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OPINION	
of	No. 81-901
GEORGE DEUKMEJIAN Attorney General	OCTOBER 26, 1981
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THE HONORABLE DON ROGERS, MEMBER OF THE CALIFORNIA ASSEMBLY, has requested an opinion on the following question:

Does article XIII A of the California Constitution or Revenue and Taxation Code section 93 affect the authority of a California Water District to levy assessments?

CONCLUSION

Article XIII A of the California Constitution and Revenue and Taxation Code section 93 do not affect the authority of a California Water District to levy assessments.

ANALYSIS

The California Water District Law is set forth in division 13 of the Water Code commencing at section 34000. 1/ That law, derived from the Statutes of 1913, chapter 387, authorizes the formation of public districts empowered to construct and operate water supply and distribution systems. (See § 35401.) Part 7 of the California Water District Law (commencing at § 36550) provides for the levy and collection of assessments to pay the costs of such water systems not defrayed by water sales. Such assessments are levied against the land in the district and not against

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1. Section references are to the Water Code unless otherwise indicated.

improvements to the land or personal property. (See §§ 36570-36574.) The question presented is whether a district's authority to levy and collect such assessments has been affected by article XIII A of the California Constitution (art. XIII A) or Revenue and Taxation Code section 93 (Rev. & Tax. Code, § 93) which was enacted to implement that article.

The relevant portions of article XIII A provide:

"SECTION 1. (a) The maximum amount of any ad valorem tax on real property shall not exceed One percent (1%) of the full cash value of such property. The one percent (1%) tax to be collected by the counties and apportioned according to law to the districts within the counties.

"(b) The limitation provided for in subdivision (a) shall not apply to ad valorem taxes or special assessments to pay the interest and redemption charges on any indebtedness approved by the voters prior to the time this section becomes effective.

"SECTION 2. (a) The full cash value means the county assessor's valuation of real property as shown on the 1975-76 tax bill under 'full cash value' or, thereafter, the appraised value of real property when purchased, newly constructed, or a change in ownership has occurred after the 1975 assessment. . . .

"SECTION 4. Cities, Counties and special districts, by a two-thirds vote of the qualified electors of such district, may impose special taxes on such district, except ad valorem taxes on real property or a transaction tax or sales tax on the sale of real property within such City, County or special district. . . ."

Rev. & Tax. Code, § 93 provides:

"(a) Notwithstanding any other provision of law, except as provided in subdivision (b), no local agency, school district, county superintendent of schools, or community college district shall levy an ad valorem property tax, other than that amount which is equal to the amount needed to make annual payments for the interest and principal on

general obligation bonds or other indebtedness approved by the voters prior to July 1, 1978 or the amount levied pursuant to Part 10 (commencing with Section 15000) of Division 1 and Sections 39308, 39311, 81338, and 81341 of the Education Code. In determining the tax rate required for the purposes specified in this subdivision, the amount of the levy shall be increased to compensate for any allocation and payment of tax revenues required pursuant to subdivision (b) of Section 33670 and subdivision (d) of Section 33675 of the Health and Safety Code.

"(b) A county shall levy an ad valorem property tax on taxable assessed value at a rate equal to four dollars ($4) per one hundred dollars ($100) of assessed value, and at an equivalent rate when the ratio prescribed in Section 401 is changed from 25 percent to 100 percent. The revenue from such tax shall be distributed, subject to the allocation and payment as provided in subdivision (d) of Section 33675 of the Health and Safety Code, to local agencies, school districts, county superintendents of schools, and community college districts in accordance with the provisions of the Government Code."

The question presented focuses upon the "ad valorem tax" (§ 1 of art. XIII A) and the "special tax" (§ 4 of art. XIII A) language of article XIII A and Rev. & Tax. Code, § 93. Essentially the question is whether a California Water District assessment is an ad valorem tax or a special tax within the meaning of those laws.

