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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2011-097117

12/19/2011

HONORABLE KAREN POTTS

CLERK OF THE COURT
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Deputy

JAMES J HAMM, et al.

JAMES J HAMM
139 E ENCANTO DR
TEMPE AZ 85281

v.

CHARLES L RYAN

DANA DAVID

DONNA LEONE HAMM
139 E ENCANTO DR
TEMPE AZ 85281

MINUTE ENTRY

The Court has considered Plaintiff's (Re-Submitted) Motion for Summary Judgment, Defendant's Response thereto and Cross Motion for Summary Judgment, Plaintiff's (Combined) Reply and Response, Plaintiff's Notice Regarding Requested Document, and the oral argument of counsel.

The material facts are not in dispute and are set forth in the parties' respective Statements of Fact. Plaintiffs request a declaratory judgment that A.R.S. §41-1604(B)(3) is an unconstitutional tax under Article 4, Part 2, Section 19(9) of the Arizona Constitution.¹ In the alternative, Plaintiffs argue that the statute is an unconstitutional special law under Article 4, Part 2, Section 19(20).

A.R.S. §41-1604(B)(3) allows the Director of the Arizona Department of Corrections ("DOC") to:

¹ Plaintiffs do not argue that the method in which the charge was adopted by the DOC is impermissible.

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Establish by rule a one-time fee for conducting background checks on any person who enters a department facility to visit a prisoner. A fee shall not be charged for a person who is under eighteen years of age. The director may adopt rules that waive all or part of the fee. The director shall deposit, pursuant to sections 35-146 and 35-147, any monies collected pursuant to this paragraph in the department of corrections building renewal fund established by section 41-797.

The statute establishing the building renewal fund provides:

The director shall use the monies in the fund for building renewal projects that repair or rework buildings and supporting infrastructure that are under the control of [DOC] and that result in maintaining a building's expected useful life. Monies in the fund may not be used for new building additions, new infrastructure additions, landscaping and area beautification, demolition and removal of a building and, except as provided in subsection C of this section, routine preventative maintenance.²

A.R.S. §41-797(B).

Plaintiffs argue that the visitor background check fee is a tax and a constitutionally prohibited special law because the raised monies are legislatively mandated for general public purposes (i.e. the DOC Building Renewal Fund) on a basis unrelated to the mandated purposes. Plaintiffs concede that if the charge is a fee, rather than a tax, then it is permissible. *Plaintiffs' Motion for summary Judgment, page 15, lines 14-17; Plaintiffs' (Combined) Reply/Response, page 5, lines 7-10.*

In *Stewart v. Verde River Irrigation & Power District, 49 Ariz. 531, 68 P.2d 329 (1937)*, the Verde River Irrigation and Power District brought suit against the State Water Commissioner for its imposition of a charge for the District's permit application to appropriate certain water from the Verde River for the irrigation of its land and the development of electrical energy. The District paid a required \$3.00 fee with its application, however the Water Commissioner thereafter charged plaintiff \$10,970.40 in order to obtain final approval. Plaintiff paid the charge under protest and sued for return of the sum on several grounds. One of the issues was whether the sum was a fee or a tax. The Arizona Supreme Court, concluding it was a fee, discussed the difference between a "fee" and a "tax":

The word "fee" is defined to be, "a charge fixed by law for the service of a public officer," while a "tax" is "a forced contribution of wealth to meet the public needs of the government." *Webster's New International Dictionary*. The distinction between the two is very plain. A tax

² Subsection C provides that 8% of the fund may be used for routine preventive maintenance.

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is imposed upon the party paying it by mandate of the public authorities, without his being consulted in regard to its necessity, or having any option as to its payment. The amount is not determined by any reference to the service which he receives from the government, but by his ability to pay, based on property or income. On the other hand, 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 any other members of society. We think it is clear that the payment which plaintiff is seeking to recover is in no sense a tax, but is rather a fee. In the first place, the necessity of its payment does not arise unless and until the individual request the public authority to perform some particular service. So long as the service is not asked, the money will never be demanded. In the second place, the service requested of the defendant is one which obviously and admittedly will confer a particular benefit on plaintiff alone, and upon no other person, natural or artificial. We hold, therefore, that the amount in controversy was collected from plaintiff as a fee and not as a tax, and as such is not subject to the constitutional inhibitions imposed upon taxes, but rather to such as may exist as against fees.

