

STATE OF TENNESSEE

OFFICE OF THE
ATTORNEY GENERAL
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Opinion No. 02-084

Effect of Chapter 859 of the 2002 Public Acts on the Rate and Distribution of the Business Tax

QUESTIONS

1. In those cities and counties that have imposed the business tax at a rate of less than the statutory maximum rate provided in Tenn. Code Ann. § 67-4-709(b), do the business tax rates increase pursuant to Chapter 859 of the Public Acts of 2002 (the “2002 Act”) and, if so, by how much?
2. In those cities and counties that have no business tax or have levied the business tax at less than the current statutory maximum rate, may they later levy the tax and/or increase the rate and, if so, what is the distribution of the revenues to the State and to the cities or counties?
3. Are the penalties and interest that may become due on business taxes after the effective date of the 2002 Act retained by the city or county as collector, sent to the State, or allocated between the city or county and the State in some manner?

OPINIONS

1. Yes. The 2002 Act increases the business tax rates by fifty percent in all jurisdictions that have imposed the tax by reference to the rates set out in Tenn. Code Ann. § 67-4-709(b), since the 2002 Act increased the statutory rates by that percentage. In cities and counties that imposed the business tax at the maximum rate specified by the previous law, the current business tax rates for those localities are the new maximum rates. In jurisdictions that have imposed the business tax at a stated fraction of the maximum rates provided by Tenn. Code Ann. § 67-4-709(b), the current rates for those jurisdictions are that same fraction of the new maximum rates.
2. Yes. Those cities and counties which have no business tax or which have levied the business tax at a rate less than the new maximum rate may later levy a business tax or increase the rate in accordance with Tenn. Code Ann. § 67-4-704, so long as the rate imposed does not exceed the new maximum rate. The amounts collected under such a new levy which would have been collected under a

levy at the same fraction of the old maximum rate must be distributed as they would have been under the old law, with fifteen percent to be paid to the State and the remainder retained by the locality. Any additional amounts collected because of the new rates must be paid entirely to the State. Thus, the distribution of business tax revenues in a locality that previously had no business tax but now chooses to impose one will be exactly the same as in a locality that levied the business tax all along. In each instance, the only amounts directly attributable to the new rate (and thus allocated entirely to the State) are revenues in excess of the amounts that would have been received had the old statutory rates remained unchanged. The 2002 Act does not impose any business tax in jurisdictions that have not authorized the tax by action of the local governing body.

3. Penalties and interest from the business tax are allocated between the State and the cities or counties, with each jurisdiction retaining the portions of penalties and interest that are attributable to the amount of tax due to each jurisdiction as described in the answer to Question Two.

ANALYSIS

(1)

Tennessee law authorizes a privilege tax on gross receipts, commonly referred to as the business tax, to be imposed by cities and counties on the privilege of engaging in any vocation, occupation or business described in Tenn. Code Ann. § 67-4-708(1)-(4), in an amount that cannot exceed the rates for each classification stated in Tenn. Code Ann. § 67-4-709. Section 9(a) of Chapter 856 of the 2002 Public Acts amended Tenn. Code Ann. § 67-4-709(b) and increased by fifty percent the maximum business tax rates contained in that section. Section 9(d) of the 2002 Act amends Tenn. Code Ann. § 67-4-724(a) and requires that in addition to the fifteen percent of most business tax collections that were previously allocated to the State, one hundred percent of the revenue directly attributable to the rate increases contained in the 2002 Act shall also be paid to the State.

This Office has been asked for its opinion regarding the manner in which the 2002 Act affects cities and counties that impose the tax at a rate less than the statutory maximum, including those cities and counties that impose no business tax. It is our opinion that the 2002 Act does increase the business tax rate for all cities and counties that, prior to the effective date of the 2002 Act, imposed a business tax by reference to the maximum rates set forth in Tenn. Code Ann. § 67-4-709. Cities and counties generally impose the business tax by passing an ordinance or resolution levying the tax in an amount equal to the maximum amount allowed by State law. Thus, those cities and counties that impose the business tax in that manner, at the maximum rate, should automatically impose the business tax at the new maximum rate specified in Section 9(a) of the 2002 Act.

Some cities and counties, however, impose the business tax in an amount less than the maximum allowed by state law, and some impose no business tax. The cities and counties that impose the business

tax at a lesser rate than the State maximum generally do so by stating in an ordinance or resolution that a fraction or percentage of the State maximum rate shall be imposed. Thus, in those cities and counties that have imposed the business tax at a specified fraction of the State maximum, the new law has automatically increased their tax rate to that same stated fraction of the new maximum rate specified in Section 9(a) of the 2002 Act. Those cities and counties that levied no business tax prior to the effective date of the 2002 Act continue to impose no business tax after the effective date of the 2002 Act, unless their local governing body subsequently takes action to adopt the business tax in that jurisdiction.

