

# How Is the Money Used?

## Federal and State Cases Distinguishing Taxes and Fees



by Joseph Henchman



BACKGROUND PAPER

**How Is the Money Used?  
Federal and State Cases Distinguishing  
Taxes and Fees**

**Background Paper No. 63  
March 2013**

**by Joseph Henchman<sup>1</sup>**

---

<sup>1</sup> Joseph Henchman is Vice President of State & Legal Projects at the Tax Foundation. He would like to acknowledge the enormous assistance of law clerks Daniel Borchert, Laura Lieberman, and Arushi Sharma on this project.

## EXECUTIVE SUMMARY

2

- Taxpayer protections regarding taxes, such as supermajority thresholds and voter approval requirements, depend on a meaningful definition of “tax.” The Tax Foundation’s Center for Legal Reform spotlights efforts to evade these constitutional and statutory safeguards, through public education and legal briefs.
- The public understanding of “tax” aligns with the widely understood definition of a tax as a charge imposed with the primary purpose of raising revenue.
- This is in contrast to a “fee,” a charge imposed for the primary purpose of recouping costs incurred in providing a service to the payer, and a penalty, a charge imposed for the primary purpose of punishing behavior.
- Nearly every state has adopted these definitions (all except North Carolina and Oregon). Ohio is the most recent to adopt them, in a recent case where the Tax Foundation filed a brief.
- All states but one (Oregon) have a rule to resolve any ambiguity in tax statutes in favor of the taxpayer.
- Ten states have explicitly rejected the dangerous “voluntariness” standard for defining taxes while thirteen states use it in part.
- The careful language used in the U.S. Supreme Court’s health care decision suggests that the Court did not seek to overturn its precedent defining “tax,” which aligns with the definitions used in the states.

# INTRODUCTION

The American antipathy to taxes is rooted deep in our nation's history, from early colonial taxes to the Boston Tea Party to the Whiskey Rebellion to California's Proposition 13 to today.<sup>2</sup> Policymakers have a strong incentive to avoid raising taxes or to raise revenue in ways that can avoid the political poison of being labeled a "tax hiker."

Elected and appointed officials, who face the dual reluctance to raise taxes and cut spending, are increasingly turning to a strategy of hiding increased tax burdens through subterfuge: any number of contortions to deny that even an obvious tax is a tax. They label them user fees, fines, surcharges, revenue enhancements, special assessments, and so forth. For an elected official, the best tax can be one that raises lots of money without anyone noticing or, at least, anyone calling a tax.

This game is not just a matter of semantics. Taxes that are not called taxes violate the principle of transparency by depriving taxpayers of information needed to make meaningful choices about public priorities. A good tax system is one where taxpayers can easily understand who is assessed and how much they pay.

Further, many state constitutions contain additional procedural steps and limitations that apply only to tax increases. For example, sixteen states require legislative supermajorities for tax increases of some kind.<sup>3</sup> Nearly every state requires uniformity in taxation, which means equal treatment of similarly situated taxpayers. Other tax-related protections include multiple reading requirements for legislative passage and caps on tax rates or revenue levels. Many of these taxpayer protections are long-standing, with some reaffirmed by referenda in recent years. Protections can be undermined if the legislature can circumvent them by merely relabeling what would otherwise be a tax, so a workable definition of "tax" is necessary to give them meaning.

Public understanding of what a tax is, what a fee is, and the difference between the two can help strengthen taxpayer protection provisions, contribute to openness in tax policy debates, minimize distortions caused by hidden or mislabeled taxes, and help increase awareness of the full cost of government programs.

These are the goals of the Tax Foundation's Center for Legal Reform, which was created in 2005 to advance simple, sensible tax policy in judicial decisions. Thanks in part to our filing of *amicus curiae* briefs and efforts to spotlight evasion of constitutional and legislative safeguards, today all states except two adhere to a mean-

---

<sup>2</sup> See, e.g., ALVIN RABUSHKA, *TAXATION IN COLONIAL AMERICA* (2008) (describing how the colonists strove to minimize, avoid, and evade British and local taxation); Joseph D. Reid, Jr., *Tax Revolts in Historical Perspective*, 32 NAT'L TAX J. 67, 69 (1979) ("Tax revolts are as American as 1776."); Kirk J. Stark, *The Right to Vote on Taxes*, 96 NW. U.L. REV. 191, 191 (2001) ("Time and time again Americans have turned mutinous against taxes.").

<sup>3</sup> Arizona (two-thirds requirement since 1992), Arkansas (three-fourths requirement since 1934), California (two-thirds requirement since 1979), Colorado (two-thirds requirement since 1992), Delaware (three-fifths requirement since 1980), Florida (three-fifths requirement for corporate income taxes since 1971), Kentucky (three-fifths requirement since 2000), Louisiana (two-thirds requirement since 1966), Michigan (three-fourths requirement since 1994), Mississippi (three-fifths requirement since 1970), Missouri (two-thirds requirement since 1996), Nevada (two-thirds requirement since 1996), Oklahoma (three-fourths requirement since 1992), Oregon (three-fifths requirement since 1996), South Dakota (two-thirds requirement since 1996), Washington (two-thirds requirement since 1993).

# INTRODUCTION

ingful, taxpayer-protective definition of “tax,” and all states except one have rules requiring that any ambiguity in tax statutes be resolved in the taxpayers’ favor. This report reviews the state of tax-fee definitional standards in the states to identify further opportunities for *amicus* filings and public education efforts.

## What is a Tax?

*“Shakespeare wrote, ‘That which we call a rose by any other name would smell as sweet.’ The Bard’s words are equally true regarding the noxious odor of taxes. That which we call a tax by any other name smells just as bad.”*<sup>4</sup>

- Elliot “Spike” Maynard, then-Justice of the West Virginia Supreme Court of Appeals

How does one tell the difference between a tax and a non-tax? What features are relevant? Courts have generally adopted a few rules of thumb.

## Label Used Less Important than How the Charge Operates

A charge is not a fee simply because officials decide to call it that. If that was the only requirement, legislators would eagerly re-label every tax into a fee. Instead, what matters is how a charge operates and how the money is used, not just the label used to describe it.

In 2008, a Florida legislator proposed raising the cigarette tax by \$1 per pack and using the revenue for state health programs generally, referring to the increase as a “user fee.”<sup>5</sup> Quizzed by a skeptical media as to why he was referring to the tax increase as a fee, he replied:

[A] user fee is a tax. It’s the same thing. They [the Republicans] like to hide behind the semantics. I choose not to. I’m calling it a user fee because I have spoken to my Republican colleagues who said they would support it if it was called a user fee.<sup>6</sup>

Also in 2008, California legislators sought to raise the state’s gasoline tax by 39 cents per gallon, calling it a “fee.” They did so to skirt California’s legislative supermajority requirement to raise taxes, which

---

<sup>4</sup> *City of Clarksburg v. Grandeotto, Inc.*, 513 S.E.2d 177, 183 (W. Va. 1998) (Maynard, J., dissenting).

<sup>5</sup> See Joseph Henchman, *Florida Rep. Trying to Call Cigarette Tax a “Fee,”* TAX FOUNDATION TAX POLICY BLOG, Dec. 2, 2008, <http://taxfoundation.org/blog/florida-rep-trying-call-cigarette-tax-fee>.

<sup>6</sup> Joe Follick, *Budget blues lead lawmakers to eye raising cigarette tax*, OCALA STAR-BANNER, Nov. 29, 2008, [http://www.ocala.com/article/20081129/ARTICLES/811290994/1402/NEWS?Title=Budget\\_blues\\_lead\\_lawmakers\\_to\\_eye\\_raising\\_cigarette\\_tax](http://www.ocala.com/article/20081129/ARTICLES/811290994/1402/NEWS?Title=Budget_blues_lead_lawmakers_to_eye_raising_cigarette_tax).

until recently did not apply to fees.<sup>7</sup> They argued that the funds would be set aside for transportation projects, but under widespread skepticism about the legality of the move, the plan was abandoned.

Subterfuge of this kind not only fails to convince the public, it often fails to convince judges. Nearly every state has adopted an interpretive rule providing that what matters is how a charge operates, not what it is called.

## Taxes Are Imposed for Revenue Purposes, While Fees Cover the Cost of Providing a Service

Taxes, fees, and penalties are all imposed by government, all raise revenue, and all impose economic costs. While some may equate a tax to any government action that results in costs of any kind, the general public and the courts have been careful to distinguish between different forms of government-collection exactions. The key difference between these different assessments, according to laws and interpretive rules used in nearly every state, is their *purpose*.

- **Taxes** are imposed for the primary purpose of raising revenue, with the resultant funds spent on general government services.
- **Fees** are imposed for the primary purpose of covering the cost of providing a service, with the funds raised directly from those benefitting from a particular provided service.
- **Penalties** are imposed for the primary purpose of penalizing or regulating behavior, generally imposed as part of judicial proceedings, with resultant revenue a secondary consideration.
- Some taxes, known as *Pigouvian taxes*, are justified on grounds that they will discourage behavior, but their primary purpose remains revenue raising.
- Revenues from some taxes, known as *user taxes*, are deposited in a special dedicated fund and not the general fund. If their purpose is revenue generation for general government functions, these are still taxes although they can be mischaracterized as fees.

Therefore, to determine whether a charge is a tax, one must look at its primary purpose. A charge is not a tax if it is not imposed by the government, collected from those receiving particularized benefits to pay for those benefits, or collected for a primary purpose other than raising revenue (see Figure 1).

---

<sup>7</sup> See, e.g., Jonathon Ramsey, *California legislature passes budget with a \$0.39 per gallon gas 'user fee,'* AUTO BLOG, Dec. 25, 2008, <http://www.autoblog.com/2008/12/25/california-legislature-passes-buget-with-a-0-39-per-gallon-gas/>. See also George Skelton, *Gov.'s about-face on healthcare 'fees' is more than a matter of semantics,* LOS ANGELES TIMES, Jan. 15, 2007 ("The Schwarzenegger camp has been trying out all sorts of convoluted explanations about why the doc and hospital 'fees' aren't taxes.").

In the widely relied-upon 1992 case *San Juan Cellular Telephone Co. v. Public Service Commission of Puerto Rico*, the U.S. First Circuit Court of Appeals reviewed a 3 percent charge on telephone company gross revenue meant to recoup regulatory costs. Judge (now U.S. Supreme Court Justice) Stephen Breyer encapsulated a standard for defining taxes:

Courts have had to distinguish ‘taxes’ from regulatory ‘fees’ in a variety of statutory contexts. Yet, in doing so, they have analyzed the legal issues in similar ways . . . . The classic ‘tax’ is imposed by a legislature upon many, or all, citizens. It raises money, contributed to a general fund, and spent for the benefit of the entire community . . . .

Courts [analyzing close cases] have tended (sometimes with minor differences reflecting the different statutes at issue) to emphasize the revenue’s ultimate use, asking whether it provides a general benefit to the public, of a sort often financed by a general tax, or whether it provides more narrow benefits to regulated companies or defrays the agency’s costs of regulation.<sup>8</sup>

In other words, taxes fund general benefits to everyone while fees fund particularized benefits to the fee-payer.

This standard is not a new one, and was notably adopted by the U.S. Supreme Court in 1906 when it in turn adopted a maxim by former Justice Joseph Story, that “[r]evenue bills . . . are those that levy taxes in the strict sense of the word and are not bills for other purposes which may incidentally create revenue.”<sup>9</sup> In that case, a 50 cent tax on arriving immigrants “to defray the expense” of immigration processing was held not to be a tax.<sup>10</sup> At the turn of the last century, constitutional scholar Thomas Cooley summarized the standard, stating:

If revenue is the primary purpose and regulation is merely incidental the imposition is a tax; while if regulation is the primary purpose the mere fact that incidentally revenue is also obtained does not make the imposition a tax . . . .<sup>11</sup>

An essential corollary of the *purpose* standard for defining tax is that the label used by the legislature in framing the tax is not dispositive. Most states have explicitly held that how the charge operates is more important than the label used, with many others silent on the point (see Table 1). Two states (Delaware and North Carolina) are unclear, with cases in both states relying heavily on the label given by the legislature.

At present, all states except two (North Carolina and Oregon) focus on *purpose* in distinguishing taxes from other types of revenue (see Table 1).

<sup>8</sup> *San Juan Cellular*, 967 F.2d at 685.

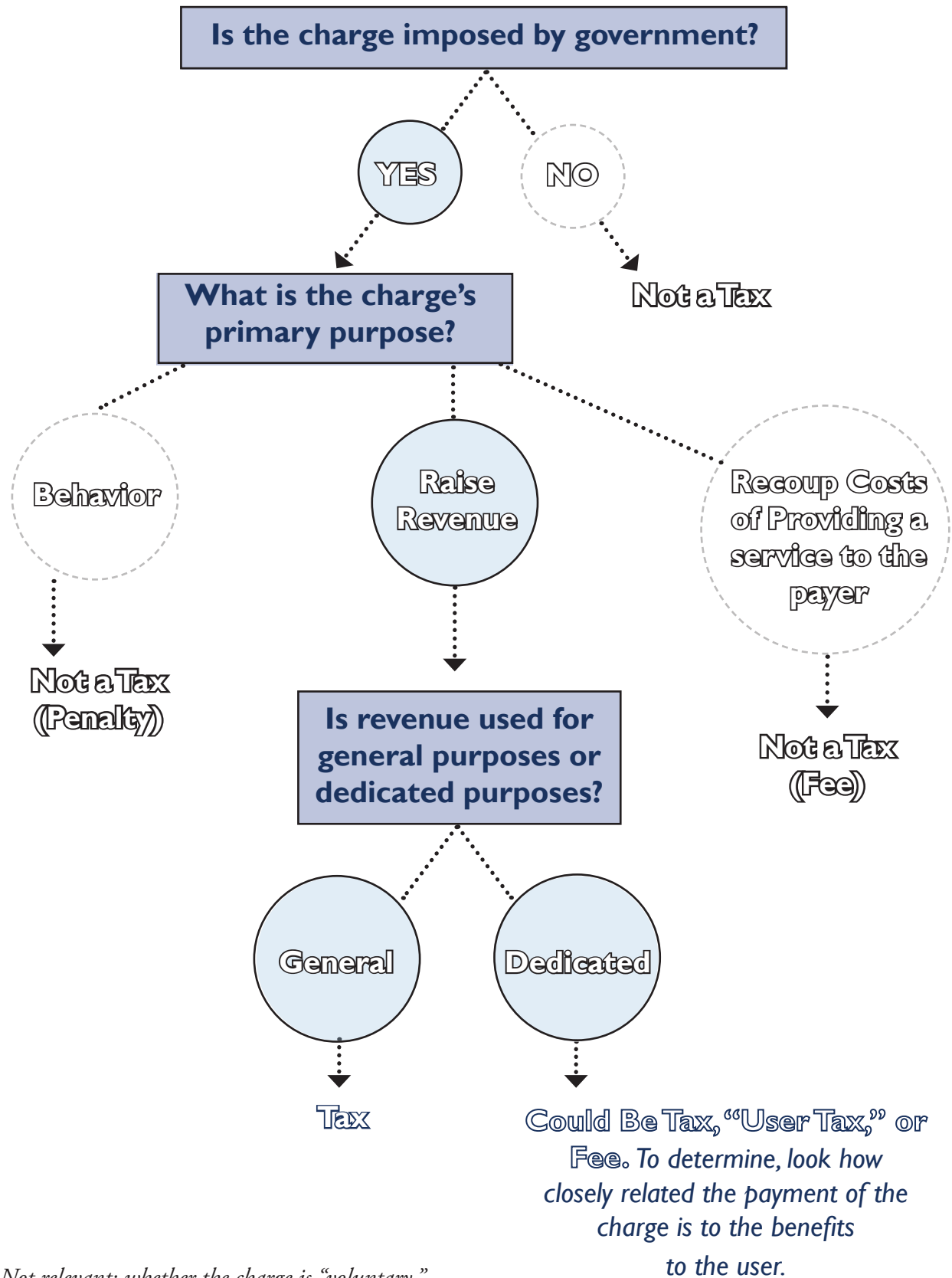
<sup>9</sup> *Millard v. Roberts*, 202 U.S. 429, 436 (1906), quoting 1 Story Const. § 880.

<sup>10</sup> *Head Money Cases*, 112 U.S. 580, 590 (1884).

<sup>11</sup> 4 Cooley, *The Law of Taxation*, ch. 29 § 1784 (4th ed. 1924).



**Figure 1: Flowchart For Determining Whether a Charge is a Tax**



**Table I:  
States that Have Adopted Common Definition of “Tax”**

State	Defines Tax as Charge with Primary Purpose of Raising Revenue	How the Charge Operates is More Important than the Label Used
Alabama	✓	✓
Alaska	✓	Implied
Arizona	✓	Implied
Arkansas	✓	✓
California	✓	✓
Colorado	✓	✓
Connecticut	✓	Implied
Delaware	✓	Unclear
Florida	✓	✓
Georgia	✓	✓
Hawaii	✓	✓
Idaho	✓	✓
Illinois	✓	Implied
Indiana	✓	✓
Iowa	✓	✓
Kansas	✓	Implied
Kentucky	✓	Implied
Louisiana	✓	✓
Maine	✓	Implied
Maryland	✓	✓
Massachusetts	✓	✓
Michigan	✓	Implied
Minnesota	✓	✓
Mississippi	✓	✓
Missouri	✓	✓
Montana	✓	✓
Nebraska	✓	Not Considered
Nevada	✓	Implied
New Hampshire	✓	Implied
New Jersey	✓	Implied
New Mexico	✓	Implied
New York	✓	Implied
North Carolina	Unclear	Unclear
North Dakota	✓	✓
Ohio	✓	✓
Oklahoma	✓	✓
Oregon	✗	✗
Pennsylvania	✓	Implied
Rhode Island	✓	Implied
South Carolina	✓	✓
South Dakota	✓	Implied
Tennessee	✓	✓
Texas	✓	✓
Utah	✓	Implied
Vermont	✓	✓
Virginia	✓	✓
Washington	✓	✓
West Virginia	✓	✓
Wisconsin	✓	✓
Wyoming	✓	Implied
District of Columbia	✓	Implied

Source: Tax Foundation review of state statutes and case law.

## Purpose of the Assessment is Used Internationally for Distinguishing Taxes from Fees

This distinction between taxes and fees has been adopted internationally as part of the Vienna Convention on Diplomatic Relations of 1961, presently ratified by 187 countries.<sup>12</sup> Article 34 of the Vienna Convention exempts diplomats from “all dues and taxes,” with the exception of a few categories, including “(e) charges levied for specific services rendered.”<sup>13</sup> A few international disputes have centered on diplomats being exempt from taxes but not necessarily exempt from fees:

- Japan ratified the Vienna Convention with a reservation relating to taxes, noting that it interpreted Article 34 to not grant immunity from transportation taxes on airline and railway tickets.<sup>14</sup>
- United Nations diplomats from 97 countries have accumulated \$18 million in unpaid parking tickets to New York City.<sup>15</sup>
- United States diplomatic officials refuse to pay the London Congestion Zone charge for driving in Greater London, arguing that it is a tax and not a toll. U.S. diplomats pay tolls in other countries.<sup>16</sup>

## Determining Purpose Can Sometimes Result in Close Cases

Determining purpose is therefore crucially important. How does one determine purpose? Breyer’s opinion recommends looking at three factors: (1) the entity that imposes the assessment, (2) the parties upon whom the assessment is imposed, and (3) the use of the revenue.<sup>17</sup> Variations of this formulation have been adopted by the vast majority of federal appeals courts and state supreme courts.<sup>18</sup>

Breyer noted that, in many cases, taxes and fees are not clearly delineated but rather exist on “a spectrum with a paradigmatic tax at one end and a paradigmatic fee at the other.”<sup>19</sup> Some charges may therefore have tax, fee, and penalty aspects. For example, a charge on truckers that covers the cost of truck weigh station and inspection services would be a fee, but if the charge produces revenue that

<sup>12</sup> Vienna Convention on Diplomatic Relations art. 34, Apr. 18, 1961, 500 U.N.T.S. 95.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* (Japan: Declaration with regard to article 34(a) of the said Convention, Jan. 27, 1987).

<sup>15</sup> See, e.g., Emily S. Rueb, *Weiner Wants Scofflaw Diplomats to Pay Up*, NEW YORK TIMES, Jan. 12, 2010, <http://cityroom.blogs.nytimes.com/2010/01/12/weiner-wants-scofflaw-diplomats-to-pay-up/>.

<sup>16</sup> See, e.g., *Embassy road toll row continues*, BBC NEWS, May 14, 2006, [http://news.bbc.co.uk/2/hi/uk\\_news/england/london/4770293.stm](http://news.bbc.co.uk/2/hi/uk_news/england/london/4770293.stm); Graeme Wilson, *Obama motorcade’s £120 congestion charge fine*, THE SUN, Jul. 20, 2011, <http://www.thesun.co.uk/sol/homepage/news/3704469/Barack-Obama-motorcades-120-congestion-charge-fine.html>.

<sup>17</sup> *San Juan Cellular*, 967 F.2d at 685.

<sup>18</sup> A complete list of citations is provided in each state’s description in this report. See also *Massachusetts v. United States*, 435 U.S. 444, 466-67 (1978) (distinguishing a fee from a tax where the charge is “based on a fair approximation of use of the system, and [is] structured to produce revenues that will not exceed the total cost . . . of the benefits to be supplied . . . .”); *Hedgepeth v. Tennessee*, 215 F.3d 608, 612 (6th Cir. 2000) (describing *San Juan Cellular* as the “leading decision” used for “the definition of the term ‘tax’”); *Time Warner Entertainment-Advance/Newhouse P’ship v. City of Lincoln*, 360 F.Supp.2d 1012, 1016-17 (D. Neb. 2005) (explaining that the *San Juan Cellular* test faithfully applies Blackstone’s description of taxation).

<sup>19</sup> *San Juan Cellular*, 967 F.2d at 685.

is spent on highway construction, that excess portion is a tax.<sup>20</sup> A Virginia charge for traffic violations is a penalty to the extent its purpose is to punish bad driving, but an additional amount of \$1,050 per violation imposed for the primary purpose of generating revenue is a tax.<sup>21</sup>

## **Tax Statute Ambiguity Should Be Resolved in Favor of the Taxpayer**

In situations where a tax case could be resolved either way, or where a tax statute could have two possible interpretations, most states have adopted a rule that such ambiguity is resolved in favor of the taxpayer. This rule is of particular importance when a local government or special district is imposing a tax but does not have proper state permission to do so.

Courts are generally reluctant to suspend the operation of a revenue-raising statute and in some cases are actively prevented from doing so on separation of powers grounds. However, judges will not allow the continued collection of a tax if its basis is improper or even ambiguous.

All states except one (Oregon) interpret ambiguity in tax statutes in favor of the taxpayer (see Table 2).

---

<sup>20</sup> *Schneider Transport, Inc. v. Cattanach*, 657 F.2d 128, 132 (7th Cir. 1981), *cert. denied*, 455 U.S. 909 (1982).

<sup>21</sup> See Joseph Henchman, *More Roadblocks for Virginia's Tax on Traffic Offenses*, TAX FOUNDATION TAX POLICY BLOG, Aug. 13, 2007, <http://taxfoundation.org/blog/more-roadblocks-virginias-tax-traffic-offenses>.

**Table 2:**  
**States that Resolve Statutory Ambiguity in Favor of the Taxpayer**

State	Binding Authority Holding That Ambiguity in Tax Statutes is Resolved in Favor of the Taxpayer
Alabama	✓
Alaska	✓
Arizona	✓
Arkansas	✓
California	✓
Colorado	✓
Connecticut	✓
Delaware	✓
Florida	✓
Georgia	✓
Hawaii	✓
Idaho	✓
Illinois	✓
Indiana	✓
Iowa	✓
Kansas	✓
Kentucky	✓
Louisiana	✓
Maine	✓
Maryland	✓
Massachusetts	✓
Michigan	✓
Minnesota	✓
Mississippi	✓
Missouri	✓
Montana	✓
Nebraska	✓
Nevada	✓
New Hampshire	✓
New Jersey	✓
New Mexico	✓
New York	✓
North Carolina	✓
North Dakota	✓
Ohio	✓
Oklahoma	✓
Oregon	✗
Pennsylvania	✓
Rhode Island	✓
South Carolina	✓
South Dakota	✓
Tennessee	✓
Texas	✓
Utah	✓
Vermont	✓
Virginia	✓
Washington	✓
West Virginia	✓
Wisconsin	✓
Wyoming	✓
District of Columbia	✓

Source: Tax Foundation review of state statutes and case law.

