

No. D052787

**IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION ONE**

SIDNEY WEISBLAT, an Individual,
KENNETH LEDGERWOOD, an Individual,
Plaintiffs and Appellants,

v.

CITY OF SAN DIEGO,
Defendant and Respondent.

Appeal from the Superior Court for the County of San Diego
Hon. Charles R. Hayes, Judge
Trial Court Case No.: GIC 871893

**BRIEF AMICUS CURIAE OF
THE TAX FOUNDATION
IN SUPPORT OF PLAINTIFF/APPELLANT**

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INTEREST OF THE *AMICUS CURIAE*

The Tax Foundation is a non-partisan, non-profit research institution founded in 1937 to educate taxpayers on tax policy. Based in Washington, D.C., the Foundation's economic and policy analysis is guided by the principles of neutrality, simplicity, transparency, and stability. The Tax Foundation makes information about government finance more understandable, such as with its annual calculation of "Tax Freedom Day," the day of the year when taxpayers have earned enough to pay for the nation's tax burden and begin earning for themselves.

The Tax Foundation educates the legal community and the general public about economics and taxpayer protections and advocates that judicial and policy decisions on tax law promote principled tax policy. Recent federal and state tax-related cases in which the Tax Foundation has participated as *amicus curiae* include *Department of Revenue of Kentucky v. Davis*, 128 S. Ct. 1801 (2008); *CSX Transportation, Inc. v. Georgia State Board of Equalization*, 128 S. Ct. 467 (2007); *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332 (2005); *Bonner v. Indiana*, No. 49S02-0809-CV-525 (Ind. 2008), and *Ardon v. City of Los Angeles* (No. B201035) (pending before the

Court of Appeal, Second Appellate District).

This case involves an important issue of tax policy. By addressing the distinction between taxes and fees, the opinion of this Court will not only have a tax impact on the largest State in the Union, but its rationale will likely aid other states confronting similar questions. Therefore this decision and the rationale behind it will have a large impact upon deciding the legality of taxes and fees throughout the country. The Tax Foundation is in a unique position to aid this Court because it has conducted extensive research into tax/fee approaches by California courts, other courts, the academic community, and various legislative bodies. Accordingly, the Tax Foundation has an institutional interest in this case.

STATEMENT OF THE CASE

Since 1942, Respondent City of San Diego has imposed a Rental Unit Business Tax (hereafter “RUBT”) on owners of residential rental property within the City. Approximately 139,000 taxpayers (including Appellants) paid the tax, raising some \$11 million annually, with the revenue deposited in the General Fund and not used for any landlord-specific purpose. All parties concede that the RUBT is a tax and not a fee, and consequently, concede that it

cannot be raised without a vote by the electorate as required by Proposition 218, which passed in 1996.

In 2004, faced with a revenue shortfall, Respondent City adopted Resolution R-299382, imposing a processing charge (termed a “fee”) on landlords and all businesses. The City at the time estimated that the costs of collecting the RUBT was \$3.5 million per year, and allocated that amount evenly among all the payers. Appellants paid the processing charge under protest and filed a claim for refund, alleging that the charge was in fact a tax, and invalid for failing to be approved by the electorate. After exhausting administrative appeals, Appellants filed suit.

Cross motions for summary judgment were filed. The court below granted summary judgment for the Respondents, holding that the charge fell within an exception created by Government Code § 50076 in that it covers the costs of the City’s RUBT collection activities. Appellant filed a notice of appeal on April 1, 2008.

SUMMARY OF ARGUMENT

The processing charge imposed by Resolution R-299382 is a tax because its purpose is to raise revenue for a quintessential government activity (tax collection), as demonstrated by the

circumstances surrounding its adoption and statements made by Respondent. The charge is not a “fee” because the revenue from the charge funds no services to the payors, nor does it confer any exclusive benefits or privileges to them, nor does the revenue from the charge fund any program that regulates the conduct of the payors.

Whether tax collection is a “special project” or a general governmental enterprise does not alter the conclusion that the charge is a tax and not a fee. Further, § 50076 does not substitute for the constitutional tax/fee inquiry based upon numerous authorities on tax/fee distinctions, most notably in the California Constitution.

