Taxes, Fees, and 'Something Else': California's *Morning Star* Decision

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In this edition of A Pinch of SALT, the authors discuss the California cap-and-trade case *Morning Star*, which challenged the state's cap-and-trade auction process as an unconstitutional tax.

On April 6, the Third District California Court of Appeal decided *Morning Star Packing Company v. California Air Resources Board*,[1] a case that challenged California's cap-and-trade auction process as an unconstitutional tax because it was not enacted by two-thirds majorities in both chambers of the State Legislature, as required for new taxes by the California Constitution (propositions 13 and 26).[2] The appeal pursued by Morning Star Packing Company against the State Air Resources Board et al. was consolidated with a separate suit filed by the California Chamber of Commerce and by intervener National Association of Manufacturers. That decision[3] is important not only to the future of the auction process, but also as to the key question of what is a tax as opposed to a fee or, in this case, as opposed to a "something else."[4]

Background

In 2006 the California State Legislature enacted the Global Warming Solutions Act of 2006 (A.B. 32), which established goals for reducing greenhouse gas (GHG) emissions in California to 1990 levels by 2020.[5] As explained by the court in *Morning Star*, "the Act reflects the Legislature's desire for a massive, historic, and immediate change in behavior regarding GHG emissions."[6] Instead of prescribing specific measures for meeting those goals, the Legislature in A.B. 32 delegated to the California Air Resources Board (ARB), an administrative agency, the responsibility to adopt market-based mechanisms[7] through regulations to achieve those levels.[8] The ARB then adopted by regulation a cap-

[1]The appeal pursued by Morning Star Packing Co. against the State Air Resources Board et al. was consolidated with a separate suit filed by the California Chamber of Commerce and Intervener National Association of Manufacturers. The resulting decision citation is *California Chamber of Commerce v. California Air Resources Board*, 10 Cal. App. 5th 604 (2017) [hereinafter *Morning Star*].

[2]Cal. Const., Art. XIII A, section 3, added by initiative, primary election June 6, 1978.

[3]*California Chamber of Commerce v. California Air Resources Board*, 10 Cal. App. 5th 604 (2017).

[4]*Morning Star*, 216 Cal. Rptr. 3d at 699-700, 720-721, 730-731.

[5]Global Warming Solutions Act of 2006 (Stats. 2006; Ch. 488; section 1, p. 3419, enacting A.B. 32 (2005-2006 Reg. Sess.); and Health and Safety Code sections 38500-38550, specifically section 38550).

[6]*Morning Star*, 216 Cal. Rptr. 3d at 710.

[7]*Id.* at 702.

[8]*Id.* at 701-702.

and-trade program under which covered entities must acquire an "allowance" for every ton of GHGs they emit.[9] Covered entities — that is, those subject to the GHG emission limits — may not emit GHGs in excess of targets without possessing the allowances created by the ARB.[10] The ARB distributes allowances free of charge to some covered entities, retains some allowances in a price containment reserve to buffer against unexpectedly high auction prices, and sells the remainder through a quarterly auction, with the proceeds being used by California.[11] The price for each allowance is determined by the operation of the market, subject to a reserve price established by the ARB.[12] Participants in the auction acquire allowances in exchange for their payment of the sales price.[13] Auction participants may also resell their allowances in the secondary market.[14] Participation in the auction process is not explicitly compulsory.[15] Emitters may comply with the law by reducing their emissions to the point in which they do not need to purchase any allowances, or they may purchase allowances from each other in the secondary market rather than through the auction or reserve sales.[16]

The purposes for which such auction proceeds can be used were not identified in either the enabling legislation (that is, A.B. 32) nor in the ARB's cap-and-trade regulations, other than providing that the expenditures must facilitate the reduction of emissions.[17] However, the Legislature adopted legislation after A.B. 32 that more specifically governed expenditures of cap-and-trade proceeds. In 2012 the Legislature passed four separate pieces of legislation to allocate revenue generated by the auctions, none by a two-thirds vote of each chamber.[18] The California Legislative Analyst's Office has estimated that over the life of the program, the sales will raise between $12 billion and $70 billion in revenue for the state. To date, the Legislature has appropriated proceeds from the sales of the GHG allowances for a variety of programs, including a high-speed bullet train project and affordable housing.[19]

