



STATE OF INDIANA
OFFICE OF THE ATTORNEY GENERAL
INDIANA GOVERNMENT CENTER SOUTH, FIFTH FLOOR
302 W. WASHINGTON STREET · INDIANAPOLIS, IN 46204-2770

STEVE CARTER
ATTORNEY GENERAL

TELEPHONE (317) 232-6201

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OFFICIAL OPINION 2003-1

The Honorable Lawrence M. Borst
Indiana State Senator
Indiana State Senate, 430 State House
Indianapolis, IN 46204-2785

RE: Distribution of County Option Income Tax

Dear Senator Borst:

You have requested an official opinion on the statutory authority regarding distribution of County Option Income Taxes ("COIT") and specifically whether the State Budget Agency or the Indiana Department of Revenue has the statutory authority to intercept a portion of Marion County's COIT distribution to pay a portion of the past-due debt owed by Marion County for the cost of juvenile corrections.

BRIEF ANSWER

It is our opinion that the Indiana General Assembly has authorized County Option Income Taxes as a funding source solely for counties. The statutes require the Department of Revenue to collect these taxes and distribute them to the counties. Indiana statutes do not authorize the State Budget Agency or the Indiana Department of Revenue to "intercept" County Option Income Tax funds collected by the Indiana Department of Revenue for distribution to counties.

BACKGROUND

You have sought this opinion based on a December 2, 2002 letter from the State Budget Director to the Marion County Auditor stating, in part:

the State of Indiana has subtracted \$2,525,243 from Marion County's December payment for County Option Income Tax . . . to pay a portion of the past-due debt owed by Marion County to the State for the cost of juvenile corrections.

RELEVANT STATUTES

I. COUNTY OPTION INCOME TAX

Indiana Code Section 6-3.5-6 authorizes counties to adopt a County Option Income Tax, and the Consolidated City of Marion County-Indianapolis has adopted an ordinance authorizing such a tax.

The manner in which the Indiana Department of Revenue must handle the COIT payments it collects from taxpayers is prescribed by Indiana Code Section 6-3.5-6-16:

(a) A special account within the state general fund shall be established for each county that adopts the county option income tax. Any revenue derived from the imposition of the county option income tax by a county shall be deposited in that county's account in the state general fund.

(b) Any income earned on money held in an account under subsection (a) becomes a part of that account.

(c) Any revenue remaining in an account established under subsection (a) at the end of a fiscal year does not revert to the state general fund.

The distribution of COIT revenues to the counties is covered by Indiana Code Section 6-3.5-6-17:

Distribution of revenue to counties. (a) Except as provided in section 2.5 of this chapter¹, revenue derived from the imposition of the county option income tax shall, in the manner prescribed by this section, be distributed to the county that imposed it. The amount that is to be distributed to a county during an ensuing calendar year equals the amount of county option income tax revenue that the department, after reviewing the recommendation of the state budget agency, estimates will be received from that county during the twelve (12) month period beginning July 1 of the immediately preceding calendar year and ending June 30 of the ensuing calendar year.

(b) Before June 16 of each calendar year, the department, after reviewing the recommendation of the state budget agency, shall estimate and certify to the county auditor of each adopting county the amount of county option income tax revenue that will be collected from that county during the twelve (12) month period beginning July 1 of that calendar year and ending June 30 of the immediately succeeding calendar year. The amount certified is the county's "certified distribution" for the immediately succeeding calendar year. The amount certified may be adjusted under subsection (c) or (d).

¹ The underlined language was added by P.L. 178-2002 § 61. There is no section 2.5 of IC 6-3.5-6, and we assume that a correct citation will be substituted during technical changes made during the forthcoming legislative session. We have, however, reviewed both P.L. 178-2002 and other laws enacted during the 2002 legislative session and found no exceptions for a county's payment obligations to the State for housing of juvenile offenders.

(c) The department may certify to an adopting county an amount that is greater than the estimated twelve (12) month revenue collection if the department, after reviewing the recommendation of the state budget agency, determines that there will be a greater amount of revenue available for distribution from the county's account established under section 16 of this chapter.

(d) The department may certify an amount less than the estimated twelve (12) month revenue collection if the department, after reviewing the recommendation of the state budget agency, determines that a part of those collections needs to be distributed during the current calendar year so that the county will receive its full certified distribution for the current calendar year.

