



COMMONWEALTH OF VIRGINIA

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November 3, 2009

The Honorable Francis X. O'Leary
Arlington County Treasurer
#1 Courthouse Plaza, Suite 201
Arlington, Virginia 22216-7436

Dear Mr. O'Leary:

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

Issue Presented

You ask whether a local treasurer and the Department of Taxation (the "Department") may lawfully enter into an agreement whereby the treasurer would collect delinquent taxes owed to the Commonwealth of Virginia in exchange for a commission of twenty percent of the state taxes so collected, which the treasurer would recover from state taxpayers in addition to their past due state taxes.

Response

It is my opinion that a local treasurer collecting delinquent state taxes pursuant to an agreement with the Department of Taxation is not authorized to recover from the taxpayer a twenty-percent commission in addition to the delinquent state taxes collected on behalf of the Department.

Background

You indicate that the Department and local treasurers may seek to enter into an agreement whereby local treasurers would collect past due tax debt owed the Commonwealth and receive a twenty-percent commission for their services, which fee would be added to the delinquent amounts collected. You assert that an agreement pursuant to these terms would be mutually beneficial to the Department and local treasurers; it would accelerate collection of delinquent state tax liabilities without committing additional state resources, and localities would derive additional revenues.

Applicable Law and Discussion

A threshold question raised by your request is whether the Department may compensate local treasurers for their efforts in collecting delinquent state taxes. Section 58.1-1803(A) provides that:

The Department of Taxation may appoint a collector in any county or city, including the treasurer thereof, to collect delinquent state taxes that were assessed at least 90 days previously therein, or elsewhere in the Commonwealth, and may allow him a reasonable compensation, to be agreed on before the service is commenced. Where the appointed collector is a local government treasurer, any actions taken pursuant to this section shall be considered part of the official duties of such treasurer.

In the first sentence of § 58.1-1803(A), the General Assembly expressly authorizes the Department to compensate local treasurers for services that they perform in collecting delinquent state taxes and associated liabilities.¹ However, the second sentence of § 58.1-1803(A) specifically provides that a treasurer’s actions to collect taxes and related charges on behalf of the Commonwealth constitute “part of the official duties of such treasurer.” When the language of a statute is plain and unambiguous and its meaning is clear and definite, it must be given effect.² In addition, the State and Local Government Conflict of Interest Act³ (the “Conflict Act”) clearly provides that it is unlawful for a local government official to “accept money or other thing of value for services performed within the scope of his official duties, except the compensation, expenses or other remuneration paid by the agency of which he is an officer or employee.”⁴

Consequently, a plain reading of § 58.1-1803(A) in conjunction with § 2.2-3103(1) of the Conflict Act yields an apparent inconsistency between these provisions that requires the application of certain principles of statutory construction.⁵ The Supreme Court of Virginia has held that “‘when two statutes seemingly conflict, they should be harmonized, if at all possible, to give effect to both.’”⁶ In my opinion, the apparent inconsistency between the authority the General Assembly has granted to the Department in § 58.1-1803(A) to compensate local treasurers and the Conflict Act’s prohibition against a local constitutional officer accepting remuneration for carrying out his official duties⁷ may be reconciled by construing § 58.1-1803(A) to allow that such compensation be paid to the treasurer’s locality, rather than to the treasurer personally. Such an interpretation comports with the purpose of the Conflict Act, which prohibits the private economic interests of governmental officers and employees from inappropriately influencing their official conduct.⁸

¹Section 58.1-1803(C) defines “the term ‘state taxes’ [to] include any penalty and interest” applicable to a state tax assessment, as well as “the local sales and use tax imposed under the authority of §§ 58.1-605 and 58.1-606 and any penalty and interest applicable thereto.”

²Temple v. Petersburg, 182 Va. 418, 423, 29 S.E.2d 357, 358 (1944); 1997 Op. Va. Att’y Gen. 16, 17.

³See VA. CODE ANN. §§ 2.2-3100 to 2.2-3131 (2008 & Supp. 2009).

⁴Section 2.2-3103(1) (2008).

