IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF CONTRA COSTA

CHEVRON U.S.A., INC.,

Plaintiff,

vs.

CITY OF RICHMOND,

Defendant.

_______________________________________/

No. C09-00491
[consol with 09-01522]

DECISION UPON CHALLENGE TO "MEASURE T"

The Court having previously taken under submission the above-entitled matter, the Court now issues its decision upon the matter as follows:

Plaintiff Chevron challenges the imposition and collection of a tax, imposed as a result of a voter initiative referred to as "Measure T", upon various grounds, one of which is that the tax, as written, interferes with interstate commerce. This Court concludes that the challenge is well-taken. While it would appear that the City of Richmond is capable of imposing a licensing or "doing business" tax upon the activities in Richmond of Chevron, and that such tax may well have considerable similarity to the tax voted upon by the voters, the tax scheme that has been selected and put into place cannot be enforced.

The Record

This action commenced on February 26, 2009, with Plaintiff Chevron U.S.A., Inc., (herein “Chevron”) filiing its complaint challenging the enactment of “Measure T”. Then, after paying to the City the required business license fee for 2009, under protest, Chevron filed a second action for refund of the amount paid. The actions have been consolidated by the Court. Chevron has filed, and the Court here considers, a motion for judgment upon the pleadings.

The decision reached herein is based solely upon the pleadings in the two consolidated actions and judicial notice, properly requested, of the existence of the following materials:

1. The cover page and pages 44 through 49 of the “Combined Voter Information Pamphlet” for the November 4, 2008, election (i.e. the relevant portions of the pamphlet as to “Measure T”);
2. A City Council Resolution, dated September 16, 2008, endorsing the measure and stating reasons for doing so;
3. Materials entitled “Frequently Asked Questions about Measure T” which appear to be from the website of the proponents of the measure, “afairshareforrichmond.org”;
4. A letter purportedly sent, on February 2, 2009, to all those holding business licenses upon that date, describing the tax and enclosing a page entitled “Frequently Asked Questions”;

5. A series of identical letters sent to parties such as the “Chamber of Commerce”, on or about March 17, 2009, enclosing a “draft” of a “Business License Ordinance Enforcement Policy”, and inviting comment upon the policy;
6. A letter addressed to tax counsel for Plaintiff Chevron, dated March 17, 2009; and
7. A copy of the “enforcement policy” showing enactment on March 27, 2009.

<u>Measure “T”</u>

By a vote at the general election of November 4, 2008, a majority of the voters of the City of Richmond (52%) enacted “Measure T” designated as an “Ordinance of the City of Richmond enacting the Richmond Business License Tax”. The primary import of the measure, as explained by the voter information pamphlet, was to replace the then existing license fee which was “primarily based on the number of persons employed by the business” such that “manufacturing businesses” would pay the <u>greater</u> of the old tax, or a new alternate tax of “a flat fee of one fourth of one percent (0.250%) of the value of raw materials used in the manufacturing process” [1]

While the City was home to other “manufacturing” businesses other than Chevron, the evidence is unequivocal that Chevron was “targeted” by this proposed new license tax. In its September, 2008, resolution endorsing the measure the City

1 The ordinance additionally changed the timing of the licenses; while they formerly ran from the original issue date and renewed upon its anniversary all licenses would now be on a calendar year basis. This aspect has no importance to the issues presently being determined by the Court.

Council stated that “nearly all revenue from Measure T will come from the Chevron refinery’s increased business license fee based on the amount of crude oil it processes in Richmond, with a relatively low impact or no impact at all on other manufacturing businesses”. In a “Frequently Asked Questions” publication voters were advised that the City Attorney had made an independent analysis and determined that “Measure T would generate about $26,462,500 in new revenue each year beginning in 2009”. It was indicated that the estimate was based “entirely on revenue from Chevron”.

