



ALAN WILSON
ATTORNEY GENERAL

November 9, 2012

The Honorable Douglas E. Henderson
Beaufort County Treasurer
P.O. Drawer 487
Beaufort, South Carolina 29901

Dear Mr. Henderson,

We received your letter requesting an opinion of this Office concerning the collection of delinquent taxes, penalties, and costs and the manner in which such funds should be disbursed. By way of background, you provide us with the following information:

[T]he State mandates penalties for past due taxes which are imposed by the Auditor's office in the amount of 3% on January 16th, 7% on February 2nd and 5% on March 17th.

Since taking office on July 1, 2011, I have taken it upon myself to analyze every aspect of our operation to insure that we are operating prudently and within the confines of all state statutes. When I looked at this procedure, I wanted to know what happened to the penalties and how they were distributed. I found that they have evolved into revenue sources for the different municipalities, agencies, and the county itself.

I have tried to determine what the original intent was for these penalties and where the mandated distribution was located within the statutes and have been unable to find anything. I have e-mailed Sandy Houck, with [the Department of Revenue], and he also could find no legally-mandated distribution or purpose for these penalties.

My thinking was that these funds, by the very nature of the definition of "penalty," would be applied to the expenses associated with the collection of those delinquent taxes to which it was applied and any remaining portion could then go to the municipalities, agencies, and the county.

We are currently not charging any municipality or agency for the collection of the delinquencies in their particular districts, but are providing them a revenue source based on the delinquent accounts within their particular areas.

Since these funds were being handled this way, the Treasurer's Office imposes Treasurer fees in order to cover the cost of collections which are significant due to the mandated procedures by which we must comply.

It appears that we are penalizing the people who can least afford to pay these penalties and fees by imposing both when in fact, we could use only the penalties to accomplish what is needed.

In consideration of the information provided, the general issues raised by your request are as follows:

- 1) May a county treasurer impose fees to cover the costs of collecting delinquent taxes and penalties?
- 2) May a county treasurer retain the penalties collected to cover the costs of collecting delinquent taxes and penalties on behalf of the county as well as for municipalities?

Law/Analysis

The penalties you reference in your letter are provided for in S.C. Code § 12-45-180(A) which states:

When the taxes and assessments or any portion of the taxes and assessments charged against any property or person on the duplicate for the current fiscal year are not paid before the sixteenth day of January or thirty days after the mailing of tax notices, whichever occurs later, the county auditor shall add a penalty of three percent on the county duplicate and the county treasurer shall collect the penalty. If the taxes, assessments, and penalty are not paid before the second day of the next February, an additional penalty of seven percent must be added by the county auditor on the county duplicate and collected by the county treasurer. If the taxes, assessments, and penalties are not paid before the seventeenth day of the next March, an additional penalty of five percent must be added by the county auditor on the county duplicate and collected by the county treasurer. **If the taxes, assessments, and penalties are not paid before the seventeenth day of March, the county treasurer shall issue his tax execution to the officer authorized and directed to collect delinquent taxes, assessments, penalties, and costs for their collection as provided in Chapter 51 of this title and they must be collected as required by that chapter....**

(emphasis added).

A tax execution issued by a county treasurer against a defaulting taxpayer as provided in § 12-45-180(A) directs "the officer authorized to collect delinquent taxes, assessments, penalties and costs ... to levy the execution by distress and sale of the defaulting taxpayer's ... property ... to satisfy the taxes, assessments, penalties, and costs" § 12-51-40. The costs that may be collected include, but are not limited to, "the expenses of taking possession of real or personal property, advertising, storage, identifying the boundaries of the property, and mailing certified notices." § 12-51-40(d). Through the

enactment of local legislation, the General Assembly has designated the Treasurer of Beaufort County as the officer charged with the collection of delinquent taxes and penalties. See Act No. 987 of 1962 (“Act 987”).¹ Pursuant to § 12-45-400, however, the county treasurer may delegate this duty.

In determining whether a county treasurer may impose a fee for the collection of delinquent taxes and penalties pursuant to the above statutory provisions we must start by examining the relevant powers afforded to counties and the nature of those powers. Article X, § 6 of the South Carolina Constitution provides that “the General Assembly may vest the power of assessing and collecting taxes in all of the political subdivisions of the State, including counties” As our Supreme Court stated in Watson v. City of Orangeburg, 229 S.C. 367, 375, 93 S.E.2d 20, 24 (1956), “[t]he power of taxation being an attribute of sovereignty vested in the legislature subject to constitutional restrictions, taxes can be assessed and collected only under statutory authority.”

The General Assembly has conferred upon counties the power to levy taxes pursuant to § 4-9-30. This power, however, must be exercised “subject to the general law of this State” Id. As we explained in a previous opinion, “[n]o separate power to impose a penalty has been delegated [under § 4-9-30, and] the power to levy the tax is subject to the general laws of the State.” Op. S.C. Att’y Gen., 1983 WL 181949 (July 26, 1983). We further advised that when the General Assembly has prescribed the penalties and costs that can be imposed, those penalties and costs are exclusive and no additional charges can be levied and collected. Id.