(e) One-twelfth (1/12) of each adopting county's certified distribution for a calendar year shall be distributed from its account established under section 16 of this chapter to the appropriate county treasurer on the first day of each month of that calendar year.

(f) Except as provided in section 2.5 of this chapter, upon receipt, each monthly payment of a county's certified distribution shall be allocated among, distributed to, and used by the civil taxing units of the county as provided in sections 18 and 19 of this chapter.

(g) All distributions from an account established under section 16 of this chapter shall be made by warrants issued by the auditor of state to the treasurer of state ordering the appropriate payments.

A "county having a consolidated city" (*i.e.*, Indianapolis-Marion County) is also subject to additional calculations that take into account obligations for qualified economic development tax projects, the county's welfare administration fund, and after December 31, 2002, the county hospital care for the indigent property tax levy and uninsured parents program property tax levy.² The General Assembly has set by statute how Marion County's COIT distribution is to be divided among its various civil taxing units.³

II. DEPARTMENT OF REVENUE AUTHORITY

The Indiana Department of Revenue is an "agency of the state of Indiana for purpose of administering, collecting, and enforcing the taxes placed under its authority."⁴ The "taxes placed under its authority" are known as "listed taxes"⁵, and include the county option income tax. However, if any statutory provisions relating to the Department of Revenue's authority to impose,

² IND. CODE § 6-3.5-6-17.6b (2002). This code section was amended both by P.L. 178-2002, SEC. 66 and by P.L. 120-2002 SEC. 55. Neither law refers to the other. The differences between the two versions are immaterial for the purpose of this official opinion.

³ IND. CODE § 6-3.5-6-1 (1998).

⁴ IND. CODE § 6-8.1-2-1.

⁵ IND. CODE § 6-8.1-1-1.

collect, or administer listed taxes “conflicts with a provision of the law relating to the listed taxes, the provision of the law relating to the listed taxes controls for the purpose of imposing, collecting, or administering that listed tax.”⁶

III. STATE BUDGET AGENCY AUTHORITY

The powers of the State Budget Agency are described in Indiana Code Section 4-12-1-1:

- (a) This chapter shall be known and may be cited as the budget agency law.
- (b) Its general purposes and policies may be perceived only from the entire chapter, but among them are four (4) of particular significance, namely:
 - (1) Vesting in the budget agency duties and functions and rights and powers which make the execution and administration of all appropriations made by law the exclusive prerogative and authority of that agency, and otherwise denying such prerogative and authority to the budget committee.
 - (2) Designating an officer of the executive department and four (4) members of the general assembly as members of the budget committee through which they may work between regular sessions of the general assembly and cooperatively propose and recommend to the general assembly the appropriations, which appear to be necessary to carry on state government in the succeeding budget period.
 - (3) Giving the members of the budget committee, who are members of the general assembly, the authority to engage in activities incidental and germane to their legislative powers, including investigations of appropriations made and to be made by law, before and after sessions of the general assembly.
 - (4) Making the gathering of information, data, and expert opinion, with reference to the revenues of the state from current sources, and with reference to procuring additional revenues to meet appropriations which may be recommended, and making the evaluation of such data and opinion and of appropriations requested by agencies of the state, the concurrent prerogative and authority of the budget committee and the budget agency.

The Budget Agency is authorized to transfer, assign and reassign appropriations, but Indiana Code Section 4-12-1-12(e) limits this authority:

- (e) The budget agency may transfer, assign and reassign any appropriation or appropriations, or parts of them, excepting those appropriations made to the Indiana state teacher's retirement fund established by IC 21-6.1, made for one specific use or purpose to another use or purpose of the agency of state to which the appropriation is made, but only when the uses and purposes to which the funds transferred, assigned and reassigned are uses and purposes the agency of state is by law required or authorized to perform. No transfer may be made as in this subsection authorized unless upon the request of and with the consent of the agency

⁶ IND. CODE § 6-8.1-1-6 (1998).

of state whose appropriations are involved. Except to the extent otherwise specifically provided, every appropriation made and hereafter made and provided, for any specific use or purpose of an agency of the state is and shall be construed to be an appropriation to the agency, for all other necessary and lawful uses and purposes of the agency, subject to the aforesaid request and consent of the agency and concurrence of the budget agency. (emphasis added)

We have also reviewed the various provisions of Indiana Code relating to reimbursement to the State by the counties for half of the costs of keeping juvenile offenders in Department of Corrections facilities⁷ and find no statutory authority allowing for a set off against funds otherwise payable to a county.

