III. Voting Requirements for Special and General Taxes

Section 2 of Article XIII C provides that a local agency cannot "impose, extend or increase" any general tax unless and until that tax is submitted to the electorate and approved by a majority vote, nor any special tax unless and until that tax is submitted to the electorate and approved by a two-thirds vote. Similarly, Sections 54722 and 53723 of the California Government Code, which were enacted in 1986 by Proposition 62, a statutory initiative inapplicable to charter cities (*Trader Sports, Inc. v. City of San Leandro* (2001) 93 Cal.App.4th 37, 49), require such approval to "impose" any general or special tax. The voter approval requirement for special taxes dates back to 1978's Proposition 13 in 1977, by which the voters enacted section 4 of article XIII A of the California Constitution to require two-thirds voter approval to "impose" any special tax.

Since the voters approved Proposition 218 in 1996, the California courts and the Proposition 218 Omnibus Implementation Act, Government Code sections 53750–53758, have supplied guidance on what it means to "impose, extend or increase" a tax.

A. Impose

"Impose means" a local agency's initial enactment of a tax. At least for purposes of determining the application of the statute of limitations of Code of Civil Procedure section 338, subdivision (a) [three years for liability arising from statute], "impose" also means "continue to impose" or the continued collection of a tax. (*Howard Jarvis Taxpayers v. La Habra* (2001) 25 Cal 4th 809, 823–824; but see *Barratt American, Inc. v. City of Rancho Cucamonga* (2005) 37 Cal.4th 685, 702–703 [time to challenge development impact fee under Gov. Code, § 66022 runs from adoption, not collection, of fee].) A local agency does not "impose" a tax within the meaning of Proposition 218 when it applies an existing tax to newly annexed territory, within which the tax did not previously apply. (*Citizens Assn. of Sunset Beach v. Orange County LAFCO* (2012) 209 Cal. App. 4th 1182, 1195 [Prop. 218 did not displace similar ruling of *Metropolitan Water District v. Dorff* (1979) 98 Cal.App.3d 109 under Prop. 13 because its provisions are silent as to annexation].) In contrast, a local agency does "impose" a tax within the meaning of Proposition 218 when it applies an existing tax to a new category of taxpayers who the local agency previously did not tax. (Gov. Code, § 53750, subd. (h)(1)(B) [Prop. 218 Omnibus Implementation Act of 1997].)

Some have also questioned whether a local government "imposes" a tax that originates from an initiative, rather than from a proposal of the local legislature. *California Cannabis Coalition v. City of Upland* (2017) 3 Cal.5th 924, 936–945, held that Proposition 218's requirement that voters approve general taxes at regularly scheduled elections does not apply to citizen-sponsored tax initiatives, construing "local agency" as used in the measure to include only government officials. The court's analysis, however, can be read to suggest that such citizen-sponsored taxes are not "imposed" by local government at all and, as a result, arguably do not trigger any part of Proposition 218. (*id.* at pp. 939–940.) As a result, some commentators have suggested that citizens could, for example, sponsor a special tax without triggering the 2/3-vote requirement. Until some further decision by a California appellate court, however, the most conservative reading of *California Cannabis Coalition* is a narrow one, limited to the specific question it resolved.

B. Extend

Government Code section 53750, subdivision (e) provides that a tax has been extended if there is "a decision by an agency to extend the stated effective period of the tax …, including but not limited to, amendment or removal of a sunset provision or expiration date." Extending a sunset date or effective period for a tax requires voter approval under article XIII C, section 2, subdivision (c). (*White v. State of California* (2001) 88 Cal.App.4th 298, 316 ("[T]he prohibition against extending taxes without a vote means a prohibition against extending the imposition of a tax for a continued time period.").) However, application of taxes, assessments, and fees to newly annexed territory does not "extend" them within the meaning of Proposition 218. (*Citizens Assn. of Sunset Beach v. Orange County LAFCO* (2012) 209 Cal. App. 4th 1182, 1195 ["'[E]xtend' is normally thought of in terms of time, not geographic areas, particularly in the context of taxation."].)