Finding that the processing charge imposed by Resolution R-299382 is a tax would also uphold the purpose and meaning of California Constitution art. XIII C, § 1, which sought debate and voter consent where discrete groups are targeted for revenue increases but the benefits accrue to society at large.

ARGUMENT

I. THE CHARGE IMPOSED BY RESOLUTION R-299382 IS A TAX.

This Court must decide whether the processing charge imposed by Resolution R-299382 is a general tax, special tax, or fee. The paramount difference between a tax and a fee is based upon the

purpose of the charge. A charge that covers the cost of providing a service to the payor or regulates the payor's conduct is a fee. *See Bay Area Cellular Telephone Co. v. City of Union City*, (2008) 162 Cal. App.4th 686, 694. A charge that raises revenue for general spending without conferring any exclusive benefit to the payor is a tax. *Id.*

Additional questions must then be asked in applying other provisions of the California's Constitution. If the Court determines that the charge is a tax, the Court must ask whether it is a general tax (where the revenue is not earmarked for a specific purpose) or a special tax (where the revenue is earmarked for a specific purpose). If the Court determines that the charge is a fee, the Court must ask whether or not it is property-related.

A. Taxes are Imposed for Revenue Purposes, While Fees Cover the Cost of Providing a Service.

In 1996, California voters passed Proposition 218, adding Articles XIII C and XIII D to the California Constitution. These provisions define the terms "general tax" and "special tax." *See* Cal. Const. art. XIII C, § 1 (defining "general tax" as "any tax imposed for general governmental purposes" and "special tax" as "any tax imposed for specific purposes, including a tax imposed for specific purposes, which is placed into a general fund"). Local government

may not impose, extend, or increase general taxes without approval by a majority of the electorate. *See* Cal. Const. art. XIII C, § 2(b)-(c).

Local government may not impose, extend, or increase special taxes without approval by two-thirds of the electorate. *See* Cal. Const. art. XIII C, § 2(d). Fees (defined as anything other than a tax) may be imposed by local governments without voter approval as an outgrowth of inherent health-safety-welfare regulatory power. *See* Cal. Const. art. XIII D § 4; *Bay Area Cellular*, 162 Cal. App.4th at 694, *quoting Kern County Farm Bureau v. County of Kern* (1993) 19 Cal.App.4th 1416, 1421 (“Special taxes must be distinguished from regulatory fees imposed under the police power, which are not subject to the constitutional provision [since they are not taxes at all]. Special taxes do not encompass fees charged to particular individuals in connection with regulatory activities or services when those fees do not exceed the reasonable cost of providing the service or activity for which the fee is charged, and are not levied for unrelated revenue purposes.”).

To effectuate Proposition 218’s purpose of limiting tax increases disguised as “fee” increases, a strong constitutional and judicial framework distinguishing between general taxes, special taxes, and fees has developed. In *Sinclair Paint Co. v. State Bd. of Equalization*

(1997) 15 Cal.4th 866, 874, the court explained that “taxes are imposed for revenue purposes, rather than in return for a specific benefit conferred or privilege granted.” In *Bay Area Cellular*, the court explained that “[s]pecial taxes do not encompass fees charged to particular individuals in connection with regulatory activities or services when those fees do not exceed the reasonable cost of providing the service or activity for which the fee is charged, and are not levied for unrelated revenue purposes.” *Bay Area Cellular*, 162 Cal. App.4th at 694. User fees, whereby a user pays a charge “generally related to the actual goods or services provided” as “payment for a specific commodity purchased,” are not taxes. *Id.*, citing *Isaac v. City of Los Angeles* (1998) 66 Cal.App.4th 586, 596-97. The tax/fee question is a legal determination, based on an independent review of the facts and regardless of the terminology used by the government. *See id.* at 693.

