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OFFICIAL OPINION

Honorable Casey Cagle
Lieutenant Governor
240 State Capitol
Atlanta, Georgia 30334

Re: When the General Assembly extends a sunset date in subsection (h) of Code section 48-8-67 in the manner of 2009 Ga. Laws 723, the extended authority to process unidentifiable sales tax proceeds pursuant to the Code section applies to undisbursed, unidentifiable proceeds of a preceding period of time, which began with the earlier sunset date and ended with its extension (the "gap period").

Dear Lieutenant Governor Cagle:

You have requested my opinion on the proper disposition of certain unidentifiable sales tax proceeds collected by the Commissioner of Revenue while his authority to distribute them under O.C.G.A. § 48-8-67 was in a temporary period of statutory sunset. The ultimate question here is whether unidentifiable local sales tax proceeds should be retained by the State or distributed to local governments for which the taxes were authorized and collected.

When collecting and disbursing sales taxes centrally for state and local governments,[1] the Department of Revenue sometimes has insufficient information from returns, even after follow-up inquiries, to attribute the proceeds to particular local jurisdictions.[2] The proceeds in question

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[1] The Revenue Code provides a comprehensive scheme for the administration of a state sales and use tax ("SUTA"). *See* O.C.G.A. §§ 48-8-1 through -67 (Article 1 of Chapter 48-8). To provide consistency in a complex situation, each of the statutes which authorize special district, city, and county sales and use taxes provides in similar language for central collection and disbursement of the taxes "exclusively" by the State Revenue Commissioner under essentially the same provisions, procedures, and penalties provided by SUTA, "for the use and benefit" of the jurisdictions. *See, e.g.,* O.C.G.A. §§ 48-8-87 ("The tax … shall be exclusively administered and collected by the commissioner for the use and benefit of each county whose geographical boundary is conterminous with that of a special district and of each qualified municipality located wholly or partially therein. Such administration and collection shall be accomplished in the same manner and subject to the same applicable provisions, procedures, and penalties provided in [SUTA with certain exceptions]") ("joint county and municipal sales and use tax;" also called "local option sales tax" or "LOST"). *See also* O.C.G.A. §§ 48-8-104(a) ("Homestead Option Sales and Use Tax Act" or "HOST"); -113 ("county special purpose local option sales tax" or "SPLOST"); -141 ("sales tax for educational purposes" or E-SPLOST); -204 ("water and sewer projects"); 1965 Ga. Laws 2243 (MARTA), *amended by* 1971 Ga. Laws 2082, 2083, § 25; 1974 Ga. Laws 2617.

[2] To facilitate identification and allocation of proceeds by the Commissioner, dealers are required to identify the place of transactions on their returns. For example, the LOST statute requires: "Each sales tax return … shall separately identify the location … at which any of the taxes remitted were collected and shall specify the amount of sales and the amount of taxes collected at each establishment for the period covered by the return in order to

are a subset of these "unidentifiable proceeds." There is a statutory procedure to allocate unidentifiable proceeds pro rata according to distributions of identifiable proceeds, O.C.G.A. § 48-8-67, enacted in 1998.[3] However, O.C.G.A. § 48-8-67 from its beginning has contained a "sunset clause," O.C.G.A. § 48-8-67(h).[4] Commencing April 12, 2005,[5] the sunset clause read as follows: "The authority of the commissioner to make distributions pursuant to this Code section shall cease on December 31, 2007, unless such authority is extended by a subsequent general Act of the General Assembly." A subsequent act, effective May 5, 2009, replaced "2007" with "2011."[6] The extending act made no other change in the sunset clause or in the Code section as a whole. In particular, the amendment made no express provision for the "gap period" from December 31, 2007, through May 4, 2009, when authority under the Code section had "ceased." Your request concerns the unidentifiable proceeds of this gap period: Does O.C.G.A. § 48-8-67, as "extended" May 5, 2009, apply to the unidentified proceeds held and collected during the gap period ("gap proceeds"), and, if not, what law does govern their disposition?

Further Background: Administration of Sales Tax Proceeds

The Constitution empowers the General Assembly "by general law [to] provide for the regulation and management of the finance and fiscal administration of the state." GA. CONST. art. III, sec. IX, par, II(c). In an exercise of that power, the General Assembly has provided in O.C.G.A. § 48-2-17:

> Except as otherwise provided by law, all taxes, penalties, interest, and other moneys collected or received by the [State Revenue Commissioner], the department, or any unit, officer, or employee of the department pursuant to this title or any other revenue or licensing law shall be paid to the Office of Treasury and Fiscal Services and deposited within 45 days of such collection or receipt.

