S T A T E O F T E N N E S S E E
OFFICE OF THE
ATTORNEY GENERAL
PO BOX 20207
NASHVILLE, TENNESSEE 37202

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Opinion No. 04-027

Constitutionality of S.B. 2074/H.B. 2146, Authorizing Coffee County to Levy a Privilege Tax on "Large Events"

QUESTION

Is S.B. 2074/H.B. 2146, authorizing Coffee County to levy a privilege tax on persons who attend a "large event," constitutional?

OPINION

Yes. It is the opinion of this Office that the Legislature, by private act such as that proposed through S.B. 2074/H.B. 2146, may authorize Coffee County to levy a privilege tax on those who attend a large event. The experience of Coffee County with such events, as recited in the preamble to the bill, affords a reasonable basis for the Legislature to distinguish Coffee from other counties in this regard. It would be advisable, however, to define a "large event" by more objective standards, since the bill as presently written could be too vague for enforcement under certain circumstances.

ANALYSIS

S.B. 2074/H.B. 2146 would, through the mechanism of a private act, authorize Coffee County to levy a privilege tax on persons attending a large event. The tax, which could be imposed by the County Commission, would equal five percent of the price of admission to the large event and would be collected by the county trustee from the operator of such an event. The bill defines a "large event" as "any commercial endeavor where admission is charged and more than fifty thousand (50,000) persons are expected to attend within a continuous seven-day period in Coffee County."

While the bill places the incidence of the tax on the consumer attending a large event, it would be collected by the operator of the event and remitted by him to the county trustee. The operation of the tax thus closely resembles that of the sales tax on amusements which is imposed by Tenn. Code Ann. § 67-6-212 on a statewide basis and which may include a county component through the local option sales tax provisions. *See* Tenn. Code Ann. §§ 67-6-701 *et seq.* While the incidence of the sales tax is clearly on the vendor, *see Beare Co. v. Olsen*, 711 S.W.2d 603 (Tenn.

1986); *Reimann v. Huddleston*, 883 S.W.2d 135 (Tenn. Ct. App. 1993), in practical effect this tax would operate much like the sales tax.

Because the proposed private act allows Coffee County to impose a different and higher tax on certain amusements than is otherwise authorized by general law, it must be measured against the standard of Article XI, §8 of the Tennessee Constitution. *Polk County v. Rogers*, 85 S.W.3d 781 (Tenn. Ct. App. 2002); *Nolichuckey Sand Co. v. Huddleston*, 896 S.W.2d 782 (Tenn. Ct. App. 1994); Op. Tenn. Atty. Gen. No. 03-134 (Oct. 8, 2003); Op. Tenn. Atty. Gen. No. 96-032 (Apr. 10, 1996). That section provides:

> 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.

This guarantee resembles the Equal Protection Clause of the Fourteenth Amendment of the federal Constitution. These provisions foster general laws. But they do not require things that are different to be treated the same. The courts have determined that a statutory exception to a general law is valid if the Legislature could have had a reasonable basis for treating the objects of the exception differently from the general run of things. *See State v. Tester*, 879 S.W.2d 823, 828 (Tenn. 1994); *City of Memphis v. International Bhd. of Elec. Workers Union Local 1288*, 545 S.W.2d 98, 102 (Tenn. 1976); *King-Bradwall Partnership v. Johnson Controls, Inc.*, 865 S.W.2d 18, 21 (Tenn. Ct. App. 1993); *Town of Huntsville v. Duncan*, 15 S.W.3d 468, 472 (Tenn. Ct. App. 2000). The Supreme Court articulated these principles in *Doe v. Norris*, 751 S.W.2d 834, 840-42 (Tenn. 1988), as follows:

> The concept of equal protection espoused by the federal and our state constitutions guarantees that "all persons similarly circumstanced shall be treated alike." Conversely, things which are different in fact or opinion are not required by either constitution to be treated the same. "The initial discretion to determine what is 'different' and what is 'the same' resides in the legislatures of the States," and legislatures are given considerable latitude in determining what groups are different and what groups are the same. *Id*. In most instances the judicial inquiry into the legislative choice is limited to ***whether the classifications have a reasonable relationship to a legitimate interest***. (emphasis added)

Consequently, legislation containing particular classifications is not in violation 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)(emphasis added); *Nolichuckey Sand Co.*, *supra*, 896 S.W.2d at 789. Indeed, 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). Moreover, it is not necessary that the reasons for the classification appear on the face of the legislation. *Id*. at 442. Rather, if "***any*** possible reason can be conceived to justify the classification, it will be upheld and deemed reasonable." *Id.* (emphasis added); *see also Knoxtenn Theatres v. McCanless*, 177 Tenn. 497, 151 S.W.2d 164 (1941).

It is particularly well-established that challenges to tax statutes are determined under the rational basis test. *Brentwood Liquors Corp. v. Fox*, 496 S.W.2d 454, 457 (Tenn. 1973); *City of Tullahoma v. Bedford County*, 936 S.W.2d 408, 412 (Tenn. 1997); *Stalcup, supra*, 577 S.W.2d at 443; *Nolichuckey, supra*, 896 S.W.2d at 789. As "the right to tax is essential to the existence of government, and is particularly a matter for the Legislature," a plaintiff seeking to challenge the constitutionality of a Tennessee revenue statute "bears a heavy burden." *Id.*, 896 S.W.2d at 788 (*quoting Vertrees v. State Board of Elections*, 141 Tenn. 645, 214 S.W. 737, 740)(1919)). Accordingly, in reviewing the proposed tax, the courts would consider whether there is a reasonable basis for imposing such a tax in Coffee but not other counties. The bill designates Coffee County by name, so the courts would be obliged to consider any features of that county that afford a rational distinction from other counties.

