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Colorado Court of Appeals Rejects Challenge Under Taxpayer's Bill of Rights

Insight — July 18, 2016

In a case decided on June 30, 2016, the Colorado Court of Appeals considered whether the Regional Transportation District and the Scientific and Cultural Facilities District violated the Taxpayer's Bill of Rights ("TABOR"). The Court of Appeals' decision reflects, courts are reluctant to invalidate legislation on TABOR grounds. The decision also makes it more difficult to challenge TABOR.

TABOR requires advance voter approval before a district may collect any new tax, increase a tax rate, or change a tax policy that causes a net tax revenue gain. Under Colorado law, the Regional Transportation District and the Scientific and Cultural Facilities District (the "Districts"), along with the state, are granted taxing power.

In 2009, the legislature removed the state sales tax exemption for cigarettes, but the exemption remained in place for the Districts. In other words, the state could collect sales tax on cigarettes starting in 2009, but the Districts could not. The legislature also removed exemptions for direct mail advertising materials, candy, soda, and food containers in 2010, but these exemptions remained in place for the Districts.

To remedy the differing tax treatment on these items between the state and the Districts, the legislature enacted a law in 2013 to remove the exemptions. Beginning, in 2014 the Districts began collecting tax on candy, soft drinks, cigarettes, direct mail advertising materials, and food containers, but did not obtain voter approval before doing so.

A nonprofit called the TABOR Foundation ("Foundation") brought a lawsuit and alleged that the taxes the Districts collected under the 2013 law removing exemptions were subject to TABOR's "voter approval in advance" requirement. The trial court rejected this argument and granted the Districts' motion for summary judgment on two grounds.

First, the trial court concluded that the 2013 law did not constitute a "new tax" under TABOR. Instead, a change in the list of items that had not been taxed before did not constitute the creation of a new tax. Instead, it was merely an adjustment to an existing tax. Second, the trial court also concluded that the 2013 law was not a tax policy change. Rather, the law was only an administrative simplification.

The primary issue on appeal was whether the trial court mistakenly concluded that the 2013 law was neither a new tax nor a tax policy change. Had the trial court ruled otherwise, the voter approval requirement

under TABOR would have been triggered. The Court of Appeals similarly rejected the Foundation's arguments.

The Court of Appeals first concluded that the 2013 law did not create a new tax because the law's primary purpose was not to raise revenue. Instead, the law both removed and added tax exemptions on certain items. Thus, while the law expanded the Districts' ability to tax certain items, the Districts were also precluded from taxing other items. Additionally, the legislative declaration provided that the intended purpose was to simplify the administration and collection of sales and use tax by the Districts, rather than to generate revenue. Because the 2013 law did not impose a new tax, the Districts were not required to hold an election before imposing taxes under it.

The Court of Appeals further concluded that even if the 2013 law did create a new tax, prior ballot measures granted the Districts the authority to collect a sales tax on "every taxable transaction," which were approved by the voters. The Court of Appeals read that authority to mean that voters approved the collection of tax on "every taxable transaction, now and in the future." Because District voters had already given their prior approval, another TABOR election was not constitutionally required.

With respect to the Foundation's argument that the 2013 law's elimination of exemptions constituted a tax policy change that caused a net tax revenue gain, the Court of Appeals noted that TABOR does not define "tax policy change." Applying a dictionary definition of "policy," the Court of Appeals concluded that the Districts' plan to impose a sales tax broadly was not a change in District policy. The Court of Appeals concluded that the Districts' high-level, overall plan to tax a broad range of items remained consistent over time.

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