S T A T E O F T E N N E S S E E
OFFICE OF THE
ATTORNEY GENERAL
PO BOX 20207
NASHVILLE, TENNESSEE 37202

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Opinion No. 07-34

Whether Attorney's Fees for Collecting Delinquent Taxes May Be Used for Other Purposes

QUESTION

May the attorneys' fees collected for the prosecution of delinquent tax suits pursuant to Tenn. Code Ann. §§ 67-5-2404, -2410, -2501 and -2506, be used for purposes other than compensation of the delinquent tax attorney?

OPINION

In most Tennessee counties, Tenn. Code Ann. § 67-5-2410(a)(1)(A) allows for the delinquent tax attorney to be compensated at a negotiated rate not to exceed 10% of the amount of delinquent taxes collected, with any remaining proceeds to be applied to the costs of the suit, then to the county, and finally to the municipality, in that order. However, for those few counties governed by Tenn. Code Ann § 67-5-2410(b)(1), a penalty of 10% of the delinquent taxes must be paid exclusively to the delinquent tax attorney.

ANALYSIS

The office of "Delinquent Tax Attorney" for most Tennessee counties, including Bradley County, is created by Tenn. Code Ann. § 67-5-2404(a), which provides in relevant part as follows:

> (a)(1) After the publication of the notice in § 67-5-2401, and between the dates of February 1 and April 1, the [county] trustee shall deliver the delinquent lists showing all unpaid land taxes to an attorney chosen by the trustee with the approval of the county mayor.
> (2)(A) Compensation of the attorney shall be determined in advance through negotiations between the trustee and the attorney, subject to the approval of the county legislative body, but in no event shall such compensation exceed ten percent (10%) of all delinquent land taxes collected.
> . . .
> (3) It is the duty of the county trustee and the county mayor to cause the attorney to prepare and file suits in the chancery or circuit courts

> for the collection of all delinquent land taxes, and all arrears of taxes due the state, county, and municipality.

Pursuant to Tenn. Code Ann. § 67-5-2404(a)(5), the aforementioned provisions are not applicable to counties with a metropolitan form of government or to counties having the following populations according to the 1970 federal census or any subsequent federal census:

> (A) Not less than 3,765 nor more than 5,200;
> (B) Not less than 6,600 nor more than 6,700;
> (C) Not less than 8,100 nor more than 8,200;
> (D) Not less than 12,300 nor more than 12,350;
> (E) Not less than 12,400 nor more than 12,550;
> (F) Not less than 14,700 nor more than 14,800;
> (G) Not less than 36,900 nor more than 37,100;
> (H) Not less than 56,200 nor more than 56,300.

In these counties exempted by Tenn. Code Ann. § 67-5-2404(a)(5), the office of "Delinquent Tax Attorney" is created by Tenn. Code Ann. § 67-5-2404(b)(1), which states as follows:

> (b)(1) After the publication of the notice in § 67-5-2401, and between the date of February 1 and April 1, the [county] trustee shall deliver the delinquent lists showing all unpaid land taxes to an attorney chosen by him with the approval of the county mayor, and it shall be the duty of the county trustee and the county mayor to cause the attorney to prepare and file suits in the chancery or circuit courts for the collection of all delinquent land taxes, and all arrears of taxes due the state, county, and municipality; and, so that delinquent and municipal taxes may be collected at the same time as other taxes, it shall be the duty of the proper municipal officers to furnish the county trustee or the trustee's attorney certified lists of delinquent municipal taxes, unless otherwise provided.

Tenn. Code Ann. § 67-5-2404 therefore provides for the county trustee, with the approval of the county mayor, to appoint an attorney to collect all delinquent taxes as shown on the delinquent lists prepared for that year. As previously stated by this Office in Op. Tenn. Att'y Gen. No. U88-62 (June 1, 1988), the chief difference between Tenn. Code Ann. § 67-5-2404(a) and Tenn. Code Ann. § 67-5-2404(b) concerns the compensation to be paid the delinquent tax attorney. Under Tenn. Code Ann. § 67-5-2404(a), the compensation of the attorney appointed must be determined in advance through negotiations between the trustee and the attorney, subject to the approval of the county legislative body. In contrast, under Tenn. Code Ann. § 67-5-2404(b), no such requirement exists.

Tenn. Code Ann. § 67-5-2410, which outlines the penalties and costs associated with the collection of delinquent taxes, also reflects the same distinction between the two penalty schemes based on form of government and population of the various Tennessee counties. In those counties

governed by Tenn. Code Ann. § 67-5-2410(b)(1), which are the same counties referred to in Tenn. Code Ann. § 67-5-2404(b)(1), upon the filing of suit to enforce the tax lien against real or personal property, an additional penalty of 10% upon all delinquent taxes is imposed upon the amount due from any defendant to the county or municipality, and that penalty is "devoted to the expense of prosecuting these suits and shall be allowed to the attorney filing the suits as compensation for his services." In contrast, in those counties where the compensation of the delinquent tax attorney is established through negotiation, Tenn. Code Ann. § 67-5-2410(a)(1)(A) also specifies that the 10% penalty upon all delinquent taxes "shall accrue," but states only that this penalty be "devoted to the expense of prosecuting the suits."