## “Voluntariness” is Not Material in the Tax/Fee Distinction

Authorities on tax/fee issues have increasingly concluded that a “voluntariness” standard, whereby only “compulsory” charges are considered taxes, is of no help in determining if a charge is a tax or a fee.

The attempt to use this notion to define taxes has proven problematic because it conflates the payment of the *charge* with the payment of the *underlying service*. One may purchase a product “voluntarily,” but this does not make the sales tax paid on the transaction “voluntary.” Use of a toll road is a result of a voluntary decision, but this fact is irrelevant to the question of whether the toll collected is a tax or a fee; it is a fee only if the revenue is used to defray the costs of providing a service to the payer and is not levied to generate revenue for general spending.

Taken to its logical extent, the voluntariness rule would mean that all charges collected for government general revenue, other than perhaps a head tax, are in fact not taxes.

Professor Laurie Reynolds has summarized this problem with voluntariness:

[T]he definition is stretched to its logical limits when the court concludes that a fee is voluntary because the individual complainant can avoid the fee by ceasing to engage in the activity being assessed. By that reasoning, many taxes are likewise voluntary—to avoid income taxes, a taxpayer need only stop earning income.<sup>22</sup>

While a minority of states (thirteen states) considers a charge’s voluntariness when determining whether a charge is a tax, most states treat it as just one of many factors or have determined that it is immaterial to the analysis entirely. Ten states have explicitly rejected the voluntariness argument. (See Table 3.)

---

<sup>22</sup> Laurie Reynolds, *Taxes, Fees, Assessments, Dues, and the “Get What You Pay For” Model of Local Government*, 56 FLA. L. REV. 373, 412 (2004).

**Table 3:**  
**State Court Treatment of the Problematic “Voluntariness” Argument**

State	Has State Rejected “Voluntariness” Argument?
Alabama	x (in one lower court case)
Alaska	Not Considered
Arizona	x
Arkansas	Not Considered
California	✓
Colorado	✓
Connecticut	x
Delaware	Unclear
Florida	x
Georgia	x
Hawaii	✓
Idaho	✓
Illinois	Not Considered
Indiana	x
Iowa	✓
Kansas	x
Kentucky	Not Considered
Louisiana	Not Considered
Maine	x
Maryland	x
Massachusetts	✓
Michigan	x
Minnesota	Not Considered
Mississippi	✓
Missouri	Not Considered
Montana	Not Considered
Nebraska	Not Considered
Nevada	x
New Hampshire	✓
New Jersey	Not Considered
New Mexico	Not Considered
New York	Not Considered
North Carolina	x
North Dakota	Not Considered
Ohio	Not Considered
Oklahoma	Not Considered
Oregon	Not Considered
Pennsylvania	x
Rhode Island	Not Considered
South Carolina	Not Considered
South Dakota	Not Considered
Tennessee	✓
Texas	Not Considered
Utah	Not Considered
Vermont	Not Considered
Virginia	Not Considered
Washington	✓
West Virginia	Not Considered
Wisconsin	Not Considered
Wyoming	Not Considered
District of Columbia	Not Considered

Source: Tax Foundation review of state case law.

## Implications of the U.S. Supreme Court’s Health Care Decision: A New Definition of “Tax” or a Hesitant, Case-Specific Rule?

The U.S. Supreme Court has adhered to these standards of distinguishing taxes from fees.<sup>23</sup> However, on June 28, 2012, the U.S. Supreme Court handed down its decision in *NFIB v. Sebelius*, which decided the constitutionality of the Patient Protection and Affordable Care Act, popularly known as “Obamacare.”<sup>24</sup> The Court had four questions before it:

- **Anti-Injunction Act.** Whether a federal law barring legal challenges to taxes prior to collection applied. If this law, the Anti-Injunction Act, did apply, then the case could not be heard until 2014. The Court unanimously held that the Anti-Injunction Act did not apply to the individual mandate to purchase health insurance because it is not a tax for the purposes of that law.
- **Medicaid Expansion.** Whether a federal requirement on states to expand their Medicaid programs or lose all federal Medicaid funding exceeded the federal spending power. The Court ruled 7 to 2 that it did, limiting the federal government only to taking away additional Medicaid money from states.
- **Commerce Clause.** Whether the individual mandate to purchase health insurance is permissible under the federal government’s power to regulate interstate commerce. The Court ruled 5 to 4 that it is not.
- **Taxing Clause.** Whether the individual mandate to purchase health insurance is permissible under the federal government’s power to tax. The Court ruled 5 to 4 that it is.

The Court’s rationale—that the individual mandate is valid under the taxing power—came as a surprise to most commentators. The parties spent most of their argument time and briefing focused on the Commerce Clause issue, with the Tax Foundation as one of the few organizations that filed a brief in the case on the taxing power argument. Even on the Court, the conclusion was seemingly not a firm one: four justices dissented from the conclusion; four other justices stated their preference for upholding the mandate under the Commerce Clause; and only Chief Justice John Roberts focused squarely on the taxing power as the basis for upholding the statute.

The Court did not conclude that the mandate is valid as a tax merely because it raises revenue. Something more is required to bring it within the taxing power. The majority at first conceded the validity of prior precedent defining the term “tax” in contrast to “penalty,” stating that penalties are charges “obviously designed to regulate behavior.”<sup>25</sup> The majority concluded that the individual mandate charge is not a penalty (and, perhaps therefore, instead a tax) for three reasons:

<sup>23</sup> See, e.g., *United States v. New York*, 315 U.S. 510, 515-16 (1942) (“But a tax for purposes of [the Bankruptcy Code] includes any pecuniary burden laid upon individuals or property for the purpose of supporting the government, by whatever name it may be called.”) (internal citations omitted); *United States v. La Franca*, 282 U.S. 568, 572 (1931) (“A ‘tax’ is an enforced contribution to provide for the support of government . . . .”); *Millard v. Roberts*, *supra* note 9.

<sup>24</sup> *National Federation of Independent Business v. Sebelius*, 567 U.S. \_\_\_\_ (2012), 132 S. Ct. 2566 (U.S. Jun. 28, 2012).

<sup>25</sup> *Id.* at 42.



- The amount to be paid is not a “prohibitory financial punishment,” because “the amount due will be far less than the price of insurance, and, by statute, it can never be more.”<sup>26</sup>
- No finding of criminal intent or guilt, referred to as “scienter,” is required.<sup>27</sup> In footnote 9, however, the Court concedes that a charge lacking a scienter requirement is not enough to bring a government exaction within the taxing power.<sup>28</sup>
- The payment is collected by the IRS through its normal collection methods, “except that the Service is *not* allowed to use those means most suggestive of a punitive sanction, such as criminal prosecution.”<sup>29</sup> In footnote 9, however, the Court concedes that the mere fact that a charge is collected by the IRS is not enough to bring a government exaction within the taxing power.<sup>30</sup>

Because only the first part of this three-part test is essential to the Court’s explanation of what falls within the taxing power, the key feature is whether a charge is financially onerous or not. If it is small relative to income, it is permissible under the taxing power, while if it is large relative to income, it is not.

The obvious response is that small and large are subjective. The Court acknowledged this concern but stated “we need not decide here the precise point at which an exaction becomes so punitive that the taxing power does not authorize it.”<sup>31</sup>

Despite popular reference to the Court’s decision as concluding that the mandate “is a tax,” Roberts’s opinion for the Court carefully avoids such a firm statement. Instead, it states that the mandate “looks like a tax,”<sup>32</sup> “may for constitutional purposes be considered a tax,”<sup>33</sup> “may be viewed as a tax,”<sup>34</sup> “may reasonably be characterized as a tax,”<sup>35</sup> and that “Congress had the power to impose [it] under the taxing power.”<sup>36</sup>

This consistent use of cautious terminology suggests that the Court’s purpose is not to overturn its past precedents defining “tax” but rather to determine a narrow space by which the individual mandate could survive as constitutional. The sheer chaos that could emerge from taking the Court’s definition as a definition of “tax”—small charges are taxes and thus must comply with supermajority and voter threshold requirements, while large charges are penalties and may therefore be levied by local governments without restraint—advises against other courts and judges assuming too much about what the *NFIB v. Sebelius* ruling means for other contexts.

---

<sup>26</sup> *Id.* at 35-36.

<sup>27</sup> *Id.* at 36.

<sup>28</sup> *Id.* n.9.

<sup>29</sup> *Id.* (emphasis original).

<sup>30</sup> *Id.* n.9.

<sup>31</sup> *Id.* at 43.

<sup>32</sup> *Id.* (slip op. at 33).

<sup>33</sup> *Id.* at 35.

<sup>34</sup> *Id.* at 36 & n. 9.

<sup>35</sup> *Id.* at 44.

<sup>36</sup> *Id.* at 39.

# ALABAMA



<b>Definition of Tax:</b> If a charge has the primary purpose of raising revenue, it is a tax	✓
<b>Definition of Tax:</b> How charge operates more important than label	✓
<b>Definition of Tax:</b> Voluntariness immaterial	✗ (in one lower court case)
Ambiguity resolved in favor of the taxpayer	✓

## Definition of Tax

In *Lightwave Technologies, LLC v. Escambia County*, the Alabama Supreme Court found that a “fee” to lay fiber-optic cable in a county-owned right-of-way was in fact a tax.<sup>37</sup> The court stated three factors to discern the difference between a tax and a fee: (1) whether “the charge was designed to generate revenue”; (2) whether the amount of the charge was rationally related to the cost of the service or substantial benefit provided; and (3) whether the money received was deposited into a segregated account earmarked for the particular service or objective.<sup>38</sup>

The court concluded that the charge in question was actually a tax because (1) the charge was designed to raise revenue, as two county commissioners testified at trial; (2) the amount of the charge was not rationally related to the specific purpose of maintaining the county’s rights-of-way; and (3) the money collected was deposited into a fund, the proceeds of which were dedicated to county bridge and road maintenance instead of county rights-of-way maintenance.<sup>39</sup>

The court reaffirmed these determinative factors in two subsequent decisions: *Densmore v. Jefferson County* and *St. Clair County Home Builders Association v. City of Pell City*.<sup>40</sup> *Densmore* slightly expanded the second factor by noting that “the benefit conferred on property owners need not relate directly to the exact amount paid . . . [instead] a ‘substantial indirect benefit . . .’ would suffice to uphold the

<sup>37</sup> See *Lightwave Tech., LLC v. Escambia County*, 804 So.2d 176, 180 (Ala. 2001).

<sup>38</sup> *Id.*; see also *Board of Water & Sewer Commissioners of the City of Mobile v. Yarbrough*, 662 So.2d 251, 255 (Ala. 1995) (stating that for a fee to be sustained as valid, the benefit conferred on property owners need not relate directly to the exact amount paid, rather a “substantial indirect benefit” to a property owner would suffice to uphold the fee’s validity).

<sup>39</sup> See *id.* at 180.

<sup>40</sup> See *Densmore v. Jefferson County*, 813 So.2d 844, 853 (Ala. 2001) (upholding a water and sewer charge as a fee because (1) the charge was not for general revenue purposes, (2) the amount was rationally related to cost of complying with state and federal clean water mandates, and (3) the charge proceeds were destined to aid the County in compliance with state and federal clean water requirements); *St. Clair County Home Builders Ass’n v. City of Pell City*, 61 So. 3d 992, 1005 (Ala. 2010) (holding that water and sewer capital-recovery charges were fees because (1) the charges were not levied for general revenue purposes, (2) the charges were limited to the specific use of defraying the cost of water and sewer services and improvement, and (3) the funds were kept in a separate earmarked account for that purpose).



validity of a fee.”<sup>41</sup>

## Voluntariness

One Alabama appellate case stated that non-voluntariness is a feature of a tax, although it is not the only relevant one.<sup>42</sup> The court stated: “The essential characteristics of a tax are that it is not a voluntary payment or donation, but an enforced contribution, exacted pursuant to legislative authority. A tax is not dependent on the will or assent of the person taxed.”<sup>43</sup>

## Ambiguity Resolved in Favor of the Taxpayer

Alabama courts strictly construe ambiguous statutes in favor of the taxpayer.<sup>44</sup>

---

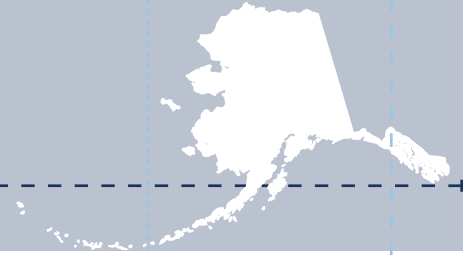
<sup>41</sup> *Densmore*, 813 So.2d at 854 (citing *Board of Water & Sewer Commissioners of the City of Mobile v. Yarbrough*, 662 So.2d 251, 255 (Ala. 1995)).

<sup>42</sup> *One Stop, Inc. v. State Dept. of Revenue*, 814 So.2d 278, 282, 285 (Ala. Civ. App. 2001), *cert. denied*, (Ala. Jan. 12, 2001) (No. 1000771).

<sup>43</sup> *Id.*

<sup>44</sup> See e.g., *Ex Parte HealthSouth Corp.*, 978 So.2d 745, 756 (Ala. 2007) (“Taxation statutes are to be strictly construed against the taxing authority.”); *Ala. Farm Bureau Mut. Cas. Ins. Co. v. City of Hartselle*, 460 So.2d 1219, 1223 (Ala. 1984) (“Where the language of a taxing statute is reasonably capable of two constructions, the interpretation most favorable to the taxpayer must be adopted.”); *Ashe Carson Co. v. State*, 35 So. 38, 38 (Ala. 1903) (“The statute above quoted, under which it is claimed the state has the right to tax the interest the lessees acquired under their lease as an interest in land, is one which must be strictly construed against the state.”).

# ALASKA



<b>Definition of Tax:</b> If a charge has the primary purpose of raising revenue, it is a tax	✓
<b>Definition of Tax:</b> How charge operates more important than label	Implied
<b>Definition of Tax:</b> Voluntariness immaterial	Not Considered
Ambiguity resolved in favor of the taxpayer	✓

## Definition of Tax

In *State v. Alex*, the Supreme Court of Alaska invalidated as a tax a mandatory assessment levied by an aquaculture association on fishermen by defining a tax as “a general levy without reference to benefits conferred while ‘assessment’ [fee] refers to an imposition based on benefits conferred.”<sup>45</sup> Alaska law further provides that “[a] fee or other charge that is set by regulation may not exceed the estimated actual costs of the state agency in administering the activity or providing the service unless otherwise provided by the statute under which the regulation is adopted.”<sup>46</sup>

## Voluntariness

No Alaska case has considered a charge’s voluntariness to be relevant in determining whether the charge is a tax.

## Ambiguity Resolved in Favor of the Taxpayer

Alaska follows the principal of construing ambiguities in favor of the taxpayer.<sup>47</sup>

<sup>45</sup> *State v. Alex*, 646 P.2d 203, 208 (Alaska 1982) (quoting BLACK’S LAW DICTIONARY 1629 (4th ed. 1968)).

<sup>46</sup> ALASKA STAT. § 37.10.050(a).

<sup>47</sup> See *Union Oil Co. of Cal. v. Dep’t of Revenue*, 560 P.2d 21, 25 (Alaska 1977) (“[W]e follow the general rule of construction of tax statutes which requires that, where possible, doubts be resolved in favor of the taxpayer.”).



<b>Definition of Tax:</b> If a charge has the primary purpose of raising revenue, it is a tax	✓
<b>Definition of Tax:</b> How charge operates more important than label	Implied
<b>Definition of Tax:</b> Voluntariness immaterial	✗
Ambiguity resolved in favor of the taxpayer	✓

## Definition of Tax

In *May v. McNally*, the Arizona Supreme Court invalidated as a tax a 10 percent surcharge on all criminal and civil fines that was distributed to political candidates.<sup>48</sup> Adopting the *San Juan Cellular* reasoning, the court specified that “[w]hether an assessment should be categorized as a tax or a fee generally is determined by examining three factors: ‘(1) the entity that imposes the assessment; (2) the parties upon whom the assessment is imposed; and (3) whether the assessment is expended for general public purposes, or used for the regulation or benefit of the parties upon whom the assessment is imposed.’”<sup>49</sup>

The court held the surcharge to be a tax because (1) the charge was levied by citizen initiative, (2) the charge was imposed on a wide array of individuals, and (3) the proceeds were used for a public purpose—campaign finance.<sup>50</sup> This decision elaborated upon the reasoning of earlier decisions by the Arizona Supreme Court, which resonated a similar distinction between taxes and fees.<sup>51</sup>

## Voluntariness

Although the Arizona Supreme Court alluded to the *San Juan Cellular* factors in order to determine the identity of a payment in *May*, the court has yet to overrule an earlier decision describing voluntariness as the defining characteristic of a fee.<sup>52</sup> In *Stewart v. Verde River Irrigation & Power Dis-*

<sup>48</sup> *May v. McNally*, 55 P.3d 768, 773-74 (Ariz. 2002) (en banc).

<sup>49</sup> *May*, 55 P.3d at 773-74 (quoting *Bidart Bros. v. Cal. Apple Comm’n*, 73 F.3d 925, 931 (9th Cir.1996) (citing *San Juan Cellular Tel. Co. v. Pub. Serv. Comm’n of Puerto Rico*, 967 F.2d 683 (1st Cir.1992))).

<sup>50</sup> *May*, 55 P.3d at 774.

<sup>51</sup> See, e.g., *Barry v. School Dist. No. 210 (Phoenix Union High School) of Maricopa County*, 460 P.2d 634, 635-36 (Ariz. 1969) (“A ‘tax’ is levied against all similarly situated property for purposes which will benefit public generally. A ‘special assessment’ is levied only against specific property which is the property benefited by the improvement.”); *Stewart v. Verde River Irrigation & Power Dist.*, 68 P.2d 329, 334-35 (Ariz. 1937) (describing taxes as proportional contributions imposed by the state upon individuals for the support of government and for all public needs, but not payments for a special privilege or a special service rendered).

<sup>52</sup> See *Stewart v. Verde River Irrigation & Power Dist.*, 68 P.2d 329, 335 (Ariz. 1937).



*strict*, the court stated that “a fee is always voluntary, in the sense that the party who pays it originally has, of his own volition, asked a public officer to perform certain services for him, which presumably bestow upon him a benefit not shared by other members of society.”<sup>53</sup>

## **Ambiguity Resolved in Favor of the Taxpayer**

Arizona courts resolve statutory ambiguity in favor of the taxpayer.<sup>54</sup>

---

<sup>53</sup> *Stewart*, 68 P.2d at 335.

<sup>54</sup> *See, e.g., Ebasco Serv., Inc. v. Ariz. State Tax Comm’n*, 459 P.2d 719, 722 (Ariz. 1969) (“This Court has previously stated that where there is ambiguity, a revenue statute should be construed liberally in favor of the taxpayer and strictly against the state.”); *Corp. Comm’n v. Equitable Life Assurance Soc’y*, 239 P.2d 360, 363 (Ariz. 1951) (“If a statute is ambiguous, it should be construed liberally in favor of the taxpayer and strictly against the state.”); *Gen. Petroleum Corp. v. Smith*, 157 P.2d 356, 359 (Ariz. 1945) (“Tax measures . . . are to be liberally interpreted in favor of the taxpayer.”).



<b>Definition of Tax:</b> If a charge has the primary purpose of raising revenue, it is a tax	✓
<b>Definition of Tax:</b> How charge operates more important than label	✓
<b>Definition of Tax:</b> Voluntariness immaterial	Not Considered
Ambiguity resolved in favor of the taxpayer	✓

## Definition of Tax

In *City of Marion v. Baioni*, the Arkansas Supreme Court upheld a sewer charge as a fee.<sup>55</sup> The court compared two earlier Arkansas decisions<sup>56</sup> and synthesized case law from other jurisdictions to distinguish taxes from fees.<sup>57</sup> The court stated that “[t]he distinction between a ‘tax’ and ‘fee’ is that the government imposes a tax for general revenue purposes, but a fee is imposed in the government’s exercise of its police powers.”<sup>58</sup> The sewer charge at issue was upheld as a fee because (1) the charge was fair and equitable; (2) the charge was reasonably related to the benefits conferred on the payers; and (3) the funds were segregated for future use to expand the city water and sewer systems for the new property developments.<sup>59</sup> This was the case even though some of the funds were dedicated to sewer expansion projects.<sup>60</sup> This same distinction between taxes and fees was reiterated in subsequent decisions.<sup>61</sup>

<sup>55</sup> See *City of Marion v. Baioni*, 850 S.W.2d 1 (Ark. 1993).

<sup>56</sup> See *Holman v. City of Dierks*, 233 S.W.2d 392, 393 (Ark. 1950) (holding an annual \$4.00 sanitation charge per residence and business to be a proper fee because the proceeds were used solely to defray the cost of the fogging the city with insecticide); *City of North Little Rock v. Graham*, 647 S.W.2d 452, 453 (Ark. 1983) (holding a \$3.00 per month “public safety fee” assessed on the water bill of each residence and business, used to increase police and firefighter salaries, to be a tax because the charge paid for traditional existing government services instead of a special service as was the case in *Holman*).

<sup>57</sup> See *City of Marion*, 850 S.W.2d at 2-3 (comparing tax distinction rulings from California, Florida, Maryland, Ohio, Oregon, and Washington).

<sup>58</sup> *Id.* at 2.

<sup>59</sup> *Id.* at 3.

<sup>60</sup> *Id.* (“Raising such expansion capital by setting connection charges, which do not exceed a pro rata share of reasonably anticipated costs of expansion, is permissible where expansion is reasonably required, *if the use of the money is limited to meeting the cost of that extension.*”) (emphasis original).

<sup>61</sup> See, e.g., *Rose v. Arkansas State Plant Bd.*, 213 S.W.3d 607, 614 (Ark. 2005) (quoting both *Baioni* and *Harris* in defining a tax to be for the purpose of general revenue raising and a fee to be imposed for a regulatory purpose, bearing a reasonable relationship to the benefits conferred on the payer); *Harris v. City of Little Rock*, 40 S.W.3d 214, 221 (Ark. 2001) (“A governmental levy of a fee, in order not to be denominated a tax requiring approval by the taxpayers, must be fair and reasonable and bear a reasonable relationship to the benefits conferred on those receiving the services.”); *Barnhart v. City of Fayetteville*, 900 S.W.2d 539, 544 (Ark. 1995) (holding that for a fee to be proper it must be reasonably related to the



The court also noted that “determining whether a governmental charge, assessment or fee is a tax is not bound by how the enactment or levy labels it.”<sup>62</sup>

## Voluntariness

No Arkansas case has considered a charge’s voluntariness to be relevant in determining whether the charge is a tax.

## Ambiguity Resolved in Favor of the Taxpayer

Arkansas courts embrace the principal of resolving statutory ambiguity in favor of the taxpayer.<sup>63</sup>

---

benefit provided to the payer).

<sup>62</sup> *Baioni*, 850 S.W.2d at 2 (citing *See also City of Hot Springs v. Vapors Theatre Restaurant, Inc.*, 769 S.W.2d 1 (1989) and *Rainwater v. Haynes*, 428 S.W.2d 254 (1968)).

<sup>63</sup> *See, e.g., Miss. River Transmission Corp. v. Weiss*, 65 S.W.3d 867, 873 (Ark. 2002) (“An additional rule of statutory construction in the area of taxation cases is that when we are reviewing matters involving the levying of taxes, any and all doubts and ambiguities must be resolved in favor of the taxpayer.”); *Barclay v. First Paris Holding Co.*, 42 S.W.3d 496, 500 (Ark. 2001) (“An additional rule of statutory construction in the area of taxation cases is that when we are reviewing matters involving the levying of taxes any and all doubts and ambiguities must be resolved in favor of the taxpayer.”).





<b>Definition of Tax:</b> If a charge has the primary purpose of raising revenue, it is a tax	✓
<b>Definition of Tax:</b> How charge operates more important than label	✗
<b>Definition of Tax:</b> Voluntariness immaterial	✓
Ambiguity resolved in favor of the taxpayer	✓

## Definition of Tax

In *Sinclair Paint Co. v. State Board of Equalization*, the California Supreme Court evaluated a program, funded by assessments on manufacturers of lead-based materials, which provided medical services for children potentially suffering from lead poisoning.<sup>64</sup> The legislature considered the program’s assessments to be a fee and passed it by a simple majority vote rather than the two-thirds required for tax increases.