The framework laid out in *Bay Area Cellular*—viewing general and special taxes as assessments imposed with the purpose of non-incidentally raising revenue for general spending, and fees as assessments imposed with the purpose of covering some or all of the cost of providing regulation or a tangible service to the person paying

it—are consistent with courts around the country. *See, e.g., San Juan Cellular Tel. Co. v. Pub. Serv. Comm’n of Puerto Rico*, 967 F.2d 683, 685 (1st Cir. 1992) (adopting a three-part test identifying taxes by evaluating (1) the entity that imposes the assessment, (2) the parties upon whom the assessment is imposed, and (3) whether the assessment is expended for general public purposes (tax) or used for the regulation or benefit of the parties upon whom the assessment is imposed (fee)); *Marshall v. Northern Virginia Transp. Authority*, 657 S.E.2d 71, 77-78 (Va. 2008) (“We consistently have held that when the primary purpose of an enactment is to raise revenue, the enactment will be considered a tax, regardless of the name attached to the act.”); *State v. Medeiros*, 973 P.2d 736, 741-45 (Haw. 1999) (labeling a charge as not a tax only if it (1) applies to the direct beneficiary of a particular service, (2) is allocated directly to defraying the costs of providing the service, and (3) is reasonably proportionate to the benefit received); *Safety Net for Abused Persons v. Segura*, 692 So.2d 1038, 1041 (La. 1997) (“[A] tax is a charge that is unrelated to or materially exceeds the special benefits conferred upon those assessed.”); *Holmdel Builders Ass’n v. Township of Holmdel*, 583 A.2d 277, 293 (N.J. 1990) (“If the primary purpose of the fee is to

raise general revenue, it is a tax. If, however, the primary purpose is to reimburse the municipality for services reasonably related to development, it is a permissible regulatory exaction.”). *See also Massachusetts v. United States*, 435 U.S. 444, 466-67 (1978) (distinguishing a fee from a tax where the charge is “based on a fair approximation of use of the system, and [is] structured to produce revenues that will not exceed the total cost . . . of the benefits to be supplied. . . .”); *Valero Terrestrial Corp. v. Caffrey*, 205 F.3d 130, 134 (4th Cir. 2000) (applying *San Juan Cellular* to determine if a charge “qualifies” as a tax, or otherwise it is a fee); *Neinast v. Texas*, 217 F.3d 275 (5th Cir. 2000) (applying *San Juan Cellular*); *Hedgepeth v. Tennessee*, 215 F.3d 608, 612 (6th Cir. 2000) (describing *San Juan Cellular* as the “leading decision” used for “the definition of the term ‘tax’”); *Bidart Bros. v. California Apple Comm’n*, 73 F.3d 925, 931 (9th Cir. 1996) (applying *San Juan Cellular* test to “determin[e] whether an assessment is a tax”); *Chicago and Nw. Transp. Co. v. Webster Co. Bd. of Supervisors*, 71 F.3d 265, 267 (8th Cir. 1995) (“[A] government levy is a tax if it raises revenue to spend for the general public welfare.”); *Brock v. WMATA*, 796 F.2d 481, 488 (D.C. Cir. 1986) (“A levy is properly

defined as a ‘tax’ . . . when its principal purpose is to raise revenues.”); *Time Warner Entertainment-Advance/Newhouse P’ship v. City of Lincoln*, 360 F. Supp.2d 1012, 1016-17 (D. Neb. 2005) (stating that the *San Juan Cellular* test faithfully applies Blackstone’s description of taxation); *Nat’l R.R. Passenger Corp. v. City of New York*, 695 F. Supp. 1570, 1575 (S.D.N.Y. 1988) (“A tax need not have any relation to governmental costs. . . . A user fee, on the other hand, must be no greater than the government’s costs.”); Roger D. Colton & Michael F. Sheehan, *Raising Local Government Revenue Through Utility Franchise Charges: If the Fee Fits, Foot It*, 21 URB. LAW. 55, 63 (1989) (“If the primary intent is to raise revenues, a measure is more likely to be considered a ‘tax.’ If the level of the fee is totally divorced from any cost-basis, it is more likely to be deemed a ‘tax.’”).

The charge in this case must be deemed a tax under application of these California precedents and persuasive authority throughout the country, because it raises revenue for the general coffers and is not a proper usage of a fee.¹ Therefore this Court need not address at length

¹ Respondent points to *Collier v. City and County of San Francisco*, (2007) 151 Cal. App. 4th 1326, to support the position that a charge used for inspections and regulation by another department is a valid fee, even where the payors enjoyed no particularized benefit. Here, it is undeniable that the charge is for the administration and collection of

whether the charge, as a fee, is property-related or not. *See* Cal. Const. article XIII D; *see also Pajaro Valley Water Management Agency v. Amrhein*, (2007) 150 Cal. App. 4th 1364, 1384.²

