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Current Developments in the Law of Public Revenues

by

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League of California Cities
Public Works Officers Institute
San Jose, California
March 22, 2012

I. Taxes

A. Utility Users Taxes
1. *Ardon v. LA* – California S. Ct. finds no bar in Gov't Claims Act to class actions; local claiming ordinance required
2. *Sipple v. City of Alameda & 134 Others:* Seeks refund of UUT paid on packages including internet access, LA Superior to consider demurrer April 2012
3. HR 1002 (Lofgren, D-San Jose) and S 543 (Wyden, D-OR) would ban new or amended cellphone taxes above 1% for 5 years; passed House, pending in Senate, exception for voter-approved taxes.
4. A.B. 1050 (Ma, D-SF): collection of state and local taxes on calling cards and prepaid services

B. Property Tax Administration Fees
1. Rev. & Tax Code § 97.75 allows counties to recover actual cost of implementing Triple Flip and VLF Swap
2. Many counties recovering average cost, not marginal cost to do so
3. $40m transfer from cities to counties
4. Suits pending against LA and Fresno Counties
5. LA appellate victory pending in S. Ct.; Fresno trial victory pending in Fresno DCA & held pending LA decision

C. Property Taxes
- *Ribiero v. County of El Dorado* (3rd DCA 2011) – buyer's ignorance of bond arrearages did not allow rescission of tax sale
- *Lowe v. Washoe County* (9th Cir. 2010) – no federal civil rights action to challenge violation of State Constitutional requirement that assessments be "equal and uniform"
- Franchise Tax Board to require itemization of deductions for property taxes starting in April 2013 to distinguish charges which can be deducted from those which must be added to tax basis in property
- AB 1350 (Lara, D-Bell Gardens) — requires County Auditor to determine lawfulness of property tax overrides imposed after 1/1/12

D. Documentary Transfer Taxes
- AB 563 (Furutani, D-Gardena) – City can seek appraisal information from County recorder at City expense to audit documentary transfer tax payments

E. Parcel Taxes
Sacks v. Oakland (2010) 190 Cal.App.4th 1070
- Deferential review of implementation of special parcel and parking tax
- Looked to City Att'y opinion & Council reso adopted after dispute arose
- Need reasonable basis to show implementation furthers voters' intent

F. Under-Collection of Bed Tax by Online Resellers
- Resellers are subject to tax as sellers of hotel nights
- Hotel pays tax on low rate reseller pays hotel, but reseller collects whole tax from customer, and pockets the different
- Class action counsel pursuing this for LA, San Diego, Anaheim & W. Hollywood
- Resellers filed multiple lawsuits to stop Anaheim:
  - Use of contingency fee counsel (S. Ct. upheld in related case)
  - Reseller duty to pay tax before litigating it (Anaheim lost in DCA)
  - Review of administrative determination of tax liability (Anaheim lost on appeal; San Diego win likely to be appealed)
- This issue is being litigated around the country; San Antonio won a $20m federal jury verdict in 2010, NYC lost in 2012; resellers seeking state & federal legislation
- SB 670 (Calderon, D-Whittier) – limits TOT to room rent, exempts internet sales, parking & other charges; bill dead for now

G. Sales Taxes
- S. 1832, Marketplace Fairness Act
  - Introduced 11/9/11 by Senator Enzi (R-WY) & 11 bipartisan co-sponsors (not including Feinstein or Boxer)
  - Would require internet retailers w/ receipts > $500k/yr to collect state and local sales and use taxes consistently with Streamlined Sales & Use Tax Agreement
- AB 155 (Calderon, D-Whittier)
  - Internet retailers to collect CA and local sales & uses taxes consistently w/ fed'l law by 2013

H. Other Tax Issues
- *Franchise Tax Board v. Superior Court* (Cal. S. Ct. 2011) – no right to jury trial in tax refund action
- *Chodos v. City of Los Angeles* (2nd DCA 2011) – lawyer challenger to business license tax must pay first and litigate later, cannot seek declaratory relief prior to paying tax
- *City of Industry v. City of Fillmore* (2nd DCA 2011) – Industry & Livermore did not have to file claim or exhaust administrative remedies and had standing to challenge allocation of sales taxes to Fillmore
- *City of Fillmore v. SBE* (2nd DCA 2011) – Industry & Livermore entitled to writ to compel SBE to implement supplemental decision w/o completing administrative review of that decision
- AB 686 (Huffman, D-San Rafael) – allows transactions & use taxes (i.e., local option sales taxes) in ⅛ % increments rather than prior ¼ %
- *Parmar v. BOE* (2nd DCA 2011) – owners of closely held corp. unentitled to refund of cigarette taxes paid by corp. even though SBE credited corp.'s tax payments to owners; may be useful in telephone tax cases
- *Confederated Tribes v. Gregoire* (9th Cir. 2011) – Indian tribes must collect WA cigarette tax from non-Indians b/c tax is on buyer and no infringement of tribal sovereignty
- *Chiatello v. City & County of San Francisco* (1st DCA 2010) 189 CA4th 169 – taxpayer action under CCP 526a not permitted in violation of anti-tax injunction and pay-first-litigate-later rules; law-firm payors filed 3 new challenges, demurrer denied as to core issue in 12/11

