STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL

April 7, 2014

Opinion No. 14-43

County's Authority to Impose Ticket Surcharge at County Agricultural Center

QUESTIONS

1. Under current law, may a county commission, through its contracts with private vendors for the rental of available facilities at the county agricultural center, require such vendors to collect, and remit to the county trustee, a $1.00 surcharge on every admission ticket sold for each private event, where the funds collected would be used to pay for the construction and operation of a new county exposition center?

2. If the answer to Question 1 is no, may the General Assembly, by private act, authorize a county commission to levy such a ticket surcharge for this purpose?

3. May the General Assembly, by private act, authorize a county commission to levy a surcharge on parking at the county agricultural center for this purpose?

OPINIONS

1. No. A ticket surcharge used to generate funds for the construction and operation of a new county exposition center is actually a tax that would conflict with the general amusement-tax statute, Tenn. Code Ann. § 67-6-212.

2. and 3. There must be a rational basis for suspending the general law in a particular county in order to impose a tax in excess of that allowed by State law. If such a rational basis were demonstrated, a private act authorizing imposition of such a tax would not violate Article XI, § 8, of the Tennessee Constitution.

ANALYSIS

Cities and counties have only those powers expressly granted by, or necessarily implied from, statutes. *City of Lebanon v. Baird*, 756 S.W.2d 236 (Tenn. 1988); *Bayless v. Knox County*, 199 Tenn. 268, 286 S.W.2d 579 (1956). Tenn. Code Ann. § 5-7-116 provides that "each county may lease land or existing buildings owned by the county to any person, corporation, partnership or association for such

consideration and upon such terms in the judgment of the governing body are in the interest of the county." While this provision gives a county commission latitude in the execution of its rental contracts, it cannot be construed to allow an imposition that would be constitutionally impermissible. *See Freeman Indus., LLC v. Eastman Chemical Co.*, 172 S.W.3d 512, 521-22 (Tenn. 2005) (statutes construed to avoid constitutional conflict).

Whether a county may constitutionally impose a ticket surcharge through its rental contracts with private vendors under current law turns on whether the surcharge is a fee or a tax. Counties have no inherent powers of taxation but possess only those taxing powers granted to them by the General Assembly.[1] *Southern Ry. Co. v. Hamblen County*, 115 Tenn. 526, 92 S.W. 238, 239 (1906). Therefore, a county can impose a surcharge only if it is clearly a fee or, in the alternative, a tax that the General Assembly has authorized. *See Kivett v. Runions*, 191 Tenn. 62, 231 S.W.2d 384, 386 (1950).

In Tennessee, taxes are distinguishable from fees by the objectives for which they are imposed. The distinction between fees and taxes lies not in the name given in the relevant legislation, but rather in the purpose of the monetary imposition. *City of Tullahoma v. Bedford County*, 938 S.W.2d 408, 412 (Tenn. 1997); *Saturn Corp. v. Johnson*, 236 S.W.3d 156, 160 (Tenn. Ct. App. 2006). A tax is a revenue-raising measure levied for the purpose of paying the government's general debts and liabilities. *City of Tullahoma*, 938 S.W. 2d at 412 (citing *Memphis Retail Liquor Dealers' Ass'n v. City of Memphis*, 547 S.W.2d 244, 245-46 (Tenn. 1977)). A fee, on the other hand, 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*, 938 S.W. 2d at 412; *Saturn Corp.*, 236 S.W.3d at 160. Moreover, a fee must bear a reasonable relation to the objective to be accomplished, *see Porter v. City of Paris*, 184 Tenn. 555, 201 S.W.2d 688, 691 (1947), or to the expenses involved, *see S & P Enterprises, Inc. v. City of Memphis*, 672 S.W.2d 213, 216 (Tenn. Ct. App. 1983).

Under these principles, a surcharge imposed on admission tickets for events at a county agricultural center, where the funds would be used for the construction and operation of a new county exposition center, cannot be characterized as a fee because it does not bear any relation to the cost of providing a service or benefit to the person buying the ticket. The ticket purchaser would receive no direct service or benefit from the surcharge. Moreover, the surcharge would bear no relationship to the regulation of events held at the agricultural center. While the monies generated from the surcharge would be designated for a particular purpose, as opposed to the

[1] Article II, § 29, of the Tennessee Constitution provides: "The General Assembly shall have power to authorize the several counties and incorporated towns in this State, to impose taxes for County and Corporation purposes, in such manner as shall be prescribed by law. . . ."

county's general debts and liabilities, the surcharge would unquestionably be a revenue-raising measure. Thus, such a surcharge must be characterized as a tax. Accordingly, it can be imposed under current law only if the General Assembly has authorized it. *See Kivett*, 231 S.W.2d at 386.

