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Opinion No. 13-50

Motor Vehicle Emissions Testing Fees

QUESTIONS

1. Does the Commissioner of the Tennessee Department of Environment and Conservation or the Tennessee Air Pollution Control Board have authority to promulgate a rule assessing an air quality fee in the context of the implementation of a motor vehicle emissions inspection and maintenance program for vehicles registered in the City of Memphis?

2. If the Commissioner or the Board has authority to promulgate such a rule, can the fee be assessed on those Shelby County motorists who are not required to participate in vehicle emission testing in order to offset the cost to Memphis residents who must comply with the testing and pay the fee?

OPINIONS

1. The Commissioner and the Board are authorized to promulgate a rule assessing a legally appropriate fee for the administration of an emissions program.

2. Although a close question, the more persuasive position is that neither the Commissioner nor the Board may impose a charge on residents of Shelby County, who are not residents of the City of Memphis, to pay for the costs of a motor vehicle emissions inspection and maintenance program for vehicles registered in the City of Memphis. Such a charge would not be a valid fee since it is not directly related to the payer's use of a service or some government-provided benefit.

ANALYSIS

1. In enacting the Clean Air Act of 1977 ("CAA"), codified at 42 U.S.C. §§ 7401-7671, Congress expressly recognized that the growth in the amount of the nation's air pollution was brought about "by urbanization, industrial development, and the increasing use of motor vehicles." 42 U.S.C. § 7401(a)(2). In furtherance of this finding, the CAA provides that each state is responsible for assuring air quality within its geographic area by submitting to the Environmental Protection Agency ("EPA") a state implementation plan ("SIP") that specifies how each air quality control region within the state will achieve and maintain primary national ambient air quality standards ("NAAQS"). 42 U.S.C. § 7407(a); 40 C.F.R. § 52.2220. In 1978, as part of this process, EPA designated Memphis and Shelby County as a "nonattainment" area under the Clean Air Act with respect to the carbon monoxide NAAQS. *See* 40 C.F.R. §§

52.2226, 81.343. *See also* Tenn. Att'y Gen. Op. 88-182 at 3-4 (Sept. 30, 1988). The City of Memphis, having received, along with Shelby County, a certificate of exemption from the State under Tenn. Code Ann. § 68-201-115, has enacted an ordinance instituting its own motor vehicle emissions inspection and maintenance ("I/M") program, only for vehicles registered inside the city, as a control measure designed to return the area into compliance with the NAAQS.[1] City of Memphis, Code of Ordinances, §§ 11-64-1 to -13 (2013), *available at* http://library.municode.com/index.aspx?clientId=15114. *See also* Tenn. Att'y Gen. Op. 88-182 at 3-4. Although Memphis/Shelby County subsequently reached attainment on the carbon monoxide NAAQS, the combined area has been designated as moderate nonattainment on EPA's eight-hour ozone NAAQS, first promulgated in 1997 and updated in 2008, as more fully discussed below. *See* 40 C.F.R. § 81.343. The Memphis City Council has now voted to discontinue funding its motor vehicle emissions testing program at the end of this fiscal year, leaving responsibility for the continuance of the I/M program with either Shelby County or the State. *See* Tom Charlier, *Memphis Shelby County Look for New Ways to Cut Pollution as End Nears for Emissions Testing*, The Commercial Appeal (May 31, 2013), *available at* http://www.commercialappeal.com.

The initial question posed concerns the State's authority to assess an air quality fee in the event the Tennessee Department of Environment and Conservation ("TDEC") assumes responsibility for implementation of the I/M program for Memphis and Shelby County. The law of Tennessee requires that "[e]very action taken by an agency must be grounded in an express statutory grant of authority or must arise by necessary implication from an express statutory grant of authority." *Sanifill of Tennessee, Inc. v. Tenn. Solid Waste Disposal Control Bd.*, 907 S.W.2d 807, 810 (Tenn. 1995). The Commissioner of TDEC possesses broad, discretionary rulemaking authority under Tennessee's statutes, which expressly includes the authority to promulgate rules "establishing fees and charges for departmental services including, but not limited to, licenses, permits, or authorizations rendered pursuant to or required by any statute administered by the department." Tenn. Code Ann. § 11-1-101(f). The Tennessee Air Pollution Control Board ("Board") has equally broad rulemaking authority under the Tennessee Air Quality Act ("TAQA"), codified at Tenn. Code Ann. §§ 68-201-101 to 68-201-202, that encompasses rules for a "schedule of fees for review of plans and specifications, issuance or renewal of permits or inspection of air contaminant sources." Tenn. Code Ann. § 68-201-105(a)(1)(A).

