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Opinion No. 11-49

Liquor Barrel Tax

QUESTION

May the General Assembly constitutionally authorize a tax on barrels for liquor to be imposed after approval by referendum in any county that approved the manufacture of intoxicating liquor before 1950?

OPINION

Yes. It is the opinion of this Office that the General Assembly, by general law, may allow counties that approved the manufacture of intoxicating liquor before 1950 to impose a privilege tax on the use of barrels that contain liquor. The classification of counties that approved the manufacture of intoxicating liquor before 1950 is defensible because a county that falls within it is more likely to be the site of a large, well-established manufacturer that places a heavy burden on local government services.[1] In addition, a private act limited to Moore County by name would also be defensible because of that county's unique situation.

ANALYSIS

This opinion concerns proposed legislation imposing a tax on liquor barrels. The legislation would apply to chartered governments in counties that before 1950 approved the manufacture of intoxicating liquor having more than five percent alcohol. The legislation would permit chartered governments in these counties to hold a referendum to impose a "fee" of not more than ten dollars on each fifty-gallon barrel when initially filled with intoxicating liquor having more than five percent alcohol. A proportionate "fee" would be imposed for barrels having more or less capacity. The bill would require the manufacturer to provide monthly reports to the county tax assessor of the number and capacity of barrels filled during each month. The "fees" would be paid twice a year to the county trustee for deposit in the general fund. As described in the request, the legislation would amend Tenn. Code Ann. § 57-2-103. The request asks whether such an act would be constitutional.

[1] Restricting this class to chartered counties raises additional constitutional concerns, since we cannot perceive a connection between the proposed tax and the existence of a county charter, other than attempting to limit the tax to Moore County without naming it specifically. The tax should either designate the rational category discussed in this opinion, or be framed as a private act for Moore County.

Tenn. Code Ann. § 57-2-103 authorizes county commissions to hold a referendum on the question of permitting and legalizing the manufacture of intoxicating liquors within the county. Although the bill refers to the proposed imposition as a fee, its proceeds would be paid into the general fund. The imposition, therefore, would be a tax, not a fee. *Saturn Corp. v. Johnson,* 236 S.W.3d 156, 160 (Tenn. Ct. App. 2007), *p.t.a. denied* (2007) ("A tax is a revenue raising measure levied for the purpose of paying the government's general debts and liabilities.")

As proposed, the act would amend the general law on referenda to approve liquor manufacturing. In fact, however, the act creates an entirely new tax and is not directly related to Tenn. Code Ann. § 57-2-103. The tax, therefore, could be authorized by an entirely new general law or by private act that applies only to Moore County by name. Regardless of the form, however, the new tax could be subject to review against the standard of Article XI, Section 8, of the Tennessee Constitution. *Admiralty Suites & Inns v. Shelby County,* 138 S.W.3d 233 (Tenn. Ct. App. 2003), *p.t.a. denied* (2004); *Nolichuckey Sand Co. v. Huddleston*, 896 S.W.2d 782 (Tenn. Ct. App. 1994), *p.t.a. denied* (1995); Op. Tenn. Att'y Gen. 04-027 (February 12, 2004); Op. Tenn. Att'y Gen. No. 03-134 (October 8, 2003). That section provides:

> The Legislature shall have no power to suspend any general law for the benefit of any particular individual, nor to pass any law for the benefit of individuals inconsistent with the general laws of the land; nor to pass any law granting to any individual or individuals, rights, privileges, immunitie[s] or exemptions other than such as may be, by the same law extended to any member of the community, who may be able to bring himself within the provisions of such law.

In order to trigger application of Article XI, Section 8, a statute "must contravene *some general law that has mandatory statewide application*." *Knox County ex rel. Kessell v. Lenoir City, Tennessee*, 837 S.W.2d 382, 383 (Tenn. 1992) (emphasis added); Op. Tenn. Att'y Gen. U90-102 (June 13, 1990) (severance tax in single county). State law authorizes a tax on barrels of beer, but not on liquor barrels. Tenn. Code Ann. § 57-5-201. The proposed tax is clearly on the barrels used to contain liquor, not on the liquor itself. Thus, the proposed tax is distinct from the privilege tax on liquor manufacture imposed under Tenn. Code Ann. § 57-2-102. It can be argued, therefore, that the proposed tax does not contravene a general law with mandatory statewide application. Nevertheless, some courts have suggested that laws authorizing taxes in particular counties still require a rational basis for their limited application. *Nolichuckey Sand Co.*, 896 S.W.2d at 788-89.

