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Opinion No. 04-154

Occupations Subject to Professional Privilege Tax

QUESTION

Does the Professional Privilege Tax levied pursuant to Tenn. Code Ann. § 67-4-1702 violate the due process or equal protection provisions of the United States or Tennessee constitutions by including within the tax's scope audiologists and speech pathologists while excluding more highly paid healthcare professionals?

OPINION

No. In enacting the Professional Privilege Tax, the Legislature had broad discretion to determine which classes of professionals to include within the tax's scope. The tax does not violate due process or equal protection principles simply because certain professionals excluded from the tax's application may on average earn more than other classes of professionals to whom the tax applies.

ANALYSIS

This Office has previously opined that the Professional Privilege Tax does not violate due process or equal protection principles simply because it includes within its application certain licensed professions while omitting others. In reaching this conclusion, we reasoned that

> [t]he general rule concerning tax laws is that the Legislature has very broad powers in raising revenues, and the courts will not interfere if any good reason conceivably justifies a classification. *See Shields v. Williams*, 159 Tenn. 349, 19 S.W.2d 261 (1929). The Legislature has wide discretion in the selection and classification of the subjects of taxation, and its choices will be upheld so long as they are reasonable and bear a valid relation to the subject of the statute. No valid constitutional objection to a tax is stated because it exempts from taxation, or is not made applicable to, particular classes of individuals. *See Lawrence v. MacFarland*, 209 Tenn. 376, 354 S.W.2d 78 (1962). The right to select the measure and subject of

> taxation lies within the discretion of the Legislature; in passing upon its enactments, courts do not assume that the Legislature intentionally passed an invalid act. *See Bank of Commerce & Trust Co. v. Senter*, 149 Tenn. 569, 260 S.W. 144 (1923). Indeed, the Legislature may decide that certain privileges or activities should be taxable rather than others that might seem to be equally desirable objects of taxation, and this decision is purely one of legislative discretion, so long as no invidious discrimination is evident.
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> Under these guiding principles, it is clear that the General Assembly acted well within its powers in selecting the objects of taxation under Chapter No. 529 [of the Public Acts of 1992]. Each of the vocations subject to tax by Section 8 [of the Act] is a more or less lucrative occupation in which the State has evidenced a particular interest and need to regulate. While other desirable objects of taxation might be suggested, the Legislature is not required to exhaust its power to designate privileges in order to tax certain enumerated ones.
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> Therefore, it is the opinion of this Office that imposition of the taxes levied by Chapter No. 529 falls well within the power of the General Assembly. The tax is not impermissibly discriminatory within the meaning of the principles of Equal Protection and Due Process embodied in the state and federal constitutions.

Op. Tenn. Att'y Gen. No. 92-48 (July 6, 1992).

In accordance with these principles, the Professional Privilege Tax does not violate due process or equal protection principles simply because it does not apply to certain licensed healthcare professionals who may on average earn more than professionals to whom the tax does apply. As the United States Supreme Court has explained, "[l]egislatures have especially broad latitude in creating classifications and distinctions in tax statutes." *Regan v. Taxation with Representation*, 461 U.S. 540, 547, 103 S. Ct. 1997, 2002, 76 L. Ed. 2d 129 (1983). "Inherent in the power to tax is the power to discriminate in taxation," *Leathers v. Medlock*, 499 U.S. 439, 451, 111 S. Ct. 1438, 1446, 113 L. Ed. 2d 494 (1991). The Legislature may impose different taxes upon different trades and professions without violating principles of equal protection. *See Allied Stores, Inc. v. Bowers*, 358 U.S. 522, 527, 79 S. Ct. 437, 441-42, 3 L. Ed. 2d 480 (1959).

In creating tax classifications, the Legislature "is not required to resort to close distinctions or to maintain a precise, scientific uniformity." *Allied Stores*, 358 U.S. at 527, 79 S. Ct. at 442. There is

> no precise application of the rule of reasonableness of classification, and the rule of equality permits many practical inequalities. And necessarily so. In a classification for governmental purposes there cannot be an exact exclusion or inclusion of persons and things.

Magoun v. Illinois Trust & Sav. Bank, 170 U.S. 283, 296, 18 S. Ct. 594, 599, 42 L. Ed. 1037 (1898) (cited in *State ex rel. Condon v. Maloney*, 108 Tenn. 82, 91, 65 S.W. 871, 873 (1901)).

This Office adheres to the opinion that the Legislature "acted well within its powers in selecting the objects of taxation" under the Professional Privilege Tax. Op. Tenn. Att'y Gen. No. 92-48 (July 6, 1992). Although other healthcare professions might seem to be "equally desirable objections of taxation," the decision to apply the tax to particular classes of individuals, and conversely not to apply the tax to other classes, "is purely one of legislative discretion." *Id.*

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