STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL

March 26, 2018

Opinion No. 18-15

Tax Exemption for "Aged Whiskey Barrels"

Question

Is proposed Senate Bill 2076/House Bill 2038, 110th Tenn. Gen. Assem. (2018), as amended by Amendment No. 2 to HB 2038 (HA 0942/Drafting Code 014670), constitutional?

Opinion

No. Under article II, section 30, of the Tennessee Constitution, as interpreted and construed by the Tennessee Supreme Court, an article being used to manufacture another product—such as a barrel being used by a whiskey maker to manufacture aged whiskey—is not entitled to an exemption from constitutionally mandated ad valorem taxation, and it is not within the legislative power to override or modify a judicial interpretation of the Constitution.

ANALYSIS

Senate Bill 2076/House Bill 2038, 110th Tenn. Gen. Assem. (2018), as amended by Amendment No. 2 to HB 2038 (HA 0942/Drafting Code 014670), would add a new subsection (c) to Tenn. Code Ann. § 67-5-216 with the goal of exempting from ad valorem tax wooden barrels used in the process of manufacturing whiskey. The new subsection (c) purports to do this by interpreting the phrase "articles manufactured from the produce of this state, or any other state of the union, in the hands of the manufacturer" to "include and [to] have always included aged whiskey barrels during the time in which such barrels are owned or leased by a person that produces or manufactures whiskey in those barrels." Amendment No. 2, Section 1(c)(1). It then defines "aged whiskey barrel" as a barrel that is made of United States-sourced timber, that contains or has contained whiskey, and that "has changed, or will change, in form or appearance as a result of the unique process of aging whiskey." Id., Section 1(c)(2).

Article II, section 28, of the Tennessee Constitution generally subjects all property to ad valorem taxation with certain limitations and permitted exceptions. Article II, section 30, exempts from that taxation any "article, manufactured of the produce of this State."[1] Amendment No. 2 is designed to declare by legislative fiat that aged whiskey barrels are "manufactured" articles within the meaning of section 30 so that they can qualify for a section 30 tax exemption.

[1] Section 30 must be read to include articles manufactured of the produce of Tennessee or any other State, because the federal Commerce Clause prohibits States from "impos[ing] upon the products of other states . . . more onerous . . . taxes than it imposes upon the like products of its own territory." I.M. Darnell & Son Co. v. City of Memphis, 208 U.S. 113, 121, 28 S. Ct. 247, 52 L. Ed. 413 (1908) (discussing article II, section 30, of the Tennessee Constitution).

But whether any given article is "manufactured" within the meaning of article II, section 30, is a question of the proper construction and interpretation of the Tennessee Constitution. *Benedict v. Davidson County*, 110 Tenn. 183, 67 S.W. 806, 807 (1902). And it is well-established that only the courts have the power to interpret the Constitution. *State ex rel Witcher v. Bilbrey*, 878 S.W.2d 567, 573 (Tenn. Ct. App. 1994) ("The courts are solely responsible for interpreting the Tennessee Constitution.").

The Tennessee Supreme Court has in fact ruled on the proper construction and interpretation of "manufactured" for purposes of applying the tax exemption in article II, section 30, of the Tennessee Constitution. The Court has determined that "[m]anufactured articles are not exempt as commodities of commerce, but as articles of manufacture in the hands of the manufacturer," which means that "the immunity from taxation of the article of manufacture assured by the Constitution *does not follow after the article has passed from the manufacturer of the particular article he produces or designs*." *Morgan & Hamilton Co. v. City of Nashville*, 151 Tenn. 382, 270 S.W. 75, 76 (1925) (emphasis added). Rather, the exemption, which is "intended to encourage domestic manufacture[,] is an exemption of the article manufactured, not of the commodities which the manufacturer may . . . use for manufacturing purposes . . . ." *Id.*

In short, the Tennessee Supreme Court has held that the section 30 tax exemption depends on the conversion of the "produce" into an article which the manufacturer himself makes—i.e., "an article different from the original product which he bought for use in manufacturing." *Morgan & Hamilton Co.*, 270 S.W. at 77. Accordingly, the section 30 exemption would apply during the process in which timber (the "produce" in question) is made into barrels (the "manufactured" article in question) by the barrel manufacturer, but would cease to apply when the barrels are used by the whiskey maker for the purpose of manufacturing whiskey, since the whiskey maker does not convert the timber out of which the barrels were made—or even the barrels themselves—into a different or distinct manufactured article.

In declaring that "aged whiskey barrels" are and always have been "manufactured" articles within the meaning of the Constitution, Amendment No. 2 purports to interpret or reinterpret the existing judicial construction of "manufactured" in article II, section 30. That is, the purpose of Amendment No. 2 is to override or modify a long-standing judicial interpretation of the Constitution and substitute a legislative interpretation.

But interpreting the Constitution is not within the power of the legislative branch of government. It is the exclusive province of the courts to interpret the Constitution. The Tennessee Constitution divides the powers of government "into three distinct departments: the Legislative, Executive, and Judicial" and expressly bars any one department from exercising the powers belonging to either of the other two departments. Tenn. Const. art. II, §§ 1 and 2. This constitutionally mandated division is known as the "separation of powers."

