STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL

July 1, 2014

Opinion No. 14-67

Transfers of Fees to General Fund

QUESTIONS

1. If a future appropriations act were to authorize transfers of fees collected by the regulatory and health-related boards to meet the funding requirements of State government operations in that year, would a court characterize those impositions as "taxes" rather than "fees"?

2. If the answer to Question 1 is yes, in order to effect future transfers could the General Assembly simply amend Tenn. Code Ann. § 4-3-1016, or would it need to amend the statutes authorizing these fees to reflect their character as general-purpose "taxes" rather than regulatory "fees"?

3. Would such transfers be constitutionally defensible?

OPINIONS

1. No. Authorizing the transfer of fees collected by the regulatory and health-related boards would not warrant their characterization as "taxes" so long as such transfers involved only a relatively small portion of the total fees collected by each board.

2. and 3. Even if the transfer of such fees caused them to be deemed "taxes" instead of "fees," the General Assembly could still appropriate them to balance the State's budget under Tenn. Code Ann. § 4-3-1016.

ANALYSIS

1. Tenn. Code Ann. § 4-3-1016 provides:

> (a) Notwithstanding any provision of law to the contrary, subject to the specific provisions of an appropriation act, *the commissioner of finance and administration is authorized to deny carry forwards for, and to transfer funds from, the funds, reserve accounts or programs identified in this section to the state general fund for the purpose of meeting the requirements of funding the operations of state government for the fiscal year ending June 30, 2006, and subsequent fiscal years.* . . . This

> authority shall only apply to transfers and carry forwards necessary to fund the expenditures for the state for the fiscal year ending June 30, 2006, and subsequent fiscal years.
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> (b) No funds shall be transferred unless specifically appropriated in an appropriations act and such funds shall only be expended in accordance with the provisions of such act.

(Emphasis added.) Subsection (d) of the statute authorizes transfers from a long list of funds, reserve accounts, and programs for certain fiscal years, including, by recent amendment, the fiscal year ending June 30, 2014. *See* 2014 Tenn. Pub. Acts, ch. 917, § 5.[1] While that list includes both the Division of Regulatory Boards Fund in the Department of Commerce and Insurance and the Health-Related Boards Fund in the Department of Health, transfers from those funds are expressly prohibited by subsection (f) of the statute for the fiscal year ending June 30, 2014. *See* 2014 Tenn. Pub. Acts, ch. 917, §§ 8, 9.[2]

But if such transfers to the general fund were authorized again in the future *without* the prohibition on transferring funds of the regulatory and health-related boards, would that render the fees imposed and collected by these boards "taxes"? The answer to that question depends upon the purpose of these fees; 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).

> 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). In *S & P Enterprises, Inc. v. City of Memphis,* 672 S.W.2d 213 (Tenn. Ct. App. 1983), the Court of Appeals noted:

> An occupational or a privilege tax embodies as its primary purpose the creation and collection of revenue while a true license fee as distinguished from such a tax should be fixed to cover the expense of issuing it, the service of officers and other expenses directly or

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[1] Transfers were also authorized for the fiscal years ending June 30, 2008; June 30, 2009; June 30, 2010; and June 30, 2011. *See also* 2008 Tenn. Pub. Acts, ch. 1203, § 67; 2009 Tenn. Pub. Acts, ch. 554, § 72; 2010 Tenn. Pub. Acts, ch. 1108, § 70; 2011 Tenn. Pub. Acts ch. 473, § 76; 2014 Tenn. Pub. Acts, ch. 919, § 58 (provisions of the corresponding appropriations acts making transfers from the funds enumerated in § 4-3-1016(d)).

[2] Transfers from those funds were also prohibited for the fiscal years ending June 30, 2009; and June 30, 2011. Tenn. Code Ann. § 4-3-1016(f)(4), (5) (2013 Supp.).

> indirectly incident to the supervision of the particular business or vocation.

