

STATE OF TENNESSEE

OFFICE OF THE
ATTORNEY GENERAL
PO BOX 20207
NASHVILLE, TENNESSEE 37202

November 27, 2013

Opinion No. 13-97

Enforcement of Kingsport Hotel/Motel Tax

QUESTIONS

1. Under the City of Kingsport's privilege tax on hotel transient occupants (also known as the "hotel/motel tax"), does an operator who collects taxes but then willfully fails or refuses to remit those taxes to the city treasurer violate Tennessee law?
2. If so, what civil and criminal liabilities would arise from non-remittance of such taxes?

OPINIONS

1. Yes.
2. Based on the language of the City of Kingsport's enabling private act, which itself incorporates generally the enforcement powers granted to the Commissioner of Revenue in Title 67 of the Tennessee Code Annotated, a hotel/motel operator who fails to remit taxes that the operator collected may incur civil liability, as well as liability for perjury under general criminal statutes if he makes a false tax return under oath. The potential civil liabilities include interest, penalties, seizure of property for forced sale and other forms of levy, and a fine not exceeding \$50 per occupant transaction. Perjury is criminally punishable by imprisonment for not greater than 11 months and 29 days, or a fine not to exceed \$2,500, or both.

ANALYSIS

Over the last several decades, private acts have authorized hotel/motel taxes in numerous Tennessee counties and municipalities.¹ Generally, these private acts authorize a county or city to levy a privilege tax upon each transient who exercises the privilege of temporary occupancy in any hotel, motel, or other non-residential place of habitation. Since 1981, the City of Kingsport has by virtue of enabling legislation assessed and collected such taxes. 1981 Tenn. Priv. Acts, ch.

¹ In addition, metropolitan and consolidated forms of local government may establish hotel/motel taxes pursuant to Tenn. Code Ann. §§ 7-4-101 to -112, and "home rule" municipalities may levy such taxes pursuant to Tenn. Code Ann. §§ 67-4-1401 to -1425.

46 (hereinafter “Chapter 46”).²

Whether a hotel/motel operator in Kingsport who fails properly to remit the tax would violate Tennessee law and thus face civil or criminal liability depends first and primarily on the language of Chapter 46.³ Chapter 46 provides that such taxes must be remitted to the Kingsport city treasurer no later than the 20th day of each month next following the collection of such taxes; otherwise the taxes are considered delinquent. *See* 1981 Tenn. Priv. Acts, ch. 46, §§ 3, 4, 5, 7. Each hotel/motel operator in Kingsport subject to the tax must also file a monthly tax return under oath with the city treasurer. *See id.* § 5. Such taxes become delinquent, and thereby accrue interest and penalty, as follows:

Taxes collected by an operator which are not remitted to the city treasurer on or before the due date are considered delinquent. Any operator delinquent in the payment of such taxes shall be obligated to pay interest from the due date at the rate of twelve percent (12%) per annum, plus a penalty of one-half percent (1/2%) for each month or fraction thereof that such taxes are delinquent. Such interest and penalty shall become a part of the tax

Id. § 7. Thus, the most basic civil liability for a Kingsport hotel/motel operator who willfully fails or refuses to remit duly collected taxes is the imposition by the city treasurer of additional interest and penalties.

Section 9 of Chapter 46 provides that the “city treasurer in administering and enforcing the provisions of this act shall have all the powers and duties provided in Title 67 [of the Tennessee Code].” Included among the powers in Title 67 are those found at Tenn. Code Ann. §§ 67-1-1401 to -1425. This part of Title 67 (Chapter 1, Part 14), titled “Tax Enforcement Procedures Act,” sets forth various civil procedures and remedies by which the Commissioner of Revenue may enforce and collect taxes due.⁴ By extension then, the city treasurer of Kingsport has available those procedures and remedies to enforce that city’s hotel/motel taxes. Specific provisions of Part 14, Title 67 that are accordingly granted to the city treasurer are the following:

² The local hotel/motel tax in Kingsport is administered through the City’s local ordinances. *See* Code of Ordinances, City of Kingsport, Tennessee §§ 94-70 to -81 (2012), located at <http://library.municode.com/index.aspx?clientID=15024>.

