Case No. S222329

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

926 NORTH ARDMORE AVENUE, LLC
Plaintiff and Appellant,

v.

COUNTY OF LOS ANGELES,
Defendant and Respondent

After A Decision by the Court of Appeal,
Second Appellate District, Division Seven, Case No. B248536
Los Angeles County Superior Court, No. BC 476670
The Honorable Rita Miller, Judge Presiding

AMICUS CURIAE BRIEF OF THE CALIFORNIA TAXPAYERS ASSOCIATION IN SUPPORT OF PLAINTIFF AND APPELLANT

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INTRODUCTION

The California Constitution establishes multiple limitations upon the imposition of new or increased taxation. The Court of Appeal's opinion in *926 North Ardmore Avenue, LLC v. County of Los Angeles,* Case No. B248356 (2d Dist. Div. 7, 9/22/2014) ("*North Ardmore*") improperly relies upon purported legislative "implication" to judicially expand the State's existing Documentary Transfer Tax ("DTT"), thus achieving a result that the constitutionally-constrained Legislature could not achieve. The taxpayers of this State have amended the Constitution multiple times to limit taxation: Propositions 13 (1978), Proposition 8 (1978), Proposition 62 (1986), Proposition 218 (1996) and Proposition 26 (2010). All of those constitutional amendments impose restrictions on the authority of government to impose or extend taxes. The expansion of the DTT accomplished by the *North Ardmore* decision contravenes California's Constitution. The judiciary should defend these constitutional tax limitations and policies, but *North Ardmore* disregards them. It is dangerous precedent, and bad policy.

The "tax creep" that *North Ardmore* ultimately validated began when Respondent Los Angeles County (the "County") asserted the right to levy DTT upon transfers of interests in legal entities that own real property (dubbed "Corporate DTT" by the County, although the County levies the DTT in these cases to all legal entities, not just corporations). The County asserts this new power by retroactively reinterpreting Revenue and Taxation Code, section 11901 et seq. (the "Documentary Transfer Tax Act," or the "DTTA") and Los Angeles County Ordinance 9443 (now codified at Title 4, Chapter 4.60, Los Angeles County Code of Ordinances), both of which were originally enacted in 1967. The County seeks to justify

the reinterpretation of its 1967 ordinance on the basis of Senate Bill No. 816 (Stats. 2009, c. 622) ("SB 816"), which, among other things, authorized county assessors to disclose to county recorders otherwise confidential change-in-ownership records obtained for property tax purposes for the purpose of "determin[ing] whether a DTT is to be imposed." The County construes this informational provision to actually expand the incidence of the DTT to include any transaction encompassed by the change-in-ownership filings made for property tax purposes, instead of merely providing access to information to identify the specific type of transactions already subject to tax (i.e., terminations of partnerships).

The Legislature, however, did not amend the DTTA to expand the tax in the manner advocated by the County and approved by *North Ardmore*. Nor did the County amend its existing ordinance or adopt a new ordinance to expand the scope of the DTT in response to SB 816. In fact, the pertinent text of both the DTTA and the County's Ordinance remained exactly the same before and after SB 816, and thus impose the tax only upon "realty sold." The expanded DTT levied by the County is a purely administrative expedient based on re-reading the same ordinance the County adopted more than forty years ago.

SB 816 did not authorize a new or expanded tax of any kind. And even if SB 816 could be construed to do so, it would violate California's Constitutional restrictions prohibiting exactly this kind of bureaucratic "tax creep" by which new or increased taxes, assessments, fees and charges are implemented without a vote of the people.

North Ardmore changes and expands – through bureaucratic "interpretation" and purported "implication" – the incidence of the DTT from an excise tax on the privilege of recording real property conveyance

documents, to a general transfer tax on the purchase or acquisition of interests in legal entities owning real property, the amount of which tax is measured by the value of that real property.

ARGUMENT

I. North Ardmore's Expansion of the DTT Is Unconstitutional

The extension of the DTT advocated by the County and accomplished by *North Ardmore* contravenes the express language of Proposition 218.

Proposition 218 enacted Article XIII D, § 3 of the California Constitution, which provides:

> (a) ***No tax***, assessment, fee, or charge ***shall be assessed by any agency upon any parcel of property or upon any person as an incident of property ownership*** except:
>
> (1) The ad valorem property tax imposed pursuant to Article XIII and Article XIII A.
>
> (2) Any special tax receiving a two-thirds vote pursuant to Section 4 of Article XIII A.
>
> (3) Assessments as provided by this article.
>
> (4) Fees or charges for property related services as provided by this article.

(Cal. Const., art. XIII D, § 3, emphasis added.)

Proposition 218 was prompted by frustration with the widespread disregard of the limitations of Proposition 13, and contained the following findings and declarations:

> The people of the State of California hereby find and declare that Proposition 13 was intended to provide effective tax relief *and to*

> *require voter approval of tax increases.* However, local governments have subjected taxpayers to excessive tax, assessments, fee and charge increases that not only frustrate the purposes of voter approval for tax increases, but also threaten the economic security of all Californians....