After reviewing California’s considerable case law on the topic, the California Supreme Court upheld the assessment as a fee, finding that the principal purpose of fees are charges for a specific benefit whereas taxes are for general revenue raising measures.<sup>65</sup> While the assessment on the manufacturers of lead-based materials generates revenue, its primary purpose is to provide ameliorative services related to their products.<sup>66</sup> Additionally, “the state must use the funds it collects under section 105310 *exclusively* for mitigating the adverse effects of lead poisoning of children, and not for general purposes.”<sup>67</sup>

The *Sinclair* court noted three general categories of charges that were not considered to be “special taxes”<sup>68</sup>: “(1) special assessments [(fees)], based on the value of benefits conferred on property; (2) development fees, exacted in return for permits or other government privileges [and reasonably related to the probable benefits and costs]; and (3) regulatory fees, imposed under the police power [as long

<sup>64</sup> See *Sinclair Paint Co. v. State Bd. of Equalization*, 937 P.2d 1350, 1354 (Cal. 1997).

<sup>65</sup> See *Sinclair Paint Co. v. State Bd. of Equalization*, 937 P.2d 1350, 1354 (Cal. 1997) (“In general, taxes are imposed for revenue purposes, rather than in return for a specific benefit conferred or privilege granted.”); see also *Bay Area Cellular Telephone Co. v. City of Union City*, 75 Cal.Rptr.3d 839, 844 (Cal. Ct. App. 2008) (quoting *Sinclair* for the distinction between fees and taxes).

<sup>66</sup> See *id.* at 1358 (“[I]f regulation is the primary purpose of the fee measure, the mere fact that the measure also generates revenue does not make the imposition a tax.”).

<sup>67</sup> *Id.* (emphasis original).

<sup>68</sup> California law distinguishes between two different classifications of taxes; a general tax and a specific tax. See CAL. CONST. art. XIII C, § 1 (“‘General tax’ means any tax imposed for general governmental purposes. . . . ‘Special tax’ means any tax imposed for specific purposes, including a tax imposed for specific purposes, which is placed into a general fund.”).



as the charges do not exceed the reasonable cost of providing services and are not for unrelated revenue purposes].”<sup>69</sup>

California law also states that “any fee which does not exceed the reasonable cost of providing the service or regulatory activity for which the fee is charged and which is not levied for general revenue purposes” is not a “special tax” but instead a general tax.<sup>70</sup>

## Voluntariness

In *Sinclair*, the California Supreme Court rejected the voluntariness standard as a characteristic of a fee.<sup>71</sup> This holding is in accord with other California courts, which have also rejected the voluntariness standard to classify a charge as a fee by noting that compulsory fees could be legitimate fees instead of taxes.<sup>72</sup>

## Ambiguity Resolved in Favor of the Taxpayer

California courts construe statutory ambiguity in favor of the taxpayer.<sup>73</sup>

---

<sup>69</sup> *Sinclair*, 937 P.2d at 1354-55 (citing *Evans v. City of San Jose*, 4 Cal. Rptr. 2d 601, 608 (Cal. Ct. App. 1992); *Shapell Industries, Inc. v. Governing Board of the Milpitas Unified School District*, 1 Cal. Rptr. 2d 818, 835 (Cal. Ct. App. 1991); *Pennell v. City of San Jose*, 721 P.2d 1111, 1119 (Cal. 1986)).

<sup>70</sup> CAL. GOV'T CODE § 50076 (West 2012) ; see also *Bay Area Cellular Telephone Co. v. City of Union City*, 75 Cal. Rptr.3d 839, 844 (Cal. Ct. App. 2008) (“Special taxes must be distinguished from regulatory fees imposed under the police power, which are not subject to the constitutional provision since they are not taxes at all. Special taxes do not encompass fees charged to particular individuals in connection with regulatory activities or services when those fees do not exceed the reasonable cost of providing the service or activity for which the fee is charged, and are not levied for unrelated revenue purposes.”) (quoting *Kern County Farm Bureau v. County of Kern*, 23 Cal. Rptr.2d 910, 914 (Cal. Ct. App. 1993)).

<sup>71</sup> *Sinclair*, 937 P.2d at 1354.

<sup>72</sup> See, e.g., *Cal. Farm Bureau Fed'n v. State Water Res. Control Bd.*, 247 P.3d 112, 123 (Cal. 2011) (“Most taxes are compulsory rather than imposed in response to a voluntary decision to develop or to seek other government benefits or privileges. But compulsory fees may be deemed legitimate fees rather than taxes.”); see also *Bay Area Cellular Telephone Co. v. City of Union City*, 75 Cal. Rptr. 3d 839, 847 (Cal. Ct. App. 2008) (rejecting the city’s argument that the charge was not a tax because taxpayers “voluntarily consented” to pay it by signing up for phone service); *Kern County Farm Bureau v. County of Kern*, 23 Cal. Rptr. 2d 910, 916 (Cal. Ct. App. 1993) (“[T]here is no requirement that a property owner be able to avoid the fee in order for the fee to be valid.”).

<sup>73</sup> See, e.g., *Cal. Motor Transp. Co. v. State Bd. of Equal.*, 187 P.2d 745, 749 (Cal. 1948) (“In case of doubt, construction is to favor the taxpayer rather than the government.” (quoting *Edison Cal. Stores, Inc. v. McColgan*, 183 P.2d 16, 19 (Cal. 1947))).

<b>Definition of Tax:</b> If a charge has the primary purpose of raising revenue, it is a tax	✓
<b>Definition of Tax:</b> How charge operates more important than label	✗
<b>Definition of Tax:</b> Voluntariness immaterial	✓
Ambiguity resolved in favor of the taxpayer	✓

## Definition of Tax

Colorado courts focus on the primary purpose of the charge to identify its character: a tax is levied primarily to raise revenue while a fee is primarily charged to defray costs of some benefit provided to the payer.<sup>74</sup> To determine the primary purpose of the charge, Colorado courts endeavor to determine the legislative intent of the charge by looking to the statutory language used.<sup>75</sup>

## Voluntariness

The Colorado Supreme Court explicitly rejected a voluntariness standard in *Bloom v. City of Fort Collins*.<sup>76</sup> The court stated: “[w]e have never held, however, that a service fee must be voluntary” and that whether a charge is a tax or not does “not turn...on whether the fee was voluntary” but rather whether “the fees were reasonably designated to offset the overall cost of services for which the fees were imposed.”<sup>77</sup>

<sup>74</sup> See e.g., *Barber v. Ritter*, 196 P.3d 238, 248 (Colo. 2008) (“To determine whether a government mandated financial imposition is a “fee” or a “tax,” the dispositive criteria is the primary or dominant purpose of such imposition at the time the enactment calling for its collection is passed.”); *Bloom v. City of Fort Collins*, 784 P.2d 304, 308 (Colo. 1989) (“Unlike a tax, a special fee is not designed to raise revenues to defray the general expenses of government, but rather is a charge imposed upon persons or property for the purpose of defraying the cost of a particular governmental service.”); *Zelinger v. City and County of Denver*, 724 P.2d 1356, 1358 (Colo. 1986) (“A hallmark of taxes is that they are intended to raise revenue to defray the general expenses of the taxing entity”); *Thrifty Rent-A-Car System, Inc. v. City and County of Denver*, 833 P.2d 852, 855 (Colo. App. 1992) (“A fee is designed to defray the expense of operating and improving the facility upon which it is imposed, whereas a tax is used to defray general municipal expenses.”).

<sup>75</sup> See *Barber v. Ritter*, 196 P.3d 238, 249-50 (Colo. 2008) (holding that the legislative intent controlled the identity of the charge, even if the charge was comingled with other funds in general revenue accounts); *Rancho Colorado, Inc. v. City of Broomfield*, 586 P.2d 659, 663 (Colo. 1978) (examining the preamble of an ordinance to determine its primary purpose).

<sup>76</sup> *Bloom v. City of Fort Collins*, 784 P.2d 304, 310-11 (Colo. 1989).

<sup>77</sup> *Id.*



## **Ambiguity Resolved in Favor of the Taxpayer**

Colorado courts strictly construe ambiguous statutory language in favor of the taxpayer.<sup>78</sup>

---

<sup>78</sup> See, e.g., *Transponder Corp. of Denver, Inc. v. Prop. Tax Adm'r*, 681 P.2d 499, 504 (Colo. 1984) (“A “long-standing rule of statutory construction” in Colorado is that tax statutes “will not be extended beyond the clear import of the language used, nor will their operation be extended by analogy . . . . All doubts will be construed against the government and in favor of the taxpayer.”(quoting *Associated Dry Goods v. City of Arvada*, 593 P.2d 1375, 1378 (Colo. 1979))).



<b>Definition of Tax:</b> If a charge has the primary purpose of raising revenue, it is a tax	✓
<b>Definition of Tax:</b> How charge operates more important than label	Implied
<b>Definition of Tax:</b> Voluntariness immaterial	✗
Ambiguity resolved in favor of the taxpayer	✓

## Definition of Tax

Connecticut’s highest court has not ruled on the distinction between taxes and fees, but two unpublished lower court decisions focused on the use of the revenue: taxes are “for the benefit of the state or the general public,”<sup>79</sup> while fees lack a general revenue raising intention.<sup>80</sup>

## Voluntariness

In one of those unpublished lower court decisions, *Gagne v. City of Hartford*, the court defined a tax based on a three-part test: (1) whether the fee is voluntary or mandatory; (2) whether the fee is for services that others do not benefit from; and (3) whether the charges raise revenue or compensate the government for its expenses.<sup>81</sup> Thus, while the court did focus on the use of the revenue, voluntariness was cited as an important factor as well.

## Ambiguity Resolved in Favor of the Taxpayer

Connecticut resolves all statutory ambiguities in favor of the taxpayer.<sup>82</sup>

<sup>79</sup> See *Bell Atlantic Nynex Mobile, Inc. v. Dept. of Pub. Utility Control*, 1998 WL 166045, at \*8 (Conn. Super. Ct. March 27, 1998).

<sup>80</sup> See *Gagne v. City of Hartford*, 1994 WL 16841. (Conn. Super. Jan. 4, 1994).

<sup>81</sup> See *id.* at \*4 (“In this case the Ordinance is not compulsory, since a property owner is not subject to the ordinance unless he chooses to convert his property to a nonresidential use . . . . In converting his property from a residential to a nonresidential use, the plaintiff has consumed the primary resource for housing in the City. Therefore, it is reasonable to impose upon him the burden of replacing that resource.”).

<sup>82</sup> See, e.g., *Sullivan v. Union & New Haven Trust Co.*, 158 A.2d 174, 176 (Conn. 1960) (“[A]n ambiguity in a statute imposing a tax is to be resolved in favor of the taxpayer.”); *Sec. Mills, Inc. v. Town of Norwich*, 143 A.2d 451, 453 (Conn. 1958) (“When a taxing statute is being considered, ambiguities are resolved in favor of the taxpayer.”); *Connelly v. Waterbury Nat’l Bank*, 72 A.2d 645, 648 (Conn. 1950) (“Even if the clause as worded could be held to be clearly ambiguous, the ambiguity would have to be resolved in favor of the taxpayer.”).

# DELAWARE



<b>Definition of Tax:</b> If a charge has the primary purpose of raising revenue, it is a tax	✓
<b>Definition of Tax:</b> How charge operates more important than label	Unclear
<b>Definition of Tax:</b> Voluntariness immaterial	Unclear
Ambiguity resolved in favor of the taxpayer	✓

## Definition of Tax

In *Tri-State Amusement, Inc. v. State Tax Dept.*, the Delaware Supreme Court held that a charge imposed on operators of coin-operated amusements is a tax because it “is a revenue-raising measure and is not an exercise by the state of its police power.”<sup>83</sup> Because the state had to issue licenses, with no discretion, to all who paid the tax, the tax could not be an arbitrarily imposed fee as the challengers asserted. The court approvingly cited a 1940 trial judge decision holding that acts to raise revenue are taxes and not license fees.<sup>84</sup>

## Voluntariness

Delaware courts have not included voluntariness as a defining feature of a tax. However, one 1999 unpublished opinion by a trial judge held that “[t]he essential characteristics of a tax is that it is not a voluntary payment or donation, but an enforced contribution enacted pursuant to legislative authority,” citing a 1966 Michigan case.<sup>85</sup>

## Ambiguity Resolved in Favor of the Taxpayer

Delaware courts construe ambiguous language in taxing statutes in favor of the taxpayer.<sup>86</sup>

<sup>83</sup> See *Tri-State Amusement, Inc. v. State Tax Dept.*, 254 A.2d 228, 229 (Del. 1969) (upholding a tax on coin-operated amusements against claims that it was arbitrary, unreasonable, and non-uniform).

<sup>84</sup> *Conard v. State*, 16 A.2d 121, 124-25 (Del. Super. 1940).

<sup>85</sup> See *Toll Bros., Inc. v. Gen. Accident Ins. Co.*, 1999 WL 1442016, at \*5 (Del. Super. Dec. 27, 1999) (citing *Michigan Employment Sec. Commission v. Patt*, 144 N.W.2d 663, 665 (Mich. Ct. App. 1966)).

<sup>86</sup> See *Arbern-Wilmington, Inc. v. Dir. of Revenue*, 596 A.2d 1385, 1388 (Del. 1991) (“If there is doubt regarding the breadth of a taxing statute, the court must construe the statute against the taxing authority and in favor of the taxpayer.”).



<b>Definition of Tax:</b> If a charge has the primary purpose of raising revenue, it is a tax	✗
<b>Definition of Tax:</b> How charge operates more important than label	✓
<b>Definition of Tax:</b> Voluntariness immaterial	✗
Ambiguity resolved in favor of the taxpayer	✓

## Definition of Tax

In *Collier County v. State*, the Florida Supreme Court held that a “fee” on property owners was in fact a tax “because it is proposed to support many of the general sovereign functions contemplated within the definition of a tax,” such as “sheriff services; libraries; parks; election services; public health services; and public works.”<sup>87</sup> The court stated that taxes are different from fees or special assessments in that “there is no requirement that taxes provide any specific benefit to the property; instead, they may be levied throughout the particular taxing unit for the general benefit of residents and property.”<sup>88</sup>

In addition to distinguishing between taxes and user fees, Florida law under some circumstances also distinguishes between user fees and special assessments. Special assessments are defined as a charge imposed on property owners to fund related improvements in the vicinity. While user fees paid by a user must be linked to the benefit that user receives, special assessments need only be geographically linked. For example, in *City of Gainesville v. State*, the Florida Supreme Court upheld a storm sewer charge as a valid fee against a challenge that it was a special assessment, because the charge for each property type varied by its average “impervious area” (area that produces stormwater runoff).<sup>89</sup> The court held that to be a reasonable proxy for stormwater usage, because water metering or precise measurement of impervious area is impracticable.<sup>90</sup>

In *City of Gainesville*, the Florida Supreme Court adopted factors to consider when distinguishing user fees from special assessments.<sup>91</sup> The non-dispositive factors are:

<sup>87</sup> See *Collier County v. State*, 733 So.2d 1012, 1018 (Fla. 1999).

<sup>88</sup> *Id.* at 1017, citing *City of Boca Raton v. State*, 595 So.2d 25, 29 (Fla. 1992).

<sup>89</sup> See *City of Gainesville v. State*, 863 So.2d 138 (Fla. 2003).

<sup>90</sup> See *id.*

<sup>91</sup> See *id.* at 145; see also *Okeechobee Util. Auth. v. Kampgrounds of Am., Inc.*, 882 So.2d 445, 447 (Fla. 2004) (applying factors).



- (1) the name given to the charge;
- (2) the relationship between the amount of the fee and the value of the service or benefit;
- (3) whether the fee is charged only to users of the service or is charged to all residents of a given area;
- (4) whether the fee is voluntary—that is, whether a property owner may avoid the fee by refusing the service;
- (5) whether the fee is a monthly charge or a one-time charge;
- (6) whether the fee is charged to recover the costs of improvements to a defined area or infrastructure or for the routine provision of a service;
- (7) whether the fee is for a traditional utility service; and
- (8) whether the fee is statutorily authorized as a fee.

The court approvingly quoted from a legal encyclopedia that “the name given to the charge is not controlling; it is the reason for the charge which controls its nature . . . .”<sup>92</sup>

## Voluntariness

As noted above, voluntariness is a factor weighed, but is not itself controlling, in determining whether a specific charge is a fee or a tax.<sup>93</sup>

## Ambiguity Resolved in Favor of the Taxpayer

Florida courts interpret ambiguities in tax statutes in favor of the taxpayer.<sup>94</sup>

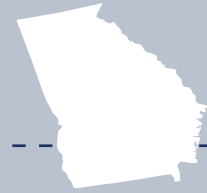
---

<sup>92</sup> See *id.* at 144, citing 70C Am.Jur.2d, *Special or Local Assessments* § 2, at 631-32 (2000).

<sup>93</sup> See *City of Gainesville v. State*, 863 So.2d 138, 145 (Fla. 2003) (“None of these factors is controlling; nor are they necessarily exclusive. Rather, we must consider each factor in light of the circumstances as a whole in each particular case.”); see also *City of Clearwater v. Sch. Bd. of Pinellas County*, 905 So.2d 1051, 1057 (Fla. Dist. Ct. App. 2005) (“In determining whether a fee imposed for a traditional utility service such as stormwater [sic] management is a user fee or a special assessment, the voluntariness of the fee is only one of several factors to be considered. The voluntariness of the fee is not dispositive.”).

<sup>94</sup> See, e.g., *Lee v. Walgreen Drug Stores Co.*, 10 So. 314, 316 (Fla. 1942) (“We recognize the rule to be, in construing tax statutes, that where the Act is so drawn that the legislative intent is in doubt it becomes the duty of courts to resolve that doubt in favor of the taxpayer and against the State.”).





<b>Definition of Tax:</b> If a charge has the primary purpose of raising revenue, it is a tax	✘
<b>Definition of Tax:</b> How charge operates more important than label	✓
<b>Definition of Tax:</b> Voluntariness immaterial	✘
Ambiguity resolved in favor of the taxpayer	✓

## Definition of Tax

In *Bellsouth Telecommunications, Inc. v. Cobb County*, the Georgia Supreme Court upheld as a fee a permit charge on telecommunications companies installing equipment on country rights-of-way.<sup>95</sup> The court stated: “The distinction between a tax and a license is not one of names but of substance. A tax is primarily intended to produce revenue, while a license is primarily intended for regulation under the police power.”<sup>96</sup> The court, citing a consulting study used by the county to estimate the costs incurred in the permit-approving process, placed significant weight on the substantial relation of the permit fee to the cost to carry out the regulation.<sup>97</sup>

## Voluntariness

Voluntariness has been held to be one characteristic of a fee. For example, in *Luke v. Georgia Department of Natural Resources*, the court held that an underground storage charge was a fee because “[p]articipation is therefore voluntary, and the owner or operator of a UST must initiate collection of the Fund participation fee.”<sup>98</sup>

## Ambiguity Resolved in Favor of the Taxpayer

Georgia courts strictly interpret ambiguous tax statutes in strong favor of the taxpayer.<sup>99</sup>

<sup>95</sup> See *Bellsouth Telecommunications, Inc. v. Cobb County*, 588 S.E.2d 704 (Ga. 2003).

<sup>96</sup> See *Bellsouth Telecommunications*, 588 S.E.2d at 705 (quoting *Richmond County Business Ass’n v. Richmond County*, 165 S.E.2d 293, 295 (Ga. 1968)); see also *Gunby v. Yates*, 102 S.E.2d 548, 550 (Ga. 1958) (“A tax is an enforced contribution exacted pursuant to legislative authority for the purpose of raising revenue to be used for public or governmental purposes, and not as payment for a special privilege or a service rendered.”); *Hadley v. City of Atlanta*, 502 S.E.2d 784 (Ga. Ct. App. 1998) (“The distinction between a tax and a fee is that a tax is imposed primarily as a revenue-raising measure, while a regulatory fee or license is imposed under the police power and is intended primarily as a means of or an aid in regulating a particular occupation or activity.”).

<sup>97</sup> 588 S.E.2d at 705.

<sup>98</sup> See *Luke v. Ga. Dep’t of Natural Res.*, 513 S.E.2d 728, 729 (Ga. 1999).

<sup>99</sup> See *State v. Camp*, 6 S.E.2d 299, 216-17 (Ga. 1939) (“Since in construing ambiguous tax statutes, they should be taken most strongly in favor of the citizen . . .”).

# HAWAII



<b>Definition of Tax:</b> If a charge has the primary purpose of raising revenue, it is a tax	✘
<b>Definition of Tax:</b> How charge operates more important than label	✓
<b>Definition of Tax:</b> Voluntariness immaterial	✓
Ambiguity resolved in favor of the taxpayer	✓

## Definition of Tax

Hawaii courts initially developed their own three-factor test for determining whether a charge is a tax by focusing on how proportional the charge is to the service provided.<sup>100</sup> In a recent case, though, they adopted the *San Juan Cellular* test.<sup>101</sup>

In the earlier case, *State v. Medeiros*, a criminal defendant challenged a \$250 cost of prosecution fee, which the court held to be a tax.<sup>102</sup> The court examined whether the charge (1) applied to the direct beneficiary of a particular service; (2) was allocated directly to defraying the costs of providing the service; and (3) was reasonably proportionate to the benefit received.<sup>103</sup>

In the more recent case, *Hawaii Insurance Council v. Lingle*, insurers challenged Hawaii’s diversion of charges they paid from a dedicated fund to the general fund. The Hawaii Supreme Court held that the *Medeiros* factors applied solely to the question of whether a charge was a tax or a service fee.<sup>104</sup> The court elected to apply the *San Juan Cellular* test to the case and defined a tax to be consistent with the *Black’s Law Dictionary* meaning and the meaning espoused in *San Juan Cellular*.<sup>105</sup> The court adopted the *San Juan Cellular* definition of a fee:

The classic “regulatory fee” is imposed by an agency upon those subject to its regulation. It may serve regulatory purposes directly by, for example, deliberately discouraging

<sup>100</sup> See *State v. Medeiros*, 973 P.2d 736, 741-45 (Haw. 1999).

<sup>101</sup> See *Hawaii Insurers Council v. Lingle*, 201 P.3d 564, 572 (Haw. 2008).

<sup>102</sup> See *Medeiros*, 973 P.2d at 741-45.

<sup>103</sup> See *id.*

<sup>104</sup> *Lingle*, 201 P.3d at 575.

<sup>105</sup> *Id.* at 573 (“[Our] definition is consistent with the plain meaning of the term “tax”: ‘A monetary charge imposed by the government on persons, entities, transactions, or property to yield public revenue . . .’ [and *San Juan Cellular*] The classic ‘tax’ is imposed by a legislature upon many, or all, citizens. It raises money, contributed to a general fund, and spent for the benefit of the entire community.”) (quoting BLACK’S LAW DICTIONARY 1496 (8th ed. 2004); *San Juan Cellular Tel. Co. v. Public Serv. Comm’n of Puerto Rico*, 967 F.2d 683, 685 (1st Cir. 1992).



particular conduct by making it more expensive. Or, it may serve such purposes indirectly by, for example, raising money placed in a special fund to help defray the agency's regulation-related expenses.<sup>106</sup>

The court found that the levied assessments were regulatory fees because: (1) a regulatory agency assessed the fee; (2) the collected proceeds were kept in a special fund that was later merged into the common fund; and (3) the funds were used to defray the cost of the regulation.<sup>107</sup>

The court also noted that “the nature of the tax or ‘charge’ that a law imposes is not determined by the label given to it but by its operating incidence.”<sup>108</sup>

## Voluntariness

Hawaii courts have explicitly rejected the voluntariness standard from consideration as to whether a particular charge is a tax or a fee, stating in *Lingle*: “We deviated from *Emerson College* by declining to adopt its ‘voluntariness’ element because, [s]ubsequent to its opinion in *Emerson College*, the Massachusetts Supreme Judicial Court has weakened its adherence to the second identifying factor described in *Emerson College*—voluntary receipt of the ‘service’—holding that ‘the element of choice is not a compelling consideration which can be used to invalidate an otherwise legitimate charge.’”<sup>109</sup>

## Ambiguity Resolved in Favor of the Taxpayer

Hawaii courts strictly interpret ambiguous tax statutes in favor of the taxpayer.<sup>110</sup>

<sup>106</sup> *Lingle*, 201 P.2d at 573 (citing *San Juan Cellular*, 967 F.2d at 685).

<sup>107</sup> See *Lingle*, 201 P.3d at 579.

<sup>108</sup> See *Lingle*, 201 P.3d at 574, citing *Medeiros*, 973 P.2d at 741 (quoting *Stewart's Pharmacies v. Fase*, 43 Haw. 131, 1959 WL 11629 at \*10 (Haw. Terr. 1959)).

