



STATE OF ARKANSAS
**Department of Finance
and Administration**

REVENUE LEGAL COUNSEL

Post Office Box 1272, Room 2380
Little Rock, Arkansas 72203-1272
Phone: (501) 682-7030
Fax: (501) 682-7599
<http://www.arkansas.gov/dfa>

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[REDACTED]

Re: Tax Set Off Program—County Delegation to Private Contractor
Opinion 20160410

Dear [REDACTED]:

This letter is in response to your request for a Revenue Legal Counsel Opinion dated April 1, 2016. Your request specifically relates to the planned efforts by your organization, [REDACTED] (“[REDACTED]”), of assisting various [REDACTED] in the collection of delinquent fines, fees, costs, and restitution assessed in the circuit courts of the various respective counties. [REDACTED] efforts in this regard would be after the passage of authorizing ordinances by the applicable county quorum courts and the entry into binding contracts signed by the applicable county judges. [REDACTED] currently plans to begin this process with [REDACTED] County.

In fulfilling these anticipated future delegated delinquent fine collection responsibilities, [REDACTED] also anticipates the possibility of utilizing the Arkansas statutory provisions regarding setoff against a debtor’s state income tax refund law, which is discussed more fully and specifically below. Prior to doing so, [REDACTED] has requested a legal determination as to whether utilization of such setoff against state income tax laws, and [REDACTED] anticipated actions based thereon, would be legally permissible.

From our communications, it is my understanding that [REDACTED] is not a state governmental agency. Instead, [REDACTED] is a “stand alone” entity classified by the Internal Revenue Service (“IRS”) as a Section 115 (26 U.S.C. § 115) entity. In response to my request for additional information, [REDACTED] provided me with a copy of an IRS letter dated March 22, 1995. Among other things, that letter held that [REDACTED] income was excludable from gross income under section 115 of the Internal Revenue Code. In reaching that determination and relevant for the purposes hereof, the IRS noted that this federal statutory provision only applies to organizations that are separate entities, that is, it only applies to organizations that are not a part of the state government or a political subdivision of a state. Reviewing the facts and law, the IRS concluded that [REDACTED] is not directly under the control of any state agency or any political subdivision thereof, but was instead formed as a separate entity with its own board of directors. Further, [REDACTED] is funded in small part by dues paid by the counties, but the vast majority of [REDACTED] funding is from fees paid in relation to the [REDACTED] [REDACTED] and the [REDACTED] [REDACTED], which is a self-insurance pool for [REDACTED] member counties.

Concerning the responsibility for the collection of fines and delinquent fines assessed by the circuit courts of this State, the Arkansas Code specifically provides as follows, in relevant part:

(a)(1)(A)(i) The quorum court of each county of the state shall designate a county official, agency, or department which shall be primarily responsible for the collection of fines assessed in the circuit courts of this state.

(ii) All fines collected each month in circuit court by the designated county official, agency, or department shall be disbursed by the fifth working day of the following month to the State Administration of Justice Fund, the county administration of justice fund, and the appropriate county fund, state entity, or state agency as provided by law.

(iii) The sheriff shall remain responsible for collecting bail or money deposited in lieu of bail on behalf of defendants discharged from incarceration pursuant to law in circuit court.

(B)(i) The quorum court may delegate the responsibility for the collection of delinquent fines assessed in circuit court to a private contractor.

(ii) The contractor may receive, under a written contract, a commission on delinquent fines collected for circuit court.

(C)(i) The commission agreed to be received by the private contractor shall be a portion of the total fine owed by a defendant.

(ii) The court shall credit the defendant with the gross amount remitted to the private contractor.

(iii) The private contractor shall remit the gross amounts collected to the county official, agency, or department designated under subdivision (a)(1)(A) of this section on at least a monthly basis.

(iv) Payment of the commission shall be through the county claims process.

(v) The county treasurer shall make a pro rata disbursement of the remaining fines to the State Administration of Justice Fund, the county administration of justice fund, and the appropriate county fund, state entity, or state agency as provided by law.

Ark. Code Ann. § 16-13-709(a)(1) (Repl. 2010) (emphasis added). As reflected by the emphasized language in the above quoted statutory provision, the applicable county quorum court is authorized to delegate the responsibility for the collection of **delinquent** fines assessed in the circuit court to a private contractor.