⁵See Boynton v. Kilgore, 271 Va. 220, 228, 228 n.11, 623 S.E.2d 922, 926, 926 n.11 (2006).

⁶Viking Enter. v. County of Chesterfield, 277 Va. 104, 110, 670 S.E.2d 741, 744 (2009) (quoting Commonwealth v. Zamani, 256 Va. 391, 395, 507 S.E.2d 608, 609 (1998) (alteration omitted)).

⁷See § 2.2-3103(1).

⁸See § 2.2-3100 (2008); § 2.2-3103.

Applying this reasoning to your inquiry, the Department may compensate a locality for actions taken by its treasurer to collect state taxes pursuant to § 58.1-1803(A), provided the compensation is: (a) reasonable; (b) determined prior to the treasurer's undertaking of such actions; and (c) paid directly to the locality and not to the treasurer personally. Further, I am not aware of any provision of Virginia law that would prohibit the Department from allowing compensation to an appointed collector in the form of a percentage commission based on the amount of state taxes and associated charges collected. Therefore, a local treasurer's office may recoup a reasonable percentage commission for its collections on behalf of the Department.

The remaining question is whether a local treasurer may recover such commission from the delinquent taxpayers against whom the treasurer pursues such collection actions on behalf of the Department. You appear to suggest that this mode of collection is permissible under § 58.1-3916, which provides that "[t]he governing body [of any county, city, or town] ... by ordinance ... may provide for the recovery of reasonable attorney's fees or collection agency's fees actually contracted for, not to exceed 20 percent of the delinquent taxes and other charges so collected."

Section 58.1-1803(C) permits a local treasurer appointed by the Department to collect delinquent state taxes pursuant to Article 2,⁹ which sets forth local treasurers' authority to enforce and collect local taxes. Therefore, if the governing body has exercised its authority to enact an ordinance to recover attorney's or collections agency's fees from delinquent local taxpayers, such locality would be authorized to recover such fees incurred in the collection of delinquent state taxes. However, § 58.1-3916 does not authorize a local treasurer to recover from the delinquent state taxpayers the flat twenty-percent commission about which you inquire. You propose that the Department and local treasurers would pursue collection of 120 percent of a delinquent state taxpayer's past due state taxes. In other words, the local treasurer would tender 100 percent of the taxpayer's debt to the Commonwealth and retain 20 percent for the treasurer's locality. Such a collection scheme is not the "reasonable attorney's or collection agency's fees actually contracted" permitted under § 58.1-3916 to be recovered from a delinquent taxpayer. Thus, it is my opinion that a treasurer may not lawfully recover a uniform twenty-percent commission on state taxes because Virginia law does not permit the treasurer to do so in conjunction with the collection of local taxes.

Virginia adheres to the Dillon Rule that "municipal corporations and counties possess and may exercise only those powers expressly granted by the General Assembly, powers necessarily or fairly implied from such express powers, and those powers that are essential and indispensable."¹⁰ Section 58.1-3916 grants a locality the authority to adopt an ordinance to recover reasonable attorney's fees or collection agency's fees that the locality actually expends in pursuit of the taxpayer's debt to the locality; it does not, either expressly or impliedly, allow a locality to levy a flat, twenty-percent surcharge on delinquent local tax liabilities. Therefore, because a local treasurer's statutory authority in collecting delinquent state taxes pursuant to an appointment from the Department is derivative of that applicable to

⁹ See VA. CODE ANN. tit. 58.1, ch. 39, art. 2, §§ 58.1-3910 to 58.1-3938 (2009) (codified in scattered sections).

¹⁰ Logan v. City Council, 275 Va. 483, 494, 659 S.E.2d 296, 302 (2008).

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the treasurer's collection of local taxes,¹¹ such recovery is just as impermissible with respect to state taxes as it is in the context of local tax collections.

Conclusion

Accordingly, it is my opinion that a local treasurer collecting delinquent state taxes pursuant to an agreement with the Department of Taxation is not authorized to recover from the taxpayer a twenty-percent commission in addition to the delinquent state taxes collected on behalf of the Department.

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

1:213; 1:941/09-067

¹¹See § 58.1-1803(C).