"I KNOW A TAX WHEN I SEE A TAX"

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The Missouri Supreme Court has granted governmental entities some relief from the burdensome requirements of the Hancock Amendment. The court has ruled that increases in the specific charges for services actually provided by an ambulance district are not required to be submitted for voter approval. The broader meaning of the decision is that governmental entities will not be required to pay for costly elections every time they want to raise fees for the services they provide. The sense of relief felt by the cities must be tempered by the fact that it now is necessary to separate "fees" into a category distinct from "taxes," and the fact that the court did not establish a clear test for making the distinction.

Background

On November 4, 1980, the voters of Missouri approved a constitutional amendment that has come to be known as the Hancock Amendment. The applicable portion of that amendment states:

> "Counties and other political subdivisions are hereby prohibited from levying any tax, license or fee not authorized by law...or from increasing the current levy of an existing tax, license or fees, above that current levy authorized by law...without the approval of the required majority of the qualified voters of that county or other political subdivision voting thereon." Missouri Constitution, Article X, Section 22(a).

In 1982, the Missouri Supreme Court unanimously interpreted that amendment to mean that fees for parks, building inspections and other services could not be increased without voter approval. *Roberts v. McNary,* 636 S.W. 2d 332 (Mo. en banc 1982).

The Decision

However, on December 17, 1991, in the case of *Keller v. Marion County Ambulance District*, No. 72979 (Mo. en banc 1991), the Missouri Supreme Court determined that an ambulance district was not required by the Hancock Amendment to obtain voter approval of increases in specific charges for its services. In order to arrive at that conclusion, the court overruled the decision it had made nine years earlier in the *Roberts* case. The court declared that the phrase "tax, license, or fees" does not refer to three separate things (taxes, licenses and fees) but instead refers only *to* taxes, whether the taxes are called taxes, licenses or fees. If it is in fact not a tax, but is instead a legitimate license or fee, then the Hancock Amendment does not apply, and it can be increased without placing it on a ballot. Determining whether the charge actually is a tax is the difficult part. The court tried to make that determination less complicated, but was only partly successful.

Criteria

The court established five criteria for guidance in determining whether a charge is a tax or whether it is a fee. Here is the language the court used:

1) When is the fee paid? – Fees subject to the Hancock Amendment likely are due to be paid on a periodic basis while fees not subject to the Hancock Amendment likely are due to be paid only on or after provision of a good or service to the individual paying the fee.

2) Who pays the fee? – A fee subject to the Hancock Amendment likely is to be blanket-billed to all or almost all the residents of the political subdivision while a fee not subject to the Hancock Amendment likely is to be charged only to those who actually use the good or service for which the fee is charged.

3) Is the amount of the fee to be paid affected by the level of goods or services provided to the fee payer? – Fees subject to the Hancock Amendment are less likely to be dependent on the level of goods or services provided to the fee payer while fees not subject to the Hancock Amendment likely are to be dependent on the level of goods or services provided to the fee payer.

4) Is the government providing a service or good? – If the government is providing a good or a service, or permission to use government property, the fee is less likely to be subject to the Hancock Amendment. If there is no good or service being provided, or someone unconnected with the government is providing the good or service, then any charge required by and paid to a local government probably is subject to the Hancock Amendment.

5) Has the activity historically and exclusively been provided by the government? – If the government has historically and exclusively provided the good, service, permission or activity, the fee is likely subject to the Hancock Amendment. If the government has not historically and exclusively provided the good, service, permission or activity, then any charge probably is not subject to the Hancock Amendment.

The criteria are very inexact, and certainly do not constitute a test. Each criterion uses imprecise terms such as "likely," "more likely," "less likely," and "probably."

In addition to the use of imprecise terms, the criteria have several other problems that complicate their use. For example, the court did not say how many of the criteria must exist in order to decide whether a charge is "closer" to a tax than a fee. Instead the court merely said that no single criterion is independently controlling, and that all the criteria together indicate whether the charge is "closer" to a user fee or "closer" to a "tax" even though it may be called a fee. Exactly how many of the five criteria it takes to decide an issue is not clear.

Another problem is that each criterion actually is a range of guidelines, and frequently may be of little help in determining whether the charge is a fee or tax. For example, Criterion #2 places charges that have been blanket-billed to almost all residents at one extreme (taxes), and charges billed only to users at the other extreme (fees). However, many charges, such as property taxes and business license fees, are not billed to users, but also are not billed to almost all of the residents. Because property taxes and business license fees fall into the middle of the range provided by this criterion, the criterion does not provide much assistance in determining whether they are taxes or whether they are fees.

