HR 434 (Chabot, R-OH)
 - Internet Tax Freedom Forever Act
 - Would extend indefinitely current internet tax ban which expires 11/1/14
 - 1, 29 and 0 co-sponsors as of 2/15/14
 - Pending in Senate Finance Committee and House Judiciary Reg. Reform Subcomm.

Utility Users Taxes (Cont.)

- A.B. 300 (Perea, D-Fresno)
 - Would have provided for collection of State & local telephony taxes on calling cards and other prepaid services at point of sale
 - Distributed by SBE
 - Preempts local taxation authority
 - Vetoed at SBE's request
 - New proposal expected shortly

Utility Users Taxes (Cont.)

- AB 792 (Mullin, D-So. SF)
 - Mandatory exemption for local UUT of power generated by “clean energy resource for the use of a single customer or the customer’s tenants.”
 - Includes solar, generators that run on renewable fuel, etc.
 - Effective 1/1/14 to 1/1/20

Tax Elections

- *Silicon Valley Taxpayers' Assn. v. Garner* (2013) 216 CA4th 402 (6th DCA)
 - Prop. 218 requires general taxes to be on general election ballots when council or board seats are contested absent unanimous vote to declare fiscal emergency
 - This case holds both primary and runoff elections are “general” elections even if all races resolved in primary.

Property Tax Administration Fees

- *Alhambra v. LA County* (2012) 55 C.4th 707
 - Counties overcharged cities for PTAF wrt VLF Swap and Triple Flip
- *Clovis et al. v. County of Fresno* (2014) 222 CA4th 1469
 - interest on PTAF and other tax- and fee refunds
 - 7% / 10% until 12/31/13; T-Bill rate and T-Bill rate plus 2% thereafter

RDA Pass-Throughs

- *LAUSD v. County of LA* (2013) 217 CA4th 597 (2nd DCA)
 - VLF Swap & Triple Flip reduce ERAF payments to schools but do not reduce property tax base on which RDA pass-throughs are calculated
 - First case citing & applying *Alhambra* PTAF case

Property Tax

- *Cal STRS v. Co. of Los Angeles* (2013) 216 Cal.App.4th 41
 - STRS had standing to challenge possessory interest tax on its tenant b/c STRS paid it
 - No duty to pay under protest
 - Less deference to agency interpretation of statute than regulation

Property Tax

- *Netjets Aviation, Inc. v. Guillory* (2012) 207 CA4th 26 (4th DCA)
 - Possessory interest tax on fractionally owned aircraft complies with Commerce Clause but may not be applied retroactively

Property Tax

- *William Jefferson & Co., Inc. v. Board of Assessments & Appeals No. 3* (2012) 695 F.3d 960 (9th Cir.)
 - Co. Counsel representation of assessor & appeals board didn't violate federal due process b/c ethical wall was sufficient
 - *Sabey v. Pomona* (2012) 215 CA4th 489 does not allow this as to partners in private firm; might be vitiated by *Today's Fresh Start v. LA Co. Office of Ed.* (2013) 57 Cal.4th 197

Property Tax

- *Western States Petroleum Assn. v. SBE* (2012) 57 C.4th 401
 - New rule allowing separate assessment of land and fixtures for oil refineries did not violate Prop. 13, but rule-making failed to comply with economic impact analysis requirement of APA, so rule invalid

Property Tax

- *Duea v. County of San Diego* (2012) 204 CA4th 691 (4th DCA)
 - Taxpayer sued to challenge County refusal to transfer base year value, claiming he sold under threat of condemnation
 - Failed to exhaust administrative remedies by alleging before County appeal board that buyer was agent of County of San Diego and its RDA

Property Tax

- *Holland v. Assessment Appeals Board No. 1* (2014) 58 Cal.4th 482
 - Statute authorizing reassessment of fractional share in coop mobilehome park on sale of a unit did not specify how that share is to be valued
 - Permissible to use sales price, less book value of mobilehome as value

Property Tax

- *Benson v. Marin Co. Assessment Appeals Board* (2013) 219 CA4th 1445
 - Termination of family joint tenancy and creation of tenancy in common was “change of ownership” triggering reassessment

Parcel Taxes

- *Borikas v. Alameda Unified Sch. Dist.* (2013)
214 CA4th 135 (1st DCA)
 - Statute authorizing school parcel taxes requires uniform taxation — no distinction by land use
 - Many special districts have comparable statutes
 - Related to debate re split roll under Prop. 13
 - Legislative fix may be in the offing

