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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLIE CONDON
ATTORNEY GENERAL

December 5, 2002

Mr. William O. Rowell
Treasurer of Lexington County
212 South Lake Drive
Lexington, South Carolina 29072

Dear Mr. Rowell:

You have asked for an opinion regarding "the use of the 'Tax Sale' overage funds when other taxes are due and payable to the county." You note that you have also sought guidance from the County Attorney, Jeff Anderson, as well as Joe Allen of the Comptroller General's Office and Ron Urban, Department of Revenue attorney. Your view is that "[v]ery simply we see the statutes in the use of overage not to clearly allow paying other tax debts to the government entity, while on the other hand they don't seem to prohibit the use of such funds to pay off other debts owed by the same taxpayer to the government entity."

In your Memorandum requesting the opinion, you reference a number of statutes which you argue might be construed as not prohibiting the use of overage funds to pay off other debts owed by the same taxpayer to the government entity. Among these statutes are: S.C. Code Ann. Section 12-51-50 [delinquent taxes are owed on more than one item of real or personal property; if the defaulting taxpayer or grantee of record has more than one item advertised to be sold," as soon as sufficient funds have been accrued to cover all the delinquent taxes, assessments, penalties and costs, further items may not be sold."]; § 12-49-40 [distress and sale of personal property not a condition precedent to seizure and sale of any real property]; § 12-49-970; § 12-49-10 [all taxes a first lien upon the property taxed and county treasurer may enforce such lien by execution upon such property or, "if it cannot be levied on, he may proceed by action at law against the person holding such property"]; § 12-49-30 [lien attaches to personal property subsequently acquired]; § 12-45-410 [any taxes paid by delinquent taxpayer must be applied to the "oldest chronological delinquency on the property for which payment was intended"; personal property taxes tendered must be applied to personal property tax delinquencies and real property taxes tendered must be applied to real property tax delinquencies]; § 12-49-90 [taxes owed to other states are recognized as a debt by State of South Carolina]; § 12-51-130 [if tax sale of an item produced more cash than full amount due in taxes, assessments, penalties and costs, "the overage belongs to the owner of record immediately before the end of the redemption period to be claimed or assigned according to law. These sums are payable ninety days after execution of the deed unless a judicial action is instituted during that time by another claimant."]; § 12-56-10 et seq. (Setoff Debt Collection Act).

It is your belief and opinion that the foregoing statutes, taken as a whole, demonstrate that "once tax sale overage is applied to the remainder of a parceled property sold at tax sale, and further applied to other properties owned by the same owner that had been brought to tax sale, <u>that further overage can and should be applied to the remaining outstanding delinquent tax debts owed the state and county by the same owner</u>." (emphasis added). You propose that "the application of the above defined overage to Delinquent Business Personal Property taxes under the conditions above described is a legal and viable application of 'actions by law' 'judicial claim' and 'other tax debt,' as referenced in law."

<u>LAW / ANALYSIS</u>

This Office issued two opinions in 1992 which are instructive in resolving your question. In <u>Op. Atty. Gen</u>., Op. No. 92-48 (September 2, 1992) we addressed the issue of whether the overage funds resulting from the sale of property for delinquent taxes are subject to the Uniform Unclaimed Property Act or are such funds subject to disposition under S.C. Code Ann. Section 12-51-130? The premise of the question posed was that "excess funds are held by the county and not claimed by the taxpayer ...." We concluded that § 12-51-130 was the controlling statute. That Section provides that

> [i]n case the tax sale of an item produced an overage in cash above the full amount due in taxes, assessments, penalties, and costs, the overage shall belong to the defaulting taxpayer to be claimed or assigned according to law. If neither claimed nor assigned within five years of date of public auction tax sale, the overage shall escheat to the general fund of the governing body. Prior to the escheat date unclaimed overages must be kept in a separate account and must be invested so as not to be idle and the governing body of the political subdivision is entitled to the earnings for keeping the overage. On escheat date the overage must be transferred to the general funds of the governing body.

