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REPORT TO THE COMMITTEE ON RULES, OPEN GOVERNMENT AND
INTERGOVERNMENTAL RELATIONS

ADDITION OF TAX APPEAL PROVISIONS TO THE SAN DIEGO MUNICIPAL CODE

INTRODUCTION

To place the City in a more defensible posture, the Office of the City Attorney recommends the addition of section 22.1708 to the San Diego Municipal Code (SDMC) relating to tax appeals. This recommendation is based on a couple of court decisions which are briefly described in this Report.

SDMC section 22.1708 would accomplish several objectives. It distinguishes between the administrative procedure used to challenge the amount of a tax assessment and the process used to challenge the legality of a City tax, penalty, or assessment. It also makes clear that a claimant may not sue the City to prevent or enjoin the collection of a tax unless the claimant first pays the disputed tax, interest, or penalties, exhausts administrative remedies, where applicable, and files a properly executed government claim. Last, SDMC section 22.1708 would prohibit a claimant from bringing a class action tax claim against the City.

DISCUSSION

The City Treasurer is responsible for, among other things, the collection of special assessments, charges for permits for private use of public streets, and other miscellaneous taxes, fees, assessments, licenses and privilege charges. San Diego Charter § 45. Given these responsibilities, the addition of SDMC section 22.1708 most appropriately fits within Chapter 2, Article 2, Division 17, of the SDMC, which discusses the City Treasurer's powers and duties in relation to collection of monies owed the City.

1. A Claimant's Ability to Challenge a Tax Assessment, Penalty, or Charge

Adding SDMC section 22.1708(a) and (b) would clarify the different procedures to challenge the amount or legality of the tax:

- (a) A claimant may challenge the amount of a tax assessment, penalty, or charge by using the administrative procedure associated with the subject tax as set forth in the San Diego Municipal Code, if any.

- (b) A claimant may challenge the legality of a tax, penalty, or charge by presenting a claim for refund in accordance with the Government Claims Act beginning at California Government Code section 900. A tax claim shall be filed on the claim form furnished by the City. A claim may be returned to the claimant if it is not presented using the proper form.

The proposed SDMC section 22.1708(a) states that a claimant may challenge the amount of an assessment or tax using the administrative procedures described in the SDMC. There are more than thirty administrative procedures in the SDMC depending on the type of assessment at issue, so it is not practical to cross-reference each hearing procedure in this section. We therefore state that a claimant may challenge the amount of a tax assessment, penalty, or charge by using the administrative procedure associated with the subject tax as set forth in the SDMC.

SDMC section 22.1708(b) provides that a claimant who wishes to challenge the legality of a tax, penalty, or charge must comply with the California Government Claims Act (Act). The claimant would present a claim for refund to the City's Risk Management Department using the City's claim form, which is available on the Internet or at that office's physical location. The Act provides guidance on claim content and filing timelines and need not be restated in the SDMC.

2. Pay First, Litigate Later

SDMC section 22.1708(c) says a claimant may not bring suit for a tax refund or for injunctive relief to prevent or enjoin the collection of taxes against the City unless the claimant first pays the disputed tax, interest, and penalties owed to the City. This was a standard procedure in the State of California until *City of Anaheim v. Superior Court*, 179 Cal. App. 4th 825 (2009). In that case, the City of Anaheim (Anaheim) assessed transient occupant tax against on-line travel companies who refused to pay the tax before initiating litigation. The Court found that Article XIII, section 32 of the California Constitution, which requires taxpayers to pay taxes before bringing suit to challenge the tax, applies only to the state and not to local governmental entities. Anaheim argued that, similar to the State, local governmental entities depend on anticipated tax revenue and on-line travel companies must be made to pre-pay. The Court disagreed, finding that Anaheim did not enforce this tax against on-line travel companies until the act giving rise to the litigation and therefore had not relied on these revenues. The Court said that cities that wish claimants to pay a local tax before suing should amend their municipal codes to say just that. Accordingly, if the Council, as a policy matter desires that tax payer claimants pay the tax before bringing suit, this Office recommends that the SDMC be revised to clarify that any claimant who wishes to sue the City must first pay the tax. If the claimant is successful in litigation, the claimant would be entitled to the return of the wrongfully collected tax.