Id. at 544-45, 68 P.2d at 334-35. See also *Arizona Department of Revenue v. Transamerica Title Insurance Company*, 124 Ariz. 417, 420, 604 P.2d 1128, 1131 (1979)(a tax is "the enforced contribution of persons and property levied by the authority of the state"); *Weller v. City of Phoenix*, 39 Ariz. 148, 151, 4 P.2d 665, 667 (1931)(in distinguishing between taxes and assessments, "[t]axes are generally held to be burdens or impositions laid for purposes of general revenue, regardless of the direct benefit accruing to the person or property taxed....")

In *Kyrene School District No. 28 v. City of Chandler*, 150 Ariz. 240, 722 P.2d 967 (App. 1986), the City of Chandler imposed system development charges on new buildings based on the size of the meter installed in the building. The resulting funds were deposited in the City's "water development reserve fund" to be used for later expansion and enlargement of the water system in Chandler. The school district argued that the charge was a tax and, therefore, invalid. Applying the test set forth in *Stewart*, the Court of Appeals concluded that "system development charges" imposed by the City of Chandler were fees, not taxes. *Id.* at 243, 722 P.2d at 970. In so holding, the court explained that the school district "receiv[ed] the overall benefit of Chandler's water and wastewater systems in exchange for the system development charges." *Id.* Thus, the amount charged the school district was based on the cost of the systems providing the service and, unlike a tax, the charges were not "based on an ability to pay theory." *Id.* Moreover, although the funds were used to retire wastewater and water debt and to expand the wastewater and water systems, the court found that in a sense, the fees represented part of the capital cost of the wastewater and water systems spread among its users." *Id.* at 244, 722 P.2d at 971. The court further held that directing part of that payment toward the expansion and replacement of these systems makes the charge no more a tax in this case than was the sewer charge in *Bexar* [a Texas case, cited omitted].

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In *Jachimek v. State of Arizona*, 205 Ariz. 632, 74 P.3d 944 (App. 2003), the Court of Appeals found that statute requiring pawnbrokers to pay a \$3.00 transaction fee for each pawn transaction report filed with the Phoenix Police Department was a fee, not a tax. The court noted that the decision to become a pawnbroker is a voluntary one, and includes the voluntary decision to comply with the legally imposed regulations and fees associated with acting as a pawnbroker. In exchange for complying with these fees and regulations, the pawnbroker receives a privilege not given to others—the right to engage in pawn transactions. The court found this similar to *Stewart*, in that “the necessity of ... payment does not arise unless and until the individual requests the public authority to perform some particular service.” *Id.* at 636, 74 P.3d at 948. Thus, if no transaction reports were filed, no fees were required. *Id.*

Mr. Jachimek specifically argued that the fees collected pay for crime prevention and other enforcement activities related to pawnshops, rather than merely for processing the required forms. Thus, he contended that the money collected benefits society at large much more than it benefits individual pawnshop owners thereby rendering the charges a tax, rather than a fee. The court rejected this argument, finding that the fact the charges collected funded more than ministerial acts of “processing forms” failed to render the charges “taxes” any more than the permit charges in *Stewart* were considered “taxes.” *Id.* at 637, 74 P.3d at 949.

Finally, in *May v. McNally*, 203 Ariz. 425, 55 P.3d 768 (2002), the Arizona Supreme Court set forth three factors in distinguishing a fee from a tax: “(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.”

Applying the foregoing rules to the facts at hand, the charge at hand is voluntary, as described in *Stewart*, in that the party who pays it has voluntarily asked the Department of Corrections to provide a benefit not shared by any other members of society—the right to enter a highly secure and regulated facility in order to visit a person incarcerated in that facility. The necessity to pay does not arise unless or until a person seeks to enter that facility, at which time a background check is performed and, upon clearance, the visitor is able to enter the facility for visitation. Thus, the charge is similar in nature to the permit fee application in *Stewart* to appropriate water, and to the report fee in *Jachimek* for pawn transactions. In each case, the government performed a service not shared by other members of society and was voluntary in nature.

Plaintiffs rely upon the fact that the Legislature mandated that the charges in issue be deposited into the DOC Building Renewal Fund and used for general public purposes in their argument that the charge is a tax. However, in *Kyrene*, the court specifically addressed the use

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of a system development charge on new buildings being used for later expansion of a municipal water system and hold that directing part of that payment toward the expansion and replacement of these systems did not transform this charge into a tax. Here, it is undisputed that at least one separate building in each correctional facility is set aside for inmate visitation. The charge at hand is required to obtain visitation and thus access this building. The funds collected are used to repair this building and other buildings within the various correctional facilities in the State but not for new buildings, a use far narrower than that allowed in *Kyrene*.

