S T A T E O F T E N N E S S E E
OFFICE OF THE
ATTORNEY GENERAL
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April 2, 2001

Opinion No. 01-051

Imposition of Amusement Tax on Whitewater River Rafting in Polk County

QUESTIONS

1. Is a proposed amendment to Chapter 2 of the Private Acts of 1981 and subsequent amendments constitutional?

2. Can the Polk County government charge an amusement tax or privilege tax for the use of a river located inside the Cherokee National Forest?

3. Can the Polk County government charge an amusement tax or privilege tax for the use of a river inside a State park?

4. Would an amusement tax or privilege tax for use of the Ocoee River, located in Polk County, violate the equal protection clause of the constitution if a similar or identical tax were not charged for another river (Hiwassee River) that is also within Polk County?

5. Would an amusement tax or privilege tax for use of the Ocoee River by outfitters' guests violate the equal protection clause of the constitution if a similar or identical tax were not charged to private kayakers or canoeists using the Ocoee River?

OPINIONS

1. Inasmuch as the constitutionality of Chapter 2 of the Private Acts of 1981, as amended, is the subject of pending litigation, this office must decline to address this question at this time.

2. Yes, the Polk County government may charge an amusement or privilege tax for the use of a river even if it is located inside the Cherokee National Forest.

3. Yes, the Polk County government may charge an amusement or privilege tax for the use of a river inside a State park.

4. No, an amusement or privilege tax for use of the Ocoee River would not violate equal protection principles based upon the Legislature's failure to tax use of the Hiwassee River as long as a reasonable basis exists to support the Legislature's disparate treatment of the users of the two rivers.

5. No, an amusement or privilege tax for use of the Ocoee River by commercial outfitters' guests would not violate equal protection principles based upon the Legislature's failure to impose a tax on use of the river by private kayakers and canoeists.

ANALYSIS

You have requested this office's opinion of the constitutionality of a proposed private act that would replace Chapter 2 of the Private Acts of 1981, as amended, authorizing the imposition of an amusement tax on whitewater rafting in Polk County. Like the 1981 private act, the proposed private act includes a preamble that sets forth the following reasons for imposing the tax:

> WHEREAS, the vast majority of the land area in Polk County is included in the Cherokee National Forest; and
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> WHEREAS, two of Tennessee's rivers which attract whitewater canoeing and rafting enthusiasts flow through Polk County and the Cherokee National Forest; and
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> WHEREAS, an increasing number of whitewater canoeists and rafters are accepting the challenge of the Ocoee and Hiwassee rivers; and
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> WHEREAS, the influx of these enthusiasts has placed an increased burden on Polk County's local inhabitants to provide law enforcement, traffic control, and first-aid and ambulance services out of proportion to the needs of the local citizenry; and
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> WHEREAS, at least a portion of the expenses of this greater service burden should be borne by the tourists for whose use and protection the needed services are provided; now, therefore,
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> BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE: . . . .

After setting forth the foregoing preamble, the proposed private act authorizes the legislative body of Polk County "to levy a privilege tax upon the privilege of a consumer participating in an amusement." The private act defines "amusement" as "any ride, excursion, or float trip by canoe, raft, or similar floating device on a whitewater river provided by a person authorized, licensed or permitted by TVA and/or the U.S. Forest Service to conduct such amusement and which is not taxed by the state of Tennessee under the 'Retailer's Sales Tax Act' in accordance with Tennessee Code Annotated, Sections 67-6-212 and 67-6-330." The private act then provides that the "tax shall be imposed at the rate of two dollars fifty cents ($2.50) per person participating in the amusement, exclusive of guides and bona fide trainees of the operator providing the amusement." The act authorizes the operator providing the amusement to collect

the tax from the consumer by adding the tax "to any other consideration charged for such amusement." Finally, the private act requires the operator to remit the tax to the county trustee within specified time frames and imposes penalties against operators who fail to collect and remit the tax as required by the act.

