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Opinion No. 01-154

Applicability of Statutory Penalties to Litigation Taxes

QUESTION

Are the penalty provisions of Tenn. Code Ann. § 67-1-804 applicable to the collection of litigation taxes?

OPINION

The penalty provisions of subsections (b) and (c) of section 67-1-804 do not apply to the collection of litigation taxes because these subsections apply only to taxpayers who fail to both report and pay taxes due. Although litigants are responsible for paying litigation taxes, they are not responsible for making a return or reporting the amount of taxes due to the Commissioner of Revenue. On the other hand, the penalty provisions of subsection (a) of the statute, relating to delinquent taxes, and subsection (d), relating to dishonored checks, do apply to the collection of litigation taxes. The penalty provisions of subsection (a) apply not only to taxpayers who fail to make a return or report, but to taxpayers who fail to timely pay taxes shown to be due on a return or report. The penalty provisions of subsection (d) apply to the payment of any amount receivable under any law administered by the Commissioner, including the payment of litigation taxes.

ANALYSIS

You have requested an opinion on the issue of whether the penalty provisions of Tenn. Code Ann. § 67-1-804 are applicable to the collection of litigation taxes. Section 67-1-804 imposes several different types of penalties on unpaid taxes, including penalties based upon delinquency (Tenn. Code Ann. § 67-1-804(a)), negligence (Tenn. Code Ann. § 67-1-804(b)), fraud (Tenn. Code Ann. § 67-1-804(c)), and dishonored checks (Tenn. Code Ann. § 67-1-804(d)). As pertinent, these provisions state that

> (a)(1) When any person fails to timely make any return or report or fails to timely pay any taxes shown to be due on the return or report, there shall be imposed against that person a penalty in the amount of five

> percent (5%) of the unpaid tax amount for each thirty (30) days or fraction thereof that the tax remains unpaid subsequent to the delinquency date, up to a maximum of twenty-five percent (25%) of the unpaid amount. Where a return or report is delinquent, the minimum penalty shall be fifteen dollars ($15.00), regardless of the amount of tax due or whether there is any tax due.
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> (b)(1) When any person fails to report and pay the total amount of taxes determined to be due by the commissioner, if such failure is determined by the commissioner to be due to negligence, there shall be imposed a penalty in the amount of ten percent (10%) of the underpayment.
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> . . . .
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> (c)(1) When any person fails to report and pay the total amount of taxes determined to be due by the commissioner, if such failure is determined by the commissioner to be due to fraud, there shall be imposed against the taxpayer a penalty in the amount of one hundred percent (100%) of the underpayment.
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> . . . .
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> (d)(1) If any check or money order in payment of any amount receivable under any law administered by the commissioner is dishonored, there shall be imposed a penalty upon the taxpayer in an amount equal to one percent (1%) of the amount of such check; provided, that the penalty imposed shall be in an amount equal to ten percent (10%) of the amount of such check for each dishonored check in excess of two (2) issued by any one (1) person within one (1) calendar year. The minimum amount of the penalty imposed under this subsection shall be fifteen dollars ($15.00). This section does not apply if the person tendered such check in good faith and with reasonable cause to believe that it would be duly paid.
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> . . . .
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> (g) The provisions of this section shall apply to all taxes administered or collected by the commissioner, except that subsection (a) shall not apply to the tax imposed in § 67-4-409(b).[1]

Tenn. Code Ann. § 67-1-804 (Supp. 2000) (footnote added).

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[1]Section 67-4-409(b) imposes a tax on mortgages, deeds of trust, and certain other instruments prior to public recordation of such instruments in the county register's office. *See* Tenn. Code Ann. § 67-4-409(b) (Supp. 2000).

A court clerk's duty to collect litigation taxes arises under Tenn. Code Ann. §§ 67-4-601 to 67-4-606 (1998 & Supp. 2000). Section 67-4-603 instructs the clerks of the various courts to collect litigation taxes 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
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> (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).

