STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL

July 14, 2015

Opinion No. 15-59

Constitutionality of Tax Credits for Commercial Marina Property Located on Federal Land

Question

Does House Bill 459, as amended, violate the Tennessee Constitution by granting tax credits to owners of commercial marina property located on land owned by the United States Army Corps of Engineers?

Opinion

Yes. As amended, H.B. 459 violates article II, section 28, of the Tennessee Constitution because it relieves owners of commercial marina property located on federal land from their obligation to pay ad valorem taxes.

ANALYSIS

As amended, H.B. 459 would grant a property tax credit to persons or entities that own commercial marina property located on land owned by the U.S. Army Corps of Engineers:

> (a) If a person owns or operates a marina, yacht club, dock, or similar property that is on property owned by the United States army corps of engineers and the property owned by the army corps of engineers is subject to a payment in lieu of tax agreement with the taxing jurisdiction or jurisdictions in which the property lies, then any payments made by such person in satisfaction of the payment in lieu of tax agreement shall be credited by the taxing jurisdiction or jurisdictions against the responsibility of such person for real and personal property taxes with respect to the marina, yacht club, dock, or similar property.

H.B. 459, amend. 1, 109th Gen. Assem. (2015). As indicated by the language of Amendment 1, the property tax credit would be available only if the land owned by the Army Corps of Engineers is subject to a payment-in-lieu-of-tax agreement, and the amount of the credit would be limited to the amount of any in-lieu-of payments made under that agreement. The tax credit would "not exceed one-third (1/3) of the amount of tax due on the [owner's] real and personal property taxes during the 2016, 2017, and 2018 tax years." *Id.* For subsequent tax years, however, the tax credit would "be a credit in full." *Id.*

"It is a fundamental rule that all property shall be taxed and bear its just share of the cost of government, and no property shall escape this common burden, unless it has been duly exempted

by organic or statute law." *City of Nashville v. State Bd. of Equalization*, 360 S.W.2d 458, 461 (Tenn. 1962). Consistent with this rule, the Tennessee Constitution subjects "[a]ll property, real, personal or mixed" to taxation and provides that "[t]he ratio of assessment to value of property in each class or subclass shall be equal and uniform throughout the State." Tenn. Const. art. II, § 28. Although the General Assembly has the authority to establish the manner in which "the value and definition of property in each class or subclass [is] to be ascertained," the constitutional requirement of uniform taxation requires that the property within each class or subclass be treated alike. *Id.*

The exceptions to the rule of uniform taxation are limited. Article II, section 28, of the Tennessee Constitution authorizes certain property tax exemptions for property owned by state and local governments, property held and used for purely religious, charitable, scientific, literary, or educational purposes, and residential property owned by elderly and disabled taxpayers. Tenn. Const. art. II, § 28. Additionally, the Supremacy Clause of the United States Constitution, *see* U.S. Const. art. 6, § 2, prohibits Tennessee and other states from taxing property owned by the federal government or institutions of the federal government. *M'Culloch v. Maryland*, 17 U.S. 316, 360-62 (1819).

When a taxpayer uses its own property to operate a for-profit business on federal land, however, the Supremacy Clause is inapplicable, and the state or local government is free to tax that property just as it does the property of any other commercial taxpayer. *See, e.g., Lin-Wood Dev. Corp. v. Town of Lincoln*, 378 A.2d 741, 742 (N.H. 1977). "[T]he federal government's constitutional immunity from state taxation is not infringed when a state imposes a tax" on private entities that are "using the property in connection with their own commercial activities for profit-making." *Mesa Verde Co. v. Montezuma County Bd. of Equalization*, 898 P.2d 1, 9 (Colo. 1995).

In accordance with the foregoing authorities, a person or entity that owns commercial marina property is constitutionally required to pay local property taxes on that property even if it is located on land owned by the Army Corps of Engineers. Although the Tennessee Constitution permits exemptions for certain types of property, it does not authorize the General Assembly to pass laws that effectively exempt the property of commercial marina operators or any other business owners. *See* Tenn. Att'y Gen. Op. 13-11 (Feb. 13, 2013) (opining that the Tennessee Constitution requires that commercial properties "be assessed in the same manner as other business properties across the state"). As amended, H.B. 459 impermissibly attempts to relieve certain entities that operate commercial marinas on federal land of their obligation to pay their proper share of local property taxes in violation of article II, section 28. Regardless of whether the tax benefit is described as an exemption or a credit, it has the same effect of reducing the commercial marina operator's property tax liability to local governments.

This constitutional infirmity cannot be cured by the local governments' receipt of in-lieu-of-tax payments on behalf of the federal government. As recognized by the language of H.B. 459, any payments made pursuant to an in-lieu-of-tax agreement relate to the property that is owned by the Army Corps of Engineers.[1] Property owned by the Army Corps of Engineers is separate and

[1] The language of H.B. 459 is confusing in that it provides that "any payments made by *such person* in satisfaction of the payment in lieu of tax agreement shall be credited . . . against the responsibility of *such person* for real and personal property taxes with respect to the marina, yacht club, dock, or similar property." This language suggests that the

distinct from the commercial property that is owned by the marina operator and that is used to conduct its business. That commercial property is subject to ad valorem taxation just like any other commercial property within the taxing jurisdiction.

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marina owner, and not the Army Corps of Engineers, is making the in-lieu-of-tax payments when, in fact, in-lieu-of-tax payments are generally made voluntarily by the federal government since it cannot be subjected to state or local taxes. In any event, any in-lieu-of-tax payments relate to the Army Corps of Engineers' property, and they cannot be used to offset the property taxes that are due on the marina owner's property.