(2)

Cities and counties that impose the business tax at a rate less than the statutory maximum, including those that impose no business tax, may later initially levy or increase their business tax rate in accordance with Tenn. Code Ann. § 67-4-704. The confusion regarding this issue is based upon Section 9(b) of the 2002 Act, which amended the business tax law by deleting Tenn. Code Ann. § 67-4-710 in its entirety. Formerly, Tenn. Code Ann. § 67-4-710 stated that “[e]ach county and/or incorporated municipality [could] reduce the rates of taxation set forth in § 67-4-709 for any or all [business tax] classifications taxable by such county and/or incorporated municipality.” The removal of Tenn. Code Ann. § 67-4-710 raises the question of whether cities and counties, if they impose a business tax, must do so at the stated statutory rates.

While Section 9(b) of the 2002 Act did delete Tenn. Code Ann. § 67-4-710, it left intact Tenn. Code Ann. § 67-4-704. Section 67-4-704 clearly states that engaging in the vocations, occupations and businesses named in Tenn. Code Ann. § 67-4-708(1)-(4) “is declared to be privilege upon which each county and/or incorporated municipality in which such business, business activity, vocation or occupation is carried on may levy a privilege tax in an amount *not to exceed the rates hereinafter fixed and provided.*” (emphasis added). The unambiguous language in Tenn. Code Ann. § 67-4-704 continues to grant each county or incorporated municipality the ability to levy the business tax initially at only a portion of the State rates, or later to increase its business tax rate, so long as the rate imposed does not exceed the new maximum rates set by the 2002 Act.

If those cities and counties that impose the business tax at a rate less than the statutory maximum, including those that impose no business tax, later choose initially to levy or to increase their business tax rate, then those localities must distribute all revenues, including interest and penalties, between the locality and the State in accordance with Tenn. Code Ann. § 67-4-724(a), as amended. Section 9(d) of the 2002 Act amended Tenn. Code Ann. § 67-4-724(a)(1) by requiring that fifteen percent of the business tax collected by cities and counties not attributable to “a local government field audit and related collection effort” or not “directly attributable to the 2002 amendments” to the business tax rates contained in Tenn. Code Ann. § 67-4-709(b), be distributed to the State. Section 9(d) also added Tenn. Code Ann. § 67-4-724(a)(2) which provides that “all increased revenues directly attributable to the 2002 amendments to § 67-4-709(b)” be paid to the State.

Thus, if a city or county, after enactment of the new law, initially levies or increases its business tax rate, fifteen percent of the amount collected (excluding amounts collected from local field audits or related collection efforts) that is attributable to the portion of the rate imposed from zero up to and including the former maximum rate, should be sent by the local collector to the State. 2002 Tenn. Pub. Acts. ch. 856, §9(d). One hundred percent of the collections that are attributable to the portion of the rate above the former maximum rate, should also be sent to the State. *Id.* The remaining amount collected would be kept by the cities and counties.

For example, suppose that before the effective date of the 2002 Act, the maximum amount that a city or county could collect from a particular business under its proper business tax classification was \$100. At that time, City X imposed the business tax at one fourth of the maximum rate allowed by State law; the business thus owed \$25 in business taxes to the tax collector for City X. After the 2002 Act became effective, the maximum amount that City X could theoretically collect from the business under the new business tax law would be \$150 (\$100 times the fifty percent increase). Because City X still imposes one fourth of the maximum rate, the business would now owe business taxes of \$37.50 (one fourth of \$150, the new maximum amount allowed). Of that \$37.50, City X should send to the State fifteen percent of the \$25 due under the old law, and all of the \$12.50 increase attributable to the new law. City X should retain the remainder. If the governing body of City X subsequently voted to increase its business tax rate to one half of the maximum rate allowed by State law, City X would then collect from the business in question \$75 (one half of the \$150 maximum) and send to the State fifteen percent of \$50 (the amount it would have collected under the old maximum rate structure had its new percentage levy then been in effect) and one hundred percent of \$25 (the amount of increased revenue directly attributable to the new maximum rate authorized by the 2002 Act). City X would retain the rest for its own purposes.

(3)

Any penalties and interest due on business taxes after the effective date of the 2002 Act are allocated between the State and the localities. Each jurisdiction retains the portion of the penalties and interest attributable to the amount of tax due that jurisdiction. The penalties and interest are allocated in this manner because any penalty or interest due on the State's portion of the business tax would be "directly attributable" to that portion of the tax, and thus allocated to the State under the 2002 Act. 2002 Tenn. Pub. Acts ch. 856, § 9(d).

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