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DEPARTMENT OF LAW
OFFICE OF THE
Attorney General
STATE CAPITOL
Phoenix, Arizona 85007

R75-757

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BRUCE E. BABBITT
ATTORNEY GENERAL

May 7, 1976

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ARIZONA ATTORNEY GENERAL

Mr. Raymond S. Long, Director
Department of Administration
West Wing, State Capitol
Phoenix, Arizona 85007

Dear Mr. Long:

This is in response to your inquiry of December 3, 1975,
wherein you ask the following questions:

1. Can the State engage the services of an outside collection service?
2. Is there a problem of confidentiality when delinquent tax accounts are turned over to outside parties for collection?
3. Is it legal for the State to share monies due it with third parties?

You have requested legal opinions on three specific situations relating to the use of private collection agencies by the State to collect monies, including taxes, owed to the State of Arizona.

The first question concerns the overall propriety of engaging the services of a private collection agency. As a general proposition, there seems to be no legal prohibition which would forbid the State to enter into a contract whereby a private collection agency would be retained to collect certain monies owed to the State. This general rule, however, is subject to several conditions.

First, only bona fide licensed collection agencies which are in full compliance with the provisions of A.R.S. §§ 32-1002 et seq. could be considered. The State of Arizona, as the sovereign, cannot become a party to any arrangement with an entity that either does not or will not comply with the Statutes which specifically govern and prescribe its mode of operation.



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Second, there exists the question of whether or not an invitation for bids on such contracts would be required under A.R.S. § 41-730. Attorney General Opinion 75-9 (R-11) recently construed the term "outside professional services" as contained in A.R.S. §§ 41-1051 et seq. in such a manner as to suggest, if not compel the conclusion, that the operation of a private collection agency does not constitute a "professional" service as contemplated under A.R.S. §§ 41-1051 et seq. As the opinion points out, however, A.R.S. § 41-730, which requires public bids, is of broad scope and notes the ". . . importance of competitive bidding. . ." Finally, A.R.S. § 41-730(c) specifically provides that the competitive bidding procedures

". . . shall apply to all purchases of . . . contractual services made by the section of purchasing for any budget unit notwithstanding any provision of law to the contrary." (Emphasis added.)

Further, A.R.S. § 41-730(A) provides that the bidding procedures apply only where the estimated expenditure will exceed ". . . one thousand dollars per transaction. . ." It could be conceivably argued that the collection agency's fee (usually a percentage of the amount collected) for any particular collection will rarely exceed \$1,000, and, therefore, A.R.S. § 41-730 would not apply. However, the more realistic and prudent approach seems to be to acknowledge the applicability of A.R.S. § 41-730 upon the grounds that any contract of this sort would clearly contemplate the collection of numerous delinquencies and the collection agency's fees in the aggregate would undoubtedly exceed \$1,000. See, also, Op. Att'y Gen. 75-11 (Dec. 22, 1975).

Third, and of crucial importance, a collection agency would be limited to collection of accounts where there are no questions involving disclosure of information of a confidential nature. Thus, if any delinquent account involves necessary reference to matters which are legally protected from disclosure, except in conformity with the law creating the confidence, such accounts could not be collected by a private collection agency. This point leads to your second question.

In the area of state taxation, there are several statutes relating to the confidentiality of information received by the sovereign from its various taxpayers. The following are the most prominent:

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1. A.R.S. § 42-111.03(10) requires the Department of Revenue to protect confidential information and prohibits the disclosure of information relating to a taxpayer, claimant or employer for any political, commercial or other unofficial purposes;
2. A.R.S. § 42-1307 prohibits the disclosure of the amount of gross income, gross proceeds of sales or tax paid by a taxpayer subject to the transaction privilege ("sales") tax except to employees of the Department of Revenue for specified purposes, to the Governor and to

