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## Current Developments in the Law of Public Revenues

by

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League of California Cities  
Financial Management Seminar  
Monterey, California  
December 3, 2009

### I. Taxes

#### A. Utility Users Taxes

1. *Ardon v. LA, McWilliams v. Long Beach, Granados v. LA County*  
class action challenges to UUTs on telephony due to IRS Notice 2006-60
2. *TracFone v. City of LA, TracFone v. County of LA*  
same theory, filed by phone card seller
3. *LA County v. Superior Court (Oronoz)*  
allowed class action challenges to local taxes and fees  
disagrees with *Batt v. SF* and other decisions
4. *LA v. Ardon*: Court of Appeal reversed *Oronoz*  
Cal. Supreme Court granted review, case to be decided in 2010
5. HR 1521 (Lofgren, D-San Jose) and S 1192 (Wyden, D-OR) would cap  
cellphone taxes at 1%  
16 Cal. Members of Congress have co-sponsored Lofgren bill

#### 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 decision for counties appealed mid-August 2009; Fresno to be tried  
November 2009

- C. Under-Collection of Bed Tax by Online Resellers
1. Resellers are subject to tax as sellers of hotel nights
  2. Hotel pays tax on low rate reseller pays hotel, but reseller collects whole tax from customer, and pockets the different
  3. Class action counsel pursuing this for LA, San Diego, Anaheim & W. Hollywood
  4. Resellers filed multiple lawsuits to stop Anaheim:
    - Use of contingency fee counsel (argued to DCA 10/10/09)
    - Reseller duty to pay tax before litigating it (same, 11/19)
    - Review of administrative determination of tax liability (trial court, 11/4)
  5. This issue is being litigated around the country; San Antonio won a \$20m federal jury verdict in October; resellers seeking federal legislation
- D. Constitutional Challenge to Prop. 13  
Former UC Chancellor filed original proceeding in Cal. Supreme Court seeks 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 Superior Court
- E. Fee to Administer a Tax is a Tax  
*Weisblad v. City of San Diego* (4<sup>th</sup> DCA, 2009)
- fee imposed to recover cost of administering Rental Unit Business Tax
  - Court invalidated it as a non-voter-approved tax
  - many business license taxes include fees for copies of licenses, etc.
  - care should be taken when increasing those to tie them closely to costs imposed by conduct of particular taxpayers and not to impose them on all taxpayers
- F. Tax Brackets May Turn on Ability to Pay  
*Jensen v. Franchise Tax Board* (2d DCA 2009)
- Prop. 64’s additional tax bracket on millionaires to fund mental health services valid
  - tax distinctions subject to minimum rationality review

## II. Fees

### A. Utility Fees After *Bighorn*

1. *Bighorn-Desert View Water Agency v. Verjil* (2006)  
metered rates for water, sewer and trash subject to Prop. 218  
45-day notice of majority protest hearing  
other fees also require property-owner or  $\frac{2}{3}$ -voter approval
2. AB 1260 and fee protest proceedings  
notice via utility bill to customers  
notice to owners, too, if delinquencies enforced via lien on property  
one protest per parcel
3. AB 3030  
CPI adjustments and wholesale pass-throughs allowed  
limited to 5 years  
30 days' notice required, can be via bill
4. AB 2882 and tiered water rates  
detailed requirements for such rates  
optional, but constitutes a "safe harbor"
5. *Paland v. Brooktrails Township CSD*  
- Minimum monthly account fees are okay  
- Cal. S. Ct. granted review and remanded for reconsideration in light of taxpayer ass'n requests for depublication; 5 local government associations will provide a joint amicus brief to the DCA on remand
6. Solid waste fees  
- government services are treated like water and sewer  
- private fees exempt from Prop. 218  
- what's a private fee?  
    who provides service?  
    who bills for it?  
    does agency set rates or just regulate them?

### B. Storm Water & NPDES Funding

1. general and special taxes with voter approval
2. assessments if special benefit can be shown
3. property-related fees with Prop. 218 compliance
4. non-property-related fees, like inspection fees
5. utility fund transfers?
6. *Greene v. Marin County Flood Control District*  
are property-owner elections subject to ballot secrecy?  
Cal. Supreme Court decision likely in 2010

- C. Groundwater Extraction Charges
  1. *Pajaro Valley Water Mgmt. Auth. v. Amrhein*  
subject to Prop. 218
  2. Are they “water fees” exempt from 218 election?  
being litigated in Santa Clara Superior and 3<sup>rd</sup> Dist. Ct. Appeal
  3. Subsidy of agriculture by municipal and industrial users violates 218
  
- D. APCD Indirect Source Rule for Development Not an AB 1600 Fee  
*California BIA v. San Joaquin APCD* (5<sup>th</sup> DCA, 2009)
  1. Indirect source rule required project changes or in lieu fee
  2. Development interests sued, claiming this was an invalid AB 1600  
development impact fee and that fee was improperly calculated
  3. Very conservative DCA upheld fee as a valid regulatory fee
  
- E. 2009 Fee Legislation
  1. SB 681 (Pavley) – SWRCB fees on water rights (inactive file)
  2. AB 1004 (Portantino) – bar emergency response fees except for DUIs  
(inactive file)
  3. AB 1084 (Adams) – audit requirements for AB 1600 fees (chaptered)

### III. Assessments

- A. *Silicon Valley Taxpayers Ass’n v. Sta. Clara Co. Open Space Authority*
  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*
  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. San Diego assessment litigation

1. Superior Court tentatively concluded assessment for sidewalk sweeping, tree trimming and graffiti removal invalid because insufficient special benefit
2. the challenged assessment is one of 57 such districts in San Diego
3. represents application of *Silicon Valley*

D. 2009 Assessment Legislation

1. SB 321 (Benoit)  
assessment ballots mailed in envelopes marked "Official Ballot Enclosed" if staff or consultants who worked on assessment count ballots, must do so in public  
information used to weight ballots disclosable when tally begins

IV. Other Finance Topics

A. Bankruptcy Bill – AB 155 (Mendoza) / SB 88 (DeSaulnier)

1. federal bankruptcy law allows state limit on local gov't bankruptcies
2. current CA law allows local discretion
3. bill would require CDIAC approval of local bankruptcy
4. motivated by union reaction to Vallejo effort to set aside labor contracts
5. neither bill passed in 2009; likely to be revisited in 2010

B. 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