I. Prop. 218 & Annexations
- Attorney General's Op. No. 09-305 (2010) bond leveling among merged school districts does not require election under Prop. 13

- *Citizens Ass'n of Sunset Beach v. OC LAFCO*, Orange County Court of Appeal – Prop. 218 does not require election to extend Huntington Beach's taxes into island annexation area

J. Fines are not Taxes
- *CalTax v. FTB* (3rd DCA 2010) – 20% penalty on late corporate taxes raising $1.4b was not a tax requiring 2/3 vote of Legislature

K. Constitutional Challenge to Prop. 13
- Former UC Chancellor filed original proceeding in Cal. Supreme Court seeking declaration that 2/3-vote requirement for state taxes is a "revision" which cannot be approved by initiative
- Case seems a long shot
- Supreme Court rejected it; refiled in LA Superior Court; pending in 2nd DCA

II. Fees

A. Groundwater Extraction Charges
- *Pajaro Valley Water Mgmt. Agency v. Amrhein* (6th DCA 2006) – groundwater augmentation charge was water fee subject to Prop. 218
- Are these "water" fees within 13D, § 6(c)'s exception to election requirement?
  - Pending in 6th DCA
  - 3rd DCA case dismissed as moot when voters repealed fee
- Statutory subsidy of agriculture appears to violate 218's proportionality requirement
- Lots of litigation
  - *Cerritos, Downey & Signal Hill v. WRD* (LA S. Ct.) – found groundwater charge to violate 218; appeal likely
  - *Ventura v. UWCD* (Sta. Barbara S. Ct.) – challenge to 218 compliance & to the statutory requirement for 3:1 ratio of M&I to ag rates to be argued 7/31/12
  - *Pendry v. Pajaro VWMA* (Sta. Cruz S. Ct.) – challenges new fee adopted after Prop. 218 hearing and election; Agency victory to be appealed in early 2012
  - *Great Oaks Water Co. v. Sta. Clara Valley WD* (6th DCA) – SCVWD appealed trial court conclusion it violated Prop. 218, will test whether groundwater charges are subject to 13D, § 6(c) election requirement

- *Eiskamp v. Pajaro VWMA,* 203 CA4th 97 (6th DCA, 2012) — belated challenge to earlier versions of management and recharge fees barred by *Amrhein* consent decree

B. Flood Control & Water Quality Fees
- *Greene v. Marin Co. Flood Control & Water Cons. Dist.* (Cal. S. Ct. 2011)
  - Ballot secrecy does not apply to Prop. 218 elections
  - 218 Omnibus Implementation Act of 1997 is good authority to construe Prop. 218
  - Some deference to local procedural rules on property related fees

C. Water Fees
- *City of Palmdale v. Palmdale Water District* (2nd DCA 2011) – conservation rates are not per se violation of 218, but rates in issue insufficiently justified
- *Mission Springs Water District v. Verjil*, 4th DCA Case No. E055176 — HJTA appealed trial court refusal to dismiss District suit to keep initiative off ballot that would cut fees, bar increases for a year, and limit future increases to CPI
- SB 34 (Simitian, D-Palo Alto) – proposed state fee on retail water sales to fund state and local water programs; required 2/3 approval under Prop. 26; dead this year but model for future?

D. Sewer Fees
- *Cal. Restaurant Mgmt. Systems v. City of San Diego* (4th DCA 2011) – class action challenge to sewer fees time-barred; timely filing of residential refund claim did not toll time to file restaurant claims
- *Armour v. City of Indianapolis*, USSC Case No. 11-161 — City mandated sewer connection and allowed property owners to pay up front or over 30 years, later cancelled duty to pay over time, without refunding those who paid up front; suit alleges violation of Equal Protection and 2/29/12 argument suggests conservative S. Ct. majority agrees

E. Development Impact Fees
- *Homebuilders Ass'n of Tulare / Kings Counties, Inc. v. City of Lemoore* (5th DCA 2010) – Fee can be based on infrastructure standards rather than CIP; Quimby Act does not preempt park & rec. fee; Fee can repay general fund loan and can be used to fund solid waste trucks & bins
- *Trinity Park, LP v. City of Sunnyvale* (6th DCA) – challenge to inclusionary housing condition of approval subject to 90-day statute of Planning & Zoning Law, not 180-day statute of Fee Mitigation Act

F. Emergency Response Fees

- SB 49 (Strickland, R-Simi Valley) — Would require statutory authorization for all local govts, including charter cities; in short run, would limit to DUI response fees; died in committee in 05/11
- *Allende v. CHP*, 201 CA4th 1006 (1st DCA 2011), pet'n rev. pending — DUI response fee upheld with broad definition of the "incidents" for which fee may be charged and allowing full cost of officers' time, including benefits and overhead

