SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN FRANCISCO

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ORDER

SAN DIEGO COUNTY WATER AUTHORITY VS. METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA et al

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN FRANCISCO

SAN DIEGO COUNTY WATER AUTHORITY, Plaintiff/Petitioner, vs. METROPOLITAN WATER DIST. OF SOUTHERN CALIFORNIA, et al. Defendants/Respondents.	Case No. CFP-10-510830 ORDER GRANTING METROPOLITAN WATER DIST. OF SOUTHERN CALIFORNIA'S MOTION TO STRIKE

Introduction

Respondent and Defendant Metropolitan Water District of Southern California (Metropolitan) transports water in southern California. Metropolitan has twenty-six member agencies, including Petitioner and Plaintiff San Diego County Water Authority (San Diego). Metropolitan sells water directly to member agencies such as San Diego, and it also transports third party water purchased by member agencies.

On April 13, 2010, Metropolitan adopted new water rates applicable to member agencies' use of its facilities for 2011/12. San Diego alleges that Metropolitan unlawfully misclassifies certain supply costs as transportation costs, such that San Diego pays inflated transportation rates. In its Third Amended Petition for Writ of Mandate and Complaint (Petition) San Diego

alleges among other things that the 2011/12 water rates violate Proposition 26, which amended the California Constitution in 2010 to impose new restrictions on local public agencies' power to levy taxes.

Metropolitan now brings demurrers and in the alternative moves to strike allegations relating to Proposition 26 from the Petition.[1] The hearing was held this date with the parties appearing through counsel.

I grant the motion to strike, mooting the demurrers.

Discussion

Prior to the passage of Proposition 26, Article XIIIC section 2(d) provided: "No local government may impose, extend, or increase any special tax unless and until that tax is submitted to the electorate and approved by a two-thirds vote." Proposition 26 amended Article XIIIC to explain that "'tax' means any levy, charge, or exaction of any kind." Cal. Const. Art. XIIIC § 1(e). There are a number of exceptions to this definition, however, including "charge[s] 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 local government providing the service or product." *Id.* Art. XIIIC § 1(e)(2). This "exception" echoes the statutory requirement that utilities set rates that do not exceed the reasonable cost of service. *See, e.g.*, Cal. Gov't Code § 54999.7. Article XIIIC section 1(e)(2) was also amended to provide:

> The local government bears the burden of proving by a preponderance of the evidence that a levy, charge, or other exaction is not a tax, that the amount is no more than necessary to cover the reasonable costs of the governmental activity, and that the manner in which those costs are allocated to a payor bear a fair or

[1] Metropolitan's request for judicial notice of the Official Voter Information Guide for Proposition 26 published by the California Secretary of State is granted.

reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity.

This provision reversed the "long-standing rule . . . that rates fixed by a lawful rate-fixing body are presumed to be reasonable, fair and lawful, and the burden of overcoming this presumption is on the party challenging the ordinance." *Winnaman v. Cambria Community Services District*, 208 Cal.App.3d 49, 54 (1989).

The moving papers assert that the new provisions only apply prospectively, i.e., starting on November 3, 2010, and that the water rates at issue in this case, which were *adopted* in April 2010 but which *became effective* on January 1, 2011, are not covered. San Diego counters that the Petition invokes no new substantive right, just a new burden of proof, and that burden—applicable only at a hearing to be held in the future—is not retrospective. *Morris v. Pac. Elec. Ry. Co.*, 2 Cal. 2d 764, 768-69 (1935)(distinguishing changes in substantive rights from procedural changes such as rules of evidence). See also, *Murphy v. City of Alameda*, 11 Cal. App. 4th 906, 912-13 (1992). In effect, San Diego claims its invocation of Proposition 26 is surplusage. San Diego also argues that in any event Proposition 26 applies because it was enacted before the *collection* of the sums at stake, and so is not retroactive.[2]

The parties do not dispute the basic rule counseling against a finding of retroactivity. *Elsner v. Uveges*, 34 Cal. 4th 915, 936 (2004); *see also Murphy v. City of Alameda*, 11 Cal.App.4th 906, 913 (1992). Nor do they dispute the usual rule that changes affecting only burdens of proof are not retrospective, because they apply to hearings taking place after enactment.

