

## A Few Examples of Suspected Illegal Fees

### CHAPTER 118G. HEALTH CARE FINANCE AND POLICY

Chapter 118G: Section 25 Nursing homes; assessment for non-medicare reimbursed patient days; quarterly reporting; audits of assessment records; appeal of assessment; penalties

Section 25. (a) For the purposes of this section, the following words shall have the following meanings:--

""Assessment"", the user **fee imposed** pursuant to this section. **For all nursing homes, the user fee shall be imposed per non Medicare reimbursed patient day**....

(b) Each nursing home shall pay an assessment per non-Medicare reimbursed patient day. **The assessment shall be sufficient in the aggregate to generate \$145 million in each fiscal year.**

### CHAPTER 118G. HEALTH CARE FINANCE AND POLICY

Chapter 118G: Section 26 Pharmacies; assessment for non Medicare and non Medicaid prescriptions dispensed; quarterly reporting; audits; appeal; penalties

Section 26. (a) For the purposes of this section, the following terms shall have the following meanings:

""Assessment"", for all pharmacies, **an amount assessed upon each non Medicare and non Medicaid prescription** dispensed by the pharmacies....

(b) Each pharmacy shall pay an assessment upon each non-Medicare and nonmedicaid prescription dispensed to the division quarterly. **The assessment shall be sufficient in the aggregate to generate \$36 million in each fiscal year.**

Conference Committee Report - FY'04 Budget – SECTION 426, SECTION 427, SECTION 428, SECTION 429, SECTION 430, SECTION 431, SECTION 432

#### Typical example of above:

SECTION 432. Section 131H of said chapter 140, as so appearing, is hereby amended by striking out the third sentence and inserting in place thereof the following 2 sentences:— The fee for the permit shall be \$100, which shall be payable to the licensing authority and shall not be prorated or refunded in case of revocation or denial. The licensing authority shall retain \$25 of the fee; **\$50 of the fee shall be deposited into the general fund of the commonwealth**; and \$25 of the fee shall be deposited in the Firearms Fingerprint Identity Verification Trust Fund.

SECTION 504. Section 34 of Chapter 262 of the General Laws, as appearing in the 2000 Official Edition, is hereby amended by striking, in line 78, the words "four dollars" and inserting in place the following:- "fifty dollars, **of which forty-six dollars shall be deposited in the General Fund.**"

## **Procedures for Setting Fees**

### **Administrative Bulletin A&F 6**

**May 13, 1996**

- Purpose and Scope
- General Principles for Fee Proposals: Fees versus Taxes
- Process and Information Required for Fee Proposals

#### **Purpose and Scope**

The purpose of this Administrative Bulletin is to describe the process for setting fees, pursuant to G.L. c. 7, § 3B. This law charges the Secretary of Administration and Finance ("A&F") with responsibility for establishing appropriate fees on behalf of all state agencies.

In addition to fees set pursuant to G.L. c. 7, § 3B, there are at least two other methods of setting fees. In some cases the Legislature delegates fee setting authority directly to an agency; in others the Legislature itself sets the fees in statute. Although agencies with authority to set their own fees are not required to follow the procedures set out in this Bulletin, their fees must be consistent with the constitutional principles governing the fee setting process. Therefore, any state agency setting fees should use the approach described in this Bulletin. Fees set in statute are not subject to further administrative process. Unless otherwise provided by law, all fee revenue is credited to the General Fund.

#### **General Principles for Fee Proposals: Fees versus Taxes**

Constitutional principles govern the fee setting process. Only a legislative body has authority to assess taxes. Therefore, fees may not be used purely as a tool to raise revenue, but must reflect the government's cost of providing the service associated with the fee. The Supreme Judicial Court has determined that "fees share common traits that distinguish them from taxes." *Emerson College v. City of Boston*, 391 Mass. 415, 424-425, 462 N.E.2d 1098, 1105 (1984). These characteristics are:

1. Fees are charged for particular governmental services that benefit the parties paying the fees.
2. Fees are paid by choice, in that one can forego the service and thereby avoid the charge.
3. Fees are collected not to raise revenues but to compensate the governmental entity providing the service for its expenses. Expenses may be broadly construed, including "all expenses imposed upon [the government] by the business" being regulated, including, for example, administrative and enforcement costs.

