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May 14, 2021

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

RE: House Bill 337 and Senate Bill 257, "Sales and Use Tax - Vendor Collection Credit - Job Training"

Dear Governor Hogan:

We have reviewed for constitutionality and legal sufficiency House Bill 337 and Senate Bill 257, "Sales and Use Tax - Vendor Collection Credit - Job Training." It is our view a court likely would conclude that the bills are unconstitutional because they allocate State tax revenues for what is essentially a grant to specified job training organizations outside the Constitution's budget process.

Description of House Bill 337 and Senate Bill 257

Maryland imposes a sales and use tax of 6% on the retail sales of certain goods and services. Tax-General Article ("TG") § 11-102. Typically, the buyer pays the tax to the vendor at the time of the sale. In collecting the sales and use tax, vendors are trustees for the State and are liable for the collection of the sales and use tax for and on account of the State. TG § 11-401.

Vendors are allowed to retain a portion of the tax proceeds as compensation for the expense of collecting and remitting the tax in a timely manner. Specifically, vendors may claim a credit equal to 0.9% of the gross amount of the sales and use tax that is to be paid to the Comptroller, up to a maximum credit of $500 each month. TG § 11-105.[1]

House Bill 337 and Senate Bill 257 would amend TG § 11-105 to allow a qualified job training organization to claim a credit equal to 100% of the sales and use tax otherwise payable to the Comptroller, up to a maximum of $100,000 in a calendar year. The bills define a "qualified job training organization" as a 501(c)(3) tax-exempt organization that is located in the State, conducts retail sales of donated items, provides job training and employment services to individuals with workplace disadvantages or disabilities, and uses a majority of its revenue for job training and job placement programs, as specified in the bills. Thus, under the bills, a qualified job training organization would be allowed to keep for itself the first $100,000 of sales and use tax revenues it collects each year, whereas other vendors may retain no more than $500 each month ($6,000 a year) as compensation for collecting the tax.

Constitutional Principles – State Revenues and the Budget Process

Article VI, § 3, of the Maryland Constitution provides that the State Treasurer "shall receive the moneys of the State, and, until otherwise prescribed by law, deposit them, as soon as received, to the credit of the State . . . ." The State Constitution does not expressly require that money received by or on behalf of State officials be remitted to the State Treasurer for deposit in the Treasury. 76 *Opinions of the Attorney General* 59, 60 (1991). That requirement is expressly set out in statute,[2] but a statutory duty is subject to statutory exceptions.

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[1] For the first $6,000 of gross sales and use tax collected each month, a vendor may claim a credit of 1.2%.

[2] 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 and the Comptroller," and except as otherwise provided by law, "pay into depositaries 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, in turn, provides that money may be withdrawn from the Treasury only "in accordance with an appropriation by Law." Md. Const., Art. III, § 32. 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 work, object or purpose, and may not be passed before the budget bill.

House Bill 337 and Senate Bill 257 do not purport to authorize the withdrawal of money from the Treasury, and they could not do so, since they are not supplementary appropriation bills that levy a tax. Rather, the apparent intent of the bills is to create a statutory exception to the requirement that the funds be deposited into the Treasury, by allowing a qualified job training organization to retain up to $100,000 each year of the sales and use taxes it collects on the State's behalf.

There was a time when this Office took the position that the General Assembly "had essentially unfettered discretion to 'designat[e] the manner of use of monies received by various agents of the State prior to the time when these monies find their way into the State Treasury.'" 76 *Opinions of the Attorney General* at 60 (quoting 6 *Opinions of the Attorney General* 345, 346 (1921)); *see also* 63 *Opinions of the Attorney General* 492 (1978). But for almost 40 years now, this Office has been of the view that, except for limited exceptions, the constitutional design requires that money received by agents of the State be deposited into the State Treasury, from which it may be withdrawn only pursuant to a valid appropriation. *See* 68 *Opinions of the Attorney General* 86, 90 (1983); 75 *Opinions of the Attorney General* 124, 126-131 (1990); 76 *Opinions of the Attorney General* at 60-63.

In 75 *Opinions of the Attorney General* 124 (1990) we considered whether the General Assembly could, by ordinary legislation, distribute income tax revenues to specified counties outside the budget process. We acknowledged that a 1925 opinion of the Court of Appeals, *Baltimore v. O'Conor*, 147 Md. 639, 647 (1925), approved a measure that directed State officials to credit to a county, for the support of the county police force, funds derived from fines for local vehicle offenses committed in the county, even though those funds otherwise would have made their way into the State Treasury. But we rejected the idea that the Court would go so far as to "authorize a system of State resource allocation completely outside of, and necessarily destructive of, the Budget Amendment, [Article III,

§ 52,]." 75 *Opinions of the Attorney General* at 130. Instead, we construed *O'Conor* narrowly to mean that the General Assembly can "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." *Id.* We thus acknowledged the validity of the statutory scheme by which the State collects and disburses local income tax revenues outside of the State's budget process – i.e, the county "piggyback" tax. "In effect, by statute these portions of income tax revenues never lose their local status, just as in *Baltimore v. O'Conor* the fines originating in one county were authorized to be kept at their source." *Id.* at 131. The specific provisions at issue in that 1990 opinion, however, did not allocate to counties funds that were, by their nature, local funds. Instead, they called for the distribution of a portion of *the State's* share of income tax revenues. Although we acknowledged the matter was not entirely free from doubt, we concluded that the distributions could not be "construed as a permissible demarcation of a category of local funds, to be returned to the source jurisdiction outside the ordinary process of appropriations," and, therefore, the legislation could be given effect only through a lawful appropriation.