In consideration of the above authorities, it is clear that the penalties and costs provided in § 12-45-180(A) and § 12-51-40 are exclusive. As such, no additional penalties or charges can be imposed and collected. It is significant to note that these two statutory sections only allow costs to be recovered by the officer authorized and directed to collect delinquent taxes and penalties – in this case, the Treasurer or his designee – after taxes and penalties have not been paid by the March 17th deadline and a tax execution has been issued against the defaulting taxpayer. As we explained in a prior opinion, the expenses a tax collector may collect as costs in carrying out a tax execution against a defaulting taxpayer pursuant to § 12-51-40 are limited to those necessary to effectuate the levy, seizure, and sale of the property. Op. S.C. Att’y Gen., 1993 WL 720117 (May 4, 1993). Accordingly, we believe a court would likely conclude that any fees imposed by a county treasurer in addition to the penalties and costs expressly permitted in § 12-45-180(A) or § 12-51-40, as the case may be, are invalid as being not authorized by statute.²

¹ § 1 of Act 987 states that “[t]he powers and duties ... relating to the collection of delinquent taxes, the seizure and sale of property for the nonpayment of taxes, the making of deeds to such property, and other matters necessary or incidental to the collection of delinquent taxes, are hereby vested and imposed upon the Treasurer of Beaufort County” § 2 provides that “the Treasurer shall charge the same penalties and fees as heretofore provided by law, which penalties and fees shall accrue to the General Fund of Beaufort County”

² We note that this conclusion does not affect a county treasurer’s right to recover costs or expenses for the collection of taxes where otherwise permitted by statute. For example, § 12-45-75 provides that a county may give taxpayers the option of paying property taxes in installments. Subsection (D) states that the county treasurer is to deposit such installment payments in an interest bearing account, and “[t]he interest is to be retained by the treasurer to offset the administrative expenses of installment payments.” § 12-45-75(D); see also § 12-45-120 (where taxpayer owes delinquent chattel tax in one county and resides or has property in another county, treasurer in county where tax is owed shall add a twenty-five percent collection fee to be split with treasurer of county where taxpayer resides or owns property upon collection of delinquent tax and penalties); § 49-19-1680 (in collecting taxes for drainage districts, “county treasurer shall retain for his service one per cent of the amount he collects on current taxes and two

Furthermore, in the opinion previously cited we also stated that a tax collector, when incurring expenses which may be collected as costs pursuant to § 12-51-40, “is not free to add expenses based on arbitrary amounts for costs. Rather, the individual must be able to substantiate the expenses which are being added as costs.” *Id.* Therefore, we believe a court would find any flat-rate fee or other arbitrary fee imposed to cover costs that is not based on the necessary and actual costs incurred in effectuating the levy, seizure, and sale of property is likewise invalid as not being authorized by statute.

As to the issue of whether a county treasurer may retain penalties collected to offset collection costs, we can find no authority to support such a practice. Act 987, § 2 clearly states that penalties charged for the collection of delinquent taxes “shall accrue to the General Fund of Beaufort County.” To the extent the proceeds of a tax sale received by the Treasurer are owed in part to municipalities or other political subdivisions, § 12-51-80 states that “[t]he treasurer shall make full settlement of tax sale monies ... to the respective political subdivisions for which the taxes were levied....” See also S.C. Revenue Ruling No. 95-18, 1995 WL 17826315 (Dec. 21, 1995) (stating that pursuant to § 12-51-80 “[t]he treasurer will then distribute the funds to the entities who are owed the taxes, penalties, and interest”). Therefore, this Office is of the opinion that penalties collected by the Treasurer may not be used to offset collection costs.

You also indicate that your office currently collects and disburses delinquent taxes on behalf of municipalities without charge. It is our understanding that the Treasurer, as the officer charged with collecting delinquent taxes in Beaufort County, is not required to collect and disburse delinquent taxes for municipalities except in certain circumstances. As previously mentioned, such a duty exists pursuant to § 12-51-80 when the Treasurer receives the proceeds of a tax sale, a portion of which is owed to a municipality. In addition, such a duty may exist if the County has entered into a contract with a municipality by which it agrees to collect delinquent municipal taxes. See § 5-7-300(D) (“A municipality may contract for the collection of municipal taxes or for the collection of delinquent municipal taxes upon terms and conditions mutually agreeable to both the municipality and the county”); § 12-51-170 (“A county and municipality may contract for the collection of municipal taxes by the county”). In the absence of such a contract, the municipality is empowered to collect its own delinquent taxes. See § 5-7-300(A) (“All municipalities ... may provide by ordinance a procedure for the collection of delinquent real and personal property taxes”).