#### **Process and Information Required for Fee Proposals**

The steps in the process for establishing new or amended fees are as follows. A&F will evaluate fee proposals as they are received and will attempt to approve or disapprove a proposal within two weeks of its submission. Once A&F approves the proposal, it must give the Legislature at least 60 days notice before the proposed effective date of the fee. During this 60 day period, A&F, in conjunction with the requesting agency, must complete a public hearing process. This process is unrelated to the regulatory review required in Executive Order 384.

To assist agencies in preparing fee proposals, A&F will provide standard forms and detailed instructions for completing the forms. These forms require the information necessary to support the promulgation and implementation of a proposed fee, including:

- the justification for and purpose of the fee;
- the source of the agency's authority to provide the service for which the fee will be charged and to charge the fee;
- a comprehensive analysis of direct and indirect costs of providing the service for which the fee will be charged;
- comparisons of the fee for the same or similar services in other states; and
- projections of revenue from the proposed fee for current and future fiscal years.

A&F will not consider any fee proposal unless the appropriate state agency head and Cabinet Secretary have approved and signed the first page of the proposal. Fee proposal forms and instructions are available from A&F.

This Bulletin takes effect immediately.

Charles D. Baker  
Secretary  
Executive Office for Administration and Finance

## **Procedures for Setting Fees**

### **Administrative Bulletin A&F 6**

**May 13, 1996**

- Purpose and Scope
- General Principles for Fee Proposals: Fees versus Taxes
- Process and Information Required for Fee Proposals

#### **Purpose and Scope**

The purpose of this Administrative Bulletin is to describe the process for setting fees, pursuant to G.L. c. 7, § 3B. This law charges the Secretary of Administration and Finance ("A&F") with responsibility for establishing appropriate fees on behalf of all state agencies.

In addition to fees set pursuant to G.L. c. 7, § 3B, there are at least two other methods of setting fees. In some cases the Legislature delegates fee setting authority directly to an agency; in others the Legislature itself sets the fees in statute. Although agencies with authority to set their own fees are not required to follow the procedures set out in this Bulletin, their fees must be consistent with the constitutional principles governing the fee setting process. Therefore, any state agency setting fees should use the approach described in this Bulletin. Fees set in statute are not subject to further administrative process. Unless otherwise provided by law, all fee revenue is credited to the General Fund.

#### **General Principles for Fee Proposals: Fees versus Taxes**

Constitutional principles govern the fee setting process. Only a legislative body has authority to assess taxes. Therefore, fees may not be used purely as a tool to raise revenue, but must reflect the government's cost of providing the service associated with the fee. The Supreme Judicial Court has determined that "fees share common traits that distinguish them from taxes." *Emerson College v. City of Boston*, 391 Mass. 415, 424-425, 462 N.E.2d 1098, 1105 (1984). These characteristics are:

1. Fees are charged for particular governmental services that benefit the parties paying the fees.
2. Fees are paid by choice, in that one can forego the service and thereby avoid the charge.
3. Fees are collected not to raise revenues but to compensate the governmental entity providing the service for its expenses. Expenses may be broadly construed, including "all expenses imposed upon [the government] by the business" being regulated, including, for example, administrative and enforcement costs.

#### **Process and Information Required for Fee Proposals**

The steps in the process for establishing new or amended fees are as follows. A&F will evaluate fee proposals as they are received and will attempt to approve or disapprove a proposal within two weeks of its submission. Once A&F approves the proposal, it must give the Legislature at least 60 days notice before the proposed effective date of the fee. During this 60 day period, A&F, in conjunction with the requesting agency, must complete a public hearing process. This process is unrelated to the regulatory review required in Executive Order 384.

