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Opinion Committee

The Honorable John Cornyn
Attorney General
Opinion Committee
P. O. Box 12548
Austin, Texas 78711-2548

FILE # ML-40882-99
I.D. # 40882

Dear General Cornyn:

On behalf of the Potter County Commissioners Court and the City of Amarillo, we request an opinion in regard to Chapter 312 of the Texas Tax Code. Our specific question concerns the ten year limit on tax abatement agreements described in §312.204 of the Tax Code.

The underlying facts are as follows. In 1988, the City of Amarillo created a reinvestment zone composed of twenty (20) acres in Potter County, Texas. Subsequently, the City of Amarillo and Potter County entered into separate tax abatement agreements with Jake Diel Construction Machinery, Inc. ("Diel"), a Texas corporation, affecting improvements to be constructed in the reinvestment zone. At that time, the period of a tax abatement agreement could not exceed fifteen (15) years. Acts 1987, 70th Leg., Ch. 191. That period of time was reduced to ten (10) years in 1989. Acts 1989, 71st Leg., ch. 1137, §6.

The significant provisions of the Agreement ("Agreement I") are summarized as follows:

1. The term of Agreement I was five years, commencing on January 1, 1989, renewable for two additional periods of five years upon the satisfaction of certain conditions subsequent, as explained below.

2. Agreement I was conditioned upon Diel employing a certain number of employees at the end of each year the Agreement was in effect.

3. If Diel employed at least 35 persons at the end of the first five-year term, Agreement I could be extended for an additional five year term. Agreement I was extended accordingly, and expired on December 31, 1998.

4. Agreement I further provided that if Diel employed seventy-five (75) people at the end of the second five years, the taxing entity would consider an additional term.

5. In exchange for Diel's compliance with the conditions, Diel received an exemption from ad valorem taxation during the term of Agreement 1 that applied to permanently affixed improvements to the real property in the reinvestment zone.[1]

A copy of Agreement I is attached for your reference.

By instrument executed December 22, 1998, the City of Amarillo entered into a new tax abatement agreement ("Agreement II") with Crony Properties, Ltd., a successor in interest of Diel. Agreement II covers the same reinvestment zone and permanently affixed improvements, and exempts the taxable value of those improvements from ad valorem taxation for a 5-year period beginning January 1, 1999. The preamble of the new agreement provides that the agreement "is for the general purpose of continuing a tax abatement on improvements constructed on the herein-described property." Potter County and other taxing entities entered agreements with the same terms. A copy of Potter County's agreement is attached for your reference.[2]

With these facts in mind, we ask the following questions:

1. Can a subsequent tax abatement be given on property that has already been the subject of a tax abatement for the ten-year period designated in Tax Code § 312.204?

For the purposes of this question, we assume that Diel and Crony are separate legal entities.

We interpret Section 312.204 as limiting a tax abatement on a given property to a ten year period.

The tax exemption in question is derived from the authority of the Texas Constitution:

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[1] It should be noted that it is undisputed that Diel satisfied all of the conditions stated. Compliance by the taxpayer with the terms of the tax abatement agreements is not an issue.

[2] We assume that the Tax Code authorizes a condition subsequent based on employment goals, since the taxing entities, in designating a reinvestment zone, which is the first step in implementing an abatement, must make a finding that the designation contributes to the retention or expansion of primary employment. TEX.TAX CODE ANN §312.202 (a)(6); §312.401(a)(Vernon 1992).

> The legislature by general law may authorize cities, towns, and other taxing units to grant exemptions or other relief from ad valorem taxes on property located in a reinvestment zone for the purpose of encouraging development or redevelopment and improvement of the property.
>
> –TEX.CONST. Art.VIII, § 1-g(a).

The Property Redevelopment and Tax Abatement Act, found in Chapter 312 of the Texas Tax Code, is the legislative enactment that authorizes the agreements in question. The duration limit for agreements under this chapter is found in Section 312.204 (a) of the Tax Code:

> The governing body of a municipality . . . may agree in writing with the owner of taxable real property that is located in a reinvestment zone . . . to exempt from taxation a portion of the value of the real property . . . **for a period not to exceed 10 years . . .**
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> –TEX TAX CODE ANN. § 312.204 (a)(Vernon 1992)(emphasis added).

A subsequent provision states that a tax abatement agreement "may not be modified to extend beyond 10 years from the date of the original agreement." § 312.208(a).

Potter County's abatement of taxes is subject to the same restriction. TEX. TAX CODE ANN. § 312.402 (a)(Vernon Supp. 1999).

