COLORADO COURT OF APPEALS

DATE FILED: March 2, 2017
CASE NUMBER: 2015CA2017

Court of Appeals No. 15CA2017
City and County of Denver District Court No. 14CV34803
Honorable A. Bruce Jones, Judge

National Federation of Independent Business,

Plaintiff-Appellant,

v.

Wayne W. Williams, in his official capacity as the Colorado Secretary of State; Colorado Department of State; and the State of Colorado,

Defendants-Appellees.

JUDGMENT REVERSED AND CASE
REMANDED WITH DIRECTIONS

Division V
Opinion by JUDGE BOORAS
Román and Fox, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced March 2, 2017

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¶ 1 Plaintiff, the National Federation of Independent Business (NFIB), appeals the district court's order concluding that section 24-21-104, C.R.S. 2016, which imposes charges upon the filing of required corporate documents with the Colorado Department of State (the Department), is constitutional under the Taxpayer's Bill of Rights (TABOR), Colo. Const. art. X, § 20. The district court granted summary judgment in favor of the Department, the State of Colorado, and Wayne W. Williams, in his official capacity as the Colorado Secretary of State (defendants). We reverse the summary judgment and remand to the district court with directions to hold further proceedings to determine whether the Business and Licensing charges have been adjusted or increased since the passage of TABOR in 1992, so as to require voter approval for the adjustments.

I. Background

¶ 2 The following facts are undisputed.

¶ 3 In 1983, the General Assembly enacted section 24-21-104(1)(a), which provides that the Secretary of State (the Secretary) shall charge fees

> for filing each body corporate and politic document, for filing each facsimile signature, for each notary public's commission, for each foreign commission, for each official certificate, for administering each oath, for all transcripts or copies of papers and records, computer tapes, microfilm, or microfiche, and for other papers officially executed and other official work that may be done in the secretary of state's office.

¶ 4 As relevant here, "[t]he department of state shall adjust its fees so that the revenue generated from the fees approximates its direct and indirect costs, including the cost of maintenance and improvements necessary for the distribution of electronic records." § 24-21-104(3)(b). The specific amount of the charges is not enumerated in the statute. The Secretary has the discretion to set or change the charges for document filing to ensure that the total annual revenue approximates the Department's costs. *See id.* The revenue collected by the Secretary is directed to the Department's cash fund, which may only be used to fund the Department, and shall not be deposited or transferred to the state's general fund. *Id.*

¶ 5 The Department is comprised of four divisions: (1) Administration; (2) Information Technology Services; (3) Elections; and (4) Business and Licensing. In fiscal year 2013-14, Business

and Licensing charges comprised approximately ninety-five percent of the $18.69 million that were credited to the Department's cash fund. This represents an increase of more than four times the revenues credited to the Department in fiscal year 1990-91. However, only approximately eleven percent of the total amount appropriated to the Department in 2013-14 was allocated to the Business and Licensing Division. The remainder of the amount was allocated to the other three divisions.

¶ 6 NFIB is a nonprofit corporation that engages in lobbying and government relations on behalf of approximately 7000 Colorado companies. In December 2014, NFIB sued defendants, arguing that the Department's funding statutes violate TABOR. After hearing oral argument on the parties' cross-motions for summary judgment, the district court concluded that the funding statutes were constitutional under TABOR.

II. Standard of Review

¶ 7 We review a district court's order granting summary judgment de novo. *TABOR Found. v. Reg'l Transp. Dist.*, 2016 COA 102, ¶ 13 (*cert. granted in part* Jan. 23, 2017). Specifically, we review the district court's legal conclusions concerning the interplay of TABOR

and related statutes de novo, while we review the district court's factual findings for clear error. *TABOR Found. v. Colo. Bridge Enter.*, 2014 COA 106, ¶ 18. Summary judgment is appropriate when no disputed issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Bruce v. City of Colorado Springs*, 131 P.3d 1187, 1189 (Colo. App. 2005).

¶ 8 We presume statutes to be constitutional, absent a showing of unconstitutionality beyond reasonable doubt.[1] *Huber v. Colo. Mining Ass'n*, 264 P.3d 884, 889 (Colo. 2011) (applying the beyond a reasonable doubt standard in determining whether a statute enacted before TABOR violated TABOR). However, where multiple interpretations of TABOR are equally supported by the text, we should choose the interpretation that would create the greatest restraint on the growth of government. Colo. Const. art. X, § 20(1); *Colo. Bridge Enter.*, ¶ 19.

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[1] NFIB argues that the statute is not entitled to a presumption of constitutionality unless shown otherwise beyond a reasonable doubt because it was enacted before TABOR. We note that the supreme court in *Huber v. Colorado Mining Ass'n*, 264 P.3d 884, 889 (Colo. 2011), applied the beyond a reasonable doubt standard to a pre-TABOR statute, thus we do the same.

