



ALAN WILSON
ATTORNEY GENERAL

July 3, 2014

The Honorable Gregorie W. Nowell
Oconee County Treasurer
Post Office Box 429
Walhalla, South Carolina 29691

Dear Treasurer Nowell:

Attorney General Alan Wilson has referred your letter of October 7, 2013 to the Opinions section for a response. The following is this Office's understanding of your question and our opinion based on that understanding.

Issue: Concerning whether or not Oconee County may continue to utilize late tax penalties collected by the county on ad valorem taxes, you stated in your letter:

1. *Oconee County has the power to levy taxes.*
2. *School District of Oconee cannot levy taxes as they do not have fiscal autonomy. They must submit a budget to Oconee County Council for approval.*
3. *Oconee County approves the School District budget and levies to meet the taxes necessary to provide for that annual budget.*
4. *Penalties collected on those taxes are never considered in the budget of the School District. Therefore the taxpayers of Oconee County do not benefit from those penalties collected.*
5. *Oconee County began using the penalties as a revenue source in their budgetary process allowing benefit of penalties to the citizens of the County.*
6. *The Auditor of Oconee County does not use the penalty amounts collected in computations to determine millage set to meet the School District budget.*
7. *The County does give all penalties paid thru the tax sales by the Delinquent Tax Collector as stated in Oconee County Ordinance 1986-04, Sec. 30-53(b) [to the school district].*

It is this Office's understanding Oconee County has appropriated late penalties for all ad valorem real property taxes and uses them for the budget for the entire county. The Oconee County School District wishes to now collect a proportional share on all late penalties on ad valorem real property taxes in addition to the funds that are already appropriated to the school district and in addition to the penalties from tax sales the District already collects pursuant to Oconee County ordinance. We understand you are asking is if the county is correct in its current policy of retaining all of the late penalties on ad valorem real property taxes to be used for the general funds of the county.

Short Answer: South Carolina law clearly conditions money being drawn from the treasury of any such political subdivision only pursuant to appropriations by law. S.C. Const. Art. X, § 8; S.C. Code § 11-9-10.

When a county has appropriated money from late penalties on ad valorem taxes, a tax collector, as a ministerial officer, must distribute funds according to their appropriation. Burger ads. State, 1 McMul. 410, 1841 WL 2267 (1841); Op. S.C. Atty. Gen., 1993 WL 720117 (May 4, 1993). Thus, a county treasurer, who is also a ministerial officer, must distribute funds pursuant to their appropriation unless in direct violation of law. O'Shields v. Caldwell, 207 S.C. 194, 35 S.E.2d 184 (1945); S.C. Code § 12-45-70.

Law/Analysis:

South Carolina's Constitution directly addresses appropriations by county treasuries when it states:

Money shall be drawn from the treasure of the State or the treasury of any of its political subdivisions only in pursuance of appropriations made by law.

S.C. Const. Article X, § 8. First and foremost, it is well established that counties in South Carolina are political subdivisions of the State. Wheeler v. County of Newberry, 18 S.C. 132, 1882 WL 5648 (1882); St. v. Maryland, 189 S.C. 405, 1 S.E.2d 516 (1939); Op. S.C. Atty. Gen., 1990 WL 599363 (December 11, 1990) (citing Parker v. Bates, 216 S.C. 52, 56 S.E. 2d 723 (1950)); et al. Therefore, that section of the State Constitution would limit draws from a county treasury for appropriated funds only. This Office has previously opined:

Thus, if a public official were to expend funds that were not appropriated, such action would be in violation of the South Carolina Constitution.

Op. S.C. Atty. Gen., 2007 WL 419432 (January 8, 2007). The next issue in your question is are the penalties on ad valorem real property taxes appropriated. Based on discussions with you, it is this Office's understanding that Oconee County has appropriated the late penalties on ad valorem real property taxes in its budget. Therefore, based on South Carolina Constitution Article X, § 8, the treasurer would be obligated to issue the money based on its appropriation. See also S.C. Code § 11-9-10 (money may only be spent as specifically appropriated).¹

Nevertheless, there are numerous other authorities and resources we would be remiss if we did not acknowledge at least a portion of them a court may consider, including additional authority for who has the right to appropriate late penalties. This Office previously opined on a similar question in 2003 where we were asked and J. Emory Smith from this Office answered:

*3. Is the [Sumter County School] District entitled to a proportional share of penalties on delinquent [real property] taxes and interest earnings thereon?
I have located no prior opinions on the above issue, and your proposed opinion identifies no authority in South Carolina which is specific to this question other than general authority regarding interest. Because the answer to this question could affect a number of other counties and school districts, we believe that this question is best resolved by a declaratory judgment action or legislative clarification.*

¹ Please note this Office believes a court will find all funds must be distributed as appropriated. Id.; see also Ops. S.C. Atty. Gen., December 2, 2005 (2005 WL 3352845); 1997 WL 811895 (November 10, 1997); 1991 WL 474751 (April 1, 1991); 1983 WL 181799 (March 16, 1983); 1970 WL 17104 (September 1, 1970).

