A157598 / A157972

COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT

HOWARD JARVIS TAXPAYERS ASSOCIATION, ET AL.

Appellants,

v.

BAY AREA TOLL AUTHORITY, ET AL.

Respondents.

RANDALL WHITNEY

Appellant,

v.

METROPOLITAN TRANSPORTATION COMMISSION

Respondent.

After Judgments of the Superior Court for the County of San Francisco,
Case Nos. CGC-18-567860 / CPF 18-516276; Hon. Ethan P. Schulman

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APPELLANTS' PETITION FOR REHEARING

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PETITION FOR REHEARING

Pursuant to CRC Rule 8.268, appellants request a rehearing because the decision of this Court, that Proposition 26 created a carte blanche exemption from voter approval for fees imposed to enter or use public property, is inconsistent with all indicia of voter intent. The Court reached that decision by misconstruing article XIII A, section 3(d) as only "a burden shifting provision [that] does not impose substantive requirements in addition to those stated in subdivision (b)" (Slip Op. at 29) and by misapplying the canon of construction favoring interpretations that avoid surplusage.

THE VOTERS DID NOT INTEND TO CREATE NEW LOOPHOLES

Quoting from this Court's opinion, it agrees with appellants that, "[p]rior to the adoption of Proposition 26, 'case law distinguish[ed] between taxes subject to the requirements of article XIII A ... on the one hand, and regulatory and other fees, on the other.' As the Supreme Court has described this distinction, '[i]n general, taxes are imposed for revenue purposes, rather than in return for a specific benefit conferred or privilege granted.' Accordingly, 'a fee does not become a tax subject to article XIII A *unless* it "exceed[s] the reasonable cost of providing services ... for which the fee is charged" or "the manner in which the costs are apportioned" do not "bear a fair or reasonable relationship to the payor's burdens on or benefits from the regulatory activity."''" (Slip Op. at 24-25, citations omitted.)[1]

This Court agrees, then, that *prior to Proposition 26*, a fee for entrance to or use of public property would be deemed a tax if it was "imposed for revenue purposes," "exceed[ed] the reasonable cost of providing [the] services

[1] Unless noted otherwise, all emphasis is added.

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... for which the fee [was] charged" or did not "bear a fair or reasonable relationship to the payor's burdens on or benefits from the regulatory activity."

As this Court further agrees, "Proposition 26 ... was an 'effort to *close* perceived loopholes' in prior efforts to restrict taxation. Proposition 26 'addressed the problem of state and local governments disguising taxes as fees, with the burden on the government to prove that the so-called fee is not in fact a tax.'" (Slip Op. at 25, citations omitted.)

If the intent of Proposition 26 was to "address[] the problem of state and local governments disguising taxes as fees," and to close that loophole, then it would be contrary to voter intent for this Court to construe Proposition 26 as instead opening a new loophole that allows fees for use of public property to *escape* classification as a tax when they are "imposed for revenue purposes," "exceed the reasonable cost of providing [the] services ... for which the fee [was] charged," or do not "bear a fair or reasonable relationship to the payor's burdens on or benefits from the regulatory activity." Yet that is the Court's holding as currently written.

The decision as currently written reaches this illogical result by misconstruing article XIII A, section 3(d) as only "a burden shifting provision [that] does not impose substantive requirements in addition to those stated in subdivision (b)" (Slip Op. at 29) and by misapplying the canon of construction favoring interpretations that avoid surplusage.

A. <u>Section 3(d) Contains Substantive Requirements</u>

The opinion mistakenly describes article XIII A, section 3(d) as merely a procedural burden-shifting provision that "does not impose substantive requirements in addition to those stated in subdivision (b)." (Slip Op. at 29.) Subdivision (b), in pertinent part, provides as follows:

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> (b) As used in this section, "tax" means any levy, charge, or exaction of any kind imposed by the State, except the following:
>
> (1) A charge imposed for a specific benefit conferred or privilege granted directly to the payor that is not provided to those not charged, and which *does not exceed the reasonable costs to the State* of conferring the benefit or granting the privilege to the payor.
>
> (2) A charge imposed for a specific government service or product provided directly to the payor that is not provided to those not charged, and which *does not exceed the reasonable costs to the State* of providing the service or product to the payor.
>
> (3) A charge imposed for the *reasonable regulatory costs to the State* incident to issuing licenses and permits, performing investigations, inspections, and audits, enforcing agricultural marketing orders, and the administrative enforcement and adjudication thereof.

