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[EXEMPT FROM FILING FEES
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SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF CONTRA COSTA

CHEVRON U.S.A. INC., a Pennsylvania Corporation,

Plaintiff,

v.

CITY OF RICHMOND, a municipal corporation,

Defendant.

CASE NO.: C09-00491

[Consolidated with Case No. C09-1533]

(Case assigned to Hon. David B. Flinn)

DEFENDANT CITY OF RICHMOND'S OPPOSITION TO PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS

Date: August 28, 2009
Time: 9:00 a.m.
Dept.: 6

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I. Introduction and Summary of Argument

In an effort to ensure that City revenues are sufficient to fund critical services to Richmond residents, businesses and property owners, the City's voters exercised their right under the California Constitution to approve an initiative measure ("Measure T") on the November 2008 ballot to increase the City's business license tax on manufacturers.

Chevron, the fifth largest corporation in the nation, brings these suits to challenge the voters' decision to make Chevron pay its fair share of the cost of City services during a time of dwindling City revenues. Like countless unsuccessful taxpayers before, Chevron asks this court to invalidate a business license excise tax by arguing that it is, instead, some other kind of tax preempted by state law. And, as countless courts have done before, the City respectfully urges this to court to reject that effort. Rather, this court should affirm the City's long-established home rule power to impose Measure T's excise tax on the privilege of doing business in the City.

Such taxes, though measured by the value of inputs to manufacturing under Measure T, are not property taxes preempted by the exemption of business inventories from county property taxes required by Revenue & Taxation Code Section 219. The California Supreme Court held over seventy years ago that an excise tax "does not become a property tax simply because it is proportioned in amount to the value of the property used in connection with the privilege which is taxed." (*Ingels v. Riley* (1936) 5 Cal.2d 154, 161.) Chevron's efforts to convert Measure T's excise tax into a property tax necessarily fails.

Similarly unavailing is Chevron's claim that Measure T is a use tax preempted by the Bradley-Burns Uniform Local Sales and Use Tax Law, Revenue & Taxation Code Sections 7200 *et seq.* ("Bradley-Burns") Chevron's argument, however, ignores two key factors, each of which is alone sufficient to defeat Chevron's claim. First, Bradley-Burns expressly permits a city to impose taxes which are "substantially different" from retail sales and use taxes. (Cal. Rev. & Tax. Code § 7203.5(f).) A local business license excise tax is just such a "substantially different" tax and, thus, permitted by Bradley-Burns. Second, the California Constitution's home rule doctrine preserves Richmond's sovereignty, including its taxing authority, and state law may not preempt the exercise

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of that except in limited circumstances. Chevron fails to establish that Measure T falls within those narrow exceptions such that it is preempted by state law.

Finally, Chevron's claims notwithstanding, Measure T does not violate the internal consistency test of the Commerce Clause. Chevron cites no case in which a challenged tax that had a mechanism by which a taxpayer might apportion the tax to reflect the portion of its business activities within the taxing jurisdiction has been determined to violate the internal consistency test. Here, the City's business license tax ordinance, as amended by Measure T, expressly authorizes Richmond's Tax Collector to issue interpretations and policies to aid enforcement of the tax. Likewise, Measure T expressly declares that it may not be construed to impose a tax that burdens interstate commerce. Thus, as required by the ordinance challenged here, the Tax Collector issued an enforcement policy *before* the taxes were due and *before* Chevron paid them under protest, which authorized businesses that operated partly in Richmond and partly elsewhere to pay a license tax proportionate to their activity in the City. Chevron ignored its opportunity (and obligation) to propose an apportionment of tax to the City and simply filed its second Complaint for a refund of the tax. That second suit has been consolidated with its first Complaint for trial. The Court should reject Chevron's effort to ignore the plain language of Measure T and the enforcement policy, which vitiate Chevron's internal consistency claim.

In sum, the Court should deny Chevron' Motion for Judgment on the pleadings. Chevron fails to establish that Measure T violates any of Revenue & Taxation Code Section 219, Bradley-Burns or the Commerce Clause. Instead, the Court and the parties should next turn to those of Chevron's challenges to Measure T that involve factual issues which have been deferred by stipulation for resolution after determination of the three legal issues presented here.

II. Statement of Facts

Pursuant to Richmond Municipal Code ("RMC") Chapter 7.04, Richmond imposes a business license tax on all persons engaged in businesses within its jurisdiction. Before January 1, 2009, the tax on a manufacturer such as Chevron was based on the number of persons employed by a business. (Complaint, ¶ 6.) However, in early 2008, Richmond voters circulated an initiative

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petition proposing what became Measure T to amend Chapter 7.04 to amend the license tax on manufacturers. The proponents gathered sufficient signatures to qualify the measure for the ballot and the Richmond City Council, as was required by the Elections Code, placed Measure T on the November 4, 2008 ballot. (Complaint, ¶ 10.) The City's voters approved the measure, which took effect on January 1, 2009 pursuant to Section 3 of the measure.

RMC Section 7.04.025, as amended by Measure T, provides in relevant part:

> Every person engaged in manufacturing shall pay an annual license fee[1] of the greater of: (i) the license fee which would apply to such person if such person were subject to the provision of Section 7.04.030[2] or (ii) a fee equal to one-fourth of one percent (0.250%) of the value of materials used in the manufacturing process during the calendar year immediately preceding the year for which the fee is paid.

RMC Section 7.04.320 also provides that the City's 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."[3] (Exh. A to Chevron's Motion.) Further, RMC Section 7.04.380 provides:

> Nothing herein shall be construed as requiring a license or the payment of a license fee, or the doing of 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.

In accordance with these two sections, the City's Tax Collector adopted and published an Enforcement Policy on March 29, 2009. A copy of that policy is attached as Exhibit 1 to the Request for Judicial Notice filed concurrently herewith, and Chevron also attached it as Exhibit C to its Verified Complaint in Case No. C09-01533. That policy states:

> 1. PURPOSE
>
> This Business License Ordinance Enforcement Policy is intended to ensure application of the City's Business License Ordinance in conformity with the Commerce Clause, clause 3 of § 8 of Article I of

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[1] Although, like many business licenses taxes, RMC Chapter 7.04 refers to the tax as a "fee," there is no dispute here that the measure in issue is a general tax.

[2] This refers to the previous employee head-count tax.

[3] "This chapter" is a reference to the business license tax as a whole which Measure T amends.

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the United States Constitution and related provisions of applicable federal, state, and local law.

2. DEFINITIONS

In addition to the definitions set forth in Richmond Municipal Code § 7.04.020, the following definitions shall apply to the construction and application of Chapter 7.04 of the Richmond Municipal Code (the Business License Ordinance):

"Employee employed or to be employed in the city" means a person whose employment contributes to business engaged or conducted in the City, whether or not that employee works within or without the City.

"Manufacturer" means a person who conducts activities which constitute "manufacturing" as that term is defined in Richmond Municipal Code § 7.04.020, which activities contribute to business activity by that person in the City of Richmond, whether or not that manufacturing activity is conducted in the City.

"Materials used in the manufacturing process" means such materials the consumption or transformation of which contributes to business activity of a manufacturer doing business in the City of Richmond, whether those materials are so used within or without the City.

"New business in the City of Richmond" means a person newly engaged in business in the City, whether or not from a fixed location, and whether or not from a location within or without the City

3. APPORTIONMENT

A. 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 employment, the tax shall reflect the number of employees or the percentage of employees' collective efforts which contribute to the conduct of the business 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.

B. A person entitled to apportionment under this policy or applicable law including, but not limited to, the Foreign Trade Zone Act or federal treaties, shall propose an apportionment of 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

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> 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.

Although Chevron's second Copmplaint – for a refund of the tax it paid under Meaure T – was filed *after* adoption and publication of the Enforcement Policy, Chevron fails to allege it proposed an apportionment of the tax or provided detailed financial information to the City to support such a proposal.