C. Increase

Government Code section 53750, subdivision (h)(1) provides that a local government "increases" a tax when it does either of the following: "[i]ncreases any applicable rate used to calculate the tax … [or] [r]evises the methodology by which the tax … is calculated, if that revision results in an increased amount being levied on any person or parcel." "A tax is increased if the math behind it is altered so that either a larger tax rate or a larger tax base is part of the calculation." (*AB Cellular LA, LLC v City of Los Angeles* (2007) 150 Cal.App.4th 747, 763.) A "methodology, under section 53750, refers to a mathematical equation for calculating taxes that is officially sanctioned by a local taxing entity." (*Id*.) A local government increases a tax within the meaning of Proposition 218 if it revises its methodology due to external factors, such as a change in federal law. (See *id*. [federal statute eliminating Commerce Clause prohibition on taxing all cellular services did not authorize the city to tax cellular services not previously taxed without voter approval].)

A tax "shall not be deemed to have been increased if it is imposed at a rate not higher than the maximum rate so approved [by voters]." (Cal. Const., art XIII C, § 2, subd. (b).) Similarly, Government Code section 53750, subdivision (h)(2) provides that a tax is not "increased" if a local agency does either of the following: "[a]djusts the amount of a tax … in accordance with a schedule of adjustments, including a clearly defined formula for inflation adjustment that was adopted by the agency prior to November 6, 1996 [or] [i]mplements or collects a previously approved tax … so long as the rate is not increased beyond the level previously approved by the agency, and the methodology previously approved by the agency is not revised so as to result in an increase in the amount being levied on any person or parcel."

Government Code section 53739 authorizes a local agency to submit a tax measure to the voters to approve a range of rates or amounts and to approve a clearly identified formula for inflation adjustments of a tax. However, when a tax is measured as a percentage — such as a percentage of a utility charge or of a hotel room rent — it cannot include an inflation adjustment. For example, a business license tax imposed at a rate of 0.1 percent of gross receipts cannot include an inflation adjustment because it is imposed as a percentage. Such taxes are self-inflating as the tax base rises with inflation, so there is no need to inflate the tax rate, too. In contrast, a business license tax imposed at a flat rate of $20 per employee can include an inflation adjustment.

Subsequent increases in a tax in accordance with a voter-approved measure do not require further voter approval. (Gov. Code, § 53739, subd. (a).) In addition, a local agency "can enforce less of a local tax than is due under a voter approved methodology, or a grandfathered methodology, and later enforce the full amount of the local tax due under that methodology without transgressing Proposition 218." (*AB Cellular LA, LLC v City of Los Angeles* (2007) 150 Cal App. 4th 747, 764.)

> **▶ PRACTICE TIP:**
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> If a local agency decides to collect a previously approved tax at a rate lower than was authorized by the voters, the documentation lowering the tax should be very clear that the reduction is temporary and that there is no "increase," which requires voter approval, when the rate is restored. This can be accomplished by adopting the tax reduction by a resolution that has a stated expiration date. The reduction can then expire without any further legislative action that can be characterized as a tax "increase." That expiration date can later be extended while still preserving this defense to a claim that the end of the tax reduction is an increase.

Finally, a local agency does not increase a tax if "higher payments are attributable to events other than an increased rate or revised methodology, such as a change in the density, intensity, or nature of the use of land." (Gov. Code, § 53750, subd. (h)(3).) Further, a local agency has not increased a tax by applying an existing tax to newly annexed territory (*Citizens Assn. of Sunset Beach v. Orange County LAFCO* (2012) 209 Cal. App. 4th 1182, 1195) or receiving increased rate revenue from wholesale customers and not retail rate payers (*Webb v. City of Riverside* (2018) 23 Cal.App.5th 244, 260). Nor does a transfer of funds previously collected that has no effect on rates constitute an increase. (*Id*. at 258-259.)