G. Solid Waste Fees

- Are AB 939 fees and franchise fees on franchise trash hauler which sets its own (monopoly) rates subject to 218?
- *Emde v. Pacifica* – settled in trial court in 2011
- *Pressnall v. City of Sutter Creek* – Amador Sup. Ct. Case No. 11-CV-7458
    - Filed 8/31/11, City answered 11/3/11
    - Sophisticated class action counsel setting their sights on local government
    - Tentative settled for future compliance
- *Tricoli v. City of Colfax* — Placer Sup. Ct. Case No. SCV-0029432
    - Disappointed hauler sued to challenge to challenge franchise fee
    - Filed June 2011

H. Green Building Permit Fees

- A.G. Op. No. 09-903 (12/27/11) — HSC 18931.6 requires building departments to collect $4 / $100k of project valuation to fund State Building Standards Commission cost to develop green building standards; AG finds this a valid regulatory fee; no need to discuss Prop. 26 because fee predates effectiveness of that measure

I. Vehicle License Fees

- *League of California Cities v. Chiang* – Sac. Sup. Ct. Case No. 34-3011-80000957
    - challenge to SB 89 & AB 118 shift of VLF from cities and counties to state fund for local law enforcement grants
    - asserts violations of Prop. 47, 1A and 22
    - filed 9/28/11, to be argued 5/4/12

J. Business License Regulatory Fees
AB 619 (Halderman, R-Fresno) – adopts B&PC § 4612(b)(3) to limit regulatory business fees on massage businesses to fees imposed on other professional services; does not apply to business license taxes

K. Prop. 26
1. Overturns *Sinclair Paint* case re regulatory fees
2. All fees are taxes unless w/in exception
3. Cost-limited exceptions
   - specific benefit / privilege (permits, franchises)
   - specific service / product (utility charges, park & rec fees)
   - reasonable regulatory fees for license and permits (permits, inspections)
4. Exceptions not limited to cost
   - Entry, use or purchase of gov't property (park & rec. entrance fees, equipment rental, some franchises)
   - Fines & penalties
5. Other Exceptions limited to cost
   - fees imposed as a condition of property development
   - Assessments & property-related fees under Prop. 218
6. Major Impacts of Prop. 26
   - non-property-based BIDs
   - park & rec service fees
   - discounts and free passes under first 2 exceptions
   - scope of recoverable regulatory costs under 3rd exception
   - application to voluntary payments (development agreements, solid waste collector agreements, etc.)
   - In-lieu fees
7. Some good news for cities:
   - Fish & Game Fees
   - Booking Fees
   - Property Tax Administration Fees
8. To-Do's
   - Don't raise or impose fee without legal advice
   - Review existing fees
   - Consider segregating discretionary from non-discretionary fee proceeds
   - Consider fees by agreement rather than ordinance or rule
   - Stay tuned! New developments are likely
9. Paper at www.cllaw.us
   Prop. 26 Implementation Guide at www.cacities.org

10. Pending suits:
    - Redding payment in lieu of taxes from electric utility
    - State gun registration fees
    - LA County plastic bag ban's 10-cent fee for paper bags

L. Constitutional limits on fees
- *Cal. Farm Bureau v. SWRCB* (Cal. S. Ct. 2011) – fee on water rights holders to fund State Board invalidated in trial court, but S. Ct. reversed for fact-finding; under Prop. 13, fee must be proportionate to cost overall, but not fee payor by fee payor; Prop. 26 appears to require more

III. Assessments

A. *Silicon Valley Taxpayers Ass'n v. Sta. Clara Co. Open Space Authority* (Cal. S. Ct. 2008)
1. independent judicial review of assessment decisions
2. tighter definition of required "special benefit" to property
3. open space and similar services that benefit whole public harder to justify
4. requirement that assessments be proportional to benefit remains unclear

B. *Dahms v. Downtown Pomona PBID* (2nd DCA 2009)
1. Allowed discounted assessments for non-profits
2. Allowed exemption of residential property
3. Allowed use of front frontage along w/ lot and bldg size to apportion assessment
4. Very generous to assessing agency

C. *Town of Tiburon v. Bonander* (1st DCA 2009)
1. no general benefit for utility undergrounding
2. court may look beyond the City's record
3. invalidated City's allocation of assessment and its establishment of zones

D. *Beutz v. County of Riverside* (4th DCA 2010)
1. park M&O could be 100% funded from assessment because capital provided by other County funds
2. Agency always bears burden to prove special benefit and proportional allocation of benefit, even if challenger does not raise the issue
3. questions use of cost to allocate benefit

E. *Concerned Citizens v. West Point Fire Prot. Dist.* (pending Cal. S. Ct.)
   1. Sufficiency of engineer's report to show special benefit & proportionality for fire suppression assessment
   2. Use of cost to allocate benefits
   3. 5 local gov't ass'ns to participate as *amici*