(Cal. Const., art. XIII D, § 2, italics added; Ballot Pamp., Gen. Elec. (Nov. 1996), Prop. 218, § 2, Findings and Declarations, p. 108.)[1]

The Legislative Analyst explained: "PROPOSAL: This measure would constrain local government's ability to impose fees, assessments, and taxes. The measure would apply to all cities, counties, special districts, redevelopment agencies, and school districts in California." (Ballot Pamp., Gen. Elec. (Nov. 1996), Prop. 218, Analysis by Legislative Analyst, p. 73.) The Analyst also explained: "Proposed Requirements for Taxes. The measure states that all *future* local general taxes, including those in cities with charters, must be approved by a majority vote of the people...." (*Id.* at 74.)

As construed by *North Ardmore,* the DTT is a tax "on transfers of interests in legal entities that result in a 'change in ownership' within the meaning of section 64." (Slip Op., 28.) So construed, the DTT is a tax on one of the incidences of property ownership. (*City of Huntington Beach, City of Huntington Beach v. Super. Ct.* (1978) 78 Cal.App.3d 333, 341 ("Liability for transfer tax arises only when property is conveyed.... the tax is, therefore, ***on the exercise of one of the incidences of property ownership*** and as such is an excise tax." Emphasis added.) *Fielder v. City of Los Angeles* (1993) 14 Cal.App.4th 137 considered the Los Angeles City

[1] A copy of the Ballot Pamphlet for Proposition 218 is attached as Exhibit A to CalTax's Motion for Judicial Notice filed concurrently herewith.

documentary transfer tax, referred to the DTT as a transfer tax (*id.* at 142), and also stated that the "transfer tax attaches to the privilege of ***exercising one of the incidents of property ownership***, its conveyance.... It is a one-time burden only, imposed solely on the privilege of disposing of one's property and realizing its actual (as opposed to 'paper') value." (*Id.* at 145, emphasis added.) The County equates a sale of a company owning real property with a sale of just real property. As so construed, both actions represent the exercise of an incidence of property ownership. As such, Proposition 218, (i.e., Article XIII D, section 3 of the California Constitution, quoted *supra*) expressly precludes the extension of DTT to include transfers of legal entity interests when the legal entity owns real property.

Proposition 218 expressly bars both the County and the Court of Appeal in *North Ardmore* from extending an unconstitutional tax. Proposition 218, the "Right to Vote on Taxes Act," was adopted by the voters in November 1996. The stated purpose of Proposition 218 was to "protect[ ] taxpayers by limiting the methods by which local governments exact revenue from taxpayers without their consent." (Cal. Const., art. XIII D, § 2, italics added; Ballot Pamp., Gen. Elec. (Nov. 1996), Prop. 218, § 2, Findings and Declarations, p. 108.) "Where the electorate has demonstrated the ability to make [its] intent clear, it is not the province of [an appellate] court to imply an intent left unexpressed." (*Fielder, supra,* 14 Cal.App.4th at 142.)[2] Proposition 218 thus limits all forms of

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[2] *Fielder* considered the scope of Proposition 13's restrictions on taxes imposed by local government. Article XIII A, section 4 of the California Constitution imposed limits on the ability of local governments to enact new taxes, including by providing that "Cities, Counties and special districts, by a two-thirds vote of the qualified

government, including Courts. *North Ardmore* contradicts the intent of the electorate.

A. The County may not now adopt a transfer tax without a vote of the people pursuant to Proposition 26.

California voters adopted Proposition 26, of which CalTax was a co-sponsor, in 2010 due to continuing public dissatisfaction with the imposition of new and increased taxes by state and local governments. Proposition 26 amended article XIII A, section 3 of the California Constitution to read:

> Any change in state statute ***which results in any taxpayer paying a higher tax*** must be imposed by an act passed by not less than two-thirds of all members elected to each of the two houses of the Legislature, except that no new ad

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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." (Cal. Const. Art. XIII A, § 4, italics added.) This restriction was expressly considered in the context of documentary transfer taxes by the Legislative Analyst. Under the heading "Alternative Local Taxes," the Legislative Analyst reviewed the expected impact of section 4 and, citing advice of the Legislative Counsel, stated "*An extension of the existing documentary transfer tax, which is imposed on the transfer of equity in real property, probably would be prohibited.*" (Emphasis added.)[2] *Fielder* construed section 4 contrary to the Legislative Analyst's guidance, to allow an increase in a transfer tax because it was a "general tax" and because the section 4 limitation only applied to special taxes. (*Fielder, supra,* at 142.) However, the *Fielder* court was particularly troubled by the "fundamentally undemocratic nature" of the two-thirds voting requirement for new or expanded taxes. *Id.* This concern is significant here because, of course, the County began demanding payment of an expanded transfer tax without any vote of the people at all, or even actual amendment of its own DTT ordinance, the epitome of undemocratic governance.

> valorem taxes on real property, or sales or transaction taxes on the sales of real property may be imposed.

(Cal. Const., art. XIII A, § 3, subd. (a), emphasis added.)

