

Paper Bag Fee – Setting A Bad Precedent

PAPER BAG FEES SET A DANGEROUS PRECEDENT AND DO AN END RUN AROUND CALIFORNIA’S CONSTITUTION!

By Anthony van Leeuwen, 27 January 2014

Executive Summary. *The paper bag fee sets a dangerous and illogical precedent. Paper bags from the paper aisle are taxed at the check stand, but paper carryout bags purchased at the checkout counter to hold your groceries are not taxable. Furthermore, the fee paid for paper carryout bags subsidizes the free paper bags provided to certain low income groups, providing a powerful argument that the fee is a tax instead. So far court rulings have stated that the paper bag fee is not a tax since the fees are retained and used by a private party. Under current court rulings, a state or local government jurisdiction can enact a statute or ordinance which requires payment of fees to a private party and then dictate how the moneys are spent by the private party and as long as no monies are remitted to the state or local jurisdiction then the scheme completely bypasses constitutional tax limitations and constitutional protection of citizens from a continual barrage of new taxes and fees. (Francois A. L., 2013, p. 6)*

Introduction

Bag Bans throughout the State of California are very similar to one another. The same prescription is copied from one community to another with minor variations. Essentially, they ban plastic carryout bags and impose a minimum fee on paper bags in order to coerce shoppers into using reusable bags. Most bans include an exemption from the paper bag fee for certain low income groups such as food stamp recipients.

In this article we want to look at different aspects of the paper bag fee. For example, are paper bags purchased at the check stand taxable, is the paper bag fee a tax or a fee, and what are the long term implications.

Sales Tax Insanity

In this section we will look at the issue of sales tax with respect to the fee paid for purchasing paper carryout bags when you shop.

You walk down the paper aisle at your local grocery store, you pick up a package of paper lunch bags and proceed to the checkout stand. You pay the price of the paper bags including sales tax, because paper bags, unlike food items, are not exempt from sales tax. (California State Board of Equalization, 2012)

You live in a community with a ban on plastic bags and fee on paper bags. You make a trip to the grocery store for your weekly shopping. You forget your reusable bags, and rather than go home and get them, you decide to pay for paper bags instead. You need 5 paper bags and are charged 50-cents for those bags with no sales tax charged.

The following week you fly up to Seattle, Washington to visit a friend. During your stay, your friend invites to go along to the grocery store. Your friend too, forgets to bring reusable bags. At the check stand, your friend asks for paper bags and five paper bags are required. Your friend pays 50 cents for the paper bags plus a sales tax of 5 cents (9.5% sales tax rate).

Now paying that extra nickel for sales tax in Washington State might not seem like much, but you begin wonder why in California you pay no tax on the paper bags purchased at the checkout stand, but if you buy a package of paper lunch bags from the paper aisle instead, you are taxed. You then begin to wonder why California, a state so desperate for sales tax revenue that it wants to tax your out-of-state internet purchases, would make purchasing paper bags at the checkout counter completely tax free? Not only does it not make sense, but California communities are deprived of millions of dollars in uncollected sales taxes!

State of Washington

The Department of Revenue in the State of Washington has ruled that purchasing a paper bags at the checkout stand is subject to sales tax. The ruling states as follows: *"... The Department has determined that the charge to customers for paper bags is a retail sale, subject to retail sales tax ..."* (Department of Revenue Washington State) Now that makes sense, you purchase bags to hold your groceries and the bags are subject to sales tax. No different than had you purchased reusable bags instead of paper.

State of California

In California, the State Board of Equalization has ruled in a Special Notice titled *"Sales Tax Does Not Apply to City and County Paper Bag Surcharges"* and stated:

"Some cities and counties have enacted ordinances that prohibit certain retailers from providing plastic bags to customers. In addition to the ban on providing plastic bags, under certain ordinances, the customer is generally required to pay the retailer a specific amount for each paper bag the customer is provided. These ordinances typically impose the charge upon the customer. Some of these ordinances specifically require that the retailer indicate on the customer's receipt the number of paper bags provided and the total amount charged for the paper bags." Under these circumstances, this charge is imposed by the local jurisdiction upon the customer, not the retailer. As such, this charge is not included in the retailer's gross receipts and is not subject to sales or use tax." (California State Board Of Equalization, 2011)

Now you might find that logic flawed! It certainly reads that way. The State Board of Equalization says that *"the paper bag charge is imposed by the local jurisdiction upon the customer"* even though the ordinance clearly mandates that the retailer charge the customer the specified fee for each paper bag issued and annotate that on the customers receipt. Furthermore, the local jurisdiction directly regulates the retail stores within its jurisdiction and not the customers. Now it is possible that the Board of Equalization considers the paper bag fee, a fee charged the customer to discourage paper bag use and not as payment for the paper bag. After all, paper bags are normally distributed free of charge.

The paper bag fee is mandated by the ordinance and states: *"Any store that provides a recyclable paper carryout bag to customer must charge the customer ten cents (\$0.10) for each [bag] provided"*. (BEACON, 2013, p.

