

The State of South Carolina

4831  
Library



Office of the Attorney General

T. TRAVIS MEDLOCK  
ATTORNEY GENERAL

REMBERT C. DENNIS BUILDING  
POST OFFICE BOX 11549  
COLUMBIA, S.C. 29211  
TELEPHONE: 803-734-3970  
FACSIMILE: 803-253-6283

April 28, 1992

The Honorable Ernest L. Passailaigue, Jr.  
Senator, District No. 43  
601 Gressette Building  
Columbia, South Carolina 29202

Dear Senator Passailaigue:

You have furnished a copy of a letter you had written to the Honorable John Drummond, dated December 3, 1991, and asked for our comments as to the matters raised therein. As to specific actions taken by the Budget and Control Board on certain dates, you questioned the authority of the Budget and Control Board to so act. After a discussion of the power and authority of the Board generally, your specific questions will be examined.

Background

The starting point must be the provisions of Art. X, § 7(a) of the State Constitution, which provides that "[t]he General Assembly shall provide by law for a budget process to insure that annual expenditures of state government may not exceed annual state revenue." Because the General Assembly cannot remain in session year-round and further for purposes of expediency, the Budget and Control Board was created to, in part, assist in administering and monitoring the annual appropriations act.

The Budget and Control Board is a creation of the General Assembly. See S.C. Code Ann. § 1-11-10 et seq. (1986). The Board has been the subject of several lawsuits, in particular challenging the Board's authority considering the separation of powers doctrine. The various judicial decisions relative to the Board are summarized in an opinion of this Office dated January 24, 1984, a copy of which is enclosed. In addition to general statutory law, the Board is subject, year to year, to various provisos in the annual appropriations acts.

The Honorable Ernest L. Passailaigue, Jr.

Page 2

April 28, 1992

Of particular importance to a number of the issues you have raised is a proviso numbered 129.15 in the 1990-91 Appropriations Act (Act 612) and the 1991-92 Appropriations Act (Act 171), which proviso provides in pertinent part:

Any appropriations made herein or by special act now or hereafter, are hereby declared to be maximum, conditional and proportionate, the purpose being to make them payable in full in the amount named herein, if necessary, but only in the event the aggregate revenues available during the period for which the appropriation is made are sufficient to pay them in full. The State Budget and Control Board shall have full power and authority to survey the progress of the collection of revenue and the expenditure of funds by all departments and institutions. If the Budget and Control Board determines that a deficit may occur, it shall utilize such funds as may be available to avoid a year end deficit and thereafter take such action as necessary to restrict the rate of expenditure as provided in Section 129.6 of this Act. No institution, activity, program, item, special appropriation, or allocation for which the General Assembly has provided funding in any part of this Act shall be discontinued, deleted, or deferred by the Budget and Control Board. Any reduction of rate of expenditure by the said Board, under authority of this Act, shall be applied as uniformly as may be practicable except that no reduction shall be applied to funds encumbered by a written contract with an agency not connected with the State Government. No such reduction shall be ordered by the State Budget and Control Board while the General Assembly is in session without first reporting such necessity to the General Assembly.

The expenditure of funds heretofore or hereafter provided, by any State Agency, ... shall be subject to approval and regulations of the State Budget and Control Board. ...

The Honorable Ernest L. Passailaigue, Jr.  
Page 3  
April 28, 1992

This language is from the 1991-92 Appropriations Act and is almost identical to that from the previous fiscal year's Act. Notably absent in 1991-92's Proviso 129.15 is language concerning aid to subdivisions; a permanent provision regarding such aid was placed in Part II, § 22 of the 1991-92 Act and has been codified as S.C. Code Ann. § 6-27-10 et seq. (1991 Cum. Supp.).

As referenced in Proviso 129.15, the relevant part of Proviso 129.6 provides:

As far as practicable all departments, institutions, and agencies of the State are hereby directed to budget and allocate the appropriations herein made to them as quarterly allocations so as to provide for operation on uniform standards throughout the fiscal year and in order to avoid a deficiency in such appropriations. ... The Budget and Control Board is authorized to require any agency, institutions or department to file a quarterly allocations plan and is further authorized to restrict the rate of expenditures of the agency, institution or department if the Board determines that a deficit may occur. ...