In 2013 a petition was filed in Sacramento County Superior Court challenging the sale/auction provisions of the ARB's regulations on the basis that (1) the regulations are invalid because nothing in A.B. 32 authorizes the creation of the auction process to sell carbon dioxide emissions allowances for billions of dollars; and alternatively, (2) the charges for the allowances constitute illegal taxes adopted in violation of the supermajority requirement of Article XIII of the California Constitution.[20] The superior court denied the petition and ruled that (1) A.B. 32 provided a broad delegation of authority to the ARB; and (2) "the charges are more like traditional regulatory fees than taxes, but it is a close question."[21] An appeal was filed, and argument was held January 24 before the Third District Court of Appeal.

Under Proposition 13, which amended the California Constitution in 1978, any legislation to increase state taxes "for the purpose of increasing revenues" must be passed by a two-thirds vote of the members of both houses of the Legislature.[22] A.B. 32, which established stated goals for GHGs and authorized the ARB to issue regulations on the subject, was not passed by a two-thirds majority.[23] California courts have established that if a revenue-generating measure is a regulatory fee and not a tax, a two-thirds vote is not required under Proposition 13, and a simple majority vote is

[9] Cal. Code Regs., tit. 17, section 95801.

[10] *Id.* at sections 95850-95858.

[11] *Morning Star*, 216 Cal. Rptr. 3d at 699-700.

[12] *Supra* note 9, at sections 95911 and 95913.

[13] *Id.* at section 95911.

[14] *Morning Star*, 216 Cal. Rptr. 3d at 699-701.

[15] *Id.* at 699-700.

[16] *Id.*

[17] Health and Safety Code section 39712.

[18] *Morning Star*, 216 Cal. Rptr. 3d at 703.

[19] Brief for California Taxpayers Association as Amici Curiae Supporting Appellants at 12, *California Commerce of Commerce v. California Air Resources Board*, 10 Cal. App. 5th 604 (2017) (Nos. C075930, C075954); *see also* California Legislative Analyst's Office, "Cap-and-Trade Revenue: Strategies to Promote Legislative Priorities" (Jan. 21, 2016).

[20] Petition for Writ of Mandate, *Morning Star Packing Co. v. California Air Resources Board*, Sacramento County Superior Court, No. 34201380001464 (filed Apr. 16, 2013).

[21] *Morning Star Packing Co. v. California Air Resources Board*, Sacramento County Superior Court, No. 34201380001464, Joint Ruling on Submitted Matters (Nov. 12, 2013).

[22] *Supra* note 2.

[23] Assembly floor vote of A.B. 32, unofficial ballot (Aug. 31, 2006); and Senate floor vote of A.B. 32, unofficial ballot (Aug. 30, 2006).

sufficient.[24] Accordingly, a major issue of the case at the trial court level and in the appellate briefing was whether the ARB's cap-and-trade auctions were unconstitutional taxes or valid regulatory fees.

The 1977 California Supreme Court opinion in *Sinclair Paint* established a four-part test to determine whether a revenue-generating measure was a tax or a fee.[25] A fee must satisfy each of the following requirements:

- a causal connection or nexus between the product or regulated activity and its adverse effects;
- the total amount of money raised by the program must be limited to the reasonable costs of the programs as defined by amounts necessary to carry out the regulation's purpose;
- the allocation of burdens among payors must reflect a fair or reasonable relationship between the charges allocated to a payor and the payor's burdens on or benefits from the regulatory activity; and
- the fee must not be used for unrelated or new purposes.[26]

However, if "regulation is the primary purpose" of a measure, "the mere fact that the measure also generates revenue does not make the imposition a tax."[27] Other cases reiterate that whether an imposition is a tax is not simply a question of raising revenue, and a court must consider how that revenue is raised.[28] "What a fee cannot do is exceed the reasonable cost of regulation with the generated surplus used for general revenue collection. An excessive fee that is used to generate general revenue is a tax."[29]

Morning Star Opinion

Morning Star argued that the auction sales exceed the Legislature's delegation of authority to the ARB to design a market-based emissions reduction system, and that under the second, third, and fourth prongs of the *Sinclair* test, the cap-and-trade auctions were not a fee but an unconstitutional tax. In a 2-1 decision, the appellate court affirmed the trial court decision, although with different reasoning.[30]