The power of the legislature is the power to "make, order, and repeal the laws," while the power of the judiciary is the power to "interpret and apply the laws." *Richardson v. Young*, 122 Tenn. 471, 125 S.W. 664, 668 (Tenn. 1909); *see also Marbury v. Madison*, 5 U.S. 137, 177, 2 L. Ed. 60 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."); *Moore v. Love*, 171 Tenn. 682, 107 S.W.2d 982, 986 (1937) ("We adhere to the fundamental principle of democratic constitutional government that, while the judiciary may not

properly legislate nor determine the policy of legislation, in like measure the Legislature may not invade the judicial sphere by limitations not directed or permitted by the charter of our liberties, the Constitution itself.").

The judiciary is not only vested with the sole power to interpret the law but also has the sole power to determine the constitutionality of actions taken by the other two branches of government, and the Tennessee Constitution prohibits the executive and the legislative branches from encroaching on that judicial power as well. *Colonial Pipeline Co. v. Morgan*, 263 S.W.3d 827, 842–43 (Tenn. 2008). The exercise of legislative power is restrained by the Constitution, "and it is always a *judicial* question as to whether or not those restraints have been ignored or overlooked by the Legislature in passing a statute." *Peay v. Nolan*, 157 Tenn. 222, 7 S.W.2d 815, 818 (1928) (emphasis added).

If the legislature were to enact Amendment No. 2, it would be encroaching impermissibly on the exclusive power of the judiciary—the power to interpret the Constitution. The legislature may not, under the guise of enacting a "law," interpret the Constitution, which is what Amendment No. 2 attempts to do by legislatively answering the question—properly a question for the judiciary—whether a barrel used to age whiskey is a "manufactured article" within the meaning of article II, section 30. Indeed, the legislature would be interpreting the Constitution in a way that contradicts long-standing judicial interpretation. Because reinterpreting or differently interpreting the Constitution is not within the power of the legislature, any attempt to do so would be a violation of the Constitution under separation-of-powers doctrine.

Amendment No. 2 is constitutionally infirm for another reason as well. In examining the constitutionality of a statute, the courts will look to "its real character, and [to] the end designed to be accomplished, and the courts are not concluded by mere declarations, for in whatever language a statute may be framed, its purpose and constitutional validity must be determined by its natural and reasonable effect." *Peay v. Nolan*, 7 S.W.2d at 819. Thus, Amendment No. 2 would be unconstitutional not only because it would violate the doctrine of separation of powers, but also because, when its "real character" is examined and not just its "declarations," it is clear that it is designed to circumvent the constitutional requirement that all property—other than "manufactured" articles within the meaning of section 30 as interpreted by the Tennessee Supreme Court—be subject to ad valorem tax.

As this Office explained in Tenn. Att'y Gen. Op. 18-06 (March 5, 2018), an exemption for barrels that are used to age whiskey would be unconstitutional under article II, section 30, because those barrels are not "manufactured articles" as the Supreme Court has interpreted that term. Amendment No. 2 does nothing to change that. Despite all the "language" in which Amendment No. 2 is "framed," the whiskey maker is still merely using the barrels as a commodity in its own manufacturing process; the whiskey maker is not converting the barrel into an article different from the barrel that the whiskey maker bought. Thus, the barrel "owned or leased" in the hands of the whiskey maker is not a "manufactured article" within the scope of section 30 as construed by the Tennessee Supreme Court.

The reference in the Amendment to the change "in form or appearance" that a barrel undergoes during the whiskey-aging process does not alter the fact that a whiskey barrel is a means to the end of producing whiskey, not the other way around. Put simply, a whiskey maker is a manufacturer of whiskey, not a manufacturer of barrels. In fact, Amendment No. 2 itself makes it clear that the "aged whiskey barrels" are not manufactured articles but are articles used for manufacturing purposes because, by its own terms, Amendment No. 2 applies to barrels that are "owned or leased *by a person that produces or manufactures whiskey in those barrels*." That alone renders the barrels ineligible for the section 30 tax exemption; articles "use[d] for manufacturing purposes" are not within the scope of section 30. *Morgan & Hamilton Co*., 270 S.W. at 76

In any event, reference to a change in appearance is a mere "declaration" that is not binding on the courts, "for in whatever language a statute may be framed, its purpose and constitutional validity must be determined by its natural and reasonable effect." *Peay v. Nolan*, 7 S.W.2d at 819. The change-in-appearance declaration notwithstanding, the natural and reasonable effect of Amendment No. 2 is that, at the end of the whiskey-manufacturing process, the barrel used to manufacture the aged whiskey is still a barrel, regardless of any secondary market that may exist for the used barrel. Any change in appearance is due only to its having been used in the whiskey-making process.

In sum, Amendment No. 2 suffers from the same constitutional infirmities as did the previous version of the proposed legislation, which was the subject of Tenn. Att'y Gen. Op. 18-06 (March 5, 2018). Under article II, section 30, of the Tennessee Constitution, as interpreted and construed by the Tennessee Supreme Court, an article being used to manufacture another product—such as a barrel being used by a whiskey maker to produce aged whiskey—is not entitled to an exemption from constitutionally mandated ad valorem taxation, and it is not within the legislative power to override or modify a judicial interpretation of the Constitution.

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