



COMMONWEALTH OF VIRGINIA

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September 1, 2009

C. Eric Young, Esq.
Tazewell County Attorney
108 East Main Street
Tazewell, Virginia 24651

Dear Mr. Young:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issues Presented

You ask whether payments erroneously made to towns by the county treasurer under § 58.1-605(H) may be refunded to such county pursuant to § 58.1-605(F). You also ask whether the distribution by the county treasurer to a town based on incorrect school census data constitutes an “error made in any such payment” pursuant to § 58.1-605(F).

Response

It is my opinion that payments erroneously made to towns by the county treasurer under § 58.1-605(H) may not be refunded to Tazewell County pursuant to § 58.1-605(F). Further, it is my opinion that the distribution by the county treasurer to a town that was based on incorrect school census data does not constitute an “error made in any such payment” under § 58.1-605(F). However, it is my opinion that § 58.1-3133(A) permits the treasurer to deduct the overpayments as “other charges” to recoup those amounts.

Background

You advise that the treasurer of Tazewell County, as directed by § 58.1-605(H), has distributed sales tax revenues to the incorporated towns in the County based on the school age populations in each town. You advise that it appears the school division did not provide the treasurer with the correct or most recent school census data. Consequently, one town received less funds while three other towns received more funds than would have been due had the correct data been used to calculate the distributions.

You conclude that future allocations to the three towns may be decreased as a refund of amounts paid in error as provided in § 58.1-605(F), in which case you conclude the county treasurer would be acting as an agent of the Comptroller of Virginia.¹

¹Section 2.2-505(B) requires that an opinion request from a county attorney “shall itself be in the form of an opinion embodying a precise statement of all facts together with such attorney’s legal conclusions.”

Applicable Law and Discussion

The power of a local governing body, unlike that of the General Assembly, “must be exercised pursuant to an express grant”² because the powers of a county “are limited to those conferred expressly or by necessary implication.”³ “If the power cannot be found, the inquiry is at an end.”⁴ The Dillon Rule requires a narrow interpretation of all powers conferred on local governments since they are delegated powers.⁵ Therefore, any doubt as to the existence of power must be resolved against the locality.⁶

The Dillon Rule of strict construction is applicable to local constitutional officers.⁷ Article VII, § 4 of the Constitution of Virginia creates the office of treasurer and provides that a treasurer’s duties “shall be prescribed by general law or special act.”⁸ The powers and duties of a local treasurer are set out generally in Article 2, Chapters 31⁹ and 39¹⁰ of Title 58.1. A county treasurer is responsible for collecting taxes and other revenues payable into the treasury of the locality he serves.¹¹

Sections 58.1-603 and 58.1-604 impose a tax on the retail sale or consumption of tangible personal property within the Commonwealth. Pursuant to § 58.1-606, cities and counties may also impose sales and use taxes to be collected with the state tax imposed under §§ 58.1-603 and 58.1-604.

In the context of the question that you present, § 58.1-605(F) provides that:

As soon as practicable after the local sales tax moneys have been paid into the state treasury in any month for the preceding month, the Comptroller shall draw his warrant on the Treasurer of Virginia in the proper amount in favor of each city or county entitled to the monthly return of its local sales tax moneys, and such payments shall be charged to the account of each such city or county under the special fund created by this section. If

² Nat’l Realty Corp. v. Va. Beach, 209 Va. 172, 175, 163 S.E.2d 154, 156 (1968).

³ Bd. of Supvrs. v. Horne, 216 Va. 113, 117, 215 S.E.2d 453, 455 (1975) (noting corollary to Dillon Rule).

⁴ Commonwealth v. County Bd., 217 Va. 558, 575, 232 S.E.2d 30, 41 (1977).

⁵ See Bd. of Supvrs. v. Countryside Inv. Co., 258 Va. 497, 504-05, 522 S.E.2d 610, 613-14 (1999) (holding that county board of supervisors does not have unfettered authority to decide what matters to include in subdivision ordinance; must include requirements mandated by Land Subdivision and Development Act and may include optional provisions contained in act); Op. Va. Att’y Gen.: 2002 at 77, 78; 1974-1975 at 403, 405.

⁶ 2A EUGENE MCQUILLEN, THE LAW OF MUNICIPAL CORPORATIONS § 10.19, at 369 (3d ed. 1996); see also Op. Va. Att’y Gen.: 2002 at 83, 84; 2000 at 75, 76.

