

# AG Opinion Number 93-18

December 28, 1995

G. Edward Leary  
Commissioner of Financial Institutions  
of the State of Utah  
324 South State Street, Suite 201  
P.O. Box 89  
Salt Lake City, Utah 84111-0089

RE: Imposition of Business License Fees on State-Chartered Credit Unions  
Opinion No. 93-18

Dear Commissioner Leary:

You have requested an opinion as to whether a Utah municipality (1) may impose business license fees on State chartered credit unions. In particular, you ask whether a municipality may impose a business license fee which is based upon sales, gross revenues, asset size, gross or net income, or similar methods, instead of a fee based upon the reasonable costs of performing the licensing function.

## SHORT ANSWER

Due to the statutory exemption of credit unions from taxation, a municipality may not levy taxes on credit unions. Nevertheless, a municipality may impose valid business license fees on credit unions.

The character of the fee being imposed by a municipality, rather than what the municipality calls the fee, will determine whether the fee is a really a "tax" or whether it is a valid business license fee. A fee which is intended primarily to raise revenue will generally be deemed to be a tax. However, a fee which a municipality imposes for the purpose of regulating a credit union, and which is reasonably related to the municipality's cost of regulating the credit union, will generally be deemed to be a legitimate business license fee which the municipality may lawfully impose on a credit union.

## RELEVANT STATUTORY AUTHORITY

Utah Code Ann.

7-9-34 Tax Exemption of credit unions.

Credit unions organized under this chapter or prior law are exempt from taxation, except that any real property or any tangible personal property owned by the credit union shall be subject to taxation to the same extent as other similar property is taxed. This section does not exempt credit unions from sales or use

taxes, or fees owed to the [Utah Department of Financial Institutions ("Department")] in accordance with this title and rules of the [Department].

## ANALYSIS

Under section 7-9-34 of the Utah Code, State-chartered credit unions are exempt from taxation. (2) This tax exemption prohibits municipalities from levying taxes on credit unions. Nor may the municipality circumvent this tax exemption by designating as a "business license fee" what is really a "tax."

Nevertheless, this tax exemption does not prohibit municipalities from imposing valid business license fees on credit unions. As part of their police power, municipalities may exact business license fees from credit unions for the purpose of regulating credit unions. Because the purpose of these fees is merely to reimburse the municipalities for their cost of regulating the businesses, rather than to generate revenue, these fees do not constitute taxes. (3)

Having established that a municipality may impose a business license fee, but may not impose a tax on a credit union, it becomes critical to define with as much precision as possible the difference between a tax and a business license fee.

### A. Fees which constitute taxes:

Under Utah law, a fee will constitute a tax if it is designed to generate revenue. The Utah Supreme Court has stated the critical test for whether a municipal charge constitutes a tax is whether the charge is devised to raise revenue. See *Provo City v. Provo Meat & Packing Co.*, DD165 P. 477, 479 (Utah 1917). See also *Davis v. Ogden City*, DD 215 P.2d 616, 622 (Utah 1950); *Mountain Fuel Supply v. Salt Lake City*, DD 752 P.2d 884 (Utah 1988). (4)

To determine whether a municipal ordinance is designed to raise revenue, Utah courts employ a "reasonable relationship approach." Under this approach, a business license "fee" will constitute a tax if the fee is not "necessary [for] and therefore proportionate to the cost of regulation of the licensed entities." *Consolidation Coal Co. v. Emery County*, 702 P.2d 121 (Utah 1985).

A fee does not constitute a tax merely because every cent of the fee is not apportioned to the cost of regulating the business. However, a fee will be considered a tax if "the proceeds therefrom are [not] purposed mainly to service, regulate, and police such business activity..." *Weber Basin Home Builders Ass'n v. Roy City*, 487 P.2d 866, 867 (Utah 1971).