The majority opinion is divided into two parts. First, it addresses and answers the first question, holding "that the Legislature gave broad discretion to the [ARB] to design a distribution system, and a system including the auction of some allowances did not exceed the scope of legislative delegation. Further, the Legislature later ratified the auction system by specifying how to use the proceeds derived therefrom."[31] Second, the majority opinion addresses and answers the second question, holding that the "twin aspects of the auction system, voluntary participation and purchase of a specific thing of value, preclude a finding that the auction system has the hallmarks of a tax."[32] The opinion acknowledges at the outset that although "the bulk of the briefing in the tax court and on appeal discusses the test to determine whether a purported regulatory fee is instead a tax subject to Proposition 13" under "key authority" *Sinclair Paint*, that test "is not applicable herein, because the auction system is unlike other governmental charges that may raise the 'tax or fee' question resolved thereby."[33]

The three-judge panel agreed unanimously on the first question, affirming the trial court's decision on legislative delegation, holding, "The Legislature conferred on the [ARB] extremely broad discretion to craft a distribution system, and the fact the Legislature did not explicitly refer to an auction of allowances does not mean such an auction falls outside the scope of the delegation. Moreover, by later specifying how the proceeds of the auctions would be used, the Legislature effectively ratified the auction system created by the [ARB]."[34] The appellate court unanimously

[24] *See Sinclair Paint Co. v. State Board of Equalization*, 15 Cal. 4th 866, 873-74 (1977).

[25] *Id.* at 881.

[26] *Id.*

[27] *Id.* at 880.

[28] *California Taxpayers Association v. Franchise Tax Board*, 190 Cal. App. 4th 1139 (2010), at 1148-1149.

[29] *Morning Star Co. v. State Board of Equalization*, 201 Cal. App. 4th 737 (2011), at 751.

[30] *Morning Star*, 216 Cal. Rptr. 3d at 699-700.

[31] *Id.* at 700, 704-716.

[32] *Id.* at 700, 716-728.

[33] *Id.* at 700.

[34] *Id.* at 704.

addressed and rejected eight arguments set forth in the appellants' briefing, specifically that:

> (1) the statute does not explicitly authorize the ARB to auction allowances (because such explicit authority is not required);
>
> (2) the legislative history includes no discussion of the term "auction" (which is "of no moment");
>
> (3) at the time of A.B. 32's enactment, most cap-and-trade program allowances were distributed for free (facts taken as true but "not compelling, or even noteworthy");
>
> (4) construing A.B. 32 as authorizing the sale of allowances renders the administrative fee provision of the act (section 38597) surplusage (because the provision is "irrelevant to the legislative delegation question");
>
> (5) the chief sponsor of A.B. 32 purportedly asserted on the floor of the Legislature, just before the vote, that the only funds to be generated under A.B. 32 were those generated by the administrative fee provision (statements which failed to speak to the ARB's ability to adopt a cap-and-trade auction component and are nonetheless "unpersuasive");
>
> (6) there is no guidance in A.B. 32 regarding how to spend the auction revenue (because it is unnecessary, and later bills specified how the auction proceeds would be spent to effectuate the Act);
>
> (7) the Legislature failed to enact a bill in 2009 that would have expressly authorized the ARB to auction the allowances (because the "light shed by such unadopted proposals is too dim to pierce statutory obscurities. As evidences of legislative intent, they have little value"); and
>
> (8) the doctrine of constitutional doubt precludes the auction component because there are doubts about the auction's constitutionality (inapplicable here).[35]

The appellate court was split on the second question, regarding whether the cap-and-trade auction program violated Proposition 13, with the presiding judge submitting a dissenting opinion on this issue. The majority affirmed the trial court decision, holding:

> Although we disagree with its method of analysis, we agree with the trial court's ultimate conclusion that the auction system does not equate to a tax subject to Proposition 13. This is so for two interrelated reasons: First, the purchase of emissions allowances, whether directly from the Board at auction or on the secondary market, is a business-driven decision, not a governmentally compelled decision; second, unlike any other tax to which we have been referred by the parties, the purchase of an emissions allowance conveys a valuable property interest — the privilege to pollute California's air — that may be freely sold or traded on the secondary market. Thus, the trial court correctly identified the two facts we find make the auction system unlike a tax, (1) participation is voluntary, and (2) entities receive a thing of value in exchange for obtaining allowances.[36]