The application of article XIII A to special assessments has been addressed in two cases in the Courts of Appeal.

County of Fresno v. Malmstrom (1979) 94 Cal.App.3d 974 was the first case to consider the effect of article XIII A on special assessments. In that case the county undertook to levy special assessments on subdivision lots in order to construct subdivision streets pursuant to the Municipal Improvement Act of 1913 and to issue assessment bonds to represent the assessments levied pursuant to the Improvement Act of 1911. Malstrom, the County Tax Collector, refused to serve the notice of assessment contending the assessment would exceed the one percent tax limit of article XIII A, section 1, and required a two-thirds vote approval as a special tax under article XIII

A, section 4. The court held that the assessment was not subject to the one percent tax limit nor was it a special tax subject to the two-thirds vote requirement of article XIII A. The Supreme Court denied a hearing.

In Solvang Mun. Improvement Dist. v. Board of Supervisors (1980) 112 Cal.App.3d 545, the Board of Supervisors refused to levy the annual assessment to pay the principal and interest on bonds issued to acquire three public parking lots in Solvang in 1968 claiming they were nonvoted special assessments which article XIII A prohibited the board from imposing. The court mandated the levy holding first that article XIII A could not be applied retroactively to impair the obligation of the contract embodied in the bonds and second that special assessments levied on benefited property to finance public improvements directly benefiting the property assessed are not subject to the one percent limitation of article XIII A. The court then stated:

> "We add a word of caution to taxing entities which might be tempted to use the special assessment exclusion as a means to circumvent the tax limitation of article XIII A. Our opinion excluding special assessments, including those assessed on a fixed, variable, ad valorem, or other basis, from the 1 percent limitation of section 1 applies only to true special assessments designed to directly benefit the real property assessed and make it more valuable. (Harrison v. Board of Supervisors (1975) 44 Cal.App.3d 852, 857-858 [118 Cal.Rptr. 828], and cases there cited.) Ordinarily, levies to meet general expenses of the taxing entity and to construct facilities to serve the general public, such as fire stations, police stations, and schools, may not be transformed from general ad valorem taxes to special assessments by a mere change in the name of the levy." (At p. 557.)

The distinction between an "assessment" and a "tax" has a long history in California constitutional law. The Constitution of 1849 provided "[t]axation shall be equal and uniform throughout the State. All property in this State shall be taxed in proportion to its value, . . ." (Art. XI, § 13.) Article IV, section 37, authorized the Legislature "to provide for the organization of cities and incorporated villages, and to restrict their powers of taxation, assessments, borrowing money, contracting debts and loaning their credit, so as to prevent abuses in assessments . . . ."

In Burnett v. Sacramento (1859) 12 Cal. 76 the court upheld an assessment against adjacent properties to pay for a street improvement against claims that it violated article XI, section 13. Justice Field, speaking for the court (at p. 83), stated:

> "The assessment, therefore, must rest for its validity upon its being a legitimate exercise of the taxing power. The thirteenth section of Article XI of the Constitution does not cover the case. That section provides for equality and uniformity of taxation upon property, but applies, in our judgment, only to that charge or imposition upon property which it is necessary to levy to raise funds to defray the expenses of the Government of the State, or of some county or town. We do not think it has any reference to special assessments for local improvements, by which individual parties are chiefly benefited in the increased value of their property, and in which the public is only to a limited extent interested."

