

FILE # ML-40885-99
I.D.# 40885



RQ-0079-JC

JOHNSON COUNTY

BILL MOORE
COUNTY ATTORNEY

RECEIVED

JUN 24 1999

Opinion Committee

June 22, 1999

Hon. Elizabeth Robinson, Chairperson
Opinion Committee
Attorney General's Office
P. O. Box 12548
Austin, TX 78711

Re: Request For An Attorney General's Opinion Concerning the Motor Vehicle Inventory Tax Fund

Dear Ms. Robinson:

I am writing this letter to request an Attorney General's Opinion regarding Texas Tax Code Section 23.122.

The Johnson County Tax Assessor/Collector and County Auditor have questions related to Texas Tax Code Section 23.122 which are as follows:

1. Can the interest from the Motor Vehicle Inventory Tax Fund be used for salary supplements to full time employees of the County Tax Assessor/Collector?
2. Does the County Auditor have authority to audit the Motor Vehicle Inventory Tax Fund and the interest from this fund?
3. Does equipment purchased with the interest from the Motor Vehicle Inventory Tax Fund become property of the county or property of the Tax Assessor/Collector?

I have enclosed a copy of the brief my office has prepared on these questions.

I would appreciate an answer to this request as soon as possible.

Sincerely,

A handwritten signature in black ink, appearing to read "Bill Moore".

Bill Moore

BM/ts

BRIEF

QUESTIONS:

1. Can the interest from the Motor Vehicle Inventory Tax Fund be used for salary supplements to full time employees of the County Tax Assessor/Collector?
2. Does the County Auditor have authority to audit the Motor Vehicle Inventory Tax Fund and the interest from this fund?
3. Does equipment purchased with the interest from the Motor Vehicle Inventory Tax Fund become property of the county or property of the Tax Assessor/Collector?

FACTUAL BACKGROUND:

The Johnson County Tax Assessor/Collector and the Johnson County Auditor have each asked questions regarding the proper use, the authority of the auditor to conduct an audit and the character of purchased equipment concerning the interest earned on the Motor Vehicle Inventory Tax Fund as provided for in Texas Tax Code Section 23.122.

The Tax Assessor/Collector wants to pay funds from the interest earned on the Motor Vehicle Inventory Tax Fund to two current full time employees of the tax office for work performed in administering the motor vehicle inventory tax prepayment procedure. The funds paid to the two employees would be in addition to or supplemental to the employees' salary paid by the county. The employees would not be working any overtime in administering the prepayment procedure, and would therefore, be administering the prepayment procedure during the normal business hours of the tax office. The auditor questions whether or not current full time employees of the tax office may be paid additional or supplemental pay for work performed in administering the motor vehicle inventory tax prepayment procedure.

In the past, the county auditor has audited the Motor Vehicle Inventory Tax Fund account as well as the interest account. The tax assessor/collector questions whether the auditor has the authority to audit these two accounts due to the Tax Code providing that the interest earned is the sole property of the tax assessor/collector, and due to an attorney retained by the Tax Assessor/Collector rendering an opinion that said funds are not public or county funds, and therefore, reaching the conclusion that the auditor is precluded from auditing the funds prior to and/or subsequent to any expenditures as the funds are not county property. The auditor disagrees and is of the opinion that he has the authority and duty to audit all monies held by the tax assessor/collector in his official capacity.

The auditor additionally questions, the character of any equipment purchased by the tax assessor/collector with interest from the Motor Vehicle Inventory Tax Fund. Does equipment purchased with the interest from the Motor Vehicle Inventory Tax Fund become property of the county or the property of the tax assessor/collector?

STATUTES AND ATTORNEY GENERAL OPINIONS:

Statutes:

Texas Tax Code Sections, 23.122

Local Government Code Sections, 115.001, 115.002, 115.035, 112.001, 112.005, 112.006, 112.007, 114.002, 114.041, 114.042

Attorney General Opinions:

DM-398

DM-357

JM-313

Texas Constitution:

Article III, Section 53

Article III, Section 51

LEGAL ANALYSIS:

Tex. Tax Code § 23.122(c) provides in relevant part:

“...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 by this section is the sole property of the collector, and that interest may be used by no entity other than the collector. Interest generated by an escrow account may not be used to reduce or otherwise affect the annual appropriation to the collector that would otherwise be made.”

