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| OPINION | : | No. 80-1107 |
| of | : | FEBRUARY 10, 1981 |
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The Honorable Douglas D. Bell, Executive Secretary, State Board of Equalization, has requested an opinion on the following questions:

1. Is the "special taxes" provision of section 4 of article XIIIA of the Constitution applicable to the adoption of a retail transactions and use tax ordinance by the Los Angeles County Transportation Commission?

2. If the "special taxes" provision is applicable, is the State Board of Equalization required to administer the tax if its imposition was approved by a majority but less than two-thirds vote of the qualified electors?

CONCLUSIONS

1. The "special taxes" provision of section 4 of the article XIIIA of the Constitution is applicable to the adoption of a retail transactions and use tax ordinance by the Los Angeles County Transportation Commission.

2. The State Board of Equalization is required to administer the tax where it has been approved pursuant to the majority vote requirement of Public Utilities Code section 130350 until such time as an appropriate court decision is rendered that the statute is unconstitutional.

ANALYSIS

In 1976, the Legislature created the Los Angeles County Transportation Commission (hereafter "Commission") pursuant to the provisions of the County Transportation Commissions Act (Pub. Util. Code §§ 130000–130373)[1] to coordinate the operation of all public transportation services within Los Angeles County. (§ 130250.) Among its duties, the Commission is to "work toward maximizing the effectiveness of existing resources available" for transportation development (§ 130001, subd. (c)), "plan, design, and construction exclusive public mass transit guideway system in the county" if certain requirements are met (§ 130258, subd. (a)), report to the Legislature "recommendations for changes and improvements in institutional arrangements, methods of funding, and methods and criteria for auditing the performance of transit operators" (§ 130290), "determine the projects on the federal-aid urban system to be funded" (§ 130306), "resolve any transit service dispute between transit operators in the County of Los Angeles" (§ 130372, subd. (a)), and prepare a proposed transit coordination and service program." (§ 130380.)

The Commission has also been given authority to adopt a "retail transactions and use tax ordinance applicable in the incorporated and unincorporated territory of the County of Los Angeles" (§ 130350), the revenues from which "shall be used for public transit purposes." (§ 130354.) The tax, of the type commonly known as a "sales tax," would be imposed generally "for the privilege of selling tangible personal property . . . at a rate of one-half of 1 percent of the gross receipts of the retailer." (Rev. & Tax. Code § 7261; see § 130350.)

On August 20, 1980, the Commission exercised its statutory authority and enacted a half-cent sales tax ordinance. Section 130350, however, mandates that for the ordinance to become operative, "a majority of the electors voting on the measure vote to authorize its enactment at a special election." On November 4, 1980, approval of the voters was given in a special election, and the tax is scheduled to go into effect on July 1, 1981.

The first question presented for analysis is whether the sales tax imposed by the Commission comes within the "special taxes" provision of section 4 of article XIIIA of the Constitution. If so, a two-thirds approval vote by the electorate would be required

[1] All section references hereafter are to the Public Utilities Code unless otherwise stated.

for such imposition rather than the simple majority requirement of section 130350. In this case, the November 4, 1980, approval vote did not meet the two-thirds standard. We conclude that the two-thirds constitutional requirement is applicable here, and thus the tax was not validly authorized by the electorate on November 4, 1980.

Section 4 of article XIIIA of the Constitution states:

> "Cities, Counties and special districts, by a two-thirds vote of the qualified electors of such district, may impose special taxes on such district, except ad valorem taxes on real property or a transaction tax or sales tax on the sale of nil property within such City, County or special district."

This constitutional provision, although stated in the permissive, has been interpreted as prohibiting the imposition of "special taxes" without a two-thirds approval vote. (*Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal. 3d 208, 242; hereafter "*Amador*.")

The problem with which we are faced is that this new constitutional amendment fails to define the term "special taxes." We have previously reviewed the possible definitions of the-term and have concluded "that the term special taxes has not acquired any well-defined or established meaning." (62 Ops. Cal. Atty. Gen. 673, 685 (1979); see also *Mills v. County of Trinity* (1980)108 Cal. App. 3d 656, 659–660.)

We have, however, certain guidelines to aid us in interpreting this constitutional provision. It is well settled that the primary goal in interpreting any constitutional language is "to give full effect to the framers' objective and the growing needs of the people." *(Mills v. County of Trinity*, *supra*, 108 Cal. App. 3d 656, 660.) As the Court of Appeal stated long ago, the Constitution "is not to be interpreted according to narrow or super technical principles, but liberally and on broad general lines, so that it may accomplish in full measure the objects of its establishment and so carry out the great principles of government." (*Stephens v. Chambers* (1917) 34 Cal. App. 660, 663–664.) Even the literal meaning of the words used 'may be disregarded to avoid absurd results and to fulfill the apparent intent of the framers. [Citations.]" (*Amador*, *supra*, 22 Cal. 3d 208, 245.)