The issue addressed in the opinion referenced above was whether the General Assembly may, consistent with Art. I, § 8 (separation of powers doctrine), lawfully delegate authority to the Budget and Control Board, to reduce or transfer appropriations. Therein, we concluded that we believed a court would likely find the Board's financial authority not to be violative of the constitutional doctrine of separation of powers. Reviewing provisos such as those set forth above and the judicial decisions relevant to the Budget and Control Board, separation of powers, and the like, we noted in the opinion of January 24, 1984 that

the Legislature has already fulfilled and completed its role in appropriating the funds, upon the condition that revenues will be available to pay them in full; it has then delegated to the Board the function of authorizing the expenditure of only so much of those funds which equal actual revenues. This, we believe, a court would conclude to be a

The Honorable Ernest L. Passailaigue, Jr.  
Page 4  
April 28, 1992

proper function of the executive branch and in our opinion it does not usurp the constitutional role of the Legislature.

In addition, the Court of Common Pleas, in sustaining a demurrer in Smith et al. v. Riley et al., 84-CP-40-2510 (a declaratory judgment action challenging certain actions of the Budget and Control Board), stated in its order of March 22, 1985, that the legislature could not "'vest unbridled, uncontrolled or arbitrary power in an administrative agency.'" (Citation omitted.) The court continued:

In the present case there is no uncontrolled or absolute discretion in the Board. The annual Appropriations Act provides restrictions on the power of the [Budget and Control] Board to make reductions: the reductions must be necessary; no institution or activity may be discontinued; and the reduction must be as uniform as practicable and not encumber a contract with a state agency. The Act further provides that no reduction can be made while the General Assembly is in session without first reporting to the General Assembly.

The Board has only ordered cutbacks when it was apparent that the anticipated revenue would fall woefully short of the appropriated expenditures. This is or was appropriate in order to prevent financial crisis in state government as has occurred in so many governmental entities. The Board has followed closely the guidelines established by the Legislature. In a legislative state government, such as ours, when the Legislature is not in session, it is imperative that immediate action be taken when a financial crisis appears imminent.

As the [Appropriations] Act places limits on the authority of the Board, there is no absolute discretion in the Board in violation of Art. I, § 8 ....

Thus, there is precedent for certain actions taken by the Budget and Control Board to reduce expenditures in previous fiscal years, which precedent received judicial approval.

The Honorable Ernest L. Passailaigue, Jr.

Page 5

April 28, 1992

With this background in mind, your questions will be examined individually.

November 1990

You have advised that in November 1990, the Budget and Control Board imposed a freeze on filling new positions authorized by the General Assembly in the FY91 Appropriations Act (exempting Corrections and DYS). You asked about statutory authority for the Board to take such an action.

Response: As noted above, the Board was granted certain authority in Proviso 129.15 (Act 612 of 1990) to reduce the rate of expenditure if it should anticipate that a deficit might occur, to avoid a year-end deficit. Any rate of reduction was to be applied as uniformly as may be practicable. The freeze was the method selected by the Board to reduce the rate of expenditures as uniformly as it deemed practicable among the agencies. While no specific statutory authority was granted to the Board to freeze positions, the authority or discretion granted in Proviso 129.15 was most probably broad enough to permit this action.

February 1991

You advised that in February 1991, the Board cancelled the fourth quarter reimbursement to state agencies for cost of living and merit pay allocations authorized by the General Assembly and made a specific reduction in the funding level of aid to subdivisions as well as other selected state agencies. Again, you have inquired about the statutory authority of the Board to do so.

Response: As stated in response to your first question, Proviso 129.15 of Act 612 of 1990 provides general authority for the Board to take this type of action. In addition, Proviso 129.6, supra, contains references to quarterly allocations and the Board's specific authority to restrict the rate of expenditure of various agencies if the Board determines that a deficit might occur. In addition, in 1990-91, the Board was specifically authorized in Proviso 129.15 to reduce aid to subdivisions just as it could reduce other appropriations.

