Local business tax revision

Number: INFORMAL

Date: July 11, 2018

Ms. Jacqueline M. Kovilaritch
City Attorney
City of St. Petersburg
Post Office Box 2842
St. Petersburg, Florida 33731-7608

Dear Ms. Kovilaritch:

We are in receipt of your letter on behalf of the City of St. Petersburg City Council requesting an opinion about the City's authority under section 205.0535(1), Florida Statutes (2018), to enact a new or revised rate structure for its business tax. Attorney General Bondi has asked me to respond to your inquiry.

Based upon the facts outlined in your letter, section 205.0535 does not authorize the City to reclassify the businesses, professions, and occupations subject to its local business tax, nor may it eliminate particular classifications within the business tax or establish a new rate structure. The City may reduce a tax rate only if the new rate is uniform within the tax classification.

Factual Background:

St. Petersburg adopted a business tax ordinance in 1994. You state that the City would like to revisit the business tax on vehicles for hire, which is required to be paid on a per-vehicle basis at a rate of $65. You point out that in 2017, the Legislature enacted section 627.748, Florida Statutes, which expressly preempts regulation of transportation network companies, which are entities that use a digital network to connect riders to drivers of vehicles that are not taxis, vehicles for hire, etc. The law prohibits local governments from levying a business tax against such companies.[1] The City would like to change its business tax ordinance to take into account "emerging technologies and business models."

The City enacted its 1994 local business tax ordinance pursuant to an equity study conducted in compliance with section 205.0535. That law, created in 1993,[2] provided in subsection (1), in part:

"(1) By October 1, 1995, any municipality or county 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."

Subsections (2) and (3) required the municipality or county to prepare an equity study recommending "a classification system and rate structure for business taxes." The local government had the discretion to then adopt the recommendations in a business tax ordinance by majority vote of the governing body, with certain specified limitations.

Subsection (4) authorized a process of subsequent biennial review of tax rates:

“(4) After the conditions specified in subsections (2) and (3) are met, municipalities and counties may, every other year thereafter, increase by ordinance the rates of local occupational taxes by up to 5 percent. The increase, however, may not be enacted by less than a majority plus one vote of the governing body.”

In 2007, the Legislature amended section 205.0535(1),[3] changing the dates as follows:

“(1) *By 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.”

(Emphasis added.)

Can the City change its classifications and rate structure?

St. Petersburg did not adopt a local business tax between October 1, 1995, and October 1, 2008, thus, cannot reclassify and establish a new rate structure under this provision. The only exception to the limitation in subsection (1) is found in section 205.0315, Florida Statutes (2018), which allows a local government that had not adopted a business tax prior to October 1, 1995, to enact a business tax ordinance based upon that of an adjacent or comparable local government that had properly implemented section 205.0535. This cannot apply to St. Petersburg, however, because the provision only authorizes a new tax first adopted after 1995, whereas St. Petersburg had adopted its tax in 1994.[4]

Therefore, under section 205.0535(1), the Legislature has provided no authority to the City at this time to amend its existing local business tax; to enact a new ordinance to reclassify the businesses, professions, and occupations subject to its 1994 tax; or to revise the tax structure therein.[5] Nothing in the statute precludes the City from performing a new equity study if it so chooses, but neither a new study nor the City’s 1994 study can provide the basis for enacting a new reclassification and rate structure ordinance outside the statutory time frames. “When the controlling law directs how a thing shall be done that is, in effect, a prohibition against its being done in any other way.”[6]

Can the City eliminate or reduce the tax on certain occupational classifications?

You also ask whether subsection 205.0535(5) would allow St. Petersburg to eliminate a particular tax, such as the tax on vehicles for hire/public vehicles. Subsection (5) provides:

“(5) This chapter does not prohibit a municipality or county from decreasing or repealing any business tax authorized under this chapter. By majority vote, the governing body of a county or municipality may adopt an ordinance *repealing a local business tax or establishing new rates that decrease local business taxes* and do not result in an increase in local business taxes for a taxpayer. Such ordinances are not subject to subsections (2) and (3).”[7]

(Emphasis added.)

Subsection (5) does not authorize the action you propose. Eliminating the tax on a single business, profession, or occupation would constitute a tax exemption, which the municipality is not authorized to do. In Attorney General Opinion 2010-41, this office concluded that an amendment to a local business tax so that it no longer applied to certain individuals or entities, constituted the establishment of a tax exemption that is not authorized in chapter 205:[8]

"[M]unicipalities have been granted the authority to levy local business taxes for the privilege of engaging in or managing businesses, professions, or occupations within their jurisdictions. Several exemptions and partial exemptions are enumerated in Chapter 205, Florida Statutes, and, as this office has consistently found, absent a specific statutory exemption from the local business tax, a municipality or county may not create new exemptions."

