S T A T E O F T E N N E S S E E
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Opinion No. 03-006

County's Authority to Impose Litigation Tax to Fund Public Building Project

QUESTION

May the tax levy for public buildings pursuant to the provisions of Tenn. Code Ann. §§ 5-5-122 and 5-5-123 be levied as a litigation tax?

OPINION

Yes, the tax levy for public buildings pursuant to the provisions of Tenn. Code Ann. §§ 5-5-122 and 5-5-123 may be levied as a litigation tax; however, in accordance with Tenn. Code Ann. § 67-4-502, a county must levy its litigation tax in the same manner and in an amount not to exceed the amount of litigation taxes levied by the state.

ANALYSIS

Pursuant to Tenn. Code Ann. § 5-5-122, "county legislative bodies have full power to lay any tax, from time to time, and, at any time that they may think proper, to build, extend or repair, any courthouse, jail or public office for county purposes." Tenn. Code Ann. § 5-5-122 (1998). As originally enacted, this statute provided that "each and every county court in this state, . . . shall have full power to lay any tax from time to time, that they may think proper, to build any court house or jail or to repair the same, any law to the contrary notwithstanding." 1829 Tenn. Pub. Acts 99, § 1. In passing this statute, the General Assembly indicated that "the number of special laws passed upon this subject [was] expensive and troublesome." 1829 Tenn. Pub. Acts 99 (Preamble). By authorizing all county legislative bodies to fund public building projects by levying taxes, the General Assembly provided uniformity in this area of the law, and eliminated the need for special acts that granted such authority only to counties named in the acts.

Prior to 1829, for example, the General Assembly had passed the following special acts authorizing certain counties to levy taxes to fund public building projects: 1819 Tenn. Priv. Acts 20 (authorizing the county court of Washington County to lay a tax on all taxable property for the purpose of building a courthouse, prison and stocks in the town of Jonesborough and, further authorizing the county court of Cocke County to lay a tax on all taxable property and polls for the

purpose of building a courthouse in the town of Newport); 1819 Tenn. Priv. Acts 21 (authorizing the county court of Franklin County to lay a tax on all taxable property for the purpose of building a jail in the town of Winchester and, further, authorizing the county courts of Warren and Overton counties to levy a tax upon every description of taxable property to build or repair the jails in their respective counties); 1819 Tenn. Priv. Acts 28 (authorizing the county court of Claiborne County to lay a tax on taxable property and polls to build a jail in the town of Tazewell); 1819 Tenn. Priv. Acts 29 (authorizing the county court of Smith County to lay an additional county tax for the purpose of erecting a courthouse and county office building); 1821 Tenn. Priv. Acts 72 (authorizing the county court of Carter County to lay a tax on all taxable property for the purpose of finishing a courthouse in the town of Elizabethton); 1824 Tenn. Priv. Acts 78 (authorizing the justices of the peace in Greene County to lay a tax for the purpose of building a new courthouse); 1824 Tenn. Priv. Acts 105 (authorizing the county court of Bedford County to lay a tax on all taxable property for the purpose of erecting a poor house).

In addition to authorizing a tax on lands and polls, some of the private acts specifically authorized counties to tax stud horses and jacks, billiard tables, retail stores, merchants, peddlers, hawkers, and pleasure carriages. *See* 1819 Tenn. Priv. Acts 20 (Washington and Cocke counties); 1819 Tenn. Priv. Acts 29 (Smith County); 1821 Tenn. Priv. Acts 72 (Carter County); 1824 Tenn. Priv. Acts 78 (Greene County). Thus, in levying taxes under these acts, counties were not limited to imposing additional taxes on real property.

