STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL

July 1, 2014

Opinion No. 14-66

Fees for Expunging Criminal Convictions

QUESTION

Does the portion of the filing fee designated to be distributed under Tenn. Code Ann. § 40-32-101(g)(10) to the State general fund constitute a tax?

OPINION

No. Although a portion of the expunction filing fee is designated for allocation to the State's general fund, neither the fee nor this portion of it is a tax because the purpose of the fee is to defray the cost of the expunction process.

ANALYSIS

Tenn. Code Ann. § 40-32-101(g) allows certain qualified nonviolent offenders to petition to have the records relating to their criminal convictions expunged and destroyed. For this class of expunctions, the statute imposes a fee of $350 upon filing of the petition. Tenn. Code Ann. § 40-32-101(g)(10). The statute provides that the $350 will be distributed as follows:

> Fifty dollars ($50.00) of the fee shall be transmitted to the Tennessee bureau of investigation for the purpose of defraying the costs incurred from the additional expunction petitions filed and granted as the result of this subsection. The clerk shall retain ten dollars ($10.00) of the fee and shall remit the remainder to the trustee to be allocated in the following manner:
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> (A) Five percent (5%) to the public defenders expunction fund;
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> (B) Forty percent (40%) to the district attorneys expunction fund for the fiscal year 2012-2013; provided, however, for all fiscal years following 2012-2013 this percent shall be forty-five percent (45%); and
>
> (C) Fifty-five percent (55%) to the state general fund for fiscal year 2012-2013; provided, however, for all fiscal years following 2012-2013 this percent shall be fifty percent (50%).

Id. Thus, 50% of the remainder, or $145, is currently allocated to the State's general fund.

Whether this portion of the filing fee is actually a tax depends upon its purpose. It is well settled that "the nature of an imposition by government is not determined by what the legislature calls it." *State v. Nashville, C. & St. L. Ry.,* 176 Tenn. 24, 137 S.W.2d 297, 299 (1940). Rather, "the nature of an imposition by government" is determined by "the purpose of the monetary imposition." *Saturn Corp. v. Johnson*, 236 S.W.3d 156, 160 (Tenn. Ct. App. 2007). "A tax is a revenue raising measure levied for the purpose of paying the government's general debts and liabilities. . . . A fee is imposed for the purpose of regulating a specific activity or defraying the cost of providing a service or benefit to the party paying the fee." *City of Tullahoma v. Bedford Cnty.*, 938 S.W.2d 408, 412 (Tenn. 1997). If the imposition is "paid into the public treasury as part of the state's general revenue and disbursed for general public need, it is a tax." *Saturn Corp.*, 236 S.W.3d at 160; *see Memphis Natural Gas Co. v. McCanless*, 183 Tenn. 635, 194 S.W.2d 476, 483 (1946). "If, however, the [imposition] 'is imposed for the purpose of regulating a specific activity or defraying the cost of providing a service or benefit to the party paying the [imposition],' it is a fee." *Saturn Corp.*, 236 S.W.3d at 160 (quoting *City of Tullahoma*, 938 S.W.2d at 412).[1]

The purpose of the expunction fee imposed by § 40-32-101(g) is to defray the cost of the expunction process. Much of the fee—nearly 65%—is expressly designated for that purpose. Although the remaining amount is paid into the State's general fund, it too is intended to fund the expunction process; the statute itself refers to this portion of the fee as "the amount allotted to the state under subdivision (g)(10)(C) *to implement* this subsection." Tenn. Code Ann. § 40-32-101(g)(13) (emphasis added). Therefore, neither the expunction fee nor the portion of the fee allocated to the general fund is a tax.

Beginning July 1, 2013, the statute does require the Department of Finance and Administration to review the expunction process to determine if the amount allocated to the general fund "is adequate and if some portion of such funds could be used for other criminal justice purposes." *Id.* But even if some of the funds are ultimately used for other purposes, this does not make this portion of the fee a tax; the funds would not be "disbursed for general public need" but for criminal-justice purposes. *Saturn Corp.*, 236 S.W.3d at 160. Two decisions from other states support this conclusion; both courts held that the portion of an imposition allocated to the state's general fund was not a tax, and in so holding, both courts acknowledged the economic realities often faced by the legislature in funding programs with the use of

[1] Other jurisdictions have likewise recognized that an important distinction between fees and taxes is that fees, unlike taxes, are charged in exchange for a particular government service and confer a special benefit on fee payers. *See* Tenn. Att'y Gen. Op. 13-50, at 4-5 (July 1, 2013).

court fees. *See Crist v. Ervin*, 56 So. 3d 745, 749-50 (Fla. 2010); *Fox v. Hunt*, 619 So. 2d 1364, 1367 (Ala. 1993).

In *Crist* and in *Hunt*, the Supreme Courts of Florida and Alabama focused their discussion on the fact that while a portion of the court fee imposed was paid into the state's general fund, significant monies from the general fund had been appropriated to support the state's judiciary system and fund the administration of justice. In explaining its reasons for determining that the portion of a jury fee transmitted to the general fund was not a tax, the Alabama Supreme Court stated:

> The State's evidence in support of its motion for summary judgment showed that in fiscal year 1989–90 the State, to run the judicial system, spent over $59 million more than the $500,000 collected in jury fees. This Court would have to deny the economic reality of the Legislature's funding of the judiciary in favor of an accounting artifice in order to hold that any portion of the jury trial fees collected by the circuit court clerks actually went to programs, other than the judiciary, funded through the state's general fund. Therefore, we hold that neither the jury trial fee, nor that portion of it that is paid directly into the general fund, is an unconstitutional tax.