Liability for the litigation tax falls upon the person from whom the court clerk is required to collect the tax. *See* Tenn. Code Ann. § 67-4-602(d) (Supp. 2000) (providing that "[e]very person, from whom the clerks of the various courts are required to collect the tax imposed by this section, shall be liable for the tax imposed by this section"). Thus, depending upon the type of action being pursued, liability for any litigation tax due falls upon one of the litigants to the action, such as the plaintiff, *see* Tenn. Code Ann. § 67-4-603(a)(1) (1998), the defendant, *see* Tenn. Code Ann. § 67-4-603(a)(2), (a)(4) (1998), the appellant, *see* Tenn. Code Ann. § 67-4-603(a)(3) (1998), or the appellee, *see* Tenn. Code Ann. § 67-4-603(a)(5) (1998). If the litigant fails to pay the litigation tax "within forty-five (45) days of its due date, it shall be considered delinquent." Tenn. Code Ann. § 67-4-206(c) (1998). The court clerk may not waive or excuse any penalties imposed with regard to the litigation taxes collected by the clerk. *See* Tenn. Code Ann. § 67-4-206(d) (1998). Only the Commissioner of Revenue may waive these penalties pursuant to the authority granted by Tenn. Code Ann. § 67-1-803 (1998).

While the litigant is responsible for paying the litigation tax, the court clerk bears the responsibility for reporting any amounts due to the Commissioner of Revenue. *See* Tenn. Code Ann. §§ 67-4-209(c), 67-4-213 (1998); *see also* Tenn. Code Ann. § 67-4-603(d) (1998). The court clerk has the duty "to ascertain the name of every person . . . liable for the payment of any [litigation] tax" to the court clerk and "to use every means at the [clerk's] command to collect the tax when due," Tenn. Code Ann. § 67-4-210(a) (1998), including issuing a distress warrant. *See* Tenn. Code Ann. § 67-4-215(a) (1998).

Moreover, the court clerk has the duty to keep a complete record of litigation tax collections and to report such collections to the Commissioner. *See* Tenn. Code Ann. § 67-4-213(a) (1998). The court clerk is required to "make a report each month to the commissioner, giving the name of each taxpayer, delinquent in the payment of the privilege tax on litigation, against whom an execution or distress warrant for such taxes has been issued, and which execution or distress warrant has been returned nulla bona, and giving the amount of such tax still owing." Tenn. Code Ann. § 67-4-213(b) (1998). If the court clerk fails to comply with the duty to report litigation tax collections and remit such collections to the Commissioner, the court clerk may be required to forfeit all commissions on the delinquent amount. *See* Tenn. Code Ann. § 67-4-213(e) (1998). Such forfeiture is "in addition to the penalties provided in chapter 1, part 8," which includes sections 67-1-801 to 67-1-804. *Id*.

Because penalties are not favored by the law, section 67-1-804's penalty provisions "are to be construed strictly against the State and liberally in favor of the taxpayer." *James v. Huddleston*, 795 S.W.2d 661, 664 (Tenn. 1990). By their terms, subsections (b) and (c) of section 67-1-804 apply only to a person who "fails to report *and* pay the total amount of taxes determined to be due by the commissioner." Tenn. Code Ann. § 67-1-804(b), (c) (Supp. 2000) (emphasis added). Thus, in order to be subject to the statutory penalties set forth in subsections (b) and (c), a person must both fail to report taxes due and fail to pay taxes due. This interpretation is supported by the general rule of statutory construction that "phrases separated by the word 'and' are usually to be interpreted in the conjunctive." *Stewart v. State*, 33 S.W.3d 785, 792 (Tenn. 2000).

Although a litigant is responsible for paying the litigation tax, the litigant is not responsible for making any return or reporting any amounts due to the Commissioner of Revenue. Rather, any responsibility for making such a report to the Commissioner belongs to the court clerk who collects the litigation tax. *See* Tenn. Code Ann. §§ 67-4-209(c), 67-4-213 (1998); *see also* Tenn. Code Ann. § 67-4-603(d) (1998). Inasmuch as a litigant responsible for paying the litigation tax is not required to both "report *and* pay" the tax, the provisions of subsections (b) and (c) of the penalty statute do not apply to litigants who fail to pay litigation taxes. *See* Tenn. Code Ann. § 67-1-804(b), (c) (Supp. 2000) (emphasis added).