Still another problem is that the phrase "permission to use government property" is found only in the last two criteria. The first three criteria refer only to goods and services. However, the failure to list "permission to use government property" in the first three criteria appears to be an oversight. The use of that phrase in the last two criteria makes no sense unless the phrase also is intended to apply to all five criteria. Another court may have to decide whether the "oversight" was intentional or was inadvertent.

Even though the criteria have weaknesses and need to be perfected, it is possible to use them to separate some of the fees from some of the taxes.

Examples – Likely to Require a Vote (A Fee That Really is a Tax)

If the city has called a charge a "fee," but it really is a "tax," then it will be treated as a "tax" regardless of the name it has been given. Business license "fees" serve as an example.

Application of the criteria to the common, everyday variety of business license fees indicate they probably are "taxes" in disguise (at least according to the criteria). The fees are paid on a periodic basis. (#1). Although they are not blanket-billed to almost all residents, they are blanket-billed to all applicable businesses, and they are not connected with any service or good

provided by the city. (#2). The amount of the fees is not affected by the amount of any goods or services provided by the city. (#3). The city does not provide a good, service or permission to use city property, and the charge is required by, and paid to, the city. (#4). Since no good, service or permission to use government property is involved, the fifth criterion does not apply. Therefore, it is "probable" that the criteria, taken as a whole, indicate that business license fees are "taxes."

Other examples of charges that probably are "taxes," and that are required to be placed on the ballot for increases, are: property taxes, sales taxes, income taxes, dog and cat license fees and liquor licenses.

Examples – Not Likely to Require a Vote (A Fee That Really is a Fee)

The other side of the coin, of course, is that a true "fee" must be treated as a "fee," regardless of its name. Application of the criteria to animal impoundment fees indicates that they fall into the category of "fees."

Animal impoundment fees are paid only on or after the service is provided to the person paying the fee. (#1). They are charged only to the users of the service. (#2). The amount of the fee is affected by the amount of the services, since the fees usually are daily fees, and the longer the animal is in impoundment, the higher the fees. (#3). The city provides a service (shelter, food and care). (#4). The only factor that would indicate a vote is required is that the impoundment service normally is historically and exclusively provided by the city. (#5). Four of the five criteria indicate that an impoundment fee is a "fee." Therefore, if the criteria are taken as a whole they indicate that no vote is needed.

Other examples of charges that probably are "fees," and are not required to be placed on the ballot for increases, are: ambulance fees, copying fees, animal adoption fees, certificate of occupancy permit fees, sewer inspection fees, water use rates, sewer use rates, bus fares,

swimming pool fees, food and drink prices at park concession stands, public meeting room use fees and reservation fees for park shelters.

Difficult Decisions

Some charges do not fall easily into the category of a tax or the category of a fee. An example is trash collection. The many different trash collection arrangements throughout the state make it impossible to say that trash collection fees "normally" are taxes, or that they "normally" are fees. Those cities that bill all residents a flat fee per month for unlimited trash collection by the city, whether the service is used or not, probably are imposing a tax, and therefore need an election to approve trash collection fee increases. However, some cities are not directly involved in trash collection. Some do not collect the trash, require any specific fee or send out the bills. Other cities bill a flat fee for one portion of the collection, but have a per-bag rate for another portion of the collection. Furthermore, in some cities the city has historically and uniformly provided trash collection. In other cities, the service always has been provided by private haulers. Each individual city will need to review its own method of handling trash collection to determine whether its particular charge is a fee or a tax.

The Changing Court

One additional factor should be noted. As mentioned earlier in this article, the 1980 decision that any increase in anything called a tax, license or fee was subject to voter approval was a unanimous decision. The 1991 decision that "true" fees are not subject to voter approval was a 4-3 decision. A close vote like this one always is vulnerable to later changes, depending on the court membership. This particularly is true in this case, since one of the judges on the prevailing side in this decision will be leaving the court in the near future.

Summary

The recent Missouri Supreme Court decision now allows governmental entities to increase some of the fees they charge for services without having to place each fee on the ballot. Distinguishing between taxes (which require a vote for increases) and fees (which do not require a vote) has been made somewhat easier by the list of criteria prescribed by the court. However, because the criteria are inexact measures, and because the criteria are not helpful in some cases, additional cases may need to be decided by the courts before governmental officials can have a clear picture of how to distinguish between a tax and a fee. It is clear, however, that a tax increase requires a vote whether it is labeled a tax or a license or a fee.