The language of the proposed private act is very similar to the existing language found in Chapter 2 of the Private Acts of 1981, as amended. *See* 1981 Tenn. Priv. Acts 2; 1997 Tenn. Priv. Acts 44. The constitutionality of that private act currently is being litigated in several lawsuits pending in the Polk County Chancery Court. In those lawsuits, operators of commercial rafting businesses on the Ocoee River in Polk County have challenged the existing private act on equal protection grounds. Citing Article XI, Section 8 of the Tennessee Constitution, the taxpayers have contended that Chapter 2 of the Private Acts of 1981, as amended, constitutes a suspension of the State's general revenue laws for the benefit of Polk County. Specifically, the taxpayers have asserted that the existing private act is inconsistent with the Retailers' Sales Tax Act, which contains an exemption prohibiting the State from assessing an amusement sales tax on commercial whitewater rafting on TVA waterways, such as the Ocoee River. *See* Tenn. Code Ann. § 67-6-330(a)(9) (1998).

The Court of Appeals addressed this constitutional challenge last year in *Polk County v. Rogers*, No. E1999-01610-COA-R3-CV, 2000 WL 224361 (Tenn. Ct. App. Feb. 28, 2000). In *Rogers*, the Court of Appeals agreed with the taxpayer's argument that, in passing the private act, the Legislature had suspended the State's general revenue laws for the benefit of Polk County. *Rogers*, 2000 WL 224361, at *3. In reaching this conclusion, the Court observed that the private act subjected Polk County businesses and customers to a tax which the State itself could not charge. *Id.* The Court held that such a suspension of the general laws would be unconstitutional unless a reasonable basis existed for the classification created by the private act. *Id.* Because neither the private act nor the record demonstrated a reasonable basis for the challenged classification, the Court remanded the case for the limited purpose of allowing "the parties to present additional evidence to the Trial Court concerning whether there is a reasonable basis for this classification and a determination by the Trial Court on that issue after consideration of this additional evidence." *Id.*, at *4.

After the case was remanded, the Chancery Court of Polk County conducted an evidentiary hearing to determine whether a reasonable basis existed for the classification created by the private act. At the hearing's conclusion, the Chancery Court again upheld the constitutionality of the private act. In a final order entered November 29, 2000, the Chancery Court "found that there is a reasonable basis under Article XI, Section 8 of the Tennessee Constitution for the classification established by the privilege tax assessed in Polk County under the Private Act of 1981." *Polk County v. Rogers*, No. 6431 (Polk County Ch. Ct. Nov. 29, 2000). The taxpayer has appealed the Chancery Court's order to the Court of Appeals.

Your request also addresses Polk County's authority to tax the use of a river located inside the Cherokee National Forest or a State park. Congress has enacted a federal statute which provides "that the State wherein any such national forest is situated shall not, by reason of the establishment thereof, lose

its jurisdiction, nor the inhabitants thereof their rights and privileges as citizens, or be absolved from their duties as citizens of the State." 16 U.S.C.A. § 480 (West 2000). The courts have interpreted this statutory provision as reserving to the states territorial jurisdiction to tax activities carried on within national forests, even where the national forest land on which the activities are conducted is owned by the federal government.[1] *Wilson v. Cook*, 327 U.S. 474, 487 (1946); *International Paper Co. v. Siskiyou County*, 515 F.2d 285, 289 (9th Cir. 1974). This interpretation is consistent with the general rule "that state taxation of the use or possessory interest of private parties in property owned by the United States does not violate the Supremacy Clause." *Mesa Verde Co. v. Montezuma County Bd. of Equalization*, 898 P.2d 1, 8 (Colo. 1995) (upholding imposition of state tax on possession and use of federally-owned parkland by park concessionaire). "[T]he federal government's constitutional immunity from state taxation is not infringed when a state imposes a tax on [independent, private parties that are] using the property in connection with their own commercial activities for profit-making." *Id*. at 9; *see Tree Farmers, Inc. v. Goeckner*, 385 P.2d 649, 653-54 (Idaho 1963) (upholding imposition of state personal property taxes on corporation's timber cut from national forest lands); *Bartlett v. Collector of Revenue*, 285 So. 2d 346, 347-48 (La. Ct. App. 1973) (upholding imposition of state severance tax on company's gravel operations in national forest); *Lin-Wood Dev. Corp. v. Town of Lincoln*, 378 A.2d 741, 742 (N.H. 1977) (upholding imposition of real estate taxes on ski lift facilities owned by corporation and partly situated on national forest land). This interpretation also is consistent with a previous opinion of this office in which the Attorney General stated that, although a proposed amendment to a private act imposing a hotel-motel tax in Blount County could not be applied to facilities in the Great Smoky Mountains National Park that were operated directly by the federal government or one of its agencies, the proposed tax could be applied to any independent contractors of the federal government operating such facilities in the park. Op. Tenn. Att'y Gen. 94-58 (Apr. 15, 1994).

