STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL

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Opinion No. 21-10

Duty of Court Clerks to Report Judicial Waiver of Litigation Taxes to the Department of Revenue

Question 1

Does Tennessee Code Annotated § 67-4-605(c) require general sessions court clerks to report to the Department of Revenue all general sessions court judges who, pursuant to Tenn. Code Ann. § 40-25-123(b), suspend litigation taxes for indigent criminal defendants?

Opinion 1

Yes. Tennessee Code Annotated § 67-4-605(c) requires a court clerk, including the clerk of a court of general sessions, to report a judge's suspension of "*any* privilege tax on litigation." The statute contains no exceptions.

Question 2

If so, how does Tenn. Code Ann. § 67-4-605(b) apply to court clerks if they do not report general sessions court judges who suspend litigation taxes for indigent defendants?

Opinion 2

Tennessee Code Annotated § 67-4-605(b) has no application to court clerks who do not *report* a judicial suspension of litigation taxes. Section 67-4-605(b) applies only to a clerk who fails or refuses to *collect and pay over* to the Department of Revenue litigation taxes that have not been judicially suspended, in which case it imposes liability for the tax on the clerk. Since § 67-4-605(b) does not deal with a clerk's failure to report a judicial waiver of a litigation tax, it simply has no application to general sessions court clerks who do not *report* a judicial waiver of litigation taxes for indigent defendants.

ANALYSIS

1. The clerks of the various courts in Tennessee generally have a duty to collect litigation taxes imposed on civil and criminal cases instituted in this State. *See* Tenn. Code Ann. §§ 67-4-601 to - 606. Litigation taxes help finance the State's general fund, as well as an array of important state and local endeavors, such as driver education programs, the public defender program, and the criminal injuries compensation fund. *See id*. § 67-4-606. For that reason, court clerks are required to collect and pay over litigation taxes to the Department of Revenue, and a clerk who fails or refuses to do so is personally liable for the tax. *Id.* § 67-4-605(a) and (b).

Judges, though, are authorized to suspend litigation taxes in certain instances.[1] Pertinent here, general sessions court judges may "suspend the court costs and the litigation tax as required by §§ 67-4-602 – 67-4-606, for any indigent criminal defendant, as in the presiding judge's opinion the equities of the case require." *Id*. § 40-25-123(b). And whenever a judge suspends or waives any litigation tax, the court clerk has a statutory duty—without exception—to make a report to the Department of Revenue.

> If the judge of any court suspends, releases, waives, remits or orders the clerk of the court not to collect any privilege tax on litigation, or in any other manner releases any party from liability for any privilege tax on litigation, the clerk of the court shall immediately report such suspension, release, waiver, remission, or order to not collect such tax, to the department in such manner as shall be prescribed by the department, and the commissioner or the commissioner's delegate shall immediately, upon receipt of such a report from any clerk of a court, present such information to the board of judicial conduct, which court shall take appropriate action pursuant to title 17, chapter 5. The commissioner or the commissioner's delegate shall also report such information to the council on pensions and insurance.

Id. § 67-4-605(c) (as amended by 2021 Tenn. Pub. Acts, ch. 303 to substitute "council on pensions" for "council on pensions and insurance," effective July 1, 2021).

The clerk's duty to report a general sessions court judge who suspends or waives a litigation tax pursuant to Tenn. Code Ann. § 40-25-123(b) was the subject of Tenn. Att'y Gen. Op. 02-063, which concluded that the reporting requirement in Tenn. Code Ann. § 67-4-605(c) is limited to only "unauthorized waivers of the litigation tax by judges." Tenn. Att'y Gen. Op. 02-063, 2002 WL 1041355 at *3 (May 16, 2002). That conclusion was based on the notion that a literal reading of § 40-25-123(b) and § 67-4-605(c) together would "yield absurd results" because it would "require a general sessions clerk to immediately report to the Department of Revenue and the Department, in turn, to the Court of the Judiciary,[2] whenever litigation taxes are suspended by a general sessions judge" even when the judge was appropriately exercising his or her statutory authority to suspend litigation taxes and would, therefore, not be liable for sanctions by the Court of the Judiciary. *Id*. And requiring a report under those circumstances would be "absurd," because "it makes no sense for the clerk to immediately report the act to the Department of Revenue to, in turn, make a report to the Court of the Judiciary" when the judge had done nothing to warrant review or sanctions by the Court of the Judiciary. *Id*.

Presented now with a request to revisit the question, this Office is constrained to conclude that § 40-25-123(b) and § 67-4-605(c) can be read together without yielding absurd results and that, therefore, there is no reason or need to construe § 67-4-605(c) to mean anything other than

[1] For instance, Tenn. Code Ann. § 55-9-603, which generally prohibits the operation of a vehicle without wearing a seat belt, provides that "[n]o litigation tax levied pursuant to title 67, chapter 4, part 6, shall be imposed or assessed against anyone convicted of a violation of this section." Similarly, Tenn. Code Ann. § 55-9-602, which generally prohibits the operation of a vehicle without a child passenger restraint system, provides that "[n]o litigation tax levied pursuant to title 67, chapter 4, part 6, shall be imposed or assessed against anyone convicted of a violation" of certain parts of that statute.