The issue is whether the limitation in Section 312.204(a) is a restriction on the duration of a tax abatement agreement, or a statement of the maximum period an abatement may last on a given property. The first interpretation of Section 312.204(a) regards the duration limit as applying only to the authorized term of an individual agreement. A taxing entity under this interpretation could enter into a series of tax abatement agreements involving the same property with the same owner as long as each agreement did not exceed ten years.

A variation of this interpretation construes Section 312.204(a) as limiting a tax abatement for a particular property owner to a term of ten years. Under this reading, subsequent owners of the same taxable property would each be eligible for tax abatement on that property for a period not to exceed ten years.

The third interpretation would allow only one abatement on a given property. In other words, taxable property in a reinvestment zone may be exempted from ad valorem taxation for a period not to exceed ten years. We believe this is the favored interpretation of this provision.

Texas courts have stated that a tax exemption must be strictly constructed. *Hilltop Village, Inc. v. Kerrville Independent School District,* 426 S.W.2d 943 at 948 (Texas 1968). The rationale behind this principle is evident in the Texas Constitution. First, all real property is required to be taxed unless exempted by the Texas Constitution. TEX.CONST. art. VIII, § 1 (b).

Compliance with this provision helps achieve the goal of subjecting all taxpayers equally to taxation, unless greater public good can be achieved.

Second, the Texas Constitution directs that the Legislature may not release any private entity from its obligation to a political subdivision of the State. TEX.CONST. art III, § 55. This provision also addresses the issue of fairness by proscribing a benefit to a private entity at the expense of the public.

All tax exemptions must be strictly construed "since they are the antithesis of equality and uniformity and because they place a greater burden on other taxpaying businesses and individuals." *Bullock v. National Bancshares Corp.*, 584 S.W.2d 268, 271-72 (Tex.1979). If there is any uncertainty in discerning the intent of the exemption that uncertainty is to be resolved in favor of the taxing entity. Id. at footnote 5, page 268. We understand that the purpose of the tax abatement under Chapter 312 is to encourage economic development, and that such abatement is a benefit to the public. A strict reading of Section 312.204 benefits the public by encouraging economic development, but does not offend the requirement that taxation be fairly administered. We therefore interpret Section 312.204(a) of the Tax Code as stating that as of September 1, 1989, a tax abatement pursuant to Chapter 312 on taxable property cannot exceed ten years, without regard to the number of agreements or creation of agreements with subsequent owners.

This reasoning applies regardless of the duration specified in Section 312.204(a). Since the 1989 change to Section 312.204(a) is not retroactive, the abatement in Agreement I could last for fifteen years. A statute is not retroactive unless its language specifically gives it a retroactive effect. TEX.CONST art. 1, § 16; TEX. GOV. CODE ANN. § 311.022 (Vernon 1998). However, based on our assumption that Diel and Crony are separate entities, Agreement II was entered after the change in the law. Therefore, since the authorized term of abatement was expended by Agreement I, there appears to be no authority for the abatement provided by Agreement II.

2. Does the 1989 amendment to Section 312.204(a) reducing tax abatements to ten years prevent the City of Amarillo from honoring a fifteen year total abatement pursuant to Agreement I?

We believe the answer to this question is "no." Agreement I provides "(i)f a total of seventy-five (75) jobs have been created at the end of the second term, the Taxing Entity will consider an additional term not to exceed five (5) years based upon mutually agreeable terms." Agreement I, p. 2, Paragraph 5. This would allow a total period of abatement of fifteen years, which is the term authorized under the former version of Section 312.204(a), and, as noted above, the 1989 amendment should not be given retroactive effect. Id. If our proposed answer to this question is correct, the way may be clear to continue the tax abatement for a period of five years.

Some language in Agreement II suggests that the taxpayer is the same entity as the taxpayer in Agreement I. For example, the preamble to Agreement II states that the agreement is being

entered "for the general purpose of continuing a tax abatement" on improvements in the reinvestment zone. Agreement II also characterizes Diel as a "predecessor in interest" to the taxpayer in the subsequent agreement. There is a possibility that Diel and Crony are in fact the same entity. If this is true, the terms of the two agreements would result in a tax abatement being granted to one entity for a twenty-year period if the second agreement runs its full term. This result is authorized only if Section 312.204(a) is interpreted to limit the duration of a single tax abatement agreement.

If, however, the taxpayers are identical, it may be possible to interpret Agreement II as an extension of Agreement I. Based on our interpretation of Section 312.204(a), Agreement II could only last for an additional five years.

We realize that a full exploration of this matter might require a finding of fact, which your office is not authorized to conduct. Any assistance you can provide on this issue will be appreciated.

We look forward to your opinion on this question. Please let us know if we can provide further information.

Sincerely,

Sonya Letson
Potter County Attorney