Subdivision (b) refers to only one substantive element of the pre-Proposition 26 test for distinguishing a valid fee from a tax – the requirement that the fee *not exceed the reasonable costs* of the governmental activity. That is the only substantive requirement that is also contained in subdivision (d).

Subdivision (d) goes further than subdivision (b) in terms of substantive requirements. It provides: "The State bears the burden of proving by a preponderance of the evidence [1] that a levy, charge, or other exaction is not a tax, [2] that the amount is no more than necessary to cover the reasonable costs of the governmental activity, and [3] that the manner in which those costs are allocated to a payor bear a fair or reasonable relationship to the payor's burdens

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on, or benefits received from, the governmental activity." (Cal. Const., art. XIII A, § 3(d).)

Subdivision (d) thus contains all three elements of the pre-Proposition 26 test for distinguishing a valid fee from a tax: (1) that the fee is not a tax; in other words, that it is not imposed for revenue purposes; (2) that the amount is no more than necessary to cover the reasonable costs of the governmental activity, and (3) that those costs are allocated in a manner that fairly or reasonably relates to the payor's burdens on, or benefits received from, the governmental activity.

Had subdivision (d) not contained all three substantive elements of the pre-Proposition 26 "tax" versus "fee" test, it would have been impossible for our Supreme Court to observe that "the language of Proposition 26 is drawn in large part from pre-Proposition 26 case law distinguishing between taxes subject to the requirements of article XIII A ... on the one hand, and regulatory and other fees, on the other." (*City of San Buenaventura v. United Water Conservation Dist.* (2017) 3 Cal.5th 1191, 1210.)

This Court's decision as currently written, then, errs when it says that subdivision (d) is merely a procedural burden-shifting provision that "does not impose substantive requirements in addition to those stated in subdivision (b)." (Slip Op. at 29.)

B. <u>Ignoring Subdivision (d) Creates A Worse Surplusage Problem</u>

As shown above, this Court erred when it described article XIII A, section 3, subdivision (d) as "not impos[ing] substantive requirements in addition to those stated in subdivision (b)." (Slip Op. at 29.) Based on that error, the Court then concluded that subdivision (d) could not be applied to subdivision (b)'s exception for fees imposed for entrance to or use of state

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property. To do so, it said, "would render the express reasonableness language in the first three exceptions as surplusage."

Since subdivision (d) does *not* mirror the first three exceptions of subdivision (b), but rather contains two additional substantive requirements that are missing from subdivision (b), it would *not* render the reasonableness language in subdivision (b) surplusage. If the two subdivisions were the same, then applying one might render the other surplusage. But they are substantially different.

Because subdivision (d) contains the full pre-Proposition 26 "tax" versus "fee" test, while subdivision (b) contains only a third of it, a much more serious surplusage problem is created by the Court severing the substantive requirements from subdivision (d) and treating it as merely a procedural "burden shifting provision [that] does not impose substantive requirements in addition to those stated in subdivision (b)." (Slip Op. at 29.) In so doing, the Court renders as impotent surplusage the other two-thirds of the subdivision (d) test.

The Court has misapplied the canon of construction disfavoring surplusage. The rule can tolerate a little repetition, especially in voter initiatives. While it may be justifiable for courts to impose high expectations on the syntax of statutes and legislative ballot measures that have been drafted by Legislative Counsel, courts generally do not demand the same precision and efficiency in the wording of voter initiatives, which are often drafted by non-lawyers.

