



METROPOLITAN
TRANSPORTATION
COMMISSION

Agenda Item 7d

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Memorandum

TO: Legislation Committee

DATE: September 3, 2010

FR: Executive Director

W. I. 1131

RE: Proposition 26: Broadening Definition of "Tax" for Purposes of Two-Thirds Voter Approval Requirement

Background

Proposition 26 broadens the definition of a state or local tax to include some charges that are now considered fees. Proposition 26 also affects some current sources of revenue at the state level, but does not affect local or regional charges in existence at the time of the election. If the state or local government chose to increase or extend those charges beyond the currently authorized timeframe, however, it would be subject to Proposition 26. This memorandum reviews Proposition 26's implications for Bay Area transportation funding.

Recommendation: Oppose

Discussion

Eliminates Majority Vote for Revenue-Neutral Changes to Tax Code. The measure specifies that changes to state law that would result in a *single* taxpayer paying a higher tax must be approved by a two-thirds vote, eliminating the potential for the Legislature to adopt tax increases by a majority vote if they are part of a revenue-neutral package that includes off-setting tax cuts. Because the measure also contains a "claw back" provision that invalidates state revenue measures that are inconsistent with its requirements and that are enacted between January 1, 2010 and election day, the gasoline tax swap enacted last March would be repealed in November 2011 unless the Legislature approved it again with a two-thirds vote in each house.

A Reaction to the "Sinclair" Case Upholding Regulatory Fees. This effort to rein in the scope of government charges that are considered "fees" and instead classify them as "taxes" stems largely from the California Supreme Court's unanimous 1997 decision — *Sinclair Paint Co. v. State Board of Equalization* — validating a fee imposed on businesses that made products containing lead to fund health services to children and to otherwise mitigate the social and environmental consequences of lead contamination. The Court ruled that the use of the proceeds of a fee need not benefit those charged to avoid characterization as a tax as long as the fee bears a reasonable relationship or "nexus" to the burden imposed by those charged.

Examples of Regulatory Fees. In recent years, California courts have upheld regulatory fees imposed to regulate point-source emitters of air pollution and an air quality district's fee on new development to mitigate the impacts of that development on air quality. The types of fees and charges that would become taxes under the measures are *new* fees that pay for services that

benefit the public broadly, rather than providing services directly to the fee payer. Attachment A provides an illustration of the types of fees that would likely be considered taxes under the measure.

Measure Would Hinder Efforts to Raise Legitimate Fees on Fuel and Vehicles

Proposition 26 would harm the San Francisco Bay Area’s ability to raise new revenue for transportation, including maintenance of the existing system. In particular, it would subject future fees on motor vehicle fuel or on motor vehicles themselves (such as a vehicle registration fee or VRF) to a two-thirds vote in Sacramento or, if authorized to be placed on the ballot locally, to a two-thirds vote of the electorate. With regard to the VRFs on the ballot in seven Bay Area counties in November 2010, they were drafted in such a way that they should not be affected by the measure, but efforts on any future ballot to raise a VRF would require a two-thirds vote. In addition, MTC’s \$1 VRF fee that currently funds the region’s call-box program, Freeway Service Patrol and 511 would be considered a local special tax under the measure, and thus, could only be increased by a two-thirds vote of the people.

We believe a regulatory fee on motor vehicle fuel, subject to a vote of the people, offers one of the most promising options for addressing the region’s significant transportation funding shortfall in a manner that is consistent with MTC’s long-standing support for user fees. In 2008, MTC co-sponsored legislation, Senate Bill 2628 (Feuer), to authorize a regional fee on motor vehicle fuel to mitigate for climate change impacts. We also supported including such a provision in the gas tax swap (Assembly Bill 6 x8 (2010)) as a way to give regions the option of backfilling the cuts to public transportation resulting from the swap.

Bridge Tolls & Express Lane Tolls Appear to Be Exempt

Among the categories of government charges that are specified as exempt from the initiative’s definition of taxes are charges for the “entrance to or use of” local or state property. Given that the state highways and the region’s seven toll bridges are state property, it appears that bridge tolls or roadway tolls on the state highway system would fall under that exemption and continue to be subject to existing law.

Conclusion

Given the difficulty of getting anything accomplished in Sacramento already discussed in our analysis of Proposition 25, the measure would also further limit the Legislature’s ability to close its structural deficit by the use of fees. Because Proposition 26 would also hinder our efforts to raise additional revenue for transportation in a manner that is consistent with the concept of regulatory fees and user fees and that adheres to the current legal interpretation of such fees, we recommend that the Commission oppose the measure.

Known Positions

Support

Stop Hidden Taxes Coalition (see attachment under Agenda Item 7c)

Oppose

California Professional Firefighters
California Federation of Teachers
California League of Conservation Voters
California Nurses Association
Consumer Federation of California
California Alliance of Retired Americans
League of Women Voters of California
American Lung Association of California
Sierra Club California



Steve Heminger

Examples of Regulatory Fees That Benefit the Public Broadly

Oil Recycling Fee

The state imposes a regulatory fee on oil manufacturers and uses the funds for:

- Public information and education programs.
- Payments to local used oil collection programs.
- Payment of recycling incentives.
- Research and demonstration projects.
- Inspections and enforcement of used-oil recycling facilities.

Hazardous Materials Fee

The state imposes a regulatory fee on businesses that treat, dispose of, or recycle hazardous waste and uses the funds for:

- Clean up of toxic waste sites.
- Promotion of pollution prevention.
- Evaluation of waste source reduction plans.
- Certification of new environmental technologies.

Fees on Alcohol Retailers

Some cities impose a fee on alcohol retailers and use the funds for:

- Code and law enforcement.
- Merchant education to reduce public nuisance problems associated with alcohol (such as violations of alcohol laws, violence, loitering, drug dealing, public drinking, and graffiti).

Source: Legislative Analyst’s Office, Proposition 26 Analysis, 7/15/10, Figure 3.