ANALYSIS

Our analysis starts with the fact that the COIT is a purely local tax, imposed by the county fiscal body and not by the State. It is considered a “pass through” tax, collected by the Department of Revenue for the benefit of a county and disbursed back to the county under a statutory framework. By statute COIT payments are held in a special account in the county’s name; all income earned on the account is for the benefit of the county; the funds never become part of the State general fund.⁸ The fact that taxpayer COIT payments must be submitted to the Department of Revenue does not alter its essential character as a local tax.⁹

The legislature’s grant of authority to counties to levy an income tax must be read within the context of Indiana’s Home Rule statute¹⁰ and its broad grant of authority to exercise “all the powers that they need for the effective operation of government as to local affairs.” The additional legislative authority to levy an income tax upon its citizens and to make these funds available to the counties to fulfill this essential governmental purpose mark these funds as unique from other taxes collected by the Department of Revenue.

Indiana Code Section 6-3.5-6-17 is explicit that the Department of Revenue shall distribute COIT funds to the county that imposed it. To the extent that the funds are collected by the State and kept in a special account within the State general fund as required by Indiana Code Section 6-8.1-3-1, they are deemed allocated and appropriated to the county on whose behalf they were generated.¹¹

⁷ IND. CODE § 11-10-2-3; IND. CODE § 4-24-7.

⁸ IND. CODE § 6-3.5-6-16.

⁹ Cf. *Lake County Council v. State Board of Tax Commissioners*, 706 N.E.2d 270, 277 n. 12 (Ind. Tax Ct. 1999), *overruled on other grounds*, 730 N.E.2d 680 (Ind. 2000); *State v. Hoover*, 668 N.E.2d 1229, 1234 (Ind. 1996).

¹⁰ See generally IND. CODE § 36-1-3.

¹¹ See, e.g., *State ex rel Mass Transportation Authority of Greater Indianapolis v. Indiana Revenue Board*, 253 N.E.2d 725, 734 (Ind. App. 1969), *cert. den.* 400 U.S. 877 (1970) (“[a]n allocation by law is an appropriation of revenues”).

The Department of Revenue collects these county funds for the county's benefit and use, and in this respect can be seen as having a fiduciary duty to act on behalf of the county as directed by the legislature. The General Assembly has given neither the Department of Revenue nor the Budget Agency the general power to make set offs, garnishments, and interceptions or otherwise allow for the withholding of COIT distributions to counties.

We are also fully aware that Indiana Code Section 4-24-7-4 mandates that a county council appropriate sufficient funds to cover a county's share of the cost of housing juvenile offenders in state institutions. As the Indiana Court of Appeals so aptly stated in *Etherton v. Wyatt*, "we are cognizant of the need for flexibility by the Budget Agency in dealing with the arduous task of balancing the state budget. However, if the Budget Agency is to reduce a legislative appropriation, it must do so in conformity with the statutory requirements and upon some reasonable basis to support its action."¹² In this regard, *Mass Transportation Authority* seems to suggest a more legally supportable framework in which to achieve an ultimate resolution.¹³

CONCLUSION

It is our opinion that the Indiana General Assembly has authorized County Option Income Taxes as a funding source solely for counties. The statutes require the Department of Revenue to collect these taxes and distribute them to the counties. Indiana statutes do not authorize the State Budget Agency or the Indiana Department of Revenue to "intercept" County Option Income Tax funds collected by the Indiana Department of Revenue for distribution to counties.

We trust that this response has adequately addressed your inquiry. If we can be of further assistance in this matter, please do not hesitate to contact me.

Sincerely,

Stephen Carter
Attorney General

Susan Gard
Deputy Attorney General

¹² *Etherton v. Wyatt*, 293 N.E.2d 43, 51 (Ind. App. 1973).

¹³ *Mass Transport Authority*, 253 N.E.2d. at 734.