<sup>109</sup> *Hawaii Insurers Council v. Lingle*, 201 P.3d 564, 574 (Haw. 2008); see also *State v. Medeiros*, 973 P.2d 736, 742 (Haw. 1999) (“Certainly, such “fees” do not appear to be any more intrinsically “tax-like” than fees for services requiring advance approval from the recipient. Thus, the “voluntariness” of the service charge or fee would seem to be essentially beside the point.”).

<sup>110</sup> See, e.g., *Matter of Hawaiian Tel. Co.*, 608 P.2d 383, 388 (Haw. 1980) (“It is a cardinal rule of construction that a statute imposing taxes is to be construed strictly against the government and in favor of the taxpayers and that no person and no property is to be included within its scope unless placed there by clear language of the statute . . . ‘In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the government and in favor of the citizen.’” (quoting *Gould v. Gould*, 245 U.S. 151, 153 (1917))).



<b>Definition of Tax:</b> If a charge has the primary purpose of raising revenue, it is a tax	✘
<b>Definition of Tax:</b> How charge operates more important than label	Implied
<b>Definition of Tax:</b> Voluntariness immaterial	✓
Ambiguity resolved in favor of the taxpayer	✓

## Definition of Tax

In *BHA Investments, Inc. v. State*, the Idaho Supreme Court upheld a liquor license fee, stating that “[f]ees and taxes are generally distinguished in that fees are for the purpose of regulation whereas taxes are solely for the purpose of raising revenue.”<sup>111</sup> Previous cases adhere to the same rule. In *Kootenai County Property Association v. Kootenai County*, the court held that a county’s solid waste disposal fee, used to both operate a current landfill site as well as to acquire new sites, provided an immediate benefit and was not a tax within meaning of state constitution.<sup>112</sup> In *Alpert v. Boise Water Corporation*, the court concluded that a 3 percent fee charged to gas and water utilities by cities was a valid franchise fee and was not a prohibited tax even though the utility companies passed the franchise fee on to customers as a cost of their business.<sup>113</sup>

## Voluntariness

In *Kootenai County*, the court rejected a voluntariness distinction, noting that mandatory fees exist and are valid:

“A fee, according to the [appellant], is voluntarily paid for specific services while a tax is involuntarily obtained for the general public benefit. However, the legislature, under its police powers, may mandate that citizens must accept certain services, and then require a fee for the receipt of those services.”<sup>114</sup>

## Ambiguity Resolved in Favor of the Taxpayer

Idaho courts resolve taxing statute ambiguities in favor of the taxpayer.<sup>115</sup>

<sup>111</sup> *BHA Investments, Inc. v. State*, 63 P.3d 474, 478-79 (Idaho 2003).

<sup>112</sup> *Kootenai County Property Ass’n v. Kootenai County*, 769 P.2d 553, 553 (Idaho 1989).

<sup>113</sup> *Alpert v. Boise Water Corp.*, 795 P.2d 298, 307 (Idaho 1990).

<sup>114</sup> *Kootenai County Prop. Ass’n*, 769 P.2d at 556-57.

<sup>115</sup> See, e.g., *Dep’t of Emp’t v. Diamond Int’l Corp.*, 529 P.2d 782, 783 (Idaho 1974) (“Tax statutes are strictly construed against the taxing authority and in favor of the taxpayer and ambiguities therein are to be resolved in favor of the taxpayer.”).



<b>Definition of Tax:</b> If a charge has the primary purpose of raising revenue, it is a tax	✘
<b>Definition of Tax:</b> How charge operates more important than label	✓
<b>Definition of Tax:</b> Voluntariness immaterial	Not Considered
Ambiguity resolved in favor of the taxpayer	✓

## Definition of Tax

In *Crocker v. Finley*, the Illinois Supreme Court struck down a \$5 divorce filing charge that dedicated its funds to domestic violence victim assistance services, holding that the charge was a tax and not a fee. The court stated: “[C]ourt charges imposed on a litigant are fees if assessed to defray the expenses of his litigation. On the other hand, a charge having no relation to the services rendered, assessed to provide general revenue rather than compensation, is a tax.”<sup>116</sup>

Although some have attempted to narrow the application of *Crocker* only to instances where the alleged tax limits access to courts,<sup>117</sup> the Illinois Supreme Court applied the rule from *Crocker* again in 2006.<sup>118</sup> In that case, the court also stated that “the label attached by the legislature is not necessarily definitive.”<sup>119</sup>

## Voluntariness

No Illinois case has considered a charge’s voluntariness to be relevant in determining whether the charge is a tax.

## Ambiguity Resolved in Favor of the Taxpayer

Illinois courts interpret ambiguous tax statutes in favor of the taxpayer.<sup>120</sup>

<sup>116</sup> *Crocker v. Finley*, 459 N.E.2d 1346, 1349-50 (Ill. 1984) (quoting BLACK’S LAW DICTIONARY 553 (5th ed. 1979)).

<sup>117</sup> See, e.g., *Arangold Corp. v. Zehnder*, 787 N.E.2d 786, 792 (Ill. 2003) (distinguishing *Crocker* on other grounds, but noting *in dicta* that “[t]he main thrust of the *Crocker* decision was its holding that the tax unconstitutionally burdened litigants’ access to the courts.”); *Browning v. Corbett*, 734 P.2d 1030, 1033 (Ariz. App. 1986) (“The court [in *Crocker*] found that the statute was unconstitutional primarily because it infringed upon the right to obtain justice freely, a right secured by a section of the Illinois constitution.”). *Arangold* is consistent with *Crocker* in that first one determines whether a charge is a tax, and if it is a tax, one then determines whether it burdens access to the courts.

<sup>118</sup> See *People v. Jones*, 861 N.E.2d 967, 976 (Ill. 2006) (citing *Crocker* approvingly for the proposition that charges that do not defray costs are in fact taxes).

<sup>119</sup> *Jones*, 861 N.E.2d at 985 (quoting *Crocker*, 459 N.E.2d at 1346).

<sup>120</sup> See, e.g., *Ingersoll Milling Mach. Co. v. Dep’t of Revenue*, 90 N.E.2d 747, 751 (Ill. 1950) (“Taxing statutes are to be strictly construed and their language is not to be extended or enlarged by implication beyond its clear import, but in cases of doubt such laws are construed most strongly against the government and in favor of the taxpayer.”).

# INDIANA



<b>Definition of Tax:</b> If a charge has the primary purpose of raising revenue, it is a tax	✘
<b>Definition of Tax:</b> How charge operates more important than label	✓
<b>Definition of Tax:</b> Voluntariness immaterial	✘
Ambiguity resolved in favor of the taxpayer	✓

## Definition of Tax

In *City of Gary v. Indiana Bell Telephone Company, Inc.*, the Indiana Supreme Court held that a charge for telecommunications companies to use city rights-of-way was a valid fee because it was “valid compensation charged by Gary for the private, commercial use of its real estate . . . .”<sup>121</sup> The court further elaborated: “A tax is compulsory and not optional; it entitles the taxpayer to receive nothing in return, other than the rights of government which are enjoyed by all citizens. On the other hand, a user fee is optional and represents a specific charge for the use of publicly-owned or publicly-provided facilities or services.”<sup>122</sup>

## Voluntariness

As mentioned above, Indiana courts upheld voluntariness of the charge as one defining characteristic.<sup>123</sup>

## Ambiguity Resolved in Favor of the Taxpayer

Indiana courts resolve ambiguities in favor of the taxpayer.<sup>124</sup>

<sup>121</sup> *City of Gary v. Indiana Bell Telephone Co., Inc.*, 732 N.E.2d 149, 156 (Ind. 2000). The tax was ultimately struck down on statutory grounds.

<sup>122</sup> *City of Gary*, 732 N.E.2d at 156 (Ind. 2000); see also *Ennis v. State Highway Commission*, 108 N.E.2d 687, 693 (Ind. 1952) (“Taxes are levied for the support of government, and their amount is regulated by its necessities. Tolls are the compensation for the use of another’s property or improvements made, and their amount is determined by the cost of the property or improvements.”); *Hochstedler v. St. Joseph County Solid Waste Management Dist.*, 770 N.E.2d 910, 915 (Ind. Ct. App. 2002) (“Generally, a tax is an enforced contribution to provide for the support of government, whereas a fee is a charge for a particular benefit to the payer.”) (quoting *BellSouth Telecomm., Inc. v. City of Orangeburg*, 522 S.E.2d 804, 806 (S.C. 1999), reh’g denied). See, e.g., *Anderson v. Indiana Dept. of State Revenue*, 758 N.E.2d 597 (Ind. T.C. 2001) (holding that the Motor Carrier Fuel Tax (MCFT) was a “tax,” rather than a “user fee” because payment was compulsory and entitled the taxpayer to receive nothing in return other than the rights of government enjoyed by all citizens alike).

<sup>123</sup> See *id.*; see also *Hochstedler v. St. Joseph County Solid Waste Management Dist.*, 770 N.E.2d 910, 915 (Ind. Ct. App. 2002). (“[A] user fee is optional and represents a specific charge for the use of publicly owned or publicly provided facilities or services.”) (citing *Ace Rent-A-Car, Inc. v. Indianapolis Airport Authority*, 612 N.E.2d 1104, 1108 (Ind. Ct. App. 1993)).

<sup>124</sup> See *Dep’t of State Revenue v. Crown Dev. Co.*, 109 N.E.2d 426, 428 (Ind. 1952) (“In case of doubt the statute will be construed against the state and in favor of the taxpayer.”).



<b>Definition of Tax:</b> If a charge has the primary purpose of raising revenue, it is a tax	✘
<b>Definition of Tax:</b> How charge operates more important than label	✘
<b>Definition of Tax:</b> Voluntariness immaterial	✘
Ambiguity resolved in favor of the taxpayer	✓

## Definition of Tax

In *City of Hawarden v. US West Communications, Inc.*, the Iowa Supreme Court held that a telecommunications fee was in actuality a tax because its purpose was to raise revenue and not recoup costs.<sup>125</sup> The decision expanded on previous holdings that fees are charges designed to compensate for the administrative expense of some regulation while taxes are charges for the primary purpose of raising revenue.<sup>126</sup> The court applied the following test:

If the fee is a reasonable estimate of the cost imposed by the person required to pay the fee, then it is a user fee and is within the municipality's regulatory power. If it is calculated not just to recover a cost imposed on the municipality or its residents but to generate revenues that the municipality can use to offset unrelated costs or confer unrelated benefits, it is a tax, whatever its nominal designation.<sup>127</sup>

The court also noted that “the city could not circumvent limitations on its taxing authority ‘by calling a tax something else, such as a franchise fee’ . . . .”<sup>128</sup>

<sup>125</sup> *City of Hawarden v. US W. Communications, Inc.*, 590 N.W.2d 504, 507 (Iowa 1999) (adopting the reasoning in *Dignet, Inc. v. Western Union ATS, Inc.*, that “[i]f [a cost] is calculated not just to recover a cost . . . but to generate revenue . . . it is a tax . . . .”) (quoting *Dignet, Inc. v. Western Union ATS, Inc.*, 958 F.2d 1388, 1399 (7th Cir. 1992)).

<sup>126</sup> See *Home Builders Ass'n of Greater Des Moines v. City of West Des Moines*, 644 N.W.2d 339, 347 (Iowa 2002) (describing that fees designed to cover the administrative expense of regulating a particular activity, occupation, or transaction are not “taxes,” because such regulatory and service fees are based on a special benefit conferred on the person paying the fee); see also *In re Shurtz's Will*, 46 N.W.2d 559, 562 (Iowa 1951) (A tax is “a charge to pay the cost of government without regard to special benefits conferred.”).

<sup>127</sup> *Hawarden*, 590 N.W.2d at 509.

<sup>128</sup> *Id.*



## Voluntariness

In *Kragnes v. City of Des Moines*, the Iowa Supreme Court functionally rejected the voluntariness standard as being a feature classifying a charge as a fee. The court discussed other jurisdictions that rely on the voluntariness standard and stated that those decisions were not persuasive.<sup>129</sup>

## Ambiguity Resolved in Favor of the Taxpayer

Iowa courts resolve tax statute ambiguities in favor of the taxpayer.<sup>130</sup>

---

<sup>129</sup> See *Kragnes v. City of Des Moines*, 714 N.W.2d 632, 642 (Iowa 2006).

<sup>130</sup> See *Naumann v. Iowa Prop. Assessment Appeal Bd.*, 791 N.W.2d 258, 262 (Iowa 2010) (“[W]hen construing tax statutes, we will resolve doubt in favor of the taxpayer.”).





<b>Definition of Tax:</b> If a charge has the primary purpose of raising revenue, it is a tax	✘
<b>Definition of Tax:</b> How charge operates more important than label	Implied
<b>Definition of Tax:</b> Voluntariness immaterial	✘
Ambiguity resolved in favor of the taxpayer	✓

## Definition of Tax

In *Citizens’ Utility Ratepayer Board. v. State Corporation Commission of the State of Kansas*, the Kansas Supreme Court rejected a claim that the telephone universal service surcharge is a tax, noting: “The primary purpose of a tax is to raise money, not regulation; such a demand is only a tax if it is a forced contribution to raise revenue for the maintenance of government services offered to the general public.”<sup>131</sup> The court stated that the charge at issue did not raise revenue but rather “manipulates the manner in which the same money is paid to the same parties in order to make an implicit subsidy explicit.”<sup>132</sup>

Similarly, in *Executive Aircraft Consulting, Inc. v. City of Newton*, the court identified the hallmark of a fee to be its purpose to compensate the government for a specific service or benefit conferred on the payer.<sup>133</sup> This distinction has been applied in other Kansas decisions.<sup>134</sup>

## Voluntariness

In *Newton*, the Kansas Supreme Court additionally stated that “[p]ayment of a fee is voluntary—an individual can avoid the charge by choosing not to take advantage of the service, benefit, or privilege offered.”<sup>135</sup>

<sup>131</sup> *Citizens’ Utility Ratepayer Bd. v. State Corp. Comm’n of State of Kan.*, 956 P.2d 685, 709 (Kan. 1998).

<sup>132</sup> *Id.*

<sup>133</sup> See *Executive Aircraft Consulting, Inc. v. City of Newton*, 845 P.2d 57, 62 (Kan. 1993) (“A fee is paid in exchange for special service, benefit, or privilege not automatically conferred upon general public. A fee is not a revenue measure, but means of compensating government for cost of offering and regulating special service, benefit, or privilege.”).

<sup>134</sup> See, e.g., *GT, Kansas, L.L.C. v. Riley County Register of Deeds*, 22 P.3d 600, 605 (Kan. 2001) (holding that mortgage registration fees are taxes because the charge is based upon the value of the property as opposed to the cost of the service provided by the government to record the mortgage); *Busby, Inc. v. Kansas Dept. of Agriculture*, 29 P.3d 441, 448 (Kan. Ct. App. 2001) (holding that an inspection statute which does not yield excess revenue over costs and does not provide that the fee be placed in the state’s general fund is not a revenue raising measure). But see *Fidelity Inv. Co. v. Hale*, 510 P.2d 1236, 1244 (Kan. 1973) (finding that charges required to be paid by lenders under Truth-in-Lending Act constituted a fee for regulatory services, rather than a tax, although 20% of amount collected went into general revenue).

<sup>135</sup> *Executive Aircraft Consulting, Inc. v. City of Newton*, 845 P.2d 57, 62 (Kan. 1993).

# KANSAS



40

## Ambiguity Resolved in Favor of the Taxpayer

Kansas courts resolve ambiguities in tax statutes in favor of the taxpayer.<sup>136</sup>

---

<sup>136</sup> See *In re City of Wichita*, 59 P.3d 336, 343 (Kan. 2002) (“On the other hand, tax statutes will be construed favorably to the taxpayer where there is a reasonable doubt as to [their] meaning.” (quoting *Water Dist. No. 1,988*, P.2d 267, 269 (Kan. Ct. App. 1999))).

# KENTUCKY



<b>Definition of Tax:</b> If a charge has the primary purpose of raising revenue, it is a tax	✘
<b>Definition of Tax:</b> How charge operates more important than label	Implied
<b>Definition of Tax:</b> Voluntariness immaterial	Not Considered
Ambiguity resolved in favor of the taxpayer	✓

## Definition of Tax

In 1958, in the case of *Krumpelman v. Louisville & Jefferson County Metropolitan Sewer District*, Kentucky’s then-highest court, the Court of Appeals, upheld sewer assessments as fees based on the use of the revenue.<sup>137</sup> The court held that taxes are a means for the government to raise general revenue without regard to direct benefits, which may inure to the payer or to the property taxed.<sup>138</sup> This standard continues to be applied.<sup>139</sup> This assertion was based, in part, on an earlier holding by the court that “any payment exacted by the state or its municipal subdivisions as a contribution toward the cost of maintaining governmental functions, where the special benefits derived from their performance is merged into the general benefit, is a tax. On the other hand, a fee is generally regarded as a charge for some particular service.”<sup>140</sup>

## Voluntariness

No Kentucky case has considered a charge’s voluntariness to be relevant in determining whether the charge is a tax.

<sup>137</sup> See *Krumpelman v. Louisville & Jefferson County Metropolitan Sewer District*, 314 S.W.2d 557, 561 (Ky. 1958).

<sup>138</sup> *Id.* at 561 (“In practice, and as usually understood, there is a clear distinction between taxes and special assessments. The latter are local burdens laid on property made for a public purpose, but fixed in amount once and for all time with reference to the special benefit which such property derives from the cost of the project, while taxes are generally held to be a rate or duty levied each year for purposes of general revenue, regardless of the direct benefit accruing to the person or property taxed.”).

<sup>139</sup> See *Com. v. Louisville Atlantis Community/Adapt, Inc.*, 971 S.W.2d 810, 815 (Ky. App. 1997) (“A tax is universally defined as enforced contribution to provide for support of government, whereas fee is charge for particular service.”) (quoting *Long Run Baptist Ass’n v. Sewer Dist.*, 775 S.W.2d 520, 522 (Ky. Ct. App. 1989)); *Kentucky River Authority v. City of Danville*, 932 S.W.2d 374, 376 (Ky. Ct. App. 1996) (concluding that amounts assessed against entities withdrawing water from Kentucky River basin, to be used for specific purpose of conserving and controlling waters in basin, were fees rather than taxes).

<sup>140</sup> *Dickson v. Jefferson Co. Bd. of Educ.*, 225 S.W.2d 672, 675 (Ky. 1949).



## Ambiguity Resolved in Favor of the Taxpayer

Kentucky courts resolve doubts and ambiguities in favor of the taxpayer.<sup>141</sup>

---

<sup>141</sup> See, e.g., *George v. Scent*, 346 S.W. 2d 784, 789 (Ky. 1961) (“If the Legislature fails so to express its intention and meaning, it is the function of the judiciary to construe the statute strictly and resolve doubts and ambiguities in favor of the taxpayer and against the taxing powers.”); *Martin v. F. H. Bee Shows*, 113 S.W.2d 448, 451 (Ky. App. 1938) (“Returning now to the task before us, we find . . . that: ‘In case of doubt they are construed most strongly against the government, and in favor of the citizen.’”).



<b>Definition of Tax:</b> If a charge has the primary purpose of raising revenue, it is a tax	✗
<b>Definition of Tax:</b> How charge operates more important than label	✓
<b>Definition of Tax:</b> Voluntariness immaterial	Not Considered
Ambiguity resolved in favor of the taxpayer	✓

## Definition of Tax

In *Audubon Insurance Co. v. Bernard*, the Louisiana Supreme Court held that the use of an assessment on insurance policies for police and sheriff operations was a new tax and therefore unconstitutionally enacted.<sup>142</sup> The court stated that “if revenue is the primary purpose for an assessment and regulation is merely incidental, or if the imposition clearly and materially exceeds the cost of regulation or conferring special benefits upon those assessed, the imposition is a tax.”<sup>143</sup>

The court recently expanded on this holding in *Safety Net for Abused Persons v. Segura*, where it held court filing fees dedicated to victim counseling to be a tax: “[A] tax is a charge that is unrelated to or materially exceeds the special benefits conferred upon those assessed.”<sup>144</sup> The court also stated: “The nature of a charge is determined not by its title, but by its incidents, attributes, and operational effect.”<sup>145</sup>

## Voluntariness

No Louisiana case has considered a charge’s voluntariness to be relevant in determining whether the charge is a tax.

## Ambiguity Resolved in Favor of the Taxpayer

Louisiana courts hold that ambiguous tax statutes must be resolved in favor of the taxpayer.<sup>146</sup>

<sup>142</sup> *Audubon Ins. Co. v. Bernard*, 434 So.2d 1072, 1074 (La. 1983).

<sup>143</sup> *Id.* (citing *Acorn v. City of New Orleans*, 407 So.2d 1225, 1228 (La. 1981)). See also *GO Petroleum Corp. v. State ex rel. Dept. of Revenue and Taxation*, 845 So.2d 558, 561 (La. Ct. App. 1 Cir. 2003) (“If the imposition has not for its principal object the raising of revenue, but is merely incidental to the making of rules and regulations to promote public order, individual liberty and general welfare, it is an exercise of the police power. In similar fashion, the police power may be exercised to charge fees to persons receiving grants or benefits not shared by other members of society.”).

<sup>144</sup> See *Safety Net for Abused Persons v. Segura*, 692 So.2d 1038, 1041 (La. 1997).

<sup>145</sup> *Id.*

<sup>146</sup> See, e.g., *United Gas Corp. v. Fontenot*, 129 So.2d 776, 782 (La. 1961) (“[T]he authority to tax must be clearly provided for in the taxing statute and any doubt or ambiguity must be resolved in favor of the taxpayer . . . .”); *State v. Standard Oil Co. of La.*, 178 So. 601, 605 (La. 1938) (“It is the well-established and universal rule of law in the interpretation of statutes levying taxes that they are to be interpreted liberally in favor of the taxpayer and all doubts and ambiguities are to be construed against the State and in favor of the taxpayer.”).



<b>Definition of Tax:</b> If a charge has the primary purpose of raising revenue, it is a tax	✘
<b>Definition of Tax:</b> How charge operates more important than label	Implied
<b>Definition of Tax:</b> Voluntariness immaterial	✘
Ambiguity resolved in favor of the taxpayer	✓

## Definition of Tax

In *Butler v. Supreme Judicial Court*, the Maine Supreme Judicial Court upheld a court charge on litigants demanding a jury trial as a valid fee, holding that the purpose of the revenue distinguishes taxes and fees.<sup>147</sup> The court also identified certain factors, indicative of fees, to be considered in identifying the primary purpose of the charge: (1) the relationship of the charge to the administering costs of the regulation; (2) the reasonable fairness of the charge to the approximate regulatory cost to the government combined with the benefit conferred on the payer;<sup>148</sup> and (3) that the charge is voluntary and paid for an exclusive benefit not received by nonpayers.<sup>149</sup>

## Voluntariness

The Maine Supreme Court has described voluntariness as an additional characteristic of a fee, stating: “Other features that may distinguish fees from more general revenue raising devices are that fees are paid in exchange for exclusive benefits not received by the general public and are voluntary in

<sup>147</sup> See *Butler v. Supreme Judicial Court*, 611 A.2d 987, 990 (Me. 1992) (“Because both a fee and a tax raise monies for governmental use, the distinction between the two is one of purpose and of degree of particularity. In the case of licensing fees, for example, we have recognized that fees ‘are part of a regulatory scheme and are intended to cover costs of administering such a program under the police power of the government.’”) (quoting *Strater v. Town of York*, 541 A.2d 938, 938 (Me. 1988)); see also *Strater v. Town of York*, 541 A.2d 938, 938 (Me. 1988) (holding that a town’s harbor usage fee was a proper fee, intended to cover costs of administering regulatory scheme, and was not a “tax”); *Maine Milk Producers, Inc. v. Commissioner of Agriculture, Food and Rural Resources*, 483 A.2d 1213, 1219 (Me. 1984) (“The test for whether an assessment is a tax rather than a license fee is whether it is primarily intended to raise revenue rather than to cover costs of administering a program under the police power of government.”); *Board of Overseers of the Bar v. Lee*, 422 A.2d 998, 1004 (Me. 1980) (“A tax . . . is a charge either to raise money for public purposes or to accomplish some governmental end. When the exactions, however, are not imposed for the main purpose of revenue, but are imposed in the exercise of a police power and as part of a program for the regulation of a particular business, occupation or profession, the levies are license fees and not taxes.”).

<sup>148</sup> See *Butler*, 611 A.2d at 990 (“[T]he amount [should] usually [be] a fair approximation of the cost to the government and the benefit to the individual of the services provided.”).