672 S.W.2d at 215 (citing *McMillan v. City of Knoxville,* 139 Tenn. 319, 202 S.W. 65 (1917)). The court stated that "it is only required that the fees bear some reasonable relation to the expenses involved and it is no objection to a regulatory license that it produces more income than is required for its administration and enforcement." *Id.* at 216 (citing *Memphis Retail Liquor Dealers' Ass'n, Inc. v. City of Memphis,* 547 S.W.2d 244 (Tenn. 1977); *City of Chattanooga v. Veatch,* 202 Tenn. 338, 304 S.W.2d 326 (1957)).[3]

The Division of Regulatory Boards administers the regulatory boards listed in Tenn. Code Ann. § 4-3-1304. *See* Tenn. Code Ann. §§ 56-1-301, -302. These boards are generally authorized to set licensing and other regulatory fees. *See, e.g.*, Tenn. Code Ann. § 62-19-111(a), (j) (Auctioneer Commission authorized to set licensing and examination fees); Tenn. Code Ann. § 62-6-111(a) (Board for Licensing Contractors authorized to set licensing and examination fees). Under Tenn. Code Ann. § 56-1-310(a), monies collected by these boards are to be credited to a separate account in the general fund for each board. The monies must be used solely to pay the boards' cost of implementing and enforcing in their areas of regulation. Tenn. Code Ann. § 56-1-310(b). Funds remaining in the boards' accounts at the end of a fiscal year generally do not revert to the general fund but remain available for expenditures in accordance with law. *Id.* § 56-1-310(d).

The Division of Health Related Boards is responsible for administrative, fiscal, inspectional, clerical, and secretarial functions of the health-related boards listed in Tenn. Code Ann. § 68-1-101(a)(8). The Commissioner of Heath is authorized to set licensing and other regulatory fees. Tenn. Code Ann. § 63-1-103. Under Tenn. Code Ann. § 63-1-137(a), monies collected by these boards are to be credited to a separate account in the general fund for each board. The monies must be used solely to pay the boards' cost of implementing and enforcing in their areas of regulation. Tenn. Code Ann. § 63-1-137(b). Funds remaining in the boards' accounts at the end of a fiscal year generally do not revert to the general fund but remain available for expenditures in accordance with law. *Id.* § 63-1-137(d).

These statutes support the conclusion that the fees imposed and collected by these boards ("Board Fees") are indeed fees and not taxes. Their purpose is not to pay the government's general debts and liabilities but to regulate a specific activity and to defray the cost of doing so. *See City of Tullahoma*, 938 S.W.2d at 412. Although authorizing a transfer of Board Fees remaining at the end of a fiscal year

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[3] In *Memphis Retail Liquor Dealers' Ass'n,* the Court found a charge to be a fee even though it generated 200 times the cost to administer it. But since this case involved regulation of liquor, a unique area, this Office has cautioned against applying it to other regulatory fees. *See e.g.,* Tenn. Att'y Gen. Op. 91-30 (Apr. 8, 1991) ("The Court . . . implied that if the activity regulated had been anything other than the liquor business, . . . the fee might have been characterized as a tax.").

into the general fund pursuant to Tenn. Code Ann. § 4-3-1016 would tend to undermine their characterization as fees, it would not alter their fundamental purpose so long as such a transfer involved only a relatively small portion of the total fees collected by each board. Continued and routine transfer of a large portion of Board Fees into the general fund, on the other hand, could lead to the conclusion that they are in fact taxes and not fees.

2. and 3. Tenn. Code Ann. § 4-3-1016(a) authorizes the transfer of funds "[n]otwithstanding any provision of law to the contrary." For this reason, if the statute were amended in the future to authorize such transfers for a new fiscal year, it would control over any inconsistent statute adopted earlier, including the statutes governing how Board Fees are to be used. *See* Tenn. Att'y Gen. Op. 09-87, at 3-4 (May 19, 2009) (opining that emergency-communications funds may be transferred pursuant to § 4-3-1016 despite the statutory limitation on how such funds may be used). The Tennessee Constitution does not prohibit the General Assembly from appropriating a regulatory fee to cover general operating expenses. Therefore, the legislature would not be constitutionally required to expressly designate Board Fees as taxes before it could appropriate them to balance the State's budget under Tenn. Code Ann. § 4-3-1016.

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