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Can the Legislature “Validate” a Previously Enacted Statute?

Chris Micheli*

Does the Legislature have the authority to validate a previously enacted statute, thereby “curing” any potential legal defect in the prior legislation?

I. INTRODUCTION

The California Legislature enacted a unique piece of legislation during the 2015 Legislative Session that presents an interesting legal question for those who follow state legislation and the powers of the Legislature. At the end of its Session, the California Legislature attempted to resolve a legal issue that has been lingering since 2010 when the Legislature previously adopted an omnibus federal tax conformity bill.1 That year, the Legislature passed and the Governor signed Senate Bill (SB) 401 (Wolk).2

SB 401 changed the specified date of California’s conformity to the federal Internal Revenue Code in order for the state to adopt numerous federal tax law changes enacted by Congress during the prior five years.3 However, the validity of the enactment of SB 401 was called into question a few months later due to the electorate’s adoption of Proposition 26 on the November 2010 statewide ballot.4

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1. California has been one of the states that generally requires the enactment of a bill to adopt federal tax law changes, rather than follow those states that have “automatic conformity.” According to the Assembly Revenue & Taxation Committee bill analysis of SB 401, “When changes are made to the federal income tax law, California does not automatically adopt such provisions. Instead, state legislation is needed to conform to most of those changes. Conformity legislation is introduced either as individual tax bills to conform to specific federal changes or as one omnibus bill to conform to the federal law as of a certain date with specified exceptions, a so-called “conformity” bill.” ASSEMBLY COMMITTEE ON REVENUE AND TAXATION, COMMITTEE ANALYSIS OF AB 154 (May 5, 2015).
4. Prop. 26 passed by a vote of 52.5% to 47.5% on November 2, 2010. It was an initiative constitutional amendment entitled The Supermajority Vote to Pass New Taxes and Fees Act. Supporters of Proposition 26 called the ballot measure the “Stop Hidden Taxes initiative.” Proposition 26 was the second effort by proponents, the first being Proposition 37 on the 2000 statewide ballot, but it failed passage by a narrow margin. California Proposition 26, Supermajority Vote to Pass New Taxes and Fees (2010), BALLOTPEDIA, https://ballotpedia.org/California_Proposition_26,_Supermajority_Vote_to_Pass_New_Taxes_and_Fees_(2010) #cite_ref-3 (last visited Nov. 20, 2016).
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Several other measures were also subject to legal speculation. Prop. 26 attempted to reinforce the 2/3 majority vote requirement contained in the California Constitution. The State Constitution now clearly provides this higher vote threshold for taxes and fees, with specified exceptions. This vote threshold is imposed on the California Legislature when it attempts to adopt tax or fee increases, which was the goal of the ballot measure.

In addition, Prop. 26 includes a provision that appeared to retroactively invalidate legislation that had been passed earlier in the calendar year by the Legislature during its 2010 Session, one of which was SB 401. A bill that contained a tax adopted earlier in 2010 that did not meet the Prop. 26 vote threshold would be void absent a proper re-enactment within 12 months.

As a result of the electorate’s adoption of Prop. 26, the legal status of the statutory changes made to California’s tax laws by the enactment of SB 401 was thrown into question because that bill was adopted earlier in 2010 with a simple majority vote, but was never re-enacted under the requirement of Prop. 26. This

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5. For example, the adoption of AB 32, termed the “Global Warming Solutions Act of 2006,” is the subject of pending litigation over whether the environmental “fees” enacted by the law should have been adopted by a 2/3 majority vote of the Legislature. Additionally, the California Legislative Analyst’s Office opined in 2012 that a proposed funding mechanism for the California Seismic Safety Commission might be unconstitutional under the provisions of Proposition 26. See Colin Sullivan, Is It a Water-Rights Fee or a Backdoor Tax? Cali’s High Court Will Decide, N.Y. TIMES (Dec. 2, 2010), available at http://www.nytimes.com/gwire/2010/12/02/02greenwire-is-it-a-water-rights-fee-or-a-backdoor-tax-cal-18175.html?pagewanted=print (on file with The University of the Pacific Law Review); Will Evans, California Seismic Safety Commission May Lose Funding, HUFFINGTON POST (Apr. 7, 2012), http://www.huffingtonpost.com/2012/04/08/california-seismic-safety-commission_n_1410221.html?