F. *Golden Hill Neighborhood Ass'n v. City of San Diego* (4th DCA 2011)
   1. Invalidated maintenance assessment for inadequate engineer's report (no basis for allocation of votes to City property)
   2. Helpfully limited DCA decision in *West Point* and provides guidance for engineers' reports

G. Advice re Assessments
   1. Use a strong, current engineer's report
   2. Get legal review of reports at least until assessment law stabilizes
   3. Stay tuned for current developments

IV. Other Finance Topics

A. Mandates
   - ACA 17 (Logue, R-Yuba County) – legislative and regulatory mandates not operative until funded; narrows exception for fee-supported programs to match Prop. 26; would authorize suit against State rather than Comm'n on State Mandates process; never heard in committee, but some coordination with Prop. 26 required
   - *CSBA v. Brown* (2nd DCA 2011) – Governor may veto mandate appropriation, which results in $0 appropriation and suspension of mandate
   - *CSBA v. State* (4th DCA 2011) – nominal funding of mandate violates Prop. 13 but no writ relief appropriate b/c annual suit for declaratory relief available; courts do not generally compel appropriations

B. Bankruptcy
   - AB 506 (Wiekowski, D-Fremont) – requires mediation or declaration of fiscal emergency before local government may file bankruptcy; union response to Vallejo's bankruptcy, passed after local gov't ass'ns w/drew opposition; Stockton first to use this process

C. Fiscal Ballot Measures

1. *Vargas v. Salinas*
   - balanced public education okay
   - express advocacy and other campaign-like efforts at public expense are not permitted
2. *Sta. Barbara County Coalition Against Automobile Subsidies v. SBCAG* – public funds may be used to prepare a ballot measure
3. *Peninsula Gardens v. Peninsula HCD*, 200 CA4th 1108 (1st DCA 2011) — District entitled to SLAPP motion on challenge to public education effort re hospital bond measure; applied *Vargas'* "style tenor and timing" test.

D. Interfund Loans

- *Tomra Pacific, Inc. v. Chiang*, 199 CA4th 463 (1st DCA 2011) — loan from Recycling Fund to State General Fund did not convert recycling fees to taxes; no violation of single-subject rule for state legislation because included in budget; transfer worked "no material harm" to recycling programs; helpful authority for interfund loans

Update on the Law of Public Revenues

League of California Cities
Public Works Officers Institute
San Jose, CA
March 22, 2011

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Utility Users Taxes

- *Ardon v. City of LA (*Cal. S. Ct. 2011)
  - Los Angeles lacked ordinance imposing local claiming requirement
  - Gov't Claims Act does not prohibit class claims for refunds of taxes and fees (*McWilliams v. Long Beach*; *Granados v. County of LA* in 2nd DCA)
  - Local governments should adopt local claiming ordinances to expressly bar class & representative claims

4

March 6, 2012

Utility Users Taxes (Cont.)

- *Sipple v. City of Alameda & 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 agencies w/ telephone taxes in Los Angeles Superior Court in July 2011
  - Demurrers to be heard April 2012

5

March 6, 2012

Utility Users Taxes (cont.)

- Federal Legislation Proposed to Bar New or Amended Cell Taxes above 1% for 5 years
  - HR 1002 (Lofgren, D-San Jose)
  - S 543 (Wyden, D-OR)
  - Passed House; in Senate Finance Committee
  - Exempts: "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."

6

March 6, 2012

Utility Users Taxes (Cont.)

- A.B. 1050 (Ma, D-San Francisco)
  - Clarifies collection of State and local telephony taxes on calling cards and other prepaid services
  - Could resolve substantial litigation industry has brought against LA and others on this issue
  - Pending in Senate Governance & Finance Committee in February 2012

Property Tax Administration Fees

- R&T 97.75 allows Counties to recover "actual cost" to implement Triple Flip & VLF Swap
- Many counties are recovering more than the marginal cost to do so
- 47 Los Angeles County cities and 7 Fresno County cities sued to test this issue
- LA victory pending S. Ct. review; Fresno victory held by 5th DCA pending LA decision

Property Taxes

- *Ribiero v. County of El Dorado* (3rd DCA 2011)
  - Investor's mistake in buying real estate at tax sale without knowing amount of bond arrearages did not entitle him to rescind sale

Property Taxes

- *Lowe v. Washoe County* (9th Cir., 2010)
  - No federal class action to challenge property tax assessments in South Lake Tahoe, Nevada
  - Individual refund actions are sufficient state law remedy to prevent federal civil rights action
  - Underlying dispute turned on violation of State Constitutional requirement (comparable to CA's) that valuations be "equal and uniform."