Emission fees assessed and collected under the TAQA, or by the Commissioner under Tenn. Code Ann. § 11-1-101, would be allocated to the Tennessee Environmental Protection Fund ("EPF") in accordance with Tenn. Code Ann. § 68-203-101(b)(1), rather than to the State's general fund. The EPF is available to TDEC "to help defray the costs of administering [its] regulatory programs," Tenn. Code Ann. § 68-203-102, and, under this rubric, the Department is authorized to charge fees for "the various services and functions it performs. . . , including, . . . inspection fees and emission fees." Tenn. Code Ann. § 68-203-103(a)(1).

[1] The Tennessee Air Quality Act, Tenn. Code Ann. §§ 68-201-101 to 68-201-202 ("TAQA"), allows any municipality or county in Tennessee to enact by ordinance or by resolution "air pollution control regulations not less stringent than the standards adopted for the state" pursuant to the Act. *See* Tenn. Code Ann. § 68-201-115(a). Before such ordinances or resolutions become effective, the municipality or county must apply for and receive from the Tennessee Air Pollution Control Board a certificate of exemption. *See* Tenn. Code Ann. § 68-201-115(b).

The Air Board has already promulgated rules for light duty motor vehicle inspection and maintenance. Tenn. Comp. R. & Reg. 1200-03-29-.01 to 1200-03-29-.12. These rules establish procedures that address I/M programs through a contracted entity operating in urbanized areas, including Davidson, Hamilton, Rutherford, Sumner, Williamson and Wilson Counties. Tenn. Comp. R. & Reg. 1200-03-29-.12. The rules include provisions for motor vehicle inspection fees set by the Board. Tenn. Comp. R. & Reg. 1200-03-29-.10. Thus, while the Commissioner has broad authority under Title 11 to promulgate rules establishing fees, the more appropriate entity to assess an inspection/emission fee is the Board, which has already implemented a regulatory I/M program. *See* Tenn. Att'y Gen. Op. 88-182 at 6-7.

2. The current motor vehicle emissions testing program and correlative fee are confined to vehicles registered within the City of Memphis, even though EPA has designated both the city and the county as a nonattainment area for ozone.[2] *Id.* at 4. According to the opinion request, approximately forty-two percent of all vehicles in Shelby County are currently registered outside the city limits of Memphis. Thus, the second question posed concerns the possibility of the State imposing an air quality charge or fee on all Shelby County vehicles, including those not participating in an I/M program for residents of the City of Memphis, as a means of off-setting the costs to those Memphis residents who may be required to comply with the emissions testing should the State assume responsibility for the I/M program.[3] This is a close question and necessarily entails an analysis of the character and purpose of the charge or fee to be assessed.

The validity of any charge by the State, through TDEC or the Board, on Shelby County residents who are not residents of the City of Memphis to partially pay for emissions testing conducted only in the City of Memphis turns upon whether the charge is legally considered a fee or a tax. As previously discussed TDEC and the Board have ample authority to impose fees to support their regulatory efforts, including paying for an emissions testing program. However, these agencies have no authority to impose a tax, which must be specifically authorized and levied by the State of Tennessee. *See, e.g., State ex rel. Bloomstein v. Sneed*, 68 Tenn. 472, 479 (1876), *aff'd*, 96 U.S. 69 (1878) (recognizing that taxation is an attribute of sovereignty and that the Tennessee Constitution vests this attribute of sovereignty with the General Assembly).

The determination of whether a particular charge is a fee or a tax "is not determined by what the legislature calls it." *Saturn Corp. v. Johnson*, 236 S.W. 3d 156, 160 (Tenn. Ct. App.

