SUPREME COURT, STATE OF COLORADO

Case No. 93SA206

BRIEF OF COLORADO MUNICIPAL LEAGUE AS AMICUS CURIAE

APOLLO STEREO MUSIC COMPANY, INC. and SKYLINE VENDING CO.,

Plaintiffs-Appellees,

v.

THE CITY OF AURORA, COLORADO, and JOHN GROSS

Defendants-Appellants

Court of Appeals, Case No 93CA903 on a Jurisdiction Transfer
Adams County District Court Case No. 90CV3020
The Honorable John D. Popovich

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Date: October 12, 1993

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ISSUE PRESENTED FOR REVIEW

Whether the Adams County District Court erred in finding that Aurora's sales tax ordinance, Aurora City Code Section 36-76(11), operates as an illegal income tax in violation of the Colorado Constitution, Article X, Section 17.

JURISDICTION AND STATEMENT OF THE CASE

The League hereby adopts and incorporates by reference the statements of jurisdiction and of the case contained in the opening brief of Appellants, the City of Aurora and John Gross (hereafter "Appellants" or "City")

STATEMENT OF FACTS

The League hereby adopts and incorporates by reference the statement of facts contained in the opening brief of Appellants.

SUMMARY OF ARGUMENT

An examination of the legislative purpose and language of the Aurora ordinance, in the context of well established rules of statutory construction enunciated by this Court, reveals that this is a standard sales tax ordinance wherein the incidence of taxation is on the retail customer, the tax is calculated on the customer's purchase price, and the vendor acts merely as a collection agent

for the City. The ordinance here at issue is clearly distinguishable from the occupation tax ordinances that this Court has invalidated as local income taxes. The Aurora ordinance does not impose a local income tax; the decision of the Adams County District Court to the contrary was error and should be reversed.

INTRODUCTION

The sales tax is the major source of tax revenue for Colorado municipalities, providing an average 68 percent of municipal general activity tax revenues. (Source: Municipal Taxes, published by the Colorado Municipal League, 1992; an excerpted chapter of this publication, concerning sales and use taxes, is attached hereto as Appendix A) A significant fraction of municipal sales tax revenue is derived from sales of tangible personal property and taxable services through coin operated devices, such as vending machines and the video game machines involved in the present case.

As in the City of Aurora, municipal sales tax ordinances across Colorado have left those who sell taxable personal property and services through coin operated devices with the flexibility to price their products in such a way that the purchase price plus the applicable sales tax equals a total cost convenient to the machine customer (such as a quarter, $.50 or $.75). As with the Aurora ordinance, municipal sales tax ordinances generally require only that the purchase price and the applicable tax be separately stated

to the customer (such as through a sticker on the coin operated device). Appellees might thus have easily complied with Section 36-76(11) and collected the tax owed by their customers to the City. Appellees chose instead not to collect the tax. They now interpose this "local income tax" argument against City efforts to secure compliance.

If accepted by this Court, the decision of the Adams County District Court would likely result in a dramatic reduction in sales tax collections and remittance by vending machine operators. Vendors who decline to collect tax on their machine sales would simply pocket the entire amount collected and argue that any effort by the municipality to force remittance constitutes an attempt to levy an unlawful local income tax.

If sustained, this gambit would result in an absurd and inequitable situation, wherein taxes are collected on sales of taxable tangible personal property or services if sold by an attendant, but no tax is collected when identical goods or services are sold in a machine! One class of vendors would enjoy a distinct, arbitrary and illogical market advantage over all others, municipalities would lose tax revenues, and citizens who purchase taxable property or services "over the counter" could be obliged to pay higher taxes in order to cover losses due to non-collection by vendors in the coin-operated segment of the retail market.

This scenario is precisely the sort of unjustified, absurd result that this Court has often said it seeks to avoid in the

construction of statutes. Climax Molybdemum Co. v. Walter, 812 P.2d 1168 (Colo. 1991); City of Ouray v. Olin, 761 P.2d 1168 (Colo. 1988); Section 2-4-201(1)(c), C.R.S. The decision of the Adams County District Court is compelled neither by the language of the ordinance nor prior decisions of this Court. The decision of the Adams County District Court was error and should be reversed.

ARGUMENT

I. The Aurora sales tax ordinance imposes on vendors of taxable services a standard sales tax collection obligation, and one with which Appellees might easily have complied; this is not a tax on the Appellee's gross receipts and is not an unlawful local income tax.

The Aurora ordinance is intended to operate, and does operate as a classic sales tax, in which the incidence of taxation is on the retail consumer, the tax is calculated on the consumer's purchase price, and the vendor serves as the collection agent for the City.

It is well established that a statute (or ordinance) should be interpreted in a way that gives consistent, harmonious, sensible effect to all its parts Jenks v. Sullivan, 826 P.2d 825 (Colo. 1992) and renders it effective in accomplishing the purpose for which it was enacted. People v. Gross, 830 P.2d 933 (Colo. 1992).

