

STATE OF TENNESSEE

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August 20, 2001

Opinion No. 01-131

Responsibility for Collecting Litigation Tax in Appeals

QUESTION

Which court's clerk is responsible for collecting the state litigation tax in appeals?

OPINION

In most cases, the event that triggers responsibility for collecting the litigation tax is the filing of the appeal. Accordingly, the litigation tax should be collected by the clerk of the court in which the notice of appeal, application for appeal, or petition for review is filed.

ANALYSIS

You have submitted a follow-up question to Attorney General Opinion No. 00-188, "Collection of Litigation Tax in Appeals," pursuant to which you seek clarification as to which court's clerk is responsible for collecting the litigation tax in appeals. Relative to criminal and original civil actions, Tennessee Code Annotated section 67-4-603(a) directs 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;
- (2) Upon a finding of guilt, plea of guilty, or submission to fine in a criminal action, from the defendant;
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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.

Tenn. Code Ann. § 67-4-603(a) (1998). Relative to appeals, section 67-4-603(a) directs the "clerks of the various courts" to collect the litigation tax in the following manner:

(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;

....

(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 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 court clerk is required to collect the litigation tax from “the first moneys collected in each case.” Tenn. Code Ann. § 67-4-603(c) (1998). The litigation tax “may be collected in the same manner as costs are collected, but the tax . . . shall not be deemed to be costs.” *Id.*

Except for its reference to the “clerks of the various courts,” section 67-4-603(a) does not specify which court clerk is required to collect the litigation taxes described in subsections (a)(1) through (a)(5). Logically, the clerks of the respective trial courts should collect the taxes described in subsections (a)(1), (a)(2), and (a)(4). These subsections describe trial court proceedings in which the event triggering the court clerk’s responsibility for collecting the tax is either the commencement of the action or the entry of judgment in the action. Inasmuch as both of these events occur in the trial court, the trial court clerk should collect the tax.

The same rationale does not necessarily apply to appellate court proceedings because, as your request points out, many appeals are initiated, not in the appellate court, but in the trial court. Under Rule 3 of the Tennessee Rules of Appellate Procedure, a party initiating an appeal as of right from a trial court judgment is required to do so by timely filing a notice of appeal “with the clerk of the trial court.” Tenn. R. App. P. 3(e); *see also* Tenn. R. App. P. 4(a) (providing that notice of appeal required by Rule 3 shall be “filed with and received by the clerk of the trial court within 30 days after the date of entry of the judgment appealed from”). Other appeals are initiated in the appropriate appellate court. *See* Tenn. R. App. P. 9(c) (requiring appellant to file application for permission to appeal “with the clerk of the appellate court”); Tenn. R. App. P. 10(b) (requiring appellant to file application for extraordinary appeal “with the clerk of the appellate court”); Tenn. R. App. P. 11(b) (requiring appellant to file application for permission to appeal “with the clerk of the Supreme Court”); Tenn. R. App. P. 12.I(a), 12.II(a) (requiring appellant to file petition for review “with the clerk of the Court of Appeals”).

Under section 67-4-603(a)(3), the event triggering the court clerk's responsibility for collecting the litigation tax is the "filing" of the appeal "from one court to another." Tenn. Code Ann. § 67-4-603(a)(3) (1998). As a general rule, therefore, the clerk of the court in which the appeal is filed should bear responsibility for collecting the litigation tax. In contrast, under section 67-4-603(a)(5), the event triggering the court clerk's responsibility for collecting the litigation tax is the court's entry of a judgment or final decree against the appellee. *See* Tenn. Code Ann. § 67-4-603(a)(5) (1998). In this category of appeals, the court clerk is not required to collect a litigation tax when a city, a county, or the State of Tennessee files an appeal. Rather, the court clerk collects a litigation tax only if the city, county, or State prevails on appeal. In that event, the court clerk is required to collect the litigation tax from the appellee upon entry of a judgment against the appellee. Inasmuch as the triggering event is the court's entry of the judgment, the clerk of the appellate court in which the judgment is entered should collect the tax.

For the majority of appeals, section 67-4-603(a)(3) requires the court clerk to collect the litigation tax upon the "filing" of the appeal "from one court to another." Tenn. Code Ann. § 67-4-603(a)(3) (1998). When read in light of the Tennessee Rules of Appellate Procedure,¹ section 67-4-603(a)(3) requires the following results:

1. In civil appeals as of right from trial court judgments under Rule 3 of the Tennessee Rules of Appellate Procedure, the clerk of the trial court should collect the litigation tax when the clerk receives the notice of appeal. *See* Tenn. R. App. P. 3, 4. This construction is consistent with Rule 6 of the Tennessee Rules of Appellate Procedure, which requires the appellant to file a bond for costs on appeal "in the trial court with the notice of appeal." Tenn. R. App. P. 6. Inasmuch as the litigation tax statute authorizes the court clerk to collect the tax "in the same manner" as the clerk collects costs, Tenn. Code Ann. § 67-4-603(c)(1998), a logical construction of the statute places the responsibility for collecting the litigation tax on the same court clerk who is responsible for receiving the bond for costs on appeal.

2. For appeals from certain administrative agencies to the Court of Appeals under Rule 12, the clerk of the Court of Appeals should collect the litigation tax when the clerk receives the petition for review. *See* Tenn. R. App. P. 12.I(a) (requiring aggrieved party to file petition for review "with the clerk of the Court of Appeals within 60 days after entry of the administrative order appealed from"); Tenn. R. App. P. 12.II(a) (requiring party to file petition for review "with the clerk of the Court of Appeals within thirty days after the date of entry of the administrative order appealed from"). This construction is consistent with Rule 12.II, which requires the petitioner to file an appeal bond with the petition for review. *See* Tenn. R. App. P. 12.II(a) (providing that petition for review filed with clerk of Court of Appeals "shall be accompanied by . . . an appropriate bond").

