Hancock Amendment Revisited

When is a fee a tax?

When is a tax a fee?

and

Other philosophical questions.

Answers and Questions

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of

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And

Of Counsel with

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Stress Test: Identical Dolphins

If you see significant differences between the dolphins, you may want to consider taking a few days off..
How is an elephant like a Hancock tax vs fee question?

The answer depends on perspective and who is looking.
Article X Section 22(a)

... political subdivisions are hereby prohibited from levying any tax, license or fees, not authorized by law, charter or self-enforcing provisions of the constitution ... or from increasing the current levy of an existing tax, license or fees, above that current levy authorized by law or charter ... without the approval of the required majority of the qualified voters ...
Purpose of Hancock Amendment

(NOT ACCORDING TO MEL)

Limit non-voter-approved increases in taxes.
Protect taxpayers, not political subdivisions.

NOT

Replace traditional methods of municipalities and quasi-governmentals.
Prohibit cost shifting to users of services.
If the people of Missouri intended to prohibit localities from increasing any source of revenue without voter approval, a general term like “revenue” or “revenue increase” could have been used. Instead, the people of Missouri characterized “fees” in § 22(a) as an alternative to a “tax.” This characterization suggests that what is prohibited are fee increases that are taxes in everything but name. What is allowed are fee increases which are “general and special revenues” but not a “tax.” page 303
Keller found additional support for this interpretation in the use of the word “levy” in section 22(a) because “[i]n ordinary usage, a tax is levied, but a fee is charged” and “a ‘fee’ can only be levied if the ‘fee’ is actually a tax.” Id. 303
Keller Legacy

Five Factor Test

Source: Footnote 10

Not specifically applied in the Keller case
Keller Caveats

Helpful

No Criterion controlling

Must take Criteria together

May look beyond criteria (only if non-dispositive)
Factor I: When is money paid?

**Tax**

Paid on periodic basis.

**Fee**

Paid only on or after the provision of services.

What about a charge for services paid on monthly basis?
Factor II: Who pays the money?

**Tax**

*Blanket-billed to all or almost all residents.*

**Fee**

Charged only to those who actually use the good or services.

What about a charge for availability of services?
Factor III: Is the charge connected to the service?

**Tax**

*Less likely to be dependent on level of service.*

**Fee**

Dependent on the level of the goods or services.

How does “less likely” relate to dependency?
Factor IV: Is the government providing a service?

<table>
<thead>
<tr>
<th>Tax</th>
<th>Fee</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>No good or service provided.</strong></td>
<td>Good, service or use of Government property provided.</td>
</tr>
</tbody>
</table>

When is a service not a service?
Factor V: Has the service historically been provided by government?

<table>
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<tr>
<th>Tax</th>
<th>Fee</th>
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<td>Historically and exclusively provided good, service or activity.</td>
<td>Not historical or exclusive governmental providence.</td>
</tr>
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</table>

Whose history, how exclusive and when measured?
You be the Judge!!

Apply the Five factors to the facts of Zweig vs. Metropolitan St. Louis Sewer District.

Stormwater Charge

Impermeable Surface

Credits

Monthly Bill
Stormwater Utility based on Impervious Surface

Zweig vs. Metropolitan St. Louis Sewer District

Result: TAX
“This language requires courts to examine the substance of a charge, in accordance with this opinion, to determine if it is a tax without regard to the label of the charge.” Keller at p. 305
Semantics and Labels

**Conflate:**

*applied to plaintiffs*

**Disguise:**

*Applied to government (attorneys?)*

*Think Docudrama!*

*Who me?*
There are a few things a bank robber (*substitute title of official*) needs to get away clean: a foolproof plan, a crack team, and — this is important — an outlandish disguise that ensures no one will recognize him as he stuffs wads of cash into that giant duffel bag (*municipal treasury*).
Gael Greene, Kanye West, Donald Trump, the Unabomber, Adam West-era Batman, and Groucho Marx.
Point Break
(Reagan, Carter, Nixon and LBJ)
You be the Judge!!

Apply the Five factors to the facts of Arbor Investment company, LLC. vs. City of Hermann

Gross Receipt Utility Tax

Transfers to General Fund

Rate Changes

GRUT rate changes
GRUT’s
Arbor Investment Company
vs. City of Hermann
Intrafund Transfers
Municipal owned utilities
Shown on Bill(?)
Revenue Intent or Amount

Result: FEE
You be the Judge!!

Apply the Five factors to the facts of Building Owners & Mgrs. Assn. of KC v KC

Annual Fire Inspection

Commercial & Multi-family

Rate Capped

Service provided previously
Fire Inspection

Revenue

Enhancement

Result: TAX
You be the Judge!!

Apply the Five Factors to the facts of Missouri Growth Ass’n. v MSD and Beatty v MSD

Sewer Rates
Fee Structure liens
Inconclusive
Service provided
Sewer Charges

Results: TIE

One fee

One tax
You be the Judge!!

Apply the Five Factors to the facts of *Keller v Marion County Ambulance District*

- Rates Increases 100%
- Revenue not critical
- Court Deference
- Service provided
Ambulance Charges

Results: FEE
What board game most resembles Hancock analysis?

http://www.youtube.com/watch?v=zLPm1vx-UOg&feature=player_detailpage#t=3s

Unfortunately … is the current state of the law.
Albert Einstein:

*We cannot solve our problems with the same thinking we used when we created them.*
<table>
<thead>
<tr>
<th>Factor VI</th>
<th>Factor VII</th>
</tr>
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<tbody>
<tr>
<td><strong>What Happens if Charge not paid?</strong></td>
<td><strong>Is Governmental entity the sole provider?</strong></td>
</tr>
<tr>
<td>Tax: Lien created</td>
<td>Tax: Sole Provider</td>
</tr>
<tr>
<td>Fee: Service disconnected</td>
<td>Fee: Service disconnected</td>
</tr>
<tr>
<td></td>
<td><strong>Note: Attorney General Position</strong></td>
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</table>
Avoid Litigation!

Distribute Ballots!
The End!

Yogi Bera:

“When you come to a fork in the road, take it.”

“I really didn’t say everything I said.”

“It ain't over till it's over.”