To assist agencies in preparing fee proposals, A&F will provide standard forms and detailed instructions for completing the forms. These forms require the information necessary to support the promulgation and implementation of a proposed fee, including:

- the justification for and purpose of the fee;
- the source of the agency's authority to provide the service for which the fee will be charged and to charge the fee;
- a comprehensive analysis of direct and indirect costs of providing the service for which the fee will be charged;
- comparisons of the fee for the same or similar services in other states; and
- projections of revenue from the proposed fee for current and future fiscal years.

A&F will not consider any fee proposal unless the appropriate state agency head and Cabinet Secretary have approved and signed the first page of the proposal. Fee proposal forms and instructions are available from A&F.

This Bulletin takes effect immediately.

Charles D. Baker  
Secretary  
Executive Office for Administration and Finance

# Precedent Court Decisions on Fees vs. Taxes

## *Relevant Excerpts*

462 N.E.2d 1098 (391 Mass. 415, 462 N.E.2d 1098)  
EMERSON COLLEGE v. CITY OF BOSTON et al.  
Supreme Judicial Court of Massachusetts, Suffolk.  
Argued Nov. 8, 1983 - Decided March 14, 1984

Fees imposed by a governmental entity tend to fall into one of two principal categories: user fees, based on the rights of the entity as proprietor of the instrumentalities used, or regulatory fees (including licensing and inspection fees), founded on the police power to regulate particular businesses or activities...

**Such fees share common traits that distinguish them from taxes:**

**they are charged in exchange for a particular governmental service which benefits the party paying the fee in a manner "not shared by other members of society";**

**they are paid by choice, in that the party paying the fee has the option of not utilizing the governmental service and thereby avoiding the charge,**

**and the charges are collected not to raise revenues but to compensate the governmental entity providing the services for its expenses.**

Fees are legitimate to the extent that the services for which they are imposed are sufficiently particularized as to justify distribution of the costs among a limited group (the "users," or beneficiaries, of the services), rather than the general public....

Fees generally are charged for services voluntarily requested....

That revenue obtained from a particular charge is not used exclusively to meet expenses incurred in providing the service but is destined instead for a broader range of services or for a general fund, "while not decisive, is of weight in indicating that the charge is a tax." ...

The AFSA charge thus resembles not a fee, **but a tax, which has been defined as "an enforced contribution to provide for the support of government."**

... the statute makes no attempt to distinguish that particularized benefit from the benefit provided to the general public.

SILVA v. CITY OF FALL RIVER, et al.

02-P-166 Appeals Court

PAUL F. SILVA vs. CITY OF FALL RIVER & another.

No. 02-P-166 - Bristol. April 30, 2003. - November 4, 2003.

Present: Brown, Lenk, & Cypher, J

Civil action commenced in the Superior Court Department on October 20, 2000.

The case was heard by Vieri Volterra, J., on motions for summary judgment.

Martin A. Silva for the plaintiff.

Thomas F. McGuire, Jr., for the defendants, submitted a brief.

Judge Ellsbeth Cypher:

J. Paul F. Silva, a licensed funeral director, filed a complaint under G. L. c. 231A against the city of Fall River and its board of health (collectively, Fall River) alleging that the twenty-dollar burial permit fee charged by Fall River is an illegal tax and seeking declaratory judgment, injunctive relief, and damages. The parties filed cross motions for summary judgment and a Superior Court judge entered judgment in favor of Fall River, concluding that the burial permit charge was a valid regulatory fee and not an unlawful tax. Silva appeals. We think that the summary judgment record establishes that the burial permit charge exhibits more characteristics of a tax than of a fee.

On July 1, 1995, Fall River began charging a fee of ten dollars for the burial permit. In 2000, Fall River increased the fee to twenty dollars. The fees are deposited into a general account of the city of Fall River.

**Whether an exactment falls within the category of a fee or a tax, however, "must be determined by its operation rather than its specially descriptive phrase." ...**

Where charges have been determined to be valid fees rather than taxes, **the fee has been for a particular service provided to a discrete group....**

We think that the issuance of the burial permit does not benefit Silva or any other permit seeker in a manner not shared by the general public. The enforcement of regulations regarding the disposal of human remains is an essential governmental function....

