

48 Op. Att'y Gen. No. 21

COUNTY GOVERNMENT - Authority of county solid waste management district to charge school district properties for waste management services;
LOCAL GOVERNMENT - Authority of county solid waste management district to charge school district properties for waste management services;
SCHOOL DISTRICTS - Authority of county solid waste management district to charge school district properties for waste management services;
SOLID WASTE - Authority of county solid waste management district to charge school district properties for waste management services;
TAXATION AND REVENUE - Authority of county solid waste management district to charge school district properties for waste management services;
MONTANA CODE ANNOTATED - Sections 1-2-103, 7-13-201(2), -202 (4)(a), -202(5), -203(2), -231(2), -232(3)(a), -234(1), 15-6-201(1)(a)(ii);
MONTANA CONSTITUTION - Article VIII, section 5;
OPINIONS OF THE ATTORNEY GENERAL - 46 Op. Att'y Gen. No. 7 (July 7, 1995), 43 Op. Att'y Gen. No. 46 (1989), 42 Op. Att'y Gen. No. 73 (1988), 42 Op. Att'y Gen. No. 21 (1987), 40 Op. Att'y Gen. No. 22 (1983).HELD:

Mont. Code Ann. § 15-6-201(1)(a)(ii) does not exempt school district properties from paying reasonable solid waste management fees which do not exceed the cost of the services they use.

December 15, 2000

Mr. Robert Zimmerman
Sanders County Attorney
P.O. Box 519
Thompson Falls, MT 59873

Dear Mr. Zimmerman:

You have requested my opinion whether Mont. Code Ann. § 15-6-201(1)(a)(ii) exempts school district properties from the payment of assessments levied by the Sanders County Solid Waste Management District. As discussed below, because the assessments are not taxes within the meaning of the statute, I conclude that the school districts are not exempt from their payment.

Article VIII, section 5 of the Montana Constitution authorizes the legislature to exempt state property from taxation. The legislature implemented this constitutional provision in Mont. Code Ann. § 15-6-201(1)(a)(ii), which specifically exempts school district property from taxation.

The Thompson Falls School District and the Montana School Boards Association (hereinafter the "School Districts") contend that the public schools within the Sanders County Solid Waste Management District (hereinafter "SWMD") are exempt from payment of the SWMD's fees because such assessments are, in actuality, taxes. The School Districts contend that the assessments are levied for the public good, that they are not directly related to the value of the benefits conferred on the properties, and that they are not use-driven.

In Sanders County a private contractor collects the garbage, which is then taken to roll-off sites or transfer stations operated by the SWMD, after which it is hauled to an approved landfill in Missoula County. The SWMD assesses property owners a fee to cover its costs, based upon an annual family residential unit charge of \$75. A unit fee of the kind utilized by the SWMD is specifically authorized by statute. Mont. Code Ann. § 7-13-232(3)(a). The School Districts do not contend that the SWMD uses revenue generated from its fee assessments for purposes unrelated to the management of solid waste. All revenues received by the SWMD are required by statute to be used solely for the purpose for which the SWMD was created. See Mont. Code Ann. §§ 7-13-231(2), -234(1).

In June 1998, the SWMD adopted a formula for calculating the respective fees of the public schools in Sanders County. By calculating total revenue needed from all schools (\$6375) and dividing that figure by the \$75 unit fee, it was determined there were 85 units to be assessed against the schools. Then, dividing total enrollment (1671) by the 85 units, it was determined that there were 19.66 students per unit. After dividing the schools' enrollment figures by the 19.66 figure, the annual fees were allocated to the schools. This formula resulted in fees ranging from \$225 for the smallest school (Paradise) to \$2625 for the largest school (Thompson Falls). The total annual fee assessed against the five public schools in Sanders County is \$6375.

All statutes "are to be liberally construed with a view to effect their objects and to promote justice." Mont. Code Ann. § 1-2-103. The object of the pertinent provision in Mont. Code Ann. § 15-6-201(1)(a)(ii) is to exempt school district properties from taxation. Thus, application of the exemption provision turns upon whether the SWMD's assessments are taxes. The United States Supreme Court has observed:

"Nothing is more familiar in taxation than the imposition of a tax upon a class or upon individuals who enjoy no direct benefit from its expenditure, and who are not responsible for the condition to be remedied.

