

MIL/IV

summary

THE STATE OF SOUTH CAROLINA
OFFICE OF THE ATTORNEY GENERAL
COLUMBIA

OPINION NO. 85-12453

February 11, 1985

SUBJECT: Taxation and Revenue - Expenditure of the Accommodations Tax

SYLLABUS: The accommodations tax cannot be appropriated to a private for profit organization to be expended by the organization to promote its event.

TO: Honorable James M. Waddell, Jr.
Member, South Carolina Senate

FROM: Joe L. Allen, Jr. *jam*
Chief Deputy Attorney General

QUESTION: Can the accommodations tax be appropriated to a "private for profit" organization to be used by that organization in the promotion of one of its events?

APPLICABLE LAW: Act 316, Acts of 1984; Section 45 of the permanent provisions of Act 512, Acts of 1984.

DISCUSSION:

The accommodations tax is allocated by Act 316 to the cities and counties. The act designates the allocation into three separate classes. Class "A" is the first twenty-five thousand dollars received by the municipality or county. That sum is exempt from the other requirements of the act:

The next, Class "B", is twenty-five percent of the remaining balance. It is allocated to a special fund and is to be used to advertise and promote tourism by increasing tourist attendance through the generation of publicity. The final, Class "C", is the remainder of the funds which is allocated to a special fund and used for "tourism-related expenditures". The term "tourism-related expenditures" is defined and includes among other things, the same authorized expenditures as Class "B", to advertise and promote tourism so as to develop and increase tourist attendance through the generation of publicity.

REQUEST LETTER

February 11, 1985

It is assumed for purposes of this opinion that the question relates to funds allocated into the second and third classes. It is further assumed that the appropriation to the for profit organization would be expended as directed by the for profit organization. In our opinion, the funds cannot be so appropriated.

As to the funds in Class "B", the statute language clearly prohibits the appropriation. The act provides that only a nonprofit organization that can demonstrate that it has an ongoing, existing tourism promotion program or that can develop an effective tourism promotion program is "to manage and direct the expenditure of these tourism funds."

An appropriation by the selected nonprofit organization to a private for profit organization would be in conflict with the requirement that the selected nonprofit organization manage and direct the expenditure. "Manage" is defined in the context here used as:

"To control and direct; to conduct, guide, administer." Webster's New Collegiate Dictionary.

"To control and direct, to administer, to take charge of. Fleet v. McCabe (1938), 299 Mass. 173, 12 N.E. 2d 89, 93." Black's Law Dictionary. (For other cases see 26 Words and Phrases).

"Direct" is defined to mean:

"To regulate the activities or course of; specif. to govern or control, to give guidance to." Webster's New Collegiate Dictionary.

"To point to; guide; order, command, instruct. In re Durkees' Estate, 47 N.Y.S. 2d 721, 725, 726, 183 Misc. 382." Black's Law Dictionary. (For other cases see 12A Words and Phrases)

The selected nonprofit organization could not appropriate the funds to another because the same would be abandonment

Honorable James M. Waddell, Jr.
Page Three

February 11, 1985

of the statutory duty to "manage and direct the expenditures".

This conclusion is fortified by another settled rule of law that is also applicable to Class "C" funds. The act vests discretion in the selected nonprofit organization as to the methods and manner the funds are to be expended to advertise and promote tourism. In example, what types of advertisement, newspaper, billboard, radio, television or other, the content, time, et cetera. This is a discretionary and not a ministerial duty. In Blalock v. Johnson, 170 S.C. 414, 185 S.E. 51, 90 A.L.R. 1412, our court held:

"Discretion in the manner of the performance of an act arises when the act may be performed in one of two or more ways, either of which would be lawful, and where it is left to the will or judgment of the performer to determine in which way it shall be performed. But when a positive duty is enjoined, and there is but one way in which it can be performed lawfully, then there is no discretion. . . ."

A ministerial duty may be delegated; however, one that involves judgment or discretion may not.

"... . So far as the functions of a municipal corporation are legislative, they rest in the discretion and judgment of the municipal body intrusted with them, and that body cannot refer the exercise of the powers to the discretion and judgment of its subordinate, or any other authority." 56 Am.Jur. 2d, Municipal Corporations, Etc., § 196, at page 251.

"'The principle is a plain one', says Dillon, 'that the public powers or trusts devolved by law or charter upon the council or governing body, to be exercised by it when and in such manner as it shall judge best, cannot be delegated to others.'" Murphy v. City

Honorable James M. Waddell, Jr.
Page Four

February 11, 1985

of Greensboro, 190 N.C. 268, 129 S.E.
614.

As to Class "C" funds, county councils are to expend the same for the designated purposes within the geographical limits of the county where practical. Such is a clear expression by the General Assembly that the County Council is to appropriate the funds and determine the manner and method of the expenditure and the designated purpose of the expenditure. This requires the exercise of judgment or discretion by the council and is thus a duty that cannot be delegated to a private for profit organization.

As to the municipalities, § 5-7-160 provides that:

"All powers of the municipality are vested in the council, except as otherwise provided by law, and the council shall provide for the exercise thereof and for the performance of all duties and obligations imposed on the municipality by law."

Again, a municipal council must exercise discretion and judgment specifically conferred by the General Assembly. The same cannot be delegated to another entity.

CONCLUSION:

The accommodations tax cannot be appropriated to a private for profit organization to be expended by the organization to advertise and promote its event.

JLAJR/jws

enclosure: 1984 Act (R347 H2186) no. 512