Op. S.C. Atty. Gen., 2003 WL 21043489 (April 8, 2003) (emphasis added). **We affirm that answer in that the issues you are asking this Office to address would best be resolved with a declaratory judgment action or legislative clarification.**

The South Carolina Constitution grants the General Assembly authority to “vest the power of assessing and collecting taxes in all of the political subdivisions of the State, including special purpose districts, public service districts, and school districts. ...” S.C. Const. Art. X, § 6. For purposes of this opinion this Office will presume that the authority to vest power to “assess and collect” implies the authority to vest the power to issue late penalties or else such authority is given elsewhere, though we make no such assertion by our assumption. See also Op. S.C. Atty. Gen., 1983 WL 181949 (July 26, 1983) (no separate power to impose a late penalty has been delegated to counties). As the South Carolina Supreme Court stated in Watson v. City of Orangeburg, 229 S.C. 367, 375, 93 S.E.2d 20, 24 (1956), “[t]he power of taxation being an attribute of sovereignty vested in the legislature subject to constitutional restrictions, taxes can be assessed and collected only under statutory authority.” It is well established the South Carolina General Assembly has chosen to grant counties the authority to assess and levy taxes pursuant to South Carolina Code § 4-9-30, which states:

...
(5)(a) to assess property and levy ad valorem property taxes and uniform service charges, including the power to tax different areas at different rates related to the nature and level of governmental services provided and make appropriations for functions and operations of the county,

S.C. Code § 4-9-30 (5)(a) (1976 Code, as amended). Counties are required to charge a late penalty set by statute on all taxes and assessments against any property. S.C. Code § 12-45-180.² The statute reads:

(A) When the taxes and assessments or any portion of the taxes and assessments charged against any property or person on the duplicate for the current fiscal year are not paid before the sixteenth day of January or thirty days after the mailing of tax notices, whichever occurs later, the county auditor shall add a penalty of three percent on the county duplicate and the county treasurer shall collect the penalty. ...

Id. (emphasis added). The General Assembly has also chosen to give municipalities the authority to assess and levy ad valorem property taxes with the option of providing for a delinquent penalty. S.C. Code § 5-7-300 (“...municipal governing body may provide for a penalty not exceeding fifteen percent of the taxes levied for nonpayment of these taxes payable when the taxes become delinquent.”) (emphasis added). Since a municipality may contract with a county for the county to collect the municipality’s taxes pursuant to South Carolina Code § 12-51-170, it would follow a municipality would not need separate authorization to impose a late penalty if the county were not already collecting one on behalf of the municipality and presumptively any other political subdivisions for which the county was already

² Please note neither a county governing body nor a political subdivision is authorized to waive or lower a penalty. Op. S.C. Atty. Gen., 1990 WL 482394 (January 15, 1990). County auditors, treasurers and assessors may correct mistakes in penalties. SC Code §§ 12-47-70, 80, 90; 12-39-250. Waiving a late penalty is solely within the discretion of the county treasurer. S.C. Code § 12-45-185. Nonetheless, in addition to other powers, the S.C. Department of Revenue may extend the time for collection of county taxes and postpone the time for imposition of tax penalties. S.C. Code § 12-4-520, et al.

collecting a tax. See Graham v. State, 109 S.C. 301, 96 S.E. 138 (1918) (we presume the Legislature knew the law when writing it and did not intend to do a futile thing). Furthermore, it is this Office's understanding the General Assembly has passed multiple statutes regarding the levy of school taxes but has not separately authorized late penalties for school taxes. See, e.g., S.C. Code § 59-73-60 (if the electorate votes for such a levy, the auditor shall add it to the tax duplicates and the county treasurer is authorized to collect the additional county taxes for school purposes the same as State and county taxes); § 59-73-10 (electorate must vote to approve any additional tax in any county for school purposes); § 59-73-70 (a levy by the county is a lien on the property subject to default); § 4-9-70 (unless otherwise provided by law, county council sets the school tax millage).³ Without separate authorization for a school district (or board) to charge a late penalty as a municipality has been given through South Carolina Code § 5-7-300 would imply the county must collect a late penalties on the tax bill through authorization given to a county treasurer pursuant to South Carolina Code § 12-45-180.⁴ Moreover, the South Carolina Constitution further outlines that school districts must prepare an annual budget, and if funds are insufficient, the governing body is to levy an additional tax the next year. S.C. Const. Art. X, Section 7(b). While the authorization for imposing a delinquent penalty has been given both to municipalities and to counties, we have not been provided with authority for a school's separate authorization for penalties.