A primary goal of courts in determining the meaning of statutes is to ascertain and give effect to the intent of the legislature, City of Lakewood v. Mavromatis, 817 P.2d 90 (Colo. 1991) and the best guide to legislative intent is the declaration

of policy that forms the initial part of the enactment. Walgreen Company v. Charnes, 819 P.2d 1039 (Colo. 1991); People v. Gross, supra.

In Section 36-16(a) of the ordinance applied in the case at bar, the City declares its intent that, under the City's sales tax system, every vendor of taxable property or services:

> . . . shall **collect** the tax imposed by this article in the manner hereinafter set forth, **on the total purchase price** of such tangible personal property or taxable services that are purchased, sold, leased or rented at any time by or to every customer or buyer. (emphasis added)

Numerous other sections of the City's sales tax code demonstrate that this is a tax collected by the vendor but imposed on the customer and calculated on the customer's purchase price; this is not a tax levied on the vendor's gross receipts. "Sales tax" is defined in the code at Section 36-18 as a tax on all sales "at retail on the basis of the **purchase . . . price.**" (emphasis added) "Purchase price" is defined in turn as the amount paid **"by a purchaser to a retailer** or any person to consummate a lease or retail sale." Ibid. (emphasis added) "Retail sale" is defined as meaning "any sale . . . or grant of a license to use . . . taxable services, except a wholesale sale or purchase for taxable resale." Ibid. Section 36-80 sets forth the City's sales tax schedule and requires that vendors add the tax imposed "to the purchase price or charge, showing such tax as a separate and distinct item" (the sole

exception to this requirement to separately state the tax as an addition to the "purchase price" applies to sales of liquor by the drink; see Section 36-82); the retailer is further designated as the "collecting agent of the city."

Certainly, a tax imposed "at retail" on the price paid "by a purchaser to a retailer," where the vendor is a "collecting agent for the city," cannot fairly be said to be a tax on the vendor. This conclusion is buttressed by Section 36-82(a), which makes it unlawful for any retailer to:

> . . . hold out or state to the public or to any customer, directly or indirectly, that the tax or any part thereof imposed by this division shall be assumed or absorbed by the retailer, or that it will not be added to the purchase price of the property sold.

Finally, Section 36-76(11), the very section wherein the tax involved in this case is imposed, provides that tax exempt organizations "shall not be required to **collect** or **remit** this tax to the City." (emphasis added) The American Heritage Dictionary of the English Language (New College ed. 1975) defines "collect" as "to call for and obtain payment of: *collect taxes*" (emphasis in original) and "remit" as "to transmit money." Plainly, the legislative intent of Section 36-76(11) is that vendors of recreation services are collection agents for the City; like other vendors of taxable services and property, they are to collect and remit taxes paid by their customers. The incidence of the Aurora recreation services tax is not on the vendors of such services, but on their customers.

In addition to falling on the retail customer, Section 36-16(a), and the definition of "sales tax" in Section 36-18, make it clear that the Aurora tax is calculated on the "purchase price" of taxable goods and services; a vendor's income or gross receipts are not the basis for calculating the tax owed. In Colorado Auto Auction Services Corp. v. City of Commerce City, 800 P.2d 998 (Colo. 1990) this Court held a flat tax on transfers of motor vehicles sold at auction not to be a sales tax because:

> . . . a "sales tax" is a tax on the sale of property with the amount of the tax based on a percentage of the purchase price paid or charged for the property exchanged in the sale. Id. 800 P.2d at 1003 (citing as authority, *inter alia*, Blacks Law Dictionary 1308 (5th ed. 1979)

Appellees acknowledged in their brief to the trial court that under the Aurora ordinance, the machine customers "are the ones from whom the location owners should collect the tax imposed," but complained that "[i]t would be impossible to collect a sales tax" from each customer when they insert a quarter into a machine (Op. Brief of Plaintiff, at 4) because "coin mechanisms are only available in quarter denominations" and "the cost would be prohibitive to have an additional coin mechanism for pennies for sales tax purposes." Id., at 2.

But Appellees present a false dilemma; their only choice was not between failing to comply with the City's sales tax ordinance or acquiring expensive new coin mechanisms for their machines. Appellees might easily have complied by setting their purchase price at 24.2 cents and adding .8 cents in tax (3.5 percent of 24.2

cents), so that the total customer charge would be a quarter. Appellees would then simply be required to place a sticker on their machines indicating this breakdown of the 25 cent charge to their customers (in order to comply with Sections 36-80 and 36-82(a) of the City ordinance). The ordinance would be complied with and no "prohibitively expensive" technological modifications to the machines would be required. Appellees should not be allowed to avoid their obligation to collect and remit the tax here lawfully imposed and then interpose an "unlawful income tax" argument to defeat the City's efforts to secure compliance.

II. The leading decisions of this Court do not support the District Court's finding that the Aurora tax here at issue is an invalid local income tax.

Article X, Section 17 of the Colorado Constitution authorizes the State to impose an income tax, and has been construed to bar enactment of local income taxes. Denver v. Sweet, 329 P.2d 441, 138 Colo. 41 (Colo. 1958). The District Court based its finding that the City ordinance operated as an invalid local income tax entirely upon this Court's decision in Town of Minturn v. Foster Lumber, 548 P.2d 1276, 190 Colo. 479 (Colo. 1976).

