S T A T E O F T E N N E S S E E
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Opinion No. 03-100

Constitutionality of 2003 Amendments to Professional Privilege Tax

QUESTIONS

1. Do recent amendments to the Professional Privilege Tax, which took effect June 24, 2003, violate the United States Constitution by in fact granting to state employees, but not to federal employees, an exemption from the tax?

2. If the tax as applied to federal employees is constitutional, can it validly apply to those professionals who had previously been exempted but who were licensed on June 1, 2003?

OPINIONS

1. No. The 2003 amendments to the Professional Privilege Tax statutes do not violate the constitutional doctrine of intergovernmental tax immunity.

2. Yes. The tax validly applies to those professionals who had previously been exempted but who were licensed on June 1, 2003.

ANALYSIS

Your request concerns the validity of recent amendments to the Professional Privilege Tax contained in Sections 7 and 8 of Chapter 418 of the Public Acts of 2003. In 2003, the General Assembly passed amendments to the Professional Privilege Tax statutes that repealed the exemption previously granted to full-time employees of the State of Tennessee. *See* 2003 Tenn. Pub. Acts 418, § 7. In removing the exemption, the Legislature declared that "[e]ach individual licensed or registered to engage in a vocation, profession, business, or occupation listed in [Tenn. Code Ann.] § 67-4-1702(a) shall be liable for the tax." 2003 Tenn. Pub. Acts 418, § 8 (now Tenn. Code Ann. § 67-4-1709). At the same time, the Legislature added a provision to the statutes that permits "[a]ny employer, including any governmental entity, . . . to remit the tax . . . on behalf of persons subject to the tax who are employed by such employer." *Id*.

Chapter 418's amendments to the Professional Privilege Tax statutes became effective June 24, 2003. *See* 2003 Tenn. Pub. Acts 418, § 16(b). The amendments specifically provide that all persons "who were previously exempt from the tax because of the operation of Section 7(b) of Chapter 856 of the Public Acts of 2002 [the former exemption for state employees], are hereby declared to be liable for the tax." 2003 Tenn. Pub. Acts 418, § 7 (now Tenn. Code Ann. § 67-4-1708(c)). For these persons, the tax "shall be due and payable on June 30, 2003." *Id*. Thus, since the 2003 amendments were passed, both private sector and governmental employees are liable for the tax, but any employer, whether private or governmental, may choose to pay the tax on behalf of its employees.

1. These amendments do not violate the doctrine of intergovernmental tax immunity. The doctrine of intergovernmental tax immunity bars taxes that are "imposed directly on one sovereign by the other." *Davis v. Michigan*, 489 U.S. 803, 811, 109 S. Ct. 1500, 1505, 103 L. Ed. 2d 891 (1989). The doctrine likewise "bar[s] taxes that 'operat[e] so as to discriminate against the Government or [against] those with whom [the Government] deals,'" such as its employees. *Davis*, 489 U.S. at 812, 109 S. Ct. at 1506 (quoting *United States v. City of Detroit*, 355 U.S. 466, 473, 78 S. Ct. 474, 478, 2 L. Ed. 2d 424 (1958)). Citing this doctrine, this Office previously opined that it would be unconstitutional to exempt state employees from application of the Professional Privilege Tax while continuing to impose the tax against federal employees. *See* Op. Tenn. Att'y Gen. No. 03-002 (Jan. 13, 2003).

Under the present statutory scheme, as amended by Chapter 418, neither state nor federal employees are exempted from application of the Professional Privilege Tax. Instead, all individuals who are "licensed or registered to engage in a vocation, profession, business, or occupation listed in § 67-4-1702(a) [are] liable for the tax." 2003 Tenn. Pub. Acts. 418, § 8 (now Tenn. Code Ann. § 67-4-1709). Inasmuch as both state and federal employees are now liable for the tax, the new statutory scheme does not violate the doctrine of intergovernmental tax immunity.

In removing the exemption for state employees, the Legislature has provided that any employer, including any governmental employer, may remit the tax on behalf of its employees. *See* 2003 Tenn. Pub. Acts 418, § 8 (now Tenn. Code Ann. § 67-4-1709). Such a provision, however, does not violate the doctrine of intergovernmental tax immunity. Any governmental employer, including a federal, state, or local governmental entity, may choose to remit the tax on behalf of its employees. If the State of Tennessee decides to remit the tax on behalf of its employees, as it apparently has elected to do, the doctrine still is not violated. A governmental employer, including the State of Tennessee, remains free to set the salaries and benefits of its employees without implicating this doctrine. Neither the taxing statute nor any other provision of Tennessee law prohibits the United States Government, if it elects to do so, from paying the tax on behalf of its professional employees.

2. Chapter 418's amendments to the Professional Privilege Tax statutes likewise do not violate the constitutional prohibition against retrospective laws. *See* Tenn. Const. art. I, § 20. The Tennessee Supreme Court has explained that

> Taxing statutes are generally held to be constitutional even though they have some retroactive effect. *Millikin v. U.S.*, 283 U.S. 15, 21, 51 S. Ct. 324, 75 L. Ed. 809 and *Welch v. Henry*, 305 U.S. 134, 59 S. Ct. 121, 118 A.L.R. 1142.
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> 'Mere retroactivity of a statute affecting taxation does not render it unconstitutional; such a statute is valid if it is not arbitrary, and does not disturb vested rights, impair contractual obligations, or violate due process.' 16 C.J.S., Constitutional Law, § 419.

Penn-Dixie Cement Corp. v. Kizer, 194 Tenn. 412, 424, 250 S.W.2d 904, 909, *appeal dismissed*, 344 U.S. 890, 73 S. Ct. 212, 97 L. Ed. 2d 689 (1952); *accord Biltmore Hotel Court, Inc. v. City of Berry Hill*, 216 Tenn. 62, 71-72, 390 S.W.2d 223, 227 (1965). In this regard, "no taxpayer has any vested rights under a taxing statute." *Cincinnati, N.O.&T.P. Ry. Co. v. Rhea County*, 194 Tenn. 167, 173, 250 S.W.2d 60, 63 (1952).

A tax statute "is not retroactive simply because it relates to antecedent facts." *Westinghouse Elec. Corp. v. King*, 678 S.W.2d 19, 26 (Tenn. 1984), *appeal dismissed*, 470 U.S. 1075, 105 S. Ct. 1830, 85 L. Ed. 2d 131 (1985). Thus, a tax statute is not open to attack as being unconstitutionally retroactive merely because the taxable event, such as the receipt of income, predates the statute. *See Welch v. Henry*, 305 U.S. 134, 147, 59 S. Ct. 121, 125, 83 L. Ed. 87 (1938). In fact, the United States Supreme Court has specifically condoned Congress's "familiar legislative practice . . . in the enactment of revenue laws to tax retroactively income or profits received during the year of the session in which the taxing statute is enacted, and in some instances during the year of the preceding session." *Welch*, 305 U.S. at 148, 59 S. Ct. at 126.

Sections 7 and 8 of Chapter 418 took effect June 24, 2003. *See* 2003 Tenn. Pub. Acts 41, § 16(b). For previously exempt persons, the professional privilege tax did not become due and payable until June 30, 2003, after the amendments' effective date. The amendments did not operate retrospectively so as to impair any vested rights. These persons had no vested interest in the tax exemption previously granted to them, and the amendments permissibly applied to persons who were exempt on June 1, 2003, but who subsequently became subject to the tax due and payable on June 30, 2003. The Legislature acted reasonably and within its constitutional powers in imposing the tax on those who would have been subject to the tax on June 1, 2003, but for the exemption then in effect, which has now been repealed.

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