B. Voluntariness is Not Material in the Tax/Fee Determination.

Authorities on tax/fee issues have increasingly concluded that a “voluntariness” standard, whereby only “compulsory” charges are considered taxes, is of no help in determining if a charge is a tax or a fee. The attempt to use this notion to define taxes has proved problematic because it conflates the payment of the *charge* with the payment of the *underlying service*. One may purchase a product “voluntarily” but this does not make the sales tax paid on the transaction “voluntary.” Use of a toll road is a result of a voluntary decision but that fact is irrelevant to the question of whether the toll collected is a tax or a fee; it is a fee only if the revenue is used to defray the costs of providing a service to the payor and is not levied to

a tax, which is not a regulatory or inspection purpose.

² It would be difficult to assert that the processing charge is entirely unrelated to property ownership, because all RUBT taxpayers must pay the charge, and to be a RUBT taxpayer, one must be (1) a property owner (2) who engages in residential rental business. *See* Respondent Br. 15-16. Respondent seemingly equates “property-related” with “unrelated to anything except property.”

generate revenue for general spending. Taken to its logical extent, the “voluntariness” rule would mean that all charges collected for government general revenue other than perhaps a head tax are in fact not taxes. *See, e.g., Bay Area Cellular*, 162 Cal.App.4th at 696-97 (rejecting the city’s argument that the charge was not a tax because taxpayers “voluntary consented” to pay it by signing up for phone service); *Medeiros*, 973 P.2d at 742 (“[T]he ‘voluntariness’ of the service charge or fee would seem to be essentially beside the point.”); *Bloom v. City of Ft. Collins*, 784 P.2d 304, 311 n.8 (Colo. 1989) (“[W]e decline to engraft a ‘voluntariness’ factor onto the tax-fee distinction in resolving this case.”); *In re Cottage Grove Hosp.*, 265 B.R. 241, 245 (Bkrcty. D. Or. 2001) (“[I]t has been held that in the context of ‘excise’ taxes, the ‘voluntariness’ prong is a red herring, and is, in essence, inapplicable.”); Laurie Reynolds, *Taxes, Fees, Assessments, Dues, and the “Get What You Pay For” Model of Local Government*, 56 FLA. L. REV. 373, 412 (2004) (“[T]he definition is stretched to its logical limits when the court concludes that a fee is voluntary because the individual complainant can avoid the fee by ceasing to engage in the activity being assessed. By that reasoning, many taxes are likewise voluntary—to avoid income taxes, a taxpayer

need only stop earning income.”). The decisions cited *supra* provide guidance for this Court despite any arguments made by Respondent regarding voluntariness.

C. The Charge is Neither Regulatory nor Covers the Cost of Providing a Service to the Payor.

Examples of charges accurately described as fees include filing fees paid to a court, tolls paid to drive on a government-operated road, user charges paid to a government-operated utility, or licensing fees paid to engage in a regulated occupation. The features shared in common are two: (1) provision of a service to a particular user, independent of society at large; and (2) the revenue is used to cover costs of that program, not transferred to other governmental programs. In some cases, regulation by the governmental entity providing the service accompanies the charge, but not always. Mere regulation by itself, however, does not make a charge a fee. (Excise taxes, often justified as a way of discouraging the taxed behavior, are taxes notwithstanding their regulatory purpose, for instance.)

If the city were to charge landlords for safety inspections or to cover rent from tenants of city-operated housing, such charges could be a fee. The charge would be imposed on specific individuals who receive government-provided services, with the charge generally

related to services provided to those specific individuals. *See, e.g., Nat'l Cable Television Ass'n v. United States*, 415 U.S. 336, 340-41 (1974) (“A fee . . . bestows a benefit on the applicant, not shared by other members of society.”); *Jacksonville Port Authority v. Alamo Rent-A-Car, Inc.*, 600 So.2d 1159, 1164 (Fla. App. 1992) (stating that a fee cannot be “a general revenue source for the support of a sovereign government”).

Here, the City’s fee-is-for-a service argument can only succeed if being taxed is a “service” provided by government to an individual. Respondent states that the charge “reimburse[s] Respondent for the cost to process RUBT applications, RUBT renewals, and rental unit business billing statements.” Respondent Br. 13. In other words, the purpose is to cover the City’s costs of levying a tax. It is mistaken to speak of tax collection as a “service.” The costs associated with tax collection, and taxes themselves, provide no particularized benefit to an individual, but rather a societal benefit not limited to those who happen to pay a tax.