[2] The Court of the Judiciary has been replaced by the Board of Judicial Conduct. *See* 2012 Tenn. Pub. Acts, ch. 819.

what the legislature—in clear and unambiguous language—has said: A court clerk must report a judge's suspension or waiver of litigation taxes in *all* instances.

"The most basic rule of statutory construction is to ascertain and give effect to the intention and purpose of the legislature." *Carson Creek Vacation Resorts, Inc. v. State Dep't of Revenue*, 865 S.W.2d 1, 2 (Tenn. 1993). In determining legislative intent and purpose, a court must not unduly restrict or expand a statute's coverage beyond its intended scope. *Worley v. Weigels, Inc*., 919 S.W.2d 589, 593 (Tenn. 1996). Rather, a court ascertains a statute's purpose "from the plain and ordinary meaning of its language within the context of the entire statute without any forced or subtle construction that would limit or extend the meaning of the language." *State v. Flemming*, 19 S.W.3d 195, 197 (Tenn. 2000).

Furthermore, it is not for the courts to alter or amend a statute. *Gleaves v. Checker Cab Transit Corp., Inc.*, 15 S.W.3d 799, 803 (Tenn. 2000). A court must not question the reasonableness of a statute or substitute its own policy judgments for those of the legislature. *Mooney v. Sneed*, 30 S.W.3d 304, 306-07 (Tenn. 2000); *BellSouth Telecomms., Inc. v. Greer*, 972 S.W.2d 663, 673 (Tenn. Ct. App. 1997). Instead, courts must "presume that the legislature says in a statute what it means and means in a statute what it says." *Kyle v. Williams*, 98 S.W.3d 661, 664 (Tenn. 2003). Accordingly, courts must construe a statute as it is written. *Gleaves*, 15 S.W.3d at 803.

The language of Tenn. Code Ann. § 67-4-605(c) is plain and clear. Its reporting requirements apply in all instances: "If the judge of any court suspends, releases, waives, remits or orders the clerk of the court not to collect *any* privilege tax on litigation, or *in any other manner* releases any party from liability for *any* privilege tax on litigation, the clerk of the court shall immediately report such suspension, release, waiver, remission or order to not collect such tax, to the department [of revenue] . . . ." [Emphasis added.] The statute contains no exceptions.

The later enactment of Tenn. Code Ann. § 40-25-123(b) did not impliedly amend Tenn. Code Ann. § 67-4-605(c) to limit a clerk's reporting duties to only those instances when a judge lacks statutory authority to waive or suspend a litigation tax. It is well established that the General Assembly is presumed to know the state of the law on the subject under consideration at the time it enacts legislation.[3] *Neff v. Cherokee Ins. Co*., 704 S.W.2d 1, 4 (Tenn. 1986). New statutes change preexisting law only to the extent expressly declared. *Johnson v. Hopkins*, 432 S.W.3d 840, 848 (Tenn. 2013). A statute not repealing directly or by implication any previous law is cumulative to such law. *Id*. Repeals and amendments by implication are not favored. *Id*.; *Hayes v. Gibson Cnty*., 288 S.W.3d 334, 337 (Tenn. 2009). An amendment by implication can occur only when the terms of a later statute are so repugnant to an earlier statute that they cannot stand together. *Hayes*, 288 S.W.3d at 337. If the enactments are capable of being construed so that they both may stand, the court should so construe them. *Kentucky-Tennessee Clay Co. v. Huddleston*, 922 S.W.2d 539, 542 (Tenn. Ct. App. 1995).

[3] In fact, when the General Assembly has enacted statutes that expressly allow judges to suspend litigation taxes, the statutes have specifically referred to title 67, chapter 4, part 6. *See* note 1, *supra*, and accompanying text.

Here, Tenn. Code Ann. § 67-4-605(c) and Tenn. Code Ann. § 40-25-123(b) can stand together, and together they require a clerk to make reports to the Department of Revenue whenever a judge suspends litigation taxes, regardless of whether the suspension is authorized or unauthorized. Invocation of the absurdity doctrine is almost never appropriate when a statute is unambiguous. *See Barnhart v. Sigmon Coal Co., Inc*., 534 U.S. 438, 459 (2002) (when legislation is unambiguous, the doctrine may rarely be invoked to override the legislation). *Cf. Martin v. Powers*, 505 S.W.3d 512, 518 (Tenn. 2016) (absurdity doctrine is generally employed when necessary to resolve statutory conflict and to provide for the harmonious operation of the laws). Indeed, the Tennessee Supreme Court has observed that "[t]he power to disregard a clear statutory text on the ground that it dictates an absurd result has been subject to criticism in recent years." *Seals v. H & F, Inc*., 301 S.W.3d 237, 251 (Tenn. 2010) (citing John F. Manning, *The Absurdity Doctrine*, 116 Harv. L Rev. 2387 (2003)). Although the absurdity doctrine remains a part of our State's statutory construction jurisprudence, the Court cautioned that it is a doctrine that "should be applied sparingly—only when a result is manifestly absurd, and not simply unpleasant or peculiar." *Id*.