Moreover, the fact that proper interment and the burial permit are compelled is further confirmation of the public nature of the benefit. "**Fees generally are charged for services voluntarily requested.**" ...

**Here, however, with uncontradicted evidence that the funds are deposited to Fall River's general account and nothing in the record to indicate the basis on which the charge was calculated or how the funds are used to defray expenses, we cannot conclude that the money collected is not used to subsidize general governmental operations....**

We think that the burial permit charge is better characterized as a tax than a fee because the payer of the fee derives no benefit that is not shared by the general public, proper interment is mandatory, the burial permit is mandatory, and it does not appear in the record that the funds are used to defray the cost of enforcing the relevant regulations.

**Both decisions in their entirety can be found on the CLT website at:**

**<http://cltg.org>**

## **Procedures for Setting Fees**

### **Administrative Bulletin A&F 6**

**May 13, 1996**

- Purpose and Scope
- General Principles for Fee Proposals: Fees versus Taxes
- Process and Information Required for Fee Proposals

#### **Purpose and Scope**

The purpose of this Administrative Bulletin is to describe the process for setting fees, pursuant to G.L. c. 7, § 3B. This law charges the Secretary of Administration and Finance ("A&F") with responsibility for establishing appropriate fees on behalf of all state agencies.

In addition to fees set pursuant to G.L. c. 7, § 3B, there are at least two other methods of setting fees. In some cases the Legislature delegates fee setting authority directly to an agency; in others the Legislature itself sets the fees in statute. Although agencies with authority to set their own fees are not required to follow the procedures set out in this Bulletin, their fees must be consistent with the constitutional principles governing the fee setting process. Therefore, any state agency setting fees should use the approach described in this Bulletin. Fees set in statute are not subject to further administrative process. Unless otherwise provided by law, all fee revenue is credited to the General Fund.

#### **General Principles for Fee Proposals: Fees versus Taxes**

Constitutional principles govern the fee setting process. Only a legislative body has authority to assess taxes. Therefore, fees may not be used purely as a tool to raise revenue, but must reflect the government's cost of providing the service associated with the fee. The Supreme Judicial Court has determined that "fees share common traits that distinguish them from taxes." *Emerson College v. City of Boston*, 391 Mass. 415, 424-425, 462 N.E.2d 1098, 1105 (1984). These characteristics are:

1. Fees are charged for particular governmental services that benefit the parties paying the fees.
2. Fees are paid by choice, in that one can forego the service and thereby avoid the charge.
3. Fees are collected not to raise revenues but to compensate the governmental entity providing the service for its expenses. Expenses may be broadly construed, including "all expenses imposed upon [the government] by the business" being regulated, including, for example, administrative and enforcement costs.

#### **Process and Information Required for Fee Proposals**

The steps in the process for establishing new or amended fees are as follows. A&F will evaluate fee proposals as they are received and will attempt to approve or disapprove a proposal within two weeks of its submission. Once A&F approves the proposal, it must give the Legislature at least 60 days notice before the proposed effective date of the fee. During this 60 day period, A&F, in conjunction with the requesting agency, must complete a public hearing process. This process is unrelated to the regulatory review required in Executive Order 384.

To assist agencies in preparing fee proposals, A&F will provide standard forms and detailed instructions for completing the forms. These forms require the information necessary to support the promulgation and implementation of a proposed fee, including:

- the justification for and purpose of the fee;
- the source of the agency's authority to provide the service for which the fee will be charged and to charge the fee;
- a comprehensive analysis of direct and indirect costs of providing the service for which the fee will be charged;
- comparisons of the fee for the same or similar services in other states; and
- projections of revenue from the proposed fee for current and future fiscal years.



A&F will not consider any fee proposal unless the appropriate state agency head and Cabinet Secretary have approved and signed the first page of the proposal. Fee proposal forms and instructions are available from A&F.

This Bulletin takes effect immediately.

Charles D. Baker  
Secretary  
Executive Office for Administration and Finance