> [T]his rule [against retroactivity] does not preclude the application of new procedural or evidentiary statutes to trials occurring after enactment, even though such trials may

[2] San Diego also argues that I can apply Proposition 26 in this case because San Diego only seeks prospective relief. Leaving aside the legal merits of this position, San Diego seeks more than prospective relief; it wants Metropolitan's 2011/12 rates vacated and its supply and transportation costs re-allocated. Petition Prayer for Relief ¶ 1.

involve the evaluation of civil or criminal conduct occurring before enactment. (*Tapia,* at pp. 288–289, 279 Cal.Rptr. 592, 807 P.2d 434.) This is so because these uses typically affect only future conduct—the future conduct of the trial. "Such a statute 'is not made retroactive merely because it draws upon facts existing prior to its enactment.... [Instead,] [t]he effect of such statutes is actually prospective in nature since they relate to the procedure to be followed in the future.' [Citations.] For this reason, we have said that 'it is a misnomer to designate [such statutes] as having retrospective effect.' " (*Id.* at p. 288, 279 Cal.Rptr. 592, 807 P.2d 434.)

Elsner v. Uveges, 34 Cal. 4th 915, 936 (2004).

Because the parties agree that that Proposition 26 is not to operate retrospectively—although they do disagree on its effective date—I need not decide now if there is an express retroactivity provision.[3]

As I say, San Diego tells me that no new *substantive* changes are imposed by Proposition 26, and indeed at first blush it is difficult to see what difference it can make to this case, aside from the burden of proof. But the fact is that the California electorate did not change the burden of proof applicable to the other bases in the Petition; instead, it generated a new law and invented a new burden of proof applicable to it. Thus, it is perfectly plausible that I might decide that San Diego has failed to meet its burden with respect to the other bases in the Petition, but that it wins on the Proposition 26 issue because Respondents such as Metropolitan failed to sustain their burden. Thus, despite the fact that the bald statement of the test for liability is at least very roughly the same for all bases (i.e. whether the rates were reasonably related to the cost of the service), it matters very much whether or not the substantive allegation of a Proposition 26 violation remains in the Petition. I cannot sever the new burden from the new liability and have that burden hover solo, as it were, to be applied later to older bases for liability.

[3] In the absence of an express retroactivity provision, constitutional amendments adopted through the initiative process will not be applied retroactively "unless it is very clear from extrinsic sources that the Legislature or the voters must have intended a retroactive application." *Strauss v. Horton*, 46 Cal.4th 364, 470 (2009) (citing *Evangelatos v. Superior Court*, 44 Cal.3d 1188, 1208-09 (1988)). As the parties agree, Proposition 26 does not contains such an express statement of retroactive application in connection with its provisions governing local charges.

Thus I must decide whether it is permissible to allege a Proposition 26 violation in this case, given the conceded rules on retroactivity.

Turning to the effective date of the Proposition, I note that under Article XIIIC, local governments and public agencies may not "impose, extend, or increase" any "general" or "special" tax until that tax is approved by a majority or two-thirds of voters, respectively. Cal. Const. Art. XIIIC §§ 2(b), 2(d). Generally, the term "impose" refers to a "discrete, initiating event," i.e., "the first enactment of a tax." *Citizens Association of Sunset Beach v. Orange County Local Agency Formation Commission*, 209 Cal.App.4th 1182, 1194-95 & n. 15 (2012) (interpreting Article XIIIC); *Santa Clara County Local Transportation Authority v. Guardino*, 11 Cal.4th 220, 240 (1995) (under Proposition 62, "imposed" means "enacted"). *Howard Jarvis Taxpayers Association v. City of La Habra,* 25 Cal.4th 809, 823-24 (2001) is not to the contrary. There the Court construed the voter intent specially applying to the Proposition there: "[T]he intent of Proposition 62's enactors was not merely to preclude enactment of a tax ordinance without voter approval, but to preclude continued imposition or collection of such tax as well."). *Id.* at 824-25. The structure of Proposition 26 suggests the opposite result. Regarding changes to the rules governing state charges, Proposition 26 stated:

> Any tax adopted after January 1, 2010, but prior to the effective date of this act, that was not adopted in compliance with the requirements of this section is void 12 months after the effective date of this act unless the tax is reenacted by the Legislature and signed into law by the Governor in compliance with the requirements of this section.

Cal. Const. Art. IIIA § 3(c). The implication is that taxes *adopted* prior to January 1, 2010 are not subject to the revisions imposed by Proposition 26. However, Proposition 26 applies to any tax "imposed" by the state government; if "imposed" meant "collected," Proposition 26 would apply to many taxes adopted before January 1, 2010.

Hence the rule counseling against retroactive application governs, and San Diego may not allege a violation of Proposition 26.

The motion to strike is granted and the demurrers are accordingly moot.

Metropolitan to give notice of this order.

Dated: March 27, 2013

Curtis E.A. Karnow
Judge of the Superior Court