S T A T E O F T E N N E S S E E
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Opinion No. 07-25

Validity of Pending Legislation Authorizing Solid Waste Disposal Control Board to Establish Amount of Certain Waste Surcharges and Pre-Disposal Fees

QUESTIONS

1. Can the General Assembly constitutionally delegate to the Solid Waste Disposal Control Board the authority to establish by rule the amount of a surcharge on municipal solid waste disposed of at class I landfills in Tenn. Code Ann. § 68-211-835(d)?

2. Can the General Assembly constitutionally delegate to the Solid Waste Disposal Control Board the authority to establish by rule the amount of a pre-disposal fee imposed on retail sales of new tires, when the Department of Revenue retains authority to collect the fee, but is statutorily required to deposit the fees into a dedicated fund?

3. Would the answers to questions 1 and 2 change if House Bill 2289 set a range for both fees within which the Board could set a specific amount?

OPINIONS

1. Yes. The surcharge imposed under Tenn. Code Ann. § 68-211-835(d) is properly characterized as a fee, rather than a tax. Therefore, the legislature's decision to authorize the Solid Waste Disposal Control Board to establish the amount of this fee by rule would not amount to an unconstitutional delegation of power.

2. It is the opinion of this Office that the legislature can also constitutionally delegate to the Solid Waste Disposal Control Board the authority to establish the amount of a pre-disposal fee imposed on retail sales of new tires, because the language of House Bill 2289 indicates that the purpose of this charge is a regulatory one and that the fee is to be deposited into a special fund, rather than the general fund.

3. No. The response to this question is identical to that provided in response to questions 1 and 2.

ANALYSIS

1. Under the provisions of the Solid Waste Management Act, found at Tenn. Code Ann. §§ 68-211-801 to 68-211-874, the legislature has established a system of surcharges and fees that may be imposed on municipal solid waste received at solid waste disposal facilities in the State. *See* Tenn. Code Ann. § 68-211-835. Currently, Tenn. Code Ann. § 68-211-835(d) provides as follows:

> (d)(1) In addition to any tipping fee imposed by any local government under this section, there shall also be imposed a surcharge of seventy-five cents (75¢) per ton on each ton of municipal solid waste received until June 30, 2008, at all Class I solid waste disposal facilities or incinerators.
>
> (2) The operator of the municipal solid waste disposal facility or incinerator shall collect this surcharge and remit it to the state treasury to be paid into the solid waste management fund.

House Bill 2289 would amend the provision in subsection (d)(1) to allow the amount of this surcharge to be established by a rule promulgated by the Solid Waste Disposal Control Board created under Tenn. Code Ann. § 68-211-111. The consequence of the proposed change is that an executive agency, not the legislature, would be authorized to set the amount of the surcharge. For the reasons expressed below, we find that such a delegation by the General Assembly is constitutionally permissible.

The surcharge in question does not appear to have been established as a general revenue-raising device, but rather appears to be assessed for the purpose of defraying the costs of providing certain services. Moreover, the statute requires that the fee be paid into a special fund, the solid waste management fund, which is established under Tenn. Code Ann. § 68-211-821. The latter statute provides that moneys from this fund "may be expended to fund activities authorized by this part," and that revenues deposited in this reserve are not to revert to the general fund. Tenn. Code Ann. § 68-211-821(a). All of this suggests to us that the surcharge is being imposed to regulate specific solid waste disposal activities. For these reasons, we believe the surcharge is properly characterized as a fee, rather than as a tax. *Memphis Retail Liquor Dealers' Association v. City of Memphis*, 547 S.W.2d 244, 245-46 (Tenn. 1977). Therefore, the General Assembly's decision to authorize the Solid Waste Disposal Control Board to establish the amount of this fee by rule does not constitute an unwarranted delegation of power. *Cf. West Tennessee Flood Control and Soil Conservation District v. Wyatt,* 193 Tenn. 566, 247 S.W.2d 56, 58 (1952) (holding that the state constitution prohibits the General Assembly from delegating to a subordinate agency the power to levy a tax).