<sup>149</sup> *Id.*



the sense that an individual may avoid the charge by choosing not to utilize the service.”<sup>150</sup> In *Butler*, the court argued that the fee was voluntary because “[e]ach litigant voluntarily decides whether to demand a jury trial and thus incur the fee.”<sup>151</sup>

### **Ambiguity Resolved in Favor of the Taxpayer**

Maine courts resolve ambiguity in tax statutes by “look[ing] to the legislative history of the statute to determine its meaning.”<sup>152</sup> Additionally in their interpretation, they strive to avoid illogical and absurd results.<sup>153</sup> Finally, Maine courts strictly construe the “State’s power to tax in favor of the taxpayer.”<sup>154</sup>

---

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Blue Yonder, LLC v. State Tax Assessor*, 17 A.3d 667, 671 (Me. 2011).

<sup>153</sup> *Id.*

<sup>154</sup> *Community Telecomm. Corp. v. State Tax Assessor*, 684 A.2d 424, 426 (Me. 1996).

# MARYLAND



<b>Definition of Tax:</b> If a charge has the primary purpose of raising revenue, it is a tax	✘
<b>Definition of Tax:</b> How charge operates more important than label	✓
<b>Definition of Tax:</b> Voluntariness immaterial	✘
Ambiguity resolved in favor of the taxpayer	✓

## Definition of Tax

In *Eastern Diversified Properties, Inc. v. Montgomery County*, Maryland’s highest court, the Court of Appeals, struck down a real estate development charge as an invalid tax after looking at the charge’s primary purpose.<sup>155</sup> The court established the factors indicative of a fee: (1) the charge is solely based on a specific service provided to the payer or to defray the regulatory expense, (2) the payer must have some additional purpose for the regulation outside the mere payment of a fee, (3) the relationship between the charge and the benefit received by the payer must be reasonable, and (4) the payment is voluntary.<sup>156</sup> The development impact fee was held to be a tax, because it was “exact[ed] solely for revenue purposes, [was] an involuntary payment of money, and the funds raised by the fee [were] used to finance road construction which benefit[ed] the general public.”<sup>157</sup> The court also stated that “the purpose of the enactment governs rather than the legislative label.”<sup>158</sup>

## Voluntariness

As stated above, Maryland courts held that the voluntariness of the charge is one characteristic of a fee.

<sup>155</sup> See *Eastern Diversified Properties, Inc. v. Montgomery County*, 570 A.2d 850 (Md. 1990). See also *Maryland Theatrical Corp. v. Brennan*, 24 A.2d 911, 913-14 (Md. 1942) (noting charge’s frequently have overlapping characteristics of both taxes and fees, but one is to look at the primary purpose of the charge to determine its identity); *Workmen’s Comp. Comm’n v. Property & Cas. Ins. Guar. Corp.*, 570 A.2d 323, 325 (Md. 1990); *Campbell v. City of Annapolis*, 424 A.2d 738, 741 (Md. 1981); *Montgomery County v. Maryland Soft Drink Ass’n*, 377 A.2d 486, 495 (Md. 1977); *American Nat’l Bldg. & Loan Ass’n v. City of Baltimore*, 224 A.2d 883, 887-88 (Md. 1966); *Anne Arundel County v. English*, 35 A.2d 135, 138-39 (Md. 1943).

<sup>156</sup> See *Eastern Diversified Properties*, 570 A.2d at 854-55.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* (quoting *Campbell v. City of Annapolis*, 424 A.2d 738, 741 (Md. 1981)).





## Ambiguity Resolved in Favor of the Taxpayer

Maryland courts interpret tax statute ambiguities in favor of the taxpayer.<sup>159</sup>

---

<sup>159</sup> See, e.g., *State Dept of Assessments & Taxation v. Consol. Coal Sales Co.*, 855 A.2d 1197, 1207 (Md. 2004) (“[A]mbiguous tax statutes are construed in favor of the taxpayer . . . .”); *Comptroller of Treasury v. Clyde’s of Chevy Chase*, 833 A.2d 1014, 1021 (Md. 2003) (“When specifically interpreting tax statutes, this Court recognizes that any ambiguity within the statutory language must be interpreted in favor of the taxpayer.”).



<b>Definition of Tax:</b> If a charge has the primary purpose of raising revenue, it is a tax	✘
<b>Definition of Tax:</b> How charge operates more important than label	✓
<b>Definition of Tax:</b> Voluntariness immaterial	✓
Ambiguity resolved in favor of the taxpayer	✓

## Definition of Tax

In *Silva v. City of Attleboro*, the Massachusetts Supreme Judicial Court upheld a burial fee, stating: “In distinguishing fees from taxes, we have noted that fees tend to share common traits. Fees, unlike taxes, ‘are charged in exchange for a particular governmental service which benefits the party paying the fee in a manner not shared by other members of society.’”<sup>160</sup> The court provided two additional traditional fee-indicative factors to consider: (1) “[f]ees ‘are paid by choice, in that the party paying the fee has the option of not utilizing the governmental service and thereby avoiding the charge;”<sup>161</sup> (2) “the charges ‘are collected not to raise revenues but to compensate the governmental entity providing the services for its expenses.”<sup>162</sup>

## Voluntariness

In *Emerson College v. City of Boston*, the court held voluntariness to be one factor, although in *Silva* it concluded that an “element of choice is not a compelling consideration which can be used to invalidate an otherwise legitimate charge.”<sup>163</sup> Other cases have also rejected voluntariness.<sup>164</sup>

<sup>160</sup> *Silva v. City of Attleboro*, 908 N.E.2d 722, 725 (Mass. 2009) (quoting *Emerson College v. City of Boston*, 462 N.E.2d 1098, 1105 (Mass. 1984)).

<sup>161</sup> *Id.* (quoting *Emerson College*, 462 N.E.2d at 1105).

<sup>162</sup> *Id.*; see also *Nuclear Metals, Inc. v. Low-Level Radioactive Waste Management Bd.*, 656 N.E.2d 563, 568 (Mass. 1995) (“The third characteristic of a fee is that it is not collected for general revenue but to compensate the agency for its services.”); *Southview Coop. Housing Corp. v. Rent Control Bd. of Cambridge*, 486 N.E.2d 700, 706 (Mass. 1985) (holding regulatory charges which only covered an agency’s reasonably anticipated cost of providing services related to such charges were fees, rather than taxes).

<sup>163</sup> See *Silva*, 908 N.E.2d at 728 (“The second factor of the *Emerson College* decision [voluntariness of the charge] should not be understood as having described the essential characteristics shared by all fees, both regulatory and proprietary. Nothing in that case suggests that whether a charge is incurred voluntarily is relevant in the regulatory fee context.”).

<sup>164</sup> See, e.g., *Bertone v. Department of Public Utils.*, 583 N.E.2d 829, 836 (Mass. 1992) (“Fees are not taxes even if they must be paid in order that a right may be enjoyed.”); *Southview Coop. Hous. Corp. v. Rent Control Bd. of Cambridge*, 486 N.E.2d 700, 705 (Mass. 1985) (holding that compensatory charges are fees even if they are not voluntary); *Baker v. Department of Env’tl. Protection*, 657 N.E.2d 480, 482 (Mass. App. 1995) (“The requirement of choice does not focus on whether it is purely voluntary, but whether the charge benefits those regulated in a manner distinguishable from the benefits at large”); *Berry v. Danvers*, 613 N.E.2d 108, 111 n.6 (Mass. App. 1993) (stating that the voluntariness factor is “arguably only subsidiary to, and an additional manifestation of, the analytically more comprehensive first factor, particularized private rather than general public benefit.”).

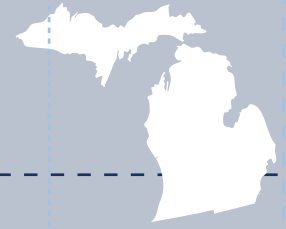


## Ambiguity Resolved in Favor of the Taxpayer

Massachusetts courts interpret ambiguities strictly in favor of the taxpayer.<sup>165</sup>

---

<sup>165</sup> See *Prudential Ins. Co. of Am. v. Comm'r of Revenue*, 709 N.E.2d 1096, 1100 (Mass. 1999) (“Tax statutes are to be construed strictly, and all ambiguities are resolved in favor of the taxpayer.”).



<b>Definition of Tax:</b> If a charge has the primary purpose of raising revenue, it is a tax	✘
<b>Definition of Tax:</b> How charge operates more important than label	Implied
<b>Definition of Tax:</b> Voluntariness immaterial	✘
Ambiguity resolved in favor of the taxpayer	✓

## Definition of Tax

In *Bolt v. City of Lansing*, the Michigan Supreme Court held that a water service charge was in fact a tax because the charge did not correspond to benefits conferred.<sup>166</sup> The court established the basic distinction between a fee and a tax: “Generally, a ‘fee’ is exchanged for a service rendered or a benefit conferred, and some reasonable relationship exists between the amount of the fee and the value of the service or benefit. A ‘tax,’ on the other hand, is designed to raise revenue. Exactions which are imposed primarily for public rather than private purposes are taxes. Revenue from taxes, therefore, must inure to the benefit of all, as opposed to exactions from a few for benefits that will inure to the persons or group assessed.”<sup>167</sup> For a charge to be considered a fee and not a tax, the court listed three criteria: (1) the “fee must serve a regulatory purpose rather than a revenue-raising purpose,” (2) the fee “must be proportionate to the necessary costs of the service,” and (3) whether the charge involves “voluntariness” or “any other element of volition.”<sup>168</sup>

## Voluntariness

The Michigan courts firmly use the voluntariness standard for user fees.<sup>169</sup> However, they have acknowledged difficulties with applying the voluntariness standard.<sup>170</sup>

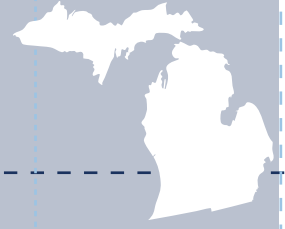
<sup>166</sup> See *Bolt v. City of Lansing*, 587 N.W.2d 264, 269 (Mich. 1998). The case involved the Headlee Amendment, MICH. CONST. art. IX, § 31, which prohibits local governments from levying taxes or increasing current taxes without a majority voter approval.

<sup>167</sup> *Bolt*, 587 N.W.2d 264 at 269 (Mich. 1998) (internal citations omitted).

<sup>168</sup> *Id.* (internal citations omitted). Additionally, the court listed three other non-dispositive characteristics in support of the water charge being classified as a fee: (1) the fee replaced a fund originating from the general fund; (2) the charge could be collected by placing a lien on the payer’s property; (3) the charge is billed through the city assessor’s office and may be sent with the property tax bill. *Bolt*, 587 N.W.2d at 272.

<sup>169</sup> See, e.g., *Bolt v. City of Lansing*, 587 N.W.2d 264, 272-73 (Mich. 1998); *Wheeler v. Shelby Charter Twp.*, 697 N.W.2d 180, 186 (Mich. Ct. App. 2005); *Mapleview Estates, Inc. v. City of Brown City*, 671 N.W.2d 572, 574 (Mich. Ct. App. 2003).

<sup>170</sup> See, e.g., *A & E Parking v. Detroit Metro. Wayne County Airport Auth.*, 723 N.W.2d 223, 227 (Mich. Ct. App. 2004)



## Ambiguity Resolved in Favor of the Taxpayer

Michigan courts resolve ambiguous language in tax statutes in favor of the taxpayer.<sup>171</sup>

---

(limiting *Bolt's* application to solely distinguishing user fees and taxes on real property and instead adopting out-of-state guidance not containing the voluntariness standard to distinguish between fees and taxes); *Lapeer County Abstract & Title Co. v. Lapeer County Register of Deeds*, 691 N.W.2d 11, 21 (Mich. Ct. App. 2004) (limiting *Bolt's* reasoning to distinguishing between fees and taxes only for real property).

<sup>171</sup> See, e.g., *Mich. Bell Tel. Co. v. Dep't of Treasury*, 518 N.W.2d 808, 811 (Mich. 1994) (“Moreover, ambiguities in the language of a tax statute are to be resolved in favor of the taxpayer.”); *In re Dodge Bros.*, 217 N.W. 777, 779 (Mich. 1928) (“Such laws may be made plain, and the language thereof, if dubious [sic], is not resolved against the taxpayer.”).



<b>Definition of Tax:</b> If a charge has the primary purpose of raising revenue, it is a tax	✘
<b>Definition of Tax:</b> How charge operates more important than label	✓
<b>Definition of Tax:</b> Voluntariness immaterial	Not Considered
Ambiguity resolved in favor of the taxpayer	✓

## Definition of Tax

In *Country Joe, Inc. v. City of Eagan*, the Minnesota Supreme Court struck down a city “road unit connection charge,” imposed as a condition of receiving a building permit, as an unlawful tax.<sup>172</sup> The court ruled that “[w]hen it has been apparent that a city’s true motivation was to raise revenue—and not merely to recover the costs of regulation—we have disregarded the fee label attached by a municipality and held that the charge in question was in fact a tax.”<sup>173</sup> The court held the charge at issue to be a tax because of the existence of another fee that was specifically used to offset the cost of the regulation; the plain language of the resolution indicated that this was a general revenue measure; and the revenue collected was not earmarked for projects necessitated by the new development but rather funded all major street construction and repairs.<sup>174</sup>

The court provided two factors to evaluate fees: (1) the relationship between the charge and the cost of the regulation, and (2) a restriction to use the proceeds for projects or regulation benefitting the payer.<sup>175</sup>

## Voluntariness

No Minnesota case has considered a charge’s voluntariness to be relevant in determining whether the charge is a tax.

<sup>172</sup> See *Country Joe, Inc. v. City of Eagan*, 560 N.W.2d 681 (Minn. 1997).

<sup>173</sup> *Id.* at 686.

<sup>174</sup> See *id.*

<sup>175</sup> See *Country Joe, Inc. v. City of Eagan*, 560 N.W.2d 681, 686 (Minn. 1997) (stating that the charge failed to be a fee because of the existence of another fee that was specifically used to offset the cost of the regulation, the plain language of the resolution indicating that this was a general revenue measure, and the revenues collected not earmarked for projects necessitated by the new development, but funded all major street construction, as well as repairs of existing streets). See also *State v. Labo’s Direct Serv.*, 44 N.W.2d 823, 827 (Minn. 1950) (striking down a fee on gasoline pumps as “a tax for the purpose of producing more revenue for the municipality”); *Barron v. City of Minneapolis*, 4 N.W.2d 622, 624 (Minn. 1942) (invalidating a license fee after concluding that “[w]hat the city council sought to accomplish, and did accomplish, was the enactment of a revenue measure”).



## Ambiguity Resolved in Favor of the Taxpayer

Minnesota courts strictly construe ambiguous statutory language in favor of the taxpayer.<sup>176</sup>

---

<sup>176</sup> See, e.g., *McLane Minn., Inc. v. Comm’r of Revenue*, 773 N.W.2d 289, 296 (Minn. 2009) (“We have previously held that ‘where the meaning of a taxing statute is doubtful, the doubt must be resolved in favor of the taxpayer.’” (quoting *Charles W. Sexton Co. v. Hatfield*, 116 N.W.2d 574, 580 (Minn. 1962))).

# MISSISSIPPI



<b>Definition of Tax:</b> If a charge has the primary purpose of raising revenue, it is a tax	✘
<b>Definition of Tax:</b> How charge operates more important than label	✓
<b>Definition of Tax:</b> Voluntariness immaterial	Not Considered
Ambiguity resolved in favor of the taxpayer	✓

## Definition of Tax

In *City of Ocean Springs v. Homebuilders Association*, the Mississippi Supreme Court invalidated a development impact fee, holding that it was actually a tax because it was “simply a revenue-raising measure” that funded general public services.<sup>177</sup> The court stated: “The chief distinction [between a tax and a fee] is that a tax is an exaction for public purposes while a fee relates to an individual privilege or benefit to the taxpayer.”<sup>178</sup>

## Voluntariness

No Mississippi case has considered a charge’s voluntariness to be relevant in determining whether the charge is a tax. Within the *City of Ocean Springs* opinion, the court *in dicta* cites a law review article that rejects the voluntariness standard.<sup>179</sup>

## Ambiguity Resolved in Favor of the Taxpayer

Mississippi courts strictly construe ambiguous language in favor of the taxpayer.<sup>180</sup>

<sup>177</sup> See *City of Ocean Springs v. Homebuilders Ass’n*, 932 So.2d 44, 55-56, 61 (Miss. 2006).

<sup>178</sup> *Id.* (quoting Miss. Att’y Gen. Op. 1996-0425 (1996)).

<sup>179</sup> See *City of Ocean Springs*, 932 So.2d at 55 (citing Hugh Spitzer, *Taxes vs. Fees: A Curious Confusion*, 38 Gonz. L. Rev. 335, 353 (2003)) (quoting *Covell v. City of Seattle*, 905 P.2d 324, 327 (1995) (“Properly understood, regulatory fees are charges to cover the cost of the state’s use of its regulatory powers which can be allocated to those who are either voluntarily or involuntarily receiving special attention from government regulators.”)).

<sup>180</sup> See, e.g., *State ex rel. Knox v. Union Tank Car Co.*, 119 So. 310, 312 (Miss. 1928) (“A fundamental rule in the construction of tax laws is that such laws will be strictly construed, and all doubt resolved in favor of the taxpayer.”); *Miller v. Ill. Cent. R. Co.*, 111 So. 558, 560 (Miss. 1927) (“Doubts are resolved in favor of the taxpayer.”).





<b>Definition of Tax:</b> If a charge has the primary purpose of raising revenue, it is a tax	✘
<b>Definition of Tax:</b> How charge operates more important than label	✓
<b>Definition of Tax:</b> Voluntariness immaterial	Not Considered
Ambiguity resolved in favor of the taxpayer	✓

## Definition of Tax

In *President Riverboat Casino-Missouri, Inc. v. Missouri Gaming Commission*, the Missouri Supreme Court held that state-imposed “admission fees” on riverboat customers were in fact taxes because the money was used for purposes other than gambling regulation administrative costs.<sup>181</sup> The court summarized an earlier decision, *Legett v. Missouri State Life Insurance*, distinguishing generally between taxes and fees:

Taxes are proportional contributions imposed by the state upon individuals for the support of government and for all public needs. Taxes are not payments for a special privilege or a special service rendered. Fees or charges prescribed by law to be paid by certain individuals to public officers for services rendered in connection with a specific purpose ordinarily are not taxes unless the object of the requirement is to raise revenue to be paid into the general fund of the government to defray customary governmental expenditures rather than compensation of public officers for particular services rendered.<sup>182</sup>

The court set out a five-part test to determine whether a charge is a tax or fee: (1) when the fee is paid; (2) who pays the fee; (3) whether the amount of the fee to be paid is affected by the level of goods or services provided to the fee payer; (4) whether the government is providing a service or good; and (5) whether the activity has been historically and exclusively provided by the government.<sup>183</sup>

The court also stated that “what is labeled a fee may in fact be a tax based on its ‘real object and result.’”<sup>184</sup>

<sup>181</sup> See *President Riverboat Casino-Missouri, Inc. v. Missouri Gaming Comm’n*, 13 S.W.3d 635 (Mo. 2000).

<sup>182</sup> *Id.* at 638 (citing *Leggett v. Missouri State Life Ins. Co.*, 342 S.W.2d 833, 875 (Mo. 1960) (internal formatting omitted)).

<sup>183</sup> See *Keller v. Marion County Ambulance Dist.*, 820 S.W.2d at 304-05 n.10 (Mo. 1991).

<sup>184</sup> *President Riverboat Casino*, 13 S.W.3d at 638, citing *State ex rel. Wyatt v. Ashbrook*, 55 S.W.2d 628-29 (Mo. 1900).



## Voluntariness

No Missouri case has considered a charge's voluntariness to be relevant in determining whether the charge is a tax.

## Ambiguity Resolved in Favor of the Taxpayer

Missouri courts construe ambiguous language in tax statutes in favor of the taxpayer.<sup>185</sup>

---

<sup>185</sup> See, e.g., *United Air Lines, Inc. v. State Tax Comm'n*, 377 S.W.2d 444, 449 (Mo. 1964) (“[W]here any real doubt exists in the construction of a taxing statute, the law requires that it be strictly construed in favor of the taxpayer.”); *A.P. Green Fire Brick Co. v. Mo. State Tax Comm'n*, 277 S.W.2d 544, 546 (Mo. 1955) (“it is well settled that such a statute must be strictly construed in favor of the taxpayer and against the taxing authority.”).



<b>Definition of Tax:</b> If a charge has the primary purpose of raising revenue, it is a tax	✘
<b>Definition of Tax:</b> How charge operates more important than label	Implied
<b>Definition of Tax:</b> Voluntariness immaterial	Not Considered
Ambiguity resolved in favor of the taxpayer	✓

## Definition of Tax

The Montana Supreme Court discussed the distinguishing features of fees and taxes in *Brackman v. Kruse*, stating: “Where [a] fee is exacted solely or primarily for revenue purposes . . . without the performance of any further conditions, it is not a license fee but a tax.”<sup>186</sup> Additionally, the court stated “[i]f the fee is exacted for the primary purpose of regulating . . . and compliance with certain conditions is required in addition to the payment of the prescribed sum, such fee is a license fee.”<sup>187</sup> For a fee to be valid, it must reasonably bear relation to the combination of direct and incidental costs of the regulation.<sup>188</sup>

## Voluntariness

No Montana case has considered a charge’s voluntariness to be relevant in determining whether the charge is a tax.

## Ambiguity Resolved in Favor of the Taxpayer

Montana courts resolve ambiguous language in favor of the taxpayer.<sup>189</sup>

<sup>186</sup> See *Brackman v. Kruse*, 122 Mont. 91, 104 (Mont. 1948)

<sup>187</sup> *Id.* In addition, the Montana Supreme Court has distinguished between tolls and taxes. See *Monarch Mining Co. v. State Highway Comm’n*, 270 P.2d 738, 741 (Mont. 1954) (“Tolls are the compensation for the use of another’s property, or of improvements made by him; their amount is determined by the cost of the property, or of the improvements, and a consideration of the return which such values or expenditures should yield. It has been stated that a tax is a demand of a sovereignty; a toll is a demand of proprietorship. Thus, there is no analogy between the imposition of taxes and the levying of tolls for improvement [sic] of highways.”) (quoting 51 Am.Jur., Taxation, § 17, p. 49).

<sup>188</sup> See *State v. Police Court of City of Bozeman*, 219 P. 810, 812 (Nev. 1923).

<sup>189</sup> See, e.g., *W. Energy Co. v. State Dep’t of Revenue*, 990 P.2d 767, 769 (Mont. 1999) (“We have previously stated that when a taxing statute is susceptible to two constructions, doubt should be resolved in the favor of the taxpayer.”); *State ex rel. Anderson v. State Bd. of Equalization*, 319 P.2d 221, 224 (Mont. 1957) (“It is a well-settled rule of construction in Montana that where a taxing statute is susceptible of two constructions and legislative intent is in doubt, such doubt should be resolved in favor of the taxpayer.”).



<b>Definition of Tax:</b> If a charge has the primary purpose of raising revenue, it is a tax	✓
<b>Definition of Tax:</b> How charge operates more important than label	Not Considered
<b>Definition of Tax:</b> Voluntariness immaterial	Not Considered
Ambiguity resolved in favor of the taxpayer	✓

## Definition of Tax

Nebraska authorizes local governments to levy taxes, which results in little need to develop rules distinguishing taxes from fees. Recent cases instead focus on distinguishing between types of taxes in situations where certain types of taxes are capped with regard to how high the rate may go.<sup>190</sup>

In an 1881 case, the Nebraska Supreme Court held that the state constitution’s definition of taxes did not encompass charges “imposed not merely for the purposes of revenue, but in a restraint of a particular business or calling, or as a license on particular pursuits, or as a mere police regulation . . . .”<sup>191</sup> This distinction was reaffirmed in an 1897 case, where the court stated that “in general a tax must be imposed solely for the purposes of revenue, while a license is imposed in the exercise of the police power, and has for its object the restriction or regulation of a certain occupation, the income derived from the license fee being only incidental to the accomplishment of the main object.”<sup>192</sup> In a 1951 case concerning whether water and sewer charges are taxes or assessments (fees), the court in *dicta* cited a number of other state court opinions holding that it would not be.<sup>193</sup>

While a Nebraska appellate court has held that labeling a tax “does not necessarily dictate the proper classification,” the Nebraska Supreme Court has not considered that point.<sup>194</sup>

<sup>190</sup> See, e.g., *Anthony, Inc. v. City of Omaha*, --- N.W.2d ---, 2012 WL 1758826 (Neb. May 18, 2012) (holding that a restaurant tax is an uncapped occupation tax and not a capped sales tax); *Kiplinger v. Nebraska Dept. of Natural Resources*, 803 N.W.2d 28 (Neb. 2011) (holding that a tax on river basis property is a permissible excise tax and not an impermissible state property tax).