Mello-Roos Special Taxes

- *City of San Diego v. Shapiro, et al.* 4th DCA Case No. D063997
 - City imposed tax on hotels to fund convention center, allowed only hotel owners to vote
 - Trial court upheld special tax
 - Taxpayer advocates appealed, arguing for registered voter election
 - Fully briefed as of 1/8/14

Income Taxes

- *Cutler v. FTB* (2012) 208 CA4th 1247 (2d DCA)
 - Deferral of income for sale of stock in corps. w/ CA assets and payroll, but not others violates commerce clause
 - FTB imposed remedy by disallowing deduction for others
 - Public outcry led to legislative fix

Payroll Taxes

- *Coblentz Patch Duffy & Bass v. San Francisco*, 1st DCA No. A135509
 - SF Initiative treats partnership distributions as taxable “payroll”
 - Several lawsuits sued; most cases stayed
 - Lead case fully briefed as of February 2013

Under-Collection of Bed Tax by Online Resellers

- Resellers are subject to bed tax as sellers of hotel nights
- Hotels pay tax on wholesale rent reseller pays hotel, reseller collects tax on retail rent from customer and pockets the difference
- Class action counsel unsuccessfully pursued this issue for LA, San Diego, Anaheim & W. Hollywood

Under-Collection of Bed Tax by Online Resellers

- Options for Cities & Counties
 - Let the money go
 - Seek voter approval of an amended ordinance
 - Enforce your existing ordinance provisions requiring disclosure to hotel guest of tax paid
- *Hotels.Com, L.P. v. San Francisco*, Case No. CGC-13-535277
- San Diego litigation, too

Sales & Use Taxes

- S 1364 (Wyden, D-OR); HR 3724 (Lamar Smith, R-TX)
 - Digital Goods and Services Tax Fairness Act of 2013
 - Facilitates collection of sales taxes on internet transactions but limits collection to a single, uniform tax
 - 3 & 8 cosponsors as of 2/15/14, pending in Senate Finance & House Judiciary Committees

Sales & Use Taxes

- Marketplace Fairness Act, S 743 (Enzi, R-WY)
 - Passed Senate 69-27
 - internet retailers w/ sales >\$1m to collect sales & use taxes consistently w/ Streamlined Sales & Use Tax Agreement
 - HR 684 (Womack, R-AZ) is companion bill
 - Pending in House Committee
- AB 155 (Calderon, D-Whittier)
 - Adopted R&T 6203 to require web retailers grossing more than \$1m to collect sales & use taxes; effective 1/1/13

Sales & Use Taxes

- *Palmdale v. SBE* (2012) 206 CA4th 329 (2d DCA)
 - 7 cities challenged SBE decision to allocate sales taxes to Pomona rather than county pool under “warehouse rule.”
 - 3 trial court writs against SBE resulted
 - DCA refused to vacate trial court ruling after settlement, publishing opinion to whack SBE

Sales & Use Taxes

- *Loeffler v. Target Corp.*, Cal. S. Ct. Case No. S173972
 - Class action challenge to alleged misapplication of sales taxes
 - May shed light on scope of art. XIII, § 32 which limits tax refunds to those specifically authorized by statute
 - Argued 2/4/14; opinion due by May

Sales & Use Taxes

- AB 576 (V.M. Perez, D-Indio)
 - Signed into law October 2013
 - 9 state agencies to collaborate to enforce sales and use taxes

Tax Enforcement

- SB 211 (Hernandez, D-West Covina)
 - Eliminates sunset on enforcement collaboration between cities / counties and the FTB
 - Effective 1/1/14

Prop. 218 & Annexation

Citizen's Ass'n of Sunset Beach v. Orange County LAFCO (4th DCA 2012)

- Ass'n challenged LAFCO approval of island annexation for lack of election to approve extension of Huntington Beach's taxes into annexation area
 - Citing Prop. 13 precedent, Court found no election required
 - Supreme Court denied review

Interest on Tax Judgments

- AB 748 (Eggman, D-Stockton)
 - Lowers interest rate on judgments against local governments from 7% to T-bill rate pre-judgment and T-bill plus 2% post-judgment
 - Sought by local govts for many years
 - Effective 1/1/14
 - *Clovis v. Fresno* found no retroactivity

Groundwater Extraction Charges

- *Pajaro Valley Water Mgmt. Agency v. AmRhein* (6th DCA 2007)
 - Groundwater augmentation / extraction charges are property related fees subject to Prop. 218

Groundwater Extraction Charges

- *Griffith v. Pajaro Water Mgmt. Agency* (2013)
220 CA4th 586 (6th DCA)
 - Charge is a fee for “water service” exempt from 13D, 6(c) election requirement
 - Omnibus Act’s definitions are good authority notwithstanding *HJTA v. Salinas*
 - Notice of protest hearing can be given to property owners alone