The distinction between taxes and assessments announced in Burnett was reexamined at length and reaffirmed in Emery v. San Francisco Gas Co. (1865) 28 Cal. 345 and again in Taylor v. Palmer (1866) 31 Cal. 240. Referring to article IV, section 37, supra, the court in the Emery case (supra, at pp. 362-363) stated:

> "Taxation and assessments are here spoken of and recognized as legitimate modes of exercising power. The framers of the Constitution could not have intended to convey the same specific idea by these two terms. If so, they are guilty of unmeaning tautology, and might just as well have said, 'taxation and taxation.' They must have meant something by the use of the word assessments specifically different from taxation, as that term was understood by them. They must have contemplated that there is some form of exercising a power different from the ordinary form of taxation, and they assumed that that form was proper, and would actually exist under the Constitution of California. We know, also, that a particular system of imposing charges, with some variation in the principle upon which they were apportioned, for local improvements at that time, and for a long period prior thereto, existed in nearly every State in the

Union from which the people of California emigrated, known under the name of assessments. And we know that this section of our Constitution is a verbatim copy of a section of the Constitution of the State of New York, where this system had been in use, according to the statement of Mr. Justice Ruggles, in one form or another, for one hundred and fifty years. And we know that substantially the same provision is contained in the Constitutions of several other States where the same system prevails. We may reasonably presume, then, that the terms taxation and assessment were intended to be understood in the sense in which they were used in the State from which the provision was borrowed, and consequently that taxation, as used in our Constitution in relation to a similar subject matter, is not to be regarded as including assessments."

The provisions for equality and uniformity of taxation upon property were carried forward in the California Constitution of 1879 and are set forth in article XIII, section 1, which now provides in part:

". . . (a) All property is taxable and shall be assessed at the same percentage of fair market value. . . .

"(b) All property so assessed shall be taxed in proportion to its full value."

The purpose of these provisions is to secure equality of taxation which results from subjecting all property to the same burden. (Watchtower B. & T. Soc. v. County of Los Angeles (1947) 30 Cal.2d 426, 429.) Thus if the levies of California Water Districts were construed to be taxes instead of assessments they would violate article XIII, section 1, because they are levied against land only and not against all property.

In Los Angeles County Flood Control District v. Hamilton (1917) 177 Cal. 119 it was contended that the Los Angeles County Flood Control Act was unconstitutional because it authorized the levy of a "tax" against real property but not personal property in the district to fund flood control works. The court observed (at p. 128):

"If such be the case, the act is a palpable violation of the state constitution, requiring that all property be taxed in proportion to its value (Article XIII,

section 1). Since the act charges only the real, and not the personal, property in the district, it clearly violates this fundamental mandate, if the burden is a tax, strictly speaking."

Nevertheless the court held that the act was constitutional after concluding that the Legislature intended to fund the district by means of special assessments rather than taxes in spite of the use of the word "tax" in the act.

The legislative history of the California Water District Law makes it clear that the Legislature used the word assessment advisedly in the act. The statute from which the act was derived (Stats. 1913, ch. 387) used the word "tax" in referring to district levies. The Code Commissioners Notes to section 36590 relating to escaped assessments state:

> "Compare R. & T. C. §§ 531 to 534, The district levies an 'assessment' and not a 'tax.' Los Angeles County Flood Control Dist. v. Hamilton, 169 P. 1028, 177 Cal. 119. The word 'tax' where used in this act has been changed to 'assessment' pursuant to the authority contained in the above case and City of San Diego v. Linda Vista Irr. Dist., 41 P. 291, 108 Cal. 189, 35 L.R.A. 33."

We conclude that the levies against land authorized by the California Water District Law are true special assessments and thus do not constitute ad valorem taxes or special taxes within the meaning of article XIII A or Rev. & Tax. Code § 93. (County of Fresno v. Malmstrom, supra, 94 Cal.App.3d 974; Solvang Mun. Improvement Dist. v. Board of Supervisors, supra, 112 Cal.App.3d 545.) 2/

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2. We do not consider whether a particular levy of a California Water District meets all of the constitutional requirements for a special assessment. Nor do we consider whether a district may adopt a county tax roll prepared pursuant to article XIII A, section 2, as its roll for levying assessments under section 36575. The latter question is in issue in case No. 3 Civ. 20966 now pending before the Court of Appeal for the Third Appellate District. This office has long followed the practice of declining requests for opinions on questions which are at issue in pending litigation and we decline to address the question for that reason.