Taxation is exclusively an exercise of sovereign government authority. *See, e.g., Int'l Harvester Co. v. Wisconsin Dep't of Taxation*, 322 U.S. 435, 444-45 (1944), *citing McCulloch v.*

Maryland, 4 Wheat. (17 U.S.) 316, 429 (1819). The power to impose and collect taxes is a wielding of government authority to finance its operations. The beneficiaries of this taxation are not the taxpayer *qua* taxpayer, but rather the citizenry at large that receives government services. In the vast majority of cases, what one individual pays in tax bears no relation to the benefits received from government services. For example, payment of property taxes to support education does not depend on whether the taxpayer has children. Property owners and taxpayers without children pay the same taxes but do not receive the same benefits as those with children do.

Here, all parties concede that the underlying RUBT is a tax. If a payment made to government is a tax, then it follows logically that payments made to government to collect that tax are also a tax, for collection of a tax is more of a core governmental function than activities funded by a tax. The City has conceded that its RUBT program benefits citizens as a whole, and not the landlords who pay it. The City fails to show that landlords receive any additional benefit from the processing charge.³

³ The City does send out bills to collect the processing charge, although it is unclear as to whether this is what they point to as the “service” provided to landlords. However, it would be circular to

All those who pay the RUBT must also pay the processing charge, and no one else. It would be impossible to then assert that the collection of the tax does not benefit citizens as a whole, but only the landlords who pay it. The landlords receive no particularized benefit from the “service” of taxation; the benefits are enjoyed by society as a whole. *Cf. Oakland Raiders v. City of Berkeley* (1976) 65 Cal.App.3d 623, 627-29 (holding that if the only regulatory feature of a charge is to ensure that a tax is being paid, the charge is a tax).

Because the benefits of the RUBT program and the processing charges that facilitate its collection are not particularized “services” provided to the landlords, but revenue raising measures designed to benefit society as a whole, the charges involved are taxes. To hold otherwise would require denying that collection of taxes is a governmental function that exists to benefit society, not individual taxpayers, and would also require denying that payers of proper fees must receive a benefit beyond that enjoyed by society as a whole. Characterizing tax collection charges as “fees” would also threaten to label virtually every charge a “fee” and not a “tax.” If tax collection is not a governmental activity but rather one that provides services and

argue that the City may send out bills for a charge so long as it provides the “benefit” of sending out bills for a charge.

bestows individual benefits, then every governmental activity could be so characterized.

D. Revenues Derived From the Charge More Than Incidentally Exceed the Funds Required to Provide the Service.

Respondent has admirably sought to track revenues from the processing charge separately from general revenues, and to adjust the charge's rate as the City's tax collection expenses change, so as to prevent "overcharging." These actions, however, are immaterial because the revenues raised are far in excess of the amounts needed to provide whatever services the landlords receive from the City.

First, as explained *supra* in Part I.B, the processing charge provides no benefits to the landlord taxpayers aside from the benefits as members of society accruing from the collection of the RUBT. Since no service is therefore provided to the landlords, the funds required to provide such services is zero. Since the processing charge raises \$3.5 million, that \$3.5 million is in excess of the funds required to provide the service.

Assuming *arguendo* that the collection of taxes is the "service provided" in exchange for the payment of the processing charge, that \$3.5 million represents a rational amount of benefits accruing to the

landlords is unbelievable. The RUBT generates about \$11 million per year in revenue, so in essence the City argues that it costs 31.8 cents for every \$1 in tax it collects. This is either inflated or woefully inefficient; the federal Internal Revenue Service (IRS), with elaborate refund mechanisms and auditing powers, in 2006 spent about \$10 billion collecting \$1.236 trillion in individual income tax revenue (about 0.8 cents for every \$1 of tax). *See* Internal Revenue Service, *IRS Data Book: 2007*, at <http://www.irs.gov/taxstats/article/0,,id=168593,00.html>. The California Franchise Tax Board in Fiscal Year 2006 spent \$715 million collecting \$93 billion in tax revenue, or about 0.7 cents for every \$1 it collected. *See* Franchise Tax Board, *2007 Annual Report*, at <http://www.ftb.ca.gov/aboutftb/annrpt/2007/2007ar.shtml>. It is likely that the \$3.5 million cost is greatly in excess of actual tax collection expenditures, and consequently unreasonable and therefore in violation of Government Code §50076.