III. Standard for Motion for Judgment on the Pleadings by a Plaintiff

A plaintiff's motion for judgment on the pleading may be granted only if "the complaint states facts sufficient to constitute a cause or causes of action against the defendant and the answer does not state facts sufficient to constitute a defense to the complaint." (Cal. Code Civ. Proc. § 438(c)(1)(A).) In ruling on such a motion, a court looks to the face of the challenged pleading and at any matter of which it may take judicial notice. (Code Civ. Proc. § 438(d); *Howard Jarvis Taxpayers Assn. v. City of Riverside* (1999) 73 Cal.App.4th 679, 685.) Thus, if any of Richmond's answers in the two consolidated matters here, Chevron's two verified complaints, or any matter judicially noticed, state facts sufficient to establish a defense, then Chevron's motion must be denied. Of course, the Court only needs to review such pleadings if Chevron's arguments are meritorious in the first instance. As set forth below, Chevron's arguments fail to persuade.

IV. Measure T is a Valid Excise Tax and Not a Preempted Tax on Business Inventories

Chevron urges this court to find that Revenue & Taxation Code Section 219's exemption of business inventories from property taxes imposed by counties preempts Measure T's excise tax on the privilege of doing business in the City because one measure of that tax is the value of materials used in manufacturing. Chevron's arguments fail because it mistakenly assumes that Measure T taxes property.

As a threshold matter, tax exemptions are strictly construed against the taxpayer. (*Weber v. County of Santa Barbara* (1940) 15 Cal.2d 82, 87-88.) A property owner must establish it "clearly

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comes within the [property tax] exemption." *(Fellowship of Friends, Inc. v. County of Yuba* (1991) 235 Cal.App.3d 1190, 1197; *see also Sterigenics Internat. v. County of Orange* (1996) 47 Cal.App.4th 1541, 1545.) Doubts concerning the applicability of a claimed exemption are resolved against the taxpayer. (*Alpha Therapeutic Corp. v. County of Los Angeles* (1986) 179 Cal.App.3d 265, 270.)

Chevron fails to meet its burden to clearly establish that Measure T is a property tax preempted by Revenue & Taxation Code Section 219's exemption of inventories from county property taxes. Measure T is an excise tax, and Revenue & Taxation Code Section 219 is therefore inapplicable and irrelevant.

As noted above, RMC Section 7.04.025 requires manufacturers doing business in Richmond to pay an annual tax of one fourth of one percent (0.25%) of the value of materials used in the manufacturing process with respect to the Richmond marketplace if that amount is greater than the alternate calculation based on a fixed dollar amount per employee under RMC Section 7.04.030. RMC Section 7.04.020 defines "Manufacturing" to include "any process of refining or processing hydrocarbons, petroleum or crude oil to produce products for use as fuels, lubricants, solvents, plastics or other intermediate or final products." (Exh. A to Chevron's Motion.) Significantly, RMC Section 7.04.020 also states, in relevant part, that: "'materials used in manufacturing' does *not* include any materials acquired, stored or transported which are not actually subjected to the manufacturing process during the taxable period." (Emphasis added.)

Contrary to Chevron's claim that Measure T is an invalid property tax on its business inventories, Measure T is not a property tax at all. Rather, Measure T is an excise tax on the privilege of doing business in Richmond, as many courts have concluded regarding similar business levies.

A. <u>The Method Used To Calculate A Tax Is Not Controlling As To Its Nature</u>

California courts have long recognized that the method used to calculate a tax is not dispositive as to whether it is a property or excise tax. (*See*, e.g., *Ingels v. Riley* (1936) 5 Cal.2d 154, 161 (State vehicle license fee is not a property tax on vehicles, but an excise tax on the privilege of

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using the State's roadways measured by the value of the vehicle.).) An excise tax is levied on the exercise of certain rights (*e.g.*, using public roadways, doing business), while a property tax is imposed on bare ownership of property without regard to any particular use of that property (*e.g.*, the ad valorem[4] tax on real property authorized by Article XIII, § 1 of the California Constitution).

An excise tax is "proportioned according to the extent of the privilege enjoyed." (*Id.*) "[T]he excise tax is a tax on the privilege of exercising the taxed incidents of ownership." (*City of Oakland v. Digre* (1988) 205 Cal.App.3d 99, 106 (distinguishing ad valorem property taxes from excise taxes on real property).) ("*Digre*") "[T]he principle that a tax on the exercise of one of the incidents of property ownership is not a tax on the property is well-established." (*City of Huntington Beach v. Superior Court* (1978) 78 Cal.App.3d 333, 339 (documentary transfer tax collected upon sale of real property was an excise tax and not a property tax).) It is equally well-established that Richmond, a charter city, has the authority to impose a variety of taxes, including excise taxes. (*See* Cal. Const. art. XI, § 5; *see also,* Section V, *infra*, for a more complete discussion of the home-rule doctrine.)

In *Ingels v. Riley*, our Supreme Court analyzed a challenge to the state's vehicle license fee (VLF),[5] which is based on a vehicle's value, as are ad valorem property taxes. Just as Chevron does here, the plaintiff in *Ingels* alleged the VLF was an impermissible property tax. The Court rejected that argument. The Court noted vehicles that are stored and not used on public roads are not subject to the VLF if the owner files a certificate of non-operation with the Department of Motor Vehicles. The VLF only applies to vehicles actually used on California's roads. Thus, the Court determined the VLF to be a lawful excise tax on the privilege of using a vehicle on public highways, and not a property tax on mere vehicle ownership. (15 Cal.2d at 160-1.)

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[4] **Black's Law Dictionary** (5th ed. 1979) defines "ad valorem" as "According to value. A tax imposed on the value of property. The more common ad valorem tax is that imposed by states, counties and cities on real estate. Ad valorem taxes, can, however, be imposed upon personal property; *e.g.*, a motor vehicle tax may be imposed upon the value of an automobile and therefore deductible as a tax. ...

[5] This is the familiar tax paid annually to the Department of Motor Vehicles and payment of which is evidenced by month and year stickers on vehicle license plates and which is deductible from federal income taxes. Like Richmond's business license tax, the VLF is denominated a "fee" but is, legally, a tax.

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By contrast, in *Digre*, Oakland imposed a tax on all owners of property within that city. Oakland argued its tax was an excise tax on the benefit of using land in the city. However, the tax applied equally to property owners whether they used their properties actively or allowed them to lie vacant. (205 Cal.App.3d at 106.) Accordingly, the Court found that the tax was a property tax rather than an excise tax on a particular use of property.

As detailed below, Measure T is similar to the VLF at issue in *Ingels* and, thus, is an excise tax and not a property tax as Chevron would have it.

B. Measure T Is An Excise Tax

Courts look to a variety of factors to determine whether a challenged tax is a property tax or an excise tax, including: 1) Whether the tax is described by its own terms as an excise or property tax, though labels are not dispositive (*Ingels v. Riley*, *supra*, 5 Cal.2d at 160); 2) whether the statute taxes property ownership without conditions (*City of Oakland v. Digre*, *supra*, 205 Cal.App.3d at 106); 3) whether the tax applies only if property is used in a particular manner (*Bromley v. McCough*, (1929) 280 U.S. 124, 136, 50 S.Ct. 46, 47 (gift tax provisions of federal estate tax valid excises and not unconstitutional direct taxes on property); 4) whether the tax is secured by a lien on the taxed property or results in a personal debt (*City of Huntington Beach v. Superior Court*, *supra*, 78 Cal.App.3d at 340-341); 5) whether the tax can be avoided without loss of ownership of the property (*Digre*, *supra*, 205 Cal.App.3d at 109); and 6) whether the tax is an ad valorem tax (*Ingels v. Riley*, *supra*, 5 Cal.2d at 160).