Property Taxes

- Income taxes don't allow deduction of whole property tax bill; assessments for capital facilities add to tax basis & reduce capital gains on sale
- CA Franchise Tax Bd. to begin enforcement by requiring taxpayers to itemize the deductible and non-deductible portions of property tax bills beginning April 2012

Post-Bell Legislation re Taxes

- AB 1350 (Lara, D-Bell Gardens)
  - County Auditor must determine lawfulness of property tax overrides imposed after 1/1/12
  - Authorized by Art. XIII, § 20; applies to charter cities
  - Effective January 1, 2012, adopting R&T 96.31(e)

Special Parcel Taxes

- *Sacks v. City of Oakland* (2010) 190 Cal.App.4th 1070
  - Deferential review of City's implementation of special parcel and parking tax measure
  - Court interprets measure practically and flexibly to attain its purpose to fund police services
  - Court looked to City Att'y opinion & Council reso. adopted after dispute arose to interpret measure

13 March 6, 2012

Property Taxes

- *First American Commercial Real Estate Svcs., Inc. v. County of San Diego* (4th DCA, 2011)
  - Clerical error was not "circumstance beyond the taxpayer's control" sufficient to exonerate property tax payment service from 10% payment on erroneously delayed $6.3m wire

14 March 6, 2012

Property Taxes

- *Avalon Bay Communities, Inc. v. County of Los Angeles (*2nd DCA 2011)
  - Employee error that delayed wire payment of property taxes was not "act outside the taxpayer's control" sufficient to protect taxpayer from $215k penalty

15 March 6, 2012

Documentary Transfer Tax

- AB 563 (Furutani, D-Gardena)
  - Adopted R&T Code 408.4 to authorize a city to obtain, at its cost, appraisal information from the County recorder to audit documentary transfer tax payments

16

March 6, 2012

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 pursuing this issue for LA, San Diego, Anaheim & W. Hollywood

17

March 6, 2012

Under Collection of TOT by Online Resellers (Cont.)

- Industry pursuing lots of litigation
  - Use of contingency fee counsel (S. Ct. upheld)
  - Duty to pay before litigating (DCA loss for cities)
  - Judicial Review of administrative tax determinations (Anaheim loss, San Diego win on appeal)
- Litigation around USA: San Antonio won $20m federal jury verdict; NY court found NYC ordinance preempted by state law

18

March 6, 2012

Bed Tax Legislation

- SB 670 (Calderon, D-Whittier)
  - Would limited TOT to room rent paid to operator
  - Exempts internet sales, parking & other charges
  - Died last year, author tells League of CA Cities he will not pursue it this year (yet he introduced it …)
  - Dead for this term

19 March 6, 2012

Income Tax

- *Franchise Tax Board v. Superior Court , 51 C.4th 1006* (2011)
  - California Constitution does not require jury trial in statutory action for tax refund

20 March 6, 2012

Business License Taxes

- *Chodos v. City of Los Angeles,*195 Cal.App.4th 675 (2nd DCA, 2011)
  - Lawyer taxpayer must pay first and litigate later
  - Declaratory relief action properly dismissed in dispute involving inclusion in gross receipts of out-of-pocket costs and fees paid to contract counsel
  - Rejects *Anaheim v. Sup. Ct*. decision of another 2d DCA panel vitiating pay-first rule

21 March 6, 2012

Business License Taxes

- SF Initiative Treating Partnership Distributions as Taxable "Payroll"
  - *Chiatello* – discussed below – dismissed on standing grounds
  - Three new suits by major law firms: Hanson Bridgett (case no. 513357), Sideman & Bancroft (514071), Coblentz, Patch (514292)
  - City demurred in late 2011, but core claim survived

Sales & Use Taxes

- *City of Industry v. City of Fillmore,* 198 Cal.App.4th 191 (2nd DCA 2011)
  - Challenge to reallocation of sales tax to Fillmore of business with locations in Livermore and Industry
  - DCA reversed trial court victory for Fillmore, finding no duty to comply with Fillmore's claiming ordinance, no failure to exhaust administrative remedies, and no lack of standing

Sales & Use Taxes

- *City of Fillmore v. State Bd. of Equaliz'n,194 CA4th 716* (2nd DCA 2011)
  - Industry and Livermore need not complete administrative review at SBE before suing
  - Industry and Livermore entitled to writ to compel SBE to implement supplementation decision allocating sales tax to them

Sales & Use Taxes

- Marketplace Fairness Act, S 1832
  - Introduced Nov. 9, 2011 by Senator Enzi (R-WY)
  - 11 bi-partisan cosponsors (not Feinstein or Boxer)
  - internet retailers w/ sales >$500k to collect state & local sales & use taxes consistently w/ Streamlined Sales & Use Tax Agreement
- AB 155 (Calderon, D-Whittier)
  - Adopted R&T 6203 to require web retailers to collect sales & use taxes in 2013

Transaction & Use Taxes

- AB 686 (Huffman, D-San Rafael)
  - Authorizes Transactions & Use Taxes (i.e., local sales taxes) in ⅛ % increments
  - Previously only ¼ % increments were permitted

Cigarette Taxes

- *Parmar v. Bd. of Equalization,* 196 CA4th 705 (2nd DCA, 2011)
  - Owners of closely held corporation could not seek refund of taxes paid by corporation even though BOE credited corporation's tax payments to owners' account
  - May be helpful in telephone tax disputes

Cigarette Taxes (cont.)