Groundwater Extraction Charges

- *Griffith* (continued)
 - Debt service, GA&O, service planning all permissible uses of fee
 - AWWA M-1 Manual's cost-accounting process complies w/ Prop. 218
 - Parcel-by-parcel cost analysis is not required; class-by-class is okay provided the classes are rationally drawn

Groundwater Extraction Charges

- *Cerritos, Downey & Signal Hill v. Water Replenishment District of So. Cal.* LA Superior Court Case No. BS128136
 - Trial court invalidated WRD's charges for non-compliance w/ 218 in 2011; appeal likely when remedies resolved
- *Ventura v. United Water Conservation Dist.*, 2nd DCA No. B251810
 - Trial court found Prop. 218 violation and awarded \$1.3m refund, appeal and cross-appeal filed; briefing underway

Groundwater Extraction Charges

- *Great Oaks Water Company v. Santa Clara Valley Water District*, 6th DCA Case No. H035885
 - Revisits *AmRhein v. Pajaro* and application of 218
 - Did SCVWD comply w/ 218?
 - Fully briefed 12/8/11

Groundwater Extraction Charges

- *Water Replenishment District of So. Cal. v. Cerritos* (2013) 220 CA4th 1450 (2nd DCA)
 - “Pay first, litigate later” rule applies to local government
 - Remedy for illegal revenue measure is not full refund, but refund of difference between lawful charge and what was paid
 - Depublication request pending as of 2/22/14

Water Fees

- *City of Palmdale v. Palmdale Water District* (2011) 198 CA4th 926 (2nd DCA)
 - City challenged conservation water rates, claiming Prop. 218 disallows them
 - DCA found 218 and Constitutional provision against wasting water could be harmonized, but struck down PWD rates as insufficiently justified
 - Caution required when constructing conservation rates

Water Fees

- *Brooktrails Township CSD v. Board of Supervisors* (2013) 218 CA4th 195 (1st DCA)
 - Initiative requiring District to end policy of charging inactive accounts minimum monthly service charge was not a tax on other water customers requiring 2/3 voter approval
 - Later phase of fight in *Paland v. Brooktrails CSD* which found the policy not to violate Prop. 218
 - Prop. 26 not retroactive as to local governments

Prop. 218 & Water Rates

- *Morgan v. Imperial Irr. Dist.* 2014 WL 410039 (4th DCA 1/17)
 - Farmers not entitled to separate rate protest
 - Applied deferential substantial evidence review to trial court rulings
 - Allowed secrecy of protests
 - Rates can be less than cost
 - Reh'g denied 2/4, Pet'n for review likely

Initiatives & Water Rates

Mission Springs Water District v. Verjil (2013)
218 CA4th 82

- Initiative to reduce water rates, bar increases for a year & limit future increases
 - Registrar certified petition & District filed decl. relief action to prevent election; trial court denied HJTA's demurrer & anti-SLAPP motion
 - SLAPP and decl. relief both OK
 - Initiative invalid b/c set rates too low

Initiatives & Water Rates

- *Vagim et al. v. City of Fresno*, Fresno Superior Court Case No. CECG03206
 - City sought declaration relying on *Mission Springs*
 - Trial court granted writ ordered City to provide title & summary for rate repeal initiative
 - 5th DCA to hear argument in May 2014

Sewer Fees & Equal Protection

- *Armour v. City of Indianapolis* (2012) 132 S. Ct. 2073
 - City mandated sewer connections and allowed owners to pay up front or over 30 years
 - Then cancelled program without refund to those who paid up front
 - USSC found rational basis in administrative need to terminate all districts without tail liability; Scalia forceful dissent

Sewer Fees

- AB 2567 (Carter, D-Rialto)
 - Amended GC 53756 to add “wastewater” and “wastewater treatment” effective 1/1/13
 - Allows rates under Prop. 218 to include inflation-adjustment mechanisms until sooner of:
 - 5 years
 - Increase beyond the inflation-adjusted rate

Solid Waste Fees

Torres v. Arakelian Enterprises, 2nd DCA Case No. B246515

- Trial court invalidated award of exclusive franchise for failure to comply with Prop. 218 in setting rates
 - Residential fee collected by city
 - Respondent's brief due 3/20/14

Solid Waste Fees

- SB 713 (Wolk, D-Davis)
 - Prevents enforcement of solid waste franchise provisions requiring hauler to indemnify franchising city or county for violations of Prop. 218 with respect to rate-setting
 - Adopts Pub. Res. Code § 40059.2
 - Effective 7/1/12