Let us further examine taxation in this State. South Carolina Code § 12-43-210 requires uniform assessment throughout the State. See also S.C. Const. Art. VIII, Section 14 and Article X, Section 1 (regarding uniform assessment and taxation). South Carolina Code § 12-43-350 requires political subdivisions to list on a tax bill for real property the tax due with "penalties and applicable dates." Moreover, in 2004 this Office answered a question of whether a county council could send two tax bills (one for county operations and one for school operations) instead of one. In that opinion this Office opined the literal language said "a" tax bill so this Office concluded the legislature intended one bill. Op. S.C. Atty. Gen., 2004 WL 2247472 (September 16, 2004). Furthermore, according to our State Constitution, "[t]axes on real property must be ascertained by the methods provided by the General Assembly by general law as prescribed in Article X of this Constitution." S.C. Const. Art. III § 29.

Thus, let us address some of the other statutes concerning school budgets.⁵ South Carolina Code Section 59-69-250 states:

³ One county administrator stated that forty-six of South Carolina's school districts report to a "higher body (legislative delegation, county council, or county board) to get their budgets approved, or to raise the millage beyond a certain point," whereas twenty-three school districts maintain their ability to set their own budgets. Burriss v. Anderson County Bd. Of Educ., 369 S.C. 443, 446, 633 S.E.2d 482, 484 (2006); see also S.C. Code § 4-9-70.

⁴ See also Op. S.C. Atty. Gen., 1994 WL 249788 (June 19, 1984) (opining that levying bills do not expressly provide for the means of raising local revenue and cited a prior opinion [Ops. Atty. Gen. (August 8, 1980)] which concluded that the Education Finance Act (S.C. Code § 59-20-10, et seq.) grants no powers of taxation even though it requires increases in funding and concluded that using the same reasons cited in the 1980 opinion, the proposed bills contained no implied grant of taxation authority but only contained penalty provisions for failure to raise local revenue, and, as such, could not be deemed to contain self-executing provisions for increases in local tax millage.).

⁵ Please note there are numerous other statutes, regulations and authority concerning county and school taxes, which this opinion takes notice of but is not able to individually address each one. See, e.g., S.C. Code § 59-71-340, § 6-1-320, § 59-73-20, § 59-69-215, Ops. S.C. Atty. Gen., 2012 WL 1154974 (March 30, 2012), 1980 S.C. 81968 (August 5, 1980), Home Builders Ass'n of S.C. v. School Dist. No. 2 of Dorchester Co., 405 S.C. 458, 748 S.E.2d 230 (2013), et al.

The county treasurer shall carry forward all sums in his hands collected for any previous year or years for school purposes and unexpended to the next fiscal year and credit the same to the school districts respectively, for which they were apportioned. He shall report such sums to the county superintendent of education.

S.C. Code § 59-69-250. South Carolina Code Section 59-73-60 authorizes the county auditor to issue tax duplicates with the amount of the levy voted by the taxpayers as provided to the auditor by the school board of trustees. The levy then becomes a lien on the property. S.C. Code § 59-73-70. South Carolina Code Section 59-73-80, which states:

The tax so collected shall be paid out by the county treasurer upon warrants drawn by the board of trustees, countersigned by the county superintendent of education. But any surplus of such levy remaining in the hands of the county treasurer at the expiration of any fiscal year shall be paid out as other school funds of the district.

59-73-80 (1976 Code, as amended) (emphasis added).⁶ Based on a plain reading of the statute, the surplus directly correlates to the levy. Neither the statutes nor the opinion make mention of penalties on taxes issued by the county on all ad valorem taxes. The rule of statutory construction known as “expressio unius est exclusio alterius” or “inclusio unius est exclusio alterius” meaning “to express or include one thing implies the exclusion of another, or of the alternative” applies here. Ops. S.C. Atty. Gen., 2013 WL 5763370 (October 10, 2013); 2005 WL 1024601 (April 29, 2005) (citing Hodges v. Rainey, 341 S.C. at 86, 533 S.E.2d at 582 (2000)). Additionally, in another such opinion, this Office concluded that “[t]axes collected for specific public purposes cannot be diverted to fund unbudgeted expenses unless the purpose for which the tax was levied is first satisfied.” Op. S.C. Atty. Gen., 1991 WL 474751 (April 1, 1991). See also Op. S.C. Atty. Gen., 1978 WL 34835 (April 5, 1978) (regarding that the treasurer has the authority to receive, keep and disburse county funds, may only disburse funds as need arises pursuant to S.C. Code 12-59-220, must carry forward unexpended funds pursuant to § 59-69-250, may invest funds pursuant to § 12-45-220, et al.). However, your question raises the issue of whether the late penalties themselves, not the taxes, belong to the county or the particular school district.⁷