The Court is aware of no authority that absolutely prohibits a city from modifying its tax to include, or increase, tax for a particular taxpayer. Nor does the Court conclude that there would be reason for such an absolute prohibition. Indeed, if upon review the governing body of a municipality concluded that for unique reasons one taxpayer was escaping having to pay its fair share for the privilege of doing business, a correction would seem wholly appropriate. In any event, Plaintiff Chevron does not attack the tax upon that basis in the instant motion proceeding and the Court’s decision, as set forth herein, is not based upon that aspect.

The proposed ordinance, which was adopted as proposed, did not address or suggest any reduction of the tax beyond that described. Specifically, it contained no reference in any fashion to any “apportionment” or other reduction, either to comply with interference with interstate commerce or otherwise. Indeed, the voters were clearly led to believe that the full tax would be collected when told in the voters’ pamphlet that new revenues were expected with an estimate of $26,462,500 based upon the processing by Chevron of 91,250,000 barrels of crude oil at an average value of $116 per value.

In support of its claim of validity of the tax the City relies upon section 7.04.380 of the Ordinance which reads:

> "Nothing herein shall be construed as requiring a license or the payment of a license fee, or the doing or any act which would constitute an unlawful burden upon or an unlawful interference with interstate or foreign commerce, or which would be in violation of the Constitution or laws of the United States of America or the Constitution or laws of the State of California."

The new tax was due on March 1, 2009 (Ordinance 7.04.240). On or about March 17, 2009, the City published and mailed to license holders, a "draft", for comment, of a "business license enforcement policy". The first section described this enforcement policy as "intended to ensure application of the City's Business License Ordinance in conformity with the U.S. Constitution and related provisions of federal, state and local law". The second section summarized certain provisions of the ordinance. The third section was labeled "apportionment" and addressed that issue for the first time. The "policy" simply provided:

> "Any person who does business partly in the City of Richmond and partly elsewhere shall pay a business license tax to the City which is fairly apportioned to the volume of its business activity in the City. If

> such person…is taxed based on the value of materials used in the manufacturing process, the tax shall reflect the volume or percentage of total materials which contribute to the conduct of business in the City."

No provision was made as to <u>how</u> such tax would be "fairly apportioned". Rather, the taxpayer was simply provided the option of requesting apportionment and suggesting the method by which it would occur:

> "A person entitled to apportionment under this policy or applicable law shall propose an apportionment of the tax to the Tax Collector upon submission of the statement required by Richmond Municipal Code §7.04.300, and shall provide detailed financial information justifying that apportionment and, upon written approval of the Tax Collector, shall be entitled to apportion his, her or its tax liability accordingly. The Tax Collector may reject an apportionment proposed by a taxpayer and, if so, shall establish another basis of apportionment to which that person shall adhere."

On March 27, 2009, the Tax Collector adopted, with a minor modification, the previously drafted enforcement policy[2]. There is no evidence that the City Council was involved in either its promulgation or its enactment. It was "approved as to form" by the City Attorney. The action of the Tax Collector is claimed by the City to be pursuant to section 7.04.320 which provides:

> "The tax collector is authorized to make such rules and regulations as

2 A direct reference to 'the Commerce Clause" of the United States Constitution was added.

> may be necessary to aid or assist in enforcement of the provisions of this chapter. Notwithstanding anything in this chapter to the contrary, such rules and regulations may include withholding issuance of a business license or revoking an existing license when the underlying activity violates the Municipal Code or any state or federal law."

Chevron calculated the tax as described in the ordinance and paid to the City, under protest, the sum of $20,596,322. At this time no proposal for apportionment of the tax is before the Court.