Solid Waste Fees

- *Chung v. City of Monterey Park* (2012) 210 CA4th 394
 - Ballot measure placed on ballot by City Council without initiative petition to require competitive procurement of trash franchises not subject to CEQA
 - Helpful discussion of CEQA exemption for government actions which raise money

Development Impact Fees

- *Cresta Bella, LP v. Poway USD* (2013) 4th DCA
 - School impact fees may not be collected on gross area of new construction, but must net out prior construction on site demolished for the project

Development Impact Fees

CBIA v. City of San Jose

Cal. S. Ct. Case No. S212072

- DCA held inclusionary housing fees benefit from rebuttable presumption they are reasonably related to City housing objectives
- Developer bears burden to provide otherwise
- Fully briefed 2/20/14

Public Records Act Fees

- *Sierra Club v. Superior Court (County of Orange)* (2013) 57 C.4th 157
 - County could not impose fee for use of its GIS system because products of that system constitute public records subject to disclosure at cost under Public Records Act

Property Related Fees

- SB 553 (Yee, D-SF)
 - Fee elections (such as flood control fees) require 2/3-voter or majority property owner approval
 - Sets standards for property owner elections similar to those for assessments
 - “OFFICIAL BALLOT ENCLOSED” on envelope
 - Tabulation in public
 - Ballots secret till tallied
 - Effective 7/1/14

PILOTs on Affordable Housing

- Some County Assessors concluded that a City's PILOT agreement w/ affordable housing developer voided the welfare exemption from property tax
- SBE concluded otherwise in 12/13 opinion
- AB 1760 (Chau, D-Monterey Park) would prohibit PILOTs prospectively

Prop. 26

Griffith v. City of Santa Cruz (2012) 207 CA4th 982

- Challenge to fee on landlords for housing code enforcement
 - No violation of equal protection, 218 or 13
 - Helpful discussion of burden of proof under 26, practical application of licensing exception, applies pre-26 regulatory fee case law

Prop. 26 Litigation

- *Citizens for Fair REU Rates v. City of Redding* (3d DCA Case No. C071906)
 - Challenge to electric utility PILOT
 - City won on ground that 26 not retroactive; appeal fully briefed as of 8/13
- *Bauer v. Harris* (E.D. CA No. 11 CV 01440)
 - Challenge to gun registration fees under 2nd Amendment and Prop. 26; to be tried 3/24/15

Prop. 26 Litigation (cont.)

- *Schmeer v. County of Los Angeles* (2013)
213 CA4th 1310
 - Challenge to provision of plastic bag ban requiring retailers to charge \$0.10 for paper bags
 - Trial court concluded this was not a government fee subject to Prop. 26
 - Prop. 26 does not apply to fees not paid to govt.

Obamacare is not a Tax

- *National Federation of Independent Business v. Sebelius* (2012) 132 S. Ct. 2566, 2594:
 - “the essential feature of any tax ... produces at least some revenue for the government.”
 - Will be useful in disputes like *Schmeer*.

Prop. 26 Litigation (cont.)

- *Cal. Chamber of Commerce v. CARB*, Sacto. Superior No. 34-2012-80001313
 - Challenges AB 32 implementation under Prop. 13
 - Court ruled for State; appeal likely
- *Morning Star Packing Co. v. CARB*, Sacto, Superior No. 34-2012-80001464
 - Related to the Chamber case; same result

Prop. 26 & State Fire Fee

- State imposed \$150 / structure fee on State Responsibility Areas
- HJTA challenged under Prop. 26 b/c not approved by 2/3 of each house
- *HJTA v. CDF*, Sacto Superior Case No. 34-2012-00133197
- Third amended complaint filed 1/24/14

Prop. 26 Legislation

- AB 483 (Ting, D-SF)
 - Proposed by CA Travel Association to help defend tourism marketing district (TMD) assessments; also helpful for non-property BIDs
 - Incidental benefits to non-payors does not disqualify assessment under Prop. 26 provided they do not cost payors more
 - Effective 1/1/14, adds GC 53758

Assessments

Silicon Valley Taxpayer's Ass'n v. Sta. Clara Co. Open Space Auth. (2008) 44 Cal.4th 431

- Independent judicial review of assessments
- Tighter definition of special benefit
- Open space and other services that benefit public broadly harder to justify
- Proportionality requirement unclear

BID Assessments

Dahms v. Downtown Pomona PBID

(2009) 174 CA4th 708 allows:

- exemption of residential pty from assessment for security, streetscape maintenance & marketing
- discounted assessments for non-profits
- use of front-street frontage for apportionment, along with lot & building size
- Very generous to agency; later cases less so

