



COMPTROLLER OF PUBLIC ACCOUNTS

P.O. BOX 13528
AUSTIN, TX 78711-3528

RQ-0613-JC

September 25, 2002

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OPINION COMMITTEE

FILE # ML-42809-02
I.D. # 42809

The Honorable John Cornyn
Attorney General
State of Texas
Post Office Box 12548
Austin, Texas 78711-2548

Dear General Cornyn:

In 1999, you issued Attorney General's Opinion No. JC-0042, and earlier this year you issued Attorney General Opinion No. JC-0463 (2002), both of which affect our administration and collection of court costs, fees and fines. We seek clarification on several issues discussed in this letter, and request your formal opinion.

The Comptroller of Public Accounts ("Comptroller") is responsible for the administration and collection of a variety of court costs, fees, and fines, which are designated by statute to fund specific state and local programs. Attached Exhibit A is a list of the court costs, fees and fines (collectively referred to as "local revenue funds") that the Comptroller administers. Each imposition statute requires municipalities and counties to collect a court cost, fee or fine based upon type and date of offense and requires the remittance of the collected money to the Comptroller.

The Comptroller is charged with audit responsibility for all local revenue funds that are to be remitted to the state, and also for a few of the funds that are retained at the local level. In an audit, the Comptroller determines whether the local governmental entity collected the correct fee amount on the appropriate convictions and remitted it to the Comptroller. If our examination reveals otherwise, the Comptroller issues an assessment for the amount of the deficiency. We use this approach for all local revenue funds that we administer.

Under a pretrial diversion agreement in lieu of prosecution, the County Attorney in Hopkins County deferred prosecution for some offenses if individuals agreed to pay a fee and be placed on probation. In Attorney General Opinion No. JC-0042 (1999), your office held that a prosecutor is not authorized to defer prosecution of a law violation contingent upon the offender's donation of a fee. While conducting audits of other counties, we have encountered other programs under which a prosecutor collected a fee pursuant to an unauthorized pretrial diversion agreement. The localities may refer to their agreements by a different name, but the concept is the same. An individual is allowed to defer prosecution by paying a fee and by staying out of trouble during the "probation" period. Based on your office's opinion that such agreements were

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unauthorized, we began to assess municipalities and/or counties for funds accumulated from the unauthorized fees. Hopkins County sought clarification about what must be done with the funds accumulated under an unauthorized pretrial diversion agreement.

In Attorney General Opinion No. JC-0463 (2002), you held that the fees and any interest earned on those fees must be returned to the individuals who paid those fees. You further held that if Hopkins County could not locate those individuals, then the fees and interest constitute abandoned property that must be reported and delivered to the Comptroller. We agree with your conclusion that unauthorized fees and interest should be refunded to individuals from whom the fees were collected. However, if a county or municipality is unable to refund unauthorized court costs, fees or fines to the individuals, it has been our policy to require the county or municipality to remit the fees and interest to the Comptroller as local revenue funds. Although we administer both abandoned property and local revenue funds, there are significant distinctions between the two. It is in this area that we seek clarification.

When we discover that municipalities and counties have collected unauthorized court costs, fees or fines, we give them the opportunity to refund the money to individuals from whom the money was collected. However, if the money cannot be refunded for whatever reason, then we require remittance to this office and rely on Texas Tax Code §111.016 for support. It provides that any person who receives or collects a tax or any money represented to be a tax from another person holds the amount so collected in trust for the benefit of the state and must remit it to the state.

Chapters 101, 111, 112 and 113 of Texas Tax Code apply "to the administration, collection and enforcement of other taxes, fees, and charges, including penalties, or other financial transactions, that the comptroller is required or authorized to collect or administer under other law, to the extent that the other law does not conflict with" these chapters. See Texas Tax Code §111.0022. "Tax" is defined to include "a tax, fee, assessment, charge, or other amount that the comptroller is authorized to administer." See Texas Tax Code §101.003(13). Because the Comptroller administers the various court costs, fees, and fines that the municipalities and counties impose, we believe that local revenue funds fall within the scope of Section 111.016.

Municipalities or counties that collect unauthorized fees from individuals under a deferred prosecution program collect such money under the representation that it is a court cost or fee. We have taken the position that any representation that a municipality or county makes to individuals that court costs or fees are being collected triggers the applicability of Section 111.016 and requires remittance. Upon our collection, we allocate the money to the appropriate local revenue funds, and any excess is deposited into the state's General Revenue fund. However, if these fees are considered to be

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abandoned property and are to be reported as unclaimed property to the Comptroller as mandated by Attorney General Opinion No. JC-0463, the Comptroller deposits this money to the state's General Revenue as provided by chapter 74 of the Property Code, subject to being reclaimed by the true owner.