In contrast, the penalty provisions of subsection (a) do apply to litigants who pay litigation taxes to the court clerk. The provisions set forth in subsection (a) apply to a person who "fails to timely make any return or report *or* fails to timely pay any taxes shown to be due on the return or report." Tenn. Code Ann. § 67-1-804(a) (Supp. 2000) (emphasis added). While "statutory phrases separated by the word 'and' are usually to be interpreted in the conjunctive," *Stewart v. State*, 33 S.W.3d 785, 792 (Tenn. 2000), as a general rule, the disjunctive 'or' "separates words or phrases in an alternate relationship, indicating that either of the separated words or phrases may be employed without the other." *Pryor Oldsmobile/GMC Co. v. Tennessee Motor Vehicle Comm'n*, 803 S.W.2d 227, 230 (Tenn. Ct. App. 1990). Thus, unlike the provisions of subsections (b) and (c), the provisions of subsection (a) apply in two distinct situations: (1) when a person fails to timely make a return or report, and (2) when a person fails to timely pay taxes shown to be due on a return or report. A person need not be untimely in both reporting and paying taxes in order to be subject to the penalty provisions of subsection (a).

In accordance with the foregoing interpretation, a litigant who fails to timely pay the litigation tax due is subject to the penalty provisions of subsection (a). Although the litigant is not responsible for reporting the litigation tax due to the Commissioner, the litigant is responsible for paying the tax shown to be due on the report made by the court clerk to the Commissioner. The taxpayer's failure to timely pay the litigation tax, by itself, is sufficient to invoke subsection (a)'s penalty provisions.

This interpretation is consistent with section 67-4-206, which provides that litigation taxes not paid within forty-five days become delinquent and that only the Commissioner of Revenue is authorized to waive any penalties imposed on litigation taxes. *See* Tenn. Code Ann. § 67-4-206(b), (c) (1998). This interpretation also is consistent with section 67-4-213(e), which indicates that the penalties provided in section 67-1-804 apply to litigation taxes, *see* Tenn. Code Ann. § 67-4-213(e) (1998), and with section 67-1-804, which indicates that its provisions "apply to all taxes administered or collected by the commissioner, except that subsection (a) shall not apply to the tax imposed in § 67-4-409(b)." Tenn. Code Ann. § 67-1-804(g) (Supp. 2000). The converse of this latter provision is that the penalty provisions of subsection (a) do apply to the litigation taxes imposed in sections 67-4-601 to 67-4-606.

This interpretation is further supported by the legislative history for section 67-1-804, which was enacted as part of Chapter 526 of the Public Acts of 1988. *See* 1988 Tenn. Pub. Acts 526. The bill summaries for House Bill 1989 and Senate Bill 2209 indicated that the bill's purpose was to establish a "uniform formula of penalties and fees for delinquent tax payments." House Floor Session, 95th Gen. Assembly, 2d Reg. Sess. (Tenn. Feb. 29, 1988) (H.R. 1989 bill summary); Senate Floor Session, 95th Gen. Assembly, 2d Reg. Sess. (Tenn. Mar. 3, 1988) (S. 2209 bill summary). Before the House Calendar and Rules Committee, one of the bill's sponsors explained that the bill "creates a system of uniform penalties and fees for delinquent tax payments that'll make them all the same, and it'll clear up a hodge podge of penalties and fees that are found in different sections of the code." House Calendar & Rules Comm. Meeting, 95th Gen. Assembly, Tape 1 (Tenn. Feb. 23, 1988) (statement of Rep. Rhinehart). Similarly, in recommending passage of the bill to the House, the same sponsor stated that the proposed legislation would "make all penalties and interest uniform on all assessments of taxes." House Floor Session, 95th Gen. Assembly, 2d Reg. Sess., Tape H-21 (Tenn. Feb. 29, 1988) (statement of Rep. Rhinehart). When asked about the bill by a member of the Senate Finance, Ways and Means Committee, the Commissioner of Revenue explained that, "[i]n the penalty area, we attempted to pull them [the penalty provisions] out of all these different, I believe twenty-three different, code sections where they're scattered throughout Title 67 and pull them into one section and simplify them greatly." Senate Finance, Ways & Means Comm. Meeting, Tape 2 (Tenn. Mar. 1, 1988) (statement of Comm'r Taylor).