Given the distinction between the statutory language that establishes the two separate compensation schemes set out in Tenn. Code Ann. § 67-5-2404(a) and Tenn. Code Ann. § 67-5-2410(a)(1)(A) for the majority of counties, and Tenn. Code Ann. § 67-5-2404(b) and Tenn. Code Ann. § 67-5-2410(b)(1) for the other counties, the answer to the question of whether fees collected for the prosecution of delinquent tax suits may be used for purposes other than payment of the prosecuting attorney depends upon the type of governance and population of the county attempting to collect delinquent taxes.

Pursuant to Tenn. Code Ann. § 67-5-2410(a)(1)(A), in the majority of Tennessee's counties, including Bradley County, the trustee may negotiate a lower rate than 10% with the delinquent tax attorney and distribute the difference to those entities expressly outlined in Tenn Code Ann. §§ 67-5-2501 and -2506 pursuant to the procedures outlined therein. Tenn. Code Ann. § 67-5-2404(a)(1) expressly allows for "*negotiations between the trustee and the attorney*" in order to set compensation, which cannot "exceed ten percent (10%) of all delinquent taxes collected." (emphasis added). However, Tenn. Code Ann. § 67-5-2410(a)(1)(A) also requires the collection of an "additional penalty of ten percent (10%) upon all delinquent taxes." Accordingly, these statutory provisions, when read together, require the collection of a 10% penalty upon all delinquent taxes, but do not limit the ability of the county trustee to negotiate a rate of payment to the delinquent tax attorney of less than the full 10% penalty collected; the trustee must then distribute the remainder of the collected penalty in accordance with Tenn. Code Ann. §§ 67-5-2501(a)(3) and -2506(a)(3).

Distribution of the delinquent tax penalty must follow these specific statutory guidelines. Tenn. Code Ann. § 67-5-2501(a)(3) states:

> Up to ten percent (10%) of the sale proceeds shall be applied first to payment of any unpaid balance of compensation due the prosecuting attorney. Second, the proceeds of the sale shall be applied to the costs of the suits. Third, the remainder shall be applied to the state first, county second, and municipality third, the amount due each to be ascertained by a decree of the court.

This same distribution order is also outlined in Tenn Code Ann. § 67-5-2506(a)(3), pertaining to the sale of land for delinquent county taxes only. Accordingly, in most counties, including Bradley, when the trustee negotiates, subject to the approval of the county legislative body, to allow less than the full 10% penalty collected on delinquent taxes to the delinquent tax attorney, the remainder of the funds must be distributed to the expressly identified entities in the descending order in which they are listed in Tenn. Code Ann. §§ 67-5-2501(a)(3) and -2506(a)(3).[1] A county may not distribute the remaining funds outside the prescribed order, nor may they be distributed to specific entities not expressly listed in Tenn. Code Ann. §§ 67-5-2501(a)(3) and 2506(a)(3). The trustee may not take the excess funds after paying the delinquent tax attorney and retain them for the county trustee's office, but rather must pay them into the county general fund. Of course, the county commission could decide to allocate these funds for the trustee's office.

In contrast, the remaining counties, subject to the provisions of Tenn. Code Ann. §§ 67-5-2404(b)(1) and 67-5-2410(b)(1), are governed by statutory language that does not provide for negotiations with the prosecuting attorney. Rather, the controlling statutes require that "an additional penalty of ten percent (10%) upon all delinquent taxes *shall* accrue" and this penalty "shall be devoted to the expense of prosecuting these suits and *shall be allowed to the attorney filing the suits as compensation for the attorney's services.*" Tenn. Code Ann. § 67-5-2410(b)(1) (emphasis added). Accordingly, these counties must impose the full 10% penalty on the delinquent taxes and remit all of this penalty to the delinquent tax attorney.

ROBERT E. COOPER, JR.
Attorney General

MICHAEL E. MOORE
Solicitor General

GREGORY O. NIES
Assistant Attorney General

[1]Because there is no longer any state component of the property tax, the language in Tenn. Code Ann. § 67-5-2501(a)(3) stating that the remainder "shall be applied to the state first" is obsolete. The state is not due any portion of the proceeds because it imposes no ad valorem property taxes.

Requested by:

The Honorable Dewayne Bunch
State Senator
312 War Memorial Building
Nashville, Tennessee 37243