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## Transportation

### K-5 Toll or Tax?

The 236-mile Kansas Turnpike is operated by the Kansas Turnpike Authority (KTA). State and federal tax dollars do not flow to or from the KTA.

Additionally, the KTA cannot use toll or other revenue in ways other than maintaining, repairing, and operating Turnpike projects; paying principal and interest on bonds and creating reserves for the same; fixing and collecting tolls; and entering into certain types of contracts (KSA 68-2009). If a toll were to be used outside of the aforementioned purposes, the toll likely would be considered a tax. This article includes information on the KTA, statutes governing its operations, and court decisions related to turnpike tolls.

### Overview and Background of the Turnpike

Toll roads have a long history in the United States: the first turnpike in the United States was chartered in 1792. In a 1939 report to Congress titled *Toll Roads and Free Roads*, the U.S. Bureau of Public Roads, now the Federal Highway Administration, rejected a toll-financed Interstate system. The report found that most Interstate corridors would not generate enough toll revenue to retire the bonds that would be issued to finance them.

However, the financial success of the Pennsylvania Turnpike that opened in 1940 prompted several states to follow Pennsylvania's lead and construct their own toll roads in the late 1940s and early 1950s. The Interstate Highway System had not yet been created, so highway supporters in Kansas saw advantages in connecting the state's largest cities. Opponents argued that residents in the western half of the state should not have to pay for an expensive highway they would rarely use. Thus, a user-fee system was the only viable option to pay for the roadway.

In 1953, the Kansas Legislature created the KTA as a separate, quasi-public organization (KSA 68-2003). The KTA was tasked with constructing, operating, and maintaining a toll road connecting the three largest cities in Kansas. A mere 22 months after the creation of the KTA, the 236-mile Kansas Turnpike stretching from Kansas City to the Oklahoma state line south of Wichita was opened to traffic on October 25, 1956. The price tag for its construction was about \$147.0 million.

## Financing the Turnpike

Financing the construction of the Kansas Turnpike was a major concern for legislators and citizens. When the Kansas Legislature created the KTA, legislators wanted to make it clear that any Turnpike debt would not be considered a debt of the state or any political division of the state (KSA 68-2008). Legislation was enacted to outline the terms of Turnpike projects, including the issuance of revenue bonds and the use and disposition of tolls.

### *Creating a Turnpike Project*

Under KSA 68-2002, a toll road project cannot be undertaken unless the project and the proposed location have been thoroughly studied with respect to traffic, engineering, cost, and financing. The study must show public funds for construction of a free expressway are not available, the construction of the toll expressway can be financed wholly through the investment of private funds in toll road revenue bonds, and the project and indebtedness incurred will be entirely self-liquidating through tolls and other income from operation of the project. Various projects have been authorized for study over the years, but none have been added to the Turnpike system.

### *Issuing Revenue Bonds*

KSA 68-2007 outlines the issuance of Turnpike revenue bonds. At any time, the KTA is authorized to provide by resolution for the issuance of Turnpike revenue bonds to pay for all or part of the cost of any one or more Turnpike projects. The proceeds of the bonds of each issue are used solely for the payment of the cost of the Turnpike project or projects for which the bonds were issued. The KTA sold \$160.0 million of revenue bonds on October 14, 1954. According to the KTA, the original 1954 bond issue has been paid off and new bonds have been issued for financing safety improvements and major reconstruction projects. All current KTA bonds will mature by September 1, 2039.

## *Use and Disposition of Turnpike Tolls*

The KTA has the authority to fix, revise, charge, and collect tolls for the use of each Turnpike project (KSA 68-2009). The tolls are fixed and adjusted with respect to the aggregate of tolls from the Turnpike projects or projects in connection with issued bonds to provide a fund that is sufficient with other revenues to pay the cost of maintaining, repairing, and operating the Turnpike project or projects, and the principal of and the interest on those bonds (KSA 68-2009(a)).

