

January 9, 2002

Dear Finance Director:

Your question is: Can the city waive penalty and interest on delinquent property taxes?

In my opinion, the answer is no. That answer is supported by several reasons:

First, the statutory law of the state contains no authority for cities to waive penalty and interest on delinquent property taxes. Municipalities are authorized to collect their property taxes any one of four ways:

1. Under the provisions of their charters for the collection of delinquent property taxes;
2. By ordinance under Tennessee Code Annotated, ' 6-55-201:206;
3. Under Tennessee Code Annotated, ' 67-5-2005(a)B(c); or
4. Under Tennessee Code Annotated, ' 67B5-2005(d).

Those ways involve the collection of delinquent property taxes by statute, by the city charter, or by ordinance. But no matter under what authority such taxes are collected, Tennessee Code Annotated, ' 67-5-2101 makes property taxes, and penalties and interest, owned thereon to state, county and municipalities, a first lien on the property from January 1 of the year for which the taxes are assessed.

I do not know under which of those authorities the city collects its property taxes. But Tennessee Code Annotated, ' 67-5-2001 et seq. contains a statutory scheme for the collection of delinquent property taxes, both where the county collects the city's property taxes, and where the city collects them. Specifically, Tennessee Code Annotated, ' 67-5-2010(a) provides that, "To the amount of tax due and payable, a penalty of 0.5 percent and interest of 1 percent shall be added on March 1 following the tax due date and on the first of each succeeding month *except as otherwise provided in regard to municipal taxes.*" [Emphasis is mine.] Therefore, if the city collects its own current property taxes but turns the collection of its delinquent property taxes over to the county trustee, the property tax due and delinquency date, and the penalties and interest are those set out in the municipality's charter or ordinance.

Tennessee Code Annotated, ' 67-5-2010(b) provides that, in all instances in which current municipal taxes are collected by the county trustee, the following provisions and rules for the collection of delinquent property taxes that may be due municipalities, *and one other shall prevail and obtain, anything in this chapter to the contrary notwithstanding* [Emphasis is mine]:

- The taxes levied and assessed by such municipalities shall become due and delinquent on the dates as now provided by existing law.

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- If such municipal taxes are not paid on or before the date for the delinquencies, a penalty of 0.5 percent and interest of 1 percent shall be added on March 1 following the tax due date and on the first day of each succeeding month.

Under that statute, where the county trustee collects the municipality's current property taxes or delinquent property taxes, the property tax due and delinquency dates remain those as set out in the municipality's charter or ordinance. However, the penalty and interest prescribed by that statute prevail over the municipality's charter or ordinances.

But nowhere in the statutory scheme for the collection of delinquent property taxes is there an implication that a municipality can waive penalty an interest on property taxes, whether set by statute, or by charter, or by ordinance. Presumably, penalties and interest can be set by ordinance where the city collects delinquent property taxes under Tennessee Code Annotated, ' 6-55-201 et seq., but the waiver of penalties and interest set by ordinance under that statute is a different matter, and will be considered in more detail below.

Second, there is no authority in your City Charter for the waiver of penalty and interest on property taxes. Article X, Section 2, of the charter provides that:

The City ... shall establish due and delinquent dates for payment of property taxes and shall be allowed to assess penalties and collect interest on delinquent taxes which may be due the municipality or may hereafter be assessed and/or collected by the state and county. Taxes shall be due on December 1 of each year, and declared delinquent if not paid in full on or before March 1 of the following year.

Presumably, under Article X, Section 2, the city could set penalty and interest by ordinance. At first glance, Burns v. City of Nashville, 142 Tenn. 541 (1919) stands for the proposition that the waiver of penalties and interest on delinquent taxes set by ordinance is legal. There the Tennessee Supreme Court considered that question under a City of Nashville Charter provision similar to Article X, Section 2, of your City Charter. The facts pertinent to that question in the Court's own words were that:

For several years it has been the custom of many of the city officials, and especially Myers, Howse, Andrews and Burns, to authorize the remission of penalties and interest on delinquent taxes. This was also done at times by ordinance of the city. The greater part, however, of these penalties and interest was remitted by Mr. Burns, including penalties and interest on his own taxes.
[At 579]

In holding that the waivers were not shown to be illegal in this case, the Court pointed to the Nashville Charter, which provided that, "In order to enforce collections of taxes on property

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or privileges when due, the board of commissioners is hereby empowered by ordinance to affix a penalty to be paid by the taxpayer," and reasoned that:

It will be noted that the charter does not undertake to levy or affix a penalty on delinquent taxes, but simply empowers the board of commissioners to do so by ordinance. It does not appear from the report of the special commissioner, nor from the proof, that any ordinance was ever passed by the commissioners affixing a penalty to be paid by delinquent taxpayers. If, however, we may assume that such an ordinance was passed by the board of commissioners, and was in existence at the time of the alleged remission of penalties and interest by the defendants, still it does not appear what penalties and interest were remitted by the defendant, commissioners, or by Mrs. Burns, or by ordinance, or for what years penalties and interest were remitted by ordinance. *If the board of commissioners had the power to affix penalties and interest, they had the power to remit them by ordinance.* [At 581]

The plaintiffs also argued that even if the city could by ordinance authorize the waiver of penalty and interest on taxes, the ordinance must apply equally to all taxpayers alike. The Court's reply to that argument was that, "there is nothing in record to show that such ordinance did not apply to all taxpayers alike, and to all penalties and interest due from taxpayers for the particular year to which said ordinances applied." [At 581-82]

But there are serious problems with applying that case to your city's question. One is the statutory scheme enacted by the General Assembly governing the imposition and collection of delinquent property taxes, and to which I have pointed above.

Another is that based on the facts of Burns, the Court's assumption that there was in place an ordinance providing for the remission of penalties and interest on property taxes was probably a good one, but the ordinance itself was not in the record. It is difficult for me to see how any ordinance providing for the remission of such penalties and interest can avoid being defective either in substance or in application. The Court skated over the problem by pointing out that the ordinance was not in the record, and by declaring that the burden of proof was on the plaintiff to show such defect, and absent any such proof, the waivers would stand.

Finally, the Court almost had to look the other way to reach that conclusion. The facts of that case show that Burns was the city comptroller, and regularly waived penalty and interest on taxes, including on his own taxes. The other city officials who regularly waived penalty and interest were the mayor (Howse), commissioner of finance (Andrews), the treasurer (Myers), and apparently other city officials. Even giving all those public officials credit for being men of character and integrity, it is likely that if the ordinance gave several individuals the authority to waive penalty and interest it was substantively defective at best, and improperly administered at worst. I doubt any modern case involving the question of whether a city can by ordinance

provide for the waiver of penalties and interest on property taxes would get to the courts without the ordinance in the record.

That brings us to the third reason the city cannot waive penalty and interest on property taxes. Even if the city had such authority in its charter or ordinance, that authority would probably fall to White v. City of Chattanooga, 387 S.W.2d 821 (Tenn. 1965). In that case the Tennessee Supreme Court said that under Tennessee Code Annotated, ' 67-1801 et seq.:

When property has been assessed for the entire year's taxes, and owners have become liable thereof in full amount as of January 10 of tax year, city and county officials have no authority to accept less than whole amount of taxes assessed in satisfaction of tax.[At 823]

Tennessee Code Annotated, ' 67-1801 was subsequently changed to Tennessee Code Annotated, ' 67- 5-2101 et seq.[and the tax date to January 1]. As indicated above, under that statute the tax liability and lien apply to the penalties and interest on the taxes as well as the taxes themselves.

White v. City of Chattanooga examines the policy behind the statute in approving and explaining an earlier Tennessee Court of Appeals case in which it was held that the County Trustee of Hamilton County could not compromise property taxes:

The reason, of course, back of this is perfectly obvious because if Trustees, and those who have the authority and duty to collect taxes, could remit or compromise taxes there would never be any uniformity in the collection of these taxes. This opinion likewise held that a tax is not predicated on a contract and cannot be discharged because of a contractual situation, and where taxes are legally assessed, *the taxing authority is without power to compromise, release or abate them except as specifically authorized by statute.* [At 823-24]

There is no reason why White v. City of Chattanooga would not apply to penalty and interest as well as property taxes, given that it is based on Tennessee Code Annotated, ' 67-1801 [now Tennessee Code Annotated, ' 67-5-2101]. Just as important, the policy reasons in that case supporting the Court's rejection of the right of the county trustee to waive penalties and interest on property taxes, applies to such waivers no matter whether they are based upon statute, upon charter or upon ordinance.

TAG Opinion 86-130 also opines that even the Chancery Court has no power to permit property owners to pay their delinquent taxes, interest and penalties installment payments in the face of the state statutory scheme prescribed for the imposition and collection of delinquent real property taxes. Although Tennessee Attorney General Opinions are not "the law," in the same sense as are cases decided by the Tennessee Courts of Appeal, TAG 86-130 appears to be well-reasoned. It is based on the proposition that where interest and penalties on property taxes are governed by a statutory scheme, not even an equity court can intervene to modify that

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scheme in individual cases even when it seems fair and reasonable to do so.

Sincerely,

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