6. One of the major supporters of Prop. 26 was the California Chamber of Commerce, whose President, Allan Zaremberg, was quoted as saying, “The Stop Hidden Taxes Initiative will prohibit politicians from using a loophole to raise even more taxes by disguising them as fees. Right now, elected officials at the state and local level pass higher taxes by labeling taxes as ‘fees’ so they can pass or increase them with a 50% vote instead of the two-thirds required by law.” BALLOTpedia, supra note 4.

7. As a result of the adoption of Prop. 26, Article XIII A, SEC. 3(a) now reads: “(a) Any change in state statute which results in any taxpayer paying a higher tax must be imposed by an act passed by not less than two-thirds of all members elected to each of the two houses of the Legislature, except that no new ad valorem taxes on real property, or sales or transaction taxes on the sales of real property may be imposed.” CAL. CONST. XIII A § 3(a) (enacted by Cal. Proposition 26 (2010)).

8. The Official Summary of Prop. 26 read: “Requires that certain state fees be approved by two-thirds vote of the Legislature and certain local fees be approved by two-thirds of voters. Increases legislative vote requirement to two-thirds for certain tax measures, including those that do not result in a net increase in revenue, currently subject to majority vote.” Cal. Proposition 26 (2010).

9. The Official Ballot Title prepared by the California Attorney General read: “Requires that Certain State and Local Fees Be Approved by Two-Thirds Vote. Fees Include Those That Address Adverse Impacts on Society or the Environment Caused by the Fee-Payer’s Business.” Cal. Proposition 26 (2010).

10. The other bill at issues was ABx86. 2010 Cal. Stat. ch. 11.

11. CAL. CONST. XIII A § 3(a) (“Any tax adopted after January 1, 2010, but prior to the effective date of this act, that was not adopted in compliance with the requirements of this section is void 12 months after the effective date of this act unless the tax is reenacted by the Legislature and signed into law by the Governor in compliance with the requirements of this section.”).

12. Id.
prompted a fair amount of commentary among tax law practitioners and even resulted in a legal memo issued by the California Franchise Tax Board (FTB).13

In order to put to rest any lingering concerns about the legal status of SB 401, five years later the Legislature adopted a provision14 in Assembly Bill (AB) 154 (Ting) that the Governor signed in September 2015. This particular provision of AB 154 attempted to “validate” the adoption of SB 401 five years earlier.16 This section of AB 154 reads: “It is the intent of the Legislature to confirm the validity and ongoing effect of Senate Bill No. 401 of the 2009-10 Regular Session.”17

This legislative pronouncement in AB 154 gives rise to the question whether the Legislature actually has the power to validate a previously-enacted statute in order to “cure” any potential defects in the original legislation. This author does not believe the Legislature has such authority.

II. ENACTING SB 401, PROPOSITION 26, AND AB 154

Ironically, AB 154 also made numerous changes to California’s tax laws based upon prior federal tax law changes that had been adopted over the previous six years.18 AB 154 primarily did so by changing the specified date of California’s conformity to the Internal Revenue Code, similar to what SB 401 had done several years earlier.19 Because AB 154 contained an urgency clause, the measure’s provisions took effect upon the date the bill was chaptered, which was September 30, 2015.20

After the adoption of SB 401, the FTB opined that there is no basis to believe that SB 401 is not a valid law, at least for the 12-month period following the

16. ASSEMBLY COMMITTEE ON REVENUE AND TAXATION, COMMITTEE ANALYSIS OF AB 154, at 6 (May 5, 2015) (“Despite the FTB pronouncement, some taxpayers are seeking reassurance that the last conformity bill stands on firm legal ground, which this bill would provide. Specifically, this bill includes a legislative intent provision confirming the validity and ongoing effect of SB 401.”). Analysis prepared for May 18, 2015 hearing.
17. 2015 Cal. Stat. ch. 359, § 42.
18. According to the Assembly Revenue & Taxation Committee bill analysis of AB 154, the bill “changes California’s specified date of conformity to federal income tax law from January 1, 2009 to January 1, 2015 and, thereby, generally conforms to numerous changes made to federal income tax law during that six-year period.” ASSEMBLY COMMITTEE ON REVENUE AND TAXATION, COMMITTEE ANALYSIS OF AB 154, at 1 (May 5, 2015) (analysis prepared for May 18, 2015, hearing).
20. See 2015 Cal. Stat. ch. 359, § 44 (“This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting the necessity are: In order to provide much needed tax relief to taxpayers in conformity with federal tax relief enacted in the last four years and to alleviate administrative burdens on state tax agencies, it is necessary that this act go into immediate effect.”)
adoption of Proposition 26.\textsuperscript{21} The FTB noted that the California Constitution\textsuperscript{22} requires the FTB to enforce SB 401 until an appellate court has made a determination that some portion or all of SB 401 is “void” pursuant to Proposition 26 and, therefore, unenforceable.\textsuperscript{23}