³ As stated, the private act for the City of Kingsport was first passed in 1981. Subsequently, according to an official note by the Secretary of State, this act was properly ratified and approved by the local governing body for the City of Kingsport. Since 1981, this private act has been amended three times. By virtue of those amendments, the authorized rate for the tax has increased from 3% to 7% of the consideration charged by the hotel operator for the occupancy at issue. *See* 1989 Tenn. Priv. Acts, ch. 10; 1996 Tenn. Priv. Acts, ch. 132; 2007 Tenn. Priv. Acts, ch. 52. However, none of these amendments changed or added language that would impact the inquiry posed by this opinion request.

⁴ *See generally* Tenn. Code Ann. § 67-1-1402(a), (b) (“This part shall apply to every public tax . . . and/or any penalty or interest payable thereon, levied under the provisions of any existing or later enacted law The purpose of this part is to supplement and clarify existing provisions of the general law relating to the enforcement of state taxes.”).

- § 67-1-1405. Collection by levy authorized.⁵
- § 67-1-1410. Levy – Padlocking [business] premises.
- § 67-1-1413. Levy – Production of books [or records upon demand].
- § 67-1-1415. Notice of sale [of property].
- § 67-1-1431. Action where tax in jeopardy.
- § 67-1-1435. Sale of personal property. . . .
- § 67-1-1437. Obtaining evidence [examination of books and witnesses, summons].
- § 67-1-1441. Revenue officers . . . Execution of search warrants.
- § 67-1-1442. Continuation of business to satisfy delinquent tax liability.
- § 67-1-1444. Collection of tax debt from transferees – Liability of transferee.⁶

Chapter 46 also provides a separate fine at Section 7:

Each occurrence of willful refusal of an operator to collect . . . or remit the tax . . . is declared to be unlawful and shall be punishable upon conviction by a fine not in excess of fifty dollars (\$50.00). Such fine shall be levied for each transaction involving the payment of consideration for occupancy of a space in a hotel.

1981 Tenn. Priv. Acts, ch. 46, § 7. An apparent ambiguity exists in the language of the two quoted sentences of Section 7. The words “unlawful,” “conviction,” “fine,” and “levied” create uncertainty whether a civil or criminal fine is intended, although Section 7 does *not* use words such as “misdemeanor,” “felony,” or “imprisonment.”

⁵ Levy is defined in Tenn. Code Ann. § 67-1-1404 to include “the power of distraint and seizure by any means.” After notice and demand, and the passage of ten days, levy is authorized on all taxpayer property, rights to property, or property “on which there is a lien provided by law for the payment of the [taxes].” Tenn. Code Ann. § 67-1-1405.

⁶ “Distress warrants” may be issued by tax collection officers if necessary “to safeguard . . . revenues.” Tenn. Code Ann. § 67-1-1201. Such warrants may be executed by sheriff, deputy sheriff, or constable for the distraint and sale of taxpayer’s personal property or, failing that, levy on taxpayer’s real estate. *See* Tenn. Code Ann. §§ 67-1-1201 to -1206.

If the quoted language of Section 7 were read to impose a criminal sanction it would come into conflict with the often repeated principle that the General Assembly cannot enact a law making certain acts a crime in only one county since such a law would “circumvent not only the rule against delegation of powers peculiarly the province of the legislature (that of creating crimes)” but also “the requirements of Article 1, § 8 [of the Tennessee Constitution] that the law of the land be general.” *State v. Toole*, 224 Tenn. 491, 493, 457 S.W.2d 269, 270 (1970). *See also Jones v. Haynes*, 221 Tenn. 50, 55, 424 S.W.2d 197, 198 (1968); Tenn. Att’y Gen. Op. 01-166, at 6 (Nov. 15, 2001); Tenn. Att’y Gen. Op. 90-05, at 3 (Jan. 11, 1990). While it is uncertain whether and how this principle would be applied with respect to a valid private act that imposes a tax in only one county and is useful in the administration of that tax, that principle remains a factor to be considered in interpreting the scope and intent of this provision of Chapter 46.