Far from supporting the District Court's finding, however, the Minturn decision, and particularly this Court's subsequent decision in Mountain States Telephone and Telegraph Company v. City of Colorado Springs, 572 P.2d 834, 194 Colo. 404 (Colo. 1972), serve to illustrate why the Aurora ordinance here at issue is most assuredly not a local income tax.

The Minturn case involved a challenge to the Town's occupation tax on construction related businesses and occupations. It is significant, for purposes of the present case, that the Minturn ordinance by its express terms was levied at a rate of two percent of the total gross revenues derived from sales within the town. After observing that the purpose of an occupation tax is "to tax the owners of businesses" for the privilege of conducting business within the jurisdiction, this Court invalidated the Town's tax because it was not fixed at a flat rate, but instead bore "a direct relation to the income or receipts" of the business. Ibid. 548 P.2d at 1278.

Obviously, the ordinance invalidated in Minturn is quite different from the Aurora ordinance at issue in the present case. The Minturn ordinance imposed a tax directly on businesses; the Aurora sales tax ordinance imposes a tax not on businesses, but on the business' customers. In Minturn the business paid the tax; here the customers pay the tax, and the business merely serves as the collection agent for the city. In Minturn the ordinance, by its express terms, imposed a tax based on the business' gross sales revenue; the Aurora ordinance expressly imposes a tax based upon the purchase price paid by the business' customers. Put otherwise, unlike the tax at issue in Minturn, the Aurora sales tax has nothing to do with what a business' gross receipts might be - all that matters is what purchase price the customer pays.

In the course of its Minturn opinion, this Court referred to its earlier decision in Johnson v. Denver, 527 P.2d 883, 186 Colo.

398 (Colo. 1974), wherein the Denver head tax was evaluated against an argument that it was an invalid local income tax. The Minturn Court recounted that in Johnson:

> . . . we discussed the issue of whether that tax was an income tax. In holding that it was not an income tax we noted that the tax was levied on the person and the privilege of working in Denver, and that it was a uniform flat fee which bore no relation to income. The clear inference is that an income tax, whether net or gross, bears a direct relation to the income or receipts of a business. Ibid. 548 P.2d at 1278.

Clearly the Aurora sales tax on video games is not an income tax. The tax is not levied on video game vendors, the tax bears no relation to the income or receipts of those businesses, and certainly the amount of tax paid has nothing to do with the income of the customers who purchase the video game recreation services and actually pay the tax.

At the time of the Minturn decision, the City of Colorado Springs had on the books a utility occupation tax of three percent on the gross revenues received by a utility for service delivered within the City. Shortly after Minturn, Mountain States Telephone and Telegraph obtained a declaratory judgment that the City's ordinance was an invalid local income tax. This Court affirmed the trial court's finding in Mountain States Telephone and Telegraph v. City of Colorado Springs, supra.

The occupation tax ordinance invalidated in Mountain States was very similar to the flawed Minturn ordinance, and is equally

distinguishable from the Aurora ordinance considered here.

Minturn, and its successor Mountain States, are the principle cases defining the characteristics of unconstitutional local income taxes. Like Minturn, Mountain States also provides guidance as to what sorts of local taxes do not run afoul of this constitutional prohibition. Mountain States is particularly instructive in the case at bar because in Mountain States this Court addressed an argument by the City that the tax there at issue ought to be considered a lawful sales tax. In rejecting this suggestion, the Mountain States Court explained that any construction of the City's ordinance as a sales tax:

> . . . flies in the face of the clear intent of the drafters to levy an occupation tax. It was expressly levied 'on and against all public utilities maintaining facilities and carrying on operations . . . ' **Its incidence was on the public utility itself and not on the consumers.** Ibid. 572 P.2d at 835. (emphasis added)

Here, on the other hand, the incidence of taxation is on the consumer and clearly not on the vendor; the tax is calculated based on the purchase price of services sold, not the gross revenues or "gross receipts" of the vendor. The conclusion of the District Court that the Aurora tax is an income tax was error and should be reversed.

CONCLUSION

The Aurora ordinance is clearly intended to be a tax on retail consumers that is calculated on the consumer's purchase price for taxable goods or services. A vendor of taxable services is a collection agent for the City and should not be able to avoid his obligation to collect and remit tax pursuant to the City ordinance by arguing that the City's efforts to secure his compliance amount to imposition of an unlawful local income tax. Prior decisions of this Court in Minturn and Mountain States provide direction for finding that the Aurora ordinance here at issue does not operate as an unlawful local income tax.

WHEREFORE, the League urges this Court to reverse the decision of the Adams County District Court.