- *Confederated Tribes v. Gregoire*, 658 F.3d 1078 (9th Cir. 2011)
  - Legal incidence of cigarette tax is on buyer, not seller
  - Washington statute requiring tribes to collect tax from non-Indian purchasers did not infringe tribal sovereignty and was not preempted

Prop. 218 Doesn't Apply to Annexations

- Att'y Gen. Op. No. 09-305 (Dec. 20, 2010)
  - Bond leveling among 4 merged school districts did not trigger election under Prop. 13
  - Cites early case regarding Prop. 13
  - Same logic should apply to Prop. 218

Prop. 218 & Annexation (cont.)

- *Citizen's Ass'n of Sunset Beach v. Orange County LAFCO* (4th DCA Case No. G045878)
  - 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, trial court found no election required
  - HJTA representing plaintiffs on appeal; appeal now being briefed

Fines are not Taxes

- *Cal. Taxpayers Ass'n v. Franchise Tax Board* 190 Cal.App.4th 1139 (3rd DCA 2010)
  - 20% penalty on late corporate taxes raising $1.4b not a tax requiring 2/3 vote of Legislature
  - Distinguishing characteristics: label, revenues diminish over time, triggered by violation
  - No need for findings or good faith defense; post-payment remedy sufficient
  - Relevant to Prop. 26 analysis

Constitutional Challenge to Prop. 13

- Former UC Chancellor filed original action in Cal. Supreme Court arguing requirement for 2/3 vote of Legislature for taxes is a Constitutional revision & cannot be accomplished by initiative. Court denied the writ; refiled in LA trial court, motion for judgment granted to HJTA in 2010, appeal being briefed in 2012
- *Young v. Schmidt,* 2nd DCA No. B230629

Taxpayer Challenge Cannot Enjoin Collection of Tax

- *Chiatello v. CCSF,* 189 Cal.App.4th 169 (1st DCA, 2010)
  - Non-taxpayer could not challenge payroll tax on profit distributions to employee/owners of business organizations
  - CCP 526a not an and-run around anti-tax-injunction and pay-first-litigate-later rules

Groundwater Extraction Charges

- *Pajaro Valley Water Mgmt. Agency v. Amrhein,* 150 Cal.App.4th 1364 (6th DCA 2007) – Subject to Prop. 218
- Are they "water" fees exempt from election requirement? – pending in 6th DCA
- Subsidy of agriculture plainly violates 218's proportionality requirement

34

March 6, 2012

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; appeal likely
- *Ventura v. United Water Conservation Dist.,* Sta. Barbara Superior Court Case. No. VENCI-00401714
  - Challenges 218 compliance & statutory 3:1 fee ratio of M&I to ag; trial of legal issues set for July 31, 2012
- *Pendry v. Pajaro Valley Water Agency*, Sta. Cruz Superior Court Case No. CV 168936
  - Post-*Amrhein* fee w/ Prop. 218 compliance subject to 6(c) election, but weighting permissible; appeal likely in early 2012

35

March 6, 2012

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?
  - Is charge exempt from election as "water" charge?
  - On conference list in January 2012

36

March 6, 2012

Groundwater Extraction Charges

- *Eiskamp v. Pajaro Valley Water Mgmt. Agcy.*, 203 CA4th 97 (6th DCA 2012), *pet'n rev. pending*
  - Belated challenge to earlier versions of PVWMA's management fee and recharge fee barred by res judicata effect of *Amrhein* consent decree

37

March 6, 2012

Flood Control & Water Quality Fees

- *Greene v. Marin County Flood Control Dist.*, 49 C.4th 277 (2010)
  - Ballot secrecy does not apply to 218 elections on property-related fees for things other than water, sewer and trash
  - 218 Omnibus Implement'n Act is good authority
  - Deference to local procedural rules on property-related fees

38

March 6, 2012

Water Fees

- *City of Palmdale v. Palmdale Water District* 198 Cal.App.4th 926 (2nd DCA 2011)
  - 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

39

March 6, 2012

Prop. 218 & Water Rates

- *Morgan v. Imperial Irrigation,* Dist., 4th DCA Case No. D061087
  - Are farmers entitled to separate protest vote on water rates imposed on domestic, municipal, industrial and agricultural water customers?
  - Farm Bureau and local farmers sued; trial court ruled for plaintiffs; IID appealed
  - ACWA, League and others will provide amicus support to IID

40 March 6, 2012

Initiatives & Water Rates

- *Mission Springs Water District v. Verjil*, 4th DCA Case No. E055176
  - Initiative to reduce water rates, bar increases for a year and limit future increases
  - Registrar certified petition & District filed decl. relief action to prevent election; trial court denied HJTA's demurrer & anti-SLAPP motion
  - HJTA appealed and case is now being briefed

41 March 6, 2012

State Water Fees

- SB 34 (Simitian, D-Palo Alto)
  - Would impose state fee on water retailers based on volume of non-ag sales and acreage for ag sales to fund state and local water programs
  - Required 2/3 approval under Prop. 26
  - Dead for this term

