

Opinion 12-01

OPINION OF: GARY K. KING Attorney General

January 9, 2012

TO: The Honorable Eleanor Chávez, New Mexico State Representative, 1307 del Mastro SW, Albuquerque, New Mexico, 87121

BY: Sally Malavé, Assistant Attorney General

QUESTION:

Would granting amnesty to a seller, pursuant to Section 402 of the multi-state Streamlined Sales and Use Tax Agreement (“SSUTA”), for gross receipts taxes owed on sales made in New Mexico during the period the seller was not registered in the state violate the New Mexico Constitution?

CONCLUSION:

Yes. Granting amnesty to a seller for gross receipts tax liability incurred during the twelve-month period preceding the state’s participation in the SSUTA would amount to a subsidy of the seller’s business, in violation of the anti-donation clause of Article IX, Section 14 of the Constitution of New Mexico (the “Anti-donation Clause”) and Article IV, Section 32, which prohibits the diminution or extinguishment of an obligation already incurred and owed to the state.

ANALYSIS:

Section 402 of the SSUTA, titled “Amnesty for Registration,” provides, in pertinent part:

A member state shall provide amnesty for uncollected or unpaid sales or use tax to a seller who registers to pay or collect and remit applicable sales or use tax on sales made to purchasers in the state in accordance with the terms of the Agreement, provided that the seller was not so registered in the state in the twelve-month period preceding the effective date of the state’s participation in the Agreement.

See SSUTA, <http://www.streamlinedsalestax.org/uploads/downloads/Archive/SSUTA/SSUTA%20As%20Amended%2005-19-11.pdf> (as amended through May 19, 2011).

Once New Mexico signs on to participate as a full or joint member of the SSUTA, Section 402 requires the state, in essence, to extinguish certain tax obligations owed to the state by newly registered sellers.

Section 402 implicates two provisions of the state constitution. The first is the Anti-donation Clause, which provides in pertinent part:

Neither the state nor any county, school district or municipality, except as otherwise provided in this constitution, shall directly or indirectly lend or pledge its credit or make any donation to or in aid of any person, association or public or private corporation....

N.M. Const. art. IX, § 14. Generally, the Anti-donation Clause prohibits the use of public funds to benefit private organizations. The state may not confer something of value to a private entity or individual without receiving something of value in return. See Village of Deming v. Hosdreg Co., 62 N.M. 18, 28 (1956) (unconstitutional allocation occurs when a gift, donation, allocation or appropriation of something of value, without consideration, is given to a person, association or corporation).

The second pertinent constitutional provision is Article IV, Section 32, which applies whenever a private party proposes or a public entity considers extinguishing an obligation owed to a public entity. Article IV, Section 32 states, in relevant part:

No obligation or liability of any person, association or corporation held or owned by or owing to the state . . . shall ever be exchanged, transferred, remitted, released, postponed or in any way diminished by the legislature, nor shall any such obligation or liability be extinguished except by payment thereof into the treasury or by proper proceeding in court.

This provision clearly prohibits the release or diminishment, by statute or otherwise, of those obligations or liabilities already accrued to the state “except by proper payment thereof....” State ex rel. Public Employees Retirement Association v. Longacre, 2002-NMSC-033, ¶ 11, 133 N.M. 20, 24. Unless a good faith dispute exists as to the amount of indebtedness or liability, the state cannot compromise the amount owed to it. See N.M. Att’y Gen. Op. No. 71-16 (1971).

In light of these constitutional provisions, the New Mexico Supreme Court has concluded that legislative enactments that diminish or extinguish an obligation owed to the state are unconstitutional. In Chronis v. State ex rel. Rodriguez, 100 N.M. 342 (1983), several liquor license holders brought a declaratory judgment action challenging the constitutionality of various provisions of the Liquor Control Act, 1981 N.M. Laws, ch. 39 (the “LCA”). Among these was Section 114 of the LCA that reduced the amount of gross receipts tax owed by liquor license holders during a certain period of adjustment. The trial court ruled the section unconstitutional both under Article IV, Section 32 and Article IX, Section 14 of the New Mexico Constitution. The trial court noted that every dealer in alcoholic beverages owes the state a gross receipts tax that must and should be paid. It further stated that the gross receipts tax on the sales of alcoholic beverages is an obligation that is owed to the state and cannot be excused by the legislature. See Chronis, 100 N.M. at 348. On appeal, the Supreme Court in Chronis agreed with the trial court that Section 114 of the LCA was unconstitutional for the reasons cited by the trial court and stated “the reductions in payments of gross receipts taxes in this case constitutes an unconstitutional subsidy of the liquor industry in violation of” the Anti-donation Clause. *Id.*

The same reasoning applies here. Section 402 of the SSUTA requires the state to provide amnesty to sellers for uncollected or unpaid sales or use taxes, otherwise an obligation already incurred and due to the state, for the twelve-month period preceding the state's participation in the SSUTA and the sellers' registration to collect and pay taxes on sales made in the state. However, like the gross receipts tax on alcoholic beverages contemplated in Chronis, the gross receipts tax on goods and services is an obligation that the New Mexico Constitution prohibits the state from excusing, either through legislation or agreement.

Accordingly, we conclude that, like the reduction in gross receipts tax on alcoholic beverages, providing amnesty for uncollected or unpaid taxes on sales made in the state without adequate consideration would constitute an unconstitutional subsidy of the sellers' businesses in violation of the Anti-donation Clause. We also conclude that extinguishing the amount of taxes owed by granting amnesty to sellers for unpaid sales or use taxes is prohibited by Article IV, Section 32 of the New Mexico Constitution.

GARY K. KING
Attorney General

SALLY MALAVÉ
Assistant Attorney General