The broader question becomes is a penalty and the interest thereon a part of the tax. See, e.g., Op. V.A. Atty. Gen., 1991 WL 531021 (April 25, 1991) (quoting Irving Indep. School Dist. v. Packard Properties, 741 F.Supp. 120, 124 (N.D. Tex. 1990) which found the Texas statute did not provide that the late penalties did not become part of the tax and concluding that the late penalty is still a penalty). As a 1905 Harvard Law Review stated concerning the imposition of penalties by a tax assessor:

An Illinois statute required riparian landowners to remove all obstructions to the flow of water, and provided that the tax assessor should note any failure to do so, whereupon a drainage tax of ten dollars should be levied The primary object of taxation is raising revenue, while the present statute was meant rather to keep the

⁶ But see S.C. Code § 12-43-285 which requires refunds or the transfer of funds for taxes levied over a political subdivision’s millage rate limit; see also Op. S.C. Atty. Gen., 1978 WL 34961 (June 27, 1978).

⁷ Please note in S.C. Code § 12-60-30 the definition of “tax” includes “regulatory and other penalties” but is limited to use in Chapters 54 and 60 of Title 12. See also S.C. Code § 12-43-220(c)(2)(vii) which includes the penalty and interest as ad valorem taxes due “for purposes of collection and enforcement” pursuant to a primary residence certification.

streams clear by punishing failure to remove obstructions. The imposition of punishment, however, is for the judicial department, and tax assessors are not, properly speaking, judicial officers. *Cf. State v. Thorne*, 112 Wis. 81. The present case therefore seems sound the constitution is not to be defeated by calling a penalty a tax. Attempts to do so are rare but where a statute imposed a tax of ten thousand dollars on any lottery operating without permission, the court expressed the opinion that it was not really a tax and therefore was unconstitutional. *State v. Allen*, 2 McCord (S. C.) 55. The imposition by assessors of penalties for default in making return of taxable property or in paying taxes seems also logically a judicial function, but is upheld "on the ground of state necessity and immemorial usage." *Ex parte Lynch*, 16 S. C. 32; and see *Doll v. Evans*, 11 Am. Law Reg. (n. s.) 315. Due process of law was also wanting in the principal case, as the assessor's decision, though given without a hearing, was final. *Monticello Distilling Co. v. Baltimore*, 90 Md. 416.

18 Harv. L. Rev. 540 (1905) (emphasis added). The county has no authority to sentence or otherwise impose a criminal sentence on a person, but simply charges a monetary penalty based on whether or not the property taxes were paid on time. See, e.g., *Doll v. Evans*, 4 Leg.Gaz. 113, 7 F.Cas. 855 (1872). Moreover, the South Carolina Supreme Court has stated:

It is urged, however, that the fifty per cent. is not really a tax regulation, but in the nature of a *penalty* for default, and, therefore, cannot be imposed by the mere act of the auditor, without judicial proceeding and verdict of a jury. It is called "a penalty" in the act itself, but its nature is not necessarily changed by the name given. The provision lacks some of the characteristics of a penalty. It differs very materially from the law of 1820, which was construed in the case of the *State v. Allen, supra*, to be a penalty, pure and simple. That act imposed a punishment of \$10,000 upon any person who should sell lottery tickets in the State, and, as substantially declared, for the purpose of suppressing vice; while the provision under consideration imposes no round sum of money upon the person, but only relates to the assessment of property and in strict regard to its value. The object manifestly was not so much to punish as to prevent defaults in making returns, and in that way to facilitate the collection of taxes. Such provisions have appeared in the tax acts of this State for a long series of years, and we are not aware that the courts have ever enjoined their enforcement. In the case of the *State v. Hodges*, 14 Rich. 277, Judge Wardlaw, after reviewing all the acts upon the subject, in his learned note, says: "A summary execution against defaulters has prevailed from the earliest period. At first (1701) it was issued by a justice of the peace (2 Stat. 182), afterwards by the chief justice (1716-1723). In 1734 (3 Stat. 388), and ever since, by *the enquirers and collectors*. In these cases, and in others, where double tax executions are spoken of, it seems plain that the legislature has considered it competent for a tax collector to adapt his execution to the exigencies of the case," &c.