Commerce Clause

It has long been recognized that neither the states nor their municipalities may impose a tax upon interstate commerce. As was stated in Spector Motor Service, Inc. v. O'Connor, Tax Commissioner (1951) 340 U.S. 602:

> "Taxing power is inherent in sovereign states, yet the states of the United States have divided their taxing power between the Federal Government and themselves. They delegated to the United States the exclusive power to tax the privilege to engage in interstate commerce when they gave Congress the power "To regulate Commerce with foreign Nations, and among the several States . . . ." U.S. Const., Art. I, § 8, cl. 3. While the reach of the reserved taxing power of a state is great, the constitutional separation of the federal and state powers makes it essential that no state be permitted to exercise, without authority from Congress, those functions which it has delegated

exclusively to Congress."

In Freeman v. Hewit (1946) 329 U.S. 249, 252 the Court stated:

> "The power of the States to tax and the limitations upon that power imposed by the Commerce Clause have necessitated a long, continuous process of judicial adjustment…. The history of this problem is spread over hundreds of volumes of our Reports…. This limitation on State power…does not merely forbid a State to single out interstate commerce for hostile action. A State is also precluded from taking any action which may fairly be deemed to have the effect of impeding the free flow of trade between States. It is immaterial that local commerce is subjected to a similar encumbrance."

It has been held, however, that the Commerce Clause does not unequivocally bar state and local governments from any form of taxation upon businesses within its jurisdiction simply because they are engaged in interstate commerce. As was stated in General Motors Corporation v. Washington (1964) 377 U.S. 436:

> "We start with the proposition that it was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing the business (citations)."

The Court then set forth numerous examples of types of taxes that were found not to violate the Commerce Clause. It then summarized:

> "A careful analysis of the cases in this field teaches that the validity of

> the tax rests upon whether the State is exacting a constitutionally fair demand for that aspect of interstate commerce to which it bears a special relation." ... In other words, the question is whether the State has exerted its power in proper proportion to appellant's activities within the State and to appellant's consequent enjoyment of the opportunities and protections which the State has afforded."

Taxes like those at issue here, to wit license taxes or taxes upon the "privilege" of doing business by an entity engaged in interstate commerce, came before the United States Supreme Court in Complete Auto Transit v. Brady (1977) 430 U.S. 274. In rejecting a "per se rule" that privilege taxes were void, and overruling the holding in Spector Motor Service, Inc. v. O'Connor, Tax Commissioner, *supra*, the Court held that it could "perceive no reason" why such a tax should be viewed as creating a "qualitatively different danger" than other forms of tax that had been held allowable.

In Goldberg v. Sweet (1989) 488 U.S. 252 the Court summarized the holding of the Court in Complete Auto Transit as a "four pronged test" :

> "a state tax will withstand scrutiny under the Commerce Clause if "the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State."

Additionally, numerous California cases have, based upon a similar analysis, upheld the imposition of municipal taxes upon the "privilege" of doing business within the municipality. See, for instance, City of Los Angeles v. Shell Oil Company (1971) 4 Cal. 3d 108, 119, and General Motors Company v. City of Los Angeles (1971) 5 Cal.3d 229, 238.

In the instant case Chevron challenges only the third prong, alleging a failure of the ordinance to "fairly apportion" the new tax. Its position derives from requirements that were established by the Supreme Court in Container Corporation of America v. Franchise Tax Board (1983) 463 U.S. 159, 169 which stated:

> "The first, and again obvious, component of fairness in an apportionment formula is what might be called internal consistency -- that is, the formula must be such that, if applied by every jurisdiction, it would result in no more than all of the unitary business' income being taxed. The second and more difficult requirement is what might be called external consistency -- the factor or factors used in the apportionment formula must actually reflect a reasonable sense of how income is generated."…
>
> "To be internally consistent, a tax must be structured so that if every State were to impose an identical tax, no multiple taxation would result. 463 U.S., at 169.Thus, the internal consistency test focuses on the text of the challenged statute and hypothesizes a situation where other States have passed an identical statute."