(Footnotes omitted.)

It does appear, however, that the provision in subsection (5) authorizing a municipality to "establish new rates that decrease local business taxes" would allow the City to decrease the tax applicable to a particular tax classification. Chapter 205 does not contain a definition of "rate," but "tax rate" is defined in Black's Law Dictionary as "a mathematical figure for calculating a tax, usually expressed as a percentage."[9] Thus, the *amount* of a tax, or the percentage used to determine the amount, that is charged to a business, profession, or occupation may be changed if the new rate reduces the tax owed. Any such rate reduction, however, would still have to comply with section 205.043, Florida Statutes (2018), which provides, in part:

"(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.*"

(Emphasis added.) "Classification" in chapter 205 refers to the size or type of a business or group of businesses.[10] So the City may reduce a tax rate, so long as such rate applies uniformly within the entire class to which the rate applies.

It is therefore my opinion that section 205.0535 does not authorize the City of St. Petersburg to reclassify the businesses, professions, and occupations within its local business tax, or to revise its rate structure. The City may reduce a tax rate so long as such rate is uniform within the tax classification.

Sincerely,

Ellen B. Gwynn
Senior Assistant Attorney General

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[1] Section 627.748(15), Fla. Stat. (2018).

[2] Ch. 93-180, Laws of Fla. This office discussed the procedures enacted in this law in Op. Att'y Gen. Fla. 1995-46.

[3] Ch. 2007-97, Laws of Fla.

[4] "Beginning October 1, 1995, a county or municipality *that has not adopted a business tax ordinance* or resolution may adopt a business tax ordinance." Section 205.0315, Fla. Stat. (2018) (emphasis added). *See* Ops. Att'y Gen. Fla. 1996-83 (Putnam County enacted a local business tax in 1982, thus, could not adopt a new tax in 1996 under § 205.0315); 2003-51 (Nassau County enacted a local business tax in 1972, and thus did not fall within the scope of § 205.0315).

[5] *See* Senate Professional Staff Analysis and Economic Impact Statement on CS/SB 656, p. 3, dated March 8, 2007, Florida Senate, explaining that the bill (incorporated into CS/SB 1178 [Ch. 2007-97, Laws of Fla.]) "amends s. 205.0535, F.S., to allow a municipality that adopted a local business tax ordinance on or after October 1, 1995, to reclassify businesses, professions, and occupations and to establish new rate structures before October 1, 2008, if certain conditions are met." *See also* Op. Att'y Gen. Fla. 2002-81 (the City of Satellite Beach, which adopted a local business tax prior to October 1, 1995, pursuant to § 205.0535, was not statutorily authorized to create new classifications in a subsequent biennial review).

[6] *Alsop v. Pierce*, 19 So. 2d 799, 805-06 (Fla. 1944). *See also Sun Coast Int'l Inc. v. Dep't of Bus. Reg.*, 596 So. 2d 1118, 1121 (Fla. 1st DCA 1992).

[7] Section 205.0535(5) consists of language the Legislature added in Ch. 2007-97, § 2, and 2014-38, § 7, Laws of Fla.

[8] *See also* Op. Att'y Gen. Fla. 2002-25.

[9] *Black's Law Dictionary* (10th ed. 2014). In *City of Tallahassee v. Mann*, 411 So. 2d 162, 163 (Fla. 1981), the Florida Supreme Court discussed the distinction between "rate" and "rate structure" when determining the jurisdiction of the Public Service Commission. Section 366.04(1), Fla. Stat., authorizes the Commission "to regulate and supervise each public utility with respect to its *rates* and service[,]" but does not give the Commission the power to change a utility's *rate structure*. (Emphasis added.) The Court stated that "rate" refers to "the dollar amount charged for a particular service or an established amount of consumption[,] " and "rate structure" to "the classification system used in justifying different rates." *See also Polk County v. Fla. Public Serv. Comm'n*, 460 So. 2d 370, 372 (Fla. 1984). This distinction appears to correspond to the Legislature's use of the terms "rate" and "rate structure" in subsections 205.0535(1) and (5), respectively.

[10] Section 205.022(3), Fla. Stat. (2018), defines "classification" as "the method by which a business or group of businesses is identified by size or type, or both."