TAX FOUNDATION

FISCAL FACT

June 3, 2010
No. 233

Virginia Constitution Requires Uniform Distribution of the Metrorail Tax Burden in Fairfax County

FFW Enterprises v. Fairfax County and the Board of Supervisors of Fairfax County

By Arushi Sharma and Joseph Henchman

Executive Summary

On June 1, 2010, the Tax Foundation filed an *amicus curiae* ("friend of the court") brief with the Supreme Court of Virginia in the case of *FFW Enterprises v. Fairfax County and the Board of Supervisors of Fairfax County*, No. 091883. The case involves the constitutionality of two laws that impose special taxes on property in Fairfax County to fund Metrorail improvements, but exempt all residential property from the special taxes.

FFW Enterprises is a commercial property owner in the Tysons Corner region of Northern Virginia paying two taxes imposed to fund the Washington, D.C. Metrorail extension to Tysons Corner and Dulles International Airport. FFW claims that the taxes are unconstitutional because residential property is exempted from paying the tax, while Virginia's Uniformity Clause requires all property in the taxable area to be uniformly treated as the taxable class. FFW also argues that some properties cannot be made to disproportionately bear the full burden of a tax for public benefits when the entire tax district is benefited, citing the Virginia Supreme Court decision *City of Hampton v. Ins. Co. of North America*.[1]

While FFW Enterprises did not prevail in the trial court, the Supreme Court of Virginia has granted review of the case and will hear FFW Enterprises' challenge. Since the *City of Hampton*

Arushi Sharma is a law clerk at the Tax Foundation and Joseph Henchman is Tax Counsel and Director of State Projects.

decision in 1947, the Court has not considered the precise issue of how the General Assembly may pick and choose among taxpayers (create classifications) to finance local improvements which provide general public benefits.

The Court should find that the tax laws are unconstitutional. Special district taxes for benefits from the Metrorail should be imposed uniformly over the taxing district, not arbitrarily on some types of property. Such a conclusion is consistent with the Virginia Supreme Court's previous cases interpreting the Uniformity Clause, with the U.S. Supreme Court's jurisprudence on distributing the tax burden for public benefits, and with other state courts' treatment of uniformity clauses as a strict limitation on legislatures' power to classify property for tax purposes.

Background: The Virginia General Assembly Enacts Two Tax Laws

The Virginia General Assembly passed a Transportation Tax to allow certain localities to create a special tax to raise revenue exclusively for transportation improvements.[2] The General Assembly also passed a District Tax that allows cities and counties in the Northern Virginia and Hampton Roads regions to create special transportation improvement districts within their localities to collect taxes.[3] The General Assembly specified that the Transportation Tax could only be levied on industrial and commercial real property and that the District Tax could only be levied on industrial, commercial, and rental apartment real property. Both tax laws specially exempt all real property zoned for residential use in the taxed localities.

Fairfax County's Board of Supervisors imposed the county-wide Transportation Tax in 2007 and created a special Phase I Dulles Rail Transportation Improvement District to impose the District Tax in 2004.

Courts Invalidate Arbitrary Tax Classifications for Violating Uniformity Clauses

Virginia's Constitution has a special tax provision known as a uniformity clause.[4] It states that "[a]ll taxes shall be levied and collected under general laws and shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax." This clause therefore restricts the General Assembly's power to impose discriminatory property taxes on some real property types by requiring that taxes be imposed on all property.

FFW Enterprises tests whether Virginia's Uniformity Clause is a meaningful restraint on the General Assembly's power to classify real property. Within the territorial jurisdiction which benefits from a tax for public improvements, certain property types cannot be singled out to bear the whole tax burden.

The challenged tax laws are exactly the type of arbitrary legislative tax classifications which the Uniformity Clause was enacted to prevent. As the U.S. Supreme Court has observed, uniformity clauses are "narrow and sometimes cramping," putting "inflexible restrictions upon the taxing powers of the state."[5]

The purpose of the Metrorail improvements is, in part, to benefit the area surrounding the planned stations with higher land values and improved transportation options. In other cases where the purpose of a tax is to benefit the area surrounding the planned improvement, courts have invalidated non-geographical classifications under state uniformity provisions.[6] Examples include:

- Extra levies on islands when the tax is imposed on the rest of the state at a lower rate.[7]
- Higher taxes on properties inside a municipality to benefit properties outside the municipality.[8]
- Taxes exempting one half of a county for public safety improvements benefiting the whole county.[9]
- Street light taxes imposed only on one district for lights installed in a larger area.[10]

Courts have linked the concept of uniformity to equality among taxpayers in a geographic area for tax purposes. The Indiana Supreme Court, for instance, has held that "a tax for a state purpose must be uniform and equal throughout the state, a tax for a county purpose must be uniform and equal throughout the county, and so forth."[11] The Virginia Supreme Court in particular has held that "uniformity must be co-extensive with the territory to which it applies."[12] The U.S. Supreme Court has similarly held that when special tax districts are established, none of the lands within "may escape liability solely because they will not receive direct benefits."[13]

Virginia's Uniformity Clause Is a Meaningful Restraint on the General Assembly

The County argues that because the Uniformity Clause only requires uniformity "among the same class of subjects," the General Assembly is free to define the class however it wishes and survive any Uniformity Clause challenge.