Under Proposition 26, "tax" means "any levy, charge, or exaction of any kind imposed by the State." (Cal. Const., art. XIII A, § 3, subd. (b).)

Thus, California voters have acted multiple times to forbid tax increases without a super-majority vote of the Legislature and/or a vote of the people. These interlocking constitutional provisions prohibit state tax increases without a two-thirds vote of the Legislature; tax increases imposed by local agencies, such as counties and cities, are subject to even greater scrutiny and must be submitted to the local electorate for a majority approval for general taxes (Cal. Const. art. XIII C, § 2, subd. (b)), or a two-thirds approval for special taxes (Cal. Const., art. XIII C, § 2, subd. (b); Cal. Const., art. XIII A, § 3, subd. (a).) State and local agencies have repeatedly tried to circumvent these restrictions, and the people of California have been forced to further tighten these Constitutional prohibitions to prevent their abuse. *North Ardmore* avoids the constitutional restrictions by reinterpreting a tax adopted in 1967.

The DTT addressed in the *North Ardmore* case may only be imposed by a local entity in accordance with the state statutory provisions. Either one or both sets of constitutional restrictions apply. *North Ardmore* purports to achieve by implied amendment what could not otherwise be achieved without at least a super-majority vote of the Legislature or a vote of the people who will become subject to the tax.

The Legislature was aware of these restrictions in 2013 and 2014 when it considered amending the state's DTT to extend the tax to non-

realty transfers of legal entity interests. (Assem. Bill No. 561 (2013-2014 Reg. Sess.) (hereafter, "AB 561.").) The Assembly Committee on Local Government Bill Analysis for AB 561, as amended April 30, 2014, specifically identified and explained the requirements of Propositions 13, 218 and 26 to the Committee and warned:

> The Committee may wish to consider the application of Proposition 218 to transfer taxes.
>
> * * * * *
>
> The Committee may wish to ask the author how many counties or cities have adopted the change of ownership definition and at what voter threshold, if any.
>
> The Committee may also wish to consider how this bill is impacted by Proposition 26 (2010) which specifies that an increase in the level of tax should be subject to voter approval. The issue of whether voter approval is necessary at the local level to implement the changes in this bill may be an issue that is ultimately up to the courts to decide. The Committee may wish to consider if this bill will actually achieve the author's stated intent to simply implement current practice and will result in less legal uncertainty for local governments.

(Assem. Com. on Local Govt., Analysis of Assem. Bill No. 561 (2013-2014 Reg. Sess.) as amended April 30, 2014, p. 6.)[3] The Legislature did not approve AB 561.

North Ardmore rewrites the tax code by retroactively converting the DTT into an entirely new real estate transfer tax, and thereby increases

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[3] A copy of this legislative analysis is attached as Exhibit B to CalTax's Motion for Judicial Notice filed concurrently herewith.

taxes without a vote of the electorate as required by the California Constitution. Worse, the Court of Appeal sanctioned a bureaucratic reinterpretation of an existing (and unchanged) County ordinance to support that conversion. Not even the County Board of Supervisors had a say in this remarkable expansion.

II. The DTT Is an Excise Tax on Recordation and Is Not a General Realty Transfer Tax.

The County posits a new tax, which is triggered by acquiring control of legal entities. The amount of the tax is measured by the value of the real estate owned by the entity. The County styles this tax as "Corporate DTT." While styled a subset of the long-standing and familiar documentary transfer tax levied for the privilege of availing oneself of the protections provided by a public title recording system, the County's Corporate DTT disregards the two distinguishing characteristics of the "regular" DTT: the existence of a conveyance document and the act of creating a public record of title to real property. The County advocates converting the DTT into a general transfer tax unhinged from conveyance documents and recordation.

Changing the incidence of the tax as promoted by the County is inconsistent with the simple DTT that has been in effect for decades, and so the County seeks to characterize the DTT as something else. The County asserts that the DTT is not a "recording tax." (County's Answer Brief on the Merits ("ABM"), pp. 2, 13.) This new reading of the DTT is born of expediency required to support a litigating position, but it is not a faithful description of either a literal or reasonable reading of the DTTA.

The first prerequisite for imposition of the DTT is a document conveying "realty sold." Without a deed, instrument, writing or other recorded document conveying realty, the tax cannot be imposed: A

document is required to actually "convey realty sold" as called for in Revenue and Taxation Code section 11911. The statute of frauds establishes that an estate in real property "can be transferred only by operation of the law, or by an instrument in writing, subscribed by the party disposing of the same." (Civ. Code, § 1091.)