"A tax is not an assessment of benefits. It is, as we have said, a means of distributing the burden of the cost of government. The only benefit to which the taxpayer is constitutionally entitled is that derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by the devotion of taxes to public purposes."

Commonwealth Edison Co. v. Montana, 453 U.S. 609, 622-23 (1981) (quoted case omitted). However, it is well recognized that taxation does not include special assessments or user fees. See 46 Op. Att'y Gen. No. 7 at 3-4 (July 7, 1995). Thus, the exemption does not apply if the SWMD's charges are in the nature of special assessments or user fees.

The purpose and effect of taxation is to compel taxpayers to support a variety of public programs and services which they may never use and from which they may receive no direct or individual benefit. Accordingly, the issue raised by your opinion request is whether the SWMD's fee system has that purpose or effect. "The central inquiry will thus normally be whether the **purpose** of the levy or assessment is to compensate the district for benefits directly conferred upon a particular piece of property within its jurisdiction in direct proportion to the cost of those benefits; i.e., whether the levy is in the nature of a user fee." 42 Op. Att'y Gen. No. 21 at 83 (1987) (emphasis added). "An assessment is imposed against specific property to defray the cost of a specific benefit to that property, the benefit to be commensurate with the assessment." Vail v. Custer County, 132 Mont. 205, 217, 315 P.2d 993, 1000 (1957).

The purpose of the SWMD's fee system is to recoup the costs of running its solid waste management program, not to raise general revenue or to fund other programs. In addition, a family residential unit fee is a recognized tool by which to apportion such costs. Mont. Code Ann. § 7-13-232(3)(a).

In 43 Op. Att'y Gen. No. 46 at 159-60 (1989), Attorney General Racicot held that water and sewer levies designed to satisfy expenses in connection with federal loan repayment obligations constituted property taxes, because the expenses associated with loan repayments could not be segregated on the basis of specific benefits conferred on particular properties. See also 46 Att'y Gen. No. 7 at 4-5 (July 7, 1995) (holding that fire services fees were taxes rather than assessments); 42 Op. Att'y Gen. No. 73 at 289, 291-92 (1988) (holding that conservation district assessments to fund incidental expenses and loan programs were taxes). In contrast, the purpose of the SWMD's assessments here is to fund a specific, identifiable service. In addition, the amount of waste generated by users provides a basis for measuring the benefits received.

"If charges are primarily intended to raise money, they are taxes. If the charges are primarily tools of regulation, they are not taxes." King County Fire Protection Dists. v. Housing Auth. of King County, 872 P.2d 516, 523 (Wash. 1994). Regulatory fees can be considered taxes when excess revenues are used to fund other governmental programs. See, e.g., Town of Eclectic v. Mays, 547 So. 2d 96, 98, 105 (Ala. 1989) (discussing the illegal use of excess garbage service revenues). If fees are used "as a mere device to lessen the burden of taxation for general governmental purposes, such funds should, of course, be considered in the category of taxes." Himebaugh v. City of Canton, 61 N.E.2d 483, 485 (Ohio 1945). Here,

the School Districts do not contend that the SWMD is operating at a surplus, nor do they contend that the SWMD's revenues are used to fund other programs, which is prohibited by statute. See Mont. Code Ann. § 7-13-234(1).

The absence of alternative solid waste services in Sanders County does, as a practical matter, render the SWMD's fee system mandatory. Thus, its charges are best characterized as special assessments rather than user fees. However, the fact that users cannot opt out of the system does not render such assessments taxes. "A property owner cannot opt out of a municipal solid waste disposal system by simply not requesting the service." Ennis v. City of Ray, 595 N.W.2d 305, 308 (N.D. 1999), quoting Eugene McQuillin, Law of Municipal Corporations § 24.250 (3d rev. ed. 1997). The solid wastes generated by the public schools in Sanders County are a cost to the SWMD. However, even if the school districts did not utilize the SWMD's services, their properties would still benefit by virtue of the availability of the service to the property. See 40 Op. Att'y Gen. No. 22 (1983).