Furthermore, the existing delegation of authority to the Solid Waste Disposal Control Board

in Tenn. Code Ann. § 68-211-111(d)(1) permitting the Board to adopt rules that it "deems necessary for the proper administration of this part," weighs in favor of a broad construction of the Board's rulemaking powers. The Tennessee Supreme Court has held that administrative agencies may be afforded the discretion to implement legislative policy, but not determine that policy. *Bean v. McWherter*, 953 S.W.2d 197, 199 (Tenn. 1997). In *Bean*, the court had to consider whether a delegation of rulemaking authority to an administrative body contained sufficient standards to prevent the agency from acting arbitrarily in adding to, or deleting from, the lists of wildlife created by the legislature. The court concluded:

> Detailed or specific legislation may neither be required nor feasible when the subject matter requires the agency's expertise and flexibility to deal with complex and changing conditions. . . .The requirement of expressed standards may also be relaxed when the discretion to be exercised relates to or regulates for the protection of the public's health, safety, or welfare.

Id.; compare Tasco Developing and Building Corp. v. Long, 212 Tenn. 96, 368 S.W.2d 65 (1963) (upholding broad delegation of power to board to grant contractor licenses "as it shall deem best."). All of this leads us to conclude that the General Assembly may delegate to the Solid Waste Disposal Control Board the authority to set and adjust the amount of the fee already imposed by the legislature.

2. You have also inquired whether the legislature can constitutionally delegate to the Solid Waste Disposal Control Board the authority to establish the amount of a pre-disposal fee imposed on retail sales of new tires. We note that currently such pre-disposal fees on new tires are set out at Tenn. Code Ann. §§ 67-4-1601 to 67-4-1612 in the privilege and excise tax portion of the Code. In particular, Tenn. Code Ann. § 67-4-1601 provides:

> The pre-disposal fee imposed by this part shall be in addition to all privilege taxes elsewhere imposed. The fee imposed by this part shall be administered and collected by the commissioner of revenue.

House Bill 2289 would delete Title 67, Chapter 4, Part 16 in its entirety, while importing many of its provisions and concepts for a pre-disposal fee on new tires over to a new appropriately designated part of Title 68, Chapter 211 of the solid waste statutes. But more specifically, the proposed bill would include the following language:

> A pre-disposal fee is imposed on each dealer making retail sales of new tires in this state to fund the solid waste management fund. The amount of the fee is to be established by a rule to be promulgated by the Solid Waste Disposal Control Board created under Tenn. Code Ann. § 68-211-111.

House Bill 2289 goes on to provide that the fee is to be collected and administered by the Department of Revenue, with the sole exception of the Solid Waste Disposal Control Board being authorized to set the amount of the fee by rule. It further provides that the fees collected by Revenue are to be deposited into the solid waste management fund created by Tenn. Code Ann. § 68-211-821.

It is the opinion of this Office that this portion of House Bill 2289 is also constitutionally permissible. We arrive at this conclusion based on the assumption that once the pre-disposal fee provisions are moved out of the tax code in Title 67 and into the solid waste statutes in Title 68, and the proposed bill mandates that all such fees are dedicated to a special fund, the fee no longer evinces the characteristics of a general revenue raising measure "levied for the purpose of paying the government's general debts and liabilities." *City of Tullahoma v. Bedford County*, 938 S.W.2d 408, 412 (Tenn. 1997). Instead, this charge imposed on the retail sale of new tires is in the category of a fee and, for the reasons addressed in response to question 1 above, the General Assembly may delegate to the Solid Waste Disposal Control Board the authority to set the amount of the fee being imposed by the legislature.

3. The same reasoning and case law cited above in response to questions 1 and 2 would apply if House Bill 2289 set a range for the two fees within which the Solid Waste Disposal Control Board could set a specific amount.

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