With regard to this statute, we noted that "[t]he language of Section 12-51-130 is explicit ...." In addition, we stated that

> [h]ere the General Assembly has stated the intent behind Section 12-51-130. Section 12-51-130 was enacted as Section 13 of Act 166, Acts and Joint Resolutions, 1985. Section 1 of Act 166 states that the intent of the act "... is to provide a procedure to be used exclusively for the collection of property taxes by counties." By this language, the General Assembly intended to provide an exclusive method for collecting property taxes. In designing that method, the General Assembly did not include any reference to the Unclaimed Property Act. Thus, the collection method was not intended to be governed by the Unclaimed Property Act.

In our view, "Section 12-51-130 ... is a special statute disposing of excess unclaimed tax funds while Section 27-18-140 is a general statute broadly addressing funds held by governmental agencies. Thus, Section 12-51-130 is controlling."

In Op. Atty. Gen., Op. No. 92-50 (September 3, 1992), we again considered § 12-51-130. That opinion noted that

> [u]nder the statute the funds belong to the defaulting taxpayer, but are held by the governing body. See OAG 79-49, March 13, 1979. The defaulting taxpayer may claim the funds himself or he may assign the funds to another, but in neither event does the statute state the procedure for the return of the overage. Where there is a lack of specific directions, the particulars of the procedure for accomplishing the return is within the discretion of the governing body.

The reasoning contained in the two 1992 opinions is consistent with general law in this area. For example, it has been written that

> [t]he proceeds of a tax sale are applied in the discharge of delinquent taxes against the property for which the land was sold, and of interest, costs, and penalties, in the manner and order directed by statute; any surplus remaining after the payment of taxes, interest, costs and penalties is paid to the landowner.

72 Am.Jur.2d, State and Local Taxation § 821. Elsewhere, it is stated that

> [a]s a general rule the surplus remaining after the sale of property and the payment of the taxes, interest, costs, belongs to the owner of the property at the time of sale, and such surplus will be paid over to the former owner provided he applies for it within the time allowed by statute. The sheriff holds the excess tax sale funds as a fiduciary of the record property owner. The right to such surplus is personal, and does not follow the title to the land, and a transferee of tax executions has no claim to excess sales proceeds.

Applying these general principles, the Supreme Court of Alaska in City of Anchorage v. Thomas, 624 P.2d 271 (1981) addressed the question of "whether a municipality may retain proceeds from a tax foreclosure sale in excess of the amount owed by the property owner in taxes, interest and costs." Alaska statutory law was ambiguous, observed the Court, but the Court looked to an amendment which provided for the recovery by the former record owner of excess sale proceeds for guidance. The Court believed the amendment should be construed as a clarification of rather than a change in the law in existence at the time. Noting that "the record owner has a certain period in which to redeem title to the property by paying the delinquent taxes plus interest ...," the Court held that "Mrs. Thomas has a recognizable interest in the foreclosed property and a right to recover any proceeds from the sale in excess of the amount she owed in taxes, interest and costs." Id., at 273-274.

We turn now to state law and the South Carolina statutory scheme to resolve your questions. A number of principles of statutory construction are pertinent to your inquiry. First and foremost, is the well-recognized rule that the intent of the General Assembly must be given paramount importance. State v. Martin, 293 S.C. 46, 358 S.E.2d 697 (1987). A statutory provision should be given a

reasonable and practical construction which is consistent with the purpose and policy expressed in the statute. Hay v. S.C. Tax Commission, 273 S.C. 269, 255 S.E.2d 837 (1979). In construing a statute, the words must be given their plain and ordinary meaning without resort to subtle or forced construction for the purpose of limiting or expanding its operation. Walton v. Walton, 282 S.C. 165, 318 S.E.2d 14 (1984). Specific laws usually are deemed to prevail over more general statutes. Lloyd v. Lloyd, 295 S.C. 55, 367 S.E.2d 153 (1989). Likewise, the specific section of the same Act will be generally held to govern over more general portions thereof. See, Op. Atty. Gen. March 6, 1973. Generally speaking, "[t]he canon of construction 'expressio unius est exclusio alterius' holds that 'to express or include one thing implies the exclusion of another, or the alternative.'" Hodges v. Rainey, 341 S.C. 79, 533 S.E.2d 578 (2000).