The existence of the type of document described in the DTTA (a conveyance of real property) is an essential predicate to the tax. (*U.S. v. Seattle-First Nat. Bank* (1944) 321 U.S. 583.) In that case, when two banks consolidated, real property owned by one of the banks was transferred to the surviving entity but the transfer "was not evidenced by any deed, conveyance, assignment or other instrument" (*id.* at 585), "[n]or were any documentary stamps purchased or affixed with respect to the transfer." (*Ibid.*) Even though nothing was recorded, the deputy tax collector examined bank records and exacted a tax from the bank on the theory that the consolidation had resulted in a taxable transfer. The U.S. Supreme Court held that the Stamp Act did not apply to the transfer because the transfer was not effected by means of any deed, instrument or writing. (*Id.* at 589-590.) The court noted, "[t]here was a complete absence of any of the formal instruments or writings upon which the stamp tax is laid." (*Id.* at 590.) The existence of the qualifying type of writing is therefore one essential predicate to the DTT. The County, in contrast, posits a tax unrelated to the conveyance of realty or conveyance documents even though such documents are essential to the imposition of the DTT.

The second essential predicate to the imposition of the DTT is recordation. (Rev. & Tax. Code, §§ 11932 and 11933; see generally, *City of Cathedral City v. County of Riverside* (1985) 163 Cal.App.3d 960, 962.)

Thus, both the existence of the required document type conveying realty and recordation are required to effectuate the DTT.

The recording requirement is confirmed by the method of collecting the tax. A County Recorder imposes the DTT at the time of recordation, and therefore the DTT *is* an excise tax on the privilege of recording documents regardless of any bare assertion to the contrary: the scope and means of collection define the nature of the tax. The sole collection method established by the DTTA is found in Revenue and Taxation Code sections 11932 and 11933. Section 11932 requires that "every document subject to tax which is submitted for recordation shall show on the face of the document the amount of tax due." That sum is paid to the County Recorder upon recordation of the document at issue. Section 11933 provides the sole remedy for non-payment, which is that the document shall not be recorded: "If a county has imposed a tax pursuant to this part, the recorder shall not record any deed, instrument or writing subject to the tax imposed pursuant to this part unless the tax is paid at the time of recording." There are no penalties or interest imposed for non-payment, because by definition a tax due and paid at recordation can never be "late" or "unpaid." The statute does not provide for any lien on the real property being conveyed to secure payment of the tax. The method of collection and the act triggering collection define the incidence of the tax – and recordation is both the act triggering collection and the method of tax collection.

No California case addresses the distinction between a "recording tax" or "excise tax on recordation" on the one hand, and a general realty "transfer tax" on the other. One case provides a description of the DTT in dicta that recognizes that distinction, however, as follows: "A documentary transfer tax is the fee paid in connection with the recordation of deeds or

other documents evidencing transfers of ownership of real property." (*City of Cathedral City, supra,* 163 Cal.App.3d at 962.) Another case endorses a practical approach to identifying the nature of the DTT: "It has been said that '[w]hether a transaction tax is a property tax or an excise tax ... should be determined by its operation and practical application, rather than by any particular descriptive language contained in the law.' [Citation.] To paraphrase the oral argument by one of the amici curiae, the real property transfer tax in question looks like an excise tax; it acts like one; it is one." (*City of Huntington Beach v. Super. Ct., supra,* 78 Cal.App.3d at 341 (dicta that the DTT is due upon transfer, but the limitation on collection and distinction between a recording tax and general transfer tax is not considered).) Similarly here, if the tax is only collected at recordation, it looks like a recordation excise tax; it acts like one; it is enforced as one; it is one.

The County cites three cases for the view that a DTT is not a "recording fee," and that DTT is payable even if a conveyance document is not recorded. These are *Berry v. Kavanagh* (6th Cir. 1943) 137 F.2d 574, 575-576; *Raccoon v. Development Inc. v. United States* (Ct.Cl. 1968) 391 F.2d 610, 613 and *Fielder v. City of Los Angeles, supra,* 14 Cal.App.4th at 146. (ABM. p. 13.) *Berry* merely recites language without analysis and is not a holding. *Fielder* doesn't contain the language for which it is cited. *Raccoon,* however, provides critical guidance, but not in the direction traveled by the County.

Raccoon considered a seemingly prosaic question of whether DTT was payable on just the lot, or on both the lot and mobile home located on the lot when the lot and a mobile home were purchased simultaneously, but from separate sellers. Title to the mobile home was not transferred by the

deed that conveyed the underlying realty because the mobile home was sold by another party, but the purchase price included both components. The buyer contended that the deed (land only, which was a relatively small percentage of the total purchase price) limited the scope of the DTT. The Court rejected the plaintiff's reliance on the deed, stating the rule mentioned by the County: "Neither the Treasury Regulations nor any other authority make recordation of a deed the touchstone of taxability for documentary stamp purposes. To the extent that the timing of taxability hinges on an event, it is delivery, not recordation...." *Raccoon, supra,* at 281. So far, so good for the County's position. But then the Court of Claims explained why it reached that conclusion: "Thus, section 47.4361-1(a)(2) of the Treasury Regulations provides: 'The tax attaches at the time the deed or other instrument of conveyance is delivered, irrespective of the time when the sale is made.'" (*Id.*) *Raccoon* turns on an express Treasury Regulation, *but no such provision was incorporated into the California DTTA.* The *North Ardmore* Court of Appeal and the County took it upon themselves to insert the omitted text into the California DTTA, but neither had the authority to do so.