Respectfully submitted this 12th day of October by:

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CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing Brief of Colorado Municipal League as amicus curiae was placed in the U.S. Postal System on the 12th day of October, 1993, addressed to the following:

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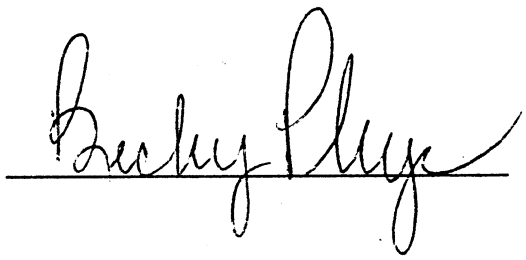


Sales and Use Taxes

Sales Tax

Retail sales taxes generally are classified as either general or selective. The general sales tax is the form authorized by statute in Colorado and predominately used at the local level. A *general* retail sales tax is levied on retail sales of tangible personal property and of some services. A few home rule municipalities also levy *selective* sales or excise taxes, such as on admissions to events or on lodging. A portion of revenues from some state-collected selective sales taxes on such items as motor fuel and cigarettes are distributed to local governments (see Intergovernmental Revenues: State-Shared Revenues).

A 7 percent, or in some instances, 8 percent maximum applies to the total state, county, and municipal sales tax imposed in any locality. The limit may be 8 percent if necessary to allow a county to impose a one percent sales or use tax. 29-2-108. The statutory maximum limitation on sales taxes does not appear to apply to home rule municipalities.

Colorado-national comparisons

In recent years the general retail sales tax has become a major source of revenue for Colorado municipalities, due in large part to a desire to reduce the general property tax burden and to develop a diversified local revenue system. For Colorado municipalities, sales tax revenues represent, on average, 66 percent of municipal tax revenues compared with only 17 percent nationwide, as shown in Figure 5.

According to *Tax Capacity of the States*, an August 1990 report of the Advisory Commission on Intergovernmental Relations,[1] state-local per capita sales tax revenues in Colorado during 1988 were $435.09; the comparable figure nationwide was $439.35.

In terms of tax capacity and tax effort, the ACIR report ranked Colorado at about average among the states for the general sales tax, as shown in Figure 6, which is reprinted from the ACIR publication. The graph also shows per capita tax revenues generated by several major tax revenue sources as compared to the U.S. average. Tax capacity for each major tax revenue source also is shown.

The ACIR report defines *tax capacity* as the dollar amount of revenue that each state would raise if it applied a nationally uniform set of tax rates to a common set of tax bases. *Tax effort* measures how intensively a state uses its potential tax base compared to all other states. For example, sales tax effort is measured relative to retail sales (including food and drugs) whether or not a state, or a municipality, exempts these or other items from the tax.

Figure 7, also reprinted from the ACIR publication, shows total *tax capacity* and *tax effort* for the years 1975-1988. Colorado was among 10 states which showed a large decrease in tax capacity from 1986-1988. Nearly all of these are states with major energy and/or agricultural economies. Colorado also was among those states which experienced an increase in tax effort. According to the ACIR report, this inverse relationship between changes in capacity and effort reflects the fact that revenues have not fallen as fast as capacity in these states. However, Colorado still remains above the national average in tax capacity and below the national average in tax effort.

It is likely that with the gradual upturn in the Colorado economy which has occurred in the last two or three years the relationship between tax capacity and tax effort has improved.

FIGURE 5—Colorado municipalities rely more on sales/use tax revenues than cities nationwide