A statutory provision which works a forfeiture or inflicts a penalty should, moreover, be strictly construed. Wallace v. Wannamaker, 231 S.C. 158, 97 S.E.2d 502 (1957). Any doubts must be resolved against the taxing authority and in favor of the taxpayers. Op. Atty. Gen., Op. No. 3529 (May 23, 1973). When statutes are capable of two constructions, one construction imposing a forfeiture and the other not, the construction not imposing forfeiture will be followed. Turner v. Lashley, 239 Ga. 678, 238 S.E.2d 371 (1977). In other words, such penalty must be clearly set forth by statute. Id. (no statutory authority for a county to add a penalty to the current year's tax duplicate because a taxpayer did not make a return of his personal property for the year. See also, McCutchen v. Hinnant, 229 S.C. 448, 93 S.E.2d 462 (1956) [absence of statutory authority in levy of taxes was fatal to validity of levy]; Alexander Amusement Co. v. State, 246 S.C. 530, 144 S.E.2d 718 (1965) [no confiscation and destruction of gambling device in absence of statutory authority]; Op. Atty. Gen., Op. No. 1584 (October 1, 1963) [absence of authority to forfeit pistol].

Further, the limitations of administrative officers in executing state laws enacted by the General Assembly must also be a point of emphasis. In South Carolina Tax Commission v. South Carolina Tax Board of Review, 278 S.C. 556, 559, 299 S.E.2d 489, 491 (1983), the South Carolina Supreme Court cautioned that

> [a]n administrative agency has only such powers as have been conferred upon it by law and must act within the granted authority for an authorized purpose. It may not validly act in excess of its powers nor has it any discretion as to the recognition of or obedience to a statute. Quoting, 2 Am.Jur.2d, Adm. Law, § 188, p. 21.

It has also been stated that the power to make laws is a legislative power and may not be exercised by executive officers or bodies, either by means of rules, regulations, or orders having the effect of legislation or otherwise. Similarly, the power to alter or repeal laws resides only in the General Assembly and executive officers may not by means of construction, rules and regulations, orders or otherwise, extend, alter, repeal, set at naught or disregard laws enacted by the Legislature. 16 C.J.S. Constitutional Law, § 217. An administrative officer may apply only the policy declared in the statutes with respect to the matter with which he purports to act and he may not set different standards or change the policy. 73 C.J.S., Public Administrative Law and Procedure, § 32.

Moreover, it is well recognized that the General Assembly possesses full authority to make such appropriations as it deems necessary in the absence of a specific constitutional limitation. Clarke v. S.C. Public Service Authority, 177 S.C. 427, 181 S.E. 481 (1935). Such power residing in the Legislature to appropriate funds – i.e., the designation of how public monies are to be spent – is plenary, except as restricted by the Constitution. Cox v. Bates, 237 S.C. 198, 116 S.E.2d 828 (1960). Indeed, Art. X, § 9 of the Constitution specifies that "money shall be drawn from the Treasury only in pursuance of appropriations made by law." Most recently, in Condon v. Hodges, 349 S.C. 232, 562 S.E.2d 623 (2002), the Supreme Court of South Carolina stated that "there is no provision in the South Carolina Code or Constitution which provides that members of the executive branch have the ability to transfer funds from those to whom the General Assembly has appropriated money." 349 S.C. at 245. See also, Gilstrap v. S.C. Budget and Control Bd., 310 S.C. 210, 423 S.E.2d 101 (1992) [the General Assembly cannot delegate its legislative power to appropriate money to executive branch members such as the Budget and Control Board.]

In your letter, you argue, with considerable logic, that "it is unreasonable to hold overage monies in hand to be refunded to a defaulting taxpayer, and to pay this overage in full to the defaulting taxpayer when that selfsame defaulting taxpayer owes further debt to the same government." In your opinion, "[t]his is even more unreasonable when it may be inferred by defaulting taxpayer's statements and actions that he or she does not intend to pay the further owed tax debt, requiring further actions of seizure and sale to collect on the debt." As referenced above, you cite a number of statutes supporting your argument. Particularly, you note that taxes, assessments and penalties constitute "a first lien upon the property taxed" (§ 12-49-10), that the lien attaches to personal property subsequently acquired (§ 12-49-30) and that "[i]f the defaulting taxpayer or the grantee of record of the property has more than one item advertised to be sold, as soon as sufficient funds have accrued to cover all of the delinquent taxes, assessments, penalties, and costs, further items may not be sold." (§ 12-51-50).