Tennessee courts have determined that a statutory exception to a general law is valid if the Legislature could have had a reasonable basis for treating the objects of the exception differently from the general run of things. *See State v. Tester*, 879 S.W.2d 823, 828 (Tenn. 1994); *City of Memphis v. International Bhd. of Elec. Workers Union Local 1288,* 545 S.W.2d 98, 102 (Tenn. 1976); *Town of Huntsville v. Duncan*, 15 S.W.3d 468, 472 (Tenn. Ct. App. 2000), *p.t.a. denied* (2000). The Supreme Court articulated these principles in *Doe v. Norris*, 751 S.W.2d 834, 840-42 (Tenn. 1988), as follows:

> The concept of equal protection espoused by the federal and our state constitutions guarantees that "all persons similarly circumstanced shall be treated alike." Conversely, things which are different in fact or opinion are not required by either constitution to be treated the same. "The initial discretion to determine what is „different' and what is „the same' resides in the legislatures of the States," and legislatures are given considerable latitude in determining what groups are different and what groups are the same. *Id.* In most instances the judicial inquiry into the legislative choice is limited to *whether the classifications have a reasonable relationship to a legitimate interest*.

(emphasis added) (citations omitted). Consequently, legislation containing particular classifications is not in violation of the Tennessee Constitution if "*any possible reason can be conceived to justify the classification, or if the reasonableness be fairly debatable . . ..*" *Estrin v. Moss*, 221 Tenn. 657, 430 S.W.2d 345, 349 (1968) (emphasis added); *Nolichuckey Sand Co., supra*, 896 S.W.2d at 789. Indeed, a statute that contravenes or is inconsistent with the general law is invalid only if "no reasonable basis for the special classification can be found." *See Stalcup v. City of Gatlinburg*, 577 S.W.2d 439, 441 (Tenn. 1978). Moreover, it is not necessary that the reasons for the classification appear on the face of the legislation. *Id.* at 442. Rather, if "*any* possible reason can be conceived to justify the classification, it will be upheld and deemed reasonable." *Id.* (emphasis added); *see also Knoxtenn Theatres v. McCanless*, 177 Tenn. 497, 151 S.W.2d 164 (1941); *Admiralty Suites and Inns, LLC v. Shelby County,* 138 S.W.3d 233 (Tenn. Ct. App. 2003), *p.t.a. denied* (2004).

It is particularly well established that challenges to tax statutes are determined under the rational basis test. *Brentwood Liquors Corp. v. Fox*, 496 S.W.2d 454, 457 (Tenn. 1973); *City of Tullahoma v. Bedford County*, 936 S.W.2d 408, 412 (Tenn. 1997); *Stalcup, supra*, 577 S.W.2d at 443; *Nolichuckey, supra*, 896 S.W.2d at 789. As "the right to tax is essential to the existence of government, and is particularly a matter for the Legislature," a plaintiff seeking to challenge the constitutionality of a Tennessee revenue statute "bears a heavy burden." *Id.*, 896 S.W.2d at 788 (quoting *Vertrees v. State Board of Elections*, 141 Tenn. 645, 214 S.W. 737, 740) (1919)); *Admiralty Suites,* 138 S.W.3d at 240. Accordingly, in reviewing the proposed tax, the courts would consider whether there is a reasonable basis for imposing the tax only in chartered counties that approved liquor manufacture before 1950.

We are aware of no rational basis for limiting the class to counties with a chartered government that approved liquor manufacture before 1950. On the other hand, if the charter feature of the class is omitted, the classification can be justified by a rational basis. Counties that approved liquor manufacture before 1950 are more likely to be the site of large, well-established manufacturers that place a heavy burden on local government services. Arguably, therefore, there is a reasonable basis for the classification. For this reason, the classification is defensible against a challenge that it violates Article XI, Section 8, of the Tennessee Constitution.

In addition, a private act limited to Moore County by name would also be even more readily defensible because of that county's unique situation in regard to the manufacture of liquor.

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