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May 21, 1981

Honorable Thomas M. Teague
Senate Chairman
Taxation Committee
State House
Augusta, Maine 04333

Honorable Bonnie Post
House Chairman
Taxation Committee
State House
Augusta, Maine 04333

Dear Senator Teague and Representative Post:

I am writing in response to your letter of May 7, 1981 in which you asked, on behalf of the Taxation Committee, several questions about the attached draft legislation. The legislation contemplates several amendments to the Tree Growth Tax Law, 36 M.R.S.A. § 571, et seq.; it also proposes an excise tax payable by certain forest landowners whose forest land is classified, for property tax purposes, under the Tree Growth Tax Law. The key question presented is whether the excise tax described in section 9 of the attached draft is valid. It is our opinion that it is not.

Excise taxes are generally described as taxes on an activity or event, or the exercise of a specific right in property, or on a corporate privilege granted to an entity. Hellerstein, J. & Hellerstein, W., State and Local Taxation, p. 29 (4th ed. 1978). See also, Opinion of the Justices, Me., 335 A.2d 904 (1975). Their validity has been upheld under the Equal Protection Clause when the State proceeded on a rational basis in establishing the class of taxpayers with the result that all taxpayers of the same class (or size) were taxed in the same manner. See, State Board of Tax Commissioners of Indiana v. Jackson, 283 U.S. 527 (1931); Fox v. Standard Oil of New Jersey, 294 U.S. 87 (1934); Stewart Dry Goods v. Lewis, 294 U.S. 550 (1935); Great Atlantic & Pacific Tea Company v. Grosjean, 301 U.S. 412 (1937).

In our view, the fundamental problem with the tax set forth in section 9 of the draft is that it chooses as its subject an improper "privilege" upon which to base an excise tax. The findings recited in section 9 describe an economic privilege granted to all persons owning 100 acres or more of forest land classified, for property tax valuation purposes, under the Tree Growth Tax Law. According to the bill, the favorable property tax treatment afforded by Tree Growth classifications results in the promotion of the "continued presence of the forest products industry" and the preservation and enhancement of "the landowner's market for his forest resource." Stated differently, the "economic privilege" granted to these forest landowners is the guarantee of low property taxes resulting from the method used to value forest land, pursuant to the Tree Growth Tax Law. The "privilege" of paying low property taxes is not a proper subject upon which to base an excise tax because it does not relate to the granting of or exercise of a property right held by the taxpayer. Rather, the "privilege" is simply the result of a legislatively created tax scheme. Ironically, if the excise tax rates are set high enough, the taxpayer would enjoy none of the economic benefits that are deemed to be the very justification for the imposition of the excise tax.

We are also concerned that the imposition of this excise tax could be viewed as an attempt to circumvent the valuation requirements of art. IX, § 8 of the Maine Constitution. That provision permits the Legislature to value forest land in accordance with its fair market value or its current use value. The Legislature must select one of these two methods. Given the distinct possibility that the proposed tax would be viewed as a property tax,[1/] the scheme would be defective since it would not be based on either of the constitutionally authorized methods of valuation. The result would be a property tax apportioned in a manner prohibited by art. IX, § 8.

1/ Although the tax in question is called an excise tax, it is expressly declared to be assessed on property and its subject is the privilege of paying low property taxes. The draft legislation contains express language having strong property tax connotations. This tends to destroy the "excise" nature of the tax. For example, the language of proposed 36 M.R.S.A. § 578-A(1) and (5) describes a property tax since the tax is said to be assessed on the property itself. The class of taxpayers consists of a group of landowners whose forest lands are valued under a particular property tax valuation scheme. The revenues of the tax are earmarked to alleviate a property tax "tax shift" problem caused by that property tax valuation scheme. Finally, the legislative findings accompanying the proposed excise tax suggest that the tax is designed to recover the economic benefits the landowners derive from the Tree Growth valuation scheme.