III. TABOR

¶ 9 NFIB contends the district court erred when it granted summary judgment in favor of defendants and concluded that the statutes authorizing the Department's Business and Licensing charges and governing its spending were not unconstitutional under TABOR. We agree that the district court erred in granting summary judgment.

A. TABOR Analysis

¶ 10 As relevant here, TABOR requires that voters must approve in advance any new tax, tax rate increase, or tax policy change that would cause a net tax revenue gain to any district. Colo. Const. art. X, § 20(4)(a). A tax is designed to raise revenue to defray the general expenses of government, while a fee "is a charge imposed upon persons or property for the purpose of defraying the cost of a particular governmental service." *Barber v. Ritter*, 196 P.3d 238, 248 (Colo. 2008) (quoting *Bloom v. City of Fort Collins*, 784 P.2d 304, 308 (Colo. 1989)). Because TABOR's vote requirements apply only to taxes, not to fees, as a threshold matter, we generally consider whether any challenged charge is properly categorized as a

tax or a fee, based on the primary purpose of the charge at the time of its enactment.[2] *Id.*

¶ 11 However, the district court concluded that it did not need to reach a conclusion on the proper categorization of the charges, because, even assuming without deciding that the charges were a tax, they were not subject to TABOR. Like the district court, we need not decide whether the charges were a fee or a tax, because even assuming the charges constitute a tax, section 24-21-204(1)(a) predated TABOR. Therefore, unless adjustments to the charges after TABOR's enactment constitute a tax rate increase or a tax policy change, the voter approval requirement of TABOR does not apply.

B. Tax Rate Increase or Tax Policy Change

¶ 12 "[T]he voter-approval requirements of section 4(a) [of TABOR] apply only to new taxes, tax rate increases, and tax policy changes adopted by legislative bodies after November 4, 1992." *Huber*, 264 P.3d at 891. Because section 24-21-104 was enacted before

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[2] The supreme court set forth a three-part test for determining whether a charge is a tax or a fee in *TABOR Found. v. Colo. Bridge Enter.*, 2014 COA 106.

November 4, 1992, we only consider whether any adjustment by the Secretary since that time constitutes a tax rate increase or tax policy change.

¶ 13 The terms "tax," "tax rate," and "tax policy change" are not specifically defined in TABOR. *See Reg'l Transp Dist.*, ¶¶ 43, 62; *see also Huber*, 264 P.3d at 892. However, the supreme court has provided guidance in the interpretation of these terms. A "tax rate" is a mathematical method for calculating a tax, which may be a "fixed numerical amount, a fixed percentage, or a mathematical formula with pre-set objective components for calculating the amount of the tax due." *Huber*, 264 P.3d at 892. A "tax policy change" is "an undefined 'catch-all' phrase attempting to encompass [an] action that is the equivalent of a new tax or a tax rate change that would not be covered by the more specific requirements listed before it." *Mesa Cty. Bd. of Cty. Comm'rs v. State*, 203 P.3d 519, 529 (Colo. 2009). A tax policy change must be a change that has more than a de minimus impact on revenue. *Id.*

¶ 14 The supreme court has considered whether the TABOR voter approval requirements applied to two statutes that implemented

taxes in place before TABOR's enactment. In both instances, the supreme court declined to require voter approval of those taxes.

In *Bolt v. Arapahoe County School District No. Six*, 898 P.2d 525, 533-34 (Colo. 1995), the supreme court reviewed a one-time levy to bring school buildings into compliance with the Americans with Disabilities Act and the Asbestos Hazard Emergency Response Act, which was passed before TABOR, but not implemented until after TABOR's effective date. Prior to TABOR's effective date in 1992, the school district finalized its budget, determined the amount needed to meet its budget requirements with a mill levy, and certified the amount to the board of county commissioners. *Id.* at 538. The board of county commissioners was then required to enter an order imposing the levy and lacked authority to modify the levy or refuse to impose it. *Id.* However, because of the timing of the school district's budgetary process, the order was not required to be entered until after TABOR's effective date. *Id.* The supreme court concluded that because the amount of the levy was effectively set before TABOR's effective date, it was neither a new tax nor a tax increase or policy change subject to TABOR. *Id.* at 539-40. The tax

at issue in *Bolt*, instead, was a one-time levy, which did not provide a mechanism for any future taxation or adjustment thereto.

¶ 15 In *Huber*, the court considered TABOR's application to a tax on extracted coal. While the tax itself was enacted before TABOR, the statute included an adjustment structure for the tax to change over time based upon a set index tracking inflation. *Huber*, 264 P.3d at 891. Because the adjustment was formulaic and based upon a structure enacted in a statute before TABOR's enactment, the supreme court concluded the calculation of the tax was a "non-discretionary, ministerial duty" involving no legislative or governmental action, so voter approval was not required under TABOR for each application of the formulaic adjustment. *Id.* at 892. The supreme court also considered other nondiscretionary tax rate mechanisms that allow "the amount of tax due to fluctuate in response to economic conditions or other external factors," including the use of specific statutory criteria, or a statutorily defined schedule of adjustments over time. *Id.* at 893.

