



Fw: Public Comment re Agenda Item 30 (11-0978)
The BOSTWO to: Cynthia C Johnson
Sent by: Kitty J. Miller

08/22/2011 01:26 PM

Thank you,

Ray Nutting, Chairman
El Dorado County Board of Supervisors
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----- Forwarded by Kitty J. Miller/PV/EDC on 08/22/2011 01:26 PM -----



Public Comment re Agenda Item 30 (11-0978)

Cris Alarcon to: John Knight, Ray Nutting, Jack Sweeney, Ron Briggs,
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08/22/2011 12:22 PM

Public Comment re Agenda Item 30 (11-0978) in support of BOS "letter of support of Referendum to Overturn ABx1 29"

DIGEST

The El Dorado County Board of Supervisors should reject Assembly Bill No. 29, Chapter 8, Statutes of 2011 because the revenue constitutes a tax, not a fee, and thereby required a super-majority vote of the legislature of California before it becomes enforceable. AB 29 passed June 15, 2011 with 52 of 80 votes, less than the required number of votes to pass a new tax. AB 29 is a new tax that passed with less than 2/3rds vote and is thereby defective.

DISCUSSION

The issue before us is whether the California State Responsibility Area Fire Prevention Fees constitutes a tax that requires a super-majority vote, or whether it constitutes a fee, such as a regulatory fee, that requires a simple majority vote.

On May 4 2011, the U.S. Government Accountability Office (GAO) rendered a decision to clarify the distinction between a tax and a fee in the matter of Administrative Office of the U.S. Courts re the California E-Waste Recycling Fee. Applying the tests provided by this decision helps us decide that AB 29 revenue is misnamed as a fee for service, but is actually a new California tax.

Distinguishing a tax from a fee for service requires careful analysis because the line between tax and fee can be a blurry one. Collins Holding Corp. v. Jasper County, South Carolina, 123 F.3d

797, 800 (4th Cir. 1997). In determining whether a charge is a tax or fee, the nomenclature is not determinative, and the inquiry must focus on explicit factual circumstances. *Valero Terrestrial Corp. v. Caffrey*, 205 F.3d 130, 134 (4th Cir. 2000); see also *City of Columbia*, 914 F.2d at 154 (applying a facts and circumstances test rather than reducing the case to a question of pure semantics). One court has described a classic tax as one satisfying a three-part inquiry—an assessment that (1) is imposed by a legislature upon many, or all, citizens, and (2) raises money that (3) is spent for the benefit of the entire community. *San Juan Cellular Telephone Co. v. Public Service Commission of Puerto Rico*, 967 F.2d 683, 685 (1st Cir. 1992). [5] On the other hand, a classic regulatory fee is imposed by an agency upon those subject to its regulation, may serve regulatory purposes, and may raise money to be placed in a special fund to help defray the agency's regulation-related expenses. *Id.*; see also B-306666, Jun. 5, 2006, at 5–9 (citations omitted) (applying *Valero* and *San Juan Cellular* in tax versus fee analysis). When the characteristic of a charge places it somewhere between a tax and a fee, the most important factor becomes the purpose underlying the statute or regulation imposing the charge in question. See *Valero*, 205 F.3d at 134, citing *South Carolina v. Block*, 717 F.2d 874, 887 (4th Cir. 1983). If the ultimate use of the revenue benefits the general public, then the charge will be considered a tax; the charge will more likely be considered a fee if the revenue's benefits are narrowly circumscribed. *San Juan Cellular*, 967 F.2d at 685.

Based on the facts and other information provided to us by the text of AB29, we conclude that, under the *San Juan Cellular* test, the Fire Prevention Fees is a tax, the legal incidence of which requires a super-majority vote of the legislature before becoming a law. See *San Juan Cellular*, 967 F.2d at 685.

The GAO's decision determining that California's e-waste recycling fee was in fact a tax, was made thus: "The e-waste recycling fee (1) has been levied by the California legislature against purchasers of CEDs (2) to raise revenue that (3) is to be spent for the public benefit, that is, to fund a statewide program that provides "consumers and the public" with cost free and convenient opportunities to recycle CEDs. Cal. Pub. Res. Code sect. 42461(b). Payment of the e-waste recycling fee by purchasers of CEDs is not linked to a specific benefit or service provided by the State of California to the payers of the fee. See 20 Op. Off. Legal Counsel 12. California acknowledges as much, stating that "[t]he fee is not designed to be strictly tied to the device the fee was levied upon" and that CED purchasers are a "relatively anonymous population." CalRecycle Letter, at 1, para. A, and 2, para. 3; BOE Interview. Further, consumers are not guaranteed cost-free recycling services in California, nor are they entitled to a refund of the fee if they elect not to avail themselves of recycling services in California. Cal. Code Regs. title 14, sect.18660.6(d); CalRecycle Letter, at 2. Rather, recycling services from authorized providers are offered to the public at large and no distinction is made between those who have paid the e-waste recycling fee and those who have not. CalRecycle Letter, at 1; BOE Interview. Thus, the benefit of the e-waste recycling fee is not narrowly circumscribed to the consumers paying the e-waste fee, but rather, is conferred on the general public.[6]"

A likewise analysis of the Fire Prevention Fees could be made thus: The Fire Prevention Fees (1) has been levied by the California legislature against Individual owners of [Habitable] structures

within state responsibility areas (2) to raise revenue that (3) is to be spent for the public benefit, that is, to fund a SRA-wide program that provides "consumers and the public" with fire prevention activities, which shall benefit not only owners of structures within the state responsibility areas but also SRA lands without habitable structures, and the public. Fund use includes, but is not limited to: Grants to the California Conservation Corps, or certified local conservation corps for fire prevention projects and activities in the state responsibility areas; Grants to a qualified nonprofit organization with a demonstrated ability to satisfactorily plan, implement, and complete a fire prevention project applicable to the state responsibility areas; Public education to reduce fire risk in the state responsibility areas; Fire severity and fire hazard mapping by the department in the state responsibility areas; Other fire prevention projects in the state responsibility areas. Cal. Pub. Res. Code CHAPTER 8 SECTION 1. Chapter 1.5 (commencing with Section 4210). Payment of the Fire Prevention Fees by Individual owners of [Habitable] structures within state responsibility areas is not linked to a specific benefit or service provided by the State of California to the payers of the fee. AB29 acknowledges as much, by use of terms, "can" and "should" rather than "do". "The presence of structures within state responsibility areas can also impair wild land firefighting techniques and could result in greater damage to state lands caused by wildfires." Cal. Pub. Res. Code CHAPTER 8 SECTION 1. Chapter 1.5 [4210 (b)] The fee is not designed to be strictly tied to the structures the fee was levied upon" structure owners are not necessarily the primary beneficiaries, and "relatively anonymous population" directly benefits from the revenue. Thus, the benefit of the Fire Prevention Fee is not narrowly circumscribed to the consumers paying the Fire Prevention Fee, but rather, is conferred on the general public.

Moreover, as discussed above, the Fire Prevention Fees is a tax, not a service charge. The payor of the Fire Prevention Fees does not receive any administrative or regulatory service directly linked to the payment of the fee.

Cris Alarcon, Placerville

August 22, 2011

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