Attorney General Opinion No. JC-0463 suggests that the various local revenue programs to which we allocated money collected as unauthorized court costs, fees or fines were not entitled to receive those funds. We ask you to address this issue for us.

We do not believe local revenue funds are different than any taxes that we administer. For example, if a retailer improperly collects sales tax from a customer on an item that is not taxable, we require that retailer to either refund the money to the customer or remit it to the state. There is no defense that the collected sales tax was not due to the state because no imposition statute exists to impose the sales tax. Section 111.016 eliminates that "unjust enrichment" by requiring the remittance to the Comptroller. If the improperly collected sales tax is remitted to the Comptroller and the customer later discovers he erroneously paid the tax, the customer may claim a refund directly from the Comptroller or may seek a refund of the money from the retailer who in turn would seek a refund from the Comptroller. See Texas Tax Code §111.104. We apply the same analysis to the money collected under the label of a court cost or fee.

We believe our current policy facilitates the funding of programs that the legislature intended to fund with court costs, fees and fines. In addition, our policy facilitates the legislative intent of Section 111.016, which is to prevent unjust enrichment by a person who caused the improper collection of a "tax" or "fee" in the first place. If the fees collected are less than \$100 per case, then municipalities or counties arguably are not required to report the amounts to the Comptroller as abandoned property as provided by chapter 76 of the Property Code. Many of the fees at issue fall below this threshold amount. After a statutory time period, and unless claimed by the true owner, the money would revert to the benefit of the general funds of the municipalities or counties that improperly collected the fees. We feel such a result would be in direct conflict with the intent of Section 111.016.

Our first question is this: Are the local revenue fees that the comptroller administers a "fee" within the meaning of Tax Code, Sec. 101.003(13), with the result that they are considered a "tax" for purposes of Sec. 111.0022?

If your answer is "yes", our second question is this: Does Tax Code, Sec. 111.016 apply to these fees in the manner discussed earlier in this letter?

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If you believe that Section 111.016 does not apply to the fees at issue collected from defendants and if you continue to hold that the money should be reported as unclaimed property, then we ask that you answer the following questions:

3. Property that is unclaimed for three years is presumed abandoned. See Property Code, Sec. 72.101. When does the three years start to run? Is it from the date of offense, from the date the fee was collected, or from the date that a county or municipality determines that it is unable to locate the individual?

4. Assume that a fee was imposed, and that the individual was allowed to make multiple payments. When does the three years start to run on multiple payments? That is, would each payment have a separate start date or would it be based on the first payment or last payment?

5. If the fee and interest earned thereon is less than \$100 per case, does chapter 76 of the Property Code apply, with the result that a municipality or county would not be required to report the money to the Comptroller?

6. With regard to unauthorized local revenue funds that we have already collected from localities and allocated to the various funds and general revenue, must we transfer those amounts to the unclaimed property program? If so, is this money to be handled under chapter 74 or chapter 76 of the Property Code?

7. If your answer to question 6 is "yes", and if the available balance in any of the funds from which money must be transferred is less than the amount to be transferred, from what source must the transfer be made?

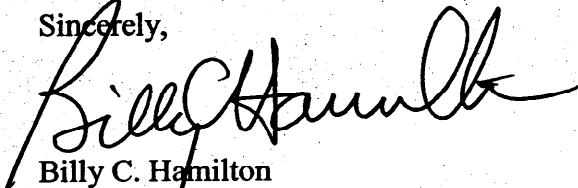
8. With regard to unauthorized local revenue funds that we have already collected from localities, but which may now fall within chapter 76 of the Property Code, must we refund money to the municipalities or counties? Should we refund the amounts automatically to cities or counties or may we refund only if a refund claim is submitted pursuant to Section 111.104 of Texas Tax Code? Currently, we require a refund claim because we believe subsection (e) of Section 111.104 applies to all taxes and fees collected or administered by the comptroller. In addition, we require the submission of evidence that the money has been refunded to the person from whom it was collected. See Texas Tax Code §111.104(f). Shall we continue to require that proof?

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9. Currently, we apply the four-year statute of limitations to amounts collected from local revenue funds. See Texas Tax Code §§111.201 et seq. If amounts are to be refunded to municipalities and counties under Chapter 76, Property Code, but which funds had been collected under local revenue funds, does the four-year statute of limitations apply to limit the time period of funds which must be refunded?

We thank you in advance for your consideration.

Sincerely,



Billy C. Hamilton
Deputy Comptroller

Attachment