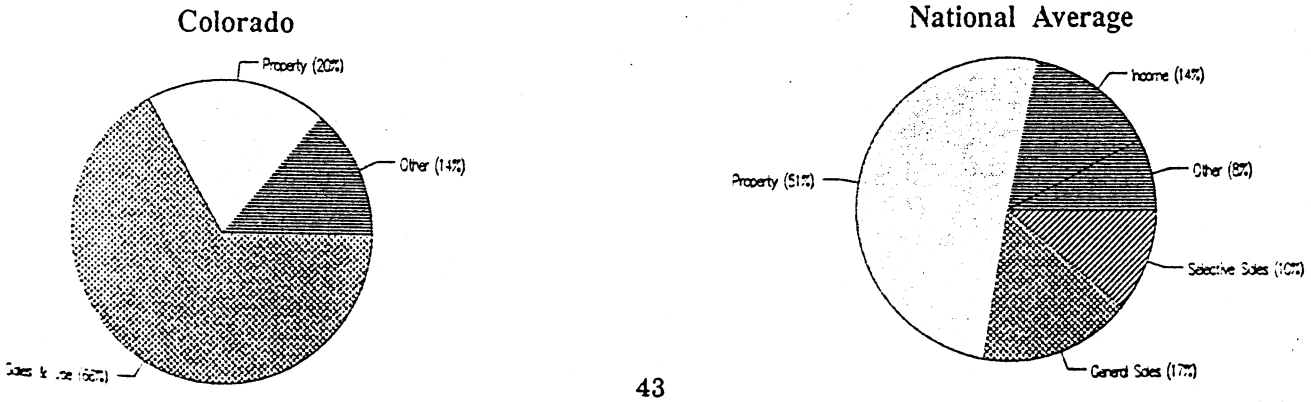


FIGURE 6—Most Colorado tax sources near U.S. average

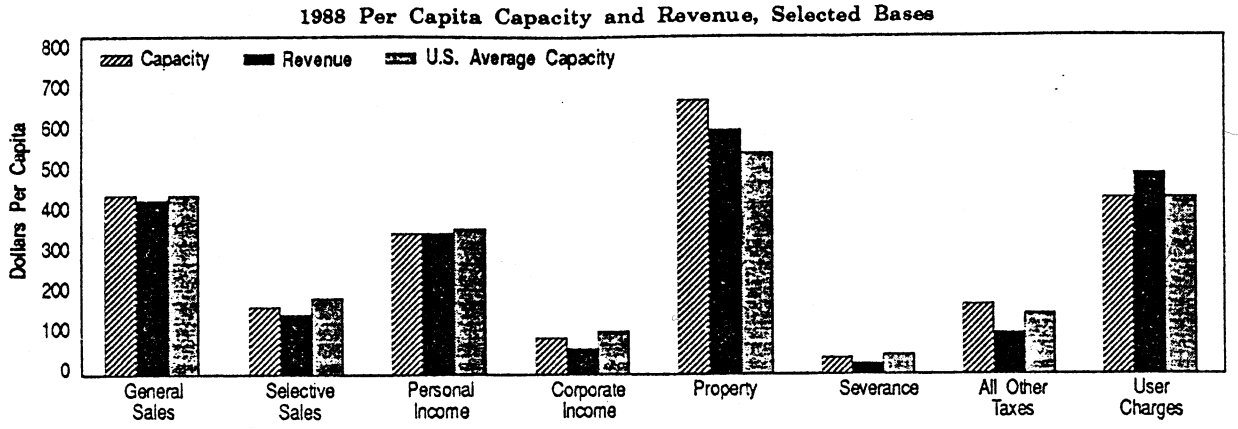
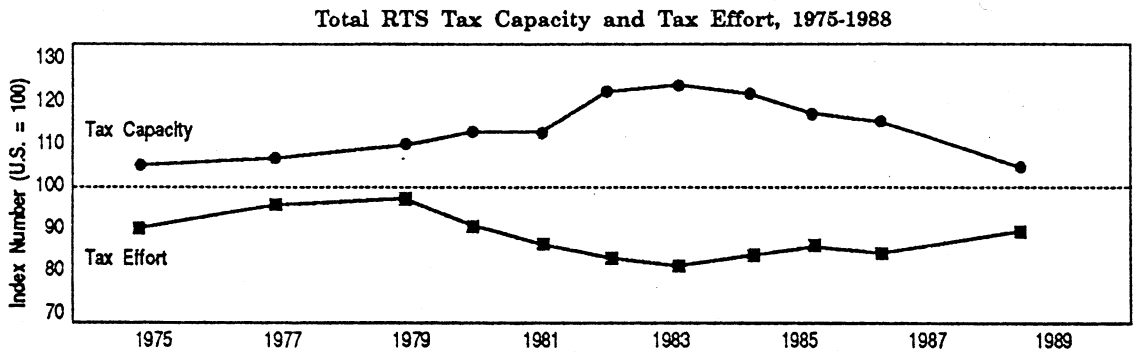


FIGURE 7—Colorado's tax base remains above U.S. average



Trends

The city and county of Denver, pursuant to its home rule powers, adopted the first municipal sales tax in Colorado in 1948. By 1965, 13 additional municipalities had adopted a sales tax. In 1967, state legislation granted authority to statutory municipalities to levy a sales tax. During the decade 1965 to 1975, 86 Colorado cities and towns adopted a sales tax, bringing the total number to 100. As of July 1, 1991, 198 Colorado cities and towns were levying a sales tax at the following rates:

Number of Municipalities	Sales Tax Rate
14	1.00%
3	1.50%
1	1.70%
80	2.00%
2	2.50%
4	2.75%
1	2.86%
53	3.00%
2	3.25%
16	3.50%
1	3.75%
21	4.00%

As reported in CML's August 1991 survey, 53 municipal sales and use tax elections were held since December 31, 1988. Of these, 43 proposals were approved by voters. There were 25 elections to increase an existing sales tax (20 were approved), 12 to increase an existing use tax (10 were approved), three to adopt a new sales tax (three were approved), and six to adopt a new use tax (six were approved). Also, there were five elections to extend an existing sales tax and two to extend an existing use tax; all were approved.

The average sales tax rate has increased from 2.43 percent in 1987 to 2.56 percent in 1991. The number of municipalities levying a use tax has increased from 100 in 1987 to 124 in 1991. Detailed information on municipal sales and use tax elections appears in Table 5.

Countywide sales and use tax elections were held in 17 counties since December 31, 1988. Two were to increase an existing sales tax (one was approved), nine were to adopt a countywide sales tax (five were approved), and six were to adopt a countywide use tax (five were approved).

As of July 1, 1991, 39 counties levy a countywide sales tax and 18 levy a use tax.

In November 1991 municipal elections, voters in Fort Lupton approved a sales tax increase from 2 to 4 percent; voters in Glenwood Springs approved a one percent sales and use tax increase, including renewal of a .75 percent sales and use tax set to expire in December 1992. Winter Park voters approved an increase in the municipal sales tax from 4 to 5 percent. Boulder voters elected not to renew a .15 percent municipal sales tax earmarked for parks and recreation and human services. In Sterling, voters rejected a proposed increase in the sales tax from 3 to 4 percent to eliminate the municipal property tax, and voters in Walsenberg rejected a sales tax increase from 2 to 3 percent.