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[2] Although EPA originally designated Memphis/Shelby County as a nonattainment area in 1978 with respect to the carbon monoxide NAAQS, by 1983 the nonattainment area for carbon monoxide was confined to the limits of the City of Memphis. That same year, EPA proposed to disapprove Tennessee's 1982 SIP revisions, in large part because the City of Memphis had failed to implement its I/M program by the 1982 deadline. Approval and Promulgation of Implementation Plans; Tennessee: 1982 Carbon Monoxide Attainment Plan for Memphis, 49 FR 5036-01 (Feb. 3, 1983). *See also* Tenn. Att'y Gen. Op. 88-182 at 4. On August 1, 1983, Memphis began operating its own motor vehicle I/M program through a certificate of exemption granted to Memphis and Shelby County and all included municipalities by the Tennessee Air Pollution Control Board in accordance with Tenn. Code Ann. § 68-201-115. Tenn. Att'y Gen. Op. 88-182 at 4. The Clean Air Act was subsequently amended and federal regulations provided that I/M programs were required in both ozone and carbon monoxide nonattainment areas, depending upon certain nonattainment area classification and population criteria. 40 C.F.R. § 51.350. Memphis' I/M program was essentially "grandfathered" under this regulation.

[3] Tennessee law prohibits municipalities from imposing a vehicle inspection fee upon any person who does not reside within the municipality's corporate boundaries. Tenn. Code Ann. § 6-55-502(c). *See* Tenn. Att'y Gen. Op. 88-186 at 2 (Sept. 30, 1988); Tenn. Att'y Gen. Op. 77-237 at 1 (July 22, 1977).

2007) (quoting *State v. Nashville, C. & St. L. Ry*, 176 Tenn. 24, 28, 137 S.W.2d 297, 299 (1940)). The Tennessee Supreme Court has articulated the following test for determining whether a charge imposed by government is a tax or a fee, stating:

> Whether the charge for depositing waste into a landfill is a tax or a fee, even though denominated a tax, is determined by its purpose. *A tax is a revenue raising measure levied for the purpose of paying the government's general debts and liabilities. . . . A fee is imposed for the purpose of regulating a specific activity or defraying the cost of providing a service or benefit to the party paying the fee.*

City of Tullahoma v. Bedford County, 938 S.W.2d 408, 412 (Tenn. 1997) (emphasis added). *See Memphis Natural Gas Co. v. McCanless*, 183 Tenn. 635, 651, 194 S.W.2d 476, 483 (1946) (stating that the proper test to determine "fees are, or are not taxes, is whether they are, or are not paid into the general public treasury and disbursable for general public expenses"); *S&P Enterprises, Inc. v. City of Memphis*, 672 S.W.2d 213, 215 (Tenn. Ct. App. 1983) (recognizing that if the imposition of a charge "is primarily for the purpose of raising revenue it is a tax; if its purpose is for the regulation of some activity under the police power of the governing authority it is a fee"). *See also* Tenn. Att'y Gen. Op. 12-11 at 3-5 (Feb. 3, 2012).

The Tennessee Court of Appeals, in applying this test distinguishing between a fee and a tax, upheld as a fee a statutory "surcharge" of four tenths of one percent on gross premiums collected for workers' compensation insurance, which amount was "earmarked for the administration of the Tennessee Occupational Safety and Health Act." *Saturn Corp. v. Johnson*, 236 S.W.3d at 159, 162. In *Saturn Corp.*, the plaintiff, a self-insurer with regard to workers' compensation claims, challenged a state surcharge on workers' compensation premiums as a tax that entitled it to tax credits. The plaintiff argued that the insurance surcharge earmarked for the administration of the Tennessee Occupational Safety and Health Act ("TOSHA") was not a fee, as the Department of Revenue contended, because the general public benefited from TOSHA. *Id.* at 161. The Court of Appeals, citing *Memphis Fire Ins. Co. v. Tidwell*, 495 S.W.2d 198, 200 (Tenn. 1973), rejected that argument, concluding that while the general public may benefit from TOSHA, no one benefited as much as the writers of workers' compensation insurance policies and self-insurers, like the plaintiff. *Id.* at 161-62. Thus, because the charge conferred a benefit to the party paying the charge as opposed to a benefit to the public at large, the Court upheld the charge as a fee rather than a tax. *Id.*

Other jurisdictions have likewise recognized that an important distinction between fees and taxes is that fees, unlike taxes, are charged in exchange for a particular government service and "confer a special benefit on fee payers in a manner not shared by those not paying the fee." 71 Am. Jur. 2d *State and Local Taxation* § 12. *See* Walter Hellerstein, State Taxation, ¶ 2.01[1] *Taxes Versus Fees* (3rd ed. 2013); 5A Ordinance Law Annotations § 2 *"Tax" versus "fee"* (Apr. 2013). One commentator has identified the following factors that courts have generally utilized to distinguish fees from taxes:

> (1) Whether the payment was voluntary (fee) or involuntary (tax); (2) whether the payment was for a specific governmental benefit (fee) or for general governmental purposes (tax); (3) whether the payment was made into a

> segregated fund (fee) or paid into the general treasury (tax); and (4) whether the payment was imposed by a regulatory agency upon those subject to regulation (fee) or to defray general governmental expenditures (tax).