It appears that an excise tax could properly be imposed on the privilege of engaging in commercial forestry. See Opinion of the Justices, Me., 335 A.2d 904 (1975). We do not believe, however, that this tax can be justified on that ground. The class of taxpayers subject to the tax must be such that all similarly situated taxpayers are taxed. By its terms, the proposed tax reaches only those landowners who own 100 acres or more of land classified under the Tree Growth Tax Law. The tax does not reach those landowners engaged in commercial forestry who have elected 2/ not to avail themselves of the benefits of the Tree Growth Tax law. For this tax scheme to pass scrutiny under the Equal Protection Clause, it must not be designed in a manner likely to exclude a significant segment of the persons enjoying the privilege to be taxed. The problem with the proposed tax is that it unreasonably excludes an important group of taxpayers engaged in commercial forestry -- those owning 100 to 499 acres of forest land not classified under the Tree Growth Tax Law.

In closing, we would note that there may be a more direct remedy to the problem which apparently prompted this bill. The bill's findings indicate that the Tree Growth Tax Law provides a benefit to the owners of forest land, apart from a lower tax rate, by enhancing the market for forest products and that it is this benefit which the bill seeks to tax. More specifically, the relevant language of the proposed 36 M.R.S.A. § 578-A(1) reads as follows:

> ". . . [T]he Legislature finds that the Tree Growth Tax Law benefits landowners beyond the application of current use valuations and a uniform scheme of taxation since it promotes the continued presence of the forest products industry and thereby preserves and enhances the landowner's market for his forest resource. The Legislature further finds that the benefits of adequate markets provided by the Tree Growth Tax Law expand proportionately with the size of a landowner's parcel. . . ."

Implicit in the above language is the conclusion that valuations under the Tree Growth Tax Law do not adequately reflect the improved market conditions which the law produces.

2/ Based upon the information available to us, we have reason to believe that a substantial number of landowners fall within this group.

If our understanding of the proposed findings is correct, it would appear that the problem could be remedied within the scope of the Tree Growth Tax Law. We see no reason why the market for forest products could not be considered in determining the current use valuation of woodlands.[3/] Put more simply, the problem seems to be that the property is undervalued even when based on its current use. If that is the case, one approach would be to insure, either legislatively or administratively, that the valuation adequately reflects the market for the products.[4/] This approach would avoid the legal problems connected with an excise tax.

Sincerely,

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Attorney General

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3/ This point may be more easily understood in the context of a private real estate transaction. If one assumed that a parcel of timberland or woodland were legally restricted to the current use, the market for forest products would certainly influence the value of the parcel in the eyes of a prospective purchaser. For the same reason, it is a legitimate factor in determining the valuation for property tax purposes.

4/ To the extent that larger parcels receive a disproportionate benefit from a readily available market, that could be reflected in the valuation of those parcels.

Committee Amendment " " to H.P. 801, L.D. 955, Bill, "An Act to Amend the Maine Tree Growth Tax Law."

Amend the Bill by striking out everything after the enacting clause and inserting in its place the following:

Sec. 1. 36 MRSA § 574, as amended by PL 1973, c. 308, § 3 is further amended by adding at the end a new paragraph to read:

A parcel of land shall be included if it exceeds 500 acres or upon presentation by the landowner of evidence that the land is being used as follows:

A. A sworn statement from the landowner establishing that the landowner is engaged in the business of selling or processing forest products and that the land is used in such business; or

B. A sworn statement from the landowner that the land has been inspected by a registered professional forester within the past 5 years and that the landowner is following the recommendations of that forester; or

C. A written forest management plan for commercial use of the land, accompanied by a sworn statement from the landowner that he is following that plan; or

more than 10 but

D. The land is less than 100 acres and the landowner is managing the land according to accepted forestry practices designed to produce trees having commercial value.