Analysis of these factors overlap, to some extent, but none suggests Measure T is a property tax. First, RMC Section 7.04.385 states:

> **7.04.385 Business License Fee Not a Property Tax**
> The payment of any amount under this chapter measure[d] by the value of any tangible or other property is not a tax on such property, but is a tax on the business undertaken by the taxpayer measured by the value of such property actually used in the business.

As *Ingels* teaches, although the City's legislative characterization of its tax is not dispositive, it is important in understanding the intent of Measure T and a factor supporting a conclusion that the tax

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is not a property tax. That is to say, the fact that the City did not intend to impose a tax on property is a significant factor in determining what the City, in fact, did.

As to the second and third factors, under RMC Section 7.04.025, adopted by Measure T, the value-based measured of the tax on manufacturers turns on the value of "materials used in the manufacturing process" – the tax is not an unconditional tax on title to property, but a tax conditioned on a particular use of property. Moreover, the tax is not on title to property at all. Use of consigned goods by a vendor or leased until sold would also affect the calculation of tax under Measure T under the language of RMC Section 7.04.025 – the concepts of "title" and "ownership" are nowhere present in the language or that section.

Thus, mere ownership or possession of the property triggers no tax liability. Only when material is used in a particular manner – *i.e.*, in manufacturing activity within Richmond's tax jurisdiction – is the tax triggered. Unlike Oakland's parcel tax challenged in *Digre* – and like the federal gift tax upheld in *Bromley* – a property owner can entirely avoid Measure T simply by avoiding use of that property in manufacturing in the course of doing business in Richmond.

If Measure T were a property tax, and preempted by Revenue & Taxation Code Section 219 as Chevron urges, the tax would be applicable to any manufacturing inputs located in the City, whether or not used in manufacturing there – *i.e.*, the tax would fall on Chevron's static inventory and not on the goods it puts to use in manufacturing. However, RMC Section 7.04.025 measures the excise tax on the privilege of doing business in Richmond only by the use, rather than ownership, of property.

As to the fourth factor, the tax Measure T imposes is not secured by a lien against the property the value of which is used to calculate the fee. Rather, RMC Section 7.04.400 provides:

> **7.04.400 Suit for recovery of unpaid sums.**
> Any sum required to be paid hereunder shall be deemed a debt to the City and any person who engages in any business required to be licensed hereunder without obtaining a license so to do shall be liable to an action by and in the name of the City in any court of competent jurisdiction for recovery of any such sum.

Thus, Measure T creates not a lien on property, but a personal debt. A true property tax, however, is secured by the property itself, not by an action against the taxpayer. (*City of Huntington Beach v.*

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Superior Court, supra, 78 Cal.App.3d at pp. 340-341) (real property transfer tax was personal obligation of buyer and seller and did not result in lien on property sold and was for that reason and others a valid excise tax, rather than an invalid property tax). Thus, this factor, too, supports the conclusion that Measure T is an excise tax, not a property tax.

As to the fifth factor, tax liability for manufacturers under Measure T can be avoided without loss of ownership of the property. Like the VLF approved by the Supreme Court in *Ingels* as an excise tax on the privilege of using public roads made inapplicable to vehicles which are not operated, a business can avoid Measure T with respect to property while retaining title to it simply by refraining from using that property in the manufacturing process within Richmond's tax jurisdiction. It is unlike the tax invalidated in *Digre* in this respect, for the Oakland parcel tax there could not be avoided by any means other than sale of the property.

Finally, as to the sixth factor, although Measure T taxes manufacturers on the basis of the value of goods used in manufacturing, it nevertheless is not an ad valorem property tax. Excise taxes are commonly based on the value of property, but an excise tax "does not become a property tax simply because it is proportioned in amount to the value of the property used in connection with the privilege which is taxed." (*Ingels v. Riley, supra*, 5 Cal.2d at 160.) Measure T imposes an excise tax on the privilege of doing business within Richmond's tax jurisdiction, not mere ownership of property. Those who possess manufacturing inputs, but do not use them in manufacturing with respect to the Richmond marketplace, are not subject to Measure T.

Measure T is an excise tax under every factor California's appellate courts have identified as relevant to this inquiry. As the California Supreme Court ruled during the Great Depression in an opinion considered so basic that it was rendered *per curium*:

> The contention made by the appellants that a use tax, such as is here involved, is in fact a tax on ownership of property and is not a tax on the privilege of use, storage or consumption, is not a new one. It has been made in one form or another in attacking nearly every use tax statute that has been enacted. There is a long line of authorities, most of them of recent date, holding that use taxes, including taxes imposed on the privilege of use, or storage, or withdrawal from storage, are excise taxes and not property taxes.

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(Douglas Aircraft Co. v. Johnson, (1939) 13 Cal.2d 545, 551 (per curium) (state use tax not subject to limitations on property taxes).) Because Measure T is an excise tax, Revenue & Taxation Code Section 219's exemption of business inventories from county property taxes is simply irrelevant. Chevron must join the long-line of disappointed taxpayers who sought to shirk their fair share of the burden of funding government services by trying to characterize a lawful excise tax as an unlawful property tax.

C. The Policy Considerations Chevron Cites as Underlying the Exemption of Inventories from County Property Taxes Are Inapposite

In support of its argument that Measure T is a preempted property tax, Chevron cites a number of policy considerations it claims animate Revenue & Taxation Code Section 219. Those considerations do not alter the conclusion that Measure T is a lawful excise tax.

Measure T is measured on the value of the inputs to manufacturing whether the inputs are warehoused in the state or not, so there is no incentive to outsource warehousing to other states. Similarly, Measure T does not encourage manufacturers to deplete their inventory just before the tax lien date, and thereby avoid the tax, because, again, mere ownership or possession of property does not trigger liability – the tax is measured by the value of inputs to manufacturing with respect to business in Richmond over the course of a year, rather than on any lien date.

Chevron's discussion of the purpose of Revenue & Taxation Code Section 219 comes from *Amdahl Corp. v. County of Santa Clara* (2004) 116 Cal.App.4th 604, which involved a challenge to a County property tax on business property. There, Santa Clara County levied escapement assessments pursuant to Revenue & Taxation Code Section 531 against spare parts used by a computer manufacturer in its warranty repairs and extended service contract operations.[6] An examination of the purpose of Revenue & Taxation Code Section 219 was proper since the challenged tax was undeniably a property tax assessed as such by the County (*i.e.*, the County never

[6] Revenue & Taxation Code Section 531 requires county tax assessors to levy an "escapement assessment" on property that has otherwise escaped assessment on earlier lien dates. Section 531 is in the Division of the Revenue & Taxation Code that deals specifically with property taxes, as opposed to use or other excise taxes.

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contended the assessment was a use or excise tax) to which Revenue & Taxation Code Section 219's exemptions expressly apply.

Such is not the case here. Chevron's characterization of Measure T as a property tax subject to Revenue & Taxation Code Section 219's inventory exemption is untenable under the long line of court decisions discussed above. Measure T is an excise tax within the City's charter city power of taxation under Article XI, § 5 of the California Constitution and is not preempted by Revenue & Taxation Code Section 219.

V. Measure T is Not Preempted by the State Sales and Use Tax

Richmond is a charter city. Article XI, § 5 of the California Constitution affirmatively grants charter cities supremacy over their "municipal affairs." This is commonly referred to as the "home rule" provision of our Constitution and was adopted in 1879 following egregious interference by the Legislature, then dominated by the Southern Pacific Railroad, in local government finance.