Ex parte Lynch, 16 S.C. 32, 38, 1881 WL 5943 (1881) (emphasis added). It appears in South Carolina's legal history the "tax collectors and inquirers" were to collect late penalties on taxes and those late penalties would be presented to the publick treasurer "by virtue of any warrant or warrants, under the hand and seal of the publick treasurer, in manner as aforesaid." 3 Stat. 390 (S.C. 1734). The current tax

was to “be appropriated, applied and paid by the publick treasurer according to the schedule or estimate ... annexed, and not otherwise.” 3 Stat. 390 (S.C. 1734). It seems historically the South Carolina Supreme Court has recognized that late penalties were to be paid as part of the expense for and pursuant to authority to collect. Moreover, regarding the history of penalties and citing Ex parte Lynch, a Connecticut case stated:

In the municipal law of England and America, the words ‘penal’ and ‘penalty’ have been used in various senses. Strictly and primarily, they denote punishment, whether corporal or pecuniary, imposed and enforced by the state, for a crime or offense against its laws. The test whether a law is penal, in the strict and primary sense, is whether the wrong sought to be redressed is a wrong to the public, or a wrong to the individual.” Huntington v. Attrill, 146 U. S. 657, 666, 13 Sup. Ct. 224, 227 (36 L. Ed. 1123). “The words ‘penal’ and ‘penalty,’ in their strict and primary sense, denote a punishment, whether corporal or pecuniary, imposed and enforced by the state for a crime or offense against its laws.” Plumb v. Griffin, 74 Conn. 132, 134, 50 Atl. 1, 2. The wrong sought to be enforced by this tax is a wrong which has been done the public treasury. The necessities of government give the state the right to tax property for such purposes and in such amounts as it may determine subject only to such restrictions as may be imposed by the Constitution, and with the power to tax must go the power to enforce collection of the tax by all summary means not contrary to the Constitution, and one of those means is the right to impose penalties in order to compel payment and as a punishment for evasion or neglect of this duty owed the public. Cooley on Taxation (3d Ed.) vol. 1, p. 899; Myers v. Park, 8 Heisk. (Tenn.) 564; Western Union Tel. Co. v. Indiana, 165 U. S. 304, 17 Sup. Ct. 345, 41 L. Ed. 725; Ex parte Lynch, 16 S. C. 32; 37 Cyc. 1542. The amount of the penalty is within the legislative discretion. These have been sustained up to 50 per cent. in Western Union Tel. Co. v. Indiana, *supra*; Ex parte Lynch, 16 S. C. 32; Scott v. Watkins, 22 Ark. 565; Lacey v. Davis, 4 Mich. 140, 157, 66 Am. Dec. 524; Cooley on Taxation (3d Ed.) p. 899, and cases cited in notes.

Bankers Trust Co. v. State, 96 Conn. 361, 114 A. 104, 106-107 (1921).

This Office further discussed some of these issues in a 2012 opinion where we concluded that a county treasurer collecting late taxes and penalties pursuant to S.C. Code 12-45-180 could not impose additional fees as collection costs and had to give the late penalties to the general funds of the county pursuant to ordinance. Quoting from that opinion:

The General Assembly has conferred upon counties the power to levy taxes pursuant to § 4-9-30. This power, however, must be exercised “subject to the general law of this State” Id. As we explained in a previous opinion, “[n]o separate power to impose a penalty has been delegated [under § 4-9-30, and] the power to levy the tax is subject to the general laws of the State.” Op. S.C. Att’y Gen., 1983 WL 181949 (July 26, 1983). We further advised that when the General Assembly has prescribed the penalties and costs that can be imposed, those penalties and costs are exclusive and no additional charges can be levied and collected. Id.

In consideration of the above authorities, it is clear that the penalties and costs provided in § 12-45-180(A) and § 12-51-40 are exclusive. As such, no additional penalties or charges can be imposed and collected. It is significant to note that these two statutory sections only allow costs to be recovered by the officer authorized and directed to collect delinquent taxes and penalties - in this case, the Treasurer or his designee - after taxes and penalties have not been paid by the March 17th deadline and a tax execution has been issued against the defaulting taxpayer. As we explained in a prior opinion, the expenses a tax collector may collect as costs in carrying out a tax execution against a defaulting taxpayer pursuant to § 12-51-40 are limited to those necessary to effectuate the levy, seizure, and sale of the property. Op. S.C. Att'y Gen., 1993 WL 720117 (May 4, 1993). Accordingly, we believe a court would likely conclude that any fees imposed by a county treasurer in addition to the penalties and costs expressly permitted in § 12-45-180(A) or § 12-51-40, as the case may be, are invalid as being not authorized by statute.

