



ALAN WILSON
ATTORNEY GENERAL

June 14, 2019

The Hon. Jason Elliot
South Carolina House of Representatives
312-D Blatt Building
Columbia, SC 29201

Dear Rep. Elliot:

We received your request seeking an opinion on the disposition of seized property and the spending of forfeited funds by the State and political subdivision. This opinion sets out our Office's understanding of your question and our response.

Issue (as quoted from your letter):

I am particularly concerned about the disposition, and deaccession, of seized real and personal property as well as spending forfeited funds [e.g. so-called 'drug money' under SC Code Section 44-54-10 *et seq.* as just one example]. By my last count, over 50 SC Code Sections cover either seizure or forfeiture of illegal items, from video poker machines to unlawful firearms, illegal drugs, and illegally produced alcohol. I would appreciate an opinion from you about transparency and public accountability for handling this seized property and these confiscated, or forfeited, funds.

Specifically,

1. In your opinion do these seized items and this forfeited money constitute revenue for the receiving agency?
2. If they are considered revenue for the receiving agency, does that make them public assets?
3. If they are public assets, how must any accounting be conducted to show any disposition, or deaccession, of them?
4. To what extent, if any, do state procurement laws found in the South Carolina Consolidated Procurement Code at SC Code Section 11-35-10 *et seq.* apply to the buying, selling, or use of any seized, or forfeited, real or personal property and money?
5. If you do not believe state procurement requirements are applicable, then what accountability to the taxpayer exists for these seized items?

6. Do you believe the Surplus Government Property code at SC Code Section 11-35-3810, and the regulations authorized under this provisions apply to these items and this confiscated money?

By reference, I am enclosing with my letter a comprehensive list of the 50 SC Code Sections covering seizure, confiscation, and forfeiture of ill-gotten gains by criminal enterprises and other law breakers, for your consideration in issuing your opinion.

Law/Analysis:

As you are no doubt aware, the questions presented in your letter encompass a broad and varied body of law. Your attached list cites fifty code sections which relate to the forfeiture of property, and those statutory provisions differ from each other in numerous ways. Moreover, our Office consistently has opined that forfeiture matters necessarily involve “fact-specific questions” which must be resolved “on an ongoing, case-by-case basis.” *Op. S.C. Att’y Gen.*, 2017 WL 5053042 (October 24, 2017). Accordingly, no opinion of this Office could possibly offer a complete and definitive answer to the questions as presented. However, in order to be as responsive as possible to your question, we will discuss some applicable law in the abstract, subject to these caveats. We also note that our Office has issued several opinions in the past on the subject of civil forfeitures, and our discussion of the law in this opinion should be read in the context of those priors. *See id.*

In your opinion do these seized items and this forfeited money constitute revenue for the receiving agency? If they are considered revenue for the receiving agency, does that make them public assets?

While any particular forfeiture must be considered according to the individual facts and circumstances, we believe a court generally would find that forfeited funds constitute “revenue” in the general meaning of the word to the extent that forfeited funds and assets become the property of the receiving agency. However, certain statutes restrict how those funds must be stored and used, and these funds should not be confused with revenue derived from other sources which are not similarly restricted. *See, e.g.*, S.C. Code Ann. § 16-15-445 (Supp. 2019). Additionally, certain forfeiture statutes contain provisions which are not consistent with describing the transfer purely as government revenue because they mandate restitution to a victim of a crime or destruction of seized property.

Your letter does not direct us to any particular statutory definition of “revenue,” and this opinion approaches the question according to the general meaning of the word. Black’s Law Dictionary (11th ed. 2019) offers several definitions for revenue, including:

1. Income from any and all sources; gross income or gross receipts.
2. The total current income of a government, however derived; esp., taxes.

Additionally, at least one previous opinion of this Office observed that drug forfeiture funds “transferred to a law enforcement agency through forfeiture proceedings are ‘public monies’ and should be maintained and spent in accordance with the laws and ordinances governing the custody and use of public monies.” *Op. S.C. Att’y Gen.*, 1991 WL 633027 (July 31, 1991). Accordingly, it is fair to say in the abstract that forfeited funds often constitute a source of income for the government, and therefore a court most likely would hold that forfeited funds plainly constitute public revenue which becomes a public asset in the general sense. *See id.*

However, we reiterate that any particular transaction must be considered according to its own facts and circumstances for several reasons. First, certain statutes authorizing a seizure contemplate that the property might be returned. For instance, the spreadsheet attached to your request letter references unlicensed game machines and devices, such as billiard tables. Section 12-21-2742 provides both for the seizure of unlicensed machines and their possible return:

In addition to the penalties above provided, any machine, apparatus, billiard, or pocket billiard table not having attached thereto the required license, or which is improperly licensed, must be seized and confiscated by the department, its agents or employees, and sold at public auction after thirty days' advertisement. Upon payment of the license required, the department may, within its discretion, return any property so seized and confiscated and compromise any penalty assessed.