Administration

Vendor's fees are intended to compensate merchants for collecting the sales tax as they make sales. The compensation is a percentage of the revenue collected. Among Colorado municipalities, fees range from 0 to 5 percent, as shown in the chart below.

Number of Municipalities	Vendor's Fee
32	0
1	0.50%
4	1.00%
1	1.33%
2	1.50%
1	1.60%
4	2.00%
4	2.50%
10	3.00%
2	3.30%
134	3.33%
3	5.00%

In 1991 the average vendor's fee among the 198 Colorado municipalities levying a sales tax was 2.66 percent, a decrease from an average of 2.79 percent in 1987. In recent years, several municipalities have decreased or eliminated the fee paid to vendors. In some instances, municipalities have earmarked this additional revenue for tourism promotion or economic development efforts. Six municipalities, Arvada, Canon City, Fort Collins, Glendale, Longmont, and Wheat Ridge, have placed a cap on the amount of the fee paid to vendors.

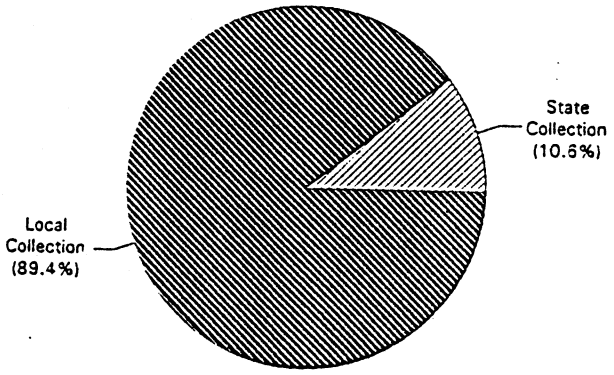
Nationwide, of the 45 states that levy a sales and use tax, more than half provide some level of compensation to vendors who collect the tax. Fourteen states provide a uniform fee amount, ranging from 0.5 percent in Texas to a high of 3.33 percent in Colorado.[2] A table showing vendor compensation systems among the states appears in Appendix B of this publication.

Statutory (non-home rule) municipalities must have the sales taxes collected and administered by the state Department of Revenue. The service is free of charge; however, the local entity must have, with some exceptions, the same sales tax base as the state and may levy a use tax only on motor vehicles and building materials.

Home rule municipalities may collect, audit, and administer their own sales and use taxes. As of October 1991, 40 Colorado home rule municipalities and 1 territorial charter municipality collected their own sales taxes.

Based on CML's 1991 survey of financial condition,[3] municipally collected sales tax revenues totaled $585 million in 1990, representing approximately 89.4 percent of municipal sales tax revenues, as shown in Figure 8.

FIGURE 8—Almost 90% of Colorado municipal sales/use tax revenues are locally collected



1990 Municipal Sales/Use Tax Revenues

State-Collected Municipal Sales Tax[1]	$69,145,232	10.6%
Locally Collected Sales/Use Tax[2]	585,026,775	89.4%
TOTAL MUNICIPAL SALES/USE TAX	$654,172,007	100%

The comparisons and percentages of state-collected and locally collected municipal sales and use tax revenues are only approximate for the following reasons: 1) the difference in fiscal years (year ended June 30 for the state and year ended December 31 for municipalities); 2) the municipal sales tax figures of municipalities for which the state collects sales taxes do not include municipal use taxes which are collected locally by these municipalities; and 3) sales tax revenues for the town of Larkspur, which recently adopted local sales-tax collection, are included with state-collected municipal sales tax revenues.

[1] 1990 Annual Report, Colorado Department of Revenue

[2] 1990 Survey of financial condition of Colorado municipalities, Colorado Municipal League.

Sales tax simplification

In response to proposed legislation in 1984 which would have mandated simplification of municipal sales tax administration, the League formed a task force to work toward simplification of municipally collected sales and use tax administrative procedures. A variety of significant sales tax simplification measures have been achieved.

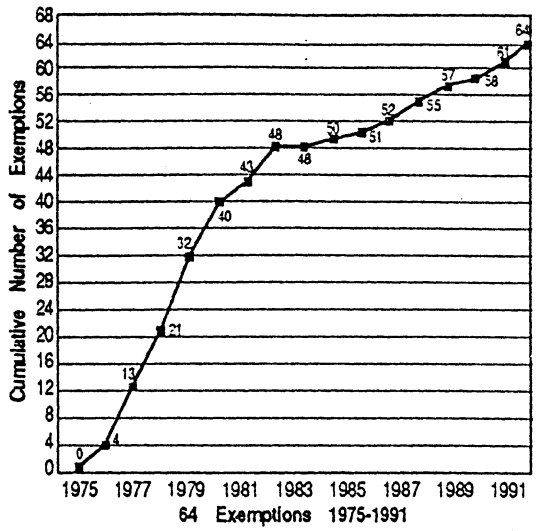
In August 1991 CML's Sales Tax Committee and the League Executive Board approved several sales tax simplification measures including standardized sales and use tax definitions, procedures for coordinated local audits upon request from businesses, standardized refund practices to assist businesses which have remitted sales taxes to the wrong jurisdiction, a centralized clearinghouse on home rule sales and use taxes, standardized dispute resolution procedures, and a permanent joint committee of business and municipal officials to be convened by CML to address sales tax problems and issues as they arise.