<sup>191</sup> *Pleuler v. State*, 10 N.W. 481, 487 (Neb. 1881).

<sup>192</sup> *German-American Fire Ins. Co. v. City of Minden*, 71 N.W. 995, 997 (Neb. 1897).

<sup>193</sup> *Michelson v. City of Grand Island*, 48 N.W.2d 769, 774-75 (Neb. 1951), citing *Laverents v. City of Cheyenne*, 217 P.2d 877, 885 (Wyo. 1950); *City of Edwardsville v. Jenkins*, 33 N.E.2d 598 (Ill. 1941); *Payne v. City of Racine*, 259 N.W. 437 (Wis. 1935); *City of Harrison v. Braswell*, 194 S.W.2d 12 (Ark. 1946); *State v. City of Miami*, 27 So.2d 118 (Fla. 1946); *Sharp v. Hall*, 181 P.2d 972 (Okla. 1947); *Grim v. Village of Lewisville*, 6 N.E.2d 998 (Ohio App. 1935).

<sup>194</sup> *Gartner v. Hume*, 686 N.W.2d 58, 77 (Neb. App. 2004).



## Voluntariness

No Nebraska case has considered a charge’s voluntariness to be relevant in determining whether the charge is a tax.

## Ambiguity Resolved in Favor of the Taxpayer

Nebraska courts resolve ambiguous language in tax statutes in favor of the taxpayer.<sup>195</sup>

---

<sup>195</sup> See *Foote Clinic, Inc. v. City of Hastings*, 580 N.W.2d 81, 84 (Neb. 1998) (“We have continuously held that the power and authority delegated to municipalities to construct improvements and levy special assessments for their payment is to be strictly construed, and every reasonable doubt as to the extent or limitation of such power and authority and the manner of exercise thereof is resolved against the city and in favor of the taxpayer.”).



<b>Definition of Tax:</b> If a charge has the primary purpose of raising revenue, it is a tax	✘
<b>Definition of Tax:</b> How charge operates more important than label	Implied
<b>Definition of Tax:</b> Voluntariness immaterial	✘
Ambiguity resolved in favor of the taxpayer	✓

## Definition of Tax

In *Southern Nevada Life Underwriters Association v. City of Las Vegas*, the Supreme Court of Nevada identified the general distinction between a tax and fee to be the purpose of the charge.<sup>196</sup> This distinction was restated by the court in *Clean Water Coalition v. The M Resort, LLC*. In that ruling, the court reiterated that the “true purpose” of the statute levying the charge will determine that charge’s character.<sup>197</sup>

In *Clean Water Coalition*, the court adopted the three-factor test for a fee stated in *State v. Medeiros*.<sup>198</sup> Thus, the court stated that a charge is a fee if it:

- (1) applies to the direct beneficiary of a particular service, (2) is allocated directly to defraying the costs of providing the service, and (3) is reasonably proportionate to the benefit received.<sup>199</sup>

The court found that the charges were, in fact, valid fees because (1) the proceeds were to be applied for the benefit of the payers; (2) the funds were allocated to defray the cost of the capital improvement project; and (3) the charges were proportionate to the benefits enjoyed by the payers.<sup>200</sup> However, to

<sup>196</sup> See *Southern Nevada Life Underwriters Ass’n v. City of Las Vegas*, 325 P.2d 757, 758 (Nev. 1958) (classifying a charge as a tax because there was no specific purpose described by the statute to indicate what regulatory cost the payment was to defray).

<sup>197</sup> See *Clean Water Coalition v. The M Resort, LLC*, 255 P.3d 247, 256 (Nev. 2011) (citing *Douglas Co. Contractors v. Douglas Co.*, 929 P.2d 253, 256 (Nev. 1996) (“[W]hen it appears from the Act itself that revenue is its main objective, and the amount of the tax supports that theory, the enactment is a revenue measure.”)).

<sup>198</sup> See *Clean Water Coalition*, 255 P.3d at 256 (“[T]o distinguish between a “fee” and a “tax,” the Hawaii Supreme Court in *Medeiros* adopted a modified version of the test articulated by the Massachusetts Supreme Judicial Court in *Emerson College*, which analyzes whether the charge ‘(1) applies to the direct beneficiary of a particular service, (2) is allocated directly to defraying the costs of providing the service, and (3) is reasonably proportionate to the benefit received.’ *Medeiros*, 973 P.2d at 742. If those criteria fit the charge, it is a fee.”) (quoting *State v. Medeiros*, 973 P.2d 736, 741 (1999)).

<sup>199</sup> *Clean Water Coalition*, 255 P.3d at 257.

<sup>200</sup> *Id.*



further complicate the analysis, these initially valid fees were transferred into the state’s general fund for unrestricted use.<sup>201</sup> The court held that this transfer altered the “true purpose” of the charge into one primarily to raise revenue, causing the charge to now be an invalid tax.<sup>202</sup>

## Voluntariness

The Nevada Supreme Court expressed, in *dicta*, their approval of voluntariness being a characteristic of a fee, stating that “[w]hile a tax is compulsory and it entitles the taxpayer to receive nothing except the governmental rights enjoyed by all citizens, a user fee is optional and applies to a specific charge for the use of publicly provided services.”<sup>203</sup>

## Ambiguity Resolved in Favor of the Taxpayer

Nevada courts interpret ambiguous language in tax statutes in favor of the taxpayer.<sup>204</sup>

---

<sup>201</sup> *Id.* at 252.

<sup>202</sup> *Id.* at 257.

<sup>203</sup> See *Clean Water Coalition v. The M Resort, LLC*, 255 P.3d 247, 256 (Nev. 2011) (citing *U.S. v. Huntington, W.Va.*, 999 F.2d 71, 74 (4th Cir. 1993)).

<sup>204</sup> See, e.g., *State, Dep’t of Taxation v. Visual Comm., Inc.*, 836 P.2d 1245, 1247 (Nev. 1992) (“Taxing statutes when of doubtful validity or effect must be construed in favor of the taxpayers.” (quoting *Cashman Photo v. Nev. Gaming Comm’n*, 538 P.2d 158, (160 Nev. 1975))); *Cashman Photo v. Nev. Gaming Comm’n*, 538 P.2d 158, 160 (Nev. 1975) (“Taxing statutes when of doubtful validity or effect must be construed in favor of the taxpayers.”).

# NEW HAMPSHIRE



<b>Definition of Tax:</b> If a charge has the primary purpose of raising revenue, it is a tax	✘
<b>Definition of Tax:</b> How charge operates more important than label	Implied
<b>Definition of Tax:</b> Voluntariness immaterial	✓
Ambiguity resolved in favor of the taxpayer	✓

## Definition of Tax

In the seminal case of *American Automobile Association v. State*, the New Hampshire Supreme Court comprehensively examined the distinguishing features of fees and taxes.<sup>205</sup>

First, the court stated that “[a] ‘tax is an enforced contribution to raise revenue and not to reimburse the state for special services . . .’ [while] licensing fees are charges that ‘bear a relation to and approximate the expense of issuing the licenses and of inspecting and regulating the business licensed.’”<sup>206</sup>

Second, to be a valid fee, the charge “must be incidental to the implementation of a regulatory program and cannot primarily be intended to produce additional revenues.”<sup>207</sup> To satisfy this requirement, the fee “must bear a relation to and approximate the expense” of the regulation.<sup>208</sup> Further, fees are not invalid merely because they generate some surplus revenue.<sup>209</sup> However, if the fee is grossly disproportionate to the regulatory expenses, it is a tax.<sup>210</sup>

Finally, to determine a charge’s proper classification it is necessary to discern the statute’s primary purpose, considering the statute’s stated purpose in conjunction with its indispensable characteristics.<sup>211</sup>

<sup>205</sup> See *American Auto. Ass’n. v. State*, 618 A.2d 844, 847-48 (N.H. 1992). These distinctions were recently re-affirmed in *Horner v. Governor*, 951 A.2d 180, 182-83 (N.H. 2008) (holding that a sex offender registration fee was not a tax).

<sup>206</sup> *American Auto. Ass’n.*, 618 A.2d at 847 (quoting *Opinion of the Justices*, 379 A.2d 782, 786 (N.H. 1977); *Laconia v. Gordon*, 219 A.2d 701, 703 (N.H. 1966)).

<sup>207</sup> *American Auto. Ass’n.*, 618 A.2d at 847 (quoting *Opinion of the Justices*, 379 A.2d 782, 786 (N.H. 1977)).

<sup>208</sup> *Laconia v. Gordon*, 219 A.2d 701, 703 (N.H. 1966) (citing *Marine Corps League v. Benoit*, 78 A.2d 513, 516 (N.H. 1951)).

<sup>209</sup> *Laconia*, 219 A.2d at 703 (citing *Opinion of the Justices*, 379 A.2d 782, 786 (N.H. 1977)).

<sup>210</sup> See *Hooksett Drive-In Theatre, Inc. v. Hooksett*, 266 A.2d 124, 126 (N.H. 1970).

<sup>211</sup> See *Laconia*, 219 A.2d at 703 (citing *Opinion of the Justices*, 379 A.2d 782, 786 (N.H. 1977); *Coltin Company v. Manchester Savings Bank*, 197 A.2d 208, 210 (N.H. 1964)).





## Voluntariness

The New Hampshire Supreme Court was presented with the option to adopt the voluntariness standard in *Horner v. Governor* as a determinative characteristic of a fee.<sup>212</sup> The court declined that opportunity and functionally rejected the prospect to include voluntariness as a defining characteristic of a fee.<sup>213</sup>

## Ambiguity Resolved in Favor of the Taxpayer

New Hampshire courts construe ambiguous language in tax statutes in favor of the taxpayer.<sup>214</sup>

---

<sup>212</sup> See *Horner v. Governor*, 951 A.2d 180, 183 (N.H. 2008).

<sup>213</sup> *Id.* at 183 (“The plaintiff argues at length that “governmental fees must be voluntarily assumed and must confer a particular benefit upon the party paying the fee, rather than upon society as a whole.” The plaintiff offers no New Hampshire law in support of this position. We decline to rely upon the federal and other state cases set forth in his brief to determine whether, under our State Constitution, the regulatory charge is a tax or a fee.”).

<sup>214</sup> See, e.g., *First Berkshire Bus. Trust v. Comm’r, N.H. Dep’t of Revenue Admin.*, 13 A.3d 232, 235 (N.H. 2010) (“We construe an ambiguous tax statute against the taxing authority rather than the taxpayer.”); *Pheasant Lane Realty Trust v. City of Nashua*, 720 A.2d 73, 76 (N.H. 1998) (“Even assuming that the statutory language was ambiguous, an “ambiguous tax statute will be construed against the taxing authority rather than the taxpayer.”(quoting *Appeal of John Denman*, 419 A.2d 1084, 1087 (N.H. 1980))); *Appeal of Denman*, 419 A.2d 1084, 1087 (N.H. 1980) (“Of course, an ambiguous tax statute will be construed against the taxing authority rather than the taxpayer.”).

# NEW JERSEY



<b>Definition of Tax:</b> If a charge has the primary purpose of raising revenue, it is a tax	✘
<b>Definition of Tax:</b> How charge operates more important than label	Implied
<b>Definition of Tax:</b> Voluntariness immaterial	Not Considered
Ambiguity resolved in favor of the taxpayer	✓

## Definition of Tax

The New Jersey Supreme Court expressed the principal distinction between taxes and fees in *Bellington v. Township of East Windsor*.<sup>215</sup> The court stated:

The powers are essentially different: one is to license and regulate under the police power; the other, to raise revenue under the general power to tax. But the two may be unitedly exercised.<sup>216</sup>

This language was reiterated in *Holmdel Builders Association v. Township of Holmdel* and *Daniels v. Borough of Point Pleasant*.<sup>217</sup> The court has further expressed that the primary purpose of the levied charge controls the identity of that exaction even if the proceeds exceed the cost of the regulation.<sup>218</sup>

<sup>215</sup> *Bellington v. East Windsor Tp.*, 112 A.2d 268, 271-72 (N.J. 1955).

<sup>216</sup> *Id.* (citing *Becker v. Pickersgill*, 143 A. 859, 861 (N.J. 1928)).

<sup>217</sup> See *Holmdel Builders Ass'n v. Township of Holmdel*, 583 A.2d 277, 293 (N.J. 1990) (“If the primary purpose of the fee is to raise general revenue, it is a tax . . . . If, however, the primary purpose is to reimburse the municipality for services reasonably related to development, it is a permissible regulatory exaction.”); *Daniels v. Borough of Point Pleasant*, 129 A.2d 265, 267 (N.J. 1957) (quoting the language in *Bellington* explaining that the primary purpose of the charge is controlling of its identity).

<sup>218</sup> See *BTD-1996 NPC 1 L.L.C. v. 350 Warren L.P.*, 784 A.2d 1214, 1219 (N.J. 2001) (“[T]he assessment may still constitute a license fee proper rather than a tax for revenue even though the fee charged be in excess of the regulatory expenses and burdens.” (citing *Bellington*, 112 A.2d at 272; *Daniels*, 129 A.2d at 267)). *But see Resolution Trust Corp. v. Lanzaro*, 658 A.2d 282, 290 (N.J. 1995) (“Where the disproportion between the charge and the cost of the service is excessive, as it is here, the conclusion is inescapable that the charge imposed is intended primarily to raise revenue and not to compensate the governmental entity for the cost of providing its service.”).



## Voluntariness

No New Jersey case has considered a charge's voluntariness to be relevant in determining whether the charge is a tax.

## Ambiguity Resolved in Favor of the Taxpayer

New Jersey courts construe ambiguous language in tax statutes in favor of the taxpayer.<sup>219</sup>

---

<sup>219</sup> See, e.g., *Hudson County Chamber of Commerce v. City of Jersey City*, 708 A.2d 690, 697 (N.J. 1998) (“[A]mbiguous tax statutes are generally to be construed in favor of the taxpayer and against the State.”); *Fedders Fin. Corp. v. Dir., Div. of Taxation*, 476 A.2d 741, 745 (N.J. 1984) (“[W]hen interpretation of a taxing provision is in doubt, and there is no legislative history that dispels that doubt, the court should construe the statute in favor of the taxpayer.”); *Kingsley v. Hawthorne Fabrics, Inc.*, 197 A.2d 673, 677 (N.J. 1964) (“In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the government, and in favor of the citizen.” (quoting *Gould v. Gould*, 245 U.S. 151, 153 (1917))).

# NEW MEXICO



<b>Definition of Tax:</b> If a charge has the primary purpose of raising revenue, it is a tax	✓
<b>Definition of Tax:</b> How charge operates more important than label	Implied
<b>Definition of Tax:</b> Voluntariness immaterial	Not Considered
Ambiguity resolved in favor of the taxpayer	✓

## Definition of Tax

The New Mexico Supreme Court addressed the distinction between taxes and fees in *El Paso Electric Company v. New Mexico Public Regulation Commission*.<sup>220</sup> To distinguish generally between the two classes of charges, the court referenced an earlier court of appeals decision, stating: “A tax is a charge imposed that is not related to the services rendered.... In contrast, a fee is related to a particular benefit or service.”<sup>221</sup>

The appellate court in *New Mexico Mining Association v. New Mexico Mining Commission* provided an additional requirement for a charge to be classified as a fee: the “fee must not exceed the amount reasonably necessary to cover the costs of performing or regulating the matter in question.”<sup>222</sup>

## Voluntariness

No New Mexico case has considered a charge’s voluntariness to be relevant in determining whether the charge is a tax.

## Ambiguity Resolved in Favor of the Taxpayer

New Mexico courts strictly construe ambiguous language in favor of the taxpayer.<sup>223</sup>

<sup>220</sup> See *El Paso Elec. Co. v. New Mexico Public Regulation Com’n*, 246 P.3d 443 (N.M. 2010).

<sup>221</sup> *Id.* at 448 (citing *N.M. Mining Ass’n v. N.M. Mining Comm’n*, 924 P.2d 741, 747 (N.M. Ct. App. 1996)). *But see Apodaca v. Wilson*, 525 P.2d 876, 886 (N.M. 1974) (holding that water and sewer charges levied by city were not “taxes,” ... irrespective of fact that revenues derived from such charges were not used solely for the maintenance of the utilities).

<sup>222</sup> *N.M. Mining Ass’n v. N.M. Mining Comm’n*, 924 P.2d 741, 747 (N.M. Ct. App. 1996) (citing *National Cable Television Ass’n v. FCC*, 554 F.2d 1094, 1106 (D.C. Cir. 1976)).

<sup>223</sup> See *Molycorp, Inc. v. State Corp. Comm’n*, 624 P.2d 1010, 1011 (N.M. 1981) (“[A] statute is to be construed strictly against the state where the applicability of a tax statute is ambiguous or doubtful in meaning or intent.”).



<b>Definition of Tax:</b> If a charge has the primary purpose of raising revenue, it is a tax	✓
<b>Definition of Tax:</b> How charge operates more important than label	Implied
<b>Definition of Tax:</b> Voluntariness immaterial	Not Considered
Ambiguity resolved in favor of the taxpayer	✓

## Definition of Tax

The New York Court of Appeals, in *American Sugar Refining Company of New York v. Waterfront Commission of New York*, distinguished between a tax and a license fee. The court provided:

The distinction between a license fee and a tax is, of course, one long understood in our law. A license fee has for its primary purpose the regulation or restriction of a business deemed in need of public control, the cost of such regulation being imposed upon the business benefited or controlled, whereas the primary purpose of a tax is to raise money for support of the government generally.<sup>224</sup>

Additionally, a compilation of other New York cases provides two additional factors to be considered when determining the identity of a charge: the reasonableness of the charge compared to the costs expended by the government under the regulation<sup>225</sup> and the maintenance of a separate earmarked account in which to keep the funds.<sup>226</sup>

<sup>224</sup> *American Sugar Ref. Co. of New York v. Waterfront Comm'n of New York Harbor*, 432 N.E.2d 578, 585 (N.Y. 1982).

<sup>225</sup> See, e.g., *Am.Ins. Ass'n v. Lewis*, 409 N.E.2d 828, 833-34 (N.Y. 1980) (holding that a "capping" fee imposed on insurers as a condition of doing business in New York constituted an unlawful tax where it bore no relationship to cost of administering licensing program or the benefits received by insurers); *Suffolk County Bldrs. Ass'n, Inc. v. Suffolk County*, 389 N.E.2d 133, 137 (N.Y. 1979) (deciding inspection fees imposed by health department with respect to issuance of permits were legitimate because there was a reasonable concurrence between the fees and regulatory program expenses); *Jewish Reconstructionist Synagogue of N. Shore v. Inc. Vill. of Roslyn Harbor*, 352 N.E.2d 115, 125 (N.Y. 1976) (finding fees imposed on applicants for zoning variances and special use permits were invalid where village failed to demonstrate any correspondence between fees and regulatory costs); *City of New York v. Second Ave. R. Co.*, 32 N.Y. 261, 273-74 (N.Y. 1865) (finding a \$50 annual fee to run rail cars through the City of New York to be a tax because its primary purpose was to raise revenue and there was no conceivable connection between the charge and any regulatory benefit or cost); *Town Bd. of Town of Poughkeepsie, on Behalf of Arlington Water Dist. v. City of Poughkeepsie*, 255 N.Y.S.2d 549, 556 (N.Y. App. Div. 1964) (holding that a water charge by city which supplied water to water districts outside city and made the charge depend solely on the quantity of water used was not a "tax").

<sup>226</sup> See *City of Buffalo v. Stevenson*, 100 N.E. 798, 800 (N.Y. 1913) ("There is no evidence that a fee of \$5 is an unreasonable charge. . . . [T]he purpose of the charge [is] . . . to meet the expenses necessarily or possibly attendant upon the granting of the permission to open the street pavement. The moneys are reserved in a particular fund, set apart for the repairs of streets, and not intended for the expenses of conducting the municipal government.").



## Voluntariness

New York courts do not specifically address voluntariness as a necessary characteristic of most charges for them to be considered fees.<sup>227</sup> However, the voluntariness standard is applicable in the case of water charges.<sup>228</sup> In *New York University v. American Book Co.*, the Court of Appeals explained that the City of New York was provided two methods to reimburse itself for water usage: (1) charge a flat rate based on different classes and sizes of buildings—a tax, or (2) install a water meter and charge solely for the amount of water used.<sup>229</sup> “In this class of cases there is merely a voluntary purchase by the consumer from the city of such quantity of water as he chooses to buy.”<sup>230</sup>

## Ambiguity Resolved in Favor of the Taxpayer

New York courts interpret ambiguous language in tax statutes in favor of the taxpayer.<sup>231</sup>

---

<sup>227</sup> See, e.g., *Kessler v. Hevesi*, 846 N.Y.S.2d 56, 56 (N.Y. App. Div. 2007) (“User fees involve the government selling a service to an individual, such as highway tolls or court filing fees, rather than exercising police powers that are generally applicable to the entire community.”); *New York Tel. Co. v. Amsterdam*, 613 N.Y.S.2d 993, 995 (N.Y. App. Div. 1994) (“[F]ees [are] characterized as the ‘visitation of the costs of special services upon the one who derives a benefit from them.’”) (quoting *Jewish Reconstructionist Synagogue of N. Shore v. Incorporated Vil. of Roslyn Harbor*, 352 N.E.2d 115, 117 (N.Y. 1976) (emphasis in original)).

<sup>228</sup> See *New York Univ. v. Am. Book Co.*, 90 N.E. 819, 820 (N.Y. 1910); *Town Bd. of Town of Poughkeepsie, on Behalf of Arlington Water Dist. v. City of Poughkeepsie*, 255 N.Y.S.2d 549, 554 (N.Y. App. Div. 1964) (“The water charge here is not a tax, for in this case ‘the charge made depends solely upon the quantity of water used’ and the water is deemed to have been the subject of ‘a voluntary purchase’, even though ‘as security for the payment of the debt a lien is imposed on the property itself for any unpaid charge.’”) (citing *New York University v. Am. Book Co.*, 90 N.E. 819, 820 (N.Y. 1910)).

<sup>229</sup> *New York Univ.*, 90 N.E. at 820.

<sup>230</sup> *Id.*

<sup>231</sup> See, e.g., *Suffolk County Fed. Sav. & Loan Ass’n v. Bragalini*, 159 N.E.2d 164, 166 (N.Y. 1959) (“In answering our question we keep in mind that tax laws are, at least when ambiguous or doubtful, construed strictly against the taxing power and liberally in favor of the taxpayer . . . and construed, if possible, so as to avoid double taxation . . .”).



<b>Definition of Tax:</b> If a charge has the primary purpose of raising revenue, it is a tax	Unclear
<b>Definition of Tax:</b> How charge operates more important than label	Unclear
<b>Definition of Tax:</b> Voluntariness immaterial	✘
Ambiguity resolved in favor of the taxpayer	✓

## Definition of Tax

The North Carolina Supreme Court has held that government assessments that go beyond a demand of payment for services rendered are properly classified as a tax.<sup>232</sup> On the other hand, charges to a user representing the actual cost of a governmental service are not taxes.<sup>233</sup> In *Hart v. Board of Commissioners of Burke County*, the court broadly stated: “[r]evenue bills, as defined by law, are those that levy taxes in the strict sense of the word and are not bills for other purposes which may incidentally create revenue.”<sup>234</sup>

This sentiment was reaffirmed by the North Carolina Court of Appeals in *North Carolina Association of ABC Boards v. Hunt*, which held that a bailment surcharge imposed on liquor was not an unconstitutional tax.<sup>235</sup> The court held that the revenues generated bore a direct and reasonable relationship to enforcement of alcoholic beverage control laws, the need for which arose out of the sale and distribution of the alcoholic beverages, and because the funds did not go into the government general fund.<sup>236</sup>

However, an appellate court’s rejection of this standard in *Heatherly v. State* was affirmed by a tie at the North Carolina Supreme Court, stripping the lower court ruling of precedential value.<sup>237</sup> The court’s unwillingness to apply the same standard it had in the past has resulted in a lack of clarity about what

<sup>232</sup> *N.C. Tpk. Auth. v. Pine Island, Inc.*, 143 S.E.2d 319, 325 (N.C. 1965) (concluding that an assessment designed just to compensate the government for the use of the service was not a tax).