Without a doubt, the General Assembly possesses the authority, in some cases, to provide by statute that funds not enter the State Treasury. For example, it has long been accepted that the General Assembly may create by statute a fiscally autonomous entity whose funds may be held outside the Treasury, like the toll revenues held in trust for the benefit of the Maryland Transportation Authority's bondholders. *Wyatt v. State Roads Comm'n*, 175 Md. 258 (1938). And in *Kelly v. Marylanders for Sports Sanity*, 310 Md. 437, 460 n.11 (1987) the Court of Appeals said that "a State instrumentality like the [Stadium] Authority may be exempted by statute from depositing its receipts in the State Treasury." Relying in part on the *Marylanders for Sports Sanity* opinion, we concluded in 76 *Opinions of the Attorney General* 59 that the General Assembly could exempt from deposit into the Treasury gifts made to the Maryland Environmental Trust, a State agency.

Still, although the precise limit of the General Assembly's authority to divert funds from entering the Treasury is not clear, we have long advised that the General Assembly may not "authorize a system of State resource allocation completely outside of, and necessarily destructive of," the constitutional budget process. 75 *Opinions of the Attorney General* at 131. It is our view that the sales tax revenues collected by a qualified job training organization under House Bill 337 and Senate Bill 257 constitute "moneys of the State" that must be deposited into the Treasury, and the General Assembly cannot exempt those funds from deposit in the Treasury, and effectively allocate the funds outside of the budget process, by allowing a qualified job training organization to claim an enhanced

credit—what is effectively a grant—that is not tied to reimbursement for its expenses incurred for collecting the tax on behalf of the State.

Certainly the General Assembly has considerable discretion to determine a reasonable level of compensation for vendors who collect the sales and use tax on behalf of the State. The amount of the credit, in fact, has varied. For example, it was halved, from 0.9% to 0.45%, beginning July 1, 2002 (Ch. 440 Laws of Maryland 2002), and then increased back to 0.9% beginning January 3, 2008, but made subject to a maximum credit of $500 each month (Ch. 3 Laws of Maryland 2007, 1st Spec. Sess.). During the COVID-19 pandemic, the General Assembly authorized vendors, excluding marketplace sellers, to retain a credit of up to $3,000 a month for 3 consecutive months if the gross amount of the sales tax that is to be remitted to the Comptroller for that month does not exceed $6,000 (Ch. 39 Laws of Maryland 2021).

But House Bill 337 and Senate Bill 257 do not set the level of compensation for vendors generally. Rather, the bills apply only to a very narrow subset of vendors,[3] and they allow those vendors to retain the first $100,000 of annual State sales and use tax collections, which is well in excess of the maximum of $500 per month ($6,000 a year) that other vendors can claim as a credit for the expense of collecting and remitting the tax. In effect, the bills confer on each qualified job training organization the equivalent of an annual grant of up to $94,000, funded through State sales and use tax revenues, and allocated completely outside of the State budget process.

[3] According to the fiscal note on the bills, the Comptroller's Office is aware of one nonprofit organization that may be eligible for the new vendor credit. Even assuming only one entity currently would meet the definition of a qualified job training organization, that would not make the bills unconstitutional special laws under Article III, § 33 of the Maryland Constitution. The Court of Appeals has repeatedly held that a law that applies to a single person is not a special law if it will apply in the same manner to all who seek to engage in the same activity in the future. *See State v. Burning Tree Club*, 315 Md. 254, 275-76 (1989) ("laws affecting only a single entity have been upheld where they can apply, in principle, to other similarly situated entities"); *Reyes v. Prince George's County*, 281 Md. 279, 306 (1977) (where there was a single sports venue in the county at the time of enactment, a statute authorizing the county to sell bonds to acquire a sports stadium or arena was not a special law because any future sports arenas or stadia were eligible for county financing).

Although the matter is not entirely free from doubt, it is our view that a court, if called upon to review the question, likely would conclude that the bills are unconstitutional.[4]

Sincerely,

Brian E. Frosh
Attorney General

BEF/DWS/kd

cc: The Honorable John C. Wobensmith
Keiffer J. Mitchell, Jr.
Victoria L. Gruber

[4] In 75 *Opinions of the Attorney General* 124, we concluded that a bill directing the Comptroller to distribute specific sums of State income tax revenues to four counties was not itself unconstitutional but "must be construed as simply an authorization that cannot be given effect without an appropriation of the funds specified in the bill." However, because the sales tax revenues claimed as a credit under House Bill 337 and Senate Bill 257 are not to be remitted to the Comptroller or any other State official, the funds would not be deposited in the State Treasury, and a qualified job training organization claiming the credit would "receive" those State funds even in the absence of a lawful appropriation. For this reason, it is our view the bills cannot be construed as mere authorizations to expend State money subject to an appropriation.