Tax base

If additional revenues are needed, some experts advocate broadening the sales tax base to include some services, rather than increasing the sales tax rate, as a means of making the sales tax less regressive. Also, by including services in the tax base, sales tax revenues are more responsive to economic growth because as people move up the income ladder their expenditures for services increase faster than for commodities.

The sales tax base of statutory municipalities and counties is subject to reduction whenever the General Assembly acts to grant or broaden an exemption. (Statutory municipalities and counties must conform their local sales tax bases with the state sales tax base, with the exception of food, residential power, and machinery and machine tools.) League research revealed that since 1975 the General Assembly granted 64 sales and use tax exemptions, as shown in Figure 9. A list of state-approved sales and use tax exemptions, prepared by the state Legislative Council, appears in Appendix C. Home rule municipalities with local collection have chosen not to enact various of these exemptions.

FIGURE 9—Sales/use tax exemptions granted by General Assembly increase



According to the *Colorado Tax Profile Study*, published in September 1983, by Zubrow and Coddington, the relative tax burden for the local sales tax for low-income taxpayers is approximately three-fourths larger than that imposed on high-income taxpayers. Although exempting food from the sales tax can partially reduce the regressiveness of the sales tax, the estimated average revenue loss would be approximately 20 percent,[4] and considerably more in some instances.

As shown in Table 2. Municipal Sales and Use Taxes, 35 of 198 municipalities which levy a municipal sales tax exempt food not consumed on the premises from the sales tax, 31 municipalities exempt machinery and machine tools, and 31 exempt residential power.

James D. Rodgers, who authored the chapter on sales taxes, income taxes, and other non-property tax revenues in a 1987 ICMA publication,[5] points out that many regard a food tax rebate approach as superior to an exemption for food to reduce the regressivity of the sales tax. A rebate can be targeted just to people with incomes below a certain level, he states.

Eleven Colorado municipalities currently have sales tax refund programs, as shown in Table 14. Tax Refunds.

Colorado's state-local tax system

Colorado is among 27 states which have relatively well-balanced tax systems (that is, none of the three major taxes raises more than twice as much as any other). In 1987, Colorado's income tax raised 26.0 percent of state-local tax revenue, for a ranking of 33rd

among the 50 states; sales taxes raised 31.6 percent of state-local tax revenue, for a rank of 24th; and property taxes raised 42.4 percent, for a rank of 19th.[6]

Sales tax characteristics

Advantages

1. Depending on sales volume, a sales tax produces a relatively high yield, even at one-half of 1 percent.

2. It is an elastic tax, in that its yield is closely related to economic cycles. Thus a sales tax is an excellent source of revenue during a period of growth.

3. Sales tax revenues help keep pace with inflation since they increase in inflationary periods along with the increase in costs of basic commodities which are subject to the tax.

4. The cost of administration to the jurisdiction is fairly low in relation to yield.

5. Basing a tax on individual purchases dilutes the tax's financial and psychological impact on the taxpayer, making it more palatable than a large annual payment.

6. A tax based on sales is especially valuable to a community which receives a large influx of tourists or other non-residents who use municipal facilities.

Disadvantages

1. The sales tax tends to be regressive because those with lower incomes usually spend a larger portion of their incomes on basic commodities which are subject to a retail sales tax. Those with higher incomes may not feel the tax burden, because a larger portion of their income is spent for services, which, in Colorado, are usually not subject to the tax. Also, a larger portion of higher incomes may be devoted to savings or investments.

2. High tax rates in relation to surrounding areas may encourage consumers not only to shop outside the corporate limits but also may encourage the development of peripheral shopping areas. A use tax can provide a partial solution to this problem, but a use tax generally can be enforced effectively only against taxable items of considerable value, such as motor vehicles and building materials.

3. Since it is elastic and sensitive to economic cycles, the yield of a sales tax can be unstable and difficult to predict, particularly in the long run. During an economic downturn a sales tax is a rather unreliable source of revenue.

4. The 1986 Tax Reform Act eliminated the deduction for state and local sales taxes for those who itemize on their federal income tax returns.

Use Tax

Use taxes often are levied in tandem with a general retail sales tax. A use tax is levied on the retail purchase price of tangible personal property which is purchased outside the taxing jurisdiction, but stored, used, or consumed within the jurisdiction.

A 7 percent or, in some instances, 8 percent maximum applies to the total state, county, and municipal use tax imposed in any locality. The limit may be 8 percent if necessary to allow a county to impose a one percent sales or use tax. 29-2-108. The statutory maximum limitation on use taxes does not appear to apply to home rule municipalities.

