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Opinion No. 00-188

Collection of Litigation Tax in Appeals

QUESTIONS

1. How should the Clerk of the Appellate Courts proceed with the collection of state litigation taxes in civil and criminal appeals?

2. If the Clerk of the Appellate Courts changes the method of collecting state litigation taxes in appeals, should the Clerk institute the changes immediately or should the Clerk establish a time certain to implement the new procedure?

3. Is payment of the litigation tax a condition precedent to the appellate court's consideration of an appeal in civil or criminal cases?

4. Is the litigation tax due in appeals of cases which originate in juvenile court?

OPINIONS

1. In most appeals of civil cases, the Clerk of the Appellate Courts is required to collect the litigation tax from the appellant upon the filing of the appeal. In those cases, if the appellant succeeds on appeal and is awarded costs, the Clerk of the Appellate Courts should collect the litigation tax from the appellee when the Clerk collects costs and should reimburse the appellant for the tax.

In appeals of criminal cases where the appellant is the defendant, the Clerk of the Appellate Courts is not authorized to collect a litigation tax.

The foregoing rules apply unless the appellant is a city, a county, or the state of Tennessee. In civil and criminal cases where the appellant is a city, a county, or the state of Tennessee, the Clerk of the Appellate Courts is not authorized to collect a litigation tax from the appellant. In those cases, the Clerk of the Appellate Courts is authorized to collect a litigation tax only if the city, county, or state prevails on appeal. In that event, the Clerk of the Appellate Courts should collect the litigation tax from the appellee upon the appellate court's entry of a judgment against the appellee.

2. If the Clerk of the Appellate Courts currently is not requiring appellants in civil cases to pay the litigation tax at the time they file their appeals, as soon as is practicable, the Clerk of the Appellate Courts should change the Clerk's method of collecting the litigation tax to conform to the procedure set forth in the litigation tax statutes.

3. No. In both civil and criminal appeals, the collection of the litigation tax is not a condition precedent to the appellate court's consideration of the appeal.

4. Yes. Although the juvenile court clerk is not authorized to collect the litigation tax in original proceedings in juvenile court where the court exercises the jurisdiction granted by title 37, chapter 1, the Clerk of the Appellate Courts is required to collect the litigation tax in civil appeals from juvenile court.

ANALYSIS

Your request requires an interpretation of Tennessee's revenue laws as they relate to the collection of litigation taxes in appeals to the appellate courts of this state. Tennessee's general revenue laws levy a privilege tax on litigation in all civil and criminal suits instituted in this state. *See* Tenn. Code Ann. § 67-4-602 (Supp. 2000). The amount of the litigation tax varies depending on the nature of the suit, civil or criminal, and the type of court in which the suit is brought. *See id*. Certain proceedings are exempted from the litigation tax, including "[a]ny hearing before the Tennessee court of the judiciary" and "[a]ny original proceeding in a juvenile court, . . . when such court exercises the jurisdiction granted by title 37, chapter 1." Tenn. Code Ann. § 67-4-604(b) (Supp. 2000).

The statute in question, section 67-4-603, instructs the clerks of the various courts to collect the litigation tax in the following manner:

> (1) Upon the commencement of an original civil action, from the plaintiff, except when such action is brought pursuant to a pauper's oath;
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> (2) Upon a finding of guilt, plea of guilty, or submission to fine in a criminal action, from the defendant;
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> (3) Upon the filing in any civil action of an appeal, or of an appeal in the nature of a writ of error or certiorari, from one court to another, from the appellant;
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> (4) Upon judgment against the defendant in any original civil action brought by a city or county of the state of Tennessee or by the state of Tennessee, from the defendant; or

> (5) Upon judgment or final decree against the appellee in any action on an appeal or on an appeal in the nature of a writ of error or certiorari, where the appellant is a city or county of the state of Tennessee or the state of Tennessee, from the appellee.