Counties are authorized by the General Assembly to levy taxes for county purposes, usually by special provisions in the general revenue laws for general county purposes and by special statutes for certain special purposes. *Southern Ry.* 92 S.W. at 239. In addition to general revenue law that authorizes counties to levy an annual tax on real property, the General Assembly has authorized counties to levy special taxes for building and repairing county buildings. *Id*. at 240. Under Tenn. Code Ann. § 5-5-122, "county legislative bodies have full power to lay any tax, from time to time that they may think proper, to build, extend or repair, any courthouse, jail or public office for county purposes." Similarly, Tenn. Code Ann. § 5-7-106 provides that "county buildings are to be erected and kept in order and repair at the expense of the county, under the direction of the county legislative body, and it may levy a special tax for this purpose."

This authority is not limited to the imposition of additional taxes on real property. In Tenn. Att'y Gen. Op. 03-006 (Jan. 22, 2003), this Office opined that a county could impose a litigation tax to fund a public building project but that it could not designate and tax a privilege unless it had been authorized to do so under some other provision of State law. Under Tenn. Code Ann. § 67-4-502, counties must levy privilege taxes, including litigation taxes, "in the same manner and not to exceed in amount the tax levied by the state, except as otherwise stated in the code." Accordingly, a county can pass a resolution levying a local litigation tax and specifying that the revenues generated by the tax would be used to fund a public building project, but the county cannot exceed the amount of the State litigation tax. Op. 03-006, at 3.

A county resolution thus is not sufficient if the county wishes to exceed the amount of a State tax. *See* Tenn. Att'y Gen. Op. 99-104 (May 10, 1999). While a county may have authority to levy a certain tax, a county may not collect a tax for any county purpose in excess of that authorized by the General Assembly. *Southern Ry*., 92 S.W. at 240. To exceed the amount of tax levied by the State, a private act would be necessary. *See* Op. 99-104, at 2. But because such a private act would suspend the general law of the State with respect to a particular county, it must comport with Article XI, § 8, of the Tennessee Constitution.

> 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. . . .

Tenn. Const. art. XI, § 8. Legislation containing particular classifications does not violate this provision 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). 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).

In Tenn. Att'y Gen. Op. 04-027 (Feb. 12, 2004), this Office considered a proposed private act that would have authorized a county commission to levy a 5% privilege tax on the price of admission for persons who attend a "large event." Because the tax would operate much like the sales tax on amusements under Tenn. Code Ann. § 67-6-212 and was different from and higher than the tax authorized by that statute, the tax was subject to Article XI, § 8's rational-basis test. Op. 04-027, at 2. *See id.* at 3-4 (discussing factors showing a rational basis for the special tax); *see also Stalcup*, 577 S.W.2d 439 (upholding special business tax because of overwhelming impact of tourism on the city); *Polk County v. Rogers*, 85 S.W.3d 781 (Tenn. Ct. App. 2002) (upholding special tax on sale of rafting tickets because of tremendous influx of whitewater enthusiasts in the county).

As was the case in Op. 04-027, the imposition of a $1.00 surcharge on event-admission tickets at a county agricultural center to generate funds for a new exposition center would result in a tax on amusements that exceeds what is authorized by Tenn. Code Ann. § 67-6-212. Thus, there must be a rational basis for suspending the law in a particular county. If such a rational basis were demonstrated, a private act authorizing imposition of such a tax would not violate Article XI, § 8, of the Tennessee Constitution.[2]

The sale of parking is also a taxable privilege under the sales tax law. *See* Tenn. Code Ann. § 67-6-205(c)(2).[3] Thus, a rational basis must likewise be demonstrated for imposing a surcharge on parking at a county agricultural center in order to raise funds to construct and operate a new county exposition center.

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[2] Inclusion in the private act of a population bracket encompassing only a single county would not, in itself, provide a rational basis. *See Buntin v. Crowder*, 173 Tenn. 388, 118 S.W.2d 221 (1938); *see also* Op. 99-104, at 2 ("It is difficult to argue that there is a rational basis for the application of a statute to a single county based on a two-hundred-person population bracket . . . .").

[3] This part of the opinion assumes that persons would manage the parking at agricultural-center events. The tax does not apply to political subdivisions when they are operating a parking lot that is unattended and the charges are collected by parking meters. Tenn. Code Ann. § 67-6-205(c)(2).

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