<sup>233</sup> See *State v. Davis*, 232 S.E.2d 698, 705 (N.C. 1977).

<sup>234</sup> *Hart v. Board of Comm’rs of Burke County*, 134 S.E. 403, 404 (N.C. 1926) (citations omitted); see also *State ex rel. Utilities Com’n v. Carolina Util. Customers Ass’n*, 446 S.E.2d 332, 347 (N.C. 1994) (noting that the collection of funds is not a tax if it “is not a charge levied upon the general citizenry for the general maintenance of the government” (emphasis added)).

<sup>235</sup> See *North Carolina Ass’n of ABC Boards v. Hunt*, 332 S.E.2d 693, 694-95 (N.C. Ct. App. 1985).

<sup>236</sup> See *id.*

<sup>237</sup> *Heatherly v. State*, 678 S.E.2d 656 (N.C. 2009) (considering whether the state lottery involved elements of a tax).



standards will apply in future cases.

## Voluntariness

Two North Carolina lower courts upheld voluntariness as a characteristic identifying a charge as a fee,<sup>238</sup> but those decisions no longer hold precedential value due to an evenly divided North Carolina Supreme Court on appeal.<sup>239</sup>

## Ambiguity Resolved in Favor of the Taxpayer

North Carolina courts construe ambiguous language in favor of the taxpayer.<sup>240</sup>

---

<sup>238</sup> See, e.g., *North Carolina Ass'n of ABC Boards v. Hunt*, 332 S.E.2d 693, 694-95 (N.C. Ct. App. 1985) (“A person purchases spirituous liquors at his option; if he does not purchase it, he does not pay the bailment surcharge.”); *N.C. Tpk. Auth. v. Pine Island, Inc.*, 143 S.E.2d 319, 325 (N.C. 1965) (“Tolls are not taxes. A person uses a toll road at his option; if he does not use it, he pays no toll.”).

<sup>239</sup> See, e.g., *Heatherly v. State*, 658 S.E.2d 11, 17-18 (N.C. App. 2008) (“[If] an individual chooses to engage in a purely voluntary activity by paying a fee; in n[o] situation can the government be said to be “levying” or “enforcing” a charge against citizens. Rather, unlike the compulsory nature of a tax, a toll and participation in the lottery are activities freely undertaken by citizens of their own volition....A sales tax, by contrast, is a cost of conducting business in North Carolina and is imposed on all members of the general population; it can hardly be considered to be “voluntary” under any practical definition of the term.”).

<sup>240</sup> See, e.g., *Appeal of Clayton-Marcus Co.*, 210 S.E.2d 199, 202 (N.C. 1974) (“It is well established that when there is doubt as to the meaning of a statute levying a tax, it is to be strictly construed against the State and in favor of the taxpayer.”); *Watson Indus. v. Shaw*, 69 S.E.2d 505, 511 (N.C. 1952) (“Tax statutes are to be strictly construed against the State and in favor of the taxpayer.”).





<b>Definition of Tax:</b> If a charge has the primary purpose of raising revenue, it is a tax	✓
<b>Definition of Tax:</b> How charge operates more important than label	✗
<b>Definition of Tax:</b> Voluntariness immaterial	Not Considered
Ambiguity resolved in favor of the taxpayer	✓

## Definition of Tax

In *Scott v. Donnelly*, a case deciding the constitutionality of a “fee” levied on potato harvesting for the purpose of improving the marketing of North Dakota potatoes, the North Dakota Supreme Court established a test to ascertain the identity of the charge.<sup>241</sup>

The court concluded that the character of a charge must be determined based upon the charge’s primary purpose. “If the primary purpose is revenue, it is a tax; on the other hand, if the primary purpose is regulation, it is not a tax.”<sup>242</sup>

The court’s decision expanded on its description of a tax thirteen years earlier in *State v. Kromarek* when stating that “[a] tax is an enforced contribution for public purposes and is in no way dependent upon the will or express consent of the person taxed.”<sup>243</sup>

## Voluntariness

North Dakota courts have not discussed whether voluntariness is a characteristic of a fee. However, the North Dakota Supreme Court, in *Menz v. Coyle*, did state that involuntariness is a characteristic of a tax.<sup>244</sup> The court recalled: “[t]his court has defined a ‘tax’ as ‘an enforced contribution for public purposes and is in no way dependent on the will or express consent of the person taxed.’”<sup>245</sup>

<sup>241</sup> See *Scott v. Donnelly*, 133 N.W.2d 418 (N.D. 1965).

<sup>242</sup> *Scott*, 133 N.W.2d at 423 (also stating: “[w]hether an exaction is called a ‘fee’ or a ‘tax’ is of little weight in determining what it really is. Its nature is the test. Sometimes an exaction may appear to be partly for revenue and partly for regulation.”).

<sup>243</sup> *State v. Kromarek*, 52 N.W.2d 713, 715 (N.D. 1952); see also *Menz v. Coyle*, 117 N.W.2d 290, 297 (N.D. 1962) (defining a tax as “an enforced contribution, and the special benefit to the one making the payment is merged in the general benefit for public purposes.”).

<sup>244</sup> *Menz*, 117 N.W.2d at 297.

<sup>245</sup> *Id.* (quoting *State v. Kromarek*, 52 N.W.2d 713, 715 (N.D. 1952)).



## Ambiguity Resolved in Favor of the Taxpayer

North Dakota courts strictly construe ambiguous language in favor of the taxpayer.<sup>246</sup>

---

<sup>246</sup> See, e.g., *W. Gas Res., Inc. v. Heitkamp*, 489 N.W.2d 869, 873 (N.D. 1992) (“[W]e generally attempt to resolve questions of doubtful legislative intent in favor of the taxpayer . . . .”); *Rocky Mountain Oil & Gas Ass’n v. Conrad*, 405 N.W.2d 279, 281 (N.D. 1987) (“[I]f a tax statute is ambiguous so that the legislative intention with respect to the meaning of the statute is doubtful, the doubt must be resolved in favor of the taxpayer.”); *Great N. Ry. Co. v. Flaten*, 225 N.W.2d 75, 78 (N.D. 1974) (“Where legislative intention is doubtful with respect to the meaning of the statutes granting taxing authority, the doubt must be resolved against the government and in favor of the taxpayer.”); *Standard Oil Co. of Ind. v. State Tax Com’r*, 299 N.W. 447, 449 (N.D. 1941) (“If the words are doubtful, the doubt must be resolved against the government and in favor of the taxpayer.” (quoting *United States v. Merriam*, 263 U.S. 179, 188 (1928))); *Goldberg v. Gray*, 297 N.W. 124, 127 (N.D. 1941) (“The plaintiff points to the rule applicable to the interpretation of tax statutes that in case of doubt they are construed most strictly against the government and in favor of the citizen . . . . We do not question the rule.”).



<b>Definition of Tax:</b> If a charge has the primary purpose of raising revenue, it is a tax	✓
<b>Definition of Tax:</b> How charge operates more important than label	✓
<b>Definition of Tax:</b> Voluntariness immaterial	Not Considered
Ambiguity resolved in favor of the taxpayer	✓

## Definition of Tax

In *Drees Co. v. Hamilton Township*, the Ohio Supreme Court applied “*Withrow* factors” from a previous case to determine that an “impact fee” on new construction was, in reality, a tax.<sup>247</sup> The court cited *Withrow* for the proposition that a charge is likely to be a fee when it (1) is imposed in furtherance of regulatory measures, (2) is not placed in the general fund and instead is spent for narrow and specific related purposes, (3) is a charge imposed by the government in return for a service it provides, and (4) is adjusted depending on the level of service provided.<sup>248</sup>

Because the charge in *Drees* (1) “is a revenue generator with the stated purpose of guaranteeing a consistent level of services to all members of the community,” (2) “the *use* of the money is general in nature [despite not being deposited in the general fund],” (3) “assessed parties get no particular service above that provided to any other taxpayer for the fee that they pay,” and (4) “this assessment is not responsive to need,” it is a tax.<sup>249</sup> This expanded beyond the *Withrow* case, where the court had declined to develop a test.<sup>250</sup>

The court also reaffirmed its statement in *Withrow* that “the simple act by the legislature of placing [the revenues] in a segregated fund does not transform them into fees. We must examine the substance of the assessments and not merely their form.”<sup>251</sup>

The Tax Foundation filed an *amicus curiae* brief in the *Drees* case urging the court to adopt these positions.

<sup>247</sup> *Drees Co. v. Hamilton Township*, --- N.E.2d ----, 2012 WL 1957881 at \*4 (Ohio May 31, 2012), citing *State ex rel. Petroleum Underground Storage Tank Release Comp. Bd. v. Withrow*, 579 N.E.2d 705 (1991).

<sup>248</sup> See *id.*

<sup>249</sup> See *id.* at \*5.

<sup>250</sup> See *Withrow*, 579 N.E.2d at 710 (“It is not possible to come up with a single test that will correctly distinguish a tax from a fee in all situations where the words ‘tax’ and ‘fee’ arise.”).

<sup>251</sup> *Id.*, citing *Withrow*, 579 N.E. 2d at 709 n.5.



## Voluntariness

No Ohio case has considered a charge's voluntariness to be relevant in determining whether the charge is a tax.

## Ambiguity Resolved in Favor of the Taxpayer

Ohio courts resolve ambiguous language in tax statutes in favor of the taxpayer.<sup>252</sup>

---

<sup>252</sup> See *Zimmer v. Hagerman*, 91 N.E.2d 254, 256 (Ohio 1950) (“[W]here the authority of the municipality is ambiguous it is our duty to construe it strictly against the taxing authorities and in favor of the taxpayer.”).



<b>Definition of Tax:</b> If a charge has the primary purpose of raising revenue, it is a tax	✓
<b>Definition of Tax:</b> How charge operates more important than label	✓
<b>Definition of Tax:</b> Voluntariness immaterial	Not Considered
Ambiguity resolved in favor of the taxpayer	✓

## Definition of Tax

In *City of Shawnee v. Reid Bros. Plumbing Co.*, the Oklahoma Supreme Court struck down an annual charge on plumbers where the city incurred no expenses relating to assessing plumber competency:

Where the exaction is imposed under the power to regulate or in the exercise of the police power, as distinguished from the power to tax for revenue, as heretofore explained, the general rule obtains that the sum levied cannot be excessive nor more than reasonably necessary to cover the costs of granting the license and of exercising proper police regulation. The nature of the business sought to be controlled and the necessity and character of police regulations are the dominating elements in determining the reasonableness of the sum to be imposed. What would be fair and reasonable in one kind of business might well be considered unfair and unreasonable in another kind.<sup>253</sup>

In a 2008 case, the court noted that a severance tax on gas production “is not a user fee or assessment designed to reimburse the state for the use of determinable quantity of government-owned or government-provided facilities and services.”<sup>254</sup>

In a 2005 case, the court stated that “the category of the tax is determined from its operation, and the name of the tax assigned by the taxing authority, *i.e.*, legislature, is not controlling.”<sup>255</sup>

## Voluntariness

No Oklahoma case has considered a charge’s voluntariness to be relevant in determining whether the charge is a tax.

<sup>253</sup> *City of Shawnee v. Reid Bros. Plumbing Co.*, 207 P.2d 779, 780 (Okla. 1949).

<sup>254</sup> *In re Assessment of Personal Property Taxes Against Missouri Gas Energy, Div. of Southern Union Co., For Tax Years 1998, 1999, and 2000*, 234 P.3d 938, 959 (Okla. 2008).

<sup>255</sup> *Twin Hills Golf & Country Club, Inc. v. Town of Forest Park*, 123 P.3d 5, 8 (Okla. 2005).

# OKLAHOMA



76

## Ambiguity Resolved in Favor of the Taxpayer

Oklahoma courts construe ambiguous and doubtful language in favor of the taxpayer.<sup>256</sup>

---

<sup>256</sup> See *W. Auto Supply Co. v. Okla. Tax Comm'n*, 328 P.2d 414, 420 (Okla. 1958) (“We are aware of the rule that where a tax statute is ambiguous and its meaning doubtful, it is usually to be construed against the government, and in favor of the taxpayer.”).



<b>Definition of Tax:</b> If a charge has the primary purpose of raising revenue, it is a tax	x
<b>Definition of Tax:</b> How charge operates more important than label	x
<b>Definition of Tax:</b> Voluntariness immaterial	Not Considered
Ambiguity resolved in favor of the taxpayer	x

## Definition of Tax

In *Automobile Club of Oregon v. State*, the Oregon Supreme Court held that charges on the sale of gasoline that fund environmental cleanup and air quality mitigation are taxes.<sup>257</sup> The court’s analysis:

In the most general sense, a tax is “any contribution imposed by government upon individuals, for the use and service of the state, whether under the name of toll, tribute, tallage, gabel, impost, duty, custom, excise, subsidy, aid, supply, or other name.” An assessment is a government fee imposed on owners of property to finance improvements or services directly benefiting that property; an assessment is exempt from constitutional limitations requiring that taxes be uniformly imposed so long as the financial burden and the private benefit are closely related.<sup>258</sup>

The court further stated that the “label attached by the legislature to the charge . . . is important but not dispositive on the issue of whether that assessment is a tax . . . .”<sup>259</sup>

## Voluntariness

No Oregon case has considered a charge’s voluntariness to be relevant in determining whether the charge is a tax.

## Ambiguity Resolved in Favor of the Taxpayer

The Oregon Supreme Court has rejected a “too strict adherence to the maxim that ambiguous tax statutes are always to be construed in favor of the taxpayer and against the state.”<sup>260</sup>

<sup>257</sup> *Automobile Club of Oregon v. State*, 840 P.2d 674 (Or. 1992).

<sup>258</sup> *Id.* at 678 (citing *King v. Portland*, 63 P. 2 (1900), *aff’d* 184 U.S. 61 (1902)) (internal citations omitted).

<sup>259</sup> *Id.* at 679.

<sup>260</sup> *Parr v. Dep’t of Revenue*, 553 P.2d 1051, 1054 n.4 (Or. 1976).

# PENNSYLVANIA



<b>Definition of Tax:</b> If a charge has the primary purpose of raising revenue, it is a tax	✓
<b>Definition of Tax:</b> How charge operates more important than label	Implied
<b>Definition of Tax:</b> Voluntariness immaterial	✗ (in one lower court case)
Ambiguity resolved in favor of the taxpayer	✓

## Definition of Tax

In *National Biscuit Co. v. City of Philadelphia*, the Pennsylvania Supreme Court upheld an inspection charge as a fee.<sup>261</sup> The court stated that taxes “are levied by virtue of the government’s taxing power solely for the purpose of raising revenue,” while a license fee “has for its purpose the defraying of the expense of the regulation of such acts for the benefit of the general public . . . .”<sup>262</sup>

“The real problem in this connection is to determine whether, in any given instance, a charge exacted by the State and designated as a ‘license fee’ is really a license fee, because, as pointed out in *Flynn v. Horst*, the name given it by the legislature is not controlling.”<sup>263</sup>

While the *National Biscuit* case is an old one, the Pennsylvania Commonwealth Court (Pennsylvania’s civil appeals court) has applied the same standard vigorously in recent years.<sup>264</sup>

## Voluntariness

One Pennsylvania appellate case, after applying the *San Juan Cellular* test, characterized fees as “paid to a public agency for bestowing a benefit which is not shared by the general members of the community *and is paid by choice*.”<sup>265</sup> Because this voluntariness prong is secondary to analyzing the use of the revenue, and because this lower court case is the only one to mention it, Pennsylvania courts would be

<sup>261</sup> *National Biscuit Co. v. City of Philadelphia*, 98 A.2d 182 (Pa. 1953).

<sup>262</sup> *Id.* at 187.

<sup>263</sup> *Id.* at 187, citing *Flynn v. Horst*, 51 A.2d 54, 58.

<sup>264</sup> See, e.g., *Selective Way Ins. Co. v. Com.*, 1 A.3d 950, 959 (Pa. Cmwlth. 2010), citing *Woodward v. City of Philadelphia*, 3 A.2d 167, 170 (Pa. 1938) (defining taxes as “burdens or charges imposed by the legislative power upon persons or property to raise money for public purposes, and to defray the necessary expenses of government); *Thompson v. City of Altoona Code Appeals Bd.*, 934 A.2d 130, 133 (Pa. Cmwlth. 2007) (“[I]f a license fee collects more than an amount commensurate with the expense of administering the license, it would become a tax revenue and cease to be a valid license fee.”); *City of Philadelphia v. Pennsylvania Public Utility Comm’n*, 676 A.2d 1298, 1308 (Pa. Cmwlth. 1996) (citing *San Juan Cellular* standard).

<sup>265</sup> *City of Philadelphia v. Pennsylvania Public Utility Comm’n*, 676 A.2d 1298, 1308 (Pa. Cmwlth. 1996) (emphasis added).





unlikely to rely entirely on the voluntariness argument.

## **Ambiguity Resolved in Favor of the Taxpayer**

Pennsylvania courts strictly construe ambiguous language strictly in favor of the taxpayer.<sup>266</sup>

---

<sup>266</sup> See, e.g., *Ne. Pa. Imaging Ctr. v. Pennsylvania*, 35 A.2d 752, 758 (Pa. 2011) (“Tax statutes must be strictly construed against the Commonwealth, and any reasonable doubt regarding the application of the statute must be resolved in the taxpayer’s favor.”); *In re Husband’s Estate*, 175 A. 503, 506 (Pa. 1934) (“It is well settled that tax laws are to be construed most strictly against the government and most favorably to the taxpayer, and a citizen cannot be subjected to a special burden without clear warrant of law.”).

# RHODE ISLAND



<b>Definition of Tax:</b> If a charge has the primary purpose of raising revenue, it is a tax	✓
<b>Definition of Tax:</b> How charge operates more important than label	Implied
<b>Definition of Tax:</b> Voluntariness immaterial	Not Considered
Ambiguity resolved in favor of the taxpayer	✓

## Definition of Tax

In *Kent County Water Authority v. State Dept. of Health*, the Rhode Island Supreme Court upheld annual charges for maintaining state water systems as a fee and not a tax.<sup>267</sup> The court stated that “the distinction between a tax—which is primarily a revenue-raising measure—and a licensing fee—which is primarily a regulatory imposition.”<sup>268</sup> A prior case, *State v. Foster*, held that “[i]f the imposition . . . has for its primary object the regulation of the business, trade, or calling to which it applies, its exercise is properly referable to the police power; but, if the main object is the obtaining of revenue, it is properly referable to the taxing power.”<sup>269</sup>

The court’s focus on use of revenue suggests that how the tax operates is more important than its label, although it did not explicitly state that labels are immaterial.

## Voluntariness

No Rhode Island case has considered a charge’s voluntariness to be relevant in determining whether the charge is a tax.

## Ambiguity Resolved in Favor of the Taxpayer

Rhode Island courts interpret ambiguous statutory language in favor of the taxpayer.<sup>270</sup>

<sup>267</sup> *Kent County Water Authority v. State Dept. of Health*, 723 A.2d 1132 (R.I. 1999).

<sup>268</sup> *Id.* at 1135.

<sup>269</sup> *State v. Foster*, 46 A. 833, 835-36 (R.I. 1900).

<sup>270</sup> See *Bassett v. DeRentis*, 446 A.2d 763, 765 (R.I. 1982) (“[T]he statute must be strictly construed with all doubts resolved in favor of the taxpayer.”).

# SOUTH CAROLINA



<b>Definition of Tax:</b> If a charge has the primary purpose of raising revenue, it is a tax	✓
<b>Definition of Tax:</b> How charge operates more important than label	✓
<b>Definition of Tax:</b> Voluntariness immaterial	Not Considered
Ambiguity resolved in favor of the taxpayer	✓

## Definition of Tax

In *Hagley Homeowners Ass’n, Inc. v. Hagley Water, Sewer, and Fire Authority*, the South Carolina Supreme Court upheld sewer charges against a claim that they were taxes.<sup>271</sup> The court stated that “[g]enerally, taxes are imposed on all property for the maintenance of government while assessments are placed only on the property to be benefitted . . . . Unlike taxes, charges and assessments are similar in that a person receives something specific in exchange for payment of a charge and/or assessment.”<sup>272</sup>

“The question of whether a particular charge is a tax depends on its real nature and not its designation.”<sup>273</sup>

## Voluntariness

No South Carolina case has considered a charge’s voluntariness to be relevant in determining whether the charge is a tax.

## Ambiguity Resolved in Favor of the Taxpayer

South Carolina courts construe ambiguous language strictly in favor of the taxpayer.<sup>274</sup>

<sup>271</sup> *Hagley Homeowners Ass’n, Inc. v. Hagley Water, Sewer, and Fire Authority*, 485 S.E.2d 92 (S.C. 1997).

<sup>272</sup> *Id.* at 96, citing *Robinson v. Richland County Council*, 358 S.E.2d 392 (1987).

<sup>273</sup> *Brown v. County of Horry*, 417 S.E.2d 565, 567 (S.C. 1992), citing *Powell v. Chapman*, 197 S.E. 2d 287 (1973); *Jackson v. Breeland*, 88 S.E. 128 (1915).

<sup>274</sup> See, e.g., *Hay v. Leonard*, 46 S.E.2d 653, 658 (S.C. 1948) (“[T]he well-established general rule requires that any substantial doubt should be resolved against the government and in favor of the taxpayer . . . .” (quoting *Fuller v. S.C. Tax Comm’n*, 121 S.E. 478, 481 (S.C. 1924))).

# SOUTH DAKOTA



<b>Definition of Tax:</b> If a charge has the primary purpose of raising revenue, it is a tax	✓
<b>Definition of Tax:</b> How charge operates more important than label	Implied
<b>Definition of Tax:</b> Voluntariness immaterial	Not Considered
Ambiguity resolved in favor of the taxpayer	✓

## Definition of Tax

In *Valandra v. Viedt*, the South Dakota Supreme Court considered a challenge to a mobile home license charge that used 15 percent of revenues for the costs of registering and titling mobile homes and 85 percent of revenues for building new highways and bridges.<sup>275</sup> “The distinction between fees and taxes is that taxes are imposed for the purpose of general revenue while license or other fees are ordinarily imposed to cover the cost and expense of supervision or regulation.”<sup>276</sup> Because 85 percent of the collected amount “is for revenue purposes and bears no relationship to the cost of administering the registration system,” the court held “that the ‘fee’ is, at least in part, a tax on mobile homes.”<sup>277</sup>

Although the court did not explicitly state that labels are immaterial, the court’s focus on use of revenue suggests that how the tax operates is more important than its label.

## Voluntariness

No South Dakota case has considered a charge’s voluntariness to be relevant in determining whether the charge is a tax.

## Ambiguity Resolved in Favor of the Taxpayer

South Dakota construes ambiguous language in favor of the taxpayer.<sup>278</sup>

<sup>275</sup> *Valandra v. Viedt*, 259 N.W.2d 510 (S.D. 1977).

<sup>276</sup> *Id.* at 512, citing *State ex. Rel. Attorney General v. Wisconsin Contractors*, 268 N.W. 238 (Wis. 1936).

<sup>277</sup> *Id.* at 512.

<sup>278</sup> See *Sioux Valley Hosp. Ass’n v. State*, 519 N.W.2d 334, 336 (S.D. 1994) (“Ambiguities in a statute are construed in favor of the taxpayer.”).



<b>Definition of Tax:</b> If a charge has the primary purpose of raising revenue, it is a tax	✓
<b>Definition of Tax:</b> How charge operates more important than label	✓
<b>Definition of Tax:</b> Voluntariness immaterial	✓
Ambiguity resolved in favor of the taxpayer	✓

## Definition of Tax

In *Saturn Corp. v. Johnson*, the Tennessee Court of Appeals summarized the state supreme court’s standards for analyzing whether a charge is a tax.<sup>279</sup> The Court of Appeals found that the distinction rests on “whether it is or is not paid into the general public treasury and disbursable for general public expenses. If the surcharge is paid into the public treasury as part of the state’s general revenue and disbursed for general public need, it is a tax. If, however, the surcharge 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 surcharge, it is a fee.”<sup>280</sup>

Further, the Tennessee Supreme Court has stated that “the nature of an imposition by government is not determined by what the legislature calls it.”<sup>281</sup> The Tennessee Court of Appeals has added that “[t]he distinction between fees and taxes, thus, lies not in the name given in the relevant statute, but rather in the purpose of the monetary imposition.”<sup>282</sup>

## Voluntariness

In another recent case, the Tennessee Supreme Court rejected the voluntariness standard: “As stated, the dispositive factor in determining whether a charge is a tax or a fee is the purpose for which the charge is imposed. Consideration of whether payment of the tax is voluntary or involuntary is irrelevant.”<sup>283</sup>

<sup>279</sup> *Saturn Corp. v. Johnson*, 236 S.W.3d 156, 160-61 (Tenn. Ct. App. 2007).