Both the majority and dissenting opinions addressed both tax hallmark "facts" in great detail. However, the majority first explained why it felt it was not bound to apply the *Sinclair Paint* test to assess the legality of the cap-and-trade auction program.[37] Specifically, the majority rejected Morning Star's claim that "*Sinclair Paint* 'established criteria that lower courts must use to determine whether a revenue generating measure is a tax under Proposition 13 or a regulatory fee.'"[38] Rather, the majority asserted that "*Sinclair Paint* did not create 'a

[35] *Id*. at 706-714.

[36] *Id*. at 716.

[37] *Id*. at 720-721.

[38] *Id*. at 720.

binary world' in which every payment to the government must be either a fee or a tax. The ARB's regulations do not purport to impose a regulatory fee on polluters, but instead call for auction of allowances, a different system entirely."[39] The majority then goes on to reason that because the issue here is different from the issue in *Sinclair Paint*, "*Sinclair Paint* does not control and we are not compelled to apply its test."[40] The dissent agreed that *Sinclair Paint* is of limited use (but not of no use) because the cap-and-trade auction program "cannot possibly fit . . . within *Sinclair Paint*'s formulation of a regulatory fee."[41]

After first rejecting the applicability of the *Sinclair Paint* test, the majority opinion then determined that the proper test to apply to determine whether the auction program is a tax is to consider the two hallmarks of a tax — again, whether participation is compulsory and whether participants receive anything of value for their payment.[42]

On the compulsory point, the majority held that participation in the cap-and-trade auction program is not compulsory because regulated entities can alternatively (1) reduce their emissions, (2) purchase allowances from third parties, (3) use banked allowances from prior years, or (4) purchase or earn emission offset credits.[43] Specifically, the majority asserted, "It is not necessary to obtain extra allowances or offset credits unless an entity choses to pollute beyond a certain level, something the government does not compel it to do. Indeed, the whole point of the Act is to *stop* entities from polluting excessively."[44]

Morning Star made the argument — factually supported by an uncontroverted declaration by Morning Star economist Janet Rabo (the Rabo declaration) — that it is "compelled" to either shut down its business, move out of California, or purchase enough allowances from the cap-and-trade auction program to remain compliant because of current technology limitations and an expensive secondary market prices for allowances.[45] As a result, the Rabo declaration dramatically concluded that it is "both false and ridiculous" to deem allowance purchases to be voluntary.[46]

The majority responded to that argument by (1) agreeing that compliance with the cap-and-trade program may increase the cost of doing business in California for companies like Morning Star; (2) asserting that the Rabo declaration fails to explain why Morning Star cannot absorb the increased cost of doing business or mitigate the increase in some other fashion; (3) acknowledging that the act contemplated some businesses may indeed choose not to participate in the program and may instead choose to leave the state; and (4) ultimately concluding that "making the business decision to pay [for more allowances] is not the same as being compelled to do so by the state."[47] The majority reasoned:

> A number of requirements for businesses, whether taxes, safety regulations, minimum wage statutes, or command-control pollution control regulations, might cause a particular business to become unprofitable. This unfortunate reality does not translate into a *compelled* purchase of auction credits.[48]

The majority also addressed and directly rejected the "foundational premise . . . plaintiffs seem to rely on" that they have a vested right to pollute California's air without paying for the privilege to do so.[49] The majority explicitly held that "there is no vested right to pollute in California" and clarified that unlike a command-and-control program in which covered entities

[39] *Id*.

[40] *Morning Star*, 216 Cal. Rptr. 3d at 720-721.

[41] *Id*. at 731.

[42] *Id*. at 720-722.

[43] *Id*. at 722.

[44] *Id*.

[45] *Morning Star*, 216 Cal. Rptr. 3d at 723.

[46] *Id*.

[47] *Morning Star*, 216 Cal. Rptr. 3d at 723-724.

[48] *Id*. at 724.

