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Cal-TaxCommentary



The Majority-Vote Tax Loophole

By Stephen Kroes

It is promoted as a new fee on tobacco companies, but this issue is about more than health and tobacco. At stake is the constitutional protection for Californians against tax increases by a simple-majority vote of the Legislature.

The Assembly Health Committee on April 21 rejected AB 2000, by Assemblymember Tom Torlakson, which supporters described as a "fee" on tobacco manufacturers. Most of the committee agreed with opponents, including the California Taxpayers' Association. They said it would set a harmful precedent for California's tax policy and business climate. It was labeled as a fee simply to avoid the two-thirds vote required for tax increases under the state Constitution.

Although failing to pass its initial committee test, AB 2000 was granted reconsideration so proponents could try again.

How can the Legislature lower the vote requirement for a new tax by simply calling it a fee? Unfortunately, the state Supreme Court sanctioned this kind of policy last summer in its *Sinclair Paint Company v. State Board of Equalization* ruling. That decision upheld a "fee" on companies that manufactured products containing lead. Revenues from the lead fee are not used to regulate those manufacturers or to provide any benefit to them, but instead are used to provide services to victims of lead poisoning. The *Sinclair* decision eliminated a set of standards that had defined as a tax any fee that exceeds the cost to regulate or provide a benefit to payers of the fee.

Now that the difference between taxes and fees has been muddled, virtually any business is at risk. The Legislature can



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now write majority-vote bills to tax businesses if it can be shown that they provide a product or service that has some detrimental impact.

That's where AB 2000 comes in. Mr. Torlakson says tobacco companies should pay about \$1 billion a year to compensate state and local agencies for health costs of treating smokers. Prior to the creation of the *Sinclair* loophole, this kind of proposal would have been a tax bill, and the Legislature would be able to raise the tax and earmark the money for these purposes as long as the proponents could muster the required two-thirds votes of the Senate and Assembly, along with the governor's signature.

This bill is the first piece of legislation designed specifically to take advantage of this legal loophole. By starting California down a slippery slope of easy-to-pass taxes on business, AB 2000 could very well be this year's biggest anti-taxpayer bill.

Even before this new authority came to be, Cal-Tax's research on tax burden showed fees and assessments to be the instrument of choice for government revenue raising. In Cal-Tax's most recent tax burden analysis, based on the 1993-94 fiscal year, state and local fees and assessments had grown to be larger than the property tax, sales tax, or income tax, amounting to more than \$23 billion statewide. In fact, growth in fees and assessments was greater than growth in any other tax category, rising almost \$2 billion that year.

Growth in fees and other non-tax revenues has been so aggressive in the past 20 years that these revenues have erased the reductions in tax burden caused by Proposition 13. (See page 23)
Californians pay over 16 percent of their income to government - virtually equal to the level of taxation that spawned the tax revolt.

Taxes masquerading as fees will only accelerate this growth in tax burden. California's economy cannot afford to be further disadvantaged against other states that have more competitive tax and systems. Taxpayers want to see this loophole closed, not exploited.