The tax that is at issue here is what has come to be referred to as a "tandem tax". By imposing upon each taxpayer the "greater" of two possible taxes the risk of failing the internal consistency test becomes substantial. Here, for instance, the City of Richmond would collect a tax based upon volume and value of the refinement of crude oil and another municipality or state, with an identical law, might tax based upon employment. This type of failure of internal consistency has been the subject of numerous appellate decisions.

In Armco v. Hardesty (1984) 467 U.S. 638 the state of West Virginia taxed the plaintiff, an Ohio steel manufacturer, based upon its sales in West Virginia. Because the state also taxed in-state manufacturers, at a higher rate, those manufacturers were "exempt" from the gross receipts tax placed upon sales. Justice Powell, writing for the Court, pointed out that if Ohio had the identical tax scheme, Armco would have to pay two taxes, one in each state, while the West Virginia in-state operator would only have to pay one. Relying upon Container Corporation of America v. Franchise Tax Board, *supra*, 463 U.S. 159, the Court pointed out that proof that there is not a similar tax in the second jurisdiction, would not change the result.

A like result followed in Tyler Pipe Industries v. Department of Revenue (1987) 483 U.S. 232.

In General Motors Corporation v. City of Los Angeles (1995) 35 Cal.App.4th 1736, the principals of Armco and Tyler Pipe were applied to divisions of General Motors that sold cars in Los Angeles. The Court of Appeal held that the federal doctrine of those cases requires the state courts to "assume that all taxing jurisdictions have a taxing scheme exactly the same as the taxing scheme under review". Since a local auto manufacturer would have been subject to just the one “manufacturing tax”, but hypothetically the out-of-state manufacturer would pay two taxes (the Los Angeles “selling tax” and the other state’s “manufacturing tax”) the Court held that the tax scheme failed the internal consistency test.

Shortly after that decision was reached by the Second District Court of Appeal, it was followed by the First District in General Motors Corporation v. City and County of San Francisco (1999) 69 Cal.App.4th 448. In response to San Francisco’s claim that it cured any defect by allowing the taxpayer to prove that it had been double taxed, the Court found such a burden to be “unreasonable”. As Justice Powell had indicated in Armco, the test is based upon a hypothetical duplicate tax. A rule to the contrary would create a “first come first serve” environment in taxation of multi-jurisdictional companies.

In Union Oil Company of California v. City of Los Angeles (2000) 79 Cal.App.4th 383, the tandem tax was very similar to the one that is here before this Court. The City of Los Angeles, “with the apparent intent to include some taxpayers who were exempt under the business license tax” added a payroll tax. To avoid the “constitutional scrutiny” of applying the tax only to those it was trying to bring into its tax schemes, the City applied the tax to all businesses but provided an exemption to any taxpayer that would also be paying the existing gross receipts tax. Holding that the “dual categories” cannot be saved, the Court invalidated the tax upon the basis described in General Motors Corporation v. City of Los Angeles, *supra*, 35 Cal.App.4th 1736.

In the case before us, the tandem tax is created by section 7.04.025 which reads:

> "Every person engaged in manufacturing shall pay an annual license fee of the <u>greater</u> of (i) the license fee which would apply to such person if such person were subject to the provisions of Section 7.04.030 or (ii) a fee equal to one fourth of one percent (0.025%) of the values of materials used in the manufacturing process during the calendar year immediately preceding the year for which the fee is paid."

Section 7.04.030 requires a license fee of $234.10 plus "an additional sum of money" equal to $40.10 per employee in excess of 25 employees.

A simple hypothetical shows that the application of the Richmond ordinance fails the internal consistency test in the same way as that in <u>Union Oil</u> and related cases. If a local oil producer had 100 employees and used $2 Million of crude oil to produce its product in a year, it would pay a tax of $5000 [The greater of the value added tax and an employment calculated tax of $4,010]. Chevron, were it to use the same $2 Million of crude oil but use 50 local employees and 50 employees working, say, in San Ramon, would also pay to Richmond a tax of $5000. The inconsistency comes when San Ramon passes an identical tax ordinance to that of Richmond and, as a result Chevron, because it refines no crude oil in San Ramon, has to pay a tax there of $2,050, for a total tax upon the same activities of $7,050.