The County's understanding of uniformity would lead to absurd results, permitting any taxpayer classification to be inherently constitutional and rendering the Uniformity Clause a dead letter. When a legislature can choose among things and individuals to impose a tax, its classification is *more* likely to run afoul of a constitutional uniformity provision, not less.[14]

Earlier debates on the Uniformity Clause foreshadow the County's attempt to make an end run around the constitutional restriction. For example, in the 1901-1902 Convention, the Constitution was amended to require uniformity only within a "class" rather than uniformly over all property in the state.[15] Some worried that the General Assembly might use the new language to "pass discriminatory taxes under the guise of classification."[16] Indeed, the County now attempts to shoulder the burden of public improvements, such as the Metrorail extension, entirely on specific types of real property rather than on the whole district to be benefited.

Promoting the broad application of the Uniformity Clause does not prevent the General Assembly from making special exemptions for property. Virginia's Constitution has been specifically amended to exempt certain types of real property from special district taxes. The underlying policy has been to ensure equality in the tax structure and to prevent the General Assembly from unduly expanding upon the exemptions created in the Constitution itself.[17] In

fact, the presence of specific exemptions to the Uniformity Clause demonstrates that it should be difficult for the General Assembly to create classifications at its discretion.[18]

City of Hampton Reinforces Uniformity as a Restriction on the General Assembly

The trial court ruled against FFW primarily by arguing that the Virginia Supreme Court's 1947 *City of Hampton* decision is no longer good law. Far from being a relic, *City of Hampton* accurately analyzes the Uniformity Clause and is consistent with the U.S. Supreme Court's analysis of the theory of taxes based on benefits conferred.

In *City of Hampton*, the Court held that the tax law at issue was not uniform under Article X § 1 of the Virginia Constitution because the law shifted the burden away from those who would benefit from the purpose of the tax (fire protection). To determine if the Uniformity Clause was violated, the Court laid down a benefit/burden test: "[A]re there others, who are benefited as much or more than those smarting under the tax imposition, who go unwhipped of its burden?"[19] The language is quaint but involves analysis used by other courts examining similar uniformity clauses.

Similarly, Virginia's Uniformity Clause requires uniform treatment of taxpayers who stand to benefit from the Metrorail improvements. Since the purpose behind the taxes is to benefit the area surrounding the new construction, the Constitution precludes tax laws which impose an arbitrary burden on some types of properties within those benefited districts.

The Transportation and District Tax Laws Have Conflicting Taxpayer Classifications

The challenged tax laws irrationally create conflicting territory-specific and property-specific classifications. When a tax is based on the theory of benefits conferred, the appropriate classification to be made by the legislature is to define the territory which will benefit specially or directly from the public improvement.[20] In contrast, when a tax is premised on the theory of special assessments, specific types or areas of property are assessed for the special benefit they receive individually over and above the benefits to surrounding area.[21]

The Transportation and District Taxes state that the taxes are for the benefit of the district or locality where the improvement is erected. Moreover, both laws permit local government to designate special areas, or districts, to impose the tax based on benefits to those areas.[22] And yet, the laws also impose the tax solely on certain types of property: industrial, commercial, and sometimes rental apartment buildings.[23] By defining the tax's purpose as *ad valorem* taxes based on the theory of benefits conferred, yet creating special assessments on only certain types of properties, the General Assembly created inconsistent statutes that defy common sense.

Conclusion

It is irrational to conclude that commercial property owners are the only beneficiaries of a public improvement erected in a defined public improvement district. If such a theory survived

constitutional scrutiny, legislative classifications could routinely overburden select groups of private property to finance benefits enjoyed by the broader public. Such classifications could then be prone to a federal takings challenge because as a classification becomes increasingly specific to a certain type of property, a tax based on benefits conferred takes the nature of a special assessment.[24]

The General Assembly's chosen route to raise revenues for the Metrorail construction may be administratively and politically convenient, but it creates exactly the type of discriminatory tax classification that the Virginia Constitution prevents. The General Assembly should not have the power to burden specific types of private property for public benefit under the guise of district-wide taxes.

The authors would like to thank Patrick M. McSweeney and his law firm McSweeney Crump Childress & Temple, PC for acting as pro bono local counsel for the Tax Foundation in the filing of this amicus curiae brief. The authors would also like to thank Steven Pahuskin for research and editing assistance.

