

January 6, 1993

TO: Executive Committee, Legislative Council

FROM: Office of Legislative Legal Services

RE: Test to be applied in determining what is a tax under Amendment #1

Based upon an analysis of the cases decided by Colorado courts and on general legal research, we have formulated the following test which can be used to determine whether a particular charge is a tax or not for purposes of section 20 (4) of article X of the state constitution.

Step 1: Is the charge:

- A. A pecuniary charge upon persons or property?
- B. Imposed by legislative authority?
- C. To raise money for a public purpose? ("For a public purpose" means for the support of the government or any of the recognized objects of government, or for the health, safety, or welfare of the entire community rather than of a narrow class of persons)

If the answer to **all 3** of these questions is "yes", the charge may be a tax, and the analysis should proceed to Step 2.

Step 2: Is the money:

- A. A special assessment? (Def.: A charge which is imposed to finance a specific local improvement, is directed to the users of that improvement, and confers a special benefit to the property assessed which is at least equal to the charge).
- B. A fee? (Def.: A charge which is made to defray the cost of a product, service, or regulation which is reasonably related to the overall cost, even though mathematical exactitude is not required, and which is not made primarily for the purpose of raising revenue for general public purposes).

- C. A fine? (Def.: A charge imposed by a judicial or administrative tribunal as a penalty for an offense).

If the charge is one of these, it is **not** a tax. If the charge is not one of these, it probably **is** a tax. If there is any doubt about the correctness of a conclusion that a charge is a tax, the analysis should continue to Step 3.

Step 3: Ask these questions:

- A. Is there any evidence that the people who voted for Amendment #1 intended that a vote would be required for future increases in the charge? (If there is no evidence that the people thought a vote would be required, the charge is less likely to be a tax.)
- B. Will voting on increases in the charge "reasonably restrain most the growth of government"? (If the effect of a "no" vote is not to limit the growth of government, the charge is less likely to be a tax.)
- C. Is the charge commonly referred to as a "tax"? (If it is called a "tax", it will be hard to argue that it isn't a tax.)
- D. How much revenue is generated by the charge? (The less revenue generated, the less likely it is a tax.)
- E. How broadly based is the charge? (The fewer people who pay the charge, the less likely it is a tax.)

If the answers to all or virtually all of these Step 3 questions point to a conclusion that the charge is not a tax, it may be possible to reverse the conclusion reached under Steps 1 and 2. However, that result will be reached only rarely. Our experience in applying the test outlined in this memo has indicated that the answers to the Step 3 questions will point in conflicting directions, or the answers to some or all of such questions will reinforce the conclusion reached under Steps 1 and 2.

### **APPLICATION OF TEST TO SPECIFIC FACTS**

1. Additional motor vehicle registration fee of \$1 per motor vehicle for the costs incurred by counties in providing motor vehicle registration services - **FEE, NOT A TAX**
2. Extension of automatic repeal date on state surcharge imposed on users of solid waste disposal sites which is used to provide state matching funds for federal superfund

funds - **TAX**

3. Increase in percentage charge imposed on car rental payments by rental companies and remitted as payment in lieu of specific ownership tax on such rental cars - **TAX**
4. Workers' compensation subsequent injury fund surcharge - **TAX**
5. Workers' compensation cost containment surcharge - **FEE, NOT A TAX**
6. Unemployment insurance tax - **TAX**
7. Cigarette vendor license fee, the amount thereof based upon the cost of regulation - **FEE, NOT A TAX**
8. Increase in rate of penalty interest which accrued on delinquent property taxes - **FINE, NOT A TAX; THEREFORE, NOT A TAX POLICY CHANGE EITHER**