No Provision for Apportionment

Apparently recognizing that the Commerce Clause is violated by a municipal ordinance which imposes a tandem tax upon a licensee that does business both within and without the municipality, the City now urges for an interpretation of Measure T that would “save” the ordinance. Specifically, it is urged that the term “in the City of Richmond”, used at several places within the ordinance, does not mean physically within the City, but rather means “within the City’s taxing jurisdiction”.

Firstly, there is nothing in Measure T nor anywhere else in the record to support the view that the voters ever intended such an unusual interpretation. As the City contends, the rules of interpretation applied to statutes and other laws are equally applicable to the interpretation of voter initiatives. Robert L. v. Superior Court (2003) 30 Cal.4th 894, 900-1. Amongst those rules is the requirement that words be interpreted with their ordinary meaning. People v. Birkett (1999) 21 cal.4th 226, 231. While courts are cautioned not to give language its ‘literal meaning” if such would lead to an absurd result [Horwich v. Superior Court (1999) 21 Cal.4th 272, 276] we look to other indications of the intent of the voters in determining any ambiguity. People v. Rizo (2000) 22 Cal.4th 681, 685.

No review of the voter materials for Measure T remotely suggests that the voters were being advised that the ordinance sought to tax Chevron in any reduced amount due to apportionment. To the contrary, the ballot materials suggest that the City will receive and keep all of the tax simply by calculating the raw materials value of the entire amount of crude oil processed. The City would have the Court presume that each person that voted in favor of the initiative would have also done so had he or she known that the City would be reducing the tax charged to Chevron by some un-indicated amount in order to avoid the improper tandem tax. The Court cannot engage in such an unsupported presumption.

Secondly, even with the adoption of the City's proposed modification of the term "in the City" the tax is not properly assessed. Indeed, the position of the City appears to be that it can collect more tax under this interpretation. At page 8 of its supplemental brief the City urges that this interpretation means that every person or entity doing any business of any sort in Richmond. that is a "manufacturer", albeit that such business does no manufacturing at all in Richmond, is subject to the alternate tax. (Also at pg. 11, line 15, and pg. 17, line 15.) This analysis would mean that if a competing oil company, say Union Oil, refined the same volume of crude oil outside of Richmond but sold a small volume of it to a Richmond filling station, Union Oil would owe the same tax of some $20 Million. This argument only goes to illustrate that the City would recognize the need to apportion (although there is no evidence that Richmond ever attempted to levy its "manufacturing" tax upon any entity selling in the city but not manufacturing there). It simply highlights the failure of the ordinance to provide for apportionment.

The City refers to several appellate cases which hold that when a business operates both in and out of a municipality it can be subject to a license or "privilege" tax. [For instance, City of Los Angeles v. Belridge Oil Co. (1954) 42 Cal.2d 823;

Volkswagen Pacific, Inc. v. City of Los Angeles (1972) 7 Cal.3d 48.] [3] Chevron does not dispute that Richmond may do so. The ordinance does not, however, in any manner provide for apportionment to avoid the tandem tax and is, therefore, facially void as violating the commerce clause.

The "Enforcement Policy"

Shortly after the initiative was passed, the City appears to have recognized that its attempt to levy the new tax upon Chevron would run afoul of the Commerce Clause due to an absence of apportionment. In an apparent effort to remedy this failure, it drafted a short document entitled "Business License Ordinance Enforcement Policy". This policy was formally adopted by the tax collector twenty seven days after the 2009 license tax had become due. The City contends that this adopted policy cures any constitutional defects in the ordinance.