⁷ See, e.g., Op. Va. Att’y Gen.: 2006 at 200, 201; 1984-1985 at 284, 284.

⁸ See also VA. CODE ANN. § 15.2-1600(A) (2008) (parallel statute).

⁹ VA. CODE ANN. §§ 58.1-3123 to 58.1-3172.1 (2004) (codified in scattered sections). For purposes of Chapter 31 of Title 58.1, the term “treasurer” applies to city, county, and town treasurers and to directors of finance and any other officers who perform the duties of a treasurer, unless the context indicates otherwise. See § 58.1-3123.

¹⁰ Sections 58.1-3910 to 58.1-3938 (2004 & Supp. 2008) (codified in scattered sections). Chapter 39 of Title 58.1, §§ 58.1-3900 through 58.1-3993, addresses the collection of local taxes. Chapter 39 does not define the term “treasurer.” Some sections within Chapter 39 refer to “county and city treasurer” while others refer to “treasurer” without apparent distinction.

¹¹ Sections 58.1-3127(A); 58.1-3910 (2004).

errors are made in any such payment, or adjustments are otherwise necessary, whether attributable to refunds to taxpayers, or to some other fact, the errors shall be corrected and adjustments made in the payments for the next six months as follows: one-sixth of the total adjustment shall be included in the payments for the next six months. In addition, the payment shall include a refund of amounts erroneously not paid to the city or county and not previously refunded during the three years preceding the discovery of the error. A correction and adjustment in payments described in this subsection due to the misallocation of funds by the dealer shall be made within three years of the date of the payment error.

Section 58.1-605(H) provides, in pertinent part, that:

One-half of such payments to counties are subject to the further qualification ..., that in any county wherein is situated any incorporated town not constituting a separate special school district which has complied with its charter provisions providing for the election of its council and mayor for a period of at least four years immediately prior to the adoption of the sales tax ordinance, the county treasurer shall pay into the town treasury of each such town for general governmental purposes the proper proportionate amount received by him in the ratio that the school age population of each such town bears to the school age population of the entire county, based on the latest statewide school census.

Generally, the object of statutory construction is the ascertainment of legislative intent.¹² Section § 58.1-605(F) clearly provides that the Comptroller of Virginia is to pay over to the county the monthly return of its local sales tax moneys. Furthermore, the General Assembly provides that all errors are to be “corrected and adjustments made in the payments for the next six months.”¹³ The statutory reference to the Comptroller of Virginia making payments to the county and correction of errors made in such payments must be viewed within the context of the statutory provision, rather than isolated from the rest of the text of the statute.¹⁴ Applying the plain language of the statute to mean that a county treasurer acts as an agent of the Comptroller when making payments into the town treasury under § 58.1-605(H) would be a result that is not supported by the plain language of the statute.¹⁵

¹²See *Vollin v. Arlington County Electoral Bd.*, 216 Va. 674, 678-79, 222 S.E.2d 793, 797 (1976) (“It is the intention of the lawmaker that constitutes the law.”); see also *London Bros. v. Nat’l Exchange Bank*, 121 Va. 460, 466-67, 93 S.E. 699, 700 (1917); *Kain v. Ashworth*, 119 Va. 605, 608, 89 S.E. 857, 858 (1916) (noting that legislative intent is to be gathered from words used unless literal interpretation leads to manifest absurdity). “The ascertainment of legislative intention involves appraisal of the subject matter, purposes, objects and effects of the statute, in addition to its express terms.” *Vollin*, 216 Va. at 679, 222 S.E.2d at 797.

¹³Section 58.1-605(F) (Supp. 2008).

¹⁴*Turner v. Commonwealth*, 226 Va. 456, 460, 309 S.E.2d 337, 339 (1983) (noting that maxim, *noscitur a sociis*, provides that meaning of word must be determined in relation to surrounding language and must be read in harmony with its context). Furthermore, it is well established that statutes should not be read in isolation. See, e.g., 2B NORMAN J. SINGER & J.D. SHAMBLE SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 51:2 (West 7th ed. 2008); Op. Va. Att’y Gen.: 2008 at 16, 18; 1999 at 22, 22; 1998 at 123, 124; 1996 at 197, 198; 1992 at 108, 112.

¹⁵See *London Brothers*, 121 Va. at 466-67, 93 S.E. at 700; *Kain*, 119 Va. at 608, 89 S.E. at 858 (noting that legislative intent to be gathered from words used unless literal interpretation leads to manifest absurdity).