549) Many jurisdictions have modified this provision to state a minimum of 10-cents so that the fee can be raised later, if required.

The paper bag fee is then to be retained by the retail store and used as specified by the ordinance as follows:

All charges collected by a store under this Chapter may be retained by the store and used for one or more of the following purposes: 1. the costs associated with complying with the requirements of this Chapter; 2. the actual costs of providing recyclable paper carryout bags; 3. the costs of providing low or no cost reusable bags to customers of the store who are exempted by section 9.150.060; or 4. the costs associated with a store's educational materials or education campaign encouraging the use of reusable bags, if any.
(BEACON, 2013, p. 549)

From the above two quotations, we see that the local jurisdiction through the ordinance mandates that the retail store collect a charge of 10 cents for each paper bag issued. We also see, that the paper bag fee is to be retained by the retail store and used for mandated purposes specified by the ordinance.

One of the mandated purposes specified in the ordinance is the exemption from paper bag fees granted to participants in the California Special Supplemental Food Program for Women, Infants, and Children (WIC) or in the Supplemental Nutrition Assistance Program (SNAP) also known as the Food Stamp program. Participants in these programs are allowed to receive free paper bags when they shop; whereas, all others must pay a fee for paper bags or purchase and use reusable bags. In addition, program participants may be eligible for free reusable bags at the option of the store. (van Leeuwen, 2013)

The fee charged to “non-exempt” customers for paper bags is to be retained by the store and used to pay for (1) cost of paper bags and (2) the cost of complying with the ordinance and (3) cost associated with educational efforts to encourage the use of reusable bags. In other words, “non-exempt” customers who pay a fee for using paper bags will subsidize “exempt” customers by paying for the free paper bags they are given. Of course, if not enough people pay for paper bags the remaining cost of the free paper bags will be borne by the retail store and passed on to customers through higher prices. (van Leeuwen, 2013)

Since providing paper bags at no charge to WIC and SNAP participants is a compelling government interest, it would appear that the paper bag fee is in actuality a hidden tax since it subsidizes a new welfare benefit bestowed upon WIC and SNAP participants. For more information about this benefit the reader is referred to the author’s article titled “[Bag Ban Creates New Welfare Benefit](#)”. (van Leeuwen, 2013)

Paper Bag Fee or Tax

The question is, does the paper bag fee constitute a new tax subject to voter approval under California’s Proposition 26? Hilex Poly Co., a manufacturer of plastic carryout bags, argued in a 2011 lawsuit (*Schmeer v. County of Los Angeles*) that the paper bag fee mandated by the local jurisdiction was indeed a “special tax” that required approval by two-thirds of voters. The lawsuit was dismissed by the

lower court and then upheld by the Second District Court of Appeal. In the ruling Justice H. Walter Croskey stated that taxes are ordinarily imposed to raise revenue for the government but since the fee was retained by the retail store it is not a tax. (Egelko, 2013)

Michael Colantuono, a lawyer for a statewide associations of city and county governments stated that had the ruling classified the paper bag fees mandated by bag ban ordinances as taxes, the ruling would have imperiled a variety of other laws, including rent control and requirements that government contractors pay local prevailing wages. (Egelko, 2013)

The Pacific Legal Foundation and the Howard Jarvis Taxpayers Association filed a letter with the California Supreme Court asking the court to review *Schmeer v. County of Los Angeles*. In *Schmeer*, the California Court of Appeal ruled that when the government forces a shopper to pay the retail store a fee of ten cents for every paper shopping bag provided to the customer, and then tells the store how to spend the money, then the fee is not a “tax”. (Francois T. , Hand me a bag, 2013)

The Pacific Legal Foundation argued that such a scheme should be prohibited by Proposition 26, which defines a “tax” as “any levy, charge, or exaction of any kind.” Proposition 26 makes it as clear that, with very limited exceptions, any new “levy, charge, or exaction of any kind” requires a supermajority vote in the state legislature, or voter approval in the case of local taxes. (Francois T. , Hand me a bag, 2013)

Essentially, *Schmeer* says that the government can raise your taxes without voter approval if it finds a private party that it can order to collect the taxes and carry out the mandated government program. (Francois T. , Hand me a bag, 2013)

According to the Pacific Legal Foundation, *Schmeer* is a blueprint for widespread mischief. Under the rule in the case, cities could force apartment renters to pay a charge to their landlord along with the rent, and then force the landlord to spend it on drought resistant landscaping, or whatever else it wants to. Or it could force drivers to pay the gas station a surcharge which the gas station has to spend to subsidize alternative fuel sales. (Francois T. , Finding one’s way out of a paper bag ... tax, 2013)

But, there’s more!

