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May 17, 2016

The Honorable Lawrence J. Hogan, Jr.
Governor of Maryland
State House
100 State Circle
Annapolis, Maryland 21401

RE: House Bill 447, "Charles County - County Transfer Tax – Revenue Received by the Clerk of the Circuit Court"

Dear Governor Hogan:

We have reviewed and hereby approve for constitutionality and legal sufficiency House Bill 447, "Charles County – County Transfer Tax – Revenue Received by the Clerk of the Circuit Court." While the bill may be signed into law, it is our view that Section 2 of the bill likely would be viewed by a court as an attempt to appropriate State money outside of the constitutionally prescribed budget process to the extent that the funds subject to disbursement have been deposited in the State Treasury. We believe the provision, as it relates to funds previously paid into the Treasury, should be construed as a non-binding expression of legislative intent that cannot be given effect without a valid appropriation. It is our view that the provision may be given effect only with respect to commissions, if any, that are (1) collected by the Clerk of the Circuit Court before the bill's effective date and (2) neither actually paid nor required by law to be paid into the State Treasury before the bill's effective date.

Pursuant to § 2-213 of the Courts and Judicial Proceedings Article ("CJP"), the Clerk of the Circuit Court for Charles County is entitled to a 5 percent commission on all public money that the Clerk receives, collects, and pays over.¹ In June, 2015, Charles County adopted a county transfer tax, which went into effect on August 8, 2015.

¹ The Clerk must deduct from the commissions on the collection of the recordation tax an amount equal to the cost of two-thirds of the salaries and benefits of the court reporters and pay that amount to the Charles County Treasurer. SFP § 2-213(e).

Bill No. 2015-06. For instruments of writing recorded with the Clerk of the Circuit Court, the county transfer tax is to be paid to the Clerk. Charles County Code, §§ 281-30 and 281-35. Thus, pursuant to CJP § 2-213, the Clerk is entitled to a 5 percent commission on the collection of the county tax.

House Bill 447 amends CJP § 2-213 to reduce the commission charged by the Clerk of the Circuit Court for Charles County on the collection of the county transfer tax from 5 percent to 0.5 percent of the funds collected. The bill takes effect July 1, 2016, and is effective only through September 30, 2016. Thus, on October 1, 2016, the commission on the county transfer tax will revert back to 5 percent. Section 2 of the bill provides that the bill shall “be construed to apply retroactively to revenue collected by the Clerk of the Circuit Court for Charles County from the county transfer tax on or after August 8, 2015,” and directs the Comptroller to remit to the County “the balance of the county transfer taxes that the county is entitled to retain for those taxes collected on or after August 8, 2015, but before July 1, 2016.” As described in the bill’s fiscal note, the purpose of this provision is to “refund” to Charles County the difference between the amount of transfer tax commissions actually collected by the Clerk after August 8, 2015, but before July 1, 2016, and the amount the Clerk would have collected during that period had the commission on the transfer tax been set at the lower rate of 0.5 percent. *See Fiscal and Policy Note, House Bill 447 of 2016*, at 1.

There appears to be little doubt that the commissions collected by the Clerk of the Circuit Court on the county transfer tax are “moneys of the State” within the meaning of Article VI, § 3 of the Maryland Constitution and are thus to be deposited in the State Treasury. *See 72 Opinions of the Attorney General* 21, 25 (1987) (by Article IV, § 10(b) of the Maryland Constitution, “[t]he revenues of the clerks’ offices are expressly termed ‘State revenues’ and, “[a]s such, ... are to be deposited in the State Treasury.”)² Article VI, § 3 requires the State Treasurer to “receive the moneys of the State, and, until otherwise prescribed by law, deposit them, as soon as received, to the credit of the State” Section 6-213(a) of the State Finance and Procurement Article (“SFP”) requires that each unit of State government, “in accordance with regulations and policies adopted by the Treasurer

² Prior to a 1986 amendment to the State Constitution, the clerks’ offices were funded through the fees they collected. Their receipts were not deposited in the State Treasury and were not subject to appropriation by the General Assembly. *72 Opinions of the Attorney General* at 24. The 1986 constitutional amendment altered how the clerks’ offices are funded and expressly provided that “[a]ll fees, commissions, or other revenues established by law for these offices shall be State revenues, unless otherwise provided by the General Assembly.” Md. Const., Art. IV, § 10(b).

and the Comptroller,” and except as otherwise provided by law, “pay into depositories designated by the Treasurer for the account of the State Treasury all collections, fees, income, and other revenues that are received by the unit” Similarly, SFP § 6-214 provides that persons who collect and receive money for the State, but who are not subject to § 6-213(a), shall “pay the money into the State Treasury as provided by law”

Article III, § 32 of the Maryland Constitution provides that “[n]o money shall be drawn from the Treasury of the State ... except in accordance with an appropriation by Law.” There are two types of laws that may appropriate State money: (1) the annual budget bill, which is prepared and initiated by the Governor, or (2) a supplementary appropriation bill, which is initiated by the General Assembly. Md. Const., Art. III, § 52(2), (4), and (8). Thus, outside of the budget bill, any bill that appropriates State money is considered a supplementary appropriation bill and is subject to the constitutional procedures that govern such bills. Article III, § 52(8) provides that a supplementary appropriation bill must levy a tax for its support, must be limited to a single object, and may not be passed before the budget bill. As House Bill 447 does not levy a tax, it does not qualify as a supplementary appropriation bill and, therefore, may not appropriate State money.