The ordinance in question does not, however, purport to make any delegation to the tax collector as to reducing the tax set forth in the ordinance for the purpose of apportionment. The relevant section of the ordinance reads:

> "**7.04.320 Rules and regulations for enforcement.**
>
> The tax collector is authorized to make such rules and regulations as may be necessary to aid or assist in enforcement of the provisions of this chapter. Notwithstanding anything in this chapter to the contrary, such rules and regulations may include withholding issuance of a business license or revoking an existing license when the underlying activity violates the Municipal Code or any state or federal law. (emphasis added)

No reasonable reading of §7.04.320 leads to the conclusion that the ordinance

3 Neither case involved a tandem tax or an absence of apportionment. In Belridge only sales within Los

has created in the tax collector the right to make any adjustment in the taxes imposed therein, whether for the purpose of apportionment or for any other purpose. Indeed, the section at best provides to the tax collector the ability to use rules and regulations to assist in collecting the tax, not imposing it.

The City, in claiming that it has empowered the tax collector to manage apportionment issues, relies upon the Court of Appeal decision in Times Mirror Co. v. City of Los Angeles (1987) 192 Cal.App.3d 170. The facts before that court, however, were dramatically different from those with which this Court is here concerned. The ordinance in that matter specifically provided [by section 21.15(h)] that the city clerk was authorized "to promulgate rules and regulations for the apportionment of gross receipts according to the amount of business done in the City of Los Angeles". It would be unreasonable for this Court to conclude that the Richmond voters, in adopting Measure T, would interpret §7.04.320 as intended to delegate to the city tax collector such a specific role as Los Angeles assigned.

Even were the Court to accept the interpretation that the City proposes as to such a delegation, or alternatively conclude that delegation was not necessary so long as some city representative created apportionment rules, the tax charged to Chevron would still fail. The "enforcement policy" adopted by the tax collector in this matter provides no method or manner for apportionment whatsoever. Again, the City relies upon the Times Mirror decision and again the facts are clearly distinguishable. In the latter case the city clerk created rules (13 and 14) which provide very specific

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Angeles were covered by the tax ordinance and in Volkswagen the matter was remanded because of percentages to varying situations, including a detailed list of exemptions available for a large variety of circumstances where “elements of the selling process” are performed outside of Los Angeles [pg.186, ft 10].

In those circumstances where delegation has been upheld, it is based upon the delegating body specifying “an intelligent principle to which the person or body authorized to administer the act is directed to conform.” El Dorado Oil Works v. McColgan (1950) 34 Cal.2d 731, 737. The closest that this ordinance comes to any such pronouncement would be §7.04.380 which merely provides that “nothing herein shall be construed…as requiring the payment of a license fee…which would constitute an unlawful burden upon or an unlawful interference with interstate or foreign commerce”. While that provision might be deemed guidance as to the need to apportion it provides no principle upon which to determine how to apportion.

The parties are surely aware that there are hundreds, perhaps even thousands, of appellate decisions reviewing the many formulas that have been litigated as to apportionment for taxation. Indeed, formulas have fared quite well in those decisions, even flexible ones. See, for instance, Butler Brothers v. McColgan (1941) 17 Cal.2d 664, affirmed 315 U.S. 501 (1942). No appellate court, however, appears to have approved apportionment that is not based upon any formula whatsoever.

In fact, the language of the “enforcement policy” appears to make apportionment more difficult than is necessary. By providing that ‘the tax shall reflect

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the lack of apportionment.

the volume or percentage of total materials which contribute to the conduct of business in the city" the policy narrows the possible formulas to be used. The City fails to explain how there can be <u>any</u> connection between the volume being produced and a "contribution" to the conduct of business in Richmond. Does the first barrel refined contribute more than the last? or less? Does any barrel contribute more or less than any other? It seems impossible to correlate the volume (or, for that matter the average price) to any "apportionment". In this sense the tax scheme perhaps fails the <u>external</u> consistency test as well as that for internal consistency.