The revenue collected is grossly in excess of the services provided to the landlords. Consequently, the City cannot find shelter under Government Code § 50076, as it claims, because the amount of fee revenue is unreasonable for the asserted purpose. *See Dickson v. Jefferson Co. Bd. of Educ.*, 225 S.W.2d 672, 675 (Ky. 1949) (“[A]ny

payment exacted by the state . . . as a contribution toward the cost of maintaining governmental functions, where the special benefits derived from their performance is merged into the general benefit, is a tax. . . .”); 4 Cooley, *The Law of Taxation*, ch. 29 § 1784 (4th ed. 1924) (“If revenue is the primary purpose and regulation is merely incidental the imposition is a tax; while if regulation is the primary purpose the mere fact that incidentally a revenue is also obtained does not make the imposition a tax. . . .”).

The California Constitution describes as taxes those charges which raise money beyond that required to cover the cost of regulation or providing a service to the payor. In enacting Proposition 218, the people of California sought debate and voter consent where discrete groups are targeted for revenue increases but the benefits accrue to society at large.

The American antipathy to taxes is rooted deeply in our nation’s history. It is no surprise that lawmakers seek to avoid raising taxes, or at least, seek to raise revenue in ways that avoid the “tax hiker” label. Consequently, lawmakers increasingly seek to raise fees, or classify an obvious tax as something else. *See, e.g.*, George Skelton, “Gov.’s about-face on healthcare ‘fees’ is more than a matter of semantics,”

LOS ANGELES TIMES (Jan. 15, 2007) (“The Schwarzenegger camp has been trying out all sorts of convoluted explanations about why the doc and hospital ‘fees’ aren’t taxes.”); Joe Follick, “Budget blues lead lawmakers to eye raising cigarette tax,” OCALA STAR-BANNER (Nov. 29, 2008) (“Seeking to exploit [anti-tax sentiment] is a not-so-subtle provision in Waldman’s bill that changes the ‘cigarette tax’ to a ‘user fee,’ an obvious move to avoid the political poison of debating a ‘tax increase.’”); “Fenty proposes raising 911 ‘fee’,” WASHINGTON TIMES (Mar. 28, 2007) (“Although the mayor has balked at labeling the [911 telephone surcharge] rate rise increase a tax increase, others haven't split the semantic hairs so well.”).

The California Constitution is designed to protect taxpayers from these types of shell games. Labeling charges like the one at issue in this case as taxes enhances transparency and helps enable California citizens to better understand the cost of government. If the government hides the true cost of government services, citizens are unable to make meaningful choices about public priorities. Excessive hidden fees here and there on some people, instead of transparent and broad-based taxes on everyone, undermine this good government objective.

E. The Question of Whether the Charge is Imposed for General Governmental Purposes or is a Special Tax is Separate From the Tax/Fee Inquiry.

A special tax is “any tax imposed for specific purposes, including a tax imposed for specific purposes, which is placed into a general fund.” Cal. Const. art. XIII C, § 1(d). This is contrasted to a general tax, which is “any tax imposed for general governmental purposes.” Cal. Const. art. XIII C, § 1(a). All taxes are either general taxes or special taxes. *See* Cal. Const. art. XIII C, § 2(a).

The California Constitution thus divides the entire universe of taxes into two categories, each with separate constitutional treatment. Taxes imposed for no specific programmatic purpose, such as a general income tax increase or sales tax increase, are treated differently than taxes imposed for a particular purpose, such as a tax on phones to support the 911 system or a sales tax increase to fund transportation. Special taxes, because they shift funds from all taxpayers to a smaller subset of beneficiaries, are subjected to a higher threshold of two-thirds support from local voters to become effective, as opposed to a simple majority required for general taxes. *See* Cal. Const. art. XIII C, § 2(c)-(d).