By its terms, Tenn. Code Ann. § 5-5-122 likewise does not limit a county's authority to levy taxes to the imposition of additional taxes on real property. Instead, section 5-5-122, as originally enacted and as currently written, broadly grants county legislative bodies the "full power to lay any tax, from time to time, . . . that they may think proper." Tenn. Code Ann. § 5-5-122 (1998); *see also* 1829 Tenn. Pub. Acts 99, § 1. More specifically, section 5-5-122 provides that "[t]he county legislative bodies have full power to lay any tax, from time to time, and, at any time that they may think proper, to build, extend or repair, any courthouse, jail or public office for county purposes." This language is broad enough to encompass the imposition of privilege taxes, which include litigation taxes. It authorizes a county to devote the proceeds of any tax that it otherwise may levy to the stated purpose. The statute does not, however, give counties the authority to designate and tax a privilege unless they have been authorized to do so under some other provision of state law.

This conclusion is consistent with prior opinions of this Office dealing with a county's authority to impose a litigation tax for the purpose of funding a public building project. In one opinion, this Office was asked to opine on the constitutionality of a proposed private act that sought to impose a privilege tax upon litigation in the courts of McNairy County for the purpose of maintaining and improving the county courthouse. In addressing this question, we observed that a private act was not needed for the county to levy this sort of litigation tax because such a tax was authorized by this state's general revenue laws. *See* Op. Tenn. Att'y Gen. 81-219 (Apr. 6, 1981) (citing Tenn. Code Ann. § 67-4202(a) Item 60 (now § 67-4-502)). Although we did not cite Tenn. Code Ann. § 5-5-122, or its predecessor, Tenn. Code Ann. § 5-524, we agreed that the county could levy such a litigation tax if the county commission passed a resolution to that effect.

A county's authority to levy litigation taxes, however, is not an unlimited one. As this Office has recognized in other opinions, a "county must levy the local litigation tax in the same manner as the state litigation tax is levied and the amount of the local litigation tax [may] not exceed the amount of the state litigation tax." Op. Tenn. Att'y Gen. 00-187 (Dec. 14, 2000); *accord* Op. Tenn. Att'y Gen. 91-003 (Jan. 8, 1991); Op. Tenn. Att'y Gen. 84-179 (May 30, 1984); Op. Tenn. Att'y Gen. 81-598 (Nov. 9, 1981). Although "[t]he legislative bodies of all counties have been authorized by general law to impose local litigation taxes," Op. Tenn. Att'y Gen. 82-320 (June 24, 1982), such taxes "may not exceed the amount of the State litigation tax." Op. Tenn. Att'y Gen. 83-330 (July 7, 1983); *accord* Op. Tenn. Att'y Gen. 99-104 (May 10, 1999). We reached this conclusion because a county's power to levy privilege taxes, including litigation taxes, derives from Tenn. Code Ann. § 67-4-502, which requires counties and incorporated cities to levy such taxes "in the same manner and not to exceed in amount the tax levied by the state, except as otherwise stated in the code." Tenn. Code Ann. § 67-4-502 (1998).

In accordance with the foregoing authorities, a county may levy a local litigation tax for the purpose of funding a public building project. As we explained in one opinion,

> [t]here are no particular restrictions on the use of revenue raised by local litigation taxes. While such taxes traditionally have gone to support courthouse maintenance and other activities related to the administration of the judicial system, there is no constitutional or general statutory requirement that they be so used. Proceeds from litigation taxes could go into a county or municipal general fund to pay general expenses. Of course, each local litigation tax must be used for the particular purposes specified in the private act, resolution, or ordinance under which it is levied.

Op. Tenn. Att'y Gen. 81-598 (Nov. 9, 1981).

Pursuant to Tenn. Code Ann. § 5-5-122, therefore, a county may pass a resolution or ordinance levying a local litigation tax and specifying that the revenues generated by the tax will be used to fund a public building project. In levying local litigation taxes, however, the county may not exceed the amount of the state litigation tax. Thus, if a county levies more than one local litigation tax, such as one designated for the county's general fund and a second designated for a public building project, the combined total of the county's litigation taxes may not exceed the state litigation tax.

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