*Furthermore, in the opinion previously cited we also stated that a tax collector, when incurring expenses which may be collected as costs pursuant to § 12-51-40, "is not free to add expenses based on arbitrary amounts for costs. Rather, the individual must be able to substantiate the expenses which are being added as costs." *Id.* Therefore, we believe a court would find any flat-rate fee or other arbitrary fee imposed to cover costs that is not based on the necessary and actual costs incurred in effectuating the levy, seizure, and sale of property is likewise invalid as not being authorized by statute.*

As to the issue of whether a county treasurer may retain penalties collected to offset collection costs, we can find no authority to support such a practice. Act 987, § 2 clearly states that penalties charged for the collection of delinquent taxes "shall accrue to the General Fund of Beaufort County." To the extent the proceeds of a tax sale received by the Treasurer are owed in part to municipalities or other political subdivisions, § 12-51-80 states that "[t]he treasurer shall make full settlement of tax sale monies ... to the respective political subdivisions for which the taxes were levied..." See also S.C. Revenue Ruling No. 95-18, 1995 WL 17826315 (Dec. 21, 1995) (stating that pursuant to § 12-51-80 "[t]he treasurer will then distribute the funds [from the tax sale] to the entities who are owed the taxes, penalties, and interest"). Therefore, this Office is of the opinion that penalties collected by the Treasurer may not be used to offset collection costs.

...

A county treasurer collecting delinquent taxes and penalties pursuant to § 12-45-180(A), or effectuating the levy, seizure, and sale of property to satisfy delinquent taxes, assessments, and costs pursuant to § 12-51-40, may not impose any fees in addition to the penalties and costs prescribed in those sections to offset collection costs. Furthermore, these two sections only allow costs to be recovered by the officer authorized to collect delinquent taxes and penalties - in this case, the Treasurer or his designee - after taxes and penalties have not been paid by the March 17th deadline and a tax execution has been issued against the defaulting taxpayer. Pursuant to § 12-51-40, the costs that may be collected are limited to those necessary to effectuate the

duties of the levy, seizure, and sale of the defaulting taxpayer's property; no flat-rate fee or any other fee of an arbitrary amount for costs may be imposed or added. Therefore, we believe a court would conclude that any fees imposed by a county treasurer in addition to the penalties and costs expressly permitted in § 12-45-180(A) or § 12-51-40, as the case may be, are invalid on the basis they are not authorized by statute.

We are also of the opinion that a county treasurer may not use penalties collected pursuant to either of these sections to offset collection costs. Act 987 clearly states that penalties charged for the collection of delinquent taxes accrue to [Beaufort] County's general fund. Furthermore, in the event of a tax sale the Treasurer is required under § 12-51-80 to distribute the proceeds of the sale to the entities that are owed the taxes, penalties, and interest. Therefore, the Treasurer is not entitled to retain penalties collected on behalf of the County, municipalities, or other entities.

Op. S.C. Atty. Gen., 2012 WL 5883797 (November 9, 2012). This Office has also previously opined on related issues concerning tax collection and appropriations. One such opinion was in 2003 concerning surplus funds from taxes collected and appropriated for school districts within a county. In that opinion, this Office concluded that:

[A] county council is not authorized to retain any unappropriated surplus school district funds collected from tax levies designated by the General Assembly to fund schools within such county. We further advise that the County Treasurer is required by Section 59-69-250 of the Code to carry forward such funds, in their entirety, to the credit of the school district budget(s) for the following year. In other words, school funds must be used for school purposes.

Op. S.C. Atty. Gen., 2003 WL 21471504 (June 3, 2003). This Office has also consistently opined that school funds are only to be "expended as needed and are not to constitute a source of investment revenue for the schools." Op. S.C. Atty. Gen., 1979 WL 43548 (August 29, 1979) (citing Op. S.C. Atty. Gen., 1972 WL 21451 (October 10, 1972); see also Op. S.C. Atty. Gen., 1978 WL 34835 (April 5, 1978). Would taking an unallocated percentage of the late penalties paid to a county for delinquent property taxes be considered investment revenue or taking unallocated funds? That is likely an issue the courts or the legislature will have to determine.

Furthermore, this Office would be remiss not to point out some relevant South Carolina legal authority, which would include:

[4-9-25:] All counties of the State, in addition to the powers conferred to their specific form of government, have authority to enact regulations, resolutions, and ordinances, not inconsistent with the Constitution and general law of this State, including the exercise of these powers in relation to health and order in counties or respecting any subject as appears to them necessary and proper for the security, general welfare, and convenience of counties or for preserving health, peace, order, and good government in them. The powers of a county must be liberally construed in favor of the county and the specific mention of particular powers may not be construed as limiting in any manner the general powers of counties.