May 1991

You have advised that in May 1991, the Board instituted a freeze on hiring, purchases, and contracts involving general funds for all but basic necessities for the balance of

The Honorable Ernest L. Passailaigue, Jr.

Page 6

April 28, 1992

FY91. You further advised that the General Assembly was in session when this action was taken. You asked about the authority of the Board to take these actions.

Response: Again, the Board was authorized by Provisos 129.15 and 129.6 to take certain actions. The Board has a great deal of latitude in taking actions to make expenditures equal revenues to prevent a year-end deficit.

As to notification of the General Assembly, such appears to be required when actions are necessary while the General Assembly is in session. How this notification is accomplished during the legislative session is unknown to this Office, as is whether notice was given in this instance. We must observe that the legislative branch is represented in the composition of the Budget and Control Board, by the membership of the chairmen of the Senate Finance Committee and the House Ways and Means Committee.

#### June 1991

You have advised that in June 1991, the Board directed state agencies not to transfer any general fund carry forwards (authorized by the General Assembly) and extended the expenditure freeze until August 1, 1991. You further advised that the Board later withdrew its action regarding carry forwards, recognizing the lack of authority. You asked about the authority of the Board to take these actions.

Response: As to the freeze of expenditures, any comment herein would necessarily duplicate our response to your first three questions. Reference must be had to Provisos 129.15 and 129.6 of Act 612 of 1990 and also those provisos in Act 171 of 1991. As to the action taken with respect to the carry forwards, no comment is necessary since your question was made moot by the action of the Board rescinding its earlier action. (See Proviso 129.59 of Act 171 of 1991.)

#### July 1991

You have advised that in July 1991, the Board rescinded the budget freeze; changed the accounting method for the recording of sales tax revenues from the cash method to the accrual method; imposed a three percent reduction in the FY92 appropriation authorized by the General Assembly; and required state agencies to submit a plan and to transfer three percent of its appropriation to the Board (one percent to be a reduction of expenditure and two percent to be held

The Honorable Ernest L. Passailaigue, Jr.

Page 7

April 28, 1992

in a sequestration fund). The capital reserve fund, debt service, and the judicial department were exempted from this reduction. You have questioned the authority of the Board to take these actions.

Response: As previously noted, the discretion granted under Provisos 129.15, 129.6, and the like would permit the Board to rescind earlier freezes, order new freezes or reductions in spending, sequestration of appropriations, and the like. It must be noted that the General Assembly in Proviso 129.15 has recognized that appropriations made in the annual appropriations act are maximum, conditional, and proportionate. Again, the Board is exercising its authority to have the state's expenditures equal revenues, to avoid a year-end deficit. Sequestration in particular could arguably assist the state agencies in quarterly budgeting and allocations to ensure that sufficient revenues will be on hand for fourth quarter expenditures, should an even greater shortfall arise than previously anticipated.

As to changing the accounting method for sales tax revenues from the cash method to the accrual method, additional comments are in order. Proviso 129.13 of Act 171 of 1991 provides in relevant part:

In addition to the powers and duties devolved upon the Budget and Control Board by the 1976 Code of Laws of this State, the said Board is hereby given full power and authority to make surveys, studies, and examinations of departments, institutions, and agencies of this State, as well as its programs, so as to determine whether a proper system of accounting is maintained in such departments, institutions, commissions, and agencies, and to require and enforce the adoption of such policies as are deemed necessary to accomplish these purposes; ....

We can locate no statute at this time which specifically prescribes a particular method of accounting for the State or its agencies. The Budget and Control Board by the above proviso is vested with authority to determine whether a "proper system of accounting" is being maintained within the state agencies, departments, and the like. Thus, there is necessarily some latitude to determine what the "proper" system should be.

The Honorable Ernest L. Passailaigue, Jr.

Page 8

April 28, 1992

It is our understanding that, as to sales tax revenues, there are two equally proper ways to account for those revenues considering GAAP as applied to the governmental setting. Due to the lack of a statutory requirement of a specific accounting method to be utilized and two proper methods which may be utilized according to accounting principles, the question becomes one of policy rather than law. It is thus inappropriate for our Office to comment further, as we do not interpret questions of policy. We are happy to provide, for your benefit, the explanation as we understand it.