Fox, 619 So. 2d at 1367; *see also Crist*, 56 So. 3d at 749-50 ("Because the Legislature funded the costs of the administration of justice with far more than the amount of filing fees deposited into the general revenue fund, the filing fee statutes are not operating as an unconstitutional tax.").

A similar situation exists with respect to the expunction filing fee under Tenn. Code Ann. § 40-32-101(g). Pursuant to the review required by subdivision (g)(13), the Department of Finance and Administration has reported that from July through December 2013, $54,436 was transmitted to the general fund under subdivision (g)(10)(C).[2] In contrast, the Governor's Budget for Fiscal Year 2013-2014 recommended amounts totaling well over $1 billion in State funds for law, safety, and correction, including nearly $125 million for the court system. Tenn. Annual Budget, Fiscal Year 2013-2014, B-229.[3] *See also* 2013 Tenn. Pub. Acts, ch. 453 (FY 2013-14 appropriations act reflects authorization for judicial-department expenditure of $124,951,000). Even if less than half of that amount funded the criminal-court system, the amount the State collected from expunction fees during the second half of 2013 represents only a small fraction of the amount the State likely spent during that period on administering criminal justice. "Because the [General Assembly] funded the costs of the administration of [criminal] justice with

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[2] Jan. 23, 2014 Memorandum from the Commissioner of Finance and Administration to the Speakers of the House and Senate (copy attached).

[3] Available at http://www.tn.gov/finance/bud/documents/2014BudgetDocumentVol1.pdf.

far more than the amount of filing fees deposited into the general revenue fund, the filing fee statute [is] not operating as a . . . tax." *Crist*, 56 So. 3d at 750.

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STATE OF TENNESSEE
DEPARTMENT OF FINANCE AND ADMINISTRATION
STATE CAPITOL
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LARRY B. MARTIN
COMMISSIONER

January 23, 2014

MEMORANDUM

TO: Lt. Governor Ron Ramsey
Speaker of the Senate

Honorable Beth Harwell
Speaker of the House

FROM: Larry B. Martin, Commissioner of Finance and Administration

SUBJECT: 2013-2014 Expunction Petitions

Pursuant to TCA §40-32-101(g)(13), attached is the report on expunction petitions for fiscal year 2013-2014.

The attached report includes information regarding the number of expunctions between July 1 and December 31, 2013, cost per expunction petition, collections and expenditures of the expunction fee by department, and a statement on the adequacy of fee collections as required by law.

LBM:DT:fdt

Cc: Honorable Randy McNally, Chairman, Senate Finance Committee
Honorable Charles Sargent, Chairman, House Finance Committee
Stacey Campfield, State Senator
G.A. Hardaway, State Representative

Attachment

EXPUNCTION FEE AND APPORTIONMENT

Application Fee:	$	350.00
Court Clerk		10.00
District Attorneys		130.50
Public Defenders		14.50
TBI		50.00
General Fund		145.00

APPLICATIONS – YEAR-TO-DATE

Approximately 230 expunctions were processed between July 1, 2013 and December 31, 2013 (six months).

PROCESSING COSTS FOR EXPUNCTION APPLICATIONS

District Attorneys General Conference – The DAs report that calculating a cost to administer expunction applications is very difficult to estimate at a district level because existing personnel are performing multiple responsibilities as part of their daily workload without performing a work study.

Public Defenders Conference – The PDs do not have administrative costs for expunction applications.

Tennessee Bureau of Investigation – TBI estimates that administrative costs are approximately $800 per month to process expunction applications.

USE OF PROCEEDS

District Attorneys General Conference – Through December 2013, the DAs have expended $28,337 to purchase supplies and provide in-service training.

Public Defenders Conference – The PDs are required to perform one educational program per district annually. As of December, no expenditures have been recorded. The executive committee is in the process of developing a plan to provide educational programs within available funding.

Tennessee Bureau of Investigation – Net proceeds are used to cover administrative costs and to support operational programs to the extent possible.

General Fund – any funds generated are used to support programs funded in the general fund, including criminal justice programs and activities.

COLLECTION AND EXPENDITURE SUMMARY - (FISCAL YEAR 2014 THROUGH DECEMBER 2013)

	Collections	Program Administration	Program Expenditures
District Attorneys	40,434.46	NA	28,337.00
Public Defenders	4,948.00	-	-
TBI	11,512.50	4,800.00	-
General Fund	54,436.21	-	-
	$ 111,331.17	$ 4,800.00	$ 28,337.00

SUMMARY

Year-to-date collections of the expunction fee for fiscal year 2014 have been less than initially projected. Although less than expected, it appears that the revenues collected exceed the cost to administer expunction applications for both the Tennessee Bureau of Investigation and the District Attorneys. At this time, any unexpended proceeds, net of administrative expenses, do not appear significant for either the District Attorneys, Public Defenders or the TBI.