

MEMORANDUM OF LAW

DATE: August 12, 1997

TO: TO Honorable Mayor and Members of the City Council

FROM: FROM City Attorney

SUBJECT: SUBJECT Effect of Article XIIC of the California Constitution on Transient Occupancy Tax Imposition and Collection

QUESTION PRESENTED

Is an increase in the amount of Transient Occupancy Tax (TOT) revenue, imposed and collected at the existing rate, subject to the voting requirements of Article XIIC of the California Constitution (enacted by Proposition 218)?

SHORT ANSWER

No. A tax, whether general or special, is only affected by Article XIIC if it is "new, extended or increased" on or after the effective dates set in Article XIIC. A tax is not considered "increased" under this provision if it is imposed at the same or a lower rate than the rate in effect prior to the effective dates of Article XIIC. An increase in the *amount* of TOT revenue, generated by the existing rate, is irrelevant to determining an "increase" for purposes of applying this constitutional measure.

ANALYSIS

A. Article XIIC and the New Tax Provisions

Article XIIC, section 2 provides that all general taxes must be approved by a majority vote of the electorate, while special taxes must be approved by a two-thirds vote of the electorate. Article XIIC, section 1 clarifies that "general taxes" are any taxes imposed for general governmental purposes, and "special taxes" are those taxes imposed for a specific purpose, whether they are placed in the general fund or any other fund of the city.

Article XIIC's provisions relating to special taxes apply only to those special taxes that are imposed, extended or increased after the date of passage of Proposition 218. General taxes, however, that were imposed, extended or increased *on or after January 1, 1995*, must be approved by a majority vote within two years of the passage of Proposition 218 in order to continue in force and effect.

Importantly, Article XIIC, section 2(b) specifically provides:

A general tax shall not be deemed to have been increased if it is imposed at a rate not higher than the maximum rate so approved.

The same explanation is provided with respect to a special tax in Article XIIC, section 2(d). It is the rate of the tax, and not the amount collected under that rate, that determines whether a vote is required.

New Government Code section 53750(h)(3)¹ confirms this conclusion, providing:

A tax, assessment, fee or charge is not deemed to be "increased" in the case in which the actual payments from a person or property are higher than would have resulted when the agency approved the tax, assessment, fee or charge, if those 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 the land.

Increased TOT revenues resulting from the development of new hotels and expansion of existing hotels falls within this exclusion from the definition of "increase" for purposes of Article XIIC.

B. The City's Transient Occupancy Tax

San Diego Municipal Code section 35.0101 establishes the City's TOT, declaring:

Some of the proceeds of the tax on Transients shall be used for promoting the City of San Diego, including the planning, construction, maintenance and operation of tourist-related cultural, recreational and convention facilities . . . and for those additional general governmental purposes . . . as the City Council may from time to time provide in accordance with the Charter of the City and the City Council's appropriation ordinance.

The broad description in section 35.0101 of the permitted uses of TOT funds leads us to conclude it is a general tax. First established at 6 percent, the TOT has occasionally been raised, to the current level of 10.5 percent. This increase was enacted as Municipal Code section 35.0108, in June, 1994, effective August 1, 1994. Nothing in any of the enacting sections of the Municipal Code elaborates on the general purposes outlined in section 35.0101, or otherwise suggests that any definable part of the tax is "special" within the meaning of Article XIIC.

Article XIIC applies only to those general taxes enacted on or after January 1, 1995.

Because the City's TOT was last increased in June, 1994, it is not affected by Article XIIC unless the rate is increased again, at which point a majority vote would be required to effect the increased rate.

CONCLUSION

Article XIIC expressly states that a general tax is not "increased" for purposes of applying Article XIIC unless the *rate* is increased beyond that which was approved prior to the effective date of this new constitutional provision. The City's TOT is a general tax that has not increased since June of 1994, and thus it is not subject at this time to any voting requirements of Article XIIC. An increase in the amount of TOT revenue, generated at the existing tax rate, does not trigger the application of Article XIIC.

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