This Week in State Tax (TWIST)

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Colorado: State high court holds that two local ordinances constitute tax increases under TABOR Amendment

The Colorado Supreme Court recently held that the amendments made by the City of Lakewood in 1996 and 2015 to its business and occupation (B&O) tax on the business of providing basic local exchange telephone service within the city constituted “new taxes” under the Colorado Taxpayer’s Bill of Rights (TABOR), thus requiring advance voter approval. As Lakewood failed to obtain such approval, both ordinances were in violation of TABOR and were therefore void.

Lakewood originally enacted its B&O tax in 1969, imposing it on utility companies that maintained telephone exchanges and supplied local exchange service within the city. In 1996, Lakewood expanded the tax to apply to “each person” providing basic local telecommunications service, including the provision of cellular service to any business entity as its primary local service. In 2015, the scope was further broadened to include all cellular and wireless voice services provided to any person or entity, regardless of whether it was their primary service.

Lakewood did not seek voter approval for either amendment. Following an audit, Lakewood assessed MetroPCS (a T-Mobile subsidiary) for $1.6 million in unpaid B&O taxes. MetroPCS challenged the ordinances, arguing the amendments imposed new taxes without voter approval in violation of TABOR. The district court agreed, finding that both ordinances expanded the tax base to previously untaxed services and providers.

The Supreme Court affirmed the district court ruling, upholding the finding that the amendments to the Lakewood B&O tax constituted a “new tax” and required voter approval under TABOR. The Court emphasized that the original 1969 ordinance was narrowly tailored to utility companies maintaining physical infrastructure, whereas the 1996 and 2015 ordinances broadened the scope of the tax to include certain non-utility providers and all cellular services, respectively. These legislative changes created new tax liabilities for previously untaxed entities and services.

The Court further concluded that revenue generated by the amendments was not merely incidental to the enactment of the ordinances. The Court explained that both ordinances expanded the tax base without eliminating any existing tax liabilities or exemptions. Unlike prior cases involving legislative changes which both added and removed taxable items—suggesting a neutral or incidental revenue impact—the Lakewood amendments moved in only one direction: they added new taxable services and providers. The Court also

pointed out that “Lakewood explicitly recognized in each Ordinance the likelihood that new providers would be subject to the tax.”

The Court further addressed Lakewood’s stated goals of promoting competitive neutrality and eliminating barriers to market entry. While acknowledging those objectives, the Court noted they could have been achieved without expanding the B&O tax. Lakewood could have rescinded the B&O tax altogether and relied on its existing sales tax structure to replace the revenue. Although rescission was not legally required, the Court emphasized that the decision to expand the tax base rather than eliminate it reinforced that revenue generation was not merely an incidental effect of the legislative changes. Accordingly, the Court concluded that without first seeking voter approval, both ordinances violated TABOR and therefore were void. Please contact Steve Metz for more information on *MetroPCS v. City of Lakewood, Colorado*.