A property owner has the right to record documents with the County recorder:

> The ***recorder*** shall, upon payment of proper fees and taxes, accept for recordation any instrument, paper, or notice that is authorized or required by statute, or court order to be recorded, or authorized or required to be recorded by a local ordinance that relates to the recordation of any instrument, paper, or notice that relates to real property, if the instrument, paper, or notice contains sufficient information to be indexed as provided by statute, meets

> recording requirements of state statutes and local ordinances, and is photographically reproducible. ***The county recorder shall not refuse to record*** any instrument, paper, or notice that is authorized or required by statute, court order, or local ordinance that relates to the recordation of any instrument, paper, or notice that relates to real property to be recorded on the basis of its lack of legal sufficiency.

(Gov. Code, § 27201, emphasis added.)

Thus, one has the right to participate in the public recording system, but not for free. One must pay, subject to certain exclusions, for the privilege. The amount one must pay and the method of doing so is established by the DTTA. The DTTA is a narrow excise tax tied by plain statutory language to the exercise of a particular privilege. It cannot be construed more broadly without materially changing the nature of the existing tax.[4]

III. Neither SB 816 Nor AB 563 Expanded the DTT to Create a General Transfer Tax.

North Ardmore relies upon implied legislative intent to expand the DTT from an excise tax imposed upon the recordation of a deed transferring real property into a general transfer tax triggered by the transfer

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[4] The statute requires imposition of the DTT for the deemed termination of a partnership under IRS standards, but terminations are rarely documented by a recordation. There is no collection mechanism established for these types of transactions – other than transactions publically documented by recordation. No instance of a county attempting to collect DTT for deemed termination of partnerships in the absence of recordation could be identified, and an informal poll of practitioners disclosed none. The "deemed terminated partnership" is the exception that proves the rule – there is no means to collect even a legal tax without recordation.

of ownership interests in legal entities that own California real property. *North Ardmore* holds that legislative amendments made to property tax laws by SB 816 and Assembly Bill 563 (Stats. 2011, c. 320) ("AB 563") "*suggest*[ ] the Legislature endorses the view that Section 11911 [of the DTTA] permits counties and cities to impose a documentary tax on transfers of interests in legal entities that result in a 'change of ownership' within the meaning of section 64." (*North Ardmore*, Slip. Op. at 28, italics added.) And, that the "Legislature has *signaled* – both through acts it has taken and the acts that it has not – that the transfer tax should be interpreted to apply [when realty is transferred through the sale of an LLC established solely to hold the realty]." (*Id.* at 31, italics added.) In other words, the Court of Appeal determined that an amendment to a property tax statute in Division 1 of the Revenue and Taxation Code "suggested" and "signaled" that the Legislature intended to amend DTT statutes in Division 2 of that code, so that the DTT would apply to transactions involving interests in legal entities for which conveyance documents are never recorded and in which there is no transfer of legal title to realty.[5]

The County is candid about when and why it began to demand payment of documentary transfer tax "whenever a legal entity had undergone a change in ownership within the meaning of California property tax law." (ABM, pp. 6-7.) This change, the County explains, was "prompted by amendment to Rev. & Tax. [Code] § 408 effective January 1, 2010 [SB 816], that allowed recorders to obtain information regarding legal

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[5] The Legislature's action to authorize disclosure of change in ownership information to county recorders makes little sense. The DTT is only collected upon recordation, and so no disclosure of change in ownership information was necessary. Recordation is a form of self-reporting. Even if disclosure is recorded, no means of collection existed.

entity transfers from the Assessor." (ABM, p. 7.) The County does not contend that the DTTA authorized imposing a tax on such transactions before SB 816, and the Court of Appeal made no such finding.

The County's current interpretation of SB 816 as expanding the DTTA is a post-hoc litigation position. The County supported SB 816 in the Legislature, but it never then contended that SB 816 expanded the DTT immediately before or immediately after the Bill was signed by the Governor.[6] So, the County's post-hoc reinterpretation of the DTTA and its Ordinance turns solely on the validity of its interpretation of SB 816.

Appellant correctly observes that SB 816 simply gave county recorders access to data pertinent to existing statutory provisions relating to the termination of partnerships. (Opening Brief on the Merits ("OBM"), p. 52 and Reply Brief on the Merits ("RBM"), p. 29). But there is more to the story.

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[6] The Governor signed SB 816 on October 11, 2010. On October 13, 2010, the Los Angeles County Chief Executive Officer sent a letter to the Los Angeles County Supervisors which provided the following description of SB 816 at page 3: "ECounty-supported SB 816 (Ducheny), which would: 1) expand the list of State and local agencies to which a county assessor is required to disclose realty transfer-related information to include a county recorder when an investigation is being conducted to determine whether a documentary transfer tax is due; 2) authorize a county board of supervisors to order that the change in ownership penalty be abated if it can be shown the failure to file the change in ownership timely was due to reasonable cause and not due to willful neglect; and 3) require corporations and other entities to file a change of ownership statement within 45 days, was signed by the Governor on October 11,2009, and it is Chapter 622, Statutes of 2009. This measure becomes effective January 1, 2010." A true and correct copy of that letter is attached as Exhibit C to CalTax's Motion for Judicial Notice filed concurrently herewith.