[49] *Id*. at 725. The majority quoted another court's analogous observation: "Here it appears the Oil Companies are asking us to determine that they have a fundamental vested right to release gasoline vapors while dispending fuel to their customers. How are we to answer the public, on the other hand, who assert a fundamental vested right to breathe clean air? If either exists, it must be the latter. We are not presented with the enforcement of a rule that effectively drives the Oil Companies out of business. *At most it puts an economic burden on them increasing the cost of doing business*." (*quoting Mobil Oil Corp. v. Superior Court*, 59 Cal. App. 3d 293 (1976), at 305).

could be ordered to stop emitting excess GHGs, the auction program provides more options because covered entities "can continue polluting the environment as much as [they were] before, except that now [they] must pay for the privilege of doing so."[50]

The dissent strongly disagreed with the majority's positions on that key issue of voluntariness. Because the Rabo declaration was admitted into evidence in the trial court without objection and there was no evidence contradicting her declaration (that is, that Morning Star's participation in the auction program was not voluntary), the dissent asserted the majority exceeded its authority in contradicting the declaration without supporting evidence.[51] The dissent stated:

> The majority finally dismisses Rabo's declaration by speculating, at respondent's invitation, that Morning Star had a "menu of options" that it could have turned to that would have allowed it to comply with the law without participating in the auctions and stay in business at the same time. But there is no evidence in the record that such is a fact. At its essence, the majority is saying that it simply disbelieves Rabo when she declares that Morning Star could not continue to do business in California without participating in the auctions, a credibility finding not often made in the first instance in my experience by a court of review, especially given the fact that the trial court apparently credited her declaration. In support of its statement of disbelief, the majority cites two cases for the proposition that, unless done arbitrarily, a "trier of fact" may reject the testimony of a witness even though that testimony is uncontradicted. We are not a trier of fact.[52]

The dissent asserted that the majority misses the point by characterizing the increased costs of doing business for companies like Morning Star as voluntary: "It is no different than saying that an increase in income taxes is nothing more than an increase in costs that a private business or citizen must bear even though it may require it or him or her to leave California."[53] The point is, according to the dissent, "the 'increase in costs' is compulsory and not voluntary unless one opts to 'voluntarily' close their business in the state of California."[54] The dissent also takes exception to the majority's statement that covered entities are relying on a vested right to continue polluting California, stating, "That is not what the plaintiffs are saying at all." Instead, the dissent continued, the plaintiffs accept the cap-and-trade program overall but challenge the lawfulness of the requirement to purchase credits from the state when such revenue is used by the state as general fund money without calling that revenue generation a tax.[55]

Regarding the question whether allowance credits are valuable commodities, the majority decided in the affirmative, specifically that each credit "conveys a valuable asset — the privilege to pollute the air. This is unlike any tax we know."[56] The majority proceeded to state that although such allowances do not constitute property rights as against the state, they do constitute "valuable, tradable private property rights" as between private parties.[57] The majority asserted that when compared with income taxes or sales taxes, in those two scenarios the taxpayer receives nothing of particular value *for the tax* itself, contrary to the cap-and-trade auction scheme in which participants choose to purchase a valuable right to pollute.[58]

[50] *Id.* at 724-725.

[51] *Id.* at 733-735.

[52] *Id.* at 734-735.

[53] *Id.* at 735.

[54] *Id.*

[55] *Id.*

[56] *Id.* at 725.

[57] *Id.* at 725-727.

[58] *Id.* at 728. Doubling down on its logic, the majority also addresses a hypothetical cap-and-trade program for vehicle mileage in which each vehicle is allotted a periodic allowance and would have to obtain additional allowances to exceed the base allotment. The majority concludes that such a program would not be a mileage tax, either, as plaintiffs suggest.