Richmond's charter city status is critical to the evaluation of Chevron's argument that Measure T is preempted by the Bradley-Burns Uniform Local Sales and Use Tax law. More than a century ago, the California Supreme Court observed that "the power of taxation is a power appropriate for a municipality to possess" and that such proposition was "too obvious to merit discussion." (*Ex Parte Braun* (1903) 141 Cal. 204, 209 (upholding Los Angeles' business license tax against claim it was required to comply with restrictions on such taxes established by state statute).) This principle has been frequently reiterated by our courts. (E.g., *Weekes v. City of Oakland* (1978) 21 Cal.3d 386, 392 (charter city's employee license fee based on gross receipts earned within the city was not an income tax prohibited by Rev. & Tax Code Section 17041.5).) In *Weekes*, the California Supreme Court reject the plaintiff's challenge to the charter city's business license tax as illegal under state law:

> [T]he power to raise revenue for local purposes is not only appropriate but, indeed, absolutely vital for a municipality. [Citations] Moreover, the power to tax for local purposes clearly is one of the privileges accorded chartered cities by the home rule provision of the California Constitution.

(*Id.*)

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State law prevails over local legislation enacted pursuant to a charter city's home rule powers only in narrow circumstances. To prevail in such a claim, a plaintiff must demonstrate that (i) an actual conflict exists between state law and the challenged local ordinance, (ii) that the state expressly or impliedly intended to fully occupy the field encompassed by the local ordinance and (iii) the subject matter of the ordinance must be of statewide concern and, therefore, not a "municipal affair." (*See*, e.g., *Fielder v. City of Los Angeles* (1993) 14 Cal.App.4th 137, 143.)

In *Fielder*, the plaintiff challenged Los Angeles' real property transfer tax under Proposition 62, a statutory initiative that bars additional taxes of that type. Gov. Code § 53725(a). Los Angeles' tax applied to conveyances of real property and was due upon sale. (*Id.* at 140.) The Supreme Court observed:

> Since charter cities such as [Los Angeles] have sovereign power over municipal affairs [citation], subdivision (a) of Government Code section 53725 does not necessarily restrict the power of a charter city to impose a transaction tax such as that enacted [by Los Angeles].

(*Id.* at 143).

The Court recognized that, for at least the two decades preceding the decision, the Legislature had expressed significant interest in easing the property tax burden in the state. (*Id.* at 144.) Nevertheless, the Court concluded that Los Angeles' transfer tax conflicted directly with state law, but did not intrude on a matter of statewide concern sufficient to warrant ignoring the home rule authority of a charter city. It reaching this conclusion, the Court noted, among other things, that: (1) the transfer tax was an excise tax rather than a property tax; (2) it had no impact on the state's goal to control ad valorem real property taxation (even though the challenged tax was measured by the value of the property sold); (3) there was no indication the state had tax rate parity, as opposed to a ceiling on real property taxation *in toto*; (4) the tax was purely local in its effect; and, (5) the loss of revenue to the charter city from striking down the tax would "not leave [Los Angeles'] taxing authority substantially intact." (*Id.* at 145-56.)

As set forth below, Chevron establishes none of the three *Fielder* factors here.

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A. **No Actual Conflict Exists Between Measure T and Sales Tax Laws**

First, there is no actual conflict between Measure T and the State Sales and Use Tax law, Sections 6001 *et seq.* That statute imposes the state's sales and use tax which benefits the state treasury. The Bradley-Burns Uniform Local Sales and Use Tax Law, Revenue & Taxation Code Sections 7200 *et seq.* authorizes cities and counties to impose local sales and use taxes, limited to 1%. To avoid disadvantaging California retailers who compete with out-of-state retailers, both the state and local sales and use taxes impose a "use tax" on goods purchased at retail outside California's tax jurisdiction and brought into California for use. (*Rivera vs. City of Fresno* (1971) 6 Cal.3d 132, 138; *Bank of America vs. State Bd. of Equalization* (1962) 209 Cal.App.2d 780, 791-2.)

Significantly, Measure T is not a "use tax" as the State Sales and Use Tax Law defines the term. Revenue & Taxation Code Section 6201 defines the use tax it imposes as follows:

> An excise tax is hereby imposed on the storage, use, or other consumption in this state of tangible personal property purchased *from any retailer* at the rate of 3 3/4 percent on and after October 1, 1973, and ... to and including March 31, 1974, and at the rate of 4 3/4 percent thereafter. (Emphasis added.)

Revenue & Taxation Code Section 7203 is to the same effect for local use taxes imposed under Bradley-Burns. Thus, for the value of goods Chevron consumes with respect to the business it conducts in Richmond to be subject to the state or local use tax, Chevron must demonstrate that it purchase those goods from a "retailer." Revenue & Taxation Code Section 6015 defines "retailer," in relevant part, as:

> (a) "Retailer" includes:
> (1) Every seller who makes any retail sale or sales of tangible personal property, and every person engaged in the business of making retail sales at auction of tangible personal property owned by the person or others.

Unless Chevron purchase the Saudi crude oil it refines and the industrial gases and other inputs to its refining processes in Richmond at the local 7-11, those goods are not subject to either the state or the local use tax and there is no conflict between Measure T and either the State Sales and Use Tax Law or Bradley-Burns. This court need not speculate on the inventories of 7-11 stores in Richmond, however, because Chevron admits its inputs to manufacturing are obtained at wholesale. (Complaint in C09-00491, ¶ 21; Motion for Judgment in Pleadings, 22:21-22.) Given

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the volume of petroleum products produced at the Chevron facility, this is necessarily the case.

As there is no actual conflict between Measure T and either the State Sales and Use Tax Law or Bradley-Burns, there is no need for this Court to reach the other two prongs of the *Fiedler* analysis of claims that a state law preempts charter city legislation.

B. The Legislature Disclaimed Intent to Preempt Business License Excise Taxes

In any event, the second prong of the *Fielder* analysis of state preemption of charter city legislation independently defeats Chevron's argument. There is no stated intent of the Legislature to preempt excises taxes like that imposed by Measure T. Indeed, Bradley-Burns is expressly to the contrary. Revenue & Taxation Code Section 7203.5(f) states:

> Nothing in this section shall be construed as prohibiting the levy or collection by a city, county, or city and county *of any other substantially different tax* authorized by the California Constitution or by statute or by the charter of any chartered city. (Emphasis added.)

Measure T is "substantially different" from a use tax on goods used in California but purchased at retail outside its tax jurisdiction, because – as detailed above – it is an excise tax on the privilege of doing business in the City's tax jurisdiction. Moreover, and critically, Measure T is imposed without respect to purchase from a retailer, the in-state or out-of-state situs of the purchase, ownership of property, or whether sales taxes were paid on the goods.

Indeed, the *Rivera* case Chevron cites *rejected* a claim that the Bradley-Burns law preempted a charter city's utility user's tax even though the tax was based on the value of utilities consumed. (*Rivera* v. *City of Fresno* (1971) 6 Cal.3d 132, 139.) The *Rivera* plaintiff alleged:

> [T]he Legislature has enacted a uniform statewide system of sales and use taxation and has declared its intent to preempt that field, that such a system is a matter of statewide concern rather than a local municipal affair, and that therefore the Fresno utility users' tax must yield to the Legislature's enactment.

(*Id.* at 135.)

The Court found the utility users tax to be substantially different than the "use tax" defined by Bradley-Burns. (*Id.*) Gas delivered through mains or pipes had not been taxed by the state, though it had been regulated significantly otherwise. (*Id.* at 138.) This ruling issued even as the

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Court acknowledged that it was the customer's "use" of the utilities that triggered the tax..

The same result is compelled here. Cities, both general law (Cal. Gov. Code § 37101) and chartered (Cal. Const. art. XI, § 5), have long had the power to impose business license taxes for both revenue and regulatory purposes. *Ex parte Braun, supra*, 141 Cal. 204, dates from 1903 and upheld Los Angeles' charter city power to impose a business license tax that varied from the requirements of state legislation applicable to general law cities. Local business license taxes have historically been measured in various ways, each calculated to fairly reflect the benefit the taxed business receives from its economic activity in the taxing city and the burden that activity places on municipal services.