Tenn. Code Ann. § 67-4-603(a) (1998). The statute also provides that "[t]he tax imposed by § 67-4-602 shall be paid out of the first moneys collected in each case, and may be collected in the same manner as costs are collected, but the tax imposed by § 67-4-602 shall not be deemed to be costs." Tenn. Code Ann. § 67-4-603(c) (1998). The court clerk is responsible for collecting the litigation tax due and paying it to the Department of Revenue. *See* Tenn. Code Ann. § 67-4-605(a), (b) (1998). If the court clerk fails to perform this responsibility, the litigation tax due "shall be a debt of the clerk," Tenn. Code Ann. § 67-4-605(a)(1) (1998), and the clerk "shall be liable therefor." Tenn. Code Ann. § 67-4-605(b) (1998).

The foregoing statute reveals that, in most civil appeals, the Clerk of the Appellate Courts is required to collect the litigation tax from the appellant when the appellant files the appeal. *See* Tenn. Code Ann. § 67-4-603(a)(3) (1998). If the appellant succeeds on appeal, however, the appellant is entitled to reimbursement by the appellee for any litigation tax incurred. The statute governing the collection of costs in civil cases provides that "[a] successful plaintiff in any civil action shall be reimbursed by the defendant for any litigation tax incurred, in the same manner as are costs." Tenn. Code Ann. § 20-12-102 (1994). This statute refers to "any" civil action and not just an "original" civil action. *Compare* Tenn. Code Ann. § 67-4-603(a)(1) (1998) (requiring payment of litigation tax upon commencement of "original civil action"), *with* Tenn. Code Ann. § 67-4-603(a)(3) (1998) (requiring payment of litigation tax upon filing of appeal in "any civil action"). Under this statute, the successful plaintiff in any civil action, including an appeal of a civil action, is entitled to reimbursement by the unsuccessful defendant for any litigation tax incurred. *See* Tenn. Code Ann. § 20-12-102 (1994). If, as appears appropriate here, the terms "plaintiff" and "defendant" are read broadly to include plaintiffs in error, *i.e.* appellants, and defendants in error, *i.e.* appellees, then this statute authorizes an appellate court to award the litigation tax to the successful appellant when the court awards costs. *See Black's Law Dictionary* 126, 507, 1309 (rev. 4th ed. 1968) (indicating that, when used broadly, the terms "appellant" and "appellee" include, respectively, plaintiffs in error and defendants in error). In that event, the Clerk of the Appellate Courts is required to collect the litigation tax from the unsuccessful appellee when the Clerk collects costs from the appellee, and then the Clerk is required to pay these amounts to the successful appellant. *See* Tenn. Code Ann. §§ 20-12-102, 20-12-141 (1994). This interpretation ensures that the Clerk of the Appellate Courts collects the litigation tax in civil cases in the same manner as do trial court clerks. This interpretation of the cost statute also is consistent with the litigation tax statute, which provides that the litigation tax "shall be paid out of the first moneys collected in each case, and may be collected in the same manner as costs are collected," Tenn. Code Ann. § 67-4-603(c) (1998), and with rule 40 of the Tennessee Rules of Appellate Procedure, governing an appellate court's taxation of costs in a case, which is designed to promote the principle that "all items of cost expended in the prosecution of a proceeding should be recoverable by the successful party." Tenn. R. App. P. 40(c) advisory commission comment.

In contrast to appeals in civil actions, in appeals in criminal actions, the litigation tax statute does not authorize the Clerk of the Appellate Courts to collect a litigation tax from the appellant. In criminal actions, a court clerk is required to collect a litigation tax from the defendant only "[u]pon a finding of guilt, plea of guilty, or submission to fine." Tenn. Code Ann. § 67-4-603(a)(2) (1998); *see also* Op. Tenn. Att'y Gen. 84-179 (observing that litigation tax is collectible in criminal action only against defendant and only upon finding of guilt, plea of guilty, or submission to fine). Although this provision authorizes the collection of a litigation tax from the defendant upon conviction in the trial court, the statute does not authorize the collection of a litigation tax if the defendant elects to appeal the conviction. *See* Op. Tenn. Att'y Gen. 81-430 (observing that § 67-4-603(a) "clearly intends for a criminal case to be subjected to litigation tax only once, not to tax appeals").