Because House Bill 447 does not constitute an appropriation measure, the legality of the disbursement under Section 2 turns on whether revenue derived from county transfer tax commissions collected before the bill’s effective date, including the amount in excess of the lower 0.5 percent commission rate, is subject to the appropriation requirement of Article III, § 32. It is our view that it is. Until July 1, 2016, the effective date of House Bill 447, the Clerk of the Circuit Court for Charles County is entitled to a 5 percent commission on collection of the county transfer tax (CJP § 2-213), and, pursuant to State law at the time of collection, those funds are to be deposited in the State Treasury (SFP § 6-213(a)), from which they may not be withdrawn without a valid appropriation (Md. Const., Art. III, § 32). To the extent that such funds are paid into the Treasury prior to July 1, 2016, or are required by law to be paid into the Treasury prior to that date, it is our view that disbursement of the funds, or any portion thereof, without a valid appropriation would be inconsistent with the State budget process. Accordingly, we believe the bill’s requirement that the Comptroller remit funds to the Charles County Treasurer should be construed as a non-binding expression of legislative intent, at least as it relates to funds paid into the State Treasury.

We reach a different conclusion, however, with respect to commissions, if any, that may be properly withheld from the Treasury until after the bill’s effective date. For transfer tax commissions collected by the Clerk before July 1, 2016, a portion of those funds may be disbursed to Charles County pursuant to Section 2 of the bill if the commissions are

neither actually paid nor required by law to be paid into the State Treasury before the bill's effective date. We believe the bill's retroactive reduction of the county transfer tax commission, coupled with the requirement that the Comptroller remit to the County the balance of the transfer taxes "that the county is entitled to retain ...," can be viewed as a valid exercise of the General Assembly's authority to divert State revenues that have not yet been deposited in the State Treasury.

It is clear that, at least under certain circumstances, the General Assembly has the power to direct by statute that "moneys of the State" not enter the Treasury. For example, the Court of Appeals and this Office have recognized the General Assembly's authority to divert to a local jurisdiction certain revenues that are derived locally, even if the funds, absent the diversion, would otherwise make their way into the State Treasury. *See Baltimore v. O'Connor*, 147 Md. 639, 647 (1925) (law provided funding for a special Montgomery County police force from revenues derived from convictions in that county under Maryland's Motor vehicle Law); 75 *Opinions of the Attorney General* 124, 130 (1990) ("General Assembly may determine by statute that a category of funds derived from the residents of a political subdivision or from events occurring within a subdivision are not to enter the ordinary flow of State revenues but instead are to be remitted directly to that subdivision for its general purposes or some specific purpose identified in statute"). This Office also has approved a law authorizing an agency to hold gift funds outside the Treasury, 76 *Opinions of the Attorney General* 59, 65-66 (1991), and in *Kelly v. Marylanders for Sports Sanity*, 310 Md. 437, 460 n.11 (1987), the Court of Appeals noted that "a State instrumentality like the [Stadium] Authority may be exempted by statute from depositing its receipts in the State Treasury."

While the precise limits of the General Assembly's authority to divert revenues from the Treasury is not clear, it appears, at least when it comes to revenues collected by the Clerks of the Circuit Courts, that the State Constitution expressly grants the General Assembly such authority. Article IV, § 10(b) of the Maryland Constitution provides that "[a]ll fees, commissions, or other revenues established by Law for [offices of the Clerks of the Circuit Courts] shall be State revenues, *unless provided otherwise by the General Assembly.*" (Emphasis added).³ Although the matter is not entirely free from doubt, we believe a court would conclude that the retroactive reduction of the transfer tax commission, as applied to funds that are not required to be paid into the Treasury before

³ In fact, by CJP § 2-213(e)(1), the General Assembly already has provided for the diversion of a portion of the commissions collected by the Clerk of the Circuit Court for Charles County by directing the Clerk to deduct an amount for payment to the County to cover a share of the salaries and benefits of court reporters.

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the bill's effective date, along with the corresponding requirement that the Comptroller remit to the County the balance of county transfer taxes "that the county is entitled to retain ...," is a valid diversion of State money that does not conflict with the appropriation requirement of Article III, § 32.

To summarize, we believe the bill's requirement that the Comptroller remit funds to the Charles County Treasurer, at least as it relates to funds previously paid into the Treasury, should be construed as a non-binding expression of legislative intent that can be given effect only with a valid appropriation. The Department of Legislative Services has advised us that the budget bill for fiscal year 2017 (Ch. 143 of 2016) does not provide for an appropriation by which the Comptroller could make the disbursement. Possible vehicles for appropriating the funds include the fiscal year 2018 budget bill (via a deficiency appropriation) or the statutory budget amendment procedure in SFP § 7-209.⁴ Absent a valid appropriation, we believe the disbursement requirement in Section 2 of the bill may be given effect only as it relates to commissions on the county transfer tax, if any, that are (1) collected by the Clerk before the bill's effective date and (2) neither actually paid nor required by law to be paid into the State Treasury before the bill's effective date.

Sincerely,



Brian E. Frosh
Attorney General

BEF/DS/kk

cc: The Honorable John C. Wobensmith
Joseph M. Getty
Warren Deschenaux

⁴ We note, however, that the constraints on the statutory budget amendment procedure may limit its use as a viable remedy.