The dissent took strong issue with that majority position, asserting that the majority's construction of the state owning "rights to pollute which it can sell to others" is a "curious construction to say the least."[59] The dissent also attacks the majority's attempt to sidestep the plain language of the pertinent regulation providing, "a compliance instrument issued by the Executive Officer does not constitute property or a property right" by characterizing the allowances as property rights not against the state but as between private parties by acknowledging the litigation is between the plaintiffs and the state, *not* between private parties.[60] Because cap-and-trade allowances can be limited or terminated by the state at any time, the dissent considers them "no more a 'thing of value' than is the payment of property taxes to keep ownership of one's home":

> For plaintiffs, it cannot accurately be said that what Morning Star and others in their situation buy at the auctions are commodities carrying property rights. The auctions are instead a revenue vehicle for the state, a vehicle by which businesses are compelled to pay the state and obtain, in return only the ability to remain in business in California; a state exaction that has all the components of a traditional tax.[61]

After arriving at its conclusion, the majority explained why it did not take use of the auction proceeds into consideration for its analysis.[62] First, the issue was not ripe because none of the petitions at issue in the consolidated case sought to invalidate the Legislature's decisions about how to spend the auction proceeds.[63] Second, "it is important to decouple the issues of generation of revenue from the expenditure thereof, when evaluating whether a payment to the government equates to a tax" because "the possibility that an erroneous diversion might occur does not bolster the claim that the auction system creates an unlawful tax."[64] Finally, although the analysis of how a collected amount is spent is relevant to the "fee versus tax" *Sinclair Paint* test, it is not relevant here because the auction program does not trigger a *Sinclair Paint* analysis for the reasons discussed above.[65]

The dissent again disagreed, asserting that the use of auction proceeds must be considered as "the hallmark, if not the gold standard, for determining if a state exaction is a tax."[66] Although not the only determinative consideration, the dissent argued that whether the state treats exaction revenue as general revenue is strongly suggestive in the assessment of whether the exaction at issue is a tax.[67] The dissent also disagreed that analysis of the use of the auction proceeds was not ripe, because "while perhaps such individual challenges to expenditures could have been made each time the money was spent, it would make no practical or legal sense to piecemeal the litigation as opposed to challenging the entire program as a tax."[68]

Looking at the substance of the use of auction proceeds, the dissent listed all the pertinent provisions assigning uses of auction program revenue and then challenged the "obvious broad use of the auction revenues."[69] As a specific example, the dissent pointed to the respondents' oral argument that affordable housing was relevant to emissions because the housing would be built near places of employment and transportation hubs to encourage public transportation, then asserted "following that line of argument would probably allow the proceeds to be spent on education on the theory that a better educated populace on the question of [GHGs] would be more likely to seek to reduce those emissions in the future."[70] The dissent stated such reasoning also "conflates the funding of the *costs* of administering the auction program with funding of the *goals* of cap-and-trade," concluding:

[59] *Id.* at 735.
[60] *Id.* at 736.
[61] *Id.* at 736-737
[62] *Id.* at 729-730.
[63] *Id.*
[64] *Id.*
[65] *Id.*
[66] *Id.* at 730.
[67] *Id.* at 737-738.
[68] *Id.*
[69] *Morning Star*, 216 Cal Rptr. 3d at 738-742.
[70] *Id.* at 742.

> And here is the magic, the sleight of hand, of respondents' argument. Since an argument can be, and has been, made that nearly all human activity (and, apparently, some animal activity) increases greenhouse gases, *voilà*, auction funds can be used to address nearly any human activity without being considered a tax that generates general revenue, thus avoiding the prohibitions of Proposition 13, so long as the use of the funds has any tenuous connection to the reduction of greenhouse gases, connections that can always be found if one reaches far enough.[71]

Finally, the dissent argued that because "the auction proceeds are not intended, or, more importantly needed, to pay for the costs of implementation of Assembly Bill No. 32. . . . [t]he only reasonable conclusion one can reach is that the auction proceeds are intended to, and do, generate general revenue to the state of California" like a tax.[72]

What's Next?

On May 15, three separate petitions for review were filed with the California Supreme Court in this matter. One was filed by plaintiff and appellant California Chamber of Commerce; one by intervener and appellant National Association of Manufacturers; and one by plaintiff and appellant Morning Star Packing Company et al. The court exercises a discretionary right of review, so it is not guaranteed that the court will choose to hear the case. However, one ground for review is when it is necessary "to settle an important question of law."[73] That standard is more than satisfied in this case. The trial court concluded it was a "close question" whether the charges were more like traditional regulatory fees than taxes in an analysis framed under the supreme court's 1997 landmark decision in *Sinclair Paint*. Then, in yet another 2-1 decision, the appellate court in *Morning Star* recognized *Sinclair Paint* as the "key authority" on the issue of the tax versus fee dichotomy,[74] but then concluded *Sinclair Paint* was not applicable because the facts involving the voluntary purchase of a valuable commodity fell outside the *Sinclair Paint* analysis[75] and into a "something else" category. Accordingly, not only is the legality of the cap-and-trade program at issue in what was a close case at both the trial and appellate levels, the appellate court's reading, and arguably an end-run around *Sinclair Paint*, would appear to present a host of important questions of law of interest to the supreme court.

