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June 16, 2009

Opinion No. 09-121

Privilege Tax on Whitewater Rafting on Ocoee and Hiwassee Rivers in Polk County

QUESTION

Do the provisions of HB 2411, which amends Chapter 2 of the Private Acts of 1981, as amended, imposing a privilege tax on the amusement of whitewater rafting in Polk County, comply with the Maritime Transportation Security Act of 2002?

OPINION

Yes, the proposed amendment to Chapter 2 of the Private Acts of 1981, as amended, complies with the Maritime Transportation Security Act of 2002 because it represents a reasonable charge, imposed on a fair and equitable basis, that is calculated based upon the cost of providing services to rafts and their occupants traveling on the Ocoee and Hiwassee Rivers. Moreover, the proposed levy funds services that enhance the safety and efficiency of commerce on the Ocoee and Hiwassee Rivers and, at most, imposes a minimal burden on interstate or foreign commerce. While labeled a "tax," the imposition is actually a fee and as such comes within the exception in the federal act.

ANALYSIS

The Maritime Transportation Security Act of 2002 generally prohibits state and local governments from imposing, levying, or collecting "taxes, tolls, operating charges, fees, . . . from any vessel or other water craft, or from its passengers, or crew, . . . if the vessel or water craft is operating on any navigable waters subject to the authority of the United States." 33 U.S.C. § 5(b). The federal act contains an exception for

> Reasonable fees charged on a fair and equitable basis that-
>
> (A) are used solely to pay the cost of a service to the vessel or water craft;
>
> (B) enhance the safety and efficiency of interstate and foreign commerce; and
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> (C) do not impose more than a small burden on interstate or foreign commerce.

33 U.S.C. § 5(b)(2). Based on federal preemption principles, the Court of Appeals recently invalidated the privilege tax on whitewater rafting authorized by Chapter 2 of the Private Acts of 1981, as amended, because it violated the prohibition of the Maritime Transportation Security Act of 2002 and was not used to pay the cost of services provided to the rafts. *High County Adventures, Inc. v. Polk County*, No. E2007-02678-COA-R3-CV, 2008 WL 4853105, at *10 (Tenn. Ct. App. Nov. 10, 2008), *perm. app. denied* (Tenn. May 4, 2009).

In an effort to come within the foregoing exception contained in the Maritime Transportation Security Act of 2002, HB 2411 proposes to amend Chapter 2 of the Private Acts of 1981, as amended, so that the tax levied relates directly to the cost of services that Polk County provides each year for the activity of commercial whitewater rafting. To that end, HB 2411 contains the following provisions:

> The legislative body of Polk County is hereby authorized to levy a privilege tax upon the privilege of a consumer participating in an amusement. Such tax so imposed is a privilege tax upon the consumer enjoying the amusement, and is to be collected and distributed as provided in this act. Such tax shall not be imposed upon employees and bona fide trainees of the operator providing the amusement.
>
> The rate of such privilege tax on consumers enjoying whitewater, rafting and other services on the Ocoee and Hiwassee Rivers shall be a fixed amount per person to be established by the county legislative body during the budgeting process after determination of the cost necessary for the provisions of services incident to the activities of commercial whitewater rafting. The county legislative body shall set such fixed amount per person during the budgeting process of the fiscal year which begins July 1st each year and the fixed amount per head shall become effective for the rafting season that begins the following year.
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> The calculation on the setting of the amount of the privilege tax shall be the cost of provision of services incident to the activities of commercial whitewater rafting or such other amusement to which said tax is applicable, divided by the number of persons who engage in such activities. For the purposes of whitewater rafting, such cost shall be divided by the number of persons who engaged in whitewater rafting during the preceding year's rafting activities. Such cost shall be based solely on the considerations allowable under the Maritime Transportation Security Act of 2002, compiled in 46 U.S.C. § 2101 et seq.

In this Office's opinion, the proposed levy conforms to the exception contained in the Maritime Transportation Security Act of 2002. The charge is structured so that it does not exceed the cost of providing services to whitewater rafts and their occupants, and it is fairly and equitably charged based upon the number of persons who actually engage in the privilege of

whitewater rafting each year. By ensuring a funding mechanism for the services provided to whitewater rafts and their occupants, this imposition functions solely to enhance the safety and efficiency of commerce on the Ocoee and Hiwassee Rivers. These services may include police and fire protection and other emergency and non-emergency services that are available to whitewater rafters and the commercial operators of whitewater rafting activities. Finally, the proposed charge appears to impose no significant burden on interstate or foreign commerce. Inasmuch as it is imposed only on a privilege exercised within Polk County, any impact on interstate commerce would be minimal.

While the "tax" described in HB 2411 is structured to fit within the exception contained in the Maritime Transportation Security Act of 2002, it should be noted that the exception applies to "reasonable fees," not "taxes." HB 2411 incorrectly describes the proposed charge as a privilege tax rather than a fee. While it would enhance the validity of the proposed levy if it were styled to come plainly within the terminology of the federal act, it is the opinion of this office that, despite the use of the term "tax" rather than "fee," the charge described in HB 2411 still complies with the federal act's exception. The distinction between a tax and a fee "lies not in the name given in the relevant statute, but rather in the purpose of the monetary imposition." *Saturn Corp. v. Johnson*, 236 S.W.3d 156, 160 (Tenn. Ct. App. 2007). As the Supreme Court has explained, whether the charge

> is a tax or a fee, even though denominated a tax, is determined by its purpose. A tax is a revenue raising measure levied for the purpose of paying the government's general debts and liabilities.… A fee is imposed for the purpose of regulating a specific activity or defraying the cost of providing a service or benefit to the party paying the fee.

City of Tullahoma v. Bedford County, 938 S.W.2d 408, 412 (Tenn. 1997) (citations omitted).

The charge described in HB 2411 is actually a fee because it is imposed for the purpose of defraying the cost of providing services to the rafts and occupants who engage in whitewater rafting and its proceeds are used solely for that purpose. *See id*. Accordingly, in spite of the terminology of the proposed amendment to the private act, this charge complies with the exception contained in the federal act.

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