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February 23, 2006

Opinion No. 06-039

Governmental Entity's Authority to Outsource Non-Delinquent Revenue Administration

QUESTION

Do local or state governments have the authority to outsource any aspect of their non-delinquent revenue (*i.e.*, taxes, licenses, permits, fees, fines, etc.) administration (*i.e.*, data entry, forms printing and mailing, data processing, funds disbursement, customer service and client reporting)?

OPINION

No specific statutory authority exists that would authorize local or state governments to outsource non-delinquent revenue administration beyond the statutes discussed in Opinion No. 05-181.

ANALYSIS

As a follow-up to Opinion No. 05-181, you have asked whether local or state governments have the authority to outsource any aspect of their non-delinquent revenue administration. To clarify our prior opinion, we discussed statutes that dealt primarily with the collection of delinquent taxes in that opinion because those were the statutes revealed by our research of the Tennessee Code. This Office is aware of no statutes in addition to those discussed in Opinion No. 05-181 that would specifically authorize the outsourcing of revenue administration, whether delinquent or non-delinquent.

The more difficult question is whether, in the absence of specific statutory authority, local or state governments have the authority to contract with third parties to provide revenue administration services. The statutes governing state and local contracts recognize that state and local governmental entities have some authority to contract with private individuals and entities for various professional services, such as legal services, financial advisory services, educational consultant services, and architectural and engineering services. *See* Tenn. Code Ann. § 12-4-106 (contracts for professional services made by local governments); Tenn. Code Ann. § 12-4-109 (contracts for services made by state agencies and departments).

This authority, however, is not an unlimited one. The Tennessee Court of Appeals has observed that "[n]o governmental entity can by contract deprive itself of inherent powers necessary to the performance of its functions or of power or duty imposed upon it by prior express statutory or constitutional provision." *Batson v. Pleasant View Util. Dist.*, 592 S.W.2d 578, 581 (Tenn. Ct. App. 1979) (citing *Douglas v. Kentucky*, 168 U.S. 488, 18 S. Ct. 199, 42 L. Ed. 553 (1897); *Stone v. Mississippi*, 101 U.S. 814, 25 L. Ed. 1079 (1880)); *accord Maury County Bd. of Pub. Utils. v. City of Columbia*, 854 S.W.2d 890, 891 (Tenn. Ct. App. 1993).

This principle was addressed in a prior Attorney General Opinion, No. 85-286, wherein this Office considered whether the State could contract with a private entity for the management of state prison facilities. There, we reasoned that

> The Tennessee Constitution, Article I, Section 1 declares that "all power is inherent in the people, and all free governments are founded upon their authority, and instituted for their peace, safety and happiness. . . ." The government of the state is divided into branches or departments — the legislative, executive and judicial. "To each has been delegated by the people — whose agents they are — such portion of sovereignty as was deemed expedient." *State v. Armstrong*, 35 Tenn. 634, 654 (1856), quoted in *Richardson v. Young*, 122 Tenn. 471, 492, 125 S.W. 644 (1909).
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> Nowhere in the Tennessee Constitution is there found any authority for a department to vest sovereign powers in non-governmental entities. Long ago, the Tennessee Supreme Court noted, "The delegation of sovereign power is, in itself, an act of sovereignty, and can only be made by the constituent body in whom the original power resides, or by its express authority." *State v. Armstrong*, 35 Tenn. at 655. In the case of the three departments of government, the constituent body in whom the original power resides is the people. *Id.* The sovereign powers delegated by the people are trusts which must be exercised by governmental officials personally. *Id.* These trusts "in their very nature and intention, must be exercised in person, the idea of a transfer or delegation thereof being in direct opposition to the design and ends of their creation." *Id.* at 656. Consequently, a department may not transfer its sovereign powers to another entity, governmental or non-governmental, absent constitutional authorization.

Op. Tenn. Att'y Gen. No. 85-286 (Nov. 27, 1985). After reviewing the law in this area, we opined that "Tennessee courts would take a strict position against the delegation of sovereign powers to a non-governmental entity." *Id.*

The State's authority to levy and collect taxes constitutes a sovereign power that may not be delegated to another entity. *Roane-Anderson Co. v. Evans*, 200 Tenn. 373, 397, 292 S.W.2d 398, 408 (1956); *Evans v. McCabe*, 164 Tenn. 672, 675, 52 S.W.2d 159, 160 (1932). This principle does not mean that state and local governments cannot, as presently authorized by statute, hire outside entities to assist in limited ways with the administration and collection of taxes. As discussed in Attorney General Opinion No. 05-181, several statutes currently exist that authorize state and local governments to seek limited assistance in the form of providing property tax assessment advice and performing certain tax collection services. *See* Op. Tenn. Att'y Gen. No. 05-181 (Dec. 20, 2005). As explained in the prior Attorney General Opinion dealing with contracting for the management of prison facilities, however, state and local governments cannot enter into contracts that would abdicate control over the governments' inherent powers, such as the power of taxation.

While it may theoretically be permissible to contract out certain peripheral clerical functions, such as data entry and printing forms, the core powers of making assessments, selecting audits, and distributing funds are too fundamental to be entrusted to non-governmental actors. And, in addition, under the current statutes, many administrative chores of the Department of Revenue, such as data entry and mailing forms, could not be contracted out because doing so would require divulging taxpayer identities, liabilities, and other information that is strictly confidential under Tenn. Code Ann. §§ 67-1-1701, *et seq*. Similar concerns may arise as to some local government taxing systems. *See, e.g.*, Tenn. Code Ann. § 67-5-402 (confidentiality provisions applicable to local audits and assessments of tangible personal property).

The current statutes appear to honor this principle by limiting the contractor's duties to assessment advice and collection services. *See id*. The statute dealing with property assessment advice, for example, limits the contractor's role to an advisory one and specifies that final assessment decisions shall be made by the local tax assessor and board of equalization. *See* Tenn. Code Ann. § 67-5-507(a)(2). Any proposed legislation in this area should be similarly structured so as to ensure that control over this essential governmental function is not impermissibly delegated to another entity.

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