Finally, we note that if the Treasurer’s budget is not sufficient to allow the Treasurer to perform his statutory duties of collecting taxes, this is an issue that should be addressed with the County Council. We have recognized that the Legislature has given “broad authority and discretion to county governments to appropriate funds for county purposes.” Op. S.C. Att’y Gen., 2007 WL 419432 (Jan. 8, 2007); see also § 4-9-30(5)(a) (giving a county government the power to “make appropriations for functions and operations of the county”); § 4-9-140 (“County council shall adopt annually ... operating and capital budgets for the operation of county government”). However, we have also recognized that a county government’s authority is limited in that a county “cannot interfere with any of the duties and

per cent of the amount he collects on delinquent taxes”). However, no such statutory authority exists to provide a county treasurer with the authority to collect or retain costs for the administrative expenses of collecting delinquent taxes and penalties.

responsibilities given to elected county officials³ under State law.” Op. S.C. Att’y Gen., 2011 WL 1740743 (April 29, 2011). In light of this limitation, we have concluded that although a county council has broad authority with regards to budgetary decisions, a county council must provide county elected officials “with a budget sufficient to perform the functions of their offices.” Id. However, the determination of whether the County Council has, in any particular instance, exercised its budgetary authority in a manner so as to prevent the Treasurer from sufficiently performing his duties is a factual matter beyond the scope of an opinion of this Office. Op. S.C. Att’y Gen., 2012 WL 1774920 (May 7, 2012).

Conclusion

A county treasurer collecting delinquent taxes and penalties pursuant to § 12-45-180(A), or effectuating the levy, seizure, and sale of property to satisfy delinquent taxes, assessments, and costs pursuant to § 12-51-40, may not impose any fees in addition to the penalties and costs prescribed in those sections to offset collection costs. Furthermore, these two sections only allow costs to be recovered by the officer authorized to collect delinquent taxes and penalties – in this case, the Treasurer or his designee – after taxes and penalties have not been paid by the March 17th deadline and a tax execution has been issued against the defaulting taxpayer. Pursuant to § 12-51-40, the costs that may be collected are limited to those necessary to effectuate the duties of the levy, seizure, and sale of the defaulting taxpayer’s property; no flat-rate fee or any other fee of an arbitrary amount for costs may be imposed or added. Therefore, we believe a court would conclude that any fees imposed by a county treasurer in addition to the penalties and costs expressly permitted in § 12-45-180(A) or § 12-51-40, as the case may be, are invalid on the basis they are not authorized by statute.

We are also of the opinion that a county treasurer may not use penalties collected pursuant to either of these sections to offset collection costs. Act 987 clearly states that penalties charged for the collection of delinquent taxes accrue to the County’s general fund. Furthermore, in the event of a tax sale the Treasurer is required under § 12-51-80 to distribute the proceeds of the sale to the entities that are owed the taxes, penalties, and interest. Therefore, the Treasurer is not entitled to retain penalties collected on behalf of the County, municipalities, or other entities.

To the extent you assert that the Treasurer’s Office collects delinquent taxes on behalf of municipalities at no charge, it is our understanding the Treasurer is under no obligation to perform such duties except in certain limited circumstances. As previously mentioned, such a duty exists pursuant to § 12-51-80 which requires the Treasurer to disburse the proceeds of a tax sale to entities that are owed taxes, penalties, and interest. In addition, such a duty may exist if the County has entered into a contract with a municipality by which it agrees to collect delinquent municipal taxes. See § 5-7-300(D); § 12-51-70. In the absence of such a contract, a municipality is otherwise empowered to collect its own delinquent taxes.

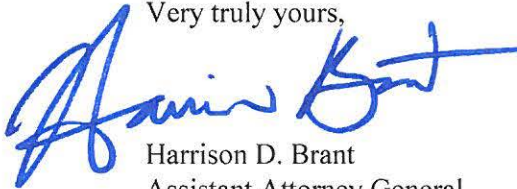
Notwithstanding the above conclusions, prior opinions of this Office dictate that although the County Council is statutorily afforded broad authority with regards to budgetary matters, this authority is limited in that the County Council cannot interfere with the duties or responsibilities given to an elected

³ The Treasurer of Beaufort County is an elected official by virtue of the fact that the County operates under the council-administrator form of government. See § 4-9-60 (“Under the council, council-supervisor and council-administrator forms of government ... the county treasurer ... shall be elected”).

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Page 6
November 9, 2012

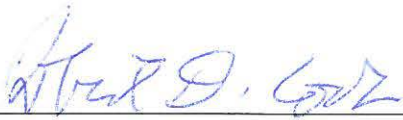
official such as the Treasurer under State law. This means that the County Council must provide the Treasurer with a budget sufficient to perform the functions of his office. However, the determination of whether the County Council has exercised its budgetary authority in such a manner so as to prevent the Treasurer from sufficiently performing his duties is a matter beyond the scope of an opinion of this Office. Therefore, if you believe your budget is not sufficient to allow you to perform your statutory duty of collecting delinquent taxes and penalties, we suggest you bring this matter to the attention of the County Council.

Very truly yours,



Harrison D. Brant
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Deputy Attorney General