CalTax supported SB 816, as did other members of the business community. CalTax is familiar with that Bill's intended purpose, and more importantly, can confirm what the Bill *did not do*: it *did not* create a general transfer tax on transfers of ownership interests of legal entities that own California real property.[7] This is demonstrated by legislative history documentation, discussed below, which flatly contradicts the County's interpretation of the SB 816.

Additionally, except in instances where a deed is recorded, the County does not enforce the tax that it claims it has the power to levy. The County's failure to enforce the tax upon legal entity transfers and the lack of any statutory tax collection or enforcement mechanism, except upon deed recordation, demonstrates that the County in fact does not have the power to levy or collect the DTT with reference legal entity interest transfers, and also confirm that the sole point of taxation is recordation and not mere transfer – whether of realty or interests in legal entities.

A. The legislative history of SB 816 contradicts the County's interpretation of that Bill.

SB 816 was a property tax bill, the primary purpose of which was to promote the disclosure of changes in control of legal entities by establishing penalties for failing to self-report such changes to the State Board of Equalization. SB 816 also amended Revenue and Taxation Code section 408(b) to allow county assessors to disclose otherwise confidential property tax change-in-ownership information to county recorders. The bill

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[7] The statement of support for SB 816, attached hereto, filed by CalTax, the California Chamber of Commerce and others makes no mention of an expanded DTT or new general transfer tax. CalTax would have opposed expanding the tax the County claims was created by SB 816, as it did in subsequent legislation proposed, but never enacted.

did not authorize county recorders to do anything new or different; it did not address or expand the incidence of the DTT; it did not authorize the levy of a "Corporate DTT" or any other transfer tax directed at changes in ownership of legal entities.

The only changes made to the DTTA by SB 816 were to Section 11935, to authorize creating an administrative appeal process for DTT and to prohibit the use of DTT value determinations for property tax purposes. This latter amendment was made to legislatively cancel the effect of another case decided against the County, *AES Alamitos, L.L.C. v. County of Los Angeles* (2006) (Court of Appeal, Second District, Division 7, No. B177807), unpublished 2006 WL 1216795 (holding that a superior court's determination of fair market value of real property for purposes of calculating DTT also established value for property tax purposes). Neither Section 11911 nor Section 11925, which define the scope of the DTT, were amended in any respect.

Beside the fact that none of the provisions of the DTTA that define the incidence of the tax were changed in any way, three concrete components of the legislative history are pertinent.

First, the Assembly Committee on Appropriations Bill Analysis of SB 816 (2009-2010) as amended June 26, 2009, expressly addressed the fiscal effect of SB 816. That analysis concluded: "No change in tax liabilities. However, the bill may result in increased penalties and property tax collections."[8] Thus, while the County now interprets SB 816 as

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[8] Assem. Com. on Appropriations, Analysis of Sen. Bill 816 (2009-2010 Reg. Sess.) as amended June 26, 2009, p. 1, a copy of which is attached as Exhibit D to CalTax's Motion for Judicial Notice filed concurrently herewith.

retroactively expanding the tax base subject to DTT (although it did not do so contemporaneously with the bill),[9] the actual legislative history documents show that no change in tax liabilities would occur, and that the only revenue increase would arise from increased penalties for failure to report *property tax* changes in ownership and increased *property tax* collections due to improved change-in-ownership reporting.

Second, in the Senate Third Reading Bill Analysis, the BOE is reported as stating "BOE notes that this bill has no direct revenue impact." Again, these comments are irreconcilable with expansion of the DTT base asserted by the County and approved by *North Ardmore*.[10]

Third, the Senate Rules Committee, Office of the Senate Floor Analyses, Bill Analysis of SB 816 as Amended August 31, 2009 expressly recognized the constitutional limitations prohibiting adoption of a transaction tax on transfers of real property, and that the DTT applied to deeds transferring realty: "Analysis: Existing law (California Constitution, Article XIIIA, section 4) prohibits transaction taxes or sales taxes on transfers of real property; however, the Revenue and Taxation Code authorizes counties to approve an ordinance to impose a documentary transfer tax (DTT), which applies to deeds of transfer of realty within that jurisdiction and is based on the value of the transfer."[11]

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[9] See footnote 5, *supra.*

[10] Sen. 3d Reading Bill Analysis of Sen. Bill No. 816 (2009-2010 Reg. Sess.) as amended Aug. 31, 2009, p. 2, a copy of which is attached as Exhibit E to CalTax's Motion for Judicial Notice filed concurrently herewith.