[4-9-140:] The fiscal year of the county government shall begin on the first day of July of each year and shall end on the thirtieth day of June next following, and the fiscal year shall constitute the budget year of the county government. All county offices, departments, boards, commissions or institutions receiving county funds shall make a full, detailed annual fiscal report to the county council at the end of the fiscal year.

County council shall adopt annually and prior to the beginning of the fiscal year operating and capital budgets for the operation of county government and shall in such budgets identify the sources of anticipated revenue including taxes necessary to meet the financial requirements of the budgets adopted. Council shall further provide for the levy and collection of taxes necessary to meet all budget requirements except as provided for by other revenue sources.

Council may make supplemental appropriations which shall specify the source of funds for such appropriations. The procedure for approval of supplemental appropriations shall be the same as that prescribed for enactment of ordinances.

For the purposes of this section a supplemental appropriation shall be defined as an appropriation of additional funds which have come available during the fiscal year and which have not been previously obligated by the current operating or capital budget. The provisions of this section shall not be construed to prohibit the transfer of funds appropriated in the annual budget for purposes other than as specified in such annual budget when such transfers are approved by the council. ...

S.C. Code § 4-9-25 and § 4-9-140 (1976 Code, as amended) (emphasis added).

Nevertheless, let us address some of the opinions and issues regarding tax sales. South Carolina Code § 12-51-130 outlines before any overages from tax sales escheat, the funds must be invested in a separate account to earn interest. The interest (on presumptively the tax levy itself) belongs to the governing body of the political subdivision. Once any overage escheats, it belongs to the general funds of the governing body. S.C. Code § 12-51-130 (1976 Code, as amended). We also find it noteworthy in regards to tax sales South Carolina Code § 12-51-80 requires a treasurer to:

...make full settlement of tax monies, within thirty days after the [tax] sale, to the respective political subdivisions for which the taxes were levied. Proceeds of the sales in excess thereof must be retained by the treasurer as otherwise provided by law.

S.C. Code § 12-51-80 (emphasis added). This statute implies that if the taxes are what are appropriated to the various entities, then any excess funds not otherwise designated by law would escheat to the county pursuant to South Carolina Code § 12-51-130. But see Ops. S.C. Atty. Gen., 1987 WL 245450 (April 29, 1987) (regarding the distribution of proceeds from a tax sale this Office opined that the school district taxes were separate from county taxes and that the county treasurer must disperse the proceeds of the tax sale including penalties and interest generated from the sale to the political subdivisions for which the taxes were levied).

We would be remiss if we did not note how some other states have previously handled this question of who is entitled to the late penalties on real property taxes. Corpus Juris Secundum states:

Penalties, interest, and costs collected on delinquent taxes follow the tax and go to the state, county, city, or district which is entitled to the tax itself in the absence of a statute providing otherwise.

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Where two or more political subdivisions or districts are interested in the particular delinquent tax, interest and penalties should generally be apportioned among them in the ratio of their respective shares of the tax. ...However, the legislature may change these rules and otherwise dispose of interest or penalties, ...such as where it makes special provision for the purpose of compensating a county or municipality for the expense to which it is put in collecting delinquent taxes for distribution among the various subdivisions or districts interested therein. ...In this regard, it should be noted that a statute providing for the distribution of interest and penalties collected in a manner different from the disposition of the taxes on which the interest and penalties are based does not amount to the application of taxes to objects other than for which they were imposed. ...

85 C.J.S. Taxation § 1791 (2013). Please note this Office is not aware of a statute requiring the late penalty imposed pursuant to South Carolina Code § 12-45-180 to go to the political subdivisions for which the tax was levied instead of the county except for municipalities pursuant to S.C. Code § 5-7-300.

⁸ Therefore, this Office believes a court is likely to conclude that since the county auditor is not only authorized but required by statute to add a late penalty on its tax bill, and the treasurer is required by statute to collect the late penalty, it would follow in absence of a statute to the contrary, the county is entitled to the late fee for its general funds.⁹ S.C. Code § 12-45-180.

Conclusion: Pursuant to the South Carolina Constitution and State law, a county treasurer is obligated to issue money collected based on its appropriation. However, in regards to what happens to the penalties a county collects for delinquent tax bills pursuant to South Carolina Code § 12-45-180, this Office believes a court will likely find the county is entitled to the late fees for its general fund unless specifically authorized otherwise by statute.¹⁰ Nevertheless, each county is organized differently and has various

⁸ Please note this Office is presuming, for purposes of this question, that interest on any penalty would also be included with the penalty. See, e.g., Op. V.A. Atty. Gen., 1991 WL 531021 (April 25, 1991) (citing Irving Indep. School Dist. v. Packard Properties, 741 F.Supp. 120, 124 (N.D.Tex.1990)). Per our discussion, this Office also understands your question concerns late penalties on the percentage of the taxes payable to the school districts, as a county treasurer collects various county, school and other taxes on a standard property tax bill. S.C. § 12-43-350.

