

MAINE STATE LEGISLATURE

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STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
STATE HOUSE STATION 6
AUGUSTA, MAINE 04333

November 9, 1985

Governor Joseph E. Brennan
Executive Department
State House Station #1
Augusta, ME 04333

Dear Governor Brennan:

You have requested an opinion of this Office concerning the constitutionality of L.D. 1661 (112th Leg. 1985) entitled "AN ACT Establishing a Commercial Forestry Excise Tax and Providing an Appropriation for Refunding Maine Forest Fire Suppression Taxes Paid" (the "Act"). In particular, you have sought an opinion whether the proposed statute which creates an excise tax would likely be sustained by the Law Court in light of its recent opinion in Eastler v. State Tax Assessor, No. 3844 (Me. Oct. 16, 1985). For reasons to be set forth below, it is the opinion of this office that the proposed statute imposes a constitutionally valid excise tax on commercial forestry enterprise and would likely be sustained as an appropriate tax if it were challenged.

In Eastler the Law Court held that the Forest Fire Suppression Tax was a property tax rather than an excise tax; because that tax was not apportioned or assessed according to the value of the land, the tax violated Art. IX, section 8 of the Maine Constitution. Id. Thus, the issue to be addressed in this opinion is whether the proposed tax is a property tax or an excise tax.

In the Act, the proposed tax is denominated an excise tax to be levied on the privilege of utilizing forest land in the business of producing commercial forest products. L.D. 1661, Section 2; and Statement of Fact (112th Legis. 1985). The owners of such commercially utilized forest land are liable for

this tax. "Commercial forest land" is defined to be land classified or which would be eligible for classification as forest land pursuant to the Tree Growth Tax Law, 36 M.R.S.A. §§ 571-583 (1978 and Supp. 1985-86). Such a definition would exclude those types of land unsuitable for growing commercially valuable forest products. Further, the Act specifically excludes from its definition forest lands which would be commercially valuable sources of forest products but for the existence of legally enforceable restrictions upon their commercial utilization. Finally, single parcels of up to 100 acres of commercially valuable forest land harvested by their owners for personal, noncommercial use are excluded from the definition whether or not classified under the Tree Growth Tax Law. There is, in addition, a general 500 acre exemption for each owner of commercial forest land based upon holdings throughout the State.

The tax is apportioned among forest land owners based upon taxable acreage of commercial forest land. The amount of tax to be assessed and collected for the first year is \$9.77 million; in subsequent years the amount to be assessed and collected will be one-half the General Fund appropriation for forest fire suppression with various adjustments not relevant to this opinion. The enforcement of this tax is accomplished by the lien and collection procedures currently available for collection of State income taxes. 36 M.R.S.A. §§ 5311-5322 (1978 and Supp. 1985-86). Such procedures closely resemble similar procedures under the State's sales and use tax law.

Generally speaking, the Maine Constitution contains no limitation on the legislative imposition of taxes on business, State v. Stinson Canning Co., 161 Me. 320, 325, 211 A.2d 553, 556 (1965), if the tax is for a public purpose and is assessed uniformly upon all business of a like kind. State v. Western Union Telegraph Company, 73 Me. 518, 526-27, 531 (1982). The present statute clearly serves a public purpose--the State's need for revenue to meet State obligations as well as to fund, in part, forest fire protection for Maine's most important economic resource, its forests. The tax does not seem susceptible of challenge on the basis that it is not uniformly imposed. All persons owning land utilized for harvesting or production of commercial forest products are subject to this tax.

An excise tax may be levied only upon a use of a property or an exercise of a particular power over property incidental to its ownership. Bromley v. McCaughn, 280 U.S. 124, 136 (1929); State v. Western Union Telegraph Company, 73 Me. at 526. An excise tax may, for example, be levied on the

privilege of conducting a business or franchise, the right to inherit property, or the right to make a gift of property. A property tax is levied on the mere ownership of property. Dawson v. Kentucky Distilleries & Warehouse Co., 255 U.S. 288, 294 (1921). In order to determine the proper legal characterization of a tax, it is necessary to determine what is, in fact, the subject of the tax. As an aid to this determination, the method of taxation (e.g. the manner of the tax calculation or its method of enforcement) may provide significant but not conclusive evidence of the character of the tax. Eastler, Slip Op. at 8-9.

In the present case, there is no doubt that the subject matter of the tax is the use of land for commercial forest enterprises. The proposed statute explicitly provides that it is a tax imposed "upon the privilege of using one's land in commercial forestry enterprise in this State." Proposed 36 M.R.S.A. § 2720, L.D. 1661 (112th Leg. 1985). The commercial focus of the proposed tax is made clear by the definition of "commercial forest land" which provides, in pertinent part, as follows:

"Commercial forest land" means land which is classified or which would be eligible for classification as forest land pursuant to the Tree Growth Tax Law, chapter 105, subchapter II-A . . . Proposed 36 M.R.S.A. § 2723(2).