'. . . the attorney general or other authorized representative of the state, in any action pertaining to the tax due under [Article 1, Ch. 8, Title 42 A.R.S.]';
3. A.R.S. § 42-1362 incorporates the prohibitions of A.R.S. § 42-1307 into the administration of A.R.S. §§ 42-1361 et seq. dealing with the state education excise tax;
4. A.R.S. § 42-1372 incorporates the prohibitions of A.R.S. § 42-1307 into the administration of A.R.S. §§ 42-1371 et seq. dealing with the state special excise tax for education;
5. A.R.S. § 42-1406 sets forth an even more rigid standard of use tax confidentiality than does A.R.S. § 42-1307. Prohibited are disclosures of the business affairs, operations, information, income, profits, losses, expenditures or any particular thereof set forth in a taxpayer's use tax return or abstract thereof. Moreover, civil and criminal penalties are imposed for violations;

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6. A.R.S. § 42-1451 authorizes the Department of Revenue to enter into inter-governmental agreements with cities and towns to collect and administer their transaction privilege and/or use taxes. If such cities have confidentiality ordinances, it is clear that the Department of Revenue could not divulge such information from the cities to the private collection agency;
7. A.R.S. § 42-1704 is virtually identical to A.R.S. § 42-1406 insofar as confidential information from a rental occupancy taxpayer is concerned; and
8. A.R.S. § 43-145(b) prohibits the disclosure of confidential income tax information except in certain specified instances.

In short, there appears to be no way that the State could turn over delinquent tax accounts, as outlined above, to a private collection agency. Such a procedure is clearly prohibited by the numerous statutes protecting confidential tax information. The rationale of such protection was stated by the Supreme Court in Arizona in Wales v. Tax Commission, 100 Ariz. 181, 412 P.2d 472 (1966). Cf. Op. Att'y Gen. 74-7 (R-14). Finally, insofar as the State's power of taxation is concerned, Article IX, § 1, of the Arizona Constitution provides, in part, that

"The power of taxation shall never be surrendered, suspended, or contracted away."

It was held in Shumway v. State, 63 Ariz. 400, 163 P.2d 274 (1946), that this constitutional provision includes not only the power to levy and assess taxes, but also the power to collect them. While the decision in the Shumway case, supra, involved a property tax rather than an income or excise tax, the provision is cited for purposes of analogy and as persuasive authority for the conclusion expressed herein that a contract with an outside collection agency to collect taxes is not authorized under the law.

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Your final question concerns the "sharing" of monies due the State with third parties. With the exception of the "tax areas" previously discussed and other areas where confidentiality or other prohibitions would prevent such a contract, there appears to be no legal impediment to a contract whereby the State would agree to pay a certain fee for services rendered by the collection agency. Rather than a "sharing" of monies due the State, the situation is actually compensation for the collection agency's efforts.

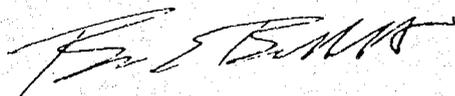
However, the mode of payment of the fee may present some problems. A.R.S. §§ 35-143(A) and 35-146 require that all State budget units collect all monies due them at the time of their accrual or receipt, and promptly remit them to the account of the State Treasurer. This language seems to contemplate that the collection agency would have to remit 100% of the monies it collected for the State to the particular budget unit entitled thereto, and be compensated by the budget unit under the contract by a separate payment. The budget unit authorized to contract for the collection agency's services would have to estimate collection expenses, including compensation to collection agencies based on amounts collected, and budget annually for that item.

This procedure is somewhat at variance with the common practice whereby a creditor will contract with a collection agency and agree to pay the agency a percentage of the amount actually collected, the net result usually being that the agency collects 100% of what it can get, subtracts its percentage first, and then remits the balance to the creditor. With few exceptions, this practice, insofar as contracts with the State would be concerned, would seem to be unauthorized. See, e.g., the exceptions in A.R.S. § 35-149(D).

Assuming for the purposes of this opinion that the budgeting and payment problems as outlined above could be resolved, there appears to be no legal prohibition to the payment for services rendered, the only question being the source and mode of the payment.

Please let us know if we can be of further assistance.

Sincerely,



BRUCE E. BABBITT
Attorney General

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