

# MEMORANDUM

State of Alaska

Department of Law

TO: Honorable Wilson Condon  
Commissioner  
Department of Revenue

DATE: February 3, 1995

FILE: 663-95-0081

TEL.NO.: 465-4118

SUBJECT: Collection of  
obligations due to  
the department

FROM: Vincent L. Usera  
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Your predecessor asked our advice on the question of whether the Permanent Fund Dividend Division can avail itself of private collection agencies within the state to collect obligations owed to the Permanent Fund Dividend (PFD) program. We conclude that it is not authorized by statute. Our analysis follows.

AS 43.23.035(b) provides:

If the commissioner determines that a permanent fund dividend should not have been claimed by or paid to an individual, the commissioner may use all collection procedures or remedies available for collection of taxes under this title to recover the payment of a permanent fund dividend that was improperly made.

AS 43.05.020 provides, in pertinent part:

The commissioner may employ a collection agency *outside the state* to assist in the collection of revenue owed to the state. (Emphasis added)

AS 43.05.010(15) provides:

[The commissioner of revenue shall] issue warrants for the collection of unpaid tax penalties and interest and take all steps necessary and proper to enforce full and complete compliance with the . . . revenue laws of the state[.]

As 43.05.010(14) provides:

[The commissioner of revenue shall] call upon the attorney general to institute actions for recovery of unpaid taxes, fees, excises, additions to tax, penalties, and interest[.]

The division's authority to collect improperly paid PFDs derives from AS 43.23.035(b), however, it is directly tied to the commissioner's powers and duties under AS 43.05.010 and AS 43.05.020. Since the legislature saw fit to specifically include the authority to employ collection agencies *outside the state* it is reasonable to conclude that the legislature viewed that authority as distinct from and a necessary adjunct to the authority contained in AS 43.05.010. It is, therefore, also reasonable to conclude that the legislature chose not to authorize the use of collection agencies to collect such obligations from persons within the state. The doctrine of statutory construction, "*Inclusio unius est exclusio alterius*" covers this very situation, that is, where something specific or a list of specific items is addressed in a statute, it is presumed that all other like items are excluded. See 2A NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION •• 47.23, 47.24 (5th ed. 1992).

That is not to say that in-state collection agencies could not be used under any circumstances, however, if such a plan were to be implemented, it could only be done through the Department of Law. Generally, State agencies that wish to have obligations owing to them collected by an agent -- *i.e.*, other than the agency itself -- must go through the Department of Law. See 1986 *Inf. Op. Att'y Gen.* (Feb. 7; 166-392-86). The Department of Revenue is specifically authorized to call upon the Attorney General to institute actions for the collection of monies owed to the State. AS 43.05.010(14). Decisions on whether to use department personnel to accomplish this task or to contract for outside assistance would be within the purview of the Attorney General.

We were also asked if the costs of collection could be passed on to the debtors. We conclude that reasonable costs may be added to amounts owed for improperly received PFDs. The applicable statute, AS 43.10.035, provides for attachment of a lien for the amount of unpaid taxes or licenses, interest, and penalties, "together with costs." AS 43.23.035 provides that the commissioner may use all "collection procedures and remedies available for collection of taxes" in collecting monies owed because of improperly paid PFDs. The provisions of AS 43.10.035, therefore, apply to these collections.

What constitute the "costs" of collection, however, is another matter. In *Kenai Peninsula Borough v. Cook Inlet Region, Inc.*, 807 P.2d 487, 501 (Alaska 1991), the Alaska Supreme Court reviewed the trial court's construction of the term "costs"

contained in AS 29.45.500(a), the statute pertaining to suits for tax refunds from municipalities. The Court found no error in the lower court's holding that "costs" included attorney's fees, however, under the facts of that case we believe the holding to have limited application to this inquiry. First, the superior court was acting as an intermediate court of appeal, and second, the award of attorney's fees was at least partially justified as a sanction for "unexcused delay and frivolous action." 807 P.2d at 501. While it might be possible to read the term "costs" in this statute to permit the inclusion of attorney's fees, however, there is considerable case law to the contrary. See, e.g., *Alaska Fed. Sav. & Loan Ass'n of Juneau v. Bernhardt*, 794 P.2d 579, 582 (Alaska 1990) (attorney's fees not recoverable as costs); *Tholen v. Sandy City*, 849 P.2d 592, 595 (Utah App. 1993) ("costs of collection" do not include attorney's fees unless statute or contract expressly so provide); *Sisk v. Sanditen Inv., Ltd.*, 662 P.2d 317, 320 (Okla. App. 1983) (use of the word "costs" in statute providing for recovery thereof is not ordinarily understood to include attorney's fees). If the division turned its collections over to the Department of Law, attorney's fees would be charged for services rendered and, if the matter proceeded to litigation, at least some attorney's fees could be recoverable under Ak. R. Civ. P. 82.

If handled by a collection agency, though, fees they might charge for collections would not be considered attorney's fees, although they are somewhat analogous. If the collection agency were required to take a matter to litigation, however -- which would require the services of an attorney -- an award of partial attorney's fees could be made under the provisions of Rule 82.

We conclude that the "costs" that could be recovered would include such things as filing fees, fees for service of process, long distance telephone charges, copying costs, and items of that nature, so long as reasonable. Fees paid to a collection agency for their services alone, however, would not be recoverable as "costs of collection."

If there is anything further you wish us to comment on, please contact us at your convenience.

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