Although the infrastructure needed to operate a solid waste system is not located on or appurtenant to the assessed properties, this is a function of the nature of the service, not an indication that waste management provides no direct benefit to the affected properties. The benefits from the disposal and containment of solid waste are comparable to the benefits provided by irrigation districts, which, because of the nature of the service provided (irrigation), requires the improvements to be located on or appurtenant to the affected properties. In Montana, irrigation district assessments are not considered taxes. Vail, 132 Mont. at 217, 315 P.2d at 1000. See also 42 Op. Att'y Gen. No. 21 at 82-83 (1987). Like irrigation services, the purpose of the SWMD's assessment is to recoup the costs of providing infrastructure and services which directly and tangibly benefit affected properties.

Having determined that the purpose of the SWMD's fee system is to recoup its service costs on the basis of use, I now consider whether the effect of the SWMD's fee system is to tax the public schools in Sanders County. In other words, do the SWMD's assessments operate like taxes? As one court has noted, the issue is not whether the benefit conferred is different from the benefits to the community as a whole. Rather, the issue is whether a "logical relationship" exists between the benefit to individual properties and the services provided. Lake County v. Water Oak Mgmt. Corp., 695 So. 2d 667, 669-70 (Fla. 1997). The SWMD's fee system, in particular the fees assessed against the schools, is reasonably related to the services provided, i.e., the fees are in direct (logical) proportion to the benefits conferred.

The Montana legislature has "deemed [it] necessary to provide for the creation of solid waste management districts to control storage, collection, and disposal of solid waste." See Mont. Code Ann. § 7-13-201(2). "There is a marked distinction between the exercise of taxing power and of police power." 16 Eugene McQuillin, Law of Municipal Corporations § 44.02 (rev. ed. 1994). Accordingly, special assessments may be levied throughout the community as a whole. Sarasota County v. Sarasota Church of Christ, Inc., 667 So. 2d 180, 183 (Fla. 1995). See Mont. Code Ann. §§ 7-13-202(5), -203(2). See also 40 Op. Att'y Gen. No. 22 (discussing the benefits of a county-wide refuse disposal district). Although a county-wide solid waste management program provides intangible and indirect benefits to the public as a whole, individual properties that use such services are also directly benefitted.

The School Districts' solid waste charges are based upon a \$75 residential unit charge which, in the case of the schools, comprises 19.66 students. Although inequities may exist in the SWMD's fee system, the School Districts acknowledge that such inequities are not determinative of whether the assessments constitute taxes. In addition, the School Districts do not contend that the sizeable 19.66-student unit used to calculate the fees is resulting in their schools carrying an excessive cost burden in comparison to other property owners in Sanders County.

There are more precise ways to measure solid waste than the current residential unit fee system, e.g., measuring its volume or weight. See Mont. Code Ann. § 7-13-232(3)(a). However, there is no indication this would lessen the schools' costs. If, for example, the SWMD imposed landfill fees, the garbage haulers would then pass these costs on to their customers, including the public schools. See, e.g., Barnhill Sanitation Serv., Inc. v. Gasten County, 362 S.E.2d 161, 167 (N.C. Ct. App. 1987) (holding that landfill fees are not taxes). Regardless, volume or weight is only one measure of the actual costs of disposing of and containing various types of solid waste. See Mont. Code Ann. § 7-13-202(4)(a), defining "solid

waste." I cannot conclude, based on the factual record before me, that the effect of the SWMD's assessments is to tax the School Districts' properties.

The purpose of the SWMD's assessments is to recoup the costs of its beneficial services based upon use. In addition, the operation of the SWMD's fee system does not result in the School Districts' properties bearing disproportionate or excessive costs for the services they use.

THEREFORE, IT IS MY OPINION:

Mont. Code Ann. § 15-6-201(1)(a)(ii) does not exempt school district properties from paying reasonable solid waste management fees which do not exceed the cost of the services they use.

Sincerely,

JOSEPH P. MAZUREK
Attorney General

jpm/mwm/dm