⁹ See, e.g., N.C. Const. Article IX, Section 7 where “clear proceeds of penalties... for any breach of the penal laws of the State... shall be... appropriated and used exclusively for... public schools.” N.C. School Boards Assoc. v. Moore, 359 N.C. 474, 480, 614 S.E.2d 504, 507 (2005); S.C. Code §§ 58-17-3100, 58-17-3430, et al.

¹⁰ While some counties have ordinances concerning late penalties and fees, this Office believes a court will find specific statutory authority is needed for late penalties to go elsewhere other than the county pursuant to S.C. Code § 12-45-180. See, e.g., Op. S.C. Atty. Gen., 1979 WL 29090 (June 29, 1979) (opining that a county cannot provide for a late penalty for taxes contrary to general law, as such as government function requires statewide uniformity pursuant to S.C. Const. Art. VIII, Section 14). However, in addition to county ordinances, some counties have local laws specific to their county concerning late penalties and fees. See, e.g., 1943 S.C. Act No. 149 (p.221) (Section 2-

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ordinances and statutory authority, and such a determination may vary on a county-by-county basis.¹¹ As stated above, J. Emory Smith from this Office was asked to address this question in 2003 and concluded rather than the school districts retaining a proportion of the late penalties a county collects that legislative clarification or a declaratory judgment would best resolve this question. This Office again recommends you seek a declaratory judgment from a court, as only a court of law may interpret the law. S.C. Code § 15-53-20, et al. Until a court or the Legislature specifically addresses the issues presented in your letter, this is only an opinion on how this Office believes a court would interpret the law in the matter. If it is later determined otherwise or if you have any additional questions or issues, please let us know.

Sincerely,



Anita Smith Fair
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Solicitor General

all fees go to the general fund of Oconee county); 1978 S.C. Act No. 805 (p.2486) (“Section 1. Notwithstanding any other provisions of law, all powers and dues relating to tax levies for school purposes are devolved upon the governing body of Oconee County.”); 1992 S.C. Act No. 613 §§ 10, 12 (p.3662) (“All funds in the hands of the county treasurer, arising from tax levies on the property, as well as such sums as he may hereafter receive from any such levy, must be placed by him to the credit of the school district of Oconee County; all school funds of the county must be deposited in the office of the treasurer of Oconee County to the credit of the district, and withdrawn only upon warrants issued by the board of trustees.”); et al.; Op. S.C. Atty. Gen., 2012 WL 5883797 (November 9, 2012) (Beaufort county law [Act No. 987 of 1962] stating that late penalties go to the general fund of the county). However, special legislation would fall under Home Rule. The Home Rule Act (§ 4-9-10 et seq.) “while preventing the General Assembly from enacting ‘special legislation’ and voiding any ‘special legislation’ which contradicts the general law, does not operate retroactively to abolish all ‘special legislation’ which was in effect in South Carolina prior to the enactment of the Home Rule Act.” Graham v. Creel, 289 S.C. 165, 345 S.E.2d 717 (1986); see also S.C. Const. Art. VIII § 7 (“... [n]o laws for a specific county shall be enacted and no county shall be exempted from the general laws or laws applicable to the selected alternative form of government.”); Charleston Co. School Dist. v. Charleston Co., 297 S.C. 300, 376 S.E.2d 778 (1989) (legislation on public education for a specific county does not violate the Home Rule Act, as public education is controlled by the State). Furthermore, as you noted in your question, in regards to tax sales pursuant to Oconee County Ordinance 1986-04, Section 30-53(b), Oconee County currently relinquishes all penalties paid on ad valorem taxes on real property sold pursuant to tax sales to the school districts. Please also see regarding tax sales Ops. S.C. Atty. Gen., 1992 WL 575654 (September 2, 1992); 1995 WL 803366 (April 12, 1995); 2002 WL 31958835 (December 5, 2002). However, if a court determines it will make a determination based on local law for Oconee County, based on the local laws a court may likely determine the late penalties go to the county’s general funds without specific law stating otherwise, as Oconee County has a specific ordinance stating all late penalties from tax sales go to the school districts.

¹¹ Ultimately, this issue is one for a court to interpret for your county or for the Legislature to clarify and is one that currently does not have statewide uniformity in regards to distribution of penalties pursuant to S.C. Const. Art. VIII, Section 14 and Article X, Section 1.