There is no question that all property of a defaulting taxpayer is subject to execution and sale for nonpayment of ad valorem real and personal property taxes, and a first lien for such taxes exists upon the property which generates those taxes. Op. Atty. Gen., Op. No. 3329 (January 3, 1972). Thus, we have noted that "other property of the defaulting taxpayer is subject to execution and sale for the delinquent taxes." Id. And as our Supreme Court long ago stated,

> [i]t is a common assumption that a tax execution is issued against the property; such is not the case; it is issued against the defaulting taxpayer. The assessed taxes are a debt due to the State by the owner of the property ....
>
> And the taxes may be made out of any property the taxpayer has.

Vallentine v. Robinson, 188 S.C. 194, 198 S.E. 197, 200 (1938). The process and procedure for execution and sale of property for nonpayment of real and personal taxes is set forth in great detail in § 12-51-40 et seq.

Thus, it must be remembered that the sale of property of a defaulting taxpayer is governed strictly by statute. VonElbrecht v. Jacobs et al., 286 S.C. 240, 332 S.E.2d 568 (Ct. App. 1985). Without specific statutory authority, taxing officials possess no power to retain excess proceeds from a tax sale. Syntax v. Hall, 899 S.W.2d 189 (Tex. 1995). Applying this rule that specific statutory authority governs the execution and sale of property for nonpayment of taxes, we have concluded that a municipality "is without authority to levy a flat collection charge or penalty for delinquent taxes." Op. Atty. Gen., Op. No. 79-36 (February 28, 1979). There, we stated that

> [t]he only procedure for collection of delinquent taxes is set forth in Chapter 51 of Title 12 of the 1976 Code of Laws. It is clear that the City can act only pursuant to authority granted by statutes. Watson v. Orangeburg, 229 S.C. 367, 93 S.E.2d 20. (emphasis added)

Section 12-51-130 specifically addresses overages after the tax sale has occurred. That Section provides that if the defaulting taxpayer, grantee from the owner or judgment creditor fails to redeem realty within the time period allowed for redemption, tax title is to be made to the purchaser or the purchaser's assignee. Section 12-51-130 further provides:

> [i]n case the tax sale of an item produces an overage in cash above the full amount due in taxes, assessments, penalties and costs, the overage shall belong to the defaulting taxpayer to be claimed or assigned according to law. If neither claimed nor assigned within five years of date of public auction tax sale, the overage shall escheat to the general fund of the governing body. Prior to the escheat date unclaimed overages must be kept in a separate account and must be invested so as not to be idle and the governing body of the political subdivision is entitled to the earnings for keeping the overage. On escheat the overage must be transferred to the general funds of the governing body.

It is important to recognize that § 12-51-130 was reenacted, along with numerous other statutory provisions relating to the collection of property taxes, as part of Act No. 166 of 1985. As part of Act No. 166, the General Assembly made the following findings:

> [t]he General Assembly finds that the procedure used to collect property taxes varies among counties. Different due dates, different penalties, and other variances exist that should be made uniform. The intent and purpose of this act is to provide a procedure to be used exclusively for the collection of property taxes by counties. The procedure does not apply to the collection of taxes on motor vehicles.

Many of the provisions which you have cited were also enacted in Act No. 166 of 1985. Among those statutes reenacted along with § 12-51-130 was § 12-51-50. Such provision specifically provides that "[i]n case the defaulting taxpayer has more than one item advertised to be sold, as soon as sufficient funds have been accrued to cover all of the defaulting taxpayer's delinquent taxes, assessments, penalties, and costs, no further items may be sold." (emphasis added)

In an earlier opinion, dated June 6, 1984, this Office recognized the following guidepost of statutory construction:

> [t]he intent to repeal all former laws upon a subject is made apparent by the enactment of subsequent comprehensive legislation establishing elaborate inclusions and exclusions of the persons, things and relationships ordinarily associated with that subject. Legislation of this sort which operates to revise the entire subject to which it relates, by its very comprehensiveness gives strong implication of a legislative [intent] ... not only to repeal former statutory law upon the subject, but also to supersede the common law relating to the same subject. Therefore, the failure to set out former statutory provisions in a later comprehensive enactment will operate to repeal the omitted portions which are inconsistent, and also former provisions which are not repugnant to the later legislation. Citing 2A Sutherland, Statutory Construction, § 23.113.