Sec. 2. 36 MRSA § 576, first ¶, as last amended by PL 1977, c. 549, § 2, is further amended to read:

The State Tax Assessor shall determine the average annual net wood production rate for each forest type described in section 573, subsections 5

to 7, in each county or region to be used in determining valuations applicable to forest land under this subchapter, on the basis of the surveys of average annual growth rates applicable in the State made from time to time by the United States Forest Service or by the Maine Forestry Bureau. ~~The growth rate surveys shall be reduced by a percentage discount factor determined by the State Tax Assessor pursuant to section 576-B to reflect the growth which can be extracted on a sustained basis~~ The rates shall be determined after passage of this subchapter, and when determined shall remain in effect without change for each county through the property tax year ending March 31, 1975. In 1974 and in every 10th year thereafter, the State Tax Assessor shall review and set ~~such~~ the rates for the following 10-year period in the same manner.

Sec. 3. 36 MRSA § 576, 2nd ¶, as enacted by PL 1971, c. 616, § 8, is amended to read:

The State Tax Assessor shall determine the average stumpage value for each forest type described in section 573, subsections 5 to 7, applicable in each county, or in such alternative forest economic regions as he may designate, after passage of this subchapter and in each ~~even-numbered~~ year thereafter, taking into consideration the prices upon sales of sound standing timber of that forest type in that area during the previous 2 calendar ~~years~~ year, and such other considerations as he deems appropriate.

Sec. 4. 36 MRSA § 576, 6th ¶, as amended by PL 1977, c. 694, § 678, is further amended to read:

The State Tax Assessor shall hold one or more public hearings, upon the foregoing matter to be determined, shall provide for a transcript thereof, and shall issue a rule or rules stating ~~said~~ the determinations on or before October 1, 1978 and on or before October 1st ~~biennially~~ each year thereafter.

Sec. 5. 36 MRSA § 576-B, first ¶, as last amended by PL 1977, c. 694, § 681, is repealed as follows:

~~By February 1, 1978 and every 4th year thereafter, the State Tax Assessor shall determine and prescribe by rule the percentage factor by which the growth rates set by him pursuant to section 576 shall be reduced to reflect the growth which can be extracted on a sustained basis. In determining the percentage factor, the State Tax Assessor shall rely on evidence of current wood market conditions, current technological developments and other considerations relating to the extractability of wood from forest lands on a sustained yield basis.~~

Sec. 6. 36 MRSA § 576-B, 3rd ¶, as amended by PL 1977, c. 694, § 684, is further amended to read:

The State Tax Assessor shall hold one or more public hearings, concerning his determination of the ~~discount factor and the~~ capitalization rate in November of each year preceding the date of his determinations. A transcript shall be made of the proceedings.

Sec. 7. 36 MRSA § 576-B, 6th and 7th ¶¶, as enacted by PL 1977, c. 590, are repealed as follows:

~~The discount factor and capitalizations rate determined by February 1, 1978, shall be utilized in redetermining the 100% valuation per acre for each forest type for each county for tax year 1978. All average annual gross wood production rates and average stumpage values previously determined for tax years 1977 and 1978 shall also be used to redetermine the 100% valuation per acre for each forest type for each county for tax years 1978.~~

~~The 100% valuation per acre for each forest type for each county for tax-~~

~~year-1978-shall-be-deposited-in-the-office-of-the-Secretary-of-State-by March-1,-1978,-and-shall-be-transmitted-to-the-municipal-assessors-of-each municipality-on-or-before-April-1,-1978~~

Sec. 8. 36 MRSA § 578, sub-§ 1, as last amended by PL 1977, c. 720, § 3, is repealed and the following enacted in its place:

The municipal assessors or chief assessor of a primary assessing area shall adjust the State Tax Assessor's 100% valuation per acre for each forest type of their county or region by whatever ratio, or percentage of current just value, is then being applied to other property within the municipality to obtain the assessed values. Forest land in the organized areas, subject to taxation under this subchapter, shall be taxed at the property tax rate applicable to other property in the municipality, which rate shall be applied to the assessed values so determined. For any tax year, beginning on or after January 1, 1981, in which a municipality's aggregate tax assessed on lands classified under this subchapter is less than the aggregate tax that could have been assessed, but for this subchapter, on the same lands if the lands were assessed according to the undeveloped acreage used in the state valuation then in effect, adjusted by the municipal ratio, the municipality shall have a valid claim against the State to recover 100% of the taxes lost, with adjustments for any state school subsidies that may be affected by changes in municipal valuations caused by the use of undeveloped acreage valuation. In any year when the equalization fund provided in section 578-A in combination with general fund appropriations is insufficient to reimburse municipalities for 100% of the taxes lost under this section, the State Tax Assessor shall within available funding establish a percentage of the total property tax levy above which municipalities shall be reimbursed 100% of taxes lost. The Treasurer

of State shall pay to the municipality by December 15th each year the amount certified by the State Tax Assessor.

Sec. 9. 36 MRSA § 578-A, is enacted to read:

§ 578-A. Tax shift equalization fund

1. Finding. In as much as it is the declared purpose of the State of Maine to tax all forest lands according to their productivity thereby encouraging their operation on a sustained yield basis and protecting the State's unique economic and recreational resource, the Legislature finds that the Tree Growth Tax Law benefits landowners beyond the application of current use valuations and a uniform scheme of taxation since it promotes the continued presence of the forest products industry and thereby preserves and enhances the landowner's market for his forest resource. The Legislature further finds that the benefits of adequate markets provided by the Tree Growth Tax Law expand proportionately with the size of a landowner's parcel classified under this subchapter. Therefore, an annual excise tax is levied on parcels classified under this subchapter for this economic privilege granted to such landowners.

2. Equalization fund. A landowner of any parcel of forest land classified under this subchapter shall be subject to an annual excise tax as follows:

A. The landowner who owns a parcel or parcels in a given taxing jurisdiction that cumulatively equal more than 100 acres but less than 500 acres shall pay $ w;

B. The landowner who owns a parcel or parcels in a given taxing jurisdiction that cumulatively equal more than 499 acres but less than 1,000 acres shall pay $ x;

C. The landowner who owns a parcel or parcels in a given taxing

jurisdiction that cumulatively equal more than 999 acres but less than 2,000 acres shall pay $ y;

D. The landowner who owns a parcel or parcels in a given taxing jurisdiction that cumulatively equal more than 1,999 acres shall pay $ z and $ zz for each 1,000 acres exceeding a cumulative total of 2,999 acres.

The tax shall be assessed and billed by the State Tax Assessor on the effective date of this section for 1981 and on or before April 1 thereafter. In cases of divided ownership of the forest land, the persons owning or claiming timber rights in such forest land shall be subject to such taxes.

Moneys raised pursuant to this tax shall be credited to the equalization fund and shall be distributed as provided in section 578. Any unexpended balance shall be non lapsing.

3. Due date. The tax is due 60 days after the effective date of this section for 1981 and on June 30th of the year in which it is assessed thereafter. Notice of the taxes shall be presumed complete upon mailing.

4. Interest and penalty. Any tax assess under this section which is not paid when due shall accrue interest at the rate of 1½% for each month, or fraction thereof, that the tax remains unpaid and a penalty equal to 20% of the unpaid tax shall be added to the liability of any person who fails to pay a tax when due.

5. Lien. There shall be a tax lien on all land subject to taxation under this subchapter to secure the payment of all sums due hereunder, and the lien may be enforced in the manner provided by Title 36, section 1282 and 1283.

6. Collection by Attorney General. Whenever any person fails to pay any

tax, interest and penalty due under this section within the time provided, the Attorney General shall enforce payment by civil action against the person from whom it is due for the amount of such tax, interest and penalty, together with costs, in either the Superior or District Court in Kennebec County or in the judicial division in which the person has a residence or established place of business.