As noted, Art. X, § 7 of the State Constitution requires that the State not end its fiscal year with a deficit. It appeared at the end of FY90-91 that a deficit would occur. The General Assembly had adjourned by that point in time and could not act to resolve the deficit. The Budget and Control Board decided to accrue revenue from the June collections of sales tax, formerly accounted for in July (i.e., the next fiscal year, by the cash method) in June, to post it to the 1990-91 fiscal year to avoid reporting a deficit. Had the General Assembly been in session, perhaps the solution might have been different; but the Budget and Control Board had to fashion a solution to prevent a year-end deficit.

We understand that sales tax revenues were singled out for this treatment due to the nature of the tax. Because the sales tax is collected each time a sale is made, and further because those who collect the sales tax (merchants) are considered paid agents of the State (see § 12-36-2610), sales tax revenues in the hands of the agents are or can be considered to be in the hands of the State (i.e., the principal of the agent) when received by the agent. Thus, this tax and the resulting revenues are somewhat unique and can be treated in a fashion different from other tax revenues.

The language of the statute providing the time when payment of sales tax revenue is due, is also instructive as to legislative intent. Section 12-36-2570 provides in part (A) that

[t]he taxes imposed under the provisions of this chapter, except as otherwise provided, are due and payable in monthly installments on or before the twentieth day of the month following the month in which the tax accrues.

The Honorable Ernest L. Passailaigue, Jr.  
Page 9  
April 28, 1992

(Emphasis added.) As you have pointed out, this statute is a taxation statute rather than a statute prescribing an accounting method. By using the term "accrues," however, and since agents of the State received the revenue on behalf of the principal (the State) at the time of a taxed sale, the legislature has acknowledged that the revenue has been acquired. See Black's Law Dictionary, "accrue," page 19 (5th Ed. 1979); "accrued taxes," page 20 ("taxes which are properly chargeable in a given accounting period but not yet payable"). Thus, the statute offers additional support for application of the accrual method of accounting to this form of revenue.

By making this decision at a time when it was apparent that spending (pursuant to the approved appropriations act) would exceed revenues, changing the accounting method as to sales tax revenues authorized the replenishment of moneys already spent. Thus, a means was provided to pay for already-received revenues to meet the State's financial obligations.

We further understand that once this sales tax revenue has been accelerated by changing the accounting method, to reverse the situation by again changing the accounting method would create an immediate deficit. To prevent such deficit, the general fund of the State would require an immediate infusion of the amount previously transferred, which we understand to be \$83.1 million, in real cash, at one time.

The foregoing is intended to be an explanation of the change in the accounting method for sales tax revenues and is not intended to comment on the wisdom, necessity, or appropriate application of accounting principles or auditing standards. We reiterate our belief that such is a policy decision rather than a question of law.

In conclusion, it must be noted that the Budget and Control Board is a creation of the General Assembly and derives its authority to act from the General Assembly. That body is certainly in the position to limit or modify the Board's actions as it sees fit. Also, the General Assembly could, if it wished, direct that a particular accounting system be utilized as to any or all of the various sources of revenue. Based on the foregoing and the legal principles discussed thoroughly in the enclosures, we are of the view that the Budget and Control Board was most probably acting within its scope of authority when taking the above-discussed actions.

The Honorable Ernest L. Passailaigue, Jr.  
Page 10  
April 28, 1992

With kindest regards, I am

Sincerely,

*Patricia D. Petway*  
Patricia D. Petway  
Assistant Attorney General

PDP/an  
Enclosures

REVIEWED AND APPROVED BY:

  
Robert D. Cook  
Executive Assistant for Opinions

cc: The Honorable Carroll Campbell  
The Honorable Grady Patterson  
The Honorable Earle Morris  
The Honorable John Drummond  
The Honorable William Boan  
The Honorable Timothy C. Wilkes  
Joseph D. Shine, Chief Deputy Attorney General