The KTA does not receive federal or state tax dollars, including the fuel tax collected at any of the six service stations along the Turnpike pays for the roadway. Instead, those fuel tax revenues are deposited into the State Highway Fund and distributed to pay for other transportation needs throughout the state. Maintenance and operations of the Turnpike are funded from tolls, which also pay back bondholders who loaned private capital to finance, construct, and reconstruct the Turnpike. Some additional revenue is received by non-tolling sources, such as leases and other contractual agreements. Since the Kansas Turnpike is self-financed and does not rely on taxes, the customer is not paying twice for use of the facility.

Tolls are strictly subject to the control of the KTA; they are not subject to supervision or regulation by any other commission, board, bureau, or agency of the state (KSA 68-2009(b)). As of October 2016, the passenger or passengers of two-axle vehicles who travel the entire length of the Turnpike will pay a total of \$13.25 in cash, or \$10.60 as a K-TAG customer. The KTA reported toll revenue of \$100,324,558 for the fiscal year ending June 30, 2015.

The tolls and all other revenues derived from the Turnpike project or projects pay for the maintenance, repair, and operation of those projects. Excess funds are set aside in a sinking fund, which is charged with the payment of the principal and interest of bonds as they become due and the redemption price or purchase price of bonds retired by call or purchase. The sinking fund is a fund for all bonds without distinction or priority of one bond over the other (KSA 68-2009(b)). The

KTA is not allowed to use tolls or other revenues for any other purpose (KSA 68-2009(c)).

Charging tolls has several important practical implications. First, tolls assure out-of-state users pay their fair share for use of the Turnpike. Tolls also provide a mechanism to charge users in proportion to the actual cost of their use. For example, most turnpikes across the country charge higher tolls for trucks than automobiles, reflecting the greater wear and tear trucks have on roadways. Some turnpikes charge variable rates per mile by section so that users of sections that are more costly to maintain pay accordingly. Tolls are calculated based on the length of the route traveled.

### Is a Toll a Tax? Other States' Views on Tolls

Drivers can choose to pay tolls or take alternate routes, whereas taxes are mandatory and charged to everyone. The issue of whether a toll is considered a tax has arisen in the U.S. Supreme Court of the United States and in several individual states. In the case of *Sands v. Manistee River Imp. Co.*, 123 U.S. 288, 294, 8 S. Ct. 113, 115, 31 L. Ed. 149 (1887), the Supreme Court stated there is no analogy between the imposition of taxes and the levying of tolls for improvement of highways. Taxes are levied for the support of government and their amount is regulated by its necessities. Tolls, on the other hand, are the compensation for the use of another's property, or of improvements made. The cost of a toll is determined by the cost of the property, improvements of the property, and considerations of the return such values or expenditures should yield. The Supreme Court also has held tolls may not discriminate against interstate travelers (e.g., *Selevan v. New York Thruway Authority*, 584 F. 3d 82 (2d Cir. 2009)).

State courts in Florida, Illinois, Massachusetts, Montana, and Virginia all agree that tolls are not taxes. It is clear that toll revenue cannot be used to fund projects outside of a state's transportation system. However, there is no generally accepted principle that toll revenue from one facility can be used to fund another facility.

### Florida

Florida citizens have challenged the validity of tolls, claiming that tolls are akin to taxes; however, the Florida Supreme Court has repeatedly held that tolls are user fees and not taxes. In *City of Boca Raton v. State*, 595 So. 2d 25 (Fla. 1992), the Florida Supreme Court noted that a tax is an enforced burden imposed by sovereign right for the support of the government, the administration of law, and the exercise of various functions the sovereign is called on to perform. User fees are charges based upon proprietary right of the governing body permitting the use of the instrumentality involved. User fees share common traits that distinguish them from taxes: they are charged in exchange for a particular government service that benefits the party paying the fee in a manner not shared by other members of society, and they are paid by choice. They are paid by choice because the party paying the fee has the option of not utilizing the government service and thereby avoiding the charge. This concept of user fees was approved by the Florida Supreme Court in *City of Daytona Beach Shores v. State*, 483 So. 2d 405 (Fla.1985).