In an effort to clarify this legal ambiguity created by the enactment of SB 401 and the subsequent adoption of Prop. 26 in the same year, Section 42 of AB 154 claims that the Legislature intends to “confirm the validity and ongoing effect of SB 401” in adopting AB 154.\textsuperscript{24} Is this statement sufficient to “validate” the potential infirmity of SB 401?

In examining the impact of Prop. 26 on the implementation of SB 401, FTB Legal Guidance was issued for taxpayers and practitioners alike.\textsuperscript{25} As the FTB noted, SB 401 was generally operative for taxable years beginning on or after January 1, 2010. Proposition 26 was approved by the voters on November 2, 2010, and Prop. 26 amended Section 3 of Article XIII A of the state Constitution.\textsuperscript{26} Although Prop. 26 was primarily intended to amend Subdivision (a),\textsuperscript{27} it also added Subdivision (c),\textsuperscript{28} which is the relevant provision at issue here.

Subdivision (c) provides that any tax adopted after January 1, 2010, but prior to November 3, 2010, that was not adopted in accordance with Article XIII A, Section 3,\textsuperscript{29} is void after 12 months unless it was re-enacted by the Legislature and signed into law in accordance with the new requirements imposed by Prop. 26.

As a result of Prop. 26, there were two bills impacted by this provision: the gas tax swap contained in ABx8 6 by the Assembly Committee on Budget and

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\textsuperscript{21} See Impact of Proposition 26 on SB 401, FRANCHISE TAX BOARD LEGAL DIVISION GUIDANCE (Jan. 1, 2011).

\textsuperscript{22} CAL. CONST. XIII § 3.5.

\textsuperscript{23} See Impact of Proposition 26 on SB 401, FRANCHISE TAX BOARD LEGAL DIVISION GUIDANCE (Jan. 1, 2011).

\textsuperscript{24} 2015 Cal. Stat. ch. 359, § 42 (“It is the intent of the Legislature to confirm the validity and ongoing effect of Senate Bill No. 401 of the 2009-10 Regular Session.”).

\textsuperscript{25} See Impact of Proposition 26 on SB 401, FRANCHISE TAX BOARD LEGAL DIVISION GUIDANCE (Jan. 1, 2011).

\textsuperscript{26} The primary purpose of Prop. 26 was to expand the definition of a “tax” to include many state and local government assessments classified as “fees” and to provide that any change in state statute that results in any taxpayer paying a higher tax must be passed by a two-thirds vote of the Legislature. See BALLOTPEDIA, supra note 4.

\textsuperscript{27} CAL. CONST. XIII A § 3(a) (enacted by Cal. Proposition 26 (2010)) (“Any change in state statute which results in any taxpayer paying a higher tax must be imposed by an act passed by not less than two-thirds of all members elected to each of the two houses of the Legislature[.]”).

\textsuperscript{28} CAL. CONST. XIII A § 3(c) (enacted by Cal. Proposition 26 (2010)) (“(c) Any tax adopted after January 1, 2010, but prior to the effective date of this act [November 3, 2010], that was not adopted in compliance with the requirements of this section is void 12 months after the effective date unless the tax is reenacted by the Legislature and signed into law by the Governor in compliance with the requirements of this section.”)

\textsuperscript{29} That provision requires a 2/3 majority vote of both houses of the Legislature before the bill is sent to the Governor’s Desk for final action. CAL. CONST. XIII A § 3(c) (enacted by Cal. Proposition 26 (2010)).
SB 401. ABx8 6 was re-enacted by a 2/3 majority vote of both houses of the Legislature within the 12-month period pursuant to Prop. 26. As such, it appears that ABx8 6 is valid, at least as it complies with the requirement of Prop. 26.