For example, courts ordinarily consider the following types of business license fees to be taxes:

\* Fees which are based on asset value (5)

- \* Fees which are based on gross revenues (6)
- \* Fees which are based on the sale of goods or services (7)
- \* Drastic and unwarranted increase in business license fee (8)

Ordinarily, courts will view such graduated fees as taxes because such fees are not reasonably based on the municipality's cost of regulating the relevant businesses. Therefore, a municipality will usually be prohibited from imposing such charges on tax-exempt credit unions. (9)

#### B. Fees which constitute valid business license fees

In contrast to taxes, credit unions are not immune from valid business license fees. A municipality's power to impose such business license fees on credit unions falls within their police power which enables them to regulate or prohibit businesses within their borders. See *Provo City v. Provo Meat Packing Co.*, 165 P. 477, 479 (Utah 1917). Because municipalities employ such fees to carry out their police power, rather than just to raise revenue, valid business license fees are not "taxes." Therefore, a municipality may properly impose these fees on credit unions which are exempt from paying taxes.

There is a two part test to determine whether municipal license fees qualify as valid business license fees, rather than taxes. This test first requires the fee to be based on the municipality's right to regulate business within their boundaries. (*Weber Basin Home Builders Ass'n v. Roy City*, 487 P.2d 866, 867 (Utah 1971).) This means the fee must be imposed, expressly, to grant the credit union a right to engage in business. (*Weber Basin Home Builders Ass'n v. Roy City*, 487 P.2d 866, 867 (Utah 1971), and *Davis v. Ogden City*, 215 p.2d 616, 621 (Utah 1950).)

The second part of the test requires the amount of the fee to be reasonably related to the municipality's cost of regulating the business. (10) Specifically, "the proceeds [from the license fee must be used] mainly to police [the] business or activity ... rather than to raise revenue for general municipal purposes..." (*Weber Basin Home Builders Ass'n v. Roy City*, 487 P.2d 866, 867 (Utah 1971).)

In order to qualify as a valid fee under this test, the amount of the fee must meet the following requirements:

- \* The municipality's license fee must be a reasonable estimate of the municipality's cost of regulating the business; (11) and
- \* The fee must not be indexed to a figure, such as the business' gross revenue or assets, which is unrelated to the municipality's cost of regulating the business. (12)

In most cases, a fee will qualify as a valid license fee only if the charge is a flat fee and the municipality imposes it uniformly upon all business. A municipality may differentiate the business license fee it charges various businesses only if the variation actually relates to its cost of regulating the different businesses.

## CONCLUSION

There is no simple bright line test for whether a business license fee constitutes a tax or a valid fee. (13) Instead, each fee must be examined on a case by case basis. To constitute a valid business license fee, the fee must pass the following tests:

- (1) The fee must be expressly based on the municipality's power to license businesses. The municipality must collect the fee for the purpose of authorizing the company to transact business; and
- (2) The fee must be reasonably related to the municipality's cost of regulating the business. The purpose of the fee cannot be to raise revenue.

Should you have further questions regarding this matter, please let us know.

Sincerely,

BRYCE H. PETTEY  
Assistant Attorney General

## FOOTNOTES

(1) The actual opinion request asks about business license fees imposed by "cities". The term "municipality", includes counties, towns and any other political subdivision of the State with taxing authority.

(2) While the request for an opinion dealt only with State-chartered credit unions, this opinion would apply equally to Federally-chartered credit unions. See 12 U.S.C. § 1768, which provides:

§ 1768. Taxation

The Federal credit unions organized hereunder, their property, their franchises, capital, reserves, surpluses, and other funds, and their income shall be exempt from all taxation now or hereafter imposed by the United States or by any State, Territorial, or local taxing authority; except that any real property of such Federal credit unions shall be subject to Federal, State, Territorial, and local taxation to the same extent as other similar property is taxed. Nothing herein contained shall prevent holdings in any Federal credit union organized hereunder from being included in the valuation of the personal property of the owners or holders thereof in assessing taxes imposed by authority of the State or political subdivision thereof in which the Federal credit union is located; but the duty or burden of collecting or enforcing the payment of such a tax shall not exceed the rate of taxes imposed upon holdings in domestic credit unions.

Thus, under federal law, Federally-chartered credit unions are exempt from all taxes, except for property taxes which are imposed uniformly by the taxing entity upon all similar property, regardless of ownership. However, Federally-chartered credit unions, like their state-chartered counterparts are subject to valid "fees" imposed upon all similar entities.