Attorney General Opinion-JM 313 dealt with various questions regarding the use of the “Hot Check Fund.” One such question regarded salary supplements to assistant prosecutors and other employees of the prosecutor’s office. That opinion recognized Article III, Section 53 of the Texas Constitution prohibits any extra compensation, fee or allowance to a public employee after the service has been rendered. Article III, Section 53 therefore prohibits retroactive payment of salary bonuses, supplements, or other salary increases by political subdivisions. An attorney administering the special fund may not grant extra compensation, fees or allowances to an employee after the employee’s services have been rendered. Although salary increases or supplements, are authorized.

As stated in Attorney General Opinion DM-398, the funds created by Tax Code Section 23.122 are analogous to the “Hot Check Fund” in some respects. Therefore, it would appear that as long as the salary supplement is not a payment after the service has been rendered and the salary supplement is being used to defray the cost of administration of the prepayment procedure, said supplement is permitted and is within the sole discretion of the Tax Assessor/Collector.

Local Government Code Section 114,002 provides that:

The County Auditor shall determine:

1. The time and manner for making reports to the auditor; and

2. The manner for making an annual report of:
 - (a) office fees collected and disbursed; and
 - (b) the amount of office fees refunded to the county in excess of those that the officer is permitted by law to keep.

DM-357 stated “Section 114.002(2)(A) requires the county auditor to establish the manner in which a County Official annually must report ‘office fees collected & disbursed.’”

Local Government Code Section 112.006(a) states “the County Auditor has general oversight of the books & records of a county, district or state officer authorized or required by law to receive or collect money or other property that is intended for use of the county or that belongs to the county.”

Local Government Code Section 114.041(a) states:

(a) In a county with a population of 190,000 or less, a district, county, or precinct officer shall keep, as part of a record provided for the purpose, a statement of the fees earned by the officer and of the money received by the officer as deposits for costs, trust fund deposits in the registry of a court, fees of office, and commissions. The officer must make an entry in the record when the fees or commissions are earned or the deposits are made and when the money is received. The county auditor or, if the county does not have a county auditor, the commissioners court shall annually examine the records and accounts of each officer and report the findings of the examination to the next grand jury or district court.

Local Government Code Section 115.0035 states in relevant part:

(a) For purposes of this section, “accounts” means all public funds that are subject to the control of any precinct, county or district official, including the accounts of law enforcement agencies and the attorney for the state composed of money and proceeds of property seized and forfeited to those officials.

(b) At least once each county fiscal year, or more often if the county auditor desires, the auditor shall, without advance notice, fully examine the accounts of all precinct, county and district officials.

(c) The auditor shall verify the correctness of the accounts and report the findings of the examination to the commissioners court of the county at its next term beginning after the date the audit is completed.

Attorney General Opinion DM-398 held that even though the statute speaks of the fund derived from the interest on the inventory escrow account as the “sole property of the collector,” that could not mean that the collector may retain the funds for his personal use and benefit. The collector is to retain the interest to defray the cost of administration of this prepayment procedure. Article III Section 51 of the Texas Constitution prohibits any grant of public funds to a private individual. Considering the above statutes and Attorney General Opinions, said funds are public money and are subject to audit by the county auditor.

The question of the character of purchased equipment appears to be answered by the preceding analysis. Even though the interest is designated as the "sole property of the collector" any equipment purchased should be equipment used to defray the cost of administration of the prepayment procedure. Due to the above reasoning in DM-398 regarding the constitutional prohibition against public funds being granted to a private individual, it follows that any equipment would not become personal property of the tax assessor/collector but rather the property of the tax assessor/collector's office to be used in administering the Motor Vehicle Inventory Tax Fund regardless of who holds the position of tax assessor/collector.

CONCLUSION

The interest from the Motor Vehicle Inventory Tax Fund may be used to supplement salaries of employees of the County Tax Assessor so long as the supplemental pay is for work performed in administering the prepayment program and is not extra compensation to employees after the employees' services have been rendered.

The Motor Vehicle Inventory Tax Fund and interest from said fund are public funds and therefore are subject to being audited by the county auditor and any equipment purchased with said funds are property of the tax assessor/collector's office to be used in administering this prepayment program.