In the letter requesting California Supreme Court review of *Schmeer*, the Pacific Legal Foundation and the Howard Jarvis Taxpayers Association stated the following:

“Schmeer says that the California Constitution simply has nothing to say about a scheme structured like the bag charge. In doing so, Schmeer sets forth an alarmingly simple end-run around the Constitution. If the state or a local government enacts a statute or ordinance which (1) requires a payment to a private party, (2) dictates how the private party spends the payment, and (3) does not provide for remittance of the proceeds to the government, then that scheme is completely free of any of the California Constitution’s tax limitation provisions in articles XIII A and XIII C.” (Francois A. L., 2013, p. 6)

Also in the letter is the following warning:

“Schmeer allows state and local governments to force responsibility (funding and execution) for various government services onto private parties. For example, a city with responsibility to trim trees and provide lighting on public streets could avoid all of its contracting costs by imposing a surcharge on homeowners association dues, which the associations must then use to trim trees and provide street lighting instead. The City would then be free to redeploy the tax revenue it had been spending on tree trimming and street lighting to other purposes, effectively raising taxes without meeting any constitutional requirements for voter approval under article XIII C.”
(Francois A. L., 2013, p. 7)

Conclusion

The California State Board of Equalization ruling that paper bag fees are not taxable is depriving local jurisdictions of millions of dollars in revenue. While it is possible that the board considered the paper bag fee, to be a fee paid to discourage paper bag use instead of a payment for a paper bag. It is also possible that the sale of paper carryout bags at the check stand was declared non-taxable to avoid potential legal challenges under California Proposition 26 which requires a vote of the people to approve new fees and taxes. While the sales tax itself is not new, forcing people to pay a fee for carryout bags that then triggers payment of sales tax on paper carryout bags previously distributed free of charge could constitute a new fee or tax.

More important though, is that the California Supreme Court has declined to hear the case brought by the Pacific Legal Foundation and the Howard Jarvis Taxpayers Association therefore the current court rulings stand. These rulings will embolden state legislators and local officials to do mischief such as raising your taxes through fees collected and used by private parties.

Plastic bag bans across the state of California have set a bad precedent and accomplished an end run around the constitutional protections that citizens have enjoyed from the barrage of new taxes and fees imposed by overzealous and misguided legislators, county supervisors, and city councilmembers. Indeed, a plastic bag ban is not only the wrong solution but step in the wrong direction.

About The Author

Anthony van Leeuwen is the founder of the [Fight The Plastic Bag Ban](http://fighttheplasticbagban.com) website and writes extensively on the subject. He holds a bachelors and Master's degree in Electronics Engineering and has over 40 years of experience working in the federal government.

Bibliography

BEACON. (2013, May). *BEACON Single Use Carryout Bag Ordinance Final Environmental Impact Report*. Retrieved from BEACON website: http://www.beacon.ca.gov/assets/PDFs/Bag-Ordinance/BEACON%20Single%20Use%20Carryout%20Bag%20Ordinance%20Final%20EIR_updated%20May1.pdf

California State Board Of Equalization. (2011, June). *Sales Tax Does Not Apply to City and County Paper Bag Surcharges*. Retrieved January 24, 2014, from Board of Equalization: <http://www.boe.ca.gov/news/pdf/l282.pdf>

- California State Board of Equalization. (2012, February). *Sales and Use Taxes: Exemptions and Exclusions*. Retrieved January 27, 2014, from California State Board of Equalization: <http://www.boe.ca.gov/pdf/pub61.pdf>
- Department of Revenue Washington State. (n.d.). *The Taxability of Paper Bag Fees*. Retrieved January 25, 2014, from Department of Revenue Washington State: <http://dor.wa.gov/content/getaformorpublication/publicationbysubject/taxtopics/paperbagfees.aspx>
- Egelko, B. (2013, February 23). *Paper bag fee isn't a tax, court rules*. Retrieved January 25, 2014, from SFGate: <http://www.sfgate.com/news/article/Paper-bag-fee-isn-t-a-tax-court-rules-4303356.php>
- Francois, A. L. (2013, April 19). *Letter: Schmeer v. County of Los Angeles, Supreme Court Case No. S209633*. Retrieved January 25, 2014, from Pacific Legal Foundation: <http://blog.pacificlegal.org/wordpress/wp-content/uploads/2013/04/Schmeer-AC-letter-brief.pdf>
- Francois, T. (2013, April 5). *Finding one's way out of a paper bag ... tax*. Retrieved January 25, 2014, from Pacific Legal Foundation: <http://blog.pacificlegal.org/2013/finding-ones-way-out-of-a-paper-bag-tax/>
- Francois, T. (2013, April 19). *Hand me a bag*. Retrieved January 25, 2014, from Pacific Legal Foundation Liberty Blog: <http://blog.pacificlegal.org/2013/hand-me-a-bag/>
- Massey, J. L. (2013, March 11). *Paper Carryout Bag Charge Is Not A Tax*. Retrieved January 25, 2014, from Kronick Moskowitz Tiedemann & Girard A Law Corporation: <http://www.kmtg.com/node/2644>
- van Leeuwen, A. (2013, May 3). *Plastic Bag Ban Creates New Welfare Benefit*. Retrieved from Fight The Plastic Bag Ban: <http://fighttheplasticbagban.files.wordpress.com/2013/04/plastic-bag-ban-creates-new-welfare-benefit.pdf>