S.C. Code Ann. § 12-21-2742 (2014). Additionally, the property owner has a statutory procedure available to repossess the property pursuant to S.C. Code § 12-21-2744. If a billiard table were seized and auctioned under these provisions, then the funds generated would presumably become public revenue. Conversely, if the seized tables were returned to or repossessed by the property owner, that would not be the case. *See also* S.C. Code Ann. §§ 12-21-2930 (2014) (similar provision regarding untaxed cigarettes), 46-21-425 (2017) (similar provision regarding noncomplying seed).

More generally, a recent prior opinion of this Office discussed the proper disposition of seized contraband and stated:

In the way of background, we note that our state's Supreme Court has distinguished between “derivative contraband,” meaning property which normally

has a lawful use and is seized as a result of an unlawful use; and “contraband per se,” meaning property that normally has no lawful use. *State v. 192 Coin-Operated Video Game Machines*, 338 S.C. 176, 189, 525 S.E.2d 872, 879 (2000). The Court expounded on this distinction in *Mims Amusement Co. v. SLED*:

Courts have recognized two classes of contraband subject to forfeiture by statute. The first class is contraband per se, which are things that may be forfeited because they are illegal to possess and not susceptible of ownership. This class includes illegal gambling devices such as roulette wheels or craps tables, “moonshine” liquor, [or] illegal narcotic drugs ... The second class is derivative contraband, which are things that may be forfeited because they are instrumentalities of a crime, but which ordinarily are not illegal to possess. This class includes items such as currency, vehicles, or real property used in the commission of a crime or traceable to the proceeds of criminal activity.

Mims Amusement Co., 366 S.C. at 149-50, 621 S.E.2d at 348 (2005) (internal citations omitted).

Op. S.C. Att’y Gen., 2017 WL 5053042 (October 24, 2017). Accordingly, the type of property seized is one factor among several which must be considered in assessing whether the forfeited property should be considered “revenue” to the receiving agency.

Furthermore, certain statutes require specific dispositions of funds or property that are not consistent with describing the transfer purely as government revenue in the ordinary sense. For example, Section 16-13-177 governs timber theft with a forfeiture provision and includes a mandate that “net proceeds of any sale [of forfeited property] shall be distributed to the victim of the offense” before disbursing “the remaining proceeds . . . to the South Carolina Commission on Forestry.” S.C. Code Ann. § 16-13-177 (2015). Still other statutes provide that contraband such as video poker machines must be destroyed following seizure, and the item comes into the possession of the governmental agency only briefly before that destruction. S.C. Code Ann. § 12-21-2710 (2014). Similarly, Section 16-15-445 governs property forfeited pursuant to South Carolina’s obscenity laws, and provides in relevant part:

[P]roperty forfeited pursuant to court order must be destroyed by the arresting law enforcement agency, unless that law enforcement agency can show good cause for retaining the property. Ownership of property so retained vests in the arresting law enforcement agency which may use the property in the performance of its

duties, destroy it, or sell it at public auction. . . . After payment of the expenses of the auction, one-half of the net proceeds may be retained by the arresting law enforcement agency, and one-half must be remitted to the State Treasurer for deposit to the credit of the Office of the Attorney General, South Carolina Crime Victim Services Division, Department of Crime Victim Compensation, Victim Compensation Fund.

S.C. Code Ann. § 16-15-445(C) (Supp. 2019).

In summary, numerous statutory provisions control the disposition of forfeited property in various ways. *See discussion, supra*. Therefore, the most we can say in the abstract is that forfeited property and funds generally become the property of and revenue for the governing body which comes to hold title to it, but each case must be considered according to its particular facts.

If they are public assets, how must any accounting be conducted to show any disposition, or deaccession, of them? To what extent, if any, do state procurement laws found in the South Carolina Consolidated Procurement Code at SC Code Section 11-35-10 et seq. apply to the buying, selling, or use of any seized, or forfeited, real or personal property and money? If you do not believe state procurement requirements are applicable, then what accountability to the taxpayer exists for these seized items? Do you believe the Surplus Government Property code at SC Code Section 11-35-3810, and the regulations authorized under this provisions apply to these items and this confiscated money?