On the other hand, despite the requirement in Prop. 26, SB 401 was never re-enacted within 12 months or at any subsequent time by the Legislature. Instead, AB 154 was enacted to “validate” the original enactment of SB 401. The FTB described “significant ambiguity” regarding the language of Prop. 26. Moreover, the FTB and tax practitioners posed logical questions whether all of SB 401 is void, or whether only the tax increase provisions would be void and severable from the remainder of the bill. In the end, the FTB opined that SB 401 is the law of the state, at the very least during the 12-month period following adoption of Prop. 26. This conclusion raises the obvious question regarding the validity of SB 401 after the expiration of the 12-month period.

Specifically, the legal opinion issued by the FTB begs the question whether SB 401 is still the law of the state after November 3, 2011. The adoption of AB 154 was the current Legislature’s attempt to put that question to rest by “validating” the adoption of SB 401, a measure enacted by a previous Legislature. In the end, the FTB determined that the state Constitution requires the FTB to enforce SB 401, “even after the adoption of Proposition 26.”

The legislative committee analysis of AB 154 explains the purpose of Section 42 of the bill as: “While no one has yet challenged the bill [SB 401] in court, should the measure be invalidated, an adverse decision could theoretically change the calculation of tax for every tax return filed in the state for the last five years. AB 154 restates SB 401’s validity in the hopes of eliminating any uncertainty regarding the legality of its provisions.” There is limited legislative history available aside from these statements.

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31. Specifically, see CAL. CONST. XIII A § 3(c) (enacted by Cal. Proposition 26 (2010)).
33. For example, could individual and corporate tax returns be challenged by the FTB if one or more provisions of SB 401 were held to be invalid? Could the usual four-year statute of limitations be “re-opened” because the original law was invalid?
34. See Impact of Proposition 26 on SB 401, FRANCHISE TAX BOARD LEGAL DIVISION GUIDANCE (Jan. 1, 2011).
35. That is the point in time when the 12 months expire after the enactment of Prop. 26.
36. CAL. CONST. XIII § 3.5 prohibits an administrative agency, such as FTB, from declaring a statute invalid or unenforceable in the absence of an appellate court determination that the statute is unenforceable or unconstitutional.
38. See SENATE FLOOR ANALYSIS, AB 154, at 5 (Aug. 27, 2015).
39. The Author’s Statement makes no mention of the issue addressed here. ASSEMBLY FLOOR ANALYSIS, AB 154, at 3 (Aug. 31, 2015) (“AB 154 is a vital measure conforming state tax law to federal tax, easing tax
III. CAN THE LEGISLATURE “VALIDATE” A PREVIOUSLY-ADOPTED MEASURE BY
RESTATING IT?

So, can the Legislature “validate” a previously-adopted measure by restating
it? From a different point of view, does the Legislature’s action on AB 154,
Section 42 represent an attempt to “trump” a constitutional requirement specified
in Prop. 26? If so, is that legislative action legal? In addition, this action raises
the specific question whether the Legislature can “trump” an enactment of the
electorate.

At a fundamental level of statutory construction, it does not appear that mere
legislative “intent language” is sufficient to re-enact the tax provisions of SB
401. In light of the specific language adopted by the voters in Prop. 26, it would
likely be difficult for a court to allow legislative intent language to overrule the
will of the electorate.40 In considering the “plain language” of Prop. 26, the
voters intended to require a 2/3 majority vote of each house of the Legislature to
enact a tax increase.41

While California courts have used legislative intent language to determine
the purpose of a statute, such as its substantive provisions that may be unclear,
there is no indication in any reported California appellate decisions that intent
language standing alone can accomplish any enactment of a statute or, in the case
of SB 401, re-enactment of a previously adopted bill and one that may have been
made void by a vote of the electorate. Moreover, the courts have examined recent
versus earlier-enacted statutes to conclude the recent one should be given
precedence.42 It is likely such a view would be held in this instance as well.

Courts will certainly look at the intent behind legislative changes. For
example, in Carter v. CA Dept. of Veterans Affairs,43 the court ruled that
statements of intent, while not conclusive, are entitled to consideration. However,
the appellate court also noted that these statements of legislative intent do not

40. A court is allowed to consider extrinsic aids under the rules of statutory construction. See, e.g., People
v. Zambia, 254 P.3d 965, 977 (Cal. 2011) (“Both the legislative history of a statute and the wider historical
circumstances of its enactment may be considered in ascertaining the legislative intent.”)