SDMC section 22.1708(c) would also ensure a claimant's ability to challenge a tax is not hindered. In *Chodos v. City of Los Angeles*, 195 Cal. App. 4th 675 (2011), the court held that an attorney's failure to comply with the "pay first litigate later" principle in his action challenging a city's business tax deficiency determination meant there was no "actual, present controversy over a proper subject" as required for declaratory relief. The court required the attorney to pay the assessment before challenging the tax in court.¹

3. Government Code Provisions Restated

SDMC section 22.1708(c)(ii), (c)(iii), and (d) reiterate that a claimant must exhaust all administrative remedies applicable to the claim, present a properly executed claim for refund in accordance with the mandatory provisions described in the Act, and wait for the entity to reject the claim or for the claim to be rejected by operation of law, before suing the City. *Campbell v. Regents of University of California*, 35 Cal. 4th 311, 321-22 (2005), citing *Abelleira*, 17 Cal. 2d 280, 292 (1941); Cal. Gov't Code §§ 910.2, 911.6, 912.6.

4. Class Actions Claims for Tax Refunds

SDMC section 22.1708(e) would prohibit a claimant from bringing a class action tax claim against the City or any officer, employee, board, commission, or authority of the City. This recommendation is a result of *Ardon v. City of Los Angeles*, 52 Cal. 4th 241 (2011), which resolved conflicting case law and statutes concerning class action tax claims. The California Supreme Court held that California Government Code section 910² allows local taxpayers to file class action tax claims against local governmental entities unless there is a "statute" to the contrary. Although California municipal law experts interpret the word "statute" to include local ordinances, and are encouraging local governmental entities to adopt or amend local ordinances to prohibit or limit class action tax claims, there are a couple of unresolved issues. First, *Ardon* did not resolve the issue of preemption.³ If the Act is found to preempt local ordinances, claimants will be able to file claims on behalf of a class even if the local ordinance prohibits class claims. Second, two companion cases to *Ardon* will determine whether a local ordinance

¹ See also *California Logistics, Inc. v. State*, 161 Cal. App. 4th 242 (2008), which held that the sole legal avenue for resolving tax disputes is a post payment refund action; a taxpayer may not go into court and obtain adjudication of the validity of a tax which is due but not yet paid.

² California Government Code section 910 is part of the Act.

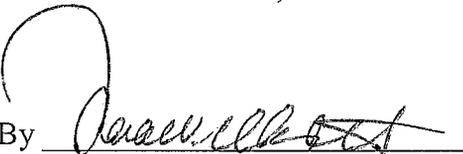
³ If no conflict exists, a charter city's law stands. If an actual conflict exists, the court will deem the matter a municipal affair unless it qualifies as a matter of statewide concern. Even if the subject matter is one of statewide concern, the state law must be reasonably related and narrowly tailored to addressing that statewide concern. See *Johnson v. Bradley*, 4 Cal. 4th 389 (1992) and *California Federal Savings and Loan Association v. City of Los Angeles*, 54 Cal. 3d 1 (1991).

can bar class action lawsuits challenging a fee or tax.⁴ If the answer is yes, further appeals to the California Supreme Court are likely to occur, and the issue may not be resolved for another year or two. Nevertheless, we recommend a change to the SDMC to address the issue of class action tax claims.

CONCLUSION

In the last few years, there have been new court decisions related to local taxes. For the reason described in this Report, this Office recommends that the Council amend the SDMC to: (1) add provisions that explain the procedures for challenging the amount of a tax assessment and the legality of a tax; (2) require the payment of a tax before a lawsuit may be brought against the City; (3) reiterate that a claimant must exhaust all administrative remedies applicable to the claim, present a properly executed claim for refund in accordance with the mandatory provisions described in the Act, and wait for the entity to reject the claim or for the claim to be rejected by operation of law, before suing the City; and (4) prohibit class action tax claims.

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⁴ On February 8, 2012, the Second District Court of Appeal heard oral argument in *McWilliams v. City of Long Beach* (B200831, Second Dist., Div. 3) and *Granados v. County of Los Angeles* (B200812, Second Dist., Div. 3). The Court has not yet rendered a decision.