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Opinion Committee

RQ-0097-JC
August 4, 1999

FILE # ML-40932-99

I.D. # 40932

Office of Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

VIA CERTIFIED MAIL Z-461-588-683

Re: Request for opinion relating to expenditures from the Tax Assessor-Collector's Vehicle Inventory Tax pursuant to Section 26.122 of the Tax Code and County Auditor's responsibilities in relation to same.

Gentlemen:

THE STATUTE IN QUESTION

Section 26.122 of the Tax Code provides that a unit property tax for each vehicle sold by a motor vehicle dealer be submitted to the county's tax collector by the 10th of the month following the month of sale, and that the money will be deposited in an escrow account by the tax collector for prepayment of property taxes.

Section 26.122(c) states the following:

"The collector shall retain any interest generated by the escrow account to defray the cost of administration of the prepayment procedure established by this section. Interest generated by an escrow account created, as provided in this section, is the sole property of the collector, and that interest may be used by no entity other than the collector."

PREVIOUSLY ISSUED ATTORNEY GENERAL'S OPINIONS

Attorney General's Opinion DM-398 summarizes that "the interest generated...constitutes a fund which is to be used at the discretion of the collector to defray the cost of administration of the statutory prepayment procedure. The funds may be kept in a special account, and the collector does not need the approval of the commissioners' court for their disbursement."

Attorney General's Opinion DM-398 states that "such funds may, however, only be used to defray the cost of administration of the prepayment procedure. They may not be used for general office expenses of the assessor-collector which are unrelated to the cost of administering the program."

However, DM-398 also states "what constitutes a legitimate cost of administration of the prepayment program is a matter of fact upon which this office cannot opine. We do note however that the requirement that the interest be used to defray the cost of administration of the prepayment procedure is more restrictive than the corresponding language in the hot-check fund statute...and these funds may not be used for general office expenses of the assessor-collector which are unrelated to the costs of the prepayment program."

DM-398 also states that "these funds are subject to audit by the county auditor."

QUESTIONS

1. Since the funds generated in accordance with Section 26.122 of the Tax Code are solely at the control of the tax assessor-collector, and the commissioners court has no authority whatsoever over the funds, does the County Auditor have a responsibility to report questioned expenditures from this fund, and if so, to whom does the county auditor issue an audit report?

The McLennan County District Attorney, in his letter dated December 16, 1998 has made several statements in relation to the County Auditor's responsibilities, as follows:

He stated on page 3 that it is his opinion the county auditor's report concerning comments about questioned expenditures should be addressed to the commissioners' court. I question this response since the commissioners' court has no authority over the fund.

He stated on page 3 that "if the collector proposes to expend or expends interest in a manner which would constitute a criminal offense, the auditor must report such action to the appropriate law enforcement agency and use such means at his disposal to prevent the consequences of the criminal act." But then he goes on to make statements which I feel are incongruous on page 4. He states that

"simply concluding that the expenditure bears "little relationship to the administration of the prepayment procedure" might be unlawful or actionable [on the part of the county auditor]";

and that "caution should be exercised lest the auditor accomplish indirectly that which he may not lawfully do directly —interfere with the spending discretion of the collector — by making a report or threatening to make a report which places into question the legality of the expenditure...";

and "the auditor may not use fiscal reporting and disbursement provisions of the law which would thwart, prevent or overturn the collector's spending decision."

2. Can the interest funds generated in accordance with Section 26.122 of the Tax Code be used to fund the entire purchase price of a piece of equipment, such as a vehicle or computer which will be utilized 25 percent for the administration of the prepayment procedure and 75 percent for general administration of the tax office?

In his letter dated October 21, 1998 the McLennan County District Attorney made the following comments:

He stated on page 7 that "expenditures must be 'related' to the cost of administering the prepayment program, and apparently do not have to be exclusively or solely confined to the administration of that program." I respectfully disagree, especially in relation to questions of the purchase of equipment.

He stated on page 7 that " the costs of administration of the prepayment program may be direct or indirect" and with that comment I agree. I feel it would be valid to allocate a portion of an employee's personnel costs to the prepayment program. I do not feel that purchasing a vehicle which is used 25% for the prepayment program and 75% for general tax office administration, and paying for 100% of the vehicle and its operating expenses from the interest generated on Section 26.122 prepayments is in accordance with the spirit of Section 26.122.

DM-398 stated that "what constitutes a legitimate cost of administration of the prepayment program is a matter of fact upon which this office cannot opine." The question asked by the requestor in DM-398 was the rather broad question

"...[can] the costs of administration for which the interest is dedicated include costs and expenses already provided for in the county budget..."

I feel that the question I am posing, unlike the question in DM-398, is indeed a question of fact. In JC-0014, the Attorney General did express an opinion on a similar question of fact concerning whether or not clip-on microphones could be purchased from the courthouse security fund under article 102.017(d)(9) of the Code of Criminal Procedures.

3. Must equipment purchased by interest funds generated on prepayment deposits provided in Section 26.122 of the Tax Code be used in a manner which defrays only the cost of the prepayment program, and would its fractional, unreimbursed, usage for any other purpose in the administration of the tax office be allowable under Section 26.122 of the Tax Code?

I realize the essence of question 3 is very similar to question 2. I am adding question 3 in hopes that you can express an opinion on it, if question 2 is one on which you cannot opine.

4. Are expenditures funded by the interest earnings generated from Section 26.122 of the Tax Code subject to the purchasing laws set forth in Chapter 262, Subchapter C of the Local Government Code relating to competitive bidding requirements?

Clearly, the aforementioned funds are not under the control of the Commissioners' Court; and, as the McLennan County District Attorney stated on page 6 of his December 7, 1998 letter to me "...does the collector have to comply with...County purchasing policies...the answer is "NO." He goes on further to state "... the interest account...must be administered within the confines of laws applicable to the use of county funds." He stops short, however, of stating whether or not Chapter 262, Subchapter C is applicable to purchases made from the aforementioned funds.

PRIOR SUBMISSION OF ISSUES TO MCLENNAN COUNTY DISTRICT ATTORNEY

I am enclosing copies of previous correspondence between the McLennan County District Attorney and myself for your information. Thank you.

Sincerely,



Steven G. Moore,
McLennan County Auditor

Enclosures