Here the General Assembly, in enacting Act No. 166 of 1985 sought to "provide a procedure to be used exclusively for the collection of property taxes by counties." Such procedure contained § 12-51-130 which expressly states that "the overage shall belong to the defaulting taxpayer to be claimed or assigned according to law." Section 12-51-130 further specifies that if "neither claimed or assigned within five years of date of public auction tax sale, the overage shall escheat to the general fund of the governing body." In our view, the phrase "according to law" refers to the words "defaulting taxpayer" in terms of his or her claim or assignment of the overage funds. Thus, it is the defaulting taxpayer who may claim the overage or assign it "according to law." If the Legislature had intended to allow county authorities to "claim" the overage for other unpaid debts to the county, it could have easily so specified. The only statutory authority relating to overage is found in § 12-51-130 and is thus controlling. As the 1992 opinion of this Office referenced above found, § 12-51-130 mandates how the overage is to be used and as the specific statute is controlling here.

It is also important to note that the General Assembly has determined in § 12-51-130 if the overage is not claimed or assigned within five years of the date of public auction sale, such funds escheat to the "general fund of the governing body." Clearly, the Legislature has appropriated the overage monies which remain unclaimed or unassigned at the end of five years to the governing body's general fund. In my opinion, county officials would possess no authority to appropriate such funds to purposes other than that designated by the General Assembly.

CONCLUSION

Although you have made logical arguments in support of your contention that overage funds from a tax sale should be retained by you to insure payment of the individual's delinquent business personal property taxes, unfortunately, this Office is unable to advise you that such a procedure is permitted under current South Carolina law. Authority for such retention must be express, not implied. Here, no express authority exists.

Since the situation referenced in your letter speaks of an "overage," it is apparent that other unpaid taxes not made a part of the relevant execution and sale are involved. Apparently, these other taxes (business personal property taxes) become in default after the execution and sale procedure is underway. Of course, as noted earlier, any unpaid real and personal property taxes may properly be a part of an execution and sale for the payment thereof.

However, as noted above, the General Assembly made clear in the passage of act No. 166 of 1985 that the procedures set forth in Chapter 51 of Title 12 are the procedures "to be used exclusively for the collection of property taxes by counties." As was concluded in Op. Atty. Gen., Op. No. 94-13 (February 1, 1994) a county must attempt to collect delinquent property taxes pursuant to the execution and sale procedure. Thus, if the particular unpaid taxes involved were not part of the original execution and sale, any overage must be returned as specified in § 12-51-130. In other words, state law does not permit you to retain such overage funds for the nonpayment of these "other taxes." Another execution and sale would be necessary.

Only recently, the Court of Appeals in H & K Specialists v. Brannen, 340 S.C. 585, 532 S.E.2d 617, 618, n. 3 (Ct. App. 2000) commented that § 12-51-130 requires the county to "refund the overage ... when the redemption period lapsed." Section 12-51-130 appears to be the exclusive means for disposition of these overage funds. As this Office concluded in Op. No. 92-48, "[t]he disposition of overage funds resulting from a sale of property for delinquent taxes is controlled by Section 12-51-130 ...." Thus, we agree with the opinion of the County Attorney concluding that § 12-51-50 only allows for the payment of other taxes on property" advertised to be sold" and that § 12-51-130 specifies what is to be done with "overage" funds from that advertised sale. Other taxes in default later must be separately handled by the same procedure.

Accordingly, in our opinion, existing law does not allow you to use overage monies from the execution and sale in the manner which you have described. The General Assembly would have to specifically provide you with such authority.

Sincerely,

Robert D. Cook
Assistant Deputy Attorney General