Construing the three reporting requirements of Tenn. Code Ann. § 67-4-605(c) to apply in all instances in which a judge suspends litigation taxes does not produce a result that is "manifestly absurd." On the contrary, for various reasons explained below, the reporting requirements under Tenn. Code Ann. § 67-4-605(c) serve specific purposes, and, as policy decisions of the General Assembly, they should not be second-guessed. *See Hughes v. Tennessee Bd. of Probation and Parole*, 514 S.W.3d 707, 722 n. 14 (Tenn. 2017) (courts are not at liberty to disregard express statutory language or to second-guess policy choices made by the General Assembly); *Mooney*, 30 S.W.3d at 306-07 (a court must not question the reasonableness of a statute or substitute its own policy judgments for those of the legislature).

First, Tenn. Code Ann. § 67-4-605(a) requires the clerk to pay over "any privilege tax imposed by Tenn. Code Ann. § 67-4-602" to the Department of Revenue. Whether the clerk fails to pay the tax over to the department due to a judge's authorized or unauthorized waiver of the tax, the result is the same: the department does not receive the tax.

Second, requiring the Department of Revenue to make reports to the Council on Pensions and Insurance in all instances in which a judge suspends litigation taxes supports the mission of the Council. The Council was created to develop and recommend standards and state policy relating to pensions and insurance for state and local governments within Tennessee. *See id.* §§ 3-9-101 to -104. Currently, Tenn. Code Ann. § 67-4-606(a)(3) provides that nearly a third of the privilege taxes, including the litigation taxes, collected are apportioned to the general fund, which subsidizes, in turn, compensation and benefits of state employees. Requiring the Department of Revenue to report to the Council taxes that were not collected by clerks due to judges' suspension of those taxes is important information for the Council to have for planning and policy purposes.

Third, requiring the department to make reports to the Board of Judicial Conduct in all instances in which a judge suspends litigation taxes is reasonable. By its express terms, the statute provides that the report is made so that the Board of Judicial Conduct may "take *appropriate* action pursuant to title 17, chapter 5." Tenn. Code Ann. § 67-4-605(c) (emphasis added). If a judge properly suspends a litigation tax under express statutory authority, the "appropriate action" is no

action, so there is no harm in making the report and no reason to ignore the plain statutory language. What would be—if not "absurd"—at least highly problematic would be a statutory construction that placed on the clerk the responsibility of determining in each instance in which a judge suspends litigation taxes whether the suspension is legally authorized or not. The legislature's policy decision to not put clerks in this untenable position should not be second-guessed.

Moreover, construing Tenn. Code Ann. § 67-4-605(c) to apply only when a judge suspends litigation taxes without statutory authority to do so would effectively amend the statute and impermissibly limit its scope. It is the prerogative of the General Assembly, not the courts, to amend statutes. *In re Swanson*, 2 S.W.3d 180, 187 (Tenn. 1999); *see State v. Strode*, 232 S.W.3d 1, 9 (Tenn. 2007) (a court's role is "to ascertain and give effect to the legislative intent without unduly restricting or expanding a statute's coverage beyond its intended scope"); *Loftin v. Langsdon*, 813 S.W.2d 475, 480 (Tenn. Ct. App. 1991) (unless "manifest injustice" would result, a court may not supply words to a statute that would limit the statute's meaning). Had the General Assembly intended that a clerk's duty to report a judge's suspension of litigation taxes applied only to unauthorized suspensions, it could have and would have explicitly done so by amending Tenn. Code Ann. § 67-4-605(c) when it enacted Tenn. Code Ann. § 40-25-123(b)—or when it enacted other similar statutes, *e.g.*, Tenn. Code Ann. §§ 55-9-602; 55-9-603.[4]

In sum, Tenn. Code Annotated § 67-4-605(c) requires court clerks, including general sessions court clerks, to report, without exception, a judge's suspension of "*any* privilege tax on litigation." This construction allows the statute to stand with Tenn. Code Ann. § 40-25-123(b) and results in no "manifest absurdity."

2. Under Tenn. Code Ann. § 67-4-605(b), a court clerk, including a general sessions court clerk, who fails or refuses to collect and pay over to the Department of Revenue the litigation tax imposed by § 67-4-602 is personally liable for the tax. But subsection 605(b) does not apply when a general sessions court clerk does not collect and pay the tax because a general sessions court judge has suspended or waived that litigation tax; in that instance the court clerk would simply lack the requisite authority to collect and pay the tax to the Department of Revenue.

[4] *See* note 1, *supra*.

And since § 67-4-605(b) does not deal at all with a clerk's failure to *report* a judicial waiver of a litigation tax, it has no application to court clerks who do not report a judicial waiver of litigation taxes for an indigent defendant. A clerk's failure to *report* the suspension or waiver of litigation taxes to the department, however, could lead to other repercussions depending on the circumstances. *See, e.g.*, Tenn. Code Ann. § 18-1-301(5) (providing that a clerk of court may be removed from office for neglect of duty).

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