Similarly, as a general rule, the State of Tennessee and its political subdivisions are not subject to a tax imposed by a statute or private act passed by the Legislature. *State ex rel. Fort v. City of Jackson*, 110 S.W.2d 323, 325 (Tenn. 1937); *State ex rel. Mayor of Morristown v. Hamblen County*, 33 S.W.2d 73, 74 (Tenn. 1930); *Mayor of Morristown v. Hamblen County*, 188 S.W. 796, 797 (Tenn. 1916); Op. Tenn. Att'y Gen. 95-74 (July 6, 1995); Op. Tenn. Att'y Gen. 86-68 (Mar. 17, 1986); Op. Tenn. Att'y Gen. 83-382 (Aug. 24, 1983). In the absence of an express provision to the contrary, the presumption arises that the Legislature did not intend for tax laws to apply to property of the State or any of the arms of State government. *State v. Hamilton County*, 144 S.W.2d 749, 751 (Tenn. 1940); *Mayor of Nashville v. Smith*, 6 S.W. 273, 274 (Tenn. 1887); Op. Tenn. Att'y Gen. 86-68 (Mar. 17, 1986). This general rule, however, does not prohibit the State or county governments from imposing taxes on commercial activities carried on by private entities within State parks. Moreover, this office is aware of no statutory or constitutional prohibition against such a tax. Rather, the Tennessee Constitution provides that the Legislature "shall have power to authorize the several counties and incorporated towns in this State,

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[1]The land within the boundaries of the National Forest System may include both federally-owned and nonfederally-owned (state-owned or privately-owned) land. *See* 16 U.S.C.A. §§ 572(a), 580g, 1134(a), 3210(a) (West 2000).

to impose taxes for County and Corporation purposes respectively, in such manner as shall be prescribed by law." Tenn. Const. art. II, § 28.

1. The constitutionality of Chapter 2 of the Private Acts of 1981, as amended, currently is being litigated in several lawsuits pending in the Polk County Chancery Court. In one of these cases, the Chancery Court ruled in favor of Polk County, and the taxpayer has appealed the Chancery Court's decision to the Court of Appeals. This office has a longstanding policy not to issue opinions on questions that are the subject of pending litigation. Although the proposed private act amends and restates Chapter 2 of the Private Acts of 1981, this office is of the opinion that the differences between the proposed private act and the existing private act are not material for purposes of answering the question posed in your request. In light of the pending litigation on the constitutionality of the existing private act, at this time this office must decline to issue an official opinion on this question.

2. Assuming that the private act imposing the amusement tax does not violate equal protection principles, the Supremacy Clause of the United States Constitution does not prevent Polk County from assessing the tax for the use of a river located inside the Cherokee National Forest. Although the Supremacy Clause prevents the State of Tennessee from imposing a tax on national forest land that is owned by the United States, the Supremacy Clause does not prevent the State from imposing a tax on independent, private entities that are using the land in connection with their own commercial activities. Thus, the Supremacy Clause does not prevent the State of Tennessee from passing a private act that authorizes Polk County to levy an amusement tax upon the use of a river in the Cherokee National Forest.

3. Similarly, this office is aware of no statutory or constitutional provision that would prevent Polk County from levying the tax for use of a river inside a State park. The Supreme Court of Tennessee consistently has adhered to the general rule that the State of Tennessee and its political subdivisions are not subject to a tax imposed by a statute or private act; however, this rule of law does not prohibit the State of Tennessee or its political subdivisions from taxing the commercial activities of private entities conducted in State parks.

4. If the Legislature decided to tax activities on the Ocoee River, but not the Hiwassee River, such disparate treatment of users of the two rivers would not necessarily violate equal protection principles. The Legislature's different classifications of the two rivers need only be supported by a reasonable basis, which might relate to the difference in the amounts of commercial use of the rivers, or the difference in burdens placed on local governments by commercial use of the two rivers.

5. Equal protection principles likewise would not be violated by the Legislature's failure to impose the tax for use of the river by private kayakers or canoeists. The Legislature's disparate treatment of persons using the Ocoee River need only be supported by a reasonable basis for the classifications created by the Legislature. For example, the Legislature may have concluded that activities provided by commercial operators impose a greater burden on local services than do non-commercial uses of the river.

Certainly, the Legislature may tax commercial enterprises without taxing those who engage in similar activities on an individual, non-commercial basis.

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