This Court is aware that in the field of unitary income taxation, the taxpayer has often been given the first chance to select an allocation (by way of its return). In each contested case, however, the test has been whether or not the <u>re-allocation</u> formula, used by the taxing entity, meets due process and equal protection requirements of fairness.

The fact that this tax was enacted by initiative creates a further impediment to its being recognized. Elections Code §9217 provides that a law enacted by initiative "shall be repealed or amended" only by vote of the people. Taxing the one entity that was 'targeted' by the initiative in a substantially different manner from that provided by the ordinance would appear to be an amendment.

In conclusion, this Court does not question the ability of a governing body (or the voters by initiative) to simply provide that in cases effecting interstate commerce there must be a fair allocation as constitutionally required and specifically delegating the making of rules and regulations for doing so in the hands of an officer such as the tax collector. Additionally, a wide variety of formulas might be selected in the tax collector's rule-making and those methods chosen need only use reasonable approximation, rather than precision, in calculating a fair tax. None of these has occurred as regards Measure T and accordingly the measure must be deemed to fail to pass constitutional muster.

Inventory or Use Tax

The foregoing determination makes it unnecessary to determine the other challenges raised by Chevron: that the tax is an inventory tax precluded by Revenue and Taxation Code §219 and/or a use tax precluded under the Bradley-Burns Uniform Sales and Use Law, Revenue and Taxation Code §§7200 et seq. Nonetheless, briefly addressing the topic appears prudent both for the purposes of appellate review and as possible guidance should the City of Richmond desire to consider tax legislation that would cure the Commerce Clause defects discussed in this decision.

"Business inventories", which are specifically exempted from taxation and cannot be assessed, are defined in Revenue and Taxation Code §129 as including "goods intended for sale or lease in the ordinary course of business and shall include raw materials and work in process with respect to such goods." Chevron urges that a tax labeled as a "license tax" but calculated upon the value of its raw materials or work in process is, indeed, an inventory tax.

Both sides agree that the case of Ingels v. Riley (1936) 5 Cal.2d 154, 159, provides the framework for the analysis of whether the subject tax is an inventory tax.

As the Ingels court stated:

> "The distinction between a tax on a privilege and a property tax is many times a close one. Generally speaking, the function of a property tax is to raise revenue. Such a tax does not impose any condition nor does it place any restriction upon the use of the property taxed. A privilege tax, although also passed to raise revenue, and as such is to be distinguished from the license tax or regulatory charge imposed under the state's police powers, is imposed upon the right to exercise a privilege, and its payment is invariably made a condition precedent to the exercise of the privilege involved (citations).
>
> "It is impossible to lay down any positive rule by means of which the character of any given tax may be ascertained. In each case the character of the given tax must be ascertained by its incidents, and from the natural and legal effect of the language employed in the statute. (*citations*)"

While the restriction against taxes upon inventory has certain differing aspects from the restriction upon property taxes, the concept of distinguishing excise or privilege taxes remains similar.

Chevron is correct that two of the more significant incidents of a property tax are contained in the Measure T scheme; the tax is collected annually and is based upon the value of the property. On the other hand, the Measure T tax does not become a lien upon the property. Appellate authority tells us, however, that what the tax does not measure is as important as what it does. City of Oakland v. Digre (1988) 205 Cal.App.3d 99, relied upon by Chevron, found a 'parcel tax' to be a property tax, because it was levied upon parcels irrespective of whether those parcels were "used" or required full city services. By comparison, in City of Huntington Beach v. Superior Court (1978) 78 Cal.App.3d 333 the court found that a 'transfer tax' was not a property tax because it only taxed the "exercise of one of the incidents of ownership" and a property would not be charged the tax if it were not being transferred. That Court found the fact that the tax was based upon the value of the property to not be determinative.

