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OPINION COMMITTEE

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April 11, 2011

Hon. Greg Abbott
Attorney General of Texas
Attention: Opinion Committee
P. O. Box 12548, Capitol Station
Austin, Texas 78711-2548

FILE # ML-46722-11
I.D. # 46722

RQ-0960-GA

Re: Tax Code Section 33.06 – Deferred Taxes

Dear General Abbott:

On behalf of the Potter County Tax Assessor-collector, we request your opinion regarding the calculation of interest and penalties pursuant to section 33.06, Texas Tax Code.

BACKGROUND

On January 1, a tax lien attaches to real property subject to property tax “to secure the payment of all taxes, penalties, and interest ultimately imposed for the year on the property.” TEX. TAX CODE ANN. § 32.01 (a) (Vernon 2008).¹ Taxes normally become delinquent if not paid before February 1 of the year after the taxes were imposed. *Id.* Section 33.01 of the Tax Code provides for escalating penalties on the unpaid base tax, with the maximum penalty of 12% attaching if the tax remains unpaid as of July 1. *See id.* § 33.01 (c). This penalty remains as a lien against the property until it is paid. In addition to the penalty, interest accumulates at the rate of 1% for each month the tax remains unpaid. The purpose of the interest is to compensate the taxing entities for revenue lost as the result of not being able to collect the tax. *Id.* Section 33.07 and 33.08 also add additional collection penalties to compensate for the costs of collecting the delinquent tax. *See id.* § 33.07 (a), § 33.08 (b).

Texas laws provide protections for a person’s homestead, and one of these protections is found in Section 33.06 of the Tax Code. This section allows an elderly or disabled person to defer the collection of ad valorem taxes on their residence homestead if they are unable or unwilling to pay the taxes. *See id.* § 33.06. This deferral continues as long as the taxpayer qualifies for the deferral, and ends as soon as the person ceases to own and/or live in the property as a homestead. *Id.* at § 33.06 (a). On the death of a married elderly person receiving the

¹ Unless otherwise indicated, all references are to TEX. TAX. CODE ANN. (Vernon 2008).

deferral, the Tax Code extends the deferral for the benefit of the surviving spouse age 55 or older until he or she ceases to use the property as a residence homestead. *Id. at* § 33.06 (f).

Several benefits are given to a person who qualifies for a deferral pursuant to §33.06. A delinquent deferred tax accumulates interest at a different rate than that described by § 33.01. Section 33.06 (d) caps the interest rate on uncollected taxes at 8 % per annum during the deferral period, as opposed to the rate prescribed by 33.01 (d), and further provides that the 33.01 penalty "is not incurred" during the deferral period. *Id. at* § 33.06 (d).

The deferral period ends as soon as the owner ceases to own or occupy the property as a residence homestead. This means that when the person sells the property, moves away with no intent to return, or dies, the deferral period is over. The deferred property tax is then eligible for collection, and the taxing entity is allowed to collect not only unpaid taxes, but interest and other penalties that accrued prior to the imposition of the deferral. *Id.*

QUESTION PRESENTED

How are penalty and interest calculated pursuant to section 33.06 after the end of the deferral period?

There are differences of opinion about the calculation of interest and penalty that accrues during the deferral period. Our position is that the regular penalty and interest under section 33.01 is calculated *until* the deferral is put in place (assuming the property has delinquent taxes prior to filing for the deferral); interest only at the rate of 8% per year attaches to all years of taxes during the deferral period; and normal penalty and interest rates apply to any delinquent taxes after the person dies.

A different interpretation holds that the Texas Legislature intended that *after* the deferral period, 33.01 interest would be calculated for the entire period of the delinquency, including the deferral period. In other words, 33.01 penalty and interest would be applied retroactively to the deferral period instead of 33.06 interest if the tax is delinquent. Under this interpretation once the deferral is removed, the penalty as well as the interest is calculated as if the deferral was never in place. Such an application would seem to be contrary to the purpose of the statute, which is to defer the collection of taxes for elderly or disabled persons and provide them with a certain amount of tax relief if they choose to pay the taxes during the deferral period.