[11] Sen. Rules Comm., Off. of Sen. Floor Analyses, Bill Analysis of Sen. Bill No. 816 (2009-2010 Reg. Sess.) as amended Aug. 31, 2009, p. 2, a

The County reasons: "I[t] defies logic that the Legislature would provide DTT tax administrators the means to identify unrecorded legal entity transactions were its intention that such transactions not be subject to documentary transfer tax assessment." (ABM, p. 21.) However, the County advances an even more illogical position by asserting that the Legislature intended to expand the incidence of the DTT: (a) without changing Sections 11911 or 11925; (b) without authorizing county recorders to take any new or different action or change their duties in any way; (c) by changing a tax in a manner that the Legislature recognized at least potentially violated the California Constitution; and (d) by "implying" an intent to expand a tax without recognizing any revenue from doing so.

The Court of Appeal concluded that the Legislature "signaled" a DTT should apply anytime a change in ownership of a legal entity owning real property occurs (Slip. Op. at 31), but that "signal" can only be heard by disregarding actual legislative statements to the contrary.

B. The County does not enforce the newly-coined tax, which is a concession that it lacks the power to do so.

The County does not actively enforce the expanded DTT on transfers of legal entity interests where the legal entity owns real property, thus conceding that it lacks authorization to levy and collect the tax. CalTax requested the Los Angeles County Recorder and the Los Angeles Tax Collector to produce documents concerning the County's administration of the DTT pursuant to the California Public Records Act. Those requests were directed at documents evidencing the County's consistent failure to enforce the expanded tax it attempts to defend in this

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copy of which is attached as Exhibit F to CalTax's Motion for Judicial Notice filed concurrently herewith.

proceeding, including documents referring the collection policies and procedures for the DTT arising from legal entity transfers (which the County sometimes refers to as "Corporate DTT" or "Corp. DTT").

In response to CalTax's Public Records Act Request, the County Recorder provided a document identified as "Procedure Number 11396-2" describing the procedure to handle "Corporate Documentary Transfer Tax."[12] That procedure, in summary, is to write three demand letters, and then transfer the matter to the County Tax Collector. The demand letter form provides in part that: "This letter constitutes a demand for payment of the documentary transfer tax. If payment is not received within 60 days from the date of this letter, the Recorder will pursue all available legal remedies to collect the unpaid tax." The County Recorder advised by letter dated May 8, 2015, that it has taken no other action to collect Corporate DTT other than to send such letters and refer matters to the Tax Collector.[13]

The County Tax Collector, in turn, produced "detailed collection records," which consisted of printouts from his department's collection system and copies of the County Recorder's demand letters.[14] The Tax Collector's information shows that dunning calls were made, and in a few cases accounts were sent to a Denver law firm that describes itself in dunning letters as a "collection firm" for further action. But beyond

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[12] A copy of the County's "Procedure Number 11396-2" is attached as Exhibit G to CalTax's Motion for Judicial Notice filed concurrently herewith.

[13] Recorder's May 8, 2015 letter to CalTax's counsel, p. 1, a copy of which is attached as Exhibit H to CalTax's Motion for Judicial Notice filed concurrently herewith.

[14] The records produced are attached as Exhibit I to CalTax's Motion for Judicial Notice filed concurrently herewith.

demand letters and telephone calls, *no legal action was taking to collect the purported tax.*

The Tax Collector provided a partial set of data documenting its efforts to collect the "Corporate DTT" consisting of 39 files.[15] The demands totaled $1,299,276. Nineteen demands were paid, in whole or in part, for a recovery of $535,305, or about 40% of the sums demanded. The balance of $763,971, or about 60% of the sums claimed, was not collected. The uncollected sums included individual demands for $42,071, $37,620, $67,200 and $74,144.

The fact that DTT is not collected in the absence of recordation is well recognized:

> Transfer tax may even be payable in the case of transfer of partnership or other equity interests, which interests themselves are personal property, not real property. For instance, where sufficient interests currently or cumulatively in the partnership, or other entity treated as a partnership for federal income tax purposes, have transferred to cause the partnership or other entity to be deemed to have been terminated for federal income tax purposes, under the Transfer Tax Act the partnership or other entity is treated as having executed an

[15] The County's production was materially incomplete. CalTax's counsel has represented several clients to whom the County made very material demands for "Corporate DTT." CalTax's counsel wrote detailed letters to the County explaining that it did not have the authority to make to such demands. The County made no further collection effort, and no sums were paid. None of these matters were included in the records produced by the County. The actual number of demands for Corporate DTT remains unknown. Moreover, the earliest collection file produced related to demands made in 2012, notwithstanding that the County contends it began demanding payment of such taxes beginning in 2010.

> instrument transferring the real property of the partnership or other entity. Under such circumstances, transfer tax will be payable based upon the fair market value of the real property owned by the partnership or other entity. ***In practice, however, transfer tax is rarely if ever actually paid under such circumstances as no change in record title is required and no instruments are recorded disclosing the transfer of interests in the partnership or other entity.***[16]

The absence of any meaningful enforcement effort can reasonably be construed to demonstrate that the County lacks the statutory power it claims to have and/or that the DTT is, in fact, a simple "recording tax," and that no means exists to collect the tax in absence of recordation of a conveyance document. Under either scenario, the County's expansive retroactive interpretation of SB 816 fails.