For example, in *Weekes*, the plaintiff challenged Oakland's employee license fee, which was measured based on the gross receipts an employee received for services performed within the city. The Supreme Court noted that "Oakland's license fee, though closely tied to 'income or [a] part thereof' in terms of the designated *measure* of tax liability, bears no immediate, compelling resemblance to the more familiar income taxation models which [Revenue & Taxation Code] section 17041.5 unquestionably purports to bar." (21 Cal.3d at 393.) It went on to conclude that the measure Oakland used "is a proper means of meeting constitutional requirements by scaling the tax to 'the quantum of business actually done in the taxing jurisdiction.'" (*Id.* at 396-97, citing *City of Los Angeles v. Shell Oil* (1974) 4 Cal.3d 108, 124 and *General Motors Corp. v. City of Los Angeles* (1971) 5 Cal.3d 229, 238-239 (business license tax based on gross receipts from business activity in the City); *see also Arnke v. City of Berkeley* (1960) 185 Cal.App.2d 842 (business license tax measured by number of employees in the City).)

The characterization of the challenged tax as a use tax, another excise tax, or an ad valorem property tax is central to determination whether the tax at issue is "substantially different" from the Bradley-Burns sales and use tax within the meaning of Revenue & Taxation Code Section 7203.5(f). That certain taxes are measured by an employee's gross wages, a business' gross receipts, or its number of employees does not convert these excise taxes on the privilege of doing business in a taxing jurisdiction into a preempted local income tax or payroll tax anymore than the measure of Vehicle Licenses Fees by the value of the vehicle on which they are imposed makes such fees illicit

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property taxes. (*Ingels v. Riley, supra*, 5 Cal.2d 154, 161 (state vehicle license fee is not a property tax on vehicles but an excise tax on the privilege of using the State's roadways measured by the value of the vehicle).)

Also instructive is the California Supreme Court's decision in *A.B.C. Distributing Co., Inc. v. City and County of San Francisco* (1975) 15 Cal.3d 566. There, a wholesale liquor distributor contended that a charter city's 1% payroll expense tax was actually a license or occupation tax that article XX, § 22 of the California Constitution authorized only the Department of Alcoholic Beverage Control to collect. (*Id.* at 570.) The Court rejected the claim, holding that article XX, § 22 did not strip a charter city of its taxing authority under the home-rule doctrine. (*Id.* at 572-73.)

The plaintiff also alleged that the payroll tax was preempted by Rev. & Tax. Code Section 32010, which provides that taxes imposed on alcoholic beverages under that part "are in lieu of all county, municipal, or district taxes on the sale of beer, wine or distilled spirits." The Court observed that although the payroll tax would be paid with revenue earned from the sale of alcoholic beverages, the tax was nonetheless legal. In so holding, the Supreme Court specifically cited Rev. & Tax. Section 7203.5's authorization for cities to levy taxes "substantially different" from the Bradley-Burns local sales and use tax.

The Court also rejected the plaintiff's argument that San Francisco's payroll tax was a preempted income tax. Again, the fact that the tax was measured by payroll expenses did not make it an income tax. It was instead an excise tax on the employer's business activity in San Francisco and "a valid tax measure authorized by the 'home rule' provisions of the state Constitution [citation] which impliedly empower local governmental agencies to levy taxes for general revenue purposes." (*Id.* at 576.)

Similarly, that Richmond's business license tax is measured by the value of inputs to manufacturing does not mean it is a "use" tax. A business license tax, an excise tax that municipalities undeniably may impose, is a "substantially different tax" than the Bradley-Burns sales and use tax and the Legislature therefore did not intend to preempt such taxes in adopting the Bradley Burns statute.

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C. The Business License Excise Tax Does Not Implicate Statewide Concerns

Finally, reaching the third prong of the *Fielder* preemption analysis, Chevron identifies no matter of statewide concern implicated by Measure T. Measure T is an excise tax, and neither an ad valorem property tax nor a use tax. Moreover, as noted above, Measure T does not create incentives to relocate warehousing out-of-state or encourage depletion of inventories before a tax lien date, the concerns which led to the adoption of Revenue & Taxation Code Section 219. Its effect is purely local – especially in light of the apportionment process discussed below which limits the tax to economic activity within Richmond's jurisdiction. Finally, invalidating Measure T would substantially interfere with Richmond's charter city taxing authority, well in excess of any stated interest of the Legislature in regulating ad valorem personal property taxes and use taxes.

Identical considerations in the *Fielder* case, *supra*, led that court to find that Proposition 62's statutory bar on additional, local property transfer taxes did not apply to charter cities. 14 Cal.App.4th at 145-46. The taxation of businesses operating in Richmond to fund municipal services on which those businesses rely is a municipal affair. (*Ex parte Braun, supra*, 141 Cal. 204.) Chevron has not met its burden to prove a contrary state interest of sufficient weight to justify preemption of Measure T.

Chevron fails to satisfy any of the three elements of the *Fielder* analysis required to prove the Legislature intended to, and did, preempt excise taxes on the privilege of doing business in a city such as Measure T. Its claim that Measure T is preempted by the State Sales and Use Tax Law and by the Bradley-Burns Uniform Local Sales and Use Tax Law must therefore fail.

VI. Measure T Does Not Violate the Internal Consistency Test of the Commerce Clause

The U. S. Supreme Court has articulated a four-prong test to determine whether a local tax violates the federal Commerce Clause. Under that standard, a local tax does not violate the Commerce Clause if it (1) is applied to activity with a substantial nexus with the taxing authority, (2) is fairly apportioned, (3) does not discriminate against interstate commerce, and (4) is fairly related to services provided by the taxing authority. (*Complete Auto Transit Inc. v. Brady* (1977) 430 U.S. 274, 279, 97 S.Ct. 1076, 1083-84; *see also Yamaha Corp. of America v. State Board of*

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Equalization (1999) 73 Cal.App.4th 338, 366.) A tax is properly apportioned if the taxing jurisdiction taxes only its fair share of an interstate transaction. (*See Oklahoma Tax Commission v. Jefferson Lines, Inc.* (1995) 514 U.S. 175, 183-84, 115 S.Ct. 1331, 1337-38.)

To evaluate a claim of malapportionment, a court must determine first, whether the tax is "internally consistent," and whether it is "externally consistent." (*Id.* at 184, 115 S.Ct. at 1338.) A tax is internally consistent if imposition of the same tax by all other jurisdictions would add no burden to interstate commerce that intrastate commerce would not also bear. (*Id.* at 183-85, 115 S.Ct. at 1337-39.) "A failure of internal consistency shows as a matter of law that a State is attempting to take more than its fair share of taxes from the interstate transaction, since allowing such a tax in one State would place interstate commerce at the mercy of those remaining States that might impose an identical tax." (*Id.* at 185, 115 S.Ct. at 1338.)

Here, as the parties' have stipulated, the only Commerce Clause issue before the court is whether Measure T violates the internal consistency requirement. Chevron's claims that Measure T violates the external consistency clause and is not fairly related to the services Richmond provides are to be addressed later in this litigation.

A. Measure T, as Interpreted and Enforced by the City, Provides for Fair Apportionment of the Business License Tax and, Thus, Satisfies the Internal Consistency Test

Contrary to Chevron's claims otherwise, Measure T does not violate the internal consistency test. Indeed Richmond has interpreted Measure T in light of the dictates of the Commerce Clause (as RMC Section 7.04.380 requires it to do) and issued the Enforcement Policy quoted at the outset of this brief to apportion its business license tax to manufacturing activity and employment pertinent to business activity in Richmond, whether or not located there. The apportionment and definitional features of the Enforcement Policy ensure Richmond does not tax more than its fair share of intercity or interstate commerce and that is does not advantage or disadvantage those with manufacturing or employment in the City as compared to those who do business there from manufacturing and employment locations outside the City.