<sup>280</sup> *Id.* at 160 (internal quotations omitted) (citing *Memphis Natural Gas Co. v. McCanless*, 194 S.W.2d 476, 483 (Tenn. 1946); *Memphis Fire Ins. Co. v. Tidwell*, 495 S.W.2d 198, 200 (Tenn. 1973); *Gray’s Disposal Co., Inc. v. Metro. Gov’t*, 122 S.W.3d 148, 159 (Tenn. Ct. App. 2002).

<sup>281</sup> *State v. Nashville, C. & St. L. Ry.*, 137 S.W.2d 297, 299 (Tenn. 1940).

<sup>282</sup> *Saturn Corp.*, 236 S.W.3d at 160.

<sup>283</sup> *Gray’s Disposal Co. v. Metro. Gov’t of Nashville*, 318 S.W.3d 342, 350 (Tenn. 2010).

# TENNESSEE



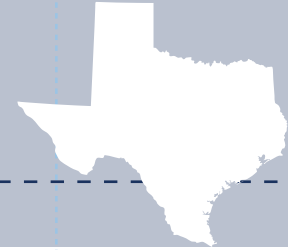
84

## Ambiguity Resolved in Favor of the Taxpayer

Tennessee courts strictly construe ambiguous statutory language in favor of the taxpayer.<sup>284</sup>

---

<sup>284</sup> See, e.g., *White v. Roden Elec. Supply Co., Inc.*, 536 S.W.2d 346, 348 (Tenn. 1976) (“[T]he tax statutes are to be liberally construed in favor of the taxpayer and strictly construed against the taxing authority.”); *Memphis Peabody Corp. v. MacFarland*, 365 S.W.2d 40, 43 (Tenn. 1963) (“Where there is doubt as to the meaning of a taxing statute, the doubt must be resolved in favor of the taxpayer.”).



<b>Definition of Tax:</b> If a charge has the primary purpose of raising revenue, it is a tax	✓
<b>Definition of Tax:</b> How charge operates more important than label	✓
<b>Definition of Tax:</b> Voluntariness immaterial	Not Considered
Ambiguity resolved in favor of the taxpayer	✓

## Definition of Tax

The leading Texas case, *H. Rouw Co. v. Texas Citrus Commission*, held that a charge on citrus sales used to finance education programs was a tax.<sup>285</sup> The Supreme Court of Texas held that “the principle of distinction generally recognized is that when, from a consideration of the statute as a whole, the primary purpose of the fees provided therein is the raising of revenue, then such fees are in fact occupation taxes, regardless of the name by which they are designated.”<sup>286</sup>

## Voluntariness

No Texas case has considered a charge’s voluntariness to be relevant in determining whether the charge is a tax.

## Ambiguity Resolved in Favor of the Taxpayer

Texas courts interpret ambiguous statutory language in favor of the taxpayer.<sup>287</sup>

<sup>285</sup> *H. Rouw Co. v. Texas Citrus Comm’n*, 247 S.W.2d 231 (Tex. 1952).

<sup>286</sup> *Id.* at 234, citing *Hoefling v. City of San Antonio*, 20 S.W. 85 (Tex. 1892); *City of Fort Worth v. Gulf Refining Co.*, 83 S.W.2d 610 (Tex. 1935); *Royall v. State of Virginia*, 116 U.S. 572 (1886); *Dayton-Goose Creek Ry. Co. v. United States*, 287 F. 728 (D.C. Tex. 1923); *Texas Co. v. Brown*, 266 F. 577 (D.C. Ga. 1920).

<sup>287</sup> See, e.g., *Bullock v. Statistical Tabulating Corp.*, 549 S.W.2d 166, 169 (Tex. 1977) (“Any ambiguity in application of the above test must be resolved in favor of the taxpayer . . . .”); *Tex. Unemp’t Comp. Comm’n v. Bass*, 151 S.W.2d 567, 570 (Tex. 1941) (“[W]here the question involved is whether the person on whom the tax is sought to be imposed comes within the statutory provision imposing the tax, the statute must be construed strictly against the taxing authority and liberally in favor of the person sought to be held.”); *Franklin Fire Ins. Co. v. Hall*, 247 S.W. 822, 823 (Tex. 1923) (“The doubt, if any arises, must be resolved against the right to make the exaction.”).



<b>Definition of Tax:</b> If a charge has the primary purpose of raising revenue, it is a tax	✓
<b>Definition of Tax:</b> How charge operates more important than label	Implied
<b>Definition of Tax:</b> Voluntariness immaterial	Not Considered
Ambiguity resolved in favor of the taxpayer	✓

## Definition of Tax

In *Tooele Associates Ltd. Partnership v. Tooele City Corp.*, the Utah Supreme Court upheld a city inspection charge as a valid fee rather than an unconstitutional tax.<sup>288</sup> The court held that a “tax raises revenue for general governmental purposes, while a fee raises revenue either to compensate the government for the provision of a specific service or benefit to the one paying the fee or to defray the government’s costs of regulating and policing a business or activity engaged in one by paying the fee.”<sup>289</sup> “[H]ow such exactions should be classified depends on their purpose.”<sup>290</sup>

A previous decision also discussed the exact relationship between revenue and services, demanding not “mathematical precision” but that “the total cost of the service so financed must fall equitably upon those who are similarly situated and in a just proportion to the benefits conferred.”<sup>291</sup>

The court’s focus on the use of revenue suggests that how the tax operates is more important than its label, although it did not explicitly state that labels are immaterial.

## Voluntariness

No Utah case has considered a charge’s voluntariness to be relevant in determining whether the charge is a tax.

## Ambiguity Resolved in Favor of the Taxpayer

Utah courts interpret ambiguous language liberally in favor of the taxpayer.<sup>292</sup>

<sup>288</sup> *Tooele Associates Ltd. Partnership v. Tooele City Corp.*, 247 P.3d 371 (Utah 2011).

<sup>289</sup> *Id.* at 376, citing *V-1 Oil Co. v. Utah State Tax Comm’n*, 942 P.2d 906, 911 (Utah 1996), *rev’d on other grounds on rehear’g*, 942 P.2d 906 (1997).

<sup>290</sup> *Weber Basin Home Builders Ass’n v. Roy City*, 487 P.2d 866, 867 (Utah 1971).

<sup>291</sup> *V-1 Oil Co.*, 942 P.2d at 911-12, citing *Banberry Dev. Corp. v. South Jordan City*, 631 P.2d 899, 905 (Utah 1981).

<sup>292</sup> See *Ivory Homes, Inc. v. Utah State Tax Comm’n*, 266 P.3d 751, 759-60 (Utah 2011) (“We generally construe tax imposition statutes liberally in favor of the taxpayer.”).





<b>Definition of Tax:</b> If a charge has the primary purpose of raising revenue, it is a tax	✓
<b>Definition of Tax:</b> How charge operates more important than label	✓
<b>Definition of Tax:</b> Voluntariness immaterial	Not Considered
Ambiguity resolved in favor of the taxpayer	✓

## Definition of Tax

In *In re Eddy's Estate*, the Vermont Supreme Court considered a challenge to a state charge of 0.5 percent on the distribution of estates to heirs.<sup>293</sup> Comparing the amount raised against the expenses of the probate court, the court concluded that “the ‘fee’ provides general revenue and is determined wholly by the value of the residue. It is, therefore, in the nature of a tax, despite the nomenclature used by the legislative body.”<sup>294</sup>

This is in line with an earlier case that concluded: “The determining factor in the question is: What is the primary purpose of the charge? So long as it is exacted as a mere incident of lawful regulation, it is a fee and not a tax; but when revenue is a primary purpose of its exaction, it is a tax.”<sup>295</sup>

## Voluntariness

No Vermont case has considered a charge’s voluntariness to be relevant in determining whether the charge is a tax.

## Ambiguity Resolved in Favor of the Taxpayer

Vermont courts strictly construe doubtful statutory language in favor of the taxpayer.<sup>296</sup>

<sup>293</sup> *In re Eddy's Estate*, 380 A.2d 530 (Vt. 1977).

<sup>294</sup> *Id.* at 533, citing *State v. Caplan*, 135 A. 705 (Vt. 1927); *State v. Hoyt*, 42 A. 973 (Vt. 1898); *Berryman v. Bowers*, 250 P. 361 (Ariz. 1926); *Smith v. Carbon County*, 63 P.2d 259 (Utah 1936); 1 T. Cooley, *Taxation*, § 33 (4th ed. 1924); 71 Am.Jur.2d, *State and Local Taxation*, §17.

<sup>295</sup> *State v. Caplan*, 135 A. 705, 709 (Vt. 1927).

<sup>296</sup> See, e.g., *Portland Pipe Line Corp. v. Morrison*, 110A.2d 700, 701 (Vt. 1955) (“[A] taxing statute is not to be extended by implication beyond the clear import of the language used and doubts are to be resolved against the taxing power and in favor of the taxpayer.”); *First Nat'l Bank of Boston v. Harvey*, 16 A.2d 184, 188 (Vt. 1940) (“[D]oubts are to be resolved against the taxing power and in favor of the taxpayer.”).



<b>Definition of Tax:</b> If a charge has the primary purpose of raising revenue, it is a tax	✓
<b>Definition of Tax:</b> How charge operates more important than label	✓
<b>Definition of Tax:</b> Voluntariness immaterial	Not Considered
Ambiguity resolved in favor of the taxpayer	✓

## Definition of Tax

In *Marshall v. NVTVA*, the Virginia Supreme Court considered a challenge to the validity of bond issuances by a regional government entity.<sup>297</sup> While such entities may impose fees under Virginia law, they may not impose taxes. The court stated that “[w]e consistently have held that when the primary purpose of an enactment is to raise revenue, the enactment will be considered a tax, regardless of the name attached to the act.”<sup>298</sup> The court found that the main purpose of the NVTVA’s taxes and fees was to raise revenue; therefore, it was illegally exercising tax powers.<sup>299</sup>

## Voluntariness

No Virginia case has considered a charge’s voluntariness to be relevant in determining whether the charge is a tax.

## Ambiguity Resolved in Favor of the Taxpayer

Virginia courts resolve ambiguous language against the state.<sup>300</sup>

<sup>297</sup> *Marshall v. Northern Virginia Transp. Authority*, 657 S.E.2d 71 (Va. 2008).

<sup>298</sup> *Marshall*, 657 S.E.2d 71, 77-78 (citing *Tidewater Ass’n of Homebuilders, Inc. v. City of Virginia Beach*, 400 S.E.2d 523, 527 (Va. 1991); *County of Loudoun v. Parker*, 136 S.E.2d 805, 808 (Va. 1964); *Board of Supervisors v. American Trailer Co.*, 68 S.E.2d 115, 118-19 (Va. 1951).

<sup>299</sup> *Id.* at 79-80.

<sup>300</sup> See, e.g., *Commonwealth v. Carter*, 92 S.E.2d 369, 373 (Va. 1956) (“[S]tatutes imposing taxes are to be construed most strongly against the government . . . .”); *Commonwealth v. Hutzler*, 97 S.E. 775, 776 (Va. 1919) (“[W]henver there is a just doubt, ‘that doubt should absolve the taxpayer from his burden.’” (quoting *Supervisors v. Tallant*, 32 S.E. 479, 480 (Va. 1899))).



<b>Definition of Tax:</b> If a charge has the primary purpose of raising revenue, it is a tax	✓
<b>Definition of Tax:</b> How charge operates more important than label	Implied
<b>Definition of Tax:</b> Voluntariness immaterial	✓
Ambiguity resolved in favor of the taxpayer	✓

## Definition of Tax

In *Covell v. City of Seattle*, the Washington Supreme Court considered a challenge to a \$2 per housing unit per month street utility charge.<sup>301</sup> Reviewing its past cases, the court established a three-factor test for distinguishing taxes from fees: (1) “[i]f the primary purpose of the charges is to raise revenue, rather than to regulate, then the charges are a tax”; (2) “whether the money collected must be allocated only to the authorized regulatory purpose”; and (3) “whether there is a direct relationship between the fee charged and the service received by those who pay the fee or between the fee charged and the burden produced by the fee payer.”<sup>302</sup> Finding “no way to conclude that the street utility charges are ‘akin to charges for services rendered,’” and that “the direct relationship between the charges and the benefits received by those who pay them is missing,” the court concluded that they were a tax.<sup>303</sup>

The *Covell* case is in line with *Hillis Homes, Inc. v. Snohomish County*, where the Washington Supreme Court concluded that development charges were taxes “although characterized by the Counties as fees.”<sup>304</sup> While not directly stating as much, the ruling implies that the court considers labels to be immaterial.

## Voluntariness

Seemingly for the sake of thoroughness, the court considered and rejected the city’s voluntariness argument that the charges were not a tax because Seattle residents could avoid it by residing elsewhere, concluding that “Seattle’s street utility charge best fits the definition of a property tax, which is an absolute and unavoidable demand against property or the ownership of property.”<sup>305</sup>

<sup>301</sup> *Covell v. City of Seattle*, 905 P.2d 324 (Wash. 1995).

<sup>302</sup> *Id.* at 327.

<sup>303</sup> *Id.* at 330-31.

<sup>304</sup> *Hillis Homes, Inc. v. Snohomish County*, 650 P.2d 193, 194-95 (Wash. 1982).

<sup>305</sup> *Id.* at 332.

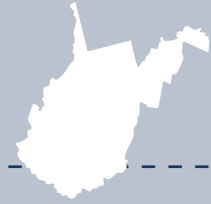


## Ambiguity Resolved in Favor of the Taxpayer

Washington courts strictly construe ambiguous language in tax statutes in favor of the taxpayer.<sup>306</sup>

---

<sup>306</sup> See, e.g., *Ski Acres, Inc. v. Kittitas County*, 827 P.2d 1000, 1003 (Wash. 1992) (“If any doubt exists as to the meaning of a taxation statute, the statute must be construed most strongly against the taxing power and in favor of the taxpayer.”).



<b>Definition of Tax:</b> If a charge has the primary purpose of raising revenue, it is a tax	✓
<b>Definition of Tax:</b> How charge operates more important than label	✓
<b>Definition of Tax:</b> Voluntariness immaterial	Not considered
Ambiguity resolved in favor of the taxpayer	✓

## Definition of Tax

In *Cooper v. City of Charleston*, the West Virginia Supreme Court of Appeals considered a challenge to a \$1-per-week assessment imposed by the City of Charleston on all workers within the city limits.<sup>307</sup> Reviewing past cases, the court stated its rule as “[t]he primary purpose of a tax is to obtain revenue for the government, while the primary purpose of a fee is to cover the expense of providing a service or of regulation and supervision of certain activities.”<sup>308</sup>

The revenue in the *Cooper* case was used to pay for police protection and street maintenance. Although the court conceded that its precedents suggest these uses would make the assessment a tax, it concluded that the assessment was in fact a fee.<sup>309</sup> The court based that conclusion on the fact that the charge raises \$2.5 million per year while the city spends \$19 million per year on police protection and street maintenance. While some part of the \$2.5 million benefits the fee-payers, none of it is used for other government services. Even though it framed the test correctly, the West Virginia court has a habit of claiming that general government services are in fact particular services benefitting a limited set of individuals.<sup>310</sup> By contrast, the federal U.S. Court of Appeals for the Fourth Circuit held a similar city charge in Huntington, West Virginia to be “a thinly disguised tax.”<sup>311</sup>

The Fourth Circuit specifically noted that “the character of a tax is determined not by its label but by

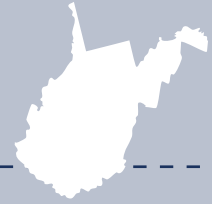
<sup>307</sup> *Cooper v. City of Charleston*, 624 S.E.2d 716 (W. Va. 2005).

<sup>308</sup> *Id.* at 722.

<sup>309</sup> *Id.* (citing *Huntington v. Bacon*, 473 S.E.2d 743 (W. Va. 1996)).

<sup>310</sup> See, e.g., *City of Clarksburg v. Grandeotto, Inc.*, 513 S.E.2d 177, 183 (W. Va. 1998) (Maynard, J., dissenting) (“It will not be long now before legitimate ‘fees’ for fire and flood protection are joined by more questionable ‘fees’ such as recreation fees, clean air fees, pollution fees, beautification fees, road paving fees, garbage fees, cultural event fees, parking fees, sporting event fees, and regatta fees. Anyone doubting that such a proliferation of government ‘fees’ could and will occur need only look at the history of taxation in the United States in the twentieth century to be convinced. Also, while the above-mentioned ‘fees’ may be collected to pay for desirable things, these ‘fees’ should be labeled what they really are: taxes.”).

<sup>311</sup> *United States v. City of Huntington*, 999 F.2d 71, 74 (4th Cir. 1993).



analyzing its operation and effect.”<sup>312</sup>

## **Voluntariness**

No West Virginia case has considered a charge’s voluntariness to be relevant in determining whether the charge is a tax.

## **Ambiguity Resolved in Favor of the Taxpayer**

West Virginia courts construe ambiguous language in favor of the taxpayer.<sup>313</sup>

---

<sup>312</sup> *Id.* (citing *City of Fairmont v. Pitrolo Pontiac-Cadillac*, 308 S.E.2d 527 (W. Va. 1983)).

<sup>313</sup> See *Consolidation Coal Co. v. Krupica*, 254 S.E.2d 813, 816 (W.Va. 1979) (“[T]ax statutes are generally to be construed in favor of the taxpayer and against the taxing authority.”).



<b>Definition of Tax:</b> If a charge has the primary purpose of raising revenue, it is a tax	✓
<b>Definition of Tax:</b> How charge operates more important than label	✓
<b>Definition of Tax:</b> Voluntariness immaterial	Not considered
Ambiguity resolved in favor of the taxpayer	✓

## Definition of Tax

In light of a state constitutional provision stating that no taxes shall be imposed on navigable waterways, the Wisconsin Supreme Court considered a challenge to a motorboat registration charge in the case of *State v. Jackman*.<sup>314</sup> The court stated that “[a] tax is one whose primary purpose is to obtain revenue while a license fee is one made primarily for regulation and whatever fee is provided is to cover the cost and the expense of supervision or regulation.”<sup>315</sup> The court analyzed twelve years of revenue data against state spending on boat registration, safety patrols, and enforcement, calculating that 94 percent of the revenue was spent for those purposes.<sup>316</sup> The court agreed with a lower court judge’s conclusion that “even if there was a surplus of revenue, the amount of the fee was so small that it could not be considered a tax.”<sup>317</sup>

Wisconsin law codifies this standard, holding that “[a]ny fee that is imposed by a political subdivision shall bear a reasonable relationship to the service for which the fee is imposed.”<sup>318</sup>

The court has consistently looked at how the charge operates rather than its label. The court once explicitly stated that “[t]he substance, and not the form, of the imposition is the test of its true character.”<sup>319</sup>

## Voluntariness

No Wisconsin case has considered a charge’s “voluntariness” to be relevant in determining whether the charge is a tax.

314 *State v. Jackman*, 211 N.W.2d 480 (Wis. 1973).

315 *Id.* at 485.

316 *Id.* at 486-87.

317 *Id.*

318 Wis. Stat. § 66.0628(2).

319 *City of Milwaukee v. Milwaukee & Suburban Transport Corp.*, 94 N.W.2d 584, 588 (Wis. 1959).



## **Ambiguity Resolved in Favor of the Taxpayer**

Wisconsin courts interpret ambiguous statutory language against the government.<sup>320</sup>

---

<sup>320</sup> See *Midland Fin. Corp. v. Wis. Dep't of Revenue*, 341 N.W.2d 397, 400 (Wis. 1983) (“In general, ambiguity in revenue laws is to be resolved against the taxing government.”).



<b>Definition of Tax:</b> If a charge has the primary purpose of raising revenue, it is a tax	✓
<b>Definition of Tax:</b> How charge operates more important than label	Implied
<b>Definition of Tax:</b> Voluntariness immaterial	Not considered
Ambiguity resolved in favor of the taxpayer	✓

## Definition of Tax

In *Ford v. City of Riverton*, the Wyoming Supreme Court considered a fireworks stand’s challenge to a city’s electrical and sign permit fees.<sup>321</sup> The court rejected the challenge, tersely stating that “[t]here is a clear distinction between the exercise of taxing power and the imposition of a fee pursuant to regulatory or police power,” citing Professor Eugene McQuillin’s treatise *The Law of Municipal Corporations*. McQuillin in turn offers this explanation:

The exercise of tax power usually is imposed for the purpose of providing funding for public services at large, unlike the exercise of police power which involves assessing the individual. A crucial factor in determining whether municipal charge for services constitutes valid regulatory fees, rather than unlawful tax, is whether charge is intended to cover cost of administering regulatory scheme or providing service.<sup>322</sup>

The Wyoming Supreme Court, by inference, has therefore adopted the standard that taxes raise revenue for general public services while fees recoup the cost of providing a particular service. This conclusion agrees with a much earlier case that concluded that “the amount over and above such expense [of administration] would be a tax, or at least in the nature of a tax.”<sup>323</sup> In both instances, the court focused on how the tax operates rather than its label although it did not explicitly state that labels are immaterial.

## Voluntariness

No Wyoming case has considered a charge’s voluntariness to be relevant in determining whether the charge is a tax.

<sup>321</sup> *Ford v. City of Riverton*, 919 P.2d 636, 638 (Wyo. 1996).

<sup>322</sup> 16 Eugene McQuillin, *The Law of Municipal Corporations* § 44.02, at 9 (3rd ed. 1994).

<sup>323</sup> *Western Auto Transports v. City of Cheyenne*, 120 P.2d 590, 595 (Wyo. 1942).

## Ambiguity Resolved in Favor of the Taxpayer

Wyoming courts strictly construe ambiguous statutory language in favor of the taxpayer.<sup>324</sup>

---

<sup>324</sup> See, e.g., *Basin Elec. Power Co-op. v. Bowen*, 979 P.2d 503, 509 (Wyo. 1999) (“Tax statutes are to be construed in favor of the taxpayer and are not to be extended absent clear intent of the legislature.”); *Chevron U.S.A., Inc. v. State*, 918 P.2d 980, 985 (Wyo. 1996) (“In case of doubt they are construed most strongly against the government and in favor of the citizen.”).

<b>Definition of Tax:</b> If a charge has the primary purpose of raising revenue, it is a tax	✓
<b>Definition of Tax:</b> How charge operates more important than label	Implied
<b>Definition of Tax:</b> Voluntariness immaterial	Not considered
Ambiguity resolved in favor of the taxpayer	✓

## Definition of Tax

In *District of Columbia v. Eastern Trans-Waste of Maryland, Inc.*, which involved a challenge to a solid waste facility charge, the D.C. Court of Appeals first considered the purpose of the assessment. It noted that one must assess whether “the charge is for revenue raising purposes, making it a ‘tax,’ or regulatory or punitive purposes, making it a ‘fee.’”<sup>325</sup> Applying that analysis to the charge at issue, the court found that both were relevant purposes. The court then applied the *San Juan Cellular* three-part test and concluded that the charge was a tax because the revenue would be used for waste cleanup benefitting the general public and not just the fee-payers.<sup>326</sup>

The court focused on how the tax operates rather than its label although it did not explicitly state that labels are immaterial.

## Voluntariness

No District of Columbia case has considered a charge’s voluntariness to be relevant in determining whether the charge is a tax.

## Ambiguity Resolved in Favor of the Taxpayer

The District of Columbia strictly construes ambiguity in tax statutes in favor of the taxpayer.<sup>327</sup>

<sup>325</sup> *District of Columbia v. Eastern Trans-Waste of Maryland, Inc.*, 758 A.2d 1, 10 (D.C. 2000).

<sup>326</sup> *Id.* at 11-12.

<sup>327</sup> See, e.g., *Sch. St. Assocs. Ltd. v. District of Columbia*, 764 A.2d 798, 805 (D.C. 2001) (“[W]e focus on the ‘settled rule that tax laws are to be strictly construed against the state and in favor of the taxpayer . . . .’” (quoting *District of Columbia v. Acme Reporting Co.*, 530 A.2d 708, 712 (D.C. 1987))); *District of Columbia v. Acme Reporting Co.*, 530 A.2d 708, 712 (D.C. 1987) (“[T]ax laws are to be strictly construed against the state and in favor of the taxpayer,’ if the statute in controversy is unclear and ambiguous.” (quoting 3A SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 66.01 (C. Sands, 4th ed. 1986))).