The foregoing analysis describes the general rules in appeals in civil and criminal actions; however, an exception to these general rules arises when the appeal is filed by a city, a county, or the state of Tennessee. If the appellant in any action, either civil or criminal, is a city, a county, or the state of Tennessee, then the appellant is not required to pay a litigation tax upon filing the appeal. *See* Tenn. Code Ann. § 67-4-603(a)(5) (1998).[1] In those cases, the Clerk of the Appellate Courts is not authorized to collect a litigation tax unless the appellant prevails on appeal. *See id*. In that event, the Clerk of the Appellate Courts is required to collect a litigation tax from the unsuccessful appellee upon the appellate court's entry of a judgment against the appellee. *See id*. As in other cases requiring the post-judgment collection of a litigation tax, the Clerk of the Appellate Courts should collect the litigation tax in the same manner as the Clerk collects costs. *See* Tenn. Code Ann. § 67-4-603(c) (1998).

1. The statute directs the Clerk of the Appellate Courts, in appeals of civil cases, to collect the litigation tax from the appellant upon the filing of the appeal. *See* Tenn. Code Ann. § 67-4-603(a)(3) (1998). If the appellant succeeds on appeal and is awarded costs, the Clerk of the Appellate Courts should collect the litigation tax from the appellee when the Clerk collects costs and should reimburse the appellant for the tax. *See* Tenn. Code Ann. § 20-12-102 (1994); Tenn. Code Ann. § 67-4-603(c) (1998); Tenn. R. App. P. 40. If the appellant loses the appeal, the appellant remains responsible for payment of the litigation tax and, thus, is not entitled to reimbursement for the tax at the appeal's conclusion.

In contrast, in most appeals of criminal cases, *i.e.* cases where the defendant is the appellant, the statute contains no authorization for the Clerk of the Appellate Courts to collect a litigation tax. The defendant is required to pay the litigation tax if the defendant is convicted in the trial court; however, the defendant is not required to pay a separate litigation tax if the defendant elects to appeal the conviction. *See* Tenn. Code Ann. § 67-4-603(a)(2) (1998); Op. Tenn. Att'y Gen. 81-430.

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[1]Unlike the other provisions of section 67-4-603(a), subsection (a)(5) does not draw a distinction between civil and criminal actions. *See* Tenn. Code Ann. § 67-4-603(a)(5) (1998). The rule set forth in subsection (a)(5) also applies if the appellant is a state official who has been sued in his or her official capacity, inasmuch as "[a]suit against a state official in his official capacity is a 'suit against the state.'" *Cox v. State*, 399 S.W.2d 776, 778 (Tenn. 1965). In such cases, the appellant is not required to pay a litigation tax upon filing the appeal.

In civil or criminal cases where the appellant is a city, a county, or the state of Tennessee, the Clerk of the Appellate Courts is not authorized to collect a litigation tax from the appellant. *See* Tenn. Code Ann. § 67-4-603(a)(5) (1998). In those cases, the Clerk of the Appellate Courts is authorized to collect a litigation tax only if the city, county, or state prevails on appeal. *See id*. In that event, the Clerk of the Appellate Courts is required to collect the litigation tax from the unsuccessful appellee when the appellate court enters a judgment against the appellee. *See id.* This collection logically should occur at the same time the Clerk of the Appellate Court collects costs in the case. *See* Tenn. Code Ann. § 67-4-603(c) (1998).

2. In many cases, the Clerk of the Appellate Courts is neither required nor authorized to collect a litigation tax upon the filing of an appeal. In criminal appeals where the defendant is the appellant, the Clerk of the Appellate Courts is not authorized to collect any litigation tax. *See* Tenn. Code Ann. § 67-4-603(a) (1998). In criminal or civil cases where a city, a county, or the state of Tennessee is the appellant, the state or other governmental entity is not required to pay the litigation tax. *See* Tenn. Code Ann. § 67-4-603(a)(5) (1998). In these cases, a litigation tax is due only if the state or other governmental entity prevails on appeal. *See id.* In that event, the Clerk of the Appellate Courts is required to collect the litigation tax from the appellee upon entry of a judgment against the appellee when the Clerk collects costs. *See id*.; *see also* Tenn. Code Ann. § 67-4-603(c) (1998).

