Taxation -- Business Tax -- Occupational License Tax

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Subject:
Taxation -- Business Tax -- Occupational License Tax

Mr. Mitchell A. Bierman
Weiss, Serota, Helfman, Pastoriza,
Cole, & Boniske, P.L.
200 East Broward Boulevard, Suite 1900
Fort Lauderdale, Florida 33301

RE: TAXATION – BUSINESS TAX – OCCUPATIONAL LICENSE TAX – MUNICIPALITIES – authority of municipality to increase rate of occupational license tax. ss. 205.0315, 205.043, 205.0535, Fla. Stat.; Art. VII, s. 9, Fla. Const.

Dear Mr. Bierman:

As Village Attorney for the Village of Pinecrest, you have asked for my opinion on substantially the following questions:

In light of sections 205.0315 and 205.0535, Florida Statutes, is the Village of Pinecrest authorized to:

1. Increase its business tax rates by up to 5% every other year upon no less than a majority plus one vote of the Village Council?

2. Increase its business tax rates pursuant to the authority set forth in section 205.043(1)(b), Florida Statutes?[1]

In sum:

1. The Village of Pinecrest is not authorized to increase its business tax rates by up to 5% every other year upon no less than a majority plus one vote of the Village Council as it does not appear that the village has complied with the requirements of section 205.0535, Florida Statutes, which would provide the village with the authority to make revisions to its business tax ordinance.

2. Section 205.043, Florida Statutes, provides an alternative scheme for the levy of a business tax. The Village of Pinecrest has implemented the procedure in sections 205.0315 and 205.0535, Florida Statutes, and may not rely on section 205.043(1)(b), Florida Statutes, as authority to revisit its business tax ordinance.

Question One

The Village of Pinecrest, Florida, was established as a municipal corporation and the village charter was adopted by the electors of the village on March 12, 1996. On May 6, 1997, the village adopted a local business tax ordinance pursuant to section 205.0315, Florida Statutes. That statute provides:

"Beginning October 1, 1995, a county or municipality that has not adopted a business tax ordinance or resolution may adopt a business tax ordinance. The business tax rate structure and classifications in the adopted ordinance must be reasonable and based upon the rate structure and classifications prescribed in ordinances adopted by adjacent local governments that have implemented s. 205.0535. If no adjacent local government has implemented s. 205.0535, or if the governing body of the county or municipality finds that the rate structures or classifications of adjacent local governments are unreasonable, the rate structure or classifications prescribed in its ordinance may be based upon those prescribed in ordinances adopted by local governments that have implemented s. 205.0535 in counties or municipalities that have a comparable population."

The business tax ordinance adopted by the Village of Pinecrest relied on a rate structure and business classifications adopted by an adjacent local government as provided in section 205.0315, Florida Statutes. The village has not adopted a single business tax rate increase since the ordinance was adopted in 1997. You ask whether, in light of the time limitations and requirements of section 205.0535, Florida Statutes, the Village of Pinecrest is now authorized to increase the business tax rates set forth in its ordinance.

The authority of a municipality to impose a tax is derived from Article VII, section 9, Florida Constitution.[2] While section 166.021, Florida Statutes, secures the broad exercise of home rule powers for municipalities granted by Article VIII, section 2(b), Florida Constitution, municipalities possess no home rule powers to levy taxes.[3] Thus, a municipality must be able to point to constitutional or statutory authority to exercise the taxing power. In exercising its taxing power, a municipality is limited to that authority expressly, or by necessary implication, conferred.[4] Thus, as a general rule, "a municipality . . . has no inherent power to exempt from taxation property which it is authorized by statute or charter to tax, since, with some exceptions, delegation of power to tax does not include power to exempt from taxation or power to remit or compromise taxes . . . ."[5]

Section 205.0535(1), Florida Statutes, states that "[b]y October 1, 2008, any municipality that has adopted by ordinance a local business tax after October 1, 1995, may by ordinance reclassify businesses, professions, and occupations and may establish new rate structures, if the conditions specified in subsections (2) and (3) are met." Subsection (2) requires the establishment of an equity study commission to recommend a classification system and rate structure for local occupational license taxes prior to adoption of the ordinance. Subsection (3) sets parameters for the new license tax in terms of the amount that may be imposed and the maximum amount of revenue that may be generated. The intention of the Legislature in adopting section 205.0535, Florida Statutes, was to provide local governments with an opportunity to revise their occupational license tax ordinances by a time certain and the continued opportunity to undertake a limited revision every other year thereafter.[6] According to information you have provided to this office, it does not appear that the village acted by October 1, 2008, to establish new rate structures or otherwise comply with the conditions specified in the statute.

Section 205.0535(4), Florida Statutes, recognizes that changes may occur and necessitate the reconsideration of such ordinances:

"After the conditions specified in subsections (2) and (3) are met, municipalities and counties may, every other year thereafter, increase or decrease by ordinance the rates of business taxes by up to 5 percent. However, an increase must be enacted by at least a majority plus one vote of the governing body."

Thus, the statutory scheme authorizes the increase or decrease of rates of business taxes by a maximum of five percent and a complete repeal of any business tax imposed pursuant to Chapter 205, Florida Statutes. However, the statute limits any such consideration to "every other year thereafter," compliance with the time limit of October 1, 2008, and the conditions specified in subsections (2) and (3).

