

THE STATE OF SOUTH CAROLINA
OFFICE OF THE ATTORNEY GENERAL
COLUMBIA

OPINION NO. _____

March 15, 1990

SUBJECT: Taxation and Revenue - Authority of a county governing body to contract with independent agents for the audit of personal property tax returns.

SYLLABI: 1. The governing body of a county should not contract with an independent agent to exercise powers and perform duties that are by general law imposed upon the county auditor.

2. A contract with an independent agent to examine property tax returns, if such a contract be authorized, should not condition payment for services of the independent agent upon the agent's finding a liability for unpaid taxes.

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FROM: Joe L. Allen, *JLA*
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QUESTIONS:

1. Is a county authorized to contract with an outside auditing firm to perform a random audit of business personal property forms that have been filed with the county?

2. Can the outside auditor perform these services on a contingent fee?

APPLICABLE LAW: Article VIII, Section 7, South Carolina Constitution, Sections 4-9-30, et seq., 12-39-10, et seq., 4-9-60, 4-9-630 and 4-9-650, Code of Laws of South Carolina, 1976.

DISCUSSION: (Question 1)

Under Article VIII, Section 7, the General Assembly is to provide for the powers and duties of a county. Section 4-9-30 in general sets forth such powers. The same, however, are subject to the state's general law. The General Assembly also has the authority to create the office

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of the county auditor and to prescribe the duties and powers of that office. Bank of Johnston v. Prince, 136 S.C. 439, 134 S.E. 387 (1926). Under Chapter 39 of Title 12, the office of the county auditor is created and specific duties are conferred upon the auditor. The issue is thus whether the county governing body may contract with an independent agent to perform part of the duties and powers of the county auditor. In our view, it cannot. Chapter 39 of Title 12 imposes the duty upon the county auditor to investigate property tax returns including a failure to file a return. Those duties are imposed by general law.

Additionally, the Home Rule Act evidences that a county governing body is without authority to alter or modify the duties of an elected official when the same are imposed by general law. Further, Sections 4-9-30(7) and 4-9-650 reflect this legislative intent. The General Assembly has provided that the auditor perform the duties that the contract would devolve upon others. The Supreme Court of New York in Zumbo v. Town of Farmington, 401 N.Y.S.2d 121, stated the principle as follows:

"Where the State has acted upon a subject and, in so acting, has evidenced a desire that its general laws should preempt the possibility of varying local laws, a local enactment may be said to be inconsistent with State law because it prohibits that which has been found acceptable under State law . . ."

A somewhat similar application was made by our Court in Webster v. Williams, 183 S.C. 368, 191 S.E. 51 (1937). A special act providing for different penalties for one county was held to violate the constitutional prohibition of special legislation.

CONCLUSION:

The governing body of a county should not contract with an independent agent to exercise powers and perform duties that are by general law imposed upon the county auditor.

DISCUSSION: (Question 2)

An agreement to be paid only if liability is found is highly suspect.

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"It is a general doctrine that contracts injuriously affecting public or government service are invalid . . . The purpose of the rule is to prevent persons from assuming a position where selfish motives may impel them to sacrifice the public good to private benefit. . ." 17 Am.Jur.2d, Contract, Section 210.

Here the independent contractor would not be paid unless the contractor found a liability. This appears to this office to jeopardize impartial examinations and such agreements should be avoided.

CONCLUSION:

A contract with an independent agent to examine property tax returns, if such a contract be authorized, should not condition payment for services of the independent agent upon the agent's finding a liability for unpaid taxes.

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