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Though Chevron virtually ignores the Enforcement Policy, referring to it only by footnote (Chevron Motion, p. 7, fn. 3) and questioning its validity without citation to authority, this administrative interpretation is central to the internal consistency analysis of Measure T. The Enforcement Policy defines the employment and manufacturing activity subject to tax as that "which contributes to business engaged or conducted in the City" whether or not located there. It states, in part:

> 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.

(Req. for Jud. Not., Exh. 1, Enforcement Policy, Section 3A. The Enforcement Policy then requires a taxpayer entitled to apportionment to propose an apportionment to the City with documents sufficient to support the proposal. (Req. for Jud. Not., Exh. 1, Enforcement Policy, Section 3B.)

Assuming that all jurisdictions enforce a tax scheme identical to Measure T as the internal consistency test requires, then each jurisdiction would also apportion its tax on an intercity or interstate business only to the extent of its business activity within the jurisdiction and limit the measure of employee head counts and value of inputs to manufacturing to those "which contribute to business engaged or conducted" in the taxing jurisdiction. Each agency would tax all businesses – local and otherwise – based on that portion of their economic activity fairly apportioned to the agency and that fair portion would trigger either an employee-head-count calculation or a value-of-inputs calculation and no agency would be exempt from the tax based on the location of its manufacturing and employment centers. The availability of similar apportionment mechanisms, designed to eliminate the risk of undue burden to interstate commerce, has repeatedly been found to satisfy *Complete Auto's* fair apportionment test. (*Complete Auto Transit*, *supra*, 430 U.S. 274, 279; cf., e.g. *Goldberg v. Sweet* (1989) 488 U.S. 252, 263-64, 109 S.Ct. 582, 589-91 (upholding Illinois telephone tax on interstate telephony); *Yamaha Corp. of Am. v. State Board of Equalization*, *supra*, 73 Cal.App.4th at 368) (apportionment permitted application of California's state sales and use tax on interstate sales).

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B. Measure T Is Demonstrably Internally Consistent

These abstract concepts can be best understood in light of some hypotheticals. Let us assume Able Builders manufacturers widgets only in Richmond, using 2 employees and $100,000 in materials per year. No apportionment would apply because it is not engaged in inter-city or inter-state commerce and its tax liability would be the greater of ¼ of 1% of $100,000 or $2500 under RMC Section 7.04.025 (the inputs measure) or $234.10 (base fee) plus 2 employees times $46.80 (per capita fee) or $327.70 (the employee measure) under RMC Section 7.04.030. Thus its tax liability would be $2,500.

Let us next assume Better Builders manufactures widgets in Berkeley but maintains two employees in Richmond, and consumes $200,000 worth of inputs to manufacturing. Better Builders demonstrates to the satisfaction of the Richmond Tax Collector that half of its business activity is attributable to Richmond based on the volume of its activity there. In this case, the inputs calculation is ¼ of 1% of the portion of the inputs to manufacturing "which contributes to" business in Richmond – *i.e.*, one-half of $200,000 or $100,000 – so this measure of tax is ¼ of 1% of ½ of $200,000 or $2,500. The employee calculation is also $234.10 (base fee) plus 2 employees (the part of its workforce fairly apportioned to Richmond) times $46.80 (per capita fee) or $327.70. Thus its tax liability would also be $2,500 notwithstanding that it does not manufacture in Richmond, but does business there.

Let us next assume Capable Builders manufactures widgets in Berkeley and maintains 6 employees there, and none in Richmond, and consumes $300,000 in inputs to manufacturing but demonstrates to the satisfaction of the Richmond Tax Collector that one-third of its business is fairly attributable to Richmond based on its volume of activity there. Now the inputs calculation is ¼ of 1% of ⅓ of $300,000 or $2,500. The employee calculation is also $234.10 (base fee) plus 2 employees (one-third of 6) times $46.80 (per capita fee) or $327.70. Thus its tax liability would also be $2,500 notwithstanding that it does not manufacture in Richmond or employ anyone there, but does engage in business there through sales or otherwise.

Let us now assume Dependable Builders manufactures widgets in Richmond and elsewhere, has 8 employees in Richmond and consumes $400,000 in manufacturing inputs each year, but

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demonstrates to the satisfaction of the Richmond Tax Collector that only one-fourth of its business is attributable to its volume of activity in Richmond. Its tax calculation would be as follows: The inputs calculation is ¼ of 1% of ¼ of $400,000 or $2,500. The employee calculation is also $234.10 (base fee) plus 2 employees (one-fourth of 8) times $46.80 (per capita fee) or $327.70. Thus its tax liability would also be $2,500.

Finally, let us assume Excellent Builders manufactures widgets only in Richmond, has 10 employees there and consumes $500,000 in inputs to manufacturing per year, but demonstrates to the satisfaction of the Richmond Tax Collector that just one-tenth of its business activity is fairly apportioned to Richmond. Its tax liability would be calculated as follows: The inputs calculation is ¼ of 1% of 1/10 of $500,000 or $125. The employee calculation is $234.10 (base fee) plus 1 employee (one-tenth of 10) times $46.80 (per capita fee) or $280.90. Thus, although it is the largest business of the five, does all of its manufacturing in Richmond and maintains all of its employees there, its tax liability would $280.90 because it does so little business there.

These hypotheticals can be summarized in the following table:

Builder	Mfg Inputs	Richmond Employees	Non-Richmond Employees	Richmond Apportionment	Input Measure	Employee Measure	Tax Due
Able	$100,000	2	0	100%	.0025x $100,000= $2500	$234.10 + 2 x $46.80 = $327.70	$2500
Better	$200,000	2	0	50%	.0025x.5x $200,000 = $2500	$234.10 + 2 x $46.80 = $327.70	$2500
Capable	$300,000	0	6	33%	.0025x.33x $300,000 =$2,500	$234.10 + .33 x 6 x $46.80 = $327.70	$2500
Dependable	$400,000	8	0	25%	.0025x.25x $400,00 =$2500	$234.10 + .25 x 8 x $46.80 = $327.70	$2500
Excellent	$500,000	10	0	10%	.0025x.1x $500,000= $125	$234.10 + .1 x 10 x $46.80 = 280.90	$280.90

Thus Measure T does not favor or disfavor business located in whole or part in Richmond as compared to those located elsewhere. The crucial determination of tax liability is the volume of the

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taxpayer's business activity fairly apportioned to Richmond. The City requires those taxpayers who claim a right to apportionment to propose any reasonable apportionment that can be supported by "detailed financial information" and that fairly measures "the volume of its business activity in the City" as compared to its total business activity. This apportionment approach is the key to avoiding discrimination in favor of or against inter-city or inter-state commerce, is required by the Commerce case law, would resolve Chevron's concerns and has not been attempted by Chevron.

Chevron's provides a contrary hypothetical at pp. 14-15 of their brief. By ignoring the Enforcement Policy, that example mistakenly assume that a business with locations in two jurisdictions, with manufacturing located at only one of the two, would pay the tax measure by the value of inputs to manufacturing only in the jurisdiction where the manufacturing takes place, and would be liable for the employee head tax in the other jurisdiction. As the Better Builders and Capabable Builders hypotheticals above demonstrate, however, the Enforcement Policy requires otherwise. In those case, although no manufacturing takes place in Richmond, the tax due Richmond is nevertheless based on the value of inputs to manufacturing to the extent that manufacturing is with respect to the portion of the firm's business in Richmond.

The parties have reserved for later resolution whether the administrative interpretation and Enforcement Policy, as applied, satisfy the external consistency test. However, for purposes of Chevron's current facial claim that Measure T necessary fails the internal consistency test, the Enforcement Policy eviscerates Chevron's argument.