On the other hand, if the language of the last two sentences of Section 7 is read to impose only a civil fine, there is no possible constitutional defect. The language is certainly susceptible to this interpretation. Initially, general principles of statutory interpretation recognize a strong presumption in favor of the constitutionality of acts passed by the General Assembly. *See, e.g., Bozeman v. Barker*, 571 S.W.2d 279, 282 (Tenn. 1978); *West v. Tenn. Hous. Dev. Agency*, 512 S.W.2d 275, 279 (Tenn. 1974). If a constitutional attack is levied on a statute, courts will indulge every presumption in favor of the statute’s validity, resolving any doubt in favor of, not against, its constitutionality. *Waters v. Farr*, 291 S.W.3d 873, 917 (Tenn. 2009); *McCarver v. Ins. Co. of State of Penn.*, 208 S.W.3d 380, 384 (Tenn. 2006); *Gallaher v. Elam*, 104 S.W.3d 455, 459 (Tenn. 2003); *Riggs v. Burson*, 941 S.W.2d 44, 51 (Tenn. 1997). Thus, when the language of a statute permits, the court must adopt a construction that will not run afoul of constitutional limitations. *State v. Lakatos*, 900 S.W.2d 699, 701 (Tenn. Crim. App. 1994).

Second, the rule of lenity from criminal jurisprudence provides additional support for this interpretation. Under that rule, the court will limit a statute’s potential criminal application to those persons or circumstances that are clearly described in the statute and will decline to impose punishment for conduct that is not “plainly and unmistakably proscribed.” *State v. Marshall*, 319 S.W.3d 558, 563 (Tenn. 2010) (citations omitted). Although, strictly speaking, the rule of lenity applies only to the interpretation of a criminal statute, *see, e.g., State v. Collins*, 166 S.W.3d 721, 727 (Tenn. 2005), by analogy, one may conclude that a court interpreting Section 7 of Chapter 46 would not “reach” to define the conduct at issue, willful refusal to collect or remit the tax, as criminal. A more lenient interpretation would view the \$50 fine as a civil sanction, quasi-criminal at most. As stated by the Tennessee Supreme Court, due process mandates that no person be “forced to speculate, at peril of indictment, whether his conduct is prohibited.” *State v. Marshall*, 319 S.W.3d at 563 (citations omitted). In light of these authorities, the \$50 fine imposed by the last two sentences of Section 7 of Kingsport’s private act should be interpreted as a civil and not criminal fine.

Finally, turning to the existence of any criminal penalty, noncompliant Kingsport hotel/motel operators might be prosecuted for perjury if their monthly tax returns underreported or otherwise misrepresented the amount of taxes collected or due. As stated, Section 5 of

Chapter 46 requires a monthly tax return under oath to be filed with the city treasurer.⁷ 1981 Tenn. Acts, ch. 46, § 5. Tennessee law provides that perjury is a crime, stating:

- (a) A person commits an offense who, with intent to deceive:
 - (1) Makes a false statement under oath . . .
 - (3) Makes a false statement, not under oath, but on an official document required or authorized by law to be made under oath and stating on its face that a false statement is subject to the penalties of perjury . . .
- (b)(1) Perjury is a Class A misdemeanor

Tenn. Code Ann. § 39-16-702(a), (b). A Class A misdemeanor is punishable by a term of imprisonment for not greater than 11 months and 29 days, or a fine not to exceed \$2,500, or both. Tenn. Code Ann. § 40-35-111(e)(1).

In summary, under Chapter 46, a Kingsport hotel/motel operator who fails to remit collected taxes may incur civil liability in the form of interest, penalties, levies, and possibly fines not exceeding \$50 per transaction. Further, if the operator makes a false return, the operator may incur criminal punishment for perjury.

ROBERT E. COOPER, JR.
Attorney General and Reporter

WILLIAM E. YOUNG
Solicitor General

CHARLES L. LEWIS
Deputy Attorney General

Requested by:

General Barry P. Staubus
District Attorney General
Second Judicial District (Sullivan County)
P.O. Box 526
Blountville, TN 37617

⁷ Consistent with that provision, the form employed by the City provides that an operator submitting a written return certify its contents as true, correct, and complete under penalty of perjury.