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Opinion No. 08-104

Regulatory Takings as Applied to Coal Severance Tax

QUESTION

If the State purchased land from which the mineral rights were severed and in the purchase the State made a representation that it would not jeopardize the value of the mineral rights, but then, at a later point, attempts to tax the mining of the minerals on the property to the point that it is not competitive for the mineral owner to mine the minerals, would that constitute a taking?

OPINION

No. It is the opinion of this Office that inasmuch as the coal severance tax is a privilege tax rather than a property tax and the Legislature possesses broad powers to levy such taxes regardless of the impact on a particular business, the imposition of the coal severance tax under the hypothetical presented in this request would not constitute a taking.

ANALYSIS

You have inquired whether the enforcement of Senate Bill 2671, which would amend the coal severance tax statutes at Tenn. Code Ann. §§ 67-7-101 to 67-7-212, would constitute a compensable taking if the following circumstances obtained: the State purchased surface rights to land from which the mineral rights had been severed and, in the process, the State represented that it would not jeopardize the value of the mineral rights, but then, at a later point, the State attempts to tax the mining of the minerals on the property to the point that it is not competitive for the mineral owner to mine the minerals.[*]

This Office has previously opined that the coal severance tax provided for in Tenn. Code Ann. § 67-7-101, *et seq.* is a privilege tax rather than a property tax and is, therefore, not precluded by the restraints on property tax set forth in Article II, Sections 28 and 30, of the Tennessee Constitution. *See* Op. Tenn. Att'y. Gen. 92-75 (Dec. 29, 1992). That opinion and others have noted

[*]We note that the hypothetical references a "representation" made by the State; however, no written or oral contract has been provided or referenced with the request. Therefore, we do not address in this opinion the import of such a representation.

a long line of Tennessee cases distinguishing an *ad valorem* or property tax from a tax on the privilege of engaging in an activity deemed taxable by the Legislature. For example, in *Seven Springs Water Co. v. Kennedy*, 156 Tenn. 1, 4, 299 S.W. 792 (1927), the Court stated that "while articles manufactured from the produce of this State in the hands of the manufacturer are exempt from taxation, the Constitution does not prohibit the laying of a privilege tax upon the occupation of selling such articles."

The Legislature possesses very broad powers to levy taxes on privileges, and the privileges that are taxable under Article II, Section 28, are not limited to businesses or occupations. *KnoxTenn Theaters v. Dance*, 186 Tenn. 114, 118-20, 208 S.W.2d 536 (1948). In *Hooten v. Carson*, 186 Tenn. 282, 286, 209 S.W.2d 273 (1948), the Tennessee Supreme Court went so far as to make the following pronouncement:

> The power to tax is inherent in the sovereign since it is necessary to the perpetuity of the government. . . . The power to tax privileges is not subject to any constitutional limitation except that the tax levied must not be arbitrary, capricious, or wholly unreasonable.

(citations omitted).

With respect to scrutiny of such taxing power under a takings analysis, the United States Supreme Court has consistently affirmed the almost plenary power of the state to tax its citizens and has declined to use the Fifth Amendment in such a way as to determine when taxes go "too far." In *Pittsburgh v. Alco Parking Corp.*, 417 U.S. 369, 94 S.Ct. 2291, 41 L.Ed.2d 132 (1974), the Court considered a takings challenge to an ordinance that placed a 20% tax on the gross receipts obtained from all transactions involving the parking or storing of automobiles at private nonresidential parking places. But the Court refused to engage in a reasonableness analysis or to hold that the tax denied due process because it rendered a business unprofitable. 94 S.Ct. at 2294. Similarly, in *Magnano Co. v. Hamilton*, 292 U.S. 40, 54 S.Ct. 599, 78 L.Ed. 1109 (1934), the Court sustained against a due process challenge a state excise tax on all butter substitutes sold in the state. While the Court acknowledged that the tax might be so excessive as to put the appellant out of business within the state, it nonetheless held that

> the due process of law clause contained in the Fifth Amendment is not a limitation upon the taxing power conferred upon Congress by the Constitution. . . . And no reason exists for applying a different rule against a state in the case of the Fourteenth Amendment. . . . Nor may a tax within the lawful power of a state be judicially stricken down under the due process clause simply because its enforcement may or will result in restricting or even destroying particular occupations or businesses.

54 S.Ct. at 601 (citations omitted). *See also Alaska Fish Salting & By-Products Co. v. Smith*, 255 U.S. 44, 41 S.Ct. 219, 220, 65 L.Ed. 489 (1921) (sustaining a tax on manufacture of certain fish products against due process challenge). The Court in *Magnano* did note that under rare

circumstances the Due Process Clause might be invoked where the taxing statute is "so arbitrary as to compel the conclusion that it does not involve an exertion of the taxing power, but constitutes . . . the direct exertion of a different and forbidden power, as, for example, the confiscation of property." 54 S.Ct. at 601.

Thus, the Supreme Court has uniformly rejected the premise that a tax may be held invalid or require compensation on the ground that it may result in the destruction of a particular business. It is therefore the opinion of this Office that the imposition of the coal severance tax under the hypothetical presented in this request would not constitute a taking, particularly since Senate Bill 2671 would amend the coal severance tax statutes to create a coal severance fund for the assistance of counties affected by coal mining, reclamation of land and waters damaged, and programs for energy conservation. We cannot infer from this a legislative attempt to exercise a "forbidden power."

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