Concerning the meaning of the term “fine” or “fines”, the Arkansas Code provides the following definition:

(a) The procedures established by this subchapter shall apply to the assessment and collection of all **monetary fines, however designated**, imposed by circuit courts and district courts for criminal convictions, traffic convictions, civil

violations, and juvenile delinquency adjudications and shall be utilized to obtain prompt and full payment of all such fines.

(b) For purposes of this subchapter, **the term “fine” or “fines” means all monetary penalties imposed by the courts of this state, which include fines, court costs, restitution, probation fees, and public service work supervisory fees.**

Ark. Code Ann. § 16-13-701 (Repl. 2010) (emphasis added).

A quorum court’s authority to delegate the responsibility for the collection of fines, however designated, is limited to the fines that are “delinquent”, which is defined as follows:

(3) **“Delinquent” means any fines assessed in the circuit courts or district courts of this state which have not been paid as ordered for a period of ninety (90) days or three (3) payments, either consecutive or concurrent, since payment was ordered or since last partial payment was received.**

Ark. Code Ann. § 16-13-709(a)(3) (Repl. 2010) (emphasis added). A copy of the quorum court’s ordinance making the designation for the delegation of the delinquent fine collection responsibility shall be provided to the Administrative Office of the Courts. Ark. Code Ann. § 16-13-709(a)(4) (Repl. 2010).

Concerning the private contractor to whom the responsibility for the collection of delinquent fines may be delegated, the Arkansas Code provides as follows:

(b)(1) **If a private contractor is selected to collect delinquent fines, then to ensure the integrity of the court and to protect the county, town, or city, the contractor shall register with the Secretary of State and shall file with the Secretary of State a surety bond or certificate of deposit.**

(2) **The amount of the surety bond or certificate of deposit shall be fifty thousand dollars (\$50,000).**

(3) The county, town, city, or any person suffering damage by reason of the acts or omissions of the contractor may bring action on the bond for damages.

(4) A contractor shall be ineligible to provide such services if the owner, operator, partner, or employee has been convicted of a felony.

Ark. Code Ann. § 16-13-709(b) (Repl. 2010) (emphasis added). As reflected above, █████ officials have represented that █████ is not a state governmental agency, but is instead a “stand alone” entity classified by the Internal Revenue Service as a Section 115 entity. Based upon this information, █████ has concluded that it qualifies as a private contractor eligible for selection as a delegate by county quorum courts for the collection of delinquent fines, fees, costs, and restitution.¹

¹ In order to qualify as a “private contractor” under the provisions of Ark. Code Ann. § 16-13-709(b)(1) (Repl. 2010), █████ has represented that it will register with the Arkansas Secretary of State and will file with that office a surety bond or certificate of deposit in the amount of fifty thousand dollars (\$50,000.00) as required by that statutory provision.

The Arkansas provisions for setoffs against state tax refunds are set forth as Ark. Code Ann. §§ 26-36-301 et seq. (Repl. 2012 and Supp. 2015).² The purpose and intent for such setoff provisions is stated as follows:

(a) The **purpose** of this subchapter is **to establish as policy that all claimant agencies and the Revenue Division of the Department of Finance and Administration shall cooperate in identifying debtors who:**

(1) **Qualify for refunds from the division; and**

(2) **Owe money to the state, to an Arkansas county, city, or town, or to a housing authority created under § 14-169-101 et seq., through its various claimant agencies.**

(b) It is also the **intent** of this subchapter that **procedures be established for setting off against any such refund the sum of any debt owed to the state, to an Arkansas county, city, or town, or to a housing authority created under § 14-169-101 et seq.**

Ark. Code Ann. § 26-36-301 (Repl. 2012) (emphasis added). The purpose and intent set forth in this statutory provision make it clear that setoffs against state tax refunds of individuals owing debts to claimant agencies is a favored procedure when available and that the intent was the establishment of procedures to accomplish these goals.

Relevant for purposes of the [REDACTED] Opinion request, the setoff against state tax refund provisions include the following definitions:

As used in this subchapter:

(1) (A) **“Claimant agency”** means:

....

(viii) **Arkansas circuit, county, district, or city courts;**

....

(xii) **County collectors and county treasurers;**

....

(2) **“Debt”** means:

(A) Any liquidated sum due and owing any claimant agency, which has accrued through contract, subrogation, tort, operation of law, legal proceeding, or any other legal theory, regardless of whether there is an outstanding judgment for that sum;

....