Even as to statutes, "there is no rule prohibiting the Legislature from emphasizing a particular point notwithstanding the rule against surplusage." (*River Garden Ret. Home v. Franchise Tax Bd.* (2010) 186 Cal.App.4th 922, 942; *Farmers Ins. Exchange v. Superior Court* (2006) 137 Cal.App.4th 842, 858.) "Nor is there a rule of statutory construction requiring courts 'to assume

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that the Legislature has used the most economical means of expression in drafting a statute.'" (*River Garden*, 186 Cal.App.4th at 942; *Voters for Responsible Retirement v. Board of Supervisors* (1994) 8 Cal.4th 765, 772–73.) "Rules such as those directing courts to avoid interpreting legislative enactments as surplusage are mere guides and will not be used to defeat legislative intent." (*People v. Cruz* (1996) 13 Cal.4th 764, 782 (citations omitted).)

Here, subdivision (b) admittedly contains some redundancy when compared to subdivision (d). But for the sake of avoiding a little repetition, this Court has sacrificed two-thirds of the subdivision (d) test for distinguishing a valid fee from a tax needing voter approval. That is a misapplication of the rule against surplusage which will produce a serious corruption of voter intent if not corrected. Courts must "*give significance to every word*, avoiding an interpretation that renders any word surplusage." (*Regents of Univ. of Cal. v. Pub. Employment Relations Bd.* (1st DCA No. A157597, 2020 Cal.App. LEXIS 578, at *22 (June 25, 2020); *Weaver v. Chavez* (2005) 133 Cal.App.4th 1350, 1355.)

Giving significance to every word in subdivision (d) compels the conclusion that it is more than just a procedural burden-shifting provision. It also contains a three-part substantive test for determining whether any fee qualifies for an exemption from section 3's "tax" definition.

C. Applying Subdivision (d) to All of (b) is Not Absurd

Although respondents argued, and this Court repeated, that applying subdivision (d) beyond the first three exceptions would produce absurd results because it would apply to the price of property sales and to criminal fines, appellants answered that argument in Section III. B of their Reply Brief.

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In a nutshell, Proposition 26 is not alone in requiring that criminal fines be for their intended purpose, reasonable, and proportional. Under the excessive fines clauses of the state and federal constitutions, "Cruel or unusual punishment may not be inflicted *or excessive fines imposed*." (Cal. Const., art. I § 17; U.S. Const., 8th Amend; *People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.* (2005) 37 Cal.4th 707, 728; *Timbs v. Indiana* (2019) 139 S.Ct. 682, 689.) Thus, fines and penalties must be reasonably related to the severity of the defendant's crime and the harm he caused; in other words, the "cost" to society.

The law also contains a reasonableness requirement for sales and leases. Article XVI, section 6, of the California Constitution prohibits the Legislature from making "any gift, of any public money or thing of value to any individual, municipal or other corporation." California courts have construed this "gift of public property" clause to prohibit the sale or lease of state property without adequate consideration. Consideration is adequate if it approximates fair market value. (*Post v. Prati* (1979) 90 Cal.App.3d 626, 635; *Winkelman v. City of Tiburon* (1973) 32 Cal.App.3d 834, 845.) The acquisition of property is an investment, and its "cost" includes not just money but also risk, which accounts for any appreciation in value. A sale or lease for fair market value, then, does not exceed the state's "cost."

Given that the amounts of fines and prices are already controlled by other provisions of the state constitution, it is not impossible or absurd to apply subdivision (d) to fines and prices. A fine is not a tax if it is not excessive under the excessive fines clause. A price is not a tax if it represents adequate consideration under the gift of public property clause.

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CONCLUSION

Because it is unnecessary to strip subdivision (d) of its substantive requirements and reduce it to a mere procedural burden-shifting provision, and because doing so violates the rule of construction requiring that every word be given effect, and is contrary to voter intent, this Court should grant a rehearing.

DATED: July 8, 2020.

Respectfully submitted,

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WORD COUNT CERTIFICATION

I certify, pursuant to Rule 8.204(c) of the California Rules of Court, that the attached petition for rehearing, including footnotes but excluding the caption page, tables, verification, and this certification, as measured by the word count of the computer program used to prepare this pleading, contains 2,059 words.

DATED: July 8, 2020.

/s/ Timothy A. Bittle
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