Similarly, in Ingels v. Riley, supra, 5 Cal.2d 154 the Court held that a vehicle license tax was not a property tax because it was limited to vehicles that used the highways and those that did not do so (e.g. used on private property only or stored and not used) were exempt from the tax. Again, the fact that the tax was based upon the value of the vehicle was not found significant. On the other hand, in Flynn v. City of San Francisco (1941) 18 Cal.2d 210, a similar tax attempted by San Francisco failed because no vehicles were exempted and thus all of the incidents of the tax were those of a property tax.

Applied to the instant situation, it can be seen that while value is used as a factor in determining the amount of tax, the entire inventory of every manufacturer is not being taxed. Rather, the volume times value factor is simply being used as a measure of the amount of business being performed in Richmond by Chevron. The Measure T tax, therefore, is not a tax upon inventory precluded by Revenue & Taxation §219.

The foregoing analysis, however, raises a more significant issue when determining whether or not the new tax violates the Bradley-Burns law. Since the City has chosen to select “use” of the inventory (crude oil) as the primary determining factor in setting the tax, it appears on the surface that a conflict exists. A ‘use tax’ is defined as “the exercise of any right or power over tangible personal property incident to the ownership of that property.” The exercise of an incident of ownership by Chevron is the very subject that the City urges, in distinguishing inventory taxes, that it is taxing with Measure T. There can be no reasonable dispute that the state fully pre-empted the field of use taxation when it enacted Revenue & Taxation §6201 placing “An excise tax...on the storage, use or other consumption in this state of tangible personal property…”. A.B.C. Distributing Co. v. City of San Francisco (1975) 15 Cal.App.3d 566; Century Plaza Hotel Co. v. Los Angeles (1970) 7 Cal.App.3d 616.

The City raises two arguments in contending that its new tax is not pre-empted. Firstly, it contends that the state has not imposed a use tax upon the crude oil refined by Chevron because the state tax is imposed solely upon goods “purchased from any retailer”. This misconstrues the purpose of the limitation of the tax to purchases from retailers which is to avoid pyramiding sales or use taxes as products move up the manufacturing or distributing chain. See Sales and use Tax Regulation 1525; Burroughs Corporation v. State Board of Equalization (1984) 153 Cal.App.3d 1152. In fact, Revenue & Taxation Code §7203 specifically provides a limited area in which a charter city or county can impose a “complementary” sales or use tax, a program which Richmond appears from the public record to participate in.

The argument that Richmond can additionally establish any use tax that the state has not adopted, without restriction, is untenable. Were such the rule, the state would be filled with such taxes, resulting in pyramiding use taxes everywhere.

The second City argument is that the Measure T tax qualifies for the specific exemption of Revenue & Taxation §7203.5(f) which allows for the imposition of “any other substantially different tax”. The problem with this position is that the tax simply is <u>not</u> substantially different. As the City acknowledges, the tax is based upon the “use”, in Richmond, of the tangible personal property. Were the tax not calculated based upon the <u>value</u> of the property, it may well qualify for the exemption. Using the <u>volume</u> of crude oil as a measure of the tax would appear to be adequately distinguishable from a use tax and would seem to more appropriately measure the amount of business being engaged in then would the value, in any event. Measure T, however, elected to tax based upon the <u>value</u> of the product that is being used. For the foregoing reasons, the Court concludes that Measure T violates the Bradley-Burns Law.

<u>Tax Refund</u>

The parties have not yet addressed this issue and perhaps a hearing is required. It would be the tentative view of this Court that the City is entitled to collect the alternative tax, i.e. the “employment” measured tax that was in effect before the Initiative was enacted. The refund to which Chevron would then be entitled can be calculated by simply deducting that tax from the tax actually paid.

Counsel for Chevron is to prepare a proposed judgment, consistent with the foregoing, and submit it to counsel for the City for review. The Court will hold a further **case management conference** to discuss any remaining issues on **<u>January 11, 2010, at 9:00 a.m.</u>**

Dated: December 16, 2009

Digitally signed by David Flinn
Date: 2009.12.16 15:30:39 -08'00'

Judge of the Superior Court