¶ 16 Here, the district court concluded that the Secretary's discretion to adjust the Business and Licensing charges to approximate the costs of the Department constituted a pre-TABOR

tax mechanism that does not allow the Secretary discretion in its implementation. Although the Secretary could make discretionary adjustments, section 24-21-104(3)(b) requires that the revenue realized from the charges not exceed a maximum amount of the Department's estimated costs. Unlike in *Huber*, section 24-21-104 does not specify how the Business and Licensing charges are to be adjusted over time. Rather, the Secretary's discretion is limited only by the upper ceiling for the total revenues matching the approximated costs and budget for the Department. As the array of services that the Department provides is diverse and changes over time, matching the total revenues to the budget is not a predictable, defined tax mechanism. Accordingly, the present record does not allow us to conclude, as a matter of law, that TABOR applies here.

C. Genuine Issue of Material Fact

¶ 17 We next conclude that the district court erred when it granted summary judgment on the grounds that there was no genuine issue of material fact to be decided.

¶ 18 In its complaint, NFIB notes that the various Business and Licensing charges range from $1 to $125. However, the parties presented the court with no evidence indicating whether these

charges themselves have been increased or adjusted since the passage of TABOR. To the contrary, the parties stipulated that between fiscal years 1990-91 and 2013-14, the number of documents filed that are subject to Business and Licensing charges and the revenues credited to the Department have increased by slightly more than fourfold. The parties further agreed that the "increase in the collected revenue is . . . generally attributable to *the significant increase in the total number of filings*." (Emphasis added.) The district court made no findings indicating whether or to what degree the Business and Licensing charges have been adjusted since the passage of TABOR and how or if that has impacted the collected revenue. In oral argument, counsel for NFIB argued that we could infer that the tax rate had been increased based on the increase in total revenues collected by the Department. We are not persuaded by that argument. While the revenue of the Department has increased significantly, the parties' stipulation suggests the increase is generally due to business growth in Colorado. The parties' stipulated facts do not identify any government action leading to the increase in the revenues collected. The fact that the Department has used the increased revenue to

continue to fund the Department's budget, which may include election services and other Department programs seemingly unrelated to Business and Licensing, does not mean that any new action or adjustment to the charges or amounts at which the charges have been set has created the increase. The parties provided no facts indicating that any new action since the passage of TABOR on the part of the Secretary has led to the increase in revenue.

¶ 19 Thus, the district court erred in granting summary judgment to defendants because the issue of whether any adjustments to the Business and Licensing charges constitute a tax rate or policy change is a disputed issue of material fact.

D. County Election Payment Statutes

¶ 20 NFIB also argues that section 24-21-104.5, C.R.S. 2016, which allows the general assembly to appropriate money from the Department's cash fund to cover the costs of the local counties relating to general elections and November odd-year elections, violates TABOR. Section 24-21-104.5 does not create or authorize a charge, but instead governs how revenue within the cash fund may be spent. Accordingly, we disagree with NFIB's argument that

sections 24-21-104 and -104.5 could be declared unconstitutional in violation of TABOR. To the extent that the revenues from the Business and Licensing charges may be used to pay for the reimbursements to the counties, the approval of any adjustment to the charges under section 24-21-104 may be subject to TABOR, if the district court concludes that a tax rate increase or tax policy change transpired after TABOR's enactment.

IV. Conclusion

¶ 21 We reverse the district court's order granting summary judgment and remand the case with directions for further proceedings to determine whether the Business and Licensing charges have been adjusted or increased since the passage of TABOR in 1992, such that voter approval was required for these adjustments or increases. Depending on the court's determination, it may need to reach the issue as to whether the Business and Licensing charges constitute a tax or a fee.

JUDGE ROMÁN and JUDGE FOX concur.

Court of Appeals

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CHRIS RYAN
CLERK OF THE COURT

PAULINE BROCK
CHIEF DEPUTY CLERK

NOTICE CONCERNING ISSUANCE OF THE MANDATE

Pursuant to C.A.R. 41(b), the mandate of the Court of Appeals may issue forty-three days after entry of the judgment. In worker's compensation and unemployment insurance cases, the mandate of the Court of Appeals may issue thirty-one days after entry of the judgment. Pursuant to C.A.R. 3.4(m), the mandate of the Court of Appeals may issue twenty-nine days after the entry of the judgment in appeals from proceedings in dependency or neglect.

Filing of a Petition for Rehearing, within the time permitted by C.A.R. 40, will stay the mandate until the court has ruled on the petition. Filing a Petition for Writ of Certiorari with the Supreme Court, within the time permitted by C.A.R. 52(b), will also stay the mandate until the Supreme Court has ruled on the Petition.

BY THE COURT: Alan M. Loeb
Chief Judge

DATED: September 22, 2016

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