42 March 6, 2012

Sewer Fees

- *California Restaurant Mgmt. Systems v. City of San Diego,* 195 Cal.App.4th 1581 (4th DCA 2011)
  - Putative class action on behalf of restaurants for allegedly excessive sewer fees
  - City won summary judgment for untimely claim
  - Appellate court affirmed, refusing to find claiming period tolled by earlier resident's claim

43

March 6, 2012

Sewer Fees & Equal Protection

- *Armour v. City of Indianapolis*, USSC Case No. 11-161
  - 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
  - Argued in USSC on 2/29/12 and oral argument suggests conservative majority will rule against City

44

March 6, 2012

Solid Waste Fees

- Are AB 939 fees & franchise fees subject to Prop. 218?
  - *Emde v. Pacifica* – settled in trial court in 2011
  - *Pressnall v. City of Sutter Creek*, Amador Sup Ct. Case No. 11-CV-7458
    - Filed 8/31/11, City answered 11/3/11
    - Further evidence that sophisticated class action counsel are setting their sights on local governments
  - *Tricoli v. City of Colfax*, Placer Sup. Ct. Case No. SCV-0029432 (filed June 2011)

45

March 6, 2012

Development Impact Fees

Homebuilders Ass'n v. Lemoore 185 Cal.App.4th 554 (5th DCA 2010)

- Fees can be based on service standards rather than CIP
- Quimby Act doesn't preempt park fees
- Fees can repay general fund loans
- Fees can be used for trash trucks & bins

46 March 6, 2012

Development Impact Fees

Trinity Park, LP v. City of Sunnyvale, 193 Cal.App.4th 1014 (6th DCA 2011)

- Developer challenge to inclusionary housing condition of approval time-barred
- 90-day period for challenges to development permits applied rather than 180-day limit of Mitigation Fee Act

47 March 6, 2012

Green Building Permit Fees

- A.G. Op. No. 09-903 (12/27/2011)
  - HSC 18931.6 requires building departments to collect $4 / $100k in project value to fund the State Bldg. Stds. Comm.'s green building standards
  - AG opined these were proper fees and not taxes
  - Does not consider Prop. 26 b/c statutes dates from 2009 – before Prop. 26's retroactive date for the state

48 March 6, 2012

Emergency Response Fees

SB 49 (Strickland, R-Simi Valley)

- Would prohibit all local governments, including charter cities, from imposing a fee to recover the expense of emergency responses by police, fire, and ambulance crews without statutory authorization (like the DUI fee)
- Prop. 26 issue re exemption for residents
- Controversy re Sacramento's fee
- Died in Comm. on Public Safety in May 2011

49

March 6, 2012

Emergency Response Fees

- *Allende v. CHP*, 201 CA4th 1006 (1st DCA 2011), *pet'n rev. pending*
  - Challenge to calculation of DUI response fee
  - Court upheld broad definition of "incidents" for which fees may be charged
  - Statute allows full cost recovery of officer time, including benefits and overhead

50

March 6, 2012

Vehicle License Fees

- *League of California Cities v. Chiang* (Sacramento S. Ct. Case No. 34-2011-80000957)
  - Challenge to SB 89 and AB 118 shift of VLF from cities and counties to state fund for local law enforcement grants
  - Asserts violations of Art. XI, §15 (Props. 47 & 1A); Art. XIII, § 25.5 (Prop. 22)
  - Filed 9/28/11; to be heard 5/4/12

51

March 6, 2012

Business License Fees

- AB 619 (Halderman, R-Fresno)
  - Limits business license regulatory fees (not taxes) on massage businesses to the amount of the fee imposed on other "professional services" businesses
  - Effective 1/1/12

52

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Prop. 26

- Overturns *Sinclair Paint*
- All fees are taxes unless exception applies

53

March 6, 2012

Prop. 26 Exceptions Limited to Cost of Service or Regulation

- Specific Benefit / Privilege (permits, franchises)
- Specific Service / Product (utility charges, park & rec. fees)
- Reasonable Regulatory Fees for licenses & permits (permits, inspections)

54

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Prop. 26 Exceptions not limited to Cost Recovery

- Fee for entry, use or purchase of gov't property (park & rec entrance fees, equipment rental, some franchises)
- Fines & penalties

55

March 6, 2012

Other Prop. 26 Exceptions

- Fees imposed as a condition of property development (limited to cost by other law)
- Assessments & property-related fees subject to Prop. 218 (limited to cost by 218)

56

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Major Impacts of Prop. 26

- Non-property-based BIDs
- Park & Rec. service fees (*cf.* GC 50402)
- Discounts & free passes for fees excepted as benefit/privilege or service/product
- Scope of recoverable regulatory costs
- App'n to voluntary payments (development agreements, *e.g.*)
- In-lieu fees

57

March 6, 2012

More Impacts of Prop. 26

Some good news for cities

- Fish & Game Fees
- Booking Fees
- Property Tax Administration Fees

58

March 6, 2012

Prop. 26 To-Do's

- Get legal advice before adopting or increasing fee
- Review Existing Fees
- Considering segregating discretionary from non-discretionary fee proceeds
- Consider fees by agreement rather than by ordinance or rule
- Stay tuned!