In *United States v. State of Maine*, 524 F. Supp. 1056 (D. Me. 1981), Maine had passed a statute imposing a sliding scale fee upon creditors, with the fee based upon the amount of loans originated by a creditor and still outstanding at the end of the year. The same statute also imposed a fixed annual "notification" fee of \$10.00 per creditor, and also a separate assessment for a creditor whose records were actually examined, with this latter assessment being for the actual expenses incurred in the examination. The federal credit union alleged the sliding scale fee was really a "tax", and therefore prohibited under 12 U.S.C. § 1768. The court agreed with the federal credit union, and struck down sliding scale fee as actually being a "tax", which the State of Maine could not impose upon a federal credit union. In a footnote, the court noted the federal credit union did not challenge the \$10.00 "notification" fee, or the assessment on creditors that were actually examined by Maine. Nor did the court take the opportunity on its own to strike down the application of these fees to the federal credit union, thus implicitly approving the imposition of such "fees" upon a federal credit union.

(3) Courts uniformly hold that such tax exemptions should be read narrowly. If there is any doubt, the tax exemption should be denied. See, e.g., *Central Credit Union v. Comptroller of the Treasury*, 220 A.2d 568, 571 (Maryland 1966).

(4) Under Utah law, the label which a municipality attaches to a business license fee will not determine whether the fee constitutes as a tax. For example, the mere fact a municipality calls a charge for a business license a "tax" does not automatically make the charge a tax. Similarly, even though a municipality calls a charge a "fee", the charge might still constitute a tax. The overall purpose and effect of a municipal charge -- rather than the legislative label -- will determine whether it is a tax. See *Smith v. Carbon County*, 63 P.2d 259, 260 (Utah 1936).

(5) See *Provo City v. Provo Meat & Packing Co*, 165 P. 477, 478-70 (Utah 1917). The city imposed a business license fee on businesses based upon the dollar value of goods they carried. The Court deemed the fee to be a tax, rather than a business license fee. See also *U.S. v. State of Maine*, 524 F. Supp. 1056, 1057-59 (D, Maine 1981).

(6) See *Davis v. Ogden City*, 215 P.2d 616, 617-18 (Utah 1950), in which the Court held a business license fee based on the gross receipts of attorneys was a tax.

(7) See *Consolidation Coal Co. v. emery County*, 702 P.2d 121, 122 (Utah 1985).

In this case, the city imposed a business license fee which consisted of a \$25 flat fee plus an additional fee of one half of one percent of the fair market of all goods and services which the business sold. The Court held the additional fee was really a tax.

(8) See *Weber Basin Home-Builders Ass'n v. Roy City*, 487 P.2d 866, 867 (Utah 1971). The city increased its building permit from \$12 to \$112 within the same year. Because the city made no showing that the increase was related to the cost of regulating building construction, the Court held the fee was in reality a tax.

(9) There so not seem to be any relevant cases which discuss business license as applied specifically to credit unions. There are, however, a few cases which discuss the tax exempt status of credit unions. See, e.g., *Central Credit Union v. Comptroller of the Treasury*, 220 A.2d 568 (Maryland 1966); *Inter-mountain Agricultural Credit Ass'n v. Payette County*, 31 P.2d 267 (Idaho 1934).

(10) See, e.g., *Kootenai County Property Owners Ass'n v. Kootenai County*, 769 P.2d 553, 555 (Idaho 1989); *Apodaca v. Wilson*, 525 P.2d 876, 884-85 (N.M. 1974).

(11) See, e.g., *Weber Basin Home Builders Ass'n v. Roy City*, 487 P.2d 866, 867 (Utah 1971).

(12) See *Davis v. Ogden City*, 215 P.2d 616, 617-18 (Utah 1950).

(13) See, e.g., *Northwestern Mut Life Ins. Co. v. State Board of Equalization*, 166 P.2d 917 (Cal. App. 1946). In this case, the court stated, "It is impossible to lay down any positive rule by means of which the character of any given tax may be ascertained. In each case the character of the given tax must be ascertained by its incidents, and from the natural and legal effect of the language employed."(166 P.2d at 919)