



ATTORNEYS AT LAW

MEMORANDUM

TO: File

FROM: Brittany Scantland

DATE: May 4, 2009

RE: *Mesa* and TABOR implications

The Colorado Supreme Court issued an opinion on March 16, 2009 interpreting the meaning and limits of TABOR¹ spending limits. *Mesa County Board of County Commissioners v. Ritter*, 203 P.3d 519 (Colo. 2009). In sum, the broadest, most liberal reading of *Mesa* is that if a municipality has broadly debruced², it does not need to return to voters to implement tax policy changes resulting in a net revenue gain. On April 27th, 2009 the Colorado Municipal League ("CML") hosted a roundtable discussion, moderated by Denver City Attorney, David Broadwell, to begin the discussion about the implications of *Mesa*. The tone of the discussion was that of cautious optimism. Participants acknowledged that the breadth of applicability of this holding has not been tested. This memorandum discusses *Mesa* and the roundtable discussion at CML.

Mesa County Board of County Commissioners v. State of Colorado

Mesa is a 2009 Colorado Supreme Court decision which originated from a dispute over TABOR imposed revenue retention limits for school district funding; however, in the course of issuing an opinion on the case, the Court made broader statements regarding the application of TABOR to districts which have debruced. Between 1995 and 2006, 175 of the 178 school districts in Colorado passed very broadly worded debrucing measure authorizing them to retrain and expend all revenue from any source notwithstanding the limitation of TABOR. Despite the passage of these debrucing measures, counsel for the school districts continued to advise that the districts stay within the TABOR revenue retention and spending limits. In light of these debruced districts, in 2007 the state senate amended the School Finance Act through SB 07-199 which effectively provided for local school districts to retain and spend amounts which would otherwise be in violation of TABOR and 07-199 explicitly provided that districts which had debruced were not in violation of TABOR. With this express wording, the districts began retaining revenue which would otherwise violate the limits contained in TABOR and the lawsuit

¹ "TABOR" refers to Colorado Constitution, Article X, Section 20 titled, "Taxpayer Bill of Rights"

² For the purposes of this memorandum, "debrucing" refers to an election increasing the TABOR-defined revenue retention/spending limits by a district.

followed. The opponents of SB 07-199 argued that *another* election was required for a district to retain revenue beyond that allowed for by TABOR.

In finding that SB 07-199 did not violate TABOR where the districts had debruced, the Court reasoned that if a district has broadly eliminated its spending limits, it does not need to return to voters to implement *tax policy changes which results in a net revenue gain*. The Court held that TABOR § (4)(a) (voter approval is required for any "tax policy change directly causing a net tax revenue gain") and TABOR § (7) (limitations on spending and the ability of any district to waive the same) are directly related to one another. The Court stated:

When read together, it becomes apparent that a "tax policy change directly causing a net tax revenue gain to any district" only requires advance voter approval when the gain exceeds one of the subsection (7) revenue limits. Otherwise, the inclusion of the specific revenue limits would be unnecessary and redundant. *Mesa* at 529.

The Court further opined:

Once a revenue limit is validly waived, it is unnecessary to require a second election for later legislation directing the use of the additional funds that a district received as result of the waiver election. Such legislation is not a policy change, but an implementation of the waiver election. *Mesa* at 530.

The Court also discussed why *all* tax policy changes (following a debrucing or not), should not be held to the election requirement of TABOR:

To this end, we find that to understand the language "tax policy change" in any real sense, it cannot be applied to any policy modifications that may have a *de minimis* impact on a district's revenues. To apply the limit in such a broad manner would make any legislative action in the revenue arena nearly impossible and cripple the government's ability to function. In some cases, the cost of the election could exceed the additional revenue obtained, an absurd result that the voters could not have intended hen they passed article X, section 20. We have consistently declined to adopt interpretations of article X, section 20 that would unreasonably curtail the everyday functions of government. *Mesa* at 529.

Therefore, even if a district has not debruced, so long as the net revenue gain is within the TABOR § 7 limits, such revenue gain is constitutional and does not need to go to a vote of the people.

The correlation between TABOR sec. (4)(a) and (7) when tied to a broad debrucing measure has the potential to free-up municipalities to more liberal interpretations of their respective municipal codes. CML warns that this area is not tested. Geoff Wilson, staff attorney for CML, stated in a recent memo, "[w]hether, and to what extend this language may permit interpretation of exiting tax code language (for example) in a way that increases tax revenue collected, without an election, is one of the numerous topics of continuing discussion among local government attorneys across Colorado, in the wake of the Court's decision."

Cautious Optimism

At the CML roundtable discussion, the group considered the following points:

- The group was *not* comfortable extending this holding to new taxes, increased tax rates or municipal bonds. In other words, *Mesa* provides support for the interpretation of a “tax policy change with a net revenue gain,” but nothing beyond that.
- Regardless of whether a municipality has debruced, so long as it is within the limits of TABOR § 7 (or whatever amount approved by voters), it is not bound to the election requirements of TABOR § 4(a).
- *Mesa* dealt with a specific situation involving a statutory amendment to the SFA and a previous waiver of revenue limits by the school districts. As with any case law, how the Court will interpret a different set of facts is still unknown.
- The Court based its ruling on the fact that the debrucing measures approved by the voters were very broad. Unfortunately, an example of one of the debrucing questions is not included in the Court’s recitals; however, the Court relied on the fact that the ballot question referenced retaining and expending “all revenue” or “full revenue” from “any source,” notwithstanding the limitations of TABOR. It would be advisable to review the debrucing language of any of our municipalities to determine exactly what authority the voters gave the municipality. In sum, the broader the debrucing language, the better.
- A question without an answer is: What happens if a tax policy change is implemented pursuant to *Mesa*, and for that year, the net revenue gain is within any spending limits (either defined by TABOR § 7 or a limited debrucing), but the next year, that same tax policy change, already in effect, now produces a net revenue gain which would violate TABOR in some capacity?
- One idea for a liberal interpretation of *Mesa* (suggested at the roundtable discussion) is that if a municipality has enacted sales tax at a certain rate for which it has gained voter approval, then extension of sales tax to other new goods does not require voter approval because a sales tax at a certain rate has already been approved by the voters; what the tax applies to is merely a tax policy change resulting in a net revenue gain. What would need to go to the voters is the enacting of an entirely new tax, such as an excise tax, where none existed before. Not all participants in the discussion were ready to consider such an interpretation; however, it might be an indication of where the law is headed.

Conclusion

Municipal governments may take comfort from the tone of *Mesa* in that the Colorado Supreme Court currently appears to favor a narrow interpretation of TABOR. This comfort, however, is laced with caution. The extent to which a court will interpret *Mesa* broadly is yet untested. It is unknown whether *Mesa* merely expresses the Supreme

Court's dislike of a broad interpretation of TABOR, or whether the case effectively narrows TABOR's scope.