Here, we are well informed as to the purposes of article XIIIA as a whole and of section 4 thereof in particular. In *Amador*, the Supreme Court concluded that the various provisions of the article "are both reasonably germane to, and functionally related in furtherance of, a common underlying purpose, namely, effective real property tax relief." (*Amador*, *supra*, 22 Cal. 3d 208, 230; see *Trent Meredith, Inc. v. City of Oxnard* (Jan. 6, 1981), 2 Civ. 59339, Cal. App. 3d ___.)

In *Board of Supervisors v. Lonergan* (1980)27 Cal. 3d 855, 863–864, the Supreme Court again reviewed the central purpose of the article and stated:

> "By its terms, article XIIIA applies only to real property taxes. In *Amador* we upheld the constitutionality of the enactment and accorded it the liberal construction to which initiative measures are entitled. (22 Cal. 3d at pp. 219, 248.) In so doing, throughout our opinion and in varying contexts we observed that the measure pertained to the subject of *real property* taxation and declared its underlying purpose and chief aim to be *real property* tax relief. (*Id*., at pp. 218, 220, 224, 230, 231, 243.)"

Against this general description of article XIIIA's focus, we must examine the Commission's tax imposition in question. A sales tax is not a property tax; it is an excise tax on the privilege of doing an activity. (See *City of Glendale v. Trondsen* (1957) 48 Cal. 2d 93, 103–104; 62 Ops. Cal. Atty. Gen. 254, 257 (1979); Due, *Sales Taxation* (1957) p. 3.) Consequently, it cannot be said that the Commission's levy falls within the general aim of the new constitutional amendment.

We must, however, examine further the specific purpose of section 4 of article XIIIA in order to reach a definite conclusion to the question presented.

In *Amador*, the reference to "special taxes" in section 4 was explained thusly:

> "As previously noted, article XIIIA consists of four major elements, a real property tax rate limitation (§ 1), a real property *assessment* limitation (§ 2), a restriction on *state* taxes (§ 3), and a restriction on *local* taxes (§ 4). Although petitioners insist that these four features constitute separate *subjects*, we find that each of them is reasonably interrelated and interdependent, forming an interlocking "package" deemed necessary by the initiative's framers to assure effective real property tax relief. Since the total real property tax is a function of both rate and assessment, sections 1 and 2 unite to assure that *both* variables in the property tax equation are subject to control. *Moreover, since any tax savings resulting from the operation of sections 1 and 2 could be withdrawn or depleted by additional or increased state or local levies of other than property taxes, sections 3 and 4 combine to place restrictions upon the imposition of such taxes*. Although sections 3 and 4 do not pertain solely to the matter of property taxation, both sections, in combination with sections 1 and 2, are reasonably germane, and functionally related, to the general subject of property tax relief." (*Amador*, *supra*, 22 Cal. 3d 208, 231; full sentence italics added.)

In *County of Fresno v. Malmstrom* (1979) 94 Cal. App. 3d 974, 983, the Court of Appeal concluded, "Section 4 of that constitutional provision is aimed at limiting local governments' ability to replace funds reduced by other sections of the article by shifting to other types of taxes."

We have previously observed that section 4 was "designed to preserve the property tax relief obtained by sections 1 and 2" (62 Ops. Cal. Atty. Gen. 673, 686 (1979)) and that it must be read together with the other sections "to effectuate its purpose of property tax relief." (62 Ops. Cal. Atty. Gen. 254, 257 (1979).)

That the object of section 4 is to prevent subterfuge and the circumvention of the property tax relief limitations of sections 1 and 2 is amply demonstrated in the analysis provided to the voters in the ballot pamphlet at the time of the measure's adoption.[2] With regard to section 4, the voters were told that "the initiative would restrict the ability of local governments to impose new taxes in order to replace the property tax revenue losses." (Cal. Voters Pamphlet (June 6, 1978), p. 70.) The analysis further discussed the impact of the replacement of property taxes by other taxes as follows:

> "*If* these property tax revenue losses *were substantially replaced*, local governments could maintain the existing level of government services and employment.
>
> "Part of these revenue losses could be covered temporarily by using the state surplus. Additional revenues to pay for these services would have to come from higher state or local taxes such as those imposed on personal income, sales and corporations. Depending upon which tax sources were used to replace local property tax losses, there could be a shift in who initially bears the tax burden. This is because most sales and personal income taxes are paid by nonbusiness taxpayers, whereas about 65 percent of property taxes are initially paid by business firms.' (*Ibid*.)

With this additional background in mind with specific regard to section 4, we believe that the Commission's tax ordinance in question comes within this constitutional provision requiring prior voter approval.

