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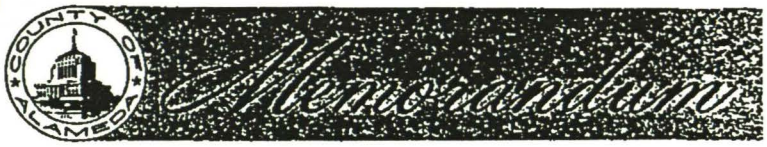
COUNTY COUNSEL



DATE: June 2, 1993

TO: Board of Supervisors

FROM: Kelvin Booty, County Counsel, QIC 20104

SUBJECT: Sales Tax

Revenue and Taxation Code section 7285 provides:

"The board of supervisors of any county may levy a transactions and use tax at a rate of 0.25 or 0.5 percent, if the ordinance or resolution proposing that tax is approved by a two–thirds vote of all members of the board of supervisors and the tax is approved by a majority vote of the qualified voters of the county voting in an election on the issue. The transactions and use tax shall conform to [sections 7251–7274, the Transaction and Use Tax Law]."

A transactions tax is imposed on retail sales of personal property; the complementary use tax is imposed on the storage, consumption, or use of purchased personal property. They are very like sales taxes. They must be administered by the State Board of Equalization. Revenue and Taxation Code section 7270.

An ordinance would have to be adopted to impose the tax. This would be a general county tax. The tax would be levied to support general governmental purposes. If this were a "special" tax, it would then require a two–thirds vote of the voters. While some particular authorized purposes may be stated in the measure, the proceeds would be available for any general governmental purpose. The tax ordinance would be drafted so as to make this clear to the voters.

The Governor has stated that he will proclaim a special election to be held on November 2. No such proclamation has yet issued. The costs to the county of the election are still unclear.

The county would have to contract with the State Board of Equalization for the administration of the tax. The Attorney General has stated that the State Board cannot enter into a contract unless the tax has been approved by the voters as indicated; and further, the attorney for the State Board has stated that the Board will in fact enter into the contract if the voters so approve the tax.

The maximum rate of transactions and use tax in Alameda County is 0.5 percent.

This is true regardless of the continuation or not of the sales tax in dispute in Sacramento. Under current law, the earliest date the State Board could begin implementation of this tax is April 1, 1994. It is possible that new legislation will allow collection to begin on January 1, 1994, in both cases assuming the voters approve the tax in November.

The Attorney General has ruled that the counties are not required to share the tax proceeds with cities or other agencies when exercising their authority to increase the tax.

There remains the legal issue concerning the possible application of Article 2, section 9 of the State Constitution. That Section prohibits the application of the referendum power to a tax ordinance. In City of Woodlake v. Logan, 230 Cal.App.3d 1058 (1991) the Court of Appeal held that a requirement of voter approval of a tax before the tax could become effective was an unconstitutional referendum. Similarly in 1990 the Attorney General had ruled that Section 9 applied to the imposition of the sales tax, that the voting requirement of section 7285 amounted to a referendum, that the election requirement could not be severed from the remainder of section 7285, and that accordingly section 7285 was illegal. (The Legislative Counsel opined that the election requirement was severable and could be ignored.) Last month the Attorney General retracted his opinion, and now states that section 7285 is valid. In order to understand this change, we have to bring in Proposition 62. Proposition 62 added provisions to the statutes (not the Constitution) to require a majority–vote approval by the voters before a general tax may become effective. The conflict between the anti–referendum provision of Article 2 section 9 and the pro–vote provision of Proposition 62 remains unresolved. The Attorney General states that he believes that Justice George's concurring opinion in Rider v. County of San Diego, 1 Cal. 4th 1 (1991) will ultimately prevail. In that opinion Justice George distinguished a referendum––which requires gathering signatures and filing a petition in the short time before a measure becomes effective––from Proposition 62 (and by implication section 7285, quoted above) which provided that the vote must be had in all cases before the measure becomes effective. The distinction is certainly subtle, and in any case must be resolved by the courts. I believe it likely that a sales tax approved pursuant to section 7285 would be challenged in court. Should that occur the proceeds might be impounded, or collection enjoined pending court resolution of the issues. In short, timely use of the sales tax proceeds cannot be assured.

KHB