The only time the Clerk of the Appellate Courts is required to collect a litigation tax upon the initiation of an appeal is when a party to a civil action files a notice of appeal, provided the appellant is not a city, a county, or the state of Tennessee. *See* Tenn. Code Ann. § 67-4-603(a)(3), (5) (1998). If the Clerk of the Appellate Courts is not currently following this practice, the Clerk should implement this change in the Clerk's method of collection as soon as is practicable.

3. Although in most appeals of civil actions the Clerk of the Appellate Courts is required to collect the litigation tax from the appellant when the appellant files the appeal, payment of the litigation tax is not necessarily a condition precedent to the appellate court's consideration of an appeal. As noted in your request, as a general rule, an appellant's payment of an appeal bond in civil cases is a condition precedent to the appellate court's consideration of the appeal. This requirement is contained in rule 6 of the Tennessee Rules of Appellate Procedure, which specifically authorizes the appellate courts to dismiss an appeal if the appellant fails to file "a bond for a stay that includes security for the payment of costs on appeal." *See* Tenn. R. App. P. 6 (providing that "[t]he appellate court may issue a show cause order as to why the appeal should not be dismissed for failure to file a bond"). Neither the appellate rules nor the revenue laws, however, contain a similar provision authorizing the dismissal of an appeal if the appellant fails to pay the litigation tax upon filing the appeal.[2] Moreover, the revenue laws make clear that the litigation

[2]The cost statutes provide that "[n]o leading process shall issue from any court without security being given by the party at whose instance the action is brought, for the successful prosecution of the party's action, and, in case of failure, for the payment of court costs and taxes which may be awarded against the party, unless in cases and instances specially excepted." Tenn. Code Ann. § 20-12-120 (Supp. 2000). This provision applies only to the "leading process," which in most cases is the "summons." *See Woods v. World Truck Transfer, Inc.*, No. M1997-00068-COA-R3-

tax "shall not be deemed to be costs." Tenn. Code Ann. § 67-4-603(c) (1998). Under these circumstances, payment of the litigation tax does not appear to be a condition precedent to an appellate court's consideration of a civil appeal.

Payment of a litigation tax likewise does not constitute a condition precedent to an appellate court's consideration of a criminal appeal. In most criminal appeals, where the defendant is the appellant, the Clerk of the Appellate Courts lacks the authority to collect any litigation tax. *See* Tenn. Code Ann. § 67-4-603(a) (1998); Op. Tenn. Att'y Gen. 81-430. In those criminal appeals where the Clerk is authorized to collect the litigation tax, *i.e.* cases in which the state is both the appellant and the prevailing party, the Clerk cannot collect the litigation tax from the unsuccessful appellee/defendant until the appeal's conclusion. *See* Tenn. Code Ann. § 67-4-603(a)(5) (1998).

4. The Clerk of the Appellate Courts is required to collect a litigation tax in appeals of civil matters originating in juvenile court. As noted in your request, the litigation tax statutes specifically exempt certain proceedings from their operation, including "[a]ny original proceeding in a juvenile court, . . . when such court exercises the jurisdiction granted by title 37, chapter 1." Tenn. Code Ann. § 67-4-604(b)(1) (Supp. 2000). No such exemption exists, however, for appeals in civil matters from juvenile court to the appellate courts. *See* Op. Tenn. Att'y Gen. 90-75. Just as in other civil appeals, therefore, the Clerk of the Appellate Courts is required to collect the litigation tax upon the filing of a civil appeal from a juvenile court to an appellate court. *See id*.

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CV, 1999 WL 1086462, at *3 (Tenn. Ct. App. Dec. 3, 1999) (*no perm. app. filed*); *see also* Tenn. R. Civ. P. 4.01 advisory commission comment. This provision does not preclude an appellate court from considering a party's appeal. *See Al-Jabbar A'La v. Department of Correction*, 914 S.W.2d 914, 916 (Tenn. Ct. App. 1995) (holding that petition for writ of certiorari was not "leading process" under § 20-12-120); *Sharp v. Sharp*, No. 01A01-9403-CH-00090, 1994 WL 581478, at *2 (Tenn. Ct. App. Oct. 21, 1994), *perm. app. denied* (Tenn. May 1, 1995) (holding that counter-complaint was not "leading process" under § 20-12-120).

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