C. The Cases Chevron Relies On Are Distinguishable

Chevron claims several authorities support its contention that Measure T violates the internal consistency requirement of Commerce Clause jurisprudence. Yet each of the taxes challenged in those cases is meaningfully distinguishable from Measure T.

For example, in *General Motors Corp. v. City of Los Angeles* (1995) 35 Cal.App.4th 1736 ("GM I"), Los Angeles' business tax was measured by gross receipts from sales. (*Id.* at 1741.) The calculation method distinguished between businesses (like General Motors) that both manufactured and sold cars in the city, which were taxed under the "Manufacturing Provision," and those that

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manufactured elsewhere but sold such goods in the city, which were taxed under the "Selling Provision." (*Id.* at 1752, fn. 6.) These distinctions were reinforced in administrative interpretations and regulations promulgated under the tax ordinance. (*Id.* at 1743.) Businesses that manufactured *and* sold good within Los Angeles were exempt from paying under the Selling Provision and taxed under the Manufacturing Provision alone.

The Court of Appeal determined Los Angeles' taxing scheme violated the internal consistency clause because manufacturers outside the city were not exempt from the Selling Provision. Thus, in the hypothetical world were all agencies have the same tax regimes that internal consistency analysis requires, firms that manufacture in one city and sell in another pay two taxes while firms that manufacture and sell in only one city pays but one.

General Motors successfully challenged San Francisco's identical taxing scheme to that invalidated in the Los Angele case. (*General Motors Corp. v. City & County of San Francisco* (1999) 69 Cal.App.4th 448, 453-54.) ("*GM II*") Unlike the provisions as interpreted and applied in *GM I and GM II*, Measure T does not exempt local manufacturers from either of the alternate measures[7] of tax for manufacturers; nor does it exempt non-local manufacturers from either of alternative measures. So long as economic activity is within Richmond's tax jurisdiction – i.e., the manufacturing is with respect to the conduct of business in Richmond – Measure T applies in a uniform manner. Both strictly local manufacturers and those that also maintain facilities elsewhere pay the tax, and Measure T does not discriminate between the two, each is taxes on the fair apportionment of its business activity in Richmond alone.

Union Oil Co. of Cal. v. City of Los Angeles (2000) 79 Cal.App.4th 383 is also distinguishable. There, Los Angeles's business license tax was calculated as a gross receipts tax on businesses operating there, and the City later adopted an alternate payroll business license tax. The payroll tax was intended to reach taxpayers who had been exempt from the gross receipts business license tax. (*Id.* at 387.) Those that paid the gross receipts tax were explicitly exempt from the payroll tax and vice versa. (*Id.*) As a result, the Court determined that local businesses that paid the

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[7] Again, Measure T requires a business to pay the greater of either the employee-based calculation or the input value calculation. RMC § 7.04.025.

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business license tax (because it had gross receipts from sale there) did not have to pay the payroll tax (even though it had employees there), while others engaged in intercity and interstate commerce were obligated to pay the payroll tax in Los Angeles and the gross receipts from sales in a hypothetical alternative city where it had sales, but not payroll. (*Id.* at 390.) Again, in the hypothetical world where all tax regimes are the same, Los Angeles' payroll and gross receipts alternatives favored those who had both sales and payroll in the city, creating an incentive to move jobs there, and discriminating against inter-city and inter-state commerce.

Critically, these challenged taxing schemes had no mechanism by which to apportion either the business license tax or the payroll tax to reflect the taxpayer's business activity pertinent to the taxing jurisdiction and to ensure each taxing jurisdiction taxed only its fair share of the interstate activity.

Likewise, the gross receipts / payroll tax scheme at issue in *Macy's Dept. Stores, Inc. v. City and County of San Francisco* (2006) 143 Cal.App.4th 1444, had no method for a taxpayer to seek apportionment or to measure payroll and gross receipts with respect to activity in the City rather than actually occurring there.[8] In the absence of such a mechanism, the taxing schemes in those matters violated the internal consistency clause.

D. Chevron's Attack on the City's Enforcement Policy Fails

Chevron claims, in passing, that the validity of Richmond's Enforcement Policy is uncertain. Chevron, however, provide no support for its contention. Chevron cites no authority establishing that the City improperly delegated authority to city staff to interpret and enforce Measure T, nor has Chevron even begun to establish that such a delegation of authority was impermissible. Perhaps it means to save its arguments for reply, but the law is plain that local agencies can (and practically must) delegate to their tax collectors authority to interpret, administer and enforce their taxes

[8] Though Chevron cites *Macy's* for the proposition that a business license tax based on the greater of either payroll expense or gross receipts necessarily violates the Commerce Clause, the Court of Appeal was not presented with such question. That case assumed a Commerce Clause violation and determined only the appropriate remedy – favorably to the City, as it happens. (143 Cal.App.4th at 1450.)

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consistently with legislative direction – such as the rule of RMC Section 7.04.380 that Measure T be enforced in a way that respects constitutional requirements.

Measure T expressly authorizes the City's Tax Collector to make such rules and regulations as may be necessary to aid or assist in its enforcement. (RMC § 7.04.320.) That a city can delegate administrative execution of an ordinance such as the City's Measure T is well-established. As but one example, in *Kugler v. Yocum*, (1968) 69 Cal.2d 371, 373, the Supreme Court analyzed whether a city unlawfully delegated legislative power by adopting an ordinance which decreed that the salaries of certain city employees should be no less than the average of those of adjoining local governments. The Court held the ordinance was valid because the legislative power had already been expressed and exerted in the enactment of the ordinance. Future adjustments to salaries were no more than execution of that policy.

The Supreme Court noted in *Kugler* that, while the essentials of the legislative function are the determination and formulation of the legislative policy, attainment of those ends, including how and by what means they are to be achieved, may constitutionally be left to others. The Court further noted that the Legislature, after declaring a policy and fixing a primary standard, may "*confer upon executive or administrative officers* the power to fill up the details by prescribing administrative rules and regulations to promote the purposes of the legislation and to carry it into effect." (*Id.* at 376 (emphasis added) (internal citations omitted), *see also*, *Select Base Materials, Inc. v. Board of Equalization* (1959) 51 Cal.2d 640, 647-48.)

Similarly, in *Pacific Legal Foundation v. Brown* (1981) 29 Cal.3d 168, 201, the Supreme Court upheld provisions of the State's Employer-Employee Relations Act empowering the State Personnel Board. The Court found that a challenged administrative policy adopted by the Board did not involve fundamental policy determinations, but rather related to the administrative details of the statute, and concluded that such delegations to a public official does not contravene any constitutional requirement. A statutory scheme may explicitly or implicitly delegate this interpretive or 'gap-filling' authority to an administrative agency. (*Moore v. California State Bd. of Accountancy* (1992) 2 Cal.4th 999, 1013-14.) Likewise, an "administrative agency is not limited to the exact provisions of a statute in adopting regulations to enforce its mandate. 'The absence of any

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specific [statutory] provisions regarding the regulation of [an issue] does not mean that such a regulation exceeds statutory authority....' The [agency] is authorized to "'fill up the details'" of the statutory scheme." (*Ford Dealers Assn. v. Department of Motor Vehicles* (1982) 32 Cal.3d 347, 362 (upholding licensing and dealer regulations of the DMV) (citations omitted).)

Of course, what the City Council may do by ordinance, the City's voters may do by initiative, for the initiative power is at least co-extensive with the power of the legislative body.[9] As the Supreme Court explained in *Rossi v. Brown*((1995) 9 Cal.4th 688, 695:

> The initiative and referendum are not rights 'granted the people, but ... power[s] reserved by them. Declaring it 'the duty of the courts to jealously guard this right of the people' [citation], the courts have described the initiative and referendum as articulating 'one of the most precious rights of our democratic process' [citation]. '[I]t has long been our judicial policy to apply a liberal construction to this power wherever it is challenged in order that the right not be improperly annulled. If doubts can reasonably be resolved in favor of the use of this reserve power, courts will preserve it.' (*Associated Home Builders etc., Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 591, fn. omitted; *see also Brosnahan v. Brown* (1982) 32 Cal.3d 236, 241.) (abridgements and omission of citations by Supreme Court).