In addition, the language of 33.06 does not support the concept that interest or penalty is retroactive. Section 33.06 (d) states in relevant part:

The annual interest rate during the deferral or abatement period is eight percent **instead of** the rate provided by Section 33.01. Interest and penalties that accrued or that were incurred or imposed under Section 33.01 or 33.07 **before the date** the individual files the deferral affidavit under Subsection (b) or the date the judgment abating the suit is entered, as applicable, are preserved. A penalty under Section 33.01 **is not incurred during a deferral or abatement period.**

--*Id.* (emphasis added).

Nothing in this language suggests that either a higher rate of interest or a 33.01 penalty is to be applied retroactively to the period of the deferral after the deferral ends. On the contrary, section 33.06 provides for interest at 8% per annum and states specifically section 33.01 penalties are not incurred. *Id.* To read otherwise seems to "read additional requirements into a

statute that are not implicit on its face.” Op. Tex. Att’y Gen. No. GA-0787 (2010) at 3 (citing *Leland v. Brandal*, 257 S.W.3d 204,207 (Tex. 2008)).

Some base a retroactive application of 33.01 on the wording that both penalty and interest continue to accrue as long as a judgment is unpaid. § 33.01 (a), (c). From this perspective, once the deferral period is over, penalty and interest must be applied over the entire period of unpaid tax without any provision for the time of deferral. However, the intent of the Texas Legislature becomes manifest when we look at the predecessors of 33.06. At one point, the Legislature intended that interest and penalty would continue to accrue during the deferral period, but, like the base tax, would not be collected until after the deferral period. This intent continued to be expressed when in early versions of the Tax Code when it was first codified:

A tax lien remains on the property and penalties and interest continue to accrue during the period collection of taxes is deferred as provided by this section. A plea of limitation, laches, or want of prosecution does not apply against the taxing unit because of deferral or abatement of collection as provided by this section.

--TEX. TAX CODE ANN. § 33.06 (d) (Acts 1981, 67th Leg., 1st C.S., p. 168, ch. 13, § 129, eff. Jan. 1, 1982.

Section 33.06 (d) as currently written modified this language providing a reduced interest rate during the deferral period and eliminating a penalty:

A tax lien remains on the property and interest continues to accrue during the period collection of taxes is deferred or abated under this section. **The annual interest rate during the deferral or abatement period is eight percent instead of the rate provided by Section 33.01. Interest and penalties that accrued or that were incurred or imposed under Section 33.01 or 33.07 before the date the individual files the deferral affidavit under Subsection (b) or the date the judgment abating the suit is entered, as applicable, are preserved. A penalty under Section 33.01 is not incurred during a deferral or abatement period. The additional penalty under Section 33.07 may be imposed and collected only if the taxes for which collection is deferred or abated remain delinquent on or after the 181st day after the date the deferral or abatement period expires.** A plea of limitation, laches, or want of prosecution does not apply against the taxing unit because of deferral or abatement of collection as provided by this section.

-- § 33.06 (d) (emphasis added).

Had the Legislature intended for interest and penalty to be retroactively applied, it would have used the same or similar language in § 33.06 (d) as it had previously used in the earlier version of § 33.06, where it explicitly states that interest and penalty continue to apply. The language of § 33.06 (d) as amended shows a shift in intent from deferring the tax, penalty and interest to deferring only tax and creating a safe harbor consisting of a time when only a lesser interest rate applies.

Finally, a section 33.01 penalty should not be routinely added retroactively since it does not automatically attach. Our interpretation is that under section 33.01(a), the regular penalty can only be calculated on a current delinquent tax *if* “...the tax remains unpaid prior to July 1 of the year in which it becomes delinquent...” *Id. at* § 33.01 (a). If the deferral ends at any time between February 1 and June 30th of any year, then regular penalties would attach to the current

delinquent tax (defined as a tax that has been delinquent for less than one year) because it "remains unpaid prior to July 1 of the year in which it becomes delinquent". *Id.* This phrase "of the year in which it becomes delinquent" limits the time in which the section 33.01 penalty can attach after a deferral period ends.

CONCLUSION

At the conclusion of a deferral period under section 33.06, regular penalty and interest under section 33.01 are applied if due until the commencement of the deferral. Interest at the rate of 8% per year attaches to all years of taxes during the deferral period, and normal penalty and interest rates apply to any delinquent taxes after the person dies.

We look forward to your opinion.

Sincerely,



David Kemp
Assistant County Attorney

c: Mr. Robert Miller – Potter County Tax Assessor-Collector
Mr. Kevin Brennen – Perdue Brandon Fielder Collins & Mott