Hellerstein at ¶ 2.01[1].

Courts, however, have not uniformly parsed the tax versus fee distinction. Other jurisdictions have developed a number of somewhat varying tests for determining which label to apply to a given charge. *See* Eben Albert-Knopp, *The California Gas Charge and Beyond: Taxes and Fees in a Changing Climate*, 32 Vt. L. Rev. 217 (2007); Hugh D. Spitzer, *Taxes vs. Fees: A Curious Confusion*, 38 Gonz. L. Rev. 335 (2003) (both collecting cases discussing the issue). The difficulty in applying the various tests to specific factual situations is exemplified by two cases where the United States Court of Appeals for the Fourth Circuit and the West Virginia Supreme Court disagreed on whether a fire service charge levied by a municipality by ordinance against owners of residential and commercial buildings was a tax or a fee. *Compare United States v. City of Huntington*, 999 F.2d 71 (4th Cir. 1993), *cert. denied*, 510 U.S. 1109 (1994) (finding this "fee" was "a thinly disguised tax" that constituted an enforced contribution for the general support of the government) *with City of Huntington v. Bacon*, 473 S.E.2d 743, 751-54 (1996) (disagreeing with the Fourth Circuit and finding the charge at issue was a user fee rather than a tax given its "sole purpose" was for "defraying the cost of fire and flood protection services" for the fee payers' use of such services).

The test developed by Tennessee courts to distinguish between a fee and a tax as applied to the facts presented in this opinion request is a difficult one. An argument can be made that a county-wide charge is justified insofar as Shelby County residents would receive indirect specific benefits unique to Shelby County through the potential lifting of Shelby County's nonattainment status and the avoidance of federal sanctions against Shelby County.[4]

But the more persuasive argument applying the legal standards as developed in Tennessee is that this inspection/testing charge is more akin to a user fee, so that the payment needs to be tied directly to the payer's use of a service or some government-provided benefit. If the purpose of applying an air quality charge county-wide is to help minimize the financial burden on those City of Memphis residents who must comply with the emissions testing program, then no special benefit would appear to accrue to registered vehicle owners outside the city limits, since the latter would not be receiving the benefit/service of the testing. The mere prospect of improved air quality in the county, the potential lifting of the county's nonattainment status, and the avoidance of federal sanctions are too attenuated and amorphous to qualify as such benefits for vehicle owners outside the city limits.

Similarly, it is problematic to argue that an emission testing charge is for the benefit of the entire county when it has the more specific purpose of defraying the cost of the testing program itself. Even though an emission/air quality charge may be earmarked for the

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[4] EPA has the authority under the Clean Air Act to issue mandatory and/or discretionary sanctions for the failure to implement an approved ozone maintenance plan in the Memphis area. 42 U.S.C. §§ 7410(m) and 7509; 40 C.F.R. §52.31. The regulation on the application of mandatory sanctions applies to an "affected area." 40 C.F.R. § 52.31(b)(3). It is unclear whether such sanctions would be applied state-wide, county-wide or just within the City of Memphis.

Environmental Protection Fund, as discussed above, we understand TDEC anticipates that a county-wide charge would be imposed and collected by the county clerk at the time of vehicle registration/renewal, not at the time or location of testing, with approximately 75% of the charge going to the contracted entity that operates the testing program with the remainder to be shared between TDEC and the county clerk. That fee structure suggests that TDEC's overhead in administering an air quality program for mobile sources county-wide would be minimal and that the real focus of the charge is targeted toward the inspection/testing program, which would only apply to vehicles registered within the City of Memphis. Since the animating principle behind *Memphis Fire*, *Bedford County*, and *Saturn* is that there be a connection between the payer of the fee and that payer's actual involvement in the purpose of the fee (participation in the activity, benefit of the service, etc.), if that is not present, such a county-wide charge would amount to an unauthorized tax. Indeed, the requirements developed by Tennessee courts to justify a charge as a valid "fee" are intended to avoid such an overly expansive construction of the term "fee" that would allow the avoidance of the required legislative process to enact a tax.

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