A specific statutory precondition to classification of forest land under the Tree Growth Tax Law is sworn statement from the landowner that the landowner is engaged in the business of selling or processing forest products and that the land is being used in this business. 36 M.R.S.A. § 574(1) (1978 and Supp. 1985-86). The definition in the Act, of course, encompasses all such forest land whether or not classified under the Tree Growth Tax Law.

The commercial focus is made all the clearer by virtue of the exclusions of specific types of nonforest land as well as any forest land which may be the subject of legally enforceable restrictions on its use for production of forest products even though such land is or might be classified as forest land under the Tree Growth Tax Law. Further, the use by the owner of a single parcel of 100 acres or less for personal needs further limits the present tax to truly commercial enterprises.

It is significant that a cross-reference to the definition of "forest land" under the Tree Growth Tax Law contained in the Spruce Budworm Tax, 36 M.R.S.A. §§ 2701-2706 (1978) had the legal effect of assisting in identifying the subject matter of that tax as commercial forestry. Opinion of the Justices, 335 A.2d 904, 912 (Me. 1975). It is noteworthy that the Spruce Budworm Tax, unlike the proposed tax, failed to identify expressly the privilege upon which an excise tax was being imposed. Nevertheless, the cross-reference to the Tree Growth Tax Law contained in the earlier Spruce Budworm Tax was perhaps the most significant factor in aid of the court's determination that the subject matter of that tax was commercial-forestry appropriate to the imposition of an excise tax.

The proposed tax has two attributes which, it may be argued, are suggestive of a property tax: (1) the tax is measured by the amount of property owned by a taxpayer, and (2) the proposed legislation does not provide for a dedication of the tax revenues raised by this tax. This Office does not believe that these attributes taken separately or together alter the conclusion that the focus of the present tax is the commercial use of forest land and not mere ownership of land. An excise tax levied on commercial business enterprise is often measured by the amount of property in taxpayer's hands. Eastler, Slip. Op. at 10; and see Western Union, 73 Me. at 531. Here, the amount of commercially used land is treated by the Legislature as a rough approximation of the value of an owner's business; it is that business which is being taxed. See id.

The fact that the Legislature has chosen not to dedicate the revenue to be assessed and collected under this tax is not very significant in view of the fact that the amount of the tax to be collected after the first year is based upon one-half the projected cost of forest fire protection for the State. Dedication of tax revenues from some excise taxes may be explained by the fact that unlike the proposed excise tax, specific revenue goals are not set for such taxes. See, e.g., 36 M.R.S.A. § 4571 (1978 and Supp. 1985-86) (Potato Tax); 36 M.R.S.A. § 4699 (1978 and Supp. 1985-86) (Sardine Tax); 36 M.R.S.A. § 4311-A (1978 and Supp. 1985-86) (Blueberry Tax). The possibility that the State's projected cost for forest fire suppression services may exceed expenditures in one year is tempered by the likelihood that actual costs in another year will exceed such a projection and must be defrayed by other sources of general fund revenues. Importantly, dedication of revenues from otherwise legal excise taxes has not been held to

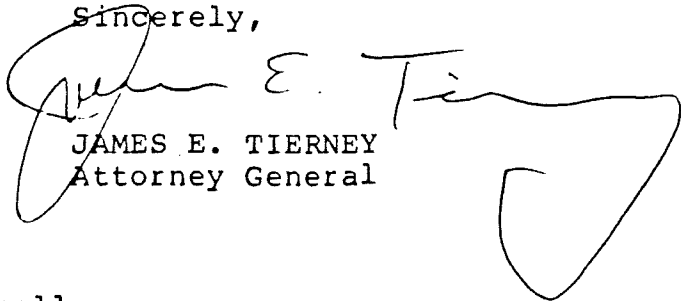
be a legal requirement for such a tax. See, e.g. 36 M.R.S.A. § 2683 (Telephone & Telegraph Companies); 36 M.R.S.A. § 2623 (Railroad Companies); and cf. Eastler, Slip Op. at 14.

It should also be noted that the proposed tax, unlike the tax held to be unconstitutional in the Eastler case, is not enforced through a direct lien upon real estate as is the case with property taxes in this State. Enforcement of the proposed tax is accomplished through the same lien and collection procedures as are used under the State's income tax laws.

On balance, it is the opinion of this Office that the Commercial Forestry Excise Tax, if enacted, would constitute an excise tax upon commercial forestry enterprise and would therefore be found constitutional if challenged.

I hope the foregoing answers your request. Please feel free to reinquire if further clarification is necessary.

Sincerely,

A large, stylized handwritten signature in black ink, appearing to read "James E. Tierney". The signature is written over the typed name and title.

JAMES E. TIERNEY
Attorney General

JET:sw

cc: Senator Donald R. Twitchell
Representative John A. Cashman
Representative John E. Masterman