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[2] Ballot pamphlets provide the "legislative history" of initiative measures adopted by the voters (*White v. Davis* (1975) 13 Cal. 3d 757, 775) and thus are helpful in determining the probable meaning of uncertain language. (*Board of Supervisors v. Lonergan*, *supra*, 27 Cal. 3d 855, 866; *Amador*, *supra*, 22 Cal. 3d 208, 245-246.)

First, it is a type of tax that is specifically mentioned in the ballot pamphlet as a possible replacement for property tax revenue losses caused by the limitations contained in sections 1 and 2.

Second, it comes within the expressed goals of section 4 as stated in the ballot pamphlet's argument in favor of the measure's adoption: "Limits property tax to 1 % of market value, requires two-thirds vote of both houses of the Legislature to raise any other taxes, limits yearly market value tax raises to 2% per year*, and requires all other tax raises to be approved by the people.*" (Cal. Voters Pamphlet (June 6, 1978), p. 58; emphasis added.)

Third, it meets the general tests stated in *Amador*: "it seems evident that section 4 assists in preserving home rule principles by leaving to *local* voters the decision whether or not to authorize special' taxes to support *local* programs (*Amador*, *supra*, 22 Cal. 3d, 208. 226) and "since any tax savings resulting from the operation of sections 1 and 2 could be withdrawn or depleted by additional or increased state or local levies other than property taxes, sections 3 and 4 combine to place restrictions upon the imposition of such taxes." (*Id*. at 230–23 1.)

Fourth, it meets the standard set forth in *County of Fresno v. Malmstrom, supra*, 94 Cal. App. 3d 974, 983: "A 'special tax' is a tax collected and earmarked for a special purpose, rather than being deposited in a general fund. [Citations.]"

Fifth, it is covered by the constitutional voter requirement under our previous conclusions that a special tax is a new or additional local tax levied for revenue purposes. (62 Ops. Cal. Atty. Gen. 831, 836–838 (1979), 62 Ops. Cal. Atty. Gen. 673, 685–687 (1979).)[3]

We are not unmindful of the fact that the Commission has no power to levy a property tax. An argument may thus be made that no "replacement" can occur and hence the Commission's tax is wholly outside the scope of article XIIIA. The construction, however, of a rail rapid transit system (the primary objective of the Commission's levy) is one that would be a normal use of local property taxes prior to the adoption of article XIIIA.[4] We believe that the voters, in adopting article XIIIA, were concerned with

[3] In *Trent Meredith, Inc. v. City of Oxnard* (Jan. 6, 1981) 2 Civ. 59339, ___ Cal. App. 3d __, our definition was termed "overly broad' and the *Malmstrom* definition was dismissed as dictum; however, the court refused to provide its own definition and was considering an exaction dissimilar to a sales tax.

[4] Once constructed, user fees would likely fund the system's operation, and the replacement of a user fee by a sales tax might warrant a different conclusion. (See *Mills v. County of Trinity*,

government spending in general (see *County of Fresno v. Malmstrom, supra*, 94 Cal. App. 3d 974, 981) and the types of taxes that would fund the kinds of government activities traditionally supported by local property taxes.

Accordingly, we conclude that in light of the article's goals and purposes, the "special taxes" provision of section 4 of article XIIIA is applicable to the adoption of a retail transactions and use tax ordinance by the Commission. Consequently, the ordinance in question was not validly approved by the voters on November 4, 1980.

We next consider whether the State Board of Equalization (hereafter "Board") must administer the tax approved by a majority of the voters under section 13050 even though it failed to be adopted under the 2/3 vote requirements of article XIIIA. We believe that the Board is bound by section 3.5 of article III of the Constitution to administer the tax ordinance regardless of our conclusion that the measure was not constitutionally approved by the voters.

The Board's role in administering the Commission's tax ordinance is specified in Revenue and Taxation Code sections 7270–7272, made applicable by the provisions of section 130350. These statutes provide:

> "Prior to the operative date of any ordinance imposing a transactions and use tax pursuant to this part, the district shall contract with the board to perform all functions incident to the administration and operation of the ordinance. If the district shall not have contracted with the board prior to the operative date of its ordinance, it shall nevertheless so contract and, in such case, the operative date shall be the first day of the first calendar quarter following the execution of the contract." (Rev. & Tax Code § 7270.)
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> "All transactions and use taxes collected by the board pursuant to contract with the district shall be transmitted by the board to the district periodically as promptly as feasible. The transmittals shall be made at least twice in each calendar quarter." (Rev. & Tax Code § 7271.)
>
> "The district shall pay to the board its costs of preparation to administer and operate the transactions and use taxes ordinance. The district shall pay such costs monthly as incurred and billed by the board. Such costs include all preparatory costs, including costs of developing procedures, programming for data processing, developing and adopting appropriate regulations, designing and printing of forms, developing instructions for the board's staff

*supra*, 108 Cal. App. 3d 656, 660.)

and for taxpayers, and other necessary preparatory costs which shall include the board's direct and indirect costs as specified by Section 11256 of the Government Code. Any disputes as to the amount of preparatory costs incurred shall be resolved by the Director of Finance, and his decision shall be final. The maximum amount of all preparatory costs to be paid by the district shall not, in any event, exceed one hundred twenty-five thousand dollars ($125,000)." (Rev. & Tax Code § 7272.)