Utility Undergrounding Assessments

Tiburon v. Bonander (2009) 180 CA4th 1057

- No general benefit for utility undergrounding
- Court can look outside agency's own record
- Invalidated allocation of assessment and establishment of zones of benefit

Park Assessments

Beutz v. Riverside Co. (2010) 184 CA4th 1516

- Park M&O can be 100% assessment financed b/c capital provided w/ other \$
- Agency must always prove special benefit and proportional allocation even if challenger doesn't raise these points
- Questions use of cost to allocate benefit

Fire Suppression Assessments

Concerned Citizens v. West Point FPD

Cal. S. Ct. Case No. S195152

- Sufficiency of engineer's report to show special benefit or proportionality
- Use of cost to allocate benefit
- Dismissed as moot and DCA opinion not republished

Maintenance Assessments

- *Golden Hill Neighborhood Ass'n v. City of San Diego* (2011) 199 CA4th 416
 - Invalidated maintenance district under 1972 Lighting & Landscaping Act for inadequate engineer's report (no basis for allocation of votes to City property)
 - Helpfully limited DCA's *West Point* decision and provides guidance for engineers' reports

PBIDs and BIDs

- Property based business improvement districts have engendered a fair amount of recent litigation
- AB 2618 (Perez, D-LA) proposes to codify *Dahms* as to PBIDs
- BID assessments have generated litigation under Prop. 26. Ontario prevailed on standing grounds and is on appeal; San Diego's litigation is ongoing.

Advice re Assessments

- Use a strong, current engineer's report
- Get legal review of reports at least until assessment law stabilizes
- Watch for current developments

Ballot Labels

McDonough v. Superior Court

(2012) 204 CA4th 1169

- Unions challenged ballot label for City of San Jose's pension reform measure
 - 6th DCA took emergency appeal, ordered Registrar to revise label
 - Deleted list of general fund services which might benefit from pension savings; changed “reform” to “modification.”

Audits

- AB 941 (Rendon, D-So. Gate)
 - Independent JPAs must report audits to Controller
 - Controller may audit local governments if finds not complying w/ financial requirements of law, grants, local charter or ordinance
 - If misconduct found, local government pays for audit
 - Died in Assembly Appropriations 1/31/14

Audits

- AB 1035 (Muratsuchi, D-Torrance)
 - Doubles fines for audit late for 2 years in a row, triples if late for 3 years
 - Controller may conduct audit at local expense after 3 years' delay
 - Hearing before Senate Government & Finance cancelled in June 2013

Audits

- AB 1345 (Lara, D-Bell Gardens) effective 1/1/13
 - SAA audits due to SCO w/in 9 mos. of FY end
 - If late, SCO can hire auditor at local expense
 - SCO must report unprofessional conduct or multiple failures to comply w/ standards to Bd. of Accountancy
 - All audits by CPAs in good standing
 - 6-yr limit (post FY 12–13) on relationships w/ “lead audit partner, coordinating audit partner ... or audit partner responsible for reviewing the audit”

Internal Controls

- AB 1248 (Cooley, D-Rancho Cordova)
 - Adopts GC 12422.5 to require State Controller to adopt model internal control guidelines “to assist a local agency ... in establishing a system of internal controls to safeguard asset and prevent and detect financial errors and fraud”
 - Must post to web by 1/1/15
 - Not legally binding, but may be politically so

Financial Management Training

- AB 1235 (Gordon, D-Menlo Park)
 - AB 1234-style training requirement for local officials on financial management
 - Councilmembers, paid elected officials, staff designated by local policy
 - One training session per term of office and may be taken at home, in person or online
 - Providers must consult Treasurer & Controller
 - Vetoed

Fiscal Ballot Measures

- *Owens v. Co. of Los Angeles* (2013) 220 CA4th 107
 - Post-election challenges to ballot materials disfavored and must show voters misled
 - Identifying benefited services did not make a special tax
 - Not misleading to call this a continuation and reduction of tax even though failure of measure would have ended tax

Mandates

- *Dept. of Finance v. Comm'n on State Mandates*, Cal. S. Ct. Case No. S214855
 - LA Court of Appeal found that NPDES mandates are imposed under federal rather than state law, and thus were not reimbursable mandates
 - S. Ct. granted review, vacating that ruling
 - Opening brief due 4/1/14

Litigation

- Reynolds v. Calistoga, 2014 WL 374143 (1st DCA 2/3)
 - Paying sales taxes in Napa County and holding lien on property in Calistoga did not confer taxpayer standing to challenge expenditure of special sales tax
 - Sales taxes are legally incident on seller, not buyer
 - Not yet final

Questions?
