S T A T E O F T E N N E S S E E
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Opinion No. 06-033

Legality of Amendment to Mineral Severance Tax

QUESTION

If the language "except that no tax shall be due on any sand, gravel, sandstone, chert, and limestone sold for use outside the state of Tennessee" is removed from Tenn. Code Ann. § 67-7-202(b), would this subsection, as amended, violate any federal or state laws and, in particular, the federal Commerce Clause?

OPINION

No, the statute, as amended, would not violate the federal Commerce Clause or any other provision of state or federal law of which this Office is aware.

ANALYSIS

Tenn. Code Ann. § 67-7-201(a) authorizes each county "to levy a tax on all sand, gravel, sandstone, chert and limestone severed from the ground within its jurisdiction." Pursuant to Tenn. Code Ann. § 67-7-202(b), if passed by resolution of the county legislative body, the tax "shall be levied upon the entire production in the county regardless of the place of sale or the fact that delivery may be made outside the county, except that no tax shall be due on any sand, gravel, sandstone, chert and limestone sold for use outside the state of Tennessee." Your request requires this Office to consider the effect of removing this last phrase from Tenn. Code Ann. § 67-7-202(b), *i.e.*, "except that no tax shall be due on any sand, gravel, sandstone, chert and limestone sold for use outside the state of Tennessee."

This Office is aware of no state or federal statute that would be violated by amending Tenn. Code Ann. § 67-7-202(b) as described. Moreover, such an amendment would not violate the federal Commerce Clause under the reasoning set forth by the United States Supreme Court in *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 101 S. Ct. 2946, 69 L. Ed. 2d 884 (1981). There, the Court upheld a Montana statute that imposed a severance tax on each ton of coal mined in the state. The tax applied regardless of whether the coal was consumed within the state or shipped to out-of-state customers. The Court rejected the taxpayers' arguments that this statute violated the federal Commerce Clause, despite the fact that ninety percent of Montana's coal was shipped out

of state. The Court explained that "there is no real discrimination in this case; the tax burden is borne according to the amount of coal consumed and not according to any distinction between in-state and out-of-state consumers." *Commonwealth Edison Co.*, 453 U.S. at 619, 101 S. Ct. at 2954.

As amended, Tenn. Code Ann. § 67-7-202(b) would impose the severance tax based upon "the entire production in the county regardless of the place of sale" or delivery. Like the Montana severance tax, the tax burden would be borne according to the amount of minerals extracted in the taxing jurisdiction, and it would no longer distinguish between minerals destined for out-of-state consumption. Under the Court's rationale in the *Commonwealth Edison Co.* case, such a statutory scheme of taxation would not violate the federal Commerce Clause. The incidence of the tax is on the owner (*i.e.*, the severer) at the time of severance. *See* Tenn. Code Ann. § 67-7-203(b). Although the tax is payable at the time of sale and delivery, thus enabling the owner to defer paying the tax until he actually sells the minerals, the tax is on the severance itself, and not on the sale of the minerals. This severance occurs in Tennessee and depletes the mineral resources of this State. Inasmuch as the tax would apply even-handedly to a purely local event, the Commerce Clause is not implicated by the proposed amendment, even if some of the minerals are destined for out-of-state sale or consumption.

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