Section 58.1-3133(A) relates to the duties of a local treasurer:

In the payment of any warrants lawfully drawn, the treasurer paying such warrants may first deduct all taxes and other charges due from the party in whose favor the warrant is drawn. If such warrant is insufficient to pay the entire amount due, then such treasurer shall credit the bill for such taxes or other charges by the amount of the warrant.

A 1987 opinion of the Attorney General (“1987 Opinion”) interpreted the language of § 58.1-3133 in effect at that time as it related to the authority of a treasurer to deduct funds from the regular paycheck of a regional jail employee, a county resident who owed taxes to the county.¹⁶ In 1987, the first sentence of § 58.1-3133 did not include the phrase “and other charges.”¹⁷ The 1987 Opinion concludes that § 58.1-3133 should be construed to permit only the setoff of delinquent county or city taxes against county or city warrants drawn in favor of the taxpayer.¹⁸ The 2001 Session of the General Assembly amended the first sentence of § 58.1-3133(A) to add the phrase “and other charges.”¹⁹ When the General Assembly amends existing legislation by adding new provisions, a presumption arises that it “acted with full knowledge of, and in reference to, the existing law upon the same subject and the construction placed upon it by the courts.”²⁰ Further, it is presumed that the General Assembly purposefully acted with the intent to change existing law.²¹ The common or ordinary meaning of the term “party” is “[o]ne who takes part in a transaction.”²² The towns that you describe certainly are parties to the transaction of receiving payments made by the county treasurer pursuant to § 58.1-605(H). Therefore, it is my opinion that § 58.1-3133(A) authorizes a county treasurer to deduct “other charges due” from the towns from future warrants drawn by the county treasurer for payment into the town treasury of funds received from the Comptroller under § 58.1-605(F).

In conclusion, the treasurer relied on incorrect school census figures to make an incorrect deposit that was not authorized by law. Likewise, the towns receiving the amounts paid by the county treasurer clearly were not entitled to receive such funds and did so without statutory authority because the deposit was based upon the incorrect data. Accordingly, the towns receiving the incorrect amount must return the overages to the county. If they do not do so voluntarily, § 58.1-3133(A) permits the treasurer to deduct all “other charges” due from the party “in whose favor the warrant is drawn.” Accordingly, the county treasurer may deduct such overages as “other charges” due from the towns in subsequent warrants drawn pursuant to § 58.1-605(H).

¹⁶ See 1986-1987 Op. Va. Att’y Gen. 290, 290.

¹⁷ See 2001 Va. Acts ch. 801, at 1094, 1094 (adding phrase “and other charges” to first sentence of § 58.1-3133); see also § 58.1-3133 (1984) (providing that “[i]n the payment of any warrants lawfully drawn, the treasurer paying such warrants may first deduct all taxes due from the party in whose favor the warrant is drawn”).

¹⁸ See 1986-1987 Op. Va. Att’y Gen., *supra* note 16, at 292.

¹⁹ See *supra* note 17.

²⁰ *City of Richmond v. Sutherland*, 114 Va. 688, 693, 77 S.E. 470, 472 (1913).

²¹ *Cape Henry Towers, Inc. v. Nat’l Gypsum Co.*, 229 Va. 596, 600, 331 S.E.2d 476, 479 (1985); *Wisniewski v. Johnson*, 223 Va. 141, 144, 286 S.E.2d 223, 224-25 (1982); *Sutherland*, 114 Va. at 693, 77 S.E. at 472.

²² BLACK’S LAW DICTIONARY 1231 (9th ed. 2009). When a particular word in a statute is not defined therein, it must be given its ordinary meaning. See *McKeon v. Commonwealth*, 211 Va. 24, 27, 175 S.E.2d 282, 284 (1970).

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Conclusion

Accordingly, it is my opinion that payments erroneously made to towns by the county treasurer under § 58.1-605(H) may not be refunded to Tazewell County pursuant to § 58.1-605(F). Further, it is my opinion that the distribution by the county treasurer to a town that was based on incorrect school census data does not constitute an "error made in any such payment" under § 58.1-605(F). However, it is my opinion that § 58.1-3133(A) permits the treasurer to deduct the overpayments as "other charges" to recoup those amounts.

Thank you for letting me be of service to you.

Sincerely,

A handwritten signature in black ink, appearing to read "W. C. Mims", with a stylized flourish at the end.

William C. Mims