In the case of *Gargano v. Lee Cnty. Bd. of Cnty. Comm'rs*, 921 So. 2d 661, 667 (Fla. Dist. Ct. App. 2006), the plaintiff argued a toll on a bridge was not a user fee because she did not pay the toll by choice. The court noted it is true that anyone who lives on the surrounding islands and does not own a boat or helicopter must pay a toll to reach that person's home from the mainland and does not have the choice to take other roadways. However, the court stated the concept of "choice" for defining user fees is designed to distinguish a tax whose payment can be compelled from charges for services that one can avoid. In this case, the plaintiff had the choice to stay on the island and not visit the mainland; the county did not compel her to use the bridge or pay the fee. The court noted, as a practical matter, the plaintiff did not have many available options, but as a legal matter, the toll was not a tax.

The Florida Supreme Court has stated revenue from bridge tolls can be used to fund financial improvements of approaches and approach roads to the bridge. In *McGovern v. Lee Cnty.*,

346 So. 2d 58, 64 (Fla. 1977), the court stated inherent in the legislative scheme for funding self-liquidating projects is the principle that those who directly benefit from the project should bear a substantial portion of the cost and those who bear the substantial cost should benefit from the expenditure of money on the project. To allow bridge tolls to finance improvements of approaches and approach roads to the bridge does not violate this principle because those paying the tolls will benefit by having convenient access to the bridge.

However, the court stated there are limits to utilizing revenue from bridges to fund approaches and approach roads. The closer an access road is to a bridge or causeway, the more likely a significant portion of its traffic will use the bridge. Toll revenue can be used if the roads to be improved are within the immediate vicinity of the project. However, revenues from a toll bridge or causeway can fund improvements to roads distant from the facility only if the road functions as an approach or approach road. A road or segment of road is an approach or approach road if a significant portion of its traffic moves onto the bridge or causeway, or if a significant portion of the traffic moving across the bridge or causeway came from the road or road segment.

Consequently, the Florida Supreme Court has determined tolls are user fees and not taxes. Additionally, toll revenue from a bridge or causeway can fund improvements within the immediate vicinity. Toll revenue from a toll bridge or causeway can fund improvements to roads distant from the facility, as long as a functional test is used to determine whether a road or segment of a road is an approach or approach road.

### **Illinois**

In 1945, the Supreme Court of Illinois decided on the constitutionality of the State Superhighway Act. The Act created the Illinois State Superhighway Commission and defined its powers and duties (*People ex rel. Curren v. Schommer*, 392 Ill. 17, 20, 63 N.E.2d 744, 746 (1945)). The Act contemplated a system of toll roads to be known as superhighways and provided that such system of highways would be planned, built, operated,

and maintained by the State Superhighway Commission. Plaintiffs argued the creation of the Commission was unconstitutional and tolls were unconstitutional taxes.

The court found that the creation of the Commission was not an unconstitutional delegation of legislative power. Additionally, the court found there is a clear-cut and definite distinction between tolls and taxes. The essential meaning of a tax is that it is a mode of raising revenue for the public needs of a public purpose, while tolls are the compensation for the use of another's property.

Illinois courts have found tolls are not taxes, but the courts have not stated whether toll revenue from one toll facility can be used to fund another toll facility.

### **Massachusetts**

In the recent case of *Murphy v. Massachusetts Tpk. Auth.*, 462 Mass. 701, 971 N.E.2d 231 (2012), users of toll roads and tunnels in the Metropolitan Highway System (MHS) alleged tolls collected by the Massachusetts Turnpike Authority (MTA) were an unconstitutional tax, to the extent the tolls were used to pay for overhead, maintenance, and capital costs associated with MHS's non-tolled roads, bridges, and tunnels. According to the plaintiffs, the tolls are lawful user fees when applied to pay the expenses of tolled roads and tunnels, but an unconstitutional tax when applied to pay the expenses of non-tolled roads, tunnels, and bridges.