Where the Legislature has directed how a thing shall be done, it effectively operates as a prohibition against its being done in any other manner.[7] The Legislature has provided specific directions to local governments regarding occupational license tax rate revisions in section 205.0535(4), Florida Statutes. Nothing in that section authorizes a municipality to revisit a validly enacted rate structure ordinance prior to its scheduled biennial review or to make upward or downward adjustments to individual classifications in excess of five percent.

You suggest that the fact that the adjacent local government upon whose business tax ordinance the Village of Pinecrest modeled its ordinance *has* complied with the requirements of section 205.0535, Florida Statutes, that is, the other jurisdiction satisfied the equity study commission and maximum rate and revenue requirements of subsections (2) and (3) of section 205.0535, Florida Statutes, that the Village of Pinecrest is authorized to likewise revisit its business tax ordinance based on this other jurisdiction's compliance. Nothing in the statute appears to authorize this type of piggybacking. As discussed above, in matters of taxation, a municipality is limited to that authority expressly, or by necessary implication, conferred.

Therefore, it is my opinion that the Village of Pinecrest is not authorized to increase its business tax rates by up to 5% every other year upon no less than a majority plus one vote of the Village Council as it does not appear that the village has complied with the requirements of section 205.0535, Florida Statutes, which would provide the village with the authority to make revisions to its business tax ordinance.

Question Two

You have also asked whether the Village of Pinecrest may rely on section 205.043(1)(b), Florida Statutes, to revisit its business tax ordinance.

Section 205.043(1), Florida Statutes, provides conditions for the levy of a business tax by municipalities:

"(1) The following conditions are imposed on the authority of a municipal governing body to levy a business tax:
(a) The tax must be based upon reasonable classifications and must be uniform throughout any

class.
(b) *Unless the municipality implements s. 205.0535 or adopts a new business tax ordinance under s. 205.0315*, a business tax levied under this subsection may not exceed the rate in effect in the municipality for the year beginning October 1, 1971; however, beginning October 1, 1980, the municipal governing body may increase business taxes authorized by this chapter. The amount of the increase above the tax rate levied on October 1, 1971, for taxes levied at a flat rate may be up to 100 percent for business taxes that are $100 or less; 50 percent for business taxes that are between $101 and $300; and 25 percent for business taxes that are more than $300. Beginning October 1, 1982, an increase may not exceed 25 percent for taxes levied at graduated or per unit rates. Authority to increase business taxes does not apply to receipts or licenses granted to any utility franchised by the municipality for which a franchise fee is paid." (e.s.)

It is clear that the provisions of section 205.043(1)(b), Florida Statutes, do not apply in cases where a municipality has implemented section 205.0535, Florida Statutes, or adopted a new business tax ordinance under section 205.0315, Florida Statutes. The information you have supplied this office reflects that the business tax ordinance adopted by the Village of Pinecrest relied on a rate structure and business classifications adopted by an adjacent local government as provided in section 205.0315, Florida Statutes. The adjacent local government implemented section 205.0535, Florida Statutes. Thus, the plain language of the statute would preclude the Village of Pinecrest from utilizing the provisions of section 205.043(1)(b), Florida Statutes, to increase business taxes authorized in Chapter 205, Florida Statutes.

In sum, it is my opinion that section 205.043, Florida Statutes, provides an alternative scheme for the levy of a business tax. The Village of Pinecrest has implemented the procedure in sections 205.0315 and 205.0535, Florida Statutes, and, therefore, is precluded from relying on section 205.043(1)(b), Florida Statutes, as authority to revisit its business tax ordinance.

Sincerely,

Pam Bondi
Attorney General

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[1] Based on my response to your other questions you have also asked whether there may be any existing authority for the Village to ever increase its business tax rates by any amount. This office issues opinions in response to specific legal questions and does not provide legal research services.

[2] Article VII, s. 9(a), Fla. Const., provides:

"Counties, school districts, and municipalities shall, and special districts may, be authorized by law to levy ad valorem taxes and may be authorized by general law to levy other taxes, for their respective purposes, except ad valorem taxes on intangible personal property and taxes prohibited by this constitution."

[3] *See, e.g.,* Ops. Att'y Gen. Fla. 00-01 (2000) (city may not exempt business from occupational license requirement except as provided in Ch. 205, Fla. Stat.); 90-23 (1990) (city may not provide for rebate of ad valorem taxes collected on newly annexed property, in absence of constitutional or statutory authority allowing such action); 80-87 (1980); and 79-26 (1979) (municipality has no home rule powers with respect to levy of excise or non-ad valorem taxes and exemptions therefrom, as all such taxing power must be authorized by general law).

[4] *See* Op. Att'y Gen. Fla. 79-26 (1979).

[5] 16 McQuillin Municipal Corporations s. 44.65 (3rd rev. ed. 1994), p. 243. *See also* Op. Att'y Gen Fla. 99-72 (1999) (city or county has no home rule power to levy taxes or provide exemptions therefrom).

[6] *See* Florida Senate Staff Analysis and Economic Impact Statement on SB 364, dated March 4, 1993. *Cf.* Op. Att'y Gen Fla. 95-46 (1995), discussing the amendment of municipal occupational license tax ordinances; Op. Att'y Gen. Fla. 96-83 (1996).

[7] *See, e.g., Alsop v. Pierce*, 19 So. 2d 799, 805-806 (Fla. 1944); *Dobbs v. Sea Isle Hotel*, 56 So. 2d 341, 342 (Fla. 1952); *Thayer v. State*, 335 So. 2d 815, 817 (Fla. 1976).