¹The Tennessee Rules of Appellate Procedure were established effective July 1, 1979. *See Cobb v. Beier*, 944 S.W.2d 343, 344 (Tenn. 1997). Accordingly, the Rules were in effect in 1981 when the Legislature enacted section 67-4-603(a). *See* 1981 Tenn. Pub. Acts. 488.

3. For interlocutory and extraordinary appeals by permission under Rules 9 and 10 of the Tennessee Rules of Appellate Procedure, the clerk of the appellate court should collect the litigation tax when the clerk receives the application for appeal. *See* Tenn. R. App. P. 9(c) (requiring party seeking interlocutory appeal of trial court’s order to file application for permission to appeal “with the clerk of the appellate court within 10 days after the date of entry” of the trial court’s order permitting such appeal);² Tenn. R. App. P. 10(b) (requiring party to file application for extraordinary appeal “with the clerk of the appellate court”). This construction is consistent with the appeal bond provisions of Rules 9 and 10, both of which require the appellant to file the bond “with the application.” Tenn. R. App. P. 9(c), 10(b).

4. For appeals by permission from the Court of Appeals to the Supreme Court under Rule 11, the clerk of the Supreme Court should collect the litigation tax when the clerk receives the application for permission to appeal. *See* Tenn. R. App. P. 11(b) (requiring appellant to file application for permission to appeal “with the clerk of the Supreme Court within 60 days after the entry of the judgment of the Court of Appeals”). This construction is consistent with Rule 11’s appeal bond provisions, which require a party making an application for permission to appeal to file an appeal bond if the party has not already done so. *See* Tenn. R. App. P. 11(h).³

As previously indicated, under section 67-4-603(a)(3), the event triggering the court clerk’s responsibility for collecting the litigation tax is the “filing” of the appeal “from one court to another.” Tenn. Code Ann. § 67-4-603(a)(3) (1998). Relative to appeals by permission under Rules 9, 10, and 11, this language appears to refer to the appellant’s filing of the application rather than to the appellate court’s subsequent entry of an order granting or denying permission to appeal. The Rules generally use the term “filing” to refer to the appellant’s submission of the application, while the Rules use the term “entry” to describe the appellate court’s issuance of an order granting or denying the application. *See* Tenn. R. App. P. 9(c), 9(e), 10(b), 11(d), 11(e).⁴

Section 67-4-603(a)(3) refers to several different types of appeals, including an appeal, an appeal in the nature of a writ of error, and an appeal in the nature of a writ of certiorari. *See* Tenn. Code Ann.

²Rule 9 initially requires the party seeking an appeal to file a motion requesting such relief in the trial court, *see* Tenn. R. App. P. 9(b); however, “[t]he appeal is sought by filing an application for permission to appeal with the clerk of the appellate court.” Tenn. R. App. P. 9(c).

³As a general rule, the Tennessee Rules of Appellate Procedure require the appellant to file the appeal bond with the notice of appeal, application for appeal, or petition for review. *See* Tenn. R. App. P. 6, 9(c), 10(b), 11(h), 12.II(a). The Rules do not, however, address the appellate court clerk’s responsibility for collecting the litigation tax. Instead, the collection of litigation taxes is governed by statute. *See* Tenn. Code Ann. § 67-4-603 (1998). This Office perceives no conflict between the current Rules and the statutes construed in this opinion. Inasmuch as the appellate court clerk’s responsibility for collecting the litigation tax is not dependent on the Rules, it is not necessary to amend the Rules to effectuate the principles set forth in this opinion.

⁴The procedures for pursuing appeals by permission under Rules 9, 10, and 11 are essentially the same. *See* Tenn. R. App. P. 10 advisory commission comment; Tenn. R. App. P. 11 advisory commission comment.

§ 67-4-603(a)(3) (1998). By the time this statute was enacted in 1981, *see* 1981 Tenn. Pub. Acts 488, these descriptions of the various types of appeals were outdated. Effective July 1, 1979, the Supreme Court, with the Legislature’s approval, promulgated the Tennessee Rules of Appellate Procedure, which abolished writs of error, appeals in the nature of a writ of error, and simple appeals and which, in their place, created one method of appeal as of right. *See* Tenn. R. App. P. 3(d). The Rules also changed the terminology for seeking discretionary review by the Supreme Court, replacing the petition for certiorari with the application for permission to appeal. *See* Tenn. R. App. P. 11 advisory commission comment. One authority has suggested that this latter change merely constituted the “renaming” of a “familiar” procedure. John L. Sobieski, Jr., *The Theoretical Foundations of the Proposed Tennessee Rules of Appellate Procedure*, 45 Tenn. L. Rev. 162, 235 (1978).

The Legislature’s use of this outdated terminology appears to have been an oversight. Nevertheless, the Legislature’s reference to an appeal in the nature of a writ of certiorari buttresses the conclusion that the filing of a Rule 11 application is the filing of an appeal within the meaning of the litigation tax statute. Although styled an “application for permission to appeal,” such an application serves the same function as the former petition for writ of certiorari. Under the former rules, it was the appellant’s filing of the petition for writ of certiorari, and not the Supreme Court’s subsequent action in granting or denying the petition, that transferred jurisdiction from the appellate court to the Supreme Court. *See Pairamore v. Pairamore*, 547 S.W.2d 545, 547 (Tenn. 1977). Similarly, it is the appellant’s filing of the application for permission to appeal, and not the appellate court’s subsequent action in granting or denying the application, that transfers jurisdiction from one court to another. *See id.*

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