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California Supreme Court Will Hear Bay Area Tolls Case.

The California Supreme Court will consider whether a bridge toll increase in the San Francisco Bay Area was an unlawfully approved tax.

According to an October 16 release by the supreme court, justices accepted review of the appellate court's decision in *Howard Jarvis Taxpayers Assn. v. Bay Area Toll Authority* on October 14, but deferred briefing until it rules on a separate case, *Zolly v. City of Oakland*, which addresses a similar question.

In July 2018 the tax watchdog group Howard Jarvis Taxpayers Association challenged the June 2018 passage of Regional Measure 3, a ballot measure to increase tolls on San Francisco Bay Area bridges by $1 in 2019, 2022, and 2025, for a cumulative increase of $3. The toll increase was promoted as a means to raise revenues for local transportation improvements in the region. The measure was approved with a 55 percent majority of voters in the nine-county Bay Area, but the association alleged in its suit that the toll increase is actually a tax under state law that thus required a two-thirds vote of approval.

The association notes that the tolls will be spent on a wide range of transportation improvements in the region that will be used by payers and nonpayers of the toll increase alike. It argues that under state law, the fee amount and the use of its revenue must be closely related to the benefit or service it's charged for, or else it's a tax. The group claims that the toll revenue is being used too broadly to qualify as a fee for bridge use.

California law "classifies an exaction as a 'fee' if it is charged for goods or services delivered to the payer," or mitigates harm caused by a payer, Tim Bittle, director of legal affairs for the Howard Jarvis association, wrote in a September 2018 newsletter explaining the group's position. "A 'tax,' on the other hand, raises revenue for government programs and policies without requiring any direct nexus between the payer and the use of the funds."

Both the San Francisco County Superior Court and the California First Appellate District ruled against the association. However, the supreme court's decision to hear the case means justices are willing to consider its arguments.

Randy Rentschler of the Bay Area's Metropolitan Transportation Commission told Tax Notes October 16 the supreme court's decision to review the case is disappointing, and that the legal uncertainty threatens key transportation projects in the region. He said the 2018 measure was the third of such measures approved since 1988.

"In the past, no one took it to court," Rentschler said, arguing the group's claim that the toll increase is a tax is erroneous. But voters in 2010 approved Proposition 26, which treats more levies as taxes under state law. According to Rentschler, however, judges have agreed that the toll is not a tax under Proposition 26. "We've had two courts look at this and ruled against them."

The issue in the case is similar to the one in *Zolly v. City of Oakland*, which the supreme court will

hear first. That case involves a dispute over whether Oakland's waste management franchise fees are unlawfully approved taxes. A separate panel of the California First Appellate District Court in March determined that the fees were taxes because they weren't reasonably related to the value of the franchise rights for which they're charged.

The appellate court's ruling in *Bay Area Toll Authority* and the *Zolly* opinion conflict with one another. At issue is language in Proposition 26 that amended the state constitution to restrict the types of charges that aren't considered taxes and therefore don't require a two-thirds majority vote to pass. The amendment created a list of such charges and included in the criteria for several that they be based on the actual cost to the government of the service for which the fee is charged. But the criteria for the type of charge that encompasses bridge tolls and franchise fees — charges for entrance, use, purchase, rental or lease of government property — lacks that wording.

However, the law also contains a general provision burdening government with proving that a charge is not a tax, including that its amount is linked to the cost of the service it's charged for, "and that the manner in which those costs are allocated to a payor bear a fair or reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity."

The appellate court in *Bay Area Toll Authority* determined that the absence of any reference to a cost relationship in the list's description of charges for entrance or use of government property means the general provision doesn't apply to that particular type of fees. The *Zolly* court, in contrast, determined that the general provision means that all nontax levies on the list must be linked to the cost of the service to the government, regardless of whether the specific description of each one on the list says so or not.

Bittle told Tax Notes October 16, "We're encouraged the supreme court has granted review" of Bay Area Toll Authority, and "we believe the court of appeal in *Zolly* got it right."

"Everything about Prop. 26 was intended to narrow the field of fees and expand the universe of taxes so that more things would require a two-thirds majority approval," Bittle said.

In *Howard Jarvis Taxpayers Assn. v. Bay Area Toll Authority*, the Howard Jarvis association and plaintiffs are represented by the group's attorneys; the Bay Area Toll Authority is represented by attorneys with the Metropolitan Transportation Commission and Orrick, Herrington & Sutcliffe LLP; the State Legislature is represented by attorneys with the Office of Legislative Council and Olson Remcho LLP; and the Metropolitan Transportation Commission is represented by its own counsel and Orrick, Herrington & Sutcliffe LLP.

TAX ANALYSTS

By PAUL JONES

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