Non-enforcement is a form of contemporaneous administrative construction. The general rule is that administrative inaction may be indicative of a lack of statutory power. Thus is has been said by the United States Supreme Court:

> Authority actually granted by Congress, of course, cannot evaporate through lack of administrative exercise. But just as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who

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[16] Cruz and Rogers, "*A Practical Guide to Transfer Taxes in California*," California Real Property Journal, (Spring 2005, Vol. 23, No.2) p. 2, footnotes omitted. The authors opine that DTT is payable without recordation, but offer no authority or rationale for this view, and do not consider the inherent inconsistency of that position given the recognized limitation on collection.

> presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred.

(2B Sutherland Statutes and Statutory Construction (7th ed. 2014-2015), § 49:4 (citing *Federal Trade Com. v. Bunte Bros.* (1942) 312 U.S. 349, 352); *Shealor v. City of Lodi* (1944) 22 Cal.2d 647, 655 (Carter, concurring); *Richfield Oil Corp. v. Crawford* (1952) 39 Cal.2d 729, 736.)[17]

The County's failure to make any meaningful effort to collect taxes it claims to be owed has resulted in the failure to collect at least $750,000, based just on the partial records produced. The reason for the half-hearted collection effort is not disclosed by the County's responses to CalTax's Public Records Act Request. But even in the absence of such effort the County has been able collect roughly a half-million dollars based on nothing more than demands and false threats of legal action, while also avoiding judicial review. The County's reluctance to enforce the claimed tax when challenged should be construed as a concession that the claimed new power does not actually exist. The County, in effect, attempts to obtain authority to impose a voluntary tax – one it cannot collect and has no intention of enforcing.

CONCLUSION

The Corporate DTT is a nightmare of public administration: The County's retroactive re-interpretation of its ordinance that has remained

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[17] Other cases have declined to follow the rule under distinguishable circumstances. *Siskiyou County Farm Bureau v. Department of Fish and Wildlife* (2015) 237 Cal.App.4th 411, 443 (change in circumstances justified agency to commence full enforcement of existing law); *In re Madison's Estate* (1945) 26 Cal.2d 453, 463 (single instance of prior inconsistent position in a litigated case was not determinative of an agency interpretation).

unchanged since 1967 to create an entirely new tax fails to meet many principles of sound tax policy. The County's lack of transparency deprived its electorate of its right to vote, and the County failed miserably at being a transparent government. The County failed to enforce a tax, albeit an illegal tax, which is indicative of its lack of statutory authority to impose the tax. Finally, the County failed to provide taxpayers with one of the most important principles of sound tax policy: certainty. Tax rules should clearly specify when a tax is to be paid, how it is to be paid, and how it is to be determined. Changing the rules of taxation without any prior public notice, and applying the new rules retroactively without regard to the constitutional limitations on increasing taxes, fails to protect taxpayers in a way they voted to be protected.

The foundation for this behavior should be disapproved, both substantively and procedurally. The DTT should be restored to its actual scope.

There is a long standing saying in the tax field that "An old tax is the best tax." A long established tax has been tested, its application is well recognized, and the administration of the tax is well developed. The County's "re-imagineering" of the DTTA contradicts this accepted principle in every respect.

Dated: October 1, 2015

GREENBERG TRAURIG, LLP

By: _____

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California Taxpayers Association

CERTIFICATE OF LENGTH

I certify that the following Amicus Curiae Brief of the California Taxpayers Association in Support of Plaintiff and Appellant is 7,289 words in length (exclusive of tables) as determined by the Microsoft Word word-processing software used to prepare the brief.

Dated: October 1, 2015

GREENBERG TRAURIG, LLP

By: 

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CERTIFICATE OF SERVICE

PROOF OF SERVICE

I, Johnice Cox, declare as follows:

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen years and am not a party to this action. My business address is 1840 Century Park East, Nineteenth Floor, Los Angeles, California 90067in said County and State. On October 1, 2015, I served the within:

AMICUS CURIAE BRIEF OF THE CALIFORNIA TAXPAYERS ASSOCIATION IN SUPPORT OF PLAINTIFF AND APPELLANT

to each of the persons named below at the address(es) shown, in the manner described.

SEE ATTACHED SERVICE LIST

X **BY MAIL:** I placed a true copy in a sealed envelope addressed as indicated on the attached service list for collection and mailing at my business location, on the date mentioned above, following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing with the United States Postal Service. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the U.S. Postal Service in a sealed envelope with postage fully prepaid. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date on the envelope is more than one day after the date of deposit for mailing contained in the proof of service.

I certify under penalty of perjury that the foregoing is true and correct, that the foregoing document(s), and all copies made from same, were printed

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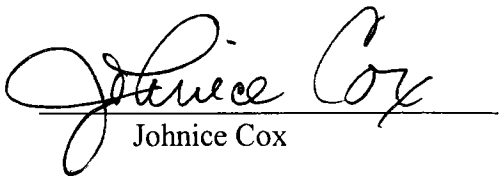

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