The Supreme Judicial Court of Massachusetts found the legislature authorized the MTA to collect tolls on only certain parts of the MHS and use those toll revenues to pay the expenses of the entire MHS. The Authority did not need to demonstrate the toll fee exactly equals the costs of maintenance or the benefits conferred. Instead, all that is required is the tolls reflect a fair approximation of the use of facilities for whose benefit they are imposed (*Cohen v. Rhode Island Turnpike & Bridge Auth.*, 775 F. Supp.2d 439, 449–450 (D.R.I.2011)). Where the MHS tolls were required by statute to be used to pay the costs of the entire MHS integrated system of roads, tunnels, and bridges, and where there is

no allegation they were put to a use prohibited by the statute or the toll revenues exceeded the total cost of the MHS, the tolls reflect a reasonable and non-excessive approximation of the value of use of the MHS (*Wallach v. Brezenoff*, 930 F.2d 1070, 1072 (3d Cir.1991)).

The court in *Murphy* found the MTA charged user fees and not unconstitutional taxes by expending portions of revenue charged to users of toll roads and tunnels to pay for overhead, maintenance, and capital costs associated with the MHS's non-tolled roads, bridges, and tunnels because the legislature specifically authorized the MTA to use tolls for expenses of non-toll roads. Users who paid the MHS tolls enjoyed a particularized benefit not enjoyed by those who only traveled on non-toll roads. Additionally, users had the option of not driving on tolled MHS roads and tunnels and thereby could avoid paying the tolls. Toll revenues were collected to compensate the MTA for expenses incurred in operating the MHS, not to raise revenues for the state.

### **Montana**

The Supreme Court of Montana has stated there is a clear distinction between taxes and tolls. A tax is a demand of the sovereignty levied for support of the government and its amount is regulated by its necessities. Toll revenues are the demands of proprietorship, exacted as compensation for use of another's property (*Monarch Min. Co. v. State Highway Commn*, 128 Mont. 65, 70, 270 P.2d 738, 740 (1954)). Montana has not yet considered the issue of whether toll revenue from one toll facility can be used to fund another toll facility.

### **Virginia**

The authority of the KTA to charge and collect tolls has not been a contentious issue like it has in Virginia. The Metropolitan Washington Airports Authority (MWAA) was formed in 1986 as an entity independent from Virginia, the District of Columbia, and the U.S. government. However, it possessed the powers delegated to it by the District of Columbia and Virginia. Congress explicitly granted MWAA the power "to levy fees or other charges"

(*Corr v. Metro. Washington Airports Auth.*, 740 F.3d 295, 297 (4th Cir. 2014)). Although the MWAA assumed control over the two Washington airports, the Dulles Toll Road continued to be operated by the Virginia Commonwealth Transportation Board (CTB).

The Virginia General Assembly repeatedly authorized CTB to use toll revenue to fund mass transit projects within the Dulles Corridor. In December 2006, Virginia agreed to transfer control over to MWAA. MWAA then had the power to set tolls on the Dulles Toll Road, but the MWAA was required to use toll revenues exclusively for transportation improvements within the Dulles Corridor.

Many legal challenges arose from this arrangement. In April 2011, plaintiffs initiated an action seeking to enjoin MWAA from using toll road revenue to repay bonds issued to fund the Metrorail project and seeking refunds of all excess tolls collected. They argued the toll paid by users of the Dulles Toll Road is in fact a tax because instead of defraying the cost of a driver's use of the road, a portion of the toll is used for other purposes, namely the Metrorail expansion project.

The *Corr* court, citing *Elizabeth River Crossings*, 286 Va. 286, 749 S.E.2d 176, 183 (2013), found the tolls paid by drivers on the Dulles Toll Road are not taxes because: (1) the toll road users pay the tolls in exchange for a particularized benefit not shared by the general public, (2) drivers are not compelled by the government to pay the tolls or accept the benefits of the Project facilities, and (3) the tolls are collected solely to fund the Project, not to raise general revenues.

The court agreed with Virginia's and MWAA's assessment that the Metrorail expansion and Dulles Toll Road are parts of a single interdependent transit project. Since they are parts of the same project, tolls charged on the Dulles Toll Road are not taxes just because they are used to fund the Metrorail expansion. The record did not indicate that surplus tolls are diverted outside those confines or are treated as general revenue. Therefore, tolls are user fees, not taxes, because they are nothing more than an authorized charge for the use of a special facility.

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