41. When the meaning of the language is clear, and there is no ambiguity, there is usually no need to use
the rules of statutory construction. This should apply in interpreting statutes and constitutional provisions. In re
W.B., Jr., 281 P.3d 906, 919 (Cal. 2012) (if the statutory language is unambiguous, the court presumes that the
Legislature meant what is said, and the plain meaning of the statute controls).

42. In re Thierry S., 566 P.2d 610 (Cal. 1977) (“When two or more statutes concern the same subject
matter and are in irreconcilable conflict, the doctrine of implied repeal provides that the most recently enacted
statute expressed the will of the Legislature, and thus to the extent of the conflict impliedly repeals the earlier
enactment.”) The same rule of statutory construction could be applied here with the later-enacted ballot measure
by the voters.

confer power but instead aid in construing a statute. In this instance, the statutory changes made by SB 401 are not being interpreted or construed. Instead, the only issue is whether the Legislature can validate the previously-enacted law. While “consideration” could be given to Section 42 of AB 154, it is not likely to be enough to confer power to validate SB 401. As such, this appellate court decision does not appear to afford the Legislature that authority.

In another case from 2006, Shamsian v. Dept. of Conservation, the appellate court ruled that statements of legislative intent do not give rise to a mandatory duty. “We agree with the trial court that section 14501, subdivision (g) is a general statement of legislative intent that does not impose any affirmative duty that would be enforceable through a writ of mandate.” If a statement of legislative intent cannot impose an affirmative duty, then it is unlikely that such a statement could provide power to validate SB 401. In a similar manner, therefore, this appellate court case does not appear to provide any authority to the Legislature to validate the prior law.

In addition, there are two significant distinctions in regard to determining the validity of SB 401. First, Prop. 26 was adopted by the statewide electorate, which poses the obvious question whether a court of law is going to reject a clear statement made by statewide voters that they intended to retroactively apply the provisions of a ballot measure. In other words, would a court of law determine that SB 401 should remain valid notwithstanding the fact that its enactment did not meet the specified requirements of Prop. 26 that was passed by the voters?

Nonetheless, some observers have argued that, although SB 401 applied to taxable years beginning on or after January 1, 2010, the bill itself did not take effect until January 1, 2011. In other words, if SB 401 did not actually take effect until January 1, 2011, how could it be impacted by Prop. 26? Is this a distinction that would place SB 401 outside the impact of Prop. 26, some have wondered? The problem with this line of reasoning is that Article XIIIA, Section 3(c), as added by Prop. 26, uses the term “adopted” and SB 401 was adopted during the relevant window. As such, this argument appears likely to fail as the bill was duly adopted in 2010 and not re-enacted thereafter pursuant to the requirement specified by Prop. 26.

Second, the requirement of Prop. 26 is contained in the California Constitution, rather than a statute. Prop. 26 amended Article XIIIA, Section 3(a), not the Government Code. While the Legislature may have the authority to make retroactive changes to statutes in order to “clarify existing law,” it would be difficult to argue that a later-enacted statement of legislative intent could override

44. Id.
46. Id. at 77.
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a constitutional amendment adopted by the state’s voters. Such an interpretation would allow the Legislature to trump the will of the voters, even when the electorate is amending the state constitution. It seems doubtful a court would allow the Legislature to do so.

IV. CONCLUSION

Based upon current case law, it does not appear that the Legislature has the authority to validate a previously enacted statute, especially by means of mere intent language. As such, the language found in AB 154 is not sufficient to give life to SB 401. However, to get a definite answer to these questions, a taxpayer would have to challenge the original enactment of SB 401 and, so far, no one has done so. As a result, SB 401 will remain in effect until it is challenged in court and an appellate court determines that it was not properly re-enacted within one year of the adoption of Prop. 26.

Another interesting legal question, not addressed here, is whether SB 401 could be invalidated back to its original enactment date.49 Under existing law, the general statute of limitations for tax purposes is four years from the due date of the return.50 At some point, the question of whether SB 401 was properly enacted, or made void by Prop. 26, may become irrelevant. Nonetheless, there does not appear to be any legal authority for the Legislature to “validate” a previously enacted statute.