And finally, application of the three factors specified in *May* confirms the conclusion that the charge at hand is a fee, not a tax. First, the DOC imposes the charges. Second, the charges are imposed upon persons using DOC facilities and services. And third, the charges personally benefit those charged. While it is true that the public also gains a benefit in the repair of DOC facilities, benefits extended to the public as well in *Stewart*, *Jachtmek*, and *Kyrene*, yet those additional public benefit did not render the charges taxes rather than fees. While Plaintiffs are correct in noting that the foregoing cases appear to involve the traditional regulatory function of a government in issuing permits, allowing persons to visit DOC facilities is in substance the issuance of a permit to visitors to use the DOC facilities for visitation. And, like the other cases, the courts did not require that the charges collected be used solely to process the permit applications.

For all of the foregoing reasons, the Court finds that A.R.S. §41-1604(B)(3) is not a tax and thus does not violate Article 4, Part 2, Section 19(9) of the Arizona Constitution.

Plaintiffs alternatively argue that A.R.S. §41-1604(B)(3) constitutes special legislation, in violation of Article 4, Part 2, Section 19(20) of the Arizona Constitution. The Court applies a three-part test to determine whether a law constitutes general or special legislation. A law does not constitute special legislation if (1) there is a rational basis for the classification; (2) the classification is legitimate, encompassing all members of the relevant class; and (3) the class is flexible, allowing members to move into and out of the class. *State Comp. Fund v. Symington*, 174 Ariz. 188, 193, 848 P.2d 273, 278 (1993), citing *Republic Investment Fund I v. Town of Surprise*, 166 Ariz. 143, 800 P.2d 1251 (1990). If one of these three requirements is not met, the legislation is invalid. *Id.* Finally, the Court has a duty to construe a statute so as to give it, if possible, a reasonable and constitutional meaning. *Symington*, at 193, 848 P.2d at 278.

First, there is a legitimate legislative purpose in maintaining the State's correctional facilities, and the statute at hand has a rational relationship to that purpose. In determining if the classification has a rational basis, one test for reasonableness of a classification is "whether there is a substantial difference between those within and those without the class." *Pastore v. Arizona Dpt. of Economic Sec.*, 128 Ariz. 337, 341, 625 P.2d 926, 930 (App.1981). Here, there is a

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difference because visitors use the prison facilities whereas non-visitors do not. Given that a building exists for the use of visitors at every State prison and the funds are used for building maintenance, the classification is rationally related.

Second, all members of the relevant class are included in that the charge applies to all Arizonans who visit inmates (except those under 18 years of age). This argument is strengthened by A.R.S. §31-230(D), enacted at the same time as the statute in issue, which authorizes DOC to also collect funds from inmate spending accounts for the Building Renewal Fund. Thus, both inmates and visitors, the two primary users of these DOC facilities, contribute to this Fund. In this regard, the classification is similar to that in *May*, wherein the court found that all persons who pay a civil or criminal fine are subject to pay the surcharge, just as all persons choosing to purchase a new car or other non-exempt good must pay a tax. *May, 203 Ariz. At 431, 55 P.3d 774*. Indeed, in *May*, the court found that no narrow, discrete group of taxpayers was at issue. Here, the same is true because all persons who visit a DOC facility are subject to the fee.³

Third, the class is elastic in that it allows persons to move within and to exit the class. Thus, A.R.S. §41-1604(B)(3) does not constitute special legislation in violation of Article 4, Part 2, Section 19(20) of the Arizona Constitution.

For the foregoing reasons,

IT IS ORDERED granting Defendant's Cross Motion for Summary Judgment and denying Plaintiffs' Motion for Summary Judgment by declaring that (1) the \$25.00 visitor background check fee imposed pursuant to A.R.S. §41-1604(B)(3) is a fee and is not prohibited by Article 4, Part 2, Section 19(9) of the Arizona Constitution, and (2) A.R.S. §41-1604(B)(3) is not special legislation within the meaning of Article 4, Part 2, Section 19(20) of the Arizona Constitution.

/ s / HONORABLE KAREN POTTS

JUDICIAL OFFICER OF THE SUPERIOR COURT

ALERT: Effective September 1, 2011, the Arizona Supreme Court Administrative Order 2011-87 directs the Clerk's Office not to accept paper filings from attorneys in civil cases. Civil cases must still be initiated on paper; however, subsequent documents must be eFiled through AZTurboCourt unless an exception defined in the Administrative Order applies.

³ Plaintiffs' argument that there are others who use the visitation buildings is grossly exaggerated; by way of example, Plaintiffs have included in these others tours groups and volunteers. Moreover, Plaintiffs suggestion that persons employed to operate the facility are also not within the class of persons appears to the Court to be rather absurd.