It should be noted that inquiring whether a tax is a general or

special tax is a separate inquiry from whether a charge is a tax or a fee. Presumably all taxes and fees have some governmental purpose behind their enactment, and a charge may still be a tax notwithstanding segregation from the general fund. The California Constitution clarifies that a charge is still a tax even though certain individuals or groups may benefit, so long as the purpose of the charge is raising revenue for a general governmental purpose.

Here, once this Court concludes that the processing charge is a tax, one must then ask whether it is a general tax or a special tax. The answer to this question ultimately depends on whether the purpose for imposing the tax – raising revenue to fund tax collection efforts – is a “specific project” or a “general governmental purpose.” On one hand, the population of taxpayers is substantially narrower than the population of general taxpayers at large and the City concedes that it tracks the revenue separately notwithstanding commingling in the General Fund. Such a conclusion is in line with Proposition 218, which sought to limit the ability of local governments to levy new taxes for popular programs and shift existing revenue to less popular programs. On the other hand, the benefits of tax collection accrue to society at large, and tax collection is about the most common of

general governmental activities. But because the universe of taxpayers is limited, and because the revenue was ostensibly dedicated to a specific project, the processing charge is best described as a special tax. In any event, be it special tax or general tax, the charge is a tax and not a fee.

This inquiry is relevant in determining whether the charge must be subject to a two-thirds vote by the electorate or a majority vote by the electorate. Because the processing charge was subjected to neither, in either case it is invalid.

F. Consideration of Section 50076's Applicability Comes After the Tax/Fee Inquiry and Cannot Substitute for the Tax/Fee Inquiry.

Government Code § 50076 states that “[a]ny fee which does not exceed the reasonable cost of providing the service or regulatory activity for which the fee is charged and which is not levied for general revenue purposes is not a special tax.” Respondent argues that this provision applies to the processing charge.

Contrary to Respondent’s assertion, Government Code § 50076 is neither a grant of power nor a method of distinguishing taxes from fees. Both emanate from provisions of the California Constitution already discussed. Instead, the purpose of Government Code § 50076

is to reiterate that any charge that raises no more than the revenue needed to defray the cost of providing a service is a fee, not a special tax. Government Code § 50076 pre-exists Proposition 218 and is fully in line with Article XIII A. § 50076 clarifies that fees, to be fees, cannot raise more revenue than needed to defray costs of providing services.

This Court should be suspicious of Respondent's argument insofar as it suggests that § 50076 reveals more about the nature of taxes and fees than does the California Constitution. According to Respondent's interpretation, § 50076 creates an exception, whereby any charges imposed to cover costs associated with a tax collection scheme are "fees" so long as the charges do not exceed the costs. This argument is entirely inconsistent with the very careful definitions of general taxes, special taxes, and fees worked out in the case law and in the California Constitution.

By its very terms, Government Code § 50076 presupposes that the charge in question is a fee, and simply rechecks to make sure that it is actually a fee. By resort to § 50076, Respondent seeks to short-circuit the tax/fee inquiry crafted by careful constitutional and precedential rulings with a statutory provision never intended to do

that work. The question of whether the processing charge is a tax or a fee must be resolved before referring to § 50076.

CONCLUSION

The processing charge imposed by Resolution R-299382 is a tax because its purpose is to raise revenue for a quintessential government activity (tax collection), as demonstrated by the circumstances surrounding its adoption and statements made by Respondent. The revenue from the charge funds no services to the payors of the tax, nor confers any exclusive benefits or privileges to them, nor funds regulation of their activities. The benefits of tax collection are accrued to society as a whole, indicating the general governmental purpose behind the processing charge.

Whether the charge is a special tax or a general tax can be debated, depending on whether tax collection is a “specific project” or a general governmental enterprise. This question, however, does not alter the conclusion that the charge is a tax and not a fee. Likewise, § 50076 does not substitute for the constitutional tax/fee inquiry.

Such a conclusion would be in line with numerous authorities on tax/fee distinctions, including careful definitions laid out in the California Constitution. Finding that the processing charge imposed

by Resolution R-299382 is a tax would also uphold the purposes of Proposition 218, which sought debate and voter consent where discrete groups are targeted for revenue increases but the benefits accrue to society at large.

For the foregoing reasons, *Amicus* respectfully requests that the decision of the Court below be reversed.

This the 3rd day of February, 2009.

Respectfully submitted,



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