59

March 6, 2012

Prop. 26

- Full paper at www.cllaw.us
- **Prop. 26 Implementation Guide** available from League: www.cacities.org

60

March 6, 2012

Prop. 26 Litigation

- *Citizens for Fair REU Rates v. City of Redding* (Shasta SC Case No. 171377)
  - Challenge to electric utility PILOT
  - City won on ground that 26 not retroactive; to be appealed in 2012
- *Bauer v. Harris* (E.D. CA No. 11 CV 01440)
  - Challenge to gun registration fees under 2nd Amendment and Prop. 26
  - Scheduling conference set for 4/12/12

61 March 6, 2012

Prop. 26 Litigation (cont.)

- *Schmeer v. County of Los Angeles* (LASC Case No. BC 470705)
  - Challenge to provision of plastic bag ban requiring retailers to charge $0.10 for paper bags
  - Writ hearing scheduled for March 15, 2012

62 March 6, 2012

Constitutional limit on fees

Cal. Farm Bureau v. SWRCB, 51 Cal.4th 421 (2011)

- Water rights holders challenge fee to fund SWRCB
- S. Ct. reversed win for challengers and remanded for fact-finding, held fee must be proportionate to cost in aggregate, not fee payor by fee payor
- Less impact than expected, but helpful
- Prop. 13 case; Prop. 26 demands more

63 March 6, 2012

Assessments

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

- 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

64

March 6, 2012

BID Assessments

Dahms v. Downtown Pomona PBID, 174 Cal.App.4th 708 (2nd DCA 2009), 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

65

March 6, 2012

Utility Undergrounding Assessments

Tiburon v. Bonander ,180 Cal.App.4th 1057 (1st DCA 2010)

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

66

March 6, 2012

Park Assessments

Beutz v. Riverside Co., 184 Cal.App.4th 1516 (4th DCA 2010)

- Park M&O can be 100% assessment financed b/c capital provided with 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

67

March 6, 2012

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
- 5 local gov't ass'ns sought depublication and filed amicus brief; replies to amicus briefs now due

68

March 6, 2012

Maintenance Assessments

- *Golden Hill Neighborhood Ass'n v. City of San Diego*, 199 CA4th 416 (4th DCA 2011)
  - 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

69

March 6, 2012

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

70

March 6, 2012

Mandate Legislation

ACA 17 (Logue, R-Yuba County)

- Legislative and regulatory mandates may not become operative until funded
- Narrows mandate exemption for fee-funded local programs to reflect requirements of Prop. 26
- Would authorize law suits to challenge mandates without first going though Comm'n process
- Never heard in committee

71

March 6, 2012

Mandates Litigation

California School Boards Ass'n v. Brown, 192 Cal.App.4th 1507 (2nd DCA 2011)

- Governor may veto appropriation for a mandate
- Result is a $0 appropriation and suspension of mandate

72

March 6, 2012

Mandates Litigation

California Sch. Bds. Ass'n v. State, 192 Cal.App.4th 470 (4th DCA, 2011)

- Nominal funding of mandate violates Prop. 13
- No writ relief b/c annual suit for declaratory relief is adequate legal remedy
- Courts do not generally compel appropriations

73

March 6, 2012

Bankruptcy

AB 506 (Wiekowski, D-Fremont)

- Federal bankruptcy law allows states to set limits on which local governments may file Ch. 9
- Requires mediation or declaration of fiscal emergency before filing
- Union reaction to Vallejo's bankruptcy
- Adopted after watered down to the point local government associations acquiesced
- Stockton first to use this process

74

March 6, 2012

Fiscal Ballot Measures

- *Vargas v. Salinas* (Cal. S. Ct. 2009)
  - Balanced public education at public expense okay; express advocacy and other campaign-like efforts are not
- *Sta. Barbara County Coalition Against Automobile Subsidies v. SBCAG* (2nd DCA 2008)
  - Can use public funds to draft a ballot measure

75

March 6, 2012

Campaign Expenditures

- *Peninsula Gardens v. Peninsula Health Care District*, 200 CA4th 1108 (1st DCA 2011)
  - Rejected challenge to public-information campaign regarding hospital bond measure
  - District entitled to SLAPP motion, so these issues can be resolved without trial
  - Applied *Vargas*' "style, tenor, and timing" test

76

March 6, 2012

Interfund Loans

- *Tomra Pacific, Inc. v. Chiang*, 199 CA 4th 463 (1st DCA 2011)
  - Loan of funds from Recycling Fund to General Fund did not convert recycling fees from regulatory fees to taxes
  - No violation of single-subject rule for state legislation to approve via budget bill
  - Transfer worked "no material harm" to recycling programs

77

March 6, 2012

Questions?

78

March 6, 2012