Notes

[1] 14 S.E.2d 396 (1941).

[2] Va. Code. Ann. § 1-3221.3(A) (2009).

[3] Va. Code. Ann. § 33.1-431 (2005).

[4] VA. CONST. art. X, § 1. Forty-seven other states have similar uniformity clauses limiting the legislature's taxing power.

[5] Nashville, C. & St. L. Ry. V. Browning, 310 U.S. 362, 368 (1940).

[6] *See generally* JEROME R. HELLERSTEIN & WALTER HELLERSTEIN, STATE TAXATION I: CONSTITUTIONAL LIMITATIONS AND CORPORATE INCOME AND FRANCHISE TAXES 8.07 [2-21] (3d ed. 1998) [hereafter, "HELLERSTEIN & HELLERSTEIN"].

[7] *See Put In Bay Island Taxing Dist. v. Colonial, Inc.*, 605 N.E.2d 21, 22 (1992), *cert denied*, 508 U.S. 930 (1993).

[8] *See Martin v. Ellis*, 249 S.E.2d 23, 26 (1978).

[9] *See Woodlard v. Thomas*, 381 S.W.2d 453, 454 (1964).

[10] *See Supervisors of Manheim Tp., Lancaster County v. Workman*, 38 A.2d 273, 276-79 (1944).

[11] *Dep't of Local Gov't Fin. v. Griffin*, 784 N.E.2d 448, 452-53 (Ind. 2003).

[12] *Brunswick County v. Peebles & Purdy Co.*, 122 S.E. 424, 426 (1924); *see also Woolfolk v. Driver*, 41 S.E.2d 463 (1947), *Campbell v. Bryant*, 52 S.E. 638, 640 (1905), *Day v. Roberts*, 43 S.E. 362, 363 (1903).

[13] *Valley Farms Co. v. Westchester County*, 261 U.S. 155, 163 (1923).

[14] William L. Matthews, Jr., *The Function of Constitutional Provisions Requiring Uniformity in Taxation*, 38 KY. L.J. 31, 62 (1949 -1950) [hereafter, "Matthews"].

[15] A.E. DICK HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 1029 (1974) [hereafter, "HOWARD"].

[16] HOWARD, at 1029 (citing 1901-02 *Convention Debates, Report of the Proceedings and Debates of the Constitutional Convention,* Vol. I, State of Virginia, Held in the City of Richmond, June 12, 1901 to June 26, 1902, 2624-41(1906)).

[17] *See* HOWARD, at 1071 (citing *The Constitution of Virginia: Report of the Commission on Constitutional Revision to His Excellency, Mills E. Godwin, Jr., Governor of Virginia, the General Assembly of Virginia, and the People of Virginia*, Jan. 1, 1969; also published as H. Doc. No. 1, 1969 Ex. Sess.) ("'[t]he basic policy ought to be one of equality in the tax structure, and exemptions, widely applied, undercut this policy'").

[18] Frank P. Grad, *The State Constitution: Its Function and Form for Our Time*, 54 VA. L. REV. 928, 966 (1968) ("[E]xpress and detailed prohibitions and limitations form a major source of constitutional inflexibility, rigidity is fostered to the same extend by express and direct grants of power to the legislature").

[19] *Id.* at 498.

[20] *See, e.g.*, THOMAS M. COOLEY, LAW OF TAXATION 138 (1876) ("Nor do these [uniformity] provisions require the rate of assessment to be equal for all purposes throughout the state, but only to be equal and uniform throughout the district for which the tax is levied."). *See also Dep't of Local Gov't Fin. v. Griffin*, 784 N.E.2d 448, 452-53 (Ind. 2003) ("This means that as a general proposition, [the Uniformity Clause] requires that a tax for a state purpose must be uniform and equal throughout the state, a tax for a county purpose must be uniform and equal throughout the county, and so forth."); *Kendall v. Douglas, Grant, Lincoln, and Okanogan Counties Public Hosp. Dist. No. 6*, 118 Wash.2d 1, 12, 820 P.2d 497, 503 (1991) ("All taxes shall be uniform upon the same class of property within the territorial limits of the authority levying the tax and shall be levied and collected for public purposes only").

[21] *See Village of Norwood v. Baker*, 172 U.S. 269, 287 (1898) (citing JOHN F. DILLON, A TREATISE ON THE LAW OF MUNICIPAL CORPORATIONS, Section 761 (1872)).

[22] VA. CODE. ANN. § 33.1-435.

[23] *See* VA. CODE. ANN. § 58.1-3221.3(B)-(D).

[24] *Village of Norwood*, 172 U.S. at 279 (1898) ("[T]he exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking, under the guise of taxation, of private property for public use without compensation").