CML survey results indicate that 63 percent of the municipalities which levied a sales tax also levied a use tax (124 of 198 cities and towns), up from 60 percent in 1987, and 54 percent in 1984. Of the 124 municipalities which levy a use tax, 110 apply the tax to both motor vehicles and building materials; eight levy the use tax only on motor vehicles, five levy the tax only on building materials, and one levies a lower use tax on building materials. Among home rule municipalities, which are not limited to levying their use taxes on motor vehicles and construction materials, 25 levy the use tax on the same items as the municipal sales tax.

Table 2. Municipal Sales and Use Taxes includes information on use tax rates levied by Colorado municipalities.

Use tax characteristics

Advantages

1. A use tax tends to reduce the incentive for local businesses to locate outside a taxing jurisdiction to escape the sales tax. Also, a use tax offers a degree of protection to the local merchant whose goods are subject to a sales tax.

2. In contrast to some other types of taxes, such as property taxes, there are no significant time lags between the occurrence of economic activity and the collection of use tax revenues.

3. Use taxes can generate substantial revenue.

Disadvantages

1. Because a significant portion of use tax collections depends primarily on expenditures for building construction materials and motor vehicles—two sectors of the economy which vary with national, not merely local, economic conditions—use tax revenues are cyclical, may not correlate with local revenue requirements, and are difficult to estimate over time.

2. Use taxes may be complex and costly to administer on items other than motor and other vehicles on which registration is required and construction materials. It is often difficult to enforce a use tax on other than major purchases.

Legal Discussion

State law authorizes non-home rule municipalities to adopt sales and use taxes. 29-2-101 *et seq.* The sales tax imposed by any non-home rule municipality must be collected by the state Department of Revenue, and in general, the collection, administration, and enforcement of the municipality's sales tax is uniform with the state sales tax. 29-2-106. The sales tax must be approved by majority vote at a regular or special municipal election. 29-2-102.

The use tax authorized by statute for non-home rule municipalities may be imposed only on the use or consumption of construction and building materials, and on the storage, use, or consumption of motor and other vehicles on which registration is required. 29-2-109. The use tax also must be approved by majority vote at a regular or special municipal election, *except that* no election on a use tax is required if a municipal sales tax was approved at an election held prior to July 1, 1973. 29-2-102. Care must be taken in drafting the use tax ordinance and, particularly, in establishing a method for collection of the use tax on building and construction materials. *See Rancho Colorado, Inc. v. City of Broomfield,* 196 Colo. 444, 586 P.2d 659 (1978).

Countywide sales or use taxes, or both, also are authorized by state statute. 29-2-103. The countywide sales or use tax proposal must be approved by a majority of the electors of the county voting thereon and must provide for any distribution of revenue collections between the county and the municipalities located within the county. 29-2-104. The countywide use tax can be imposed only on the use and consumption of construction and building materials and on the storage, use, or consumption of motor and other vehicles on which registration is required. 29-2-109.

In *Berman v. Denver,* 156 Colo. 583, 400 P.2d 434 (1965), the Colorado Supreme Court upheld the authority of a home rule municipality to adopt a sales and use tax under the home rule taxing power conferred by Article XX of the Colorado Constitution. Among the advantages of levying the sales tax under home rule powers rather than pursuant to the state statutes are: (1) there is no requirement for a referendum unless the particular home rule charter or ordinances require a referendum; (2) the tax need not be uniform with the state sales tax; (3) collection by the state Department of Revenue is optional. Additionally, home rule municipalities are not limited to imposing use taxes only on motor vehicles and building and construction materials.

Constitutional limits on the ability of a home rule city to impose a use tax collection liability on a business which delivers merchandise to residents in a city but which does not maintain a store or office in the city and does not solicit business from city residents are discussed in *Associated Dry Goods v. City of Arvada,* 197 Colo. 491, 593 P.2d 1375 (1979).

In *Security Life and Accident Company v. Temple,* 177 Colo. 14, 492 P.2d 63 (1972), the Colorado Supreme Court reaffirmed its decision in *Berman v. Denver, supra,* stating that the power to levy and collect excise taxes, such as a sales tax, is a matter of purely local and municipal concern under Article XX of the Colorado Constitution.

While home rule municipalities may determine their own administrative procedures relative to sales and use tax collection, certain matters relating to appeals of administrative rulings to the courts are of statewide concern and thus are subject to state statutes or court rules. See: *Gold Star Sausage Co. v. Kempf,* 653 P.2d 397 (Colo. 1982), *Sky Chefs v. Denver,* 653 P.2d 402 (Colo. 1982), *Walgreens v. Charnes,* 15 BTR 1536 (Colo.).

Footnotes

[1] *State Fiscal Capacity and Effort - 1988,* Advisory Commission on Intergovernmental Relations, Washington, D.C., August 1990.

[2] *The Fiscal Letter,* National Conference of State Legislatures, Denver, May/June 1990.

[3] *Financial Condition of Colorado Municipalities,* Colorado Municipal League, April 1991.

[4] *State Fiscal Capacity and Effort,* op cit., page 18.

[5] *Management Policies in Local Government Finance,* International City Management Association, Washington, D.C., 1987.

[6] *State-Local Fiscal Indicators,* National Conference of State Legislatures, Denver, January 1990, pages 26-27.