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Opinion No. 03-103

Business Tax — Not Impermissible Double Taxation

QUESTION

Is the business tax impermissible double taxation when both a municipality and the county in which it is located levy the tax at the maximum rate allowed by statute?

OPINION

No, the business tax does not involve impermissible double taxation. First, no issue of double taxation arises if the taxing jurisdiction is not the same. Second, double taxation is not prohibited if the Legislature intended that result. The Business Tax Act is clear that both counties and municipalities have the right to levy their business taxes at the maximum rate.

ANALYSIS

The instant question is whether the business tax constitutes impermissible double taxation. It is clear for several reasons that it does not do so. First, the issue of double taxation does not arise in this context because each county and each municipality in Tennessee is a separate taxing jurisdiction. Double taxation can occur only when the same taxing entity taxes the same property or transaction for the same reason within the same taxing period. *See E & L Transportation Co. v. Ellington*, 212 Tenn. 671, 675-76, 371 S.W.2d 456, 459 (Tenn. 1963)(*quoting* 84 C.J.S. *Taxation* § 39, at 131-32). The State and its counties and municipalities are considered separate taxing entities under the Tennessee Constitution. TENN. CONST. art. II, § 29. So it follows that similar taxes imposed by both a municipality and the county in which it lies are not considered double taxation, even if they are levied on the same property or transaction for the same reason within the same taxing period.

Second, Article II, Section 28 of the Tennessee Constitution expressly authorizes the business tax, through its reference to the Legislature's power to "levy a gross receipts tax on merchants and businesses." It is firmly established in Tennessee law that when the Legislature plainly intends the result, double taxation is not in violation of the Constitution. *Stalcup v. City of Gatlinburg*, 577 S.W.2d 439, 443 (Tenn. 1978); E *& L Transportation Co. v. Ellington, supra*, 212 Tenn. at 675-76, 371 S.W.2d at 458; *Throneberry Properties v. Allen*, 987 S.W.2d 37, 41 (Tenn. 1998); *Oliver v. King*, 612 S.W.2d 152, 153 (Tenn. 1981); *Super Flea Market v. Olsen*, 677 S.W.2d 449, 451-52

(Tenn. 1984). The question of impermissible double taxation therefore may also be answered through an analysis of the legislative intent of the Business Tax Act.

The Business Tax Act comprises Part 7 of Chapter 4 of Title 67 of the Tennessee Code. It is obvious from the structure of that tax that the legislature intended to allow both counties and municipalities to levy that tax simultaneously. Tenn. Code Ann. § 67-4-704 declares, in both subsections (a) and (b), that "the making of sales . . . is declared to be a privilege upon which each county and/or incorporated municipality . . . may levy a privilege tax in an amount not to exceed the rate[s] hereinafter fixed and provided." Moreover, the Legislature expressly declared that the taxes imposed by Part 7 of Chapter 4 "shall be in addition to all other privilege taxes." Both subsections also declare that the levies are "not to exceed the rates hereinafter fixed and provided." *Id.* In *Stalcup v. City of Gatlinburg, supra,* 577 S.W.2d at 443, the Supreme Court recognized that the Legislature had "expressed its intent to allow double taxation by those counties and municipalities which elected to tax under the Business Tax Act and under other constitutionally permissible acts." *See also* Tenn. Dept. of Revenue Letter Ruling No. 01-04.

This legislative intent is manifest from many portions of the Business Tax Act. Tenn. Code Ann. § 67-4-715(a) states that tax payments and returns are to be submitted "to counties *and* cities" by "transmit[ting] to the county clerk, in the case of taxes owed to the county, *and* to the city official . . ., in the case of taxes owed to a municipality . . . ." (emphasis added). The same wording is used in Tenn. Code Ann. § 67-4-721(b), in describing the appropriate office from which a receipt must be produced by a former business owner for a successor or similarly situated person, to prove that the taxes, interest, and penalties owed have been paid. Tenn. Code Ann. §§ 67-4-719(b)(2), (c), and (d) also refer to "the county clerk, in the case of taxes owed the county, *and* the proper city tax collector, in cases of taxes owed to a municipality." (emphasis added).

Therefore, it is evident from the Business Tax Act that the Legislature intended to allow both counties and municipalities to levy taxes under its terms at the maximum specified rates. As the Supreme Court has made clear, the Constitution allows double taxation if so intended by the Legislature. And because the county and municipality are separate taxing entities, authorized simultaneously to impose the maximum business tax rates, no issue of double taxation arises in this context at all. Therefore, a municipality and the county in which it is located may each levy the business tax at the maximum statutory rate without running afoul of any prohibition against double taxation.

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