While we are not limited to reasons apparent on the face of the legislation, in this instance the bill carries a preamble that explains why such a tax is particularly appropriate for Coffee County:

> WHEREAS, Coffee County, Tennessee has in recent years been the venue of large events which attract thousands of individuals; and
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> WHEREAS, the influx of thousands of individuals to Coffee County, Tennessee, that attend such events has placed an increased burden on the Coffee County local inhabitants to provide law enforcement, traffic control, first aid and ambulance services out of proportion to the needs of the local citizenry; and
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> WHEREAS, at least a portion of the expenses of this greater service burden should be born by individuals for whose use and protection the needed services are provided.

It is the opinion of this Office that these reasons are more than enough to justify the tax. In addition to the Legislature's proposed finding, it is common knowledge that in recent years Coffee County has been the site of large events that obviously burden local government in many respects. Moreover, the events that have occurred in Coffee County seem to have placed a much greater demand on the resources of that county than have large events in other counties. As the bill recites, the large events in Coffee County have produced unusual, and to some degree unique, demands on the county for traffic control, law enforcement, first aid, sanitation, and ambulance services. This is related to the fact that the events in Coffee County have been outdoor concerts held on premises without permanent facilities appropriate for such large events, and they have attracted crowds of

individuals who spend several nights with minimal accommodations. Many features of the events in Coffee County could be emphasized to distinguish the burden they have placed on that county from the impact of other large but more staid events in other non-urban counties.

Consequently, it is the opinion of this Office that there is a rational basis for the Legislature to authorize a special tax on large events in Coffee County. Such a tax falls squarely within the line of cases upholding special local taxes in smaller communities that sustain the impact of multitudes of visitors. *See Stalcup, supra*, 577 S.W.2d 439 (upholding special Gatlinburg business tax because of overwhelming impact of tourism on that city); *Polk County, supra,* 85 S.W.3d 781 (upholding special tax on sale of rafting tickets in Polk County because of tremendous influx of whitewater enthusiasts on the Ocoee River). Accordingly, this Office believes that the proposed legislation passes the rational basis test under Article XI, § 8 and would be upheld by the courts.

This Office is constrained, however, to observe that administrative difficulties could arise in applying the bill's definition of a "large event," and that these difficulties under certain circumstances could raise constitutional concerns. The bill defines a "large event" as one where more than 50,000 people "are expected to attend." This leaves open the question of whose expectations determine the application of the tax and when those expectations become operative. For example, how does the county trustee know that an event has met this standard? If a new event is being planned and the organizer cannot accurately predict the attendance, does he collect the tax? What if initial expectations of a large turnout diminish before anyone arrives but after many tickets have been sold?

A law that delegates basic policy matters to its enforcers may be "void for vagueness." *Grayned v. City of Rockford*, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972). Such an imprecise law encourages arbitrary and discriminatory enforcement. *See Crites v. Smith*, 826 S.W.2d 459, 473 (Tenn. Ct. App. 1991)(Koch, J., concurring in part and dissenting in part); *Tennessee Department of Health v. Boyle*, 2002 Tenn. App. LEXIS 894 (Dec. 19, 2002). "A tax law in particular 'must prescribe a standard sufficiently definite to be understandable to the average person who desires to comply with it.'" *State Board of Equalization v. Wirick*, 93 Cal. App. 4th 411, 420, 112 Cal. Rptr. 2d 919 (2001). The question is whether the law "gives fair notice of the tax collection and reporting requirements and provides reasonably adequate standards to guide enforcement." *Patel v. City of Gilroy*, 97 Cal. App. 4th 483, 486, 118 Cal. Rptr. 2d 354 (2002).

In this instance, this concern is alleviated to a considerable degree by the proposed act's delegation of broad rulemaking authority to the county trustee. Section 4 declares that "[t]he county trustee may promulgate reasonable rules and regulations for the enforcement and collection of such tax, shall prescribe any necessary forms, and may, by regulations, set other reporting and paying dates and periods." While it is unusual for a county trustee to have such extensive rulemaking powers, it is certainly within the Legislature's power to accord such powers to him. But the bill is

so unclear about the manner in which expectations of attendance trigger the tax that due process concerns are not entirely ameliorated.

Certainly the proposed act would not be vague in all of its applications. It would appear to apply without question to events such as those that have occurred in Coffee County in recent years. In a facial vagueness challenge, the challenger must demonstrate vagueness in all of the law's applications, not just some instances of uncertainty or ambiguity. *Evangelatos v. Superior Court*, 44 Cal. 3d 1188, 1201, 246 Cal. Rptr. 629, 753 P.2d 585 (1988). So this proposed act, in its immediate application, would appear to be valid. But a situation could arise in which its application would be so uncertain that due process would prevent its enforcement. Of course, this potential problem could easily be remedied by insertion into the bill of definite and objectively ascertainable standards for a "large event."

In sum, this Office believes that existing Tennessee precedents firmly establish that the Legislature may authorize Coffee County to levy a privilege tax on large events through a private act. This Office recommends, however, that more definite and objective standards be written into the proposed law so that operators and attendees at a "large event," as well as the county trustee, will be able readily to discern when the tax applies.

PAUL G. SUMMERS
Attorney General

MICHAEL E. MOORE
Solicitor General

CHARLES L. LEWIS
Deputy Attorney General

Requested by:

The Honorable Phillip E. Pinion
State Representative
24 Legislative Plaza
Nashville, TN 37243-0177