A final legal resolution of this important and continuing issue is required. Beginning in 2014, California's and Quebec's cap-and-trade programs have been officially linked, enabling them to hold joint auctions.[76] The 10th joint auction was February 22 and of the $74,827,773 of total allowances available for sale, $12,347,000, or only approximately 16.5 percent, were sold.[77] California Senate President Pro Tempore Kevin de León (D) promptly criticized those "anemic auction results," which demonstrated the program needs reform.[78] The Legislative Analyst's Office (LAO) has pointed out that the auction generated only about $8 million in state revenue, an amount substantially less than the $364 million the state received from the auction in November 2016 (but similar to that received in the May 2016 and August 2016 auctions).[79] The LAO cited several factors that likely contributed to revenue uncertainty and volatility, one of which was "uncertainty related to an ongoing court case challenging the legality of state-auctioned allowances," that is, *Morning Star*.[80] The 11th joint auction was held on May 16, 2017, with stronger results than the prior February joint auction. More than 90 percent of current available 2017 vintage credits were sold and over 80 percent of Advance

[71] *Id.*

[72] *Morning Star*, 216 Cal Rptr. 3d at 743-744.

[73] Cal. Rules of Court, Rule. 8.500(b)(1).

[74] *Morning Star*, 216 Cal Rptr. 3d at 700.

[75] *Id.*

[76] California Air Resources Board, "Auction Information" (last updated Apr. 25, 2017).

[77] California Cap-and-Trade Program and Québec Cap-and-Trade System February 2017 Joint Auction #10 — Summary Results Report (Mar. 1, 2017).

[78] Senate President Pro Tempore Kevin de León, "Statement on Cap and Trade Auction Results" (Mar. 1, 2017).

[79] California Legislative Analyst's Office, "February 2017 Cap-and-Trade Auction Results" (Mar. 1, 2017).

[80] *Id.*

2020 Vintage credits were sold.[81] One might speculate those improved results are tied to the court of appeals' April 6 decision rejecting challenges to the program. Now, despite an appellate decision in its favor, and as reported previously by *State Tax Notes*, lawmakers are nonetheless still seeking protection against future challenges to the auction program by obtaining the two-thirds legislative majority required for approving new or higher taxes. This complies with the directive from Gov. Jerry Brown (D) in January to do the same to "eliminate any legal uncertainty" on the program.[82] Meanwhile, legislation has been introduced seeking to stir up discussion and revisions to the cap-and-trade auction system.[83]

In sum, *Morning Star*, a published court decision, bears watching. Previously, a court of appeal opinion was no longer considered published if the supreme court granted review. However, under rule changes effective July 1, 2016, the grant of review by the supreme court of a published court of appeal decision does *not* affect the appellate court's certification of the opinion for publication (although that opinion must be accompanied by a prominent notation advising that review by the supreme court has been granted).[84] In that case, the opinion remains citable for "potentially persuasive value" while supreme court review is pending and then obtains "binding or precedential effect" after the supreme court has issued its decision "except to the extent it is inconsistent with the decision of the supreme court or is disapproved by that court."[85] ■

[81] "California Cap-and-Trade Program and Québec Cap-and Trade System May 2017 Joint Auction #11 — Summary Results Report (May 24, 2017)."

[82] Paul Jones, "California Court of Appeal Rules Cap-and-Trade Isn't a Tax," *State Tax Notes*, Apr. 17, 2017, p. 246.

[83] A.B. 151, Cal. Leg., 2017-2018 Reg. Sess. (Cal. 2017) (requiring ARB to report to the Legislature to develop regulations ensuring statewide greenhouse gases are reduced to at least 40 percent below the 1990 level by 2030).

[84] Cal. Rules of Court, Rule. 8.1105(e).

[85] *Id*.