As we noted in our analysis of the first question, the Commission's tax ordinance was approved by the voters pursuant to section 130350 ("a majority of the electors voting on the measure vote to authorize its enactment at a special election"). If, however, the ordinance imposes "special taxes" under article XIIIA of the Constitution, then the majority voter requirement of section 130350 is unconstitutional in light of the two-thirds requirement of article XIIIA. We have, in effect, concluded in response to the first question that section 130350 is unconstitutional insofar as it allows a mere majority voter approval.

Nevertheless, the Board may be compelled to administer the tax until an appropriate court rules that the Commission's tax ordinance is unconstitutional. Section 3.5 of article III of the Constitution provides:

"An *administrative agency*, including an administrative agency created by the Constitution or an initiative statute, *has no power:*

"(a) To declare a statute unenforceable, or *refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional;*

"(b) To declare a statute unconstitutional;

"(c) To declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulations." (Emphasis added.)

Clearly, the Board is an "administrative agency" for purposes of this article. (See Cal. Const. art. XIII, § 17; Gov. Code §§ 15606, 15623; 62 Ops. Cal. Atty. Gen. 809, 811–812 (1979); 62 Ops. Cal. Atty. Gen. 788, 790–791 (1979).)

It thus may not "refuse to enforce" section 130350's mere majority requirement "on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional." (See *Goldin v. Public Utilities Commission* (1979) 23 Cal. 3d 638, 669, fn. 18; 62 Ops. Cal. Atty. Gen. 809, 811 (1979).) Of course, the Board would also be required to obey a superior court order as it directly relates to the issue, should the lower court declare the statute unconstitutional. (See *Fenske v. Board of Administration* (1980) 103 Cal. App. 3d 590, 595–596.)

The purposes of section 3.5 of article III would be served by its application to the problem before us, even where as here the statute is enacted prior to the constitutional provision. Whether the Commission's tax ordinance imposes "special taxes" is a close question of law. Such a determination should be made by the judiciary before an express legislative enactment is found to be inconsistent therewith. This conclusion is consistent with the intent of section 3.5, as expressed in the ballot pamphlet's argument in favor of the measure's adoption:

> "Once the law has been enacted, however, it does not make sense for an administrative agency to refuse to carry out its legal responsibilities because the agency's members have decided the law is invalid. Yet, administrative agencies are so doing with increasing frequency. These agencies are all part of the Executive Branch of government, charged with the duty of enforcing the law.
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> "The Courts, however, constitute the proper forum for determination of the validity of State statutes. There is no justification for forcing private parties to go to Court in order to require agencies of government to perform the duties they have sworn to perform.
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> "Proposition 5 would prohibit the State agency from refusing to act under such circumstances, unless an appellate court has ruled the statute is invalid.
>
> "We urge you to support this Proposition 5 in order to insure that appointed officials do not refuse to carry out their duties by usurping the authority of the Legislature and the Courts. Your passage of Proposition 5 will help preserve the concept of the separation of powers so wisely adopted by our founding fathers." (Cal. Voters Pamphlet (June 6, 1978), p. 26.)

This language was further supported in the rebuttal portion of the ballot pamphlet as follows:

> "The opposition cites a case by the California Supreme Court concerning 'suspect' statutes. However, the United States Supreme Court has consistently held that 'State statutes, like federal ones, are entitled to the presumption of constitutionality until their invalidity is *judicially* declared.'
>
> "Under Proposition 5, the agencies themselves may challenge suspect' statutes in the courts. Then private citizens will save time and expense otherwise imposed on them to compel State agencies to perform their duties. Such agencies will no longer usurp the constitutional powers of the courts.
>
> "Your vote for Proposition 5 will return responsibility for making major decisions to the properly constituted authorities. No longer will bureaucratic officials, however well-intentioned, be able to make decisions properly reserved to the Courts and your elected representatives." (*Id*. at p. 27.)

We conclude, therefore, that the Board must administer the Commission's tax ordinance until an appropriate judicial decision is rendered, ruling that section 130350 is in conflict with section 4 of article XIIIA of the Constitution.

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