Our Office has opined previously that “monies transferred to a law enforcement agency through forfeiture proceedings are “public monies” and should be maintained and spent in accordance with the laws and ordinances governing the custody and use of public monies.” *Op. S.C. Att’y Gen.*, 1991 WL 633027 (July 31, 1991). Accordingly, public property and public funds which were forfeited generally should be accounted for according to the same process which applies to other assets of the governmental body holding title, whether that body is a State agency or a political subdivision. However, given the numerous provisions in the South Carolina Code which address seizure and forfeiture and the variations between them, we must emphasize that any particular forfeiture must be considered according to the individual facts and circumstances. In part, this is because certain statutes mandate that funds forfeited under that statute are subject to additional specific requirement relating to how those funds are kept and used. *See, e.g.*, S.C. Code Ann. § 44-53-530 (2018).

As one example of a specific requirement relating to how forfeited funds are kept and used, our Office has opined in the past concerning “funds derived from the sale” of “a vehicle

purchased with drug funds” pursuant to Section 44-53-530. *Op. S.C. Att’y Gen.*, 1995 WL 803548 (May 1, 1995). We quote at length from that opinion here:

Prior opinions of this Office have recognized that monies transferred to a law enforcement agency through forfeiture proceedings are “public monies” and therefore “should be maintained and spent in accordance with the laws and ordinances governing the custody and the use of public monies.” [*Op. S.C. Att’y Gen.*, 1991 WL 633027 (July 31, 1991)]. Therefore such monies could not be expended in a manner inconsistent with the use of public funds generally. Moreover, pursuant to subsection (i) of the referenced statute, “[a]n expenditure from these accounts must be made in accordance with the established procurement procedures of the jurisdiction where the account is established.”

Id. The opinion went to address specific legal provisions which governed forfeited drug funds specifically:

As you indicated, pursuant to Section 44-53-530(g), these funds may only be used for “drug enforcement activities.” Moreover, pursuant to other provisions of that section, such funds

...must not be used to supplant operating funds in the current or future budgets. Expenditures from these accounts for an item that would be a recurring expense must be approved by the governing body before purchase....

[quoting S.C. Code Ann. § 44-53-530] That provision further states that any expenditures must be documented with such documentation available for audit purposes and subject to review pursuant to the Freedom of Information Act. The statute makes no specific reference to the matter of handling any funds generated by the sale of an item purchased with forfeiture funds.

Subject to the limitations set forth above regarding the use of forfeiture funds generally, I am in agreement with your conclusion that funds generated by the sale of a vehicle purchased with drug fund assets would be placed back into the account established for the law enforcement agency pursuant to Section 44-53-530(g).

Id. While this opinion focused on “drug funds” in particular, we highlight this language for two reasons. First, this opinion affirms that forfeited funds often become “public monies” by statute

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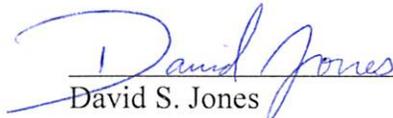
which must be spent in accordance with all applicable law. *Id.*; see also *Op. S.C. Att’y Gen.*, 1991 WL 633027 (July 31, 1991). Second, it highlights that the applicable law contained within individual forfeiture statutes sometimes control the disposition of those funds. *Id.*

Finally, we reiterate that any particular forfeiture must be considered according to the individual facts and circumstances. Additionally, this opinion should not be construed as any statement about how applicable public accounting procedures should be conducted. Specific questions about when and how public assets must be booked and accounted for are far beyond the scope of this opinion.

Conclusion:

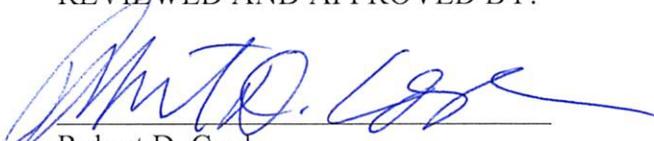
As noted above, no opinion of this Office could possibly offer a complete and definitive answer to the questions as presented given the breadth and myriad variations in the applicable law. However, in order to be as responsive as possible to your question, we have discussed some applicable law in the abstract, subject to numerous caveats. Foremost among those caveats is that our Office consistently has opined that forfeiture matters necessarily involve “fact-specific questions” which must be resolved “on an ongoing, case-by-case basis.” *Op. S.C. Att’y Gen.*, 2017 WL 5053042 (October 24, 2017). Where funds or property are forfeited and become the property of a public agency or political subdivision, we believe a court generally would find that those funds constitute “revenue” in the general meaning of the word to that agency or political subdivision. As a public asset, it generally would be subject to the same accounting and other legal requirements for public assets acquired in other ways. However, individual forfeiture statutes sometimes control the disposition of those funds and impose additional requirements on them, and we invite any follow-up questions you may have with respect to specific statutes.

Sincerely,



David S. Jones
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Solicitor General