Here, both the City Council, which adopted RMC Section 7.04.320, and the voters who framed Measure T to amend Chapter 7.04 without displacing that section, plainly intended to grant the Tax Collector rule-making power. That they may do so is unquestionable under the authorities cited above.

The rules the Tax Collector adopted via the Enforcement Policy serves as a "gap-filler" to "fill in the details" of the business license tax ordinance (RMC chapter 7.04) as amended by Measure T. Section 7.04.320 states, in plain English that:

> 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.

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[9] Although Richmond is a charter city, its charter references general law with respect to the voters reserved powers of recall, initiative and referendum: Richmond City Charter, Article VIII, Section 1: "The powers of recall, initiative and referendum shall be exercised in accordance with the constitution and general laws of the State of California."

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Further, that ordinance also demands that the business license tax, as amended by Measure T, be interpreted and amended so as to respect the demands of our state and federal Constitutions:

> Nothing herein [*i.e.*, in RMC chapter 7.04] shall be construed as requiring a license or the payment of a license fee, or the doing of 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.

(RMC § 7.04.380). The Enforcement Policy, then, is intended to follow precisely the dictates of RMC Sections 7.04.320 and 7.04.380 by adopting "such rules and regulations as may be necessary to aid or assist in enforcement of Measure T" and to do so consistently with the requirements of our Constitutions. That Chevron would prefer to ignore the Enforcement Authority is not persuasive support for its naked claim that the policy is unauthorized.

In *Consumers Union of United States, Inc. v. California Milk Producers Advisory Board*, the First District Court of Appeal considered the Fair Political Practices Commission's ("the FPPC's") interpretation of the Political Reform Act (commonly known as Proposition 9) in the FPPC's regulations. Proposition 9 was an initiative measure adopted in 1974 and established the FPPC in the wake of the Watergate scandal to administer and implement the measure. (*Consumers Union of United States, Inc. v. California Milk Producers Advisory Board* (*Consumers Union*) (1978) 82 Cal.App.3d 433, 436) (upholding FPPC regulation permitting industry representatives to serve on regulatory boards provided that their financial interests were disclosed and they abstained when required by conflict of interest rules).[10]

The issue before the *Consumers Union* court was whether the FPPC had acted in accordance with the mandate of the voters as embodied in Proposition 9 in framing the challenged regulation; the Court stated that the regulation in question must "interpret, make specific or otherwise advance the provisions of the act." (*Id.* at 439.) In upholding the challenged regulation, the court considered several rules of statutory construction, including the "great weight" afforded to administrative interpretations, unless the interpretations are clearly erroneous or unauthorized (*Id.* at 446–47.)

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[10] Then Secretary of State Jerry Brown was a proponent of Proposition 9 and that proposal figured prominently in his successful campaign to be elected Governor in 1974.

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Consumers Union thus stands for the proposition that administrators charged with effective administration and implementation of initiatives may adopt rules and regulations and administrative interpretations, so long as such interpretations are not clearly erroneous. This is the situation here, where Measure T expressly authorizes Richmond's Tax Collector to make rules and regulations as may be necessary to assist in enforcement of the business license tax ordinance as amended by Measure T and that ordinance demands the tax be construed, administered and enforced so as to be constitutional.

Moreover, the contemporaneous construction of a statute by an administrative agency charged with its administration and interpretation is entitled to great weight and should be respected by the Court unless it is clearly erroneous or unauthorized." (*Anderson v. San Francisco Rent Stabilization & Arbitration Bd.* (1987) 192 Cal.App.3d 1336, 1343 (construing rent board regulations implementing City ordinances regarding housing loans); *Consumers Union*, *supra*, 82 Cal.App.3d at 446–47.)

Here, the City's Enforcement Policy was passed "to ensure application of the City's Business License Ordinance in conformity with the . . . United States Constitution and related provisions of the applicable federal, state, and local law." (RMC § 7.04.380.) The City properly issued administrative interpretations of Measure T to fulfill the mandate granted by Measure T. That policy directly addresses the apportionment requirement in *Complete Auto Transit*, *supra*, 430 U.S. at 279. As discussed *infra*, Chevron's refusal to comply with that policy by proposing an apportionment of its economic activity so Richmond might tax only that portion within its tax jurisdiction cannot form the basis of its facial internal consistency challenge to Measure T.

VIII. Chevron Failed to Exhaust Its Administrative Remedies and this Defense Prevents Judgment for Chevron on the Pleadings

A motion for judgment on the pleadings by a plaintiff must be denied if the answer states facts sufficient to state a defense to the claim. Such is the case here, and Chevron's argument regarding the internal consistency test should therefore be rejected.

Richmond specifically pleaded that Chevron failed to exhaust its administrative remedies.

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(Answer in Case No. C09-11533, ¶ 36 and p. 6, lines 7-8.) In fact, the allegations in Chevron's own second verified Complaint (Case No. C09-01533) establish that failure. As Chevron pleaded (Complaint in C09-01533, ¶¶ 28 and 31), and as Richmond admitted in its Answer (Answer in C09-01533, ¶ 28), Richmond adopted the Enforcement Policy on March 27, 2009 *before* the business license tax was due and *before* Chevron paid its tax. (Complaint in C09-01533, ¶¶ 31-32.) Indeed, Chevron plainly had notice of the Enforcement Policy, for it attached it to the second Complaint. (Exh. C to Complaint in C09-01533).

Nowhere in either Complaint does Chevron allege that it availed itself of the apportionment mechanism afforded by the Enforcement Policy. Although it pleads the existence of the policy, Chevron nevertheless ignores its availability, arguably in an effort to bolster its claim that Measure T facially violates the internal consistency test of Commerce Clause case law.

However, the Court should not allow Chevron's willful blindness and refusal to avail itself of the apportionment afforded by the Enforcement Policy to form the basis of a ruling that Measure T is unconstitutional. The Enforcement Policy mandates that a taxpayer who does business partly in Richmond and partly elsewhere is entitled to apportionment and that the measure of tax is limited to employment and inputs to manufacturing with respect to activity in the City. Such a business, which is in the best situation to determine such facts, must propose an apportionment to the Tax Collector, who has the authority to accept, reject or propose another apportionment method. Chevron filed a claim for a complete refund with the City, but alleges nowhere in either Complaint that it engaged in this preliminary administrative step requesting apportionment.

It would stretch constitutional jurisprudence to allow Chevron, by its own failure to pursue an available administrative remedy, to create the very unconstitutionality of which it complains. Had Chevron complied with the Enforcement Policy, Richmond would have been able to evaluate Chevron's specific apportionment claim and evaluate its merits. The second verified Complaint establishes Chevron did not do so.

Because the Answer to the Second Verified Complaint, in combination with both of Chevron's own verified pleadings, state facts sufficient to raise the issue of Chevron's failure to exhaust its administrative remedies, the Court should reject Chevron's requested judgment on the

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pleadings. Granting the Motion would, in effect, approve Chevron's evasion of the very forum created to ensure compliance with the Commerce Clause and invite every unhappy taxpayer to burden the courts with disputes better resolved administratively. The issue of Chevron's failure to exhaust is live, and Richmond should be permitted the opportunity to develop this affirmative defense as the case progresses. Accordingly, Richmond respectfully requests the Court deny Chevron's Motion.

IX. Conclusion

For the foregoing reasons, the City of Richmond respectfully requests the court deny Chevron's Motion for Judgment on the Pleadings.

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