Prior to the passage of Chapter 526 of the Public Acts of 1988, the privilege tax statutes imposed the following penalty on delinquent litigation taxes:

> (3) If the privilege tax on litigation is not paid within forty-five (45) days of its due date, the taxpayer is liable for a penalty of ten percent (10%) of the delinquent tax.

> (4) Any penalty shall be a part of and collected as the tax.
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> (5) The commissioner of revenue may waive the penalties in this section under § 67-1-803, but no other collector may waive or excuse these penalties.

Tenn. Code Ann. § 67-4-206(a) (Supp. 1987). In enacting Chapter 526, the Legislature replaced the foregoing provisions with the following:

> (c) If the privilege tax on litigation is not paid within forty-five (45) days of its due date, it shall be considered delinquent.
>
> (d) The Commissioner of Revenue may waive under § 67-1-803, any penalties imposed with regard to the taxes provided by this section but no other collector may waive or excuse these penalties.

Tenn. Code Ann. § 67-4-206 (1998) (as amended by 1988 Tenn. Pub. Acts. 526, § 28).

As the foregoing legislative history demonstrates, the Legislature eliminated the statutory penalty that specifically applied to litigation taxes. *See* Tenn. Code Ann. § 67-4-206(a)(3) (Supp. 1987) (imposing "penalty of ten percent (10%) of the delinquent tax"). At the same time, however, the Legislature replaced this specific penalty provision with the more general delinquency penalty provision found in subsection (a) of section 67-1-804. *See* Tenn. Code Ann. § 67-1-804(a)(1) (Supp. 2000) (imposing "penalty in the amount of five percent (5%) of the unpaid tax amount for each thirty (30) days or fraction thereof that the tax remains unpaid subsequent to the delinquency date, up to a maximum of twenty-five percent (25%) of the unpaid amount") (as amended by 1988 Tenn. Pub. Acts 526, § 4). The Legislature retained provisions establishing that litigation taxes are delinquent if not paid within forty-five days of their due date, authorizing the Commissioner of Revenue to waive any penalties in accordance with section 67-1-803, and prohibiting any other collector from waiving or excusing penalties. *See* Tenn. Code Ann. § 67-4-206(c), (d) (1998).

Where possible, statutes should be construed so as "to avoid a construction which will place one statute in conflict with another, and [to] resolve any possible conflict between the statutes in favor of each other, . . . so as to provide a harmonious operation of the laws." *Parkridge Hosp., Inc. v. Woods*, 561 S.W.2d 754, 755 (Tenn. 1978). If section 67-1-804 were construed so that the general penalty provisions of subsection (a) did not apply to litigation taxes, then the provisions retained in section 67-4-206 would be rendered meaningless. Moreover, such a construction would conflict with section 67-4-213, which indicates that the penalties provided in section 67-1-804 apply to litigation taxes, *see* Tenn. Code Ann. § 67-4-213(e) (1998), and with section 67-1-804 itself, which indicates that, with one exception, subsection (a) of the statute applies to all taxes administered or collected by the Commissioner of Revenue. *See* Tenn. Code Ann. § 67-1-804(g) (Supp. 2000). The laws administered by the Commissioner include the litigation tax statutes. *See* Tenn. Code Ann. § 67-4-203 (1998). Accordingly, the penalty provisions of subsection (a) apply to the collection of litigation taxes.

The penalty provisions of subsection (d) likewise apply to litigants who pay litigation taxes to the court clerk. Subsection (d) imposes a penalty upon a taxpayer if the taxpayer pays a tax with a check or money order that is subsequently dishonored. *See* Tenn. Code Ann. § 67-1-804(d) (Supp. 2000). Unlike the penalties imposed in subsections (b) and (c), the penalty imposed in subsection (d) is not limited to situations in which a taxpayer has failed to both report and pay taxes due to the Commissioner of Revenue. Instead, subsection (d) broadly applies to "*any* amount receivable under *any* law administered by the commissioner." Tenn. Code Ann. § 67-1-804(d)(1) (Supp. 2000) (emphases added). Thus, the penalty provisions of subsection (d) apply to the collection of litigation taxes.

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