(D) **All of the following that are not under appeal:**

² The statutory provisions for setoff against state tax refunds contain numerous detailed provisions regarding procedures for setoff generally, debtor notification of setoff, hearing procedures, appeals, certifications of debts, claim priorities, and similar such procedures and provisions. This Opinion does not address all such procedures and provisions. Instead, the purpose of this Opinion is solely to determine if the setoff against state tax refund provisions of Ark. Code Ann. §§ 26-36-301 et seq. can lawfully extend to the [REDACTED] to whom a quorum court has delegated responsibility for the collection of delinquent fines, fees, costs, and restitution and with whom the county judge has entered into a binding written contract for that purpose.

- (i) **Traffic fines;**
- (ii) **Any court-imposed fine or cost**, including fines related to the prosecution of hot checks under the Arkansas Hot Check Law, § 5-37-301 et seq.; and
- (iii) **Restitution ordered by a circuit, county**, district, or city court related to the violation of any state law;

....

(G) Money owed to a claimant agency for all delinquent taxes, all costs resulting from delinquent taxes, and any penalties assessed against a delinquent taxpayer under § 26-36-201;

(3) “**Debtor**” means any individual owing money to or having a delinquent account with any claimant agency, which obligation has not been adjudicated, satisfied by court order, set aside by court order, or discharged in bankruptcy;

(4) “**Division**” means the Revenue Division of the Department of Finance and Administration;

(5) “**Refund**” means the Arkansas income tax refund that the division determines to be due any individual taxpayer less any amounts determined by the division to be due to the division for payment of any state tax as defined in the Arkansas Tax Procedure Act, § 26-18-101 et seq.; and

(6) “**Setoff**” means the withholding of part or all of income tax refunds due individuals who owe debts to the State of Arkansas, to a county, a city, or a town, or to a housing authority created under § 14-169-101 et seq.

Ark. Code Ann. § 26-36-303 (Supp. 2015) (emphasis added). These definitions make it clear that Arkansas circuit and county courts, as well as county collectors and treasurers, were included within the “claimant agency” definition. As such, those county courts and agencies are entitled to the benefits of the setoff against state tax refund procedures and provisions against defined debtors for the collection of delinquent fines, fees, costs, and restitution.

It is also clear from the setoff against state tax refund statutes that the Revenue Division of the Department of Finance and Administration (“Division”) is encouraged to render assistance to claimant agencies in the collection of delinquent debts. The statutes specifically provide as follows:

Subject to the limitations contained in this subchapter, **the Revenue Division of the Department of Finance and Administration shall, upon request, render assistance in the collection of any delinquent account or debt owing to any claimant agency. This assistance shall be provided by setting off any refunds due the debtor from the division by the sum certified by the claimant agency as due and owing.**

Ark. Code Ann. § 26-36-305 (Repl. 2012) (emphasis added). Finally, the provisions of the setoff against state tax refund statutes “shall be **liberally construed so as to effectuate its purposes as far as legally and practically possible.**” Ark. Code Ann. § 26-36-302 (Repl. 2012) (emphasis added).

Arkansas circuit and county courts, as well as county collectors and treasurers, have claimant agency status under the setoff against state tax refund statutes. The Revenue Division is encouraged to render assistance to claimant agencies in the collection of delinquent debts. The statutes regarding setoff against state tax refunds are to be liberally construed so as to effectuate its purposes as far as legally and practically possible.

You have concluded that, upon a quorum court's delegation to [REDACTED] of the responsibility for the collection of delinquent fines, fees, costs, and restitution and [REDACTED] entry into a binding written contract signed by the county judge, [REDACTED] would step into the legal position of the county for the limited purpose of collecting such delinquent debts. Considering the facts and circumstances provided and giving effect to the above cited and quoted law, upon that occurrence, when applicable, [REDACTED] would lawfully have the legally permissible right of setoff against the debtor's state tax refund in the collection of such delinquent debts, just as that of the delegating county.

This opinion is based on my understanding of the facts as set forth in your inquiry, and the application of Arkansas laws, rules, and regulations to those facts. Any change in the facts or law could result in a different opinion.

Please do not hesitate to contact me in the event you have any questions regarding this Opinion. Your time and attention to this matter are greatly appreciated.

Sincerely,

Tim E. Howell, Attorney at Law
Revenue Legal Counsel