My office has been advised that the Revenue Department daily remits all sales tax proceeds to the Office of Treasury and Fiscal Services (OTFS). Among its functions, OTFS manages cash

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facilitate the determination by the commissioner that all taxes imposed by this article are collected and distributed according to situs of sale." O.C.G.A. § 48-8-88. *See also* O.C.G.A. §§ 48-8-104(b) (HOST); -114 (SPLOST); -141 (E-SPLOST); -205 (water and sewer sales tax). Further inquiry and pro rata disbursement under subsection (b) of Code Section 48-8-67 apply "[w]hen a dealer makes a return with insufficient information to identify proceeds as being attributable to ... a particular special district or particular county." Subsection (g) of Code Section 48-8-67 empowers the Commissioner to "promulgate ... rules ... for the ... distribution of [unidentifiable proceeds] in accordance with this Code section." By the rule promulgated, "unidentifiable proceeds" are those "associated with returns that cannot be processed due to lack of sufficient formation. A return ... lacks sufficient information, and the ... proceeds are ... unidentifiable, when the Department has made reasonable efforts to process the return ... and is unable to do so within 90 days after its receipt.... Reasonable efforts ... shall include, but are not limited to, any [of certain listed actions, e.g., "[a]ttempting to contact a dealer."]" GA. COMP. R. & REGS. 560-12-1-.36(2) (2009).

[3] *See* 1998 Ga. Laws 769.

[4] *See id.* at 771.

[5] *See* 2005 Ga. Laws 159, 174, § 27(f) and approval note.

[6] *See* 2009 Ga. Laws 723, §§1, 2 (Act No. 145, H.B. 181, effective upon approval, May 5, 2009).

resources of the State and certain cash resources of local governments and other public bodies, including custodial accounts.[7] On administrative instructions from the Department of Revenue and local governments, OTFS disburses identified local sales tax proceeds to the jurisdictions of their collection, either by crediting accounts in the local government investment pool (LGIP) or by withdrawing funds for direct payments to the local jurisdictions. With regard to unidentifiable funds, during periods of time when the Department of Revenue has had authority under O.C.G.A. § 48-8-67 to make pro rata disbursements of unidentifiable funds, the Department and OTFS have proceeded in a similar manner by administrative correspondence but in distinct transactions and less often.[8]

The disbursements to local governments have been accomplished administratively on the basis of correspondence among the Department of Revenue, OTFS, and local sales tax recipients. There have been no corresponding appropriations in the general appropriations Act or any special appropriations, and the funds have not been disbursed pursuant to the warrant process used for drawing down appropriations because these processes have been considered inapplicable by administrators. *See Undercofler v. Eastern Air Lines*, 221 Ga. 824, 832 (1966) ("Also of significance is the contemporaneous administrative construction given the Act, and the legislative acquiescence in that construction for a long period of time.") In a corresponding way, when state administrators calculate the amount of state general funds available for appropriation, an amount for undisbursed local sales taxes, including an estimate of unidentifiable local tax funds, is "backed out" of calculations of state surplus and carried as a state liability on its financial statements.[9] In other words, the funds which are the subject of your request have never

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[7] *See* O.C.G.A. §§ 50-5A-7(a)(6) (OTFS empowered to "invest all state and custodial funds" subject to stated limitations), (9) ("all other funds in its possession" subject to stated limitations); 36-83-4(a)(1)(F) (authorizing investments of local funds in the "local government investment pool" ("LGIP"); 36-83-8 (LGIP created under control of State Depository Board and administration by OTFS). OTFS places the daily sales tax receipts in "Georgia Fund 1," which holds short-term investments of cash for state government and for the LGIP. For accounting purposes, OTFS credits all sales tax proceeds initially to the state funds account in Fund 1, as opposed to accounts in the LGIP. As held in *DeKalb County v. State*, local governments have no *vested* interest in funds until proceeds are identified and disbursed or disbursed pro rata under Code Section 48-8-67. *See* 270 Ga. 776, 778-79.

[8] The Governor and Department of Revenue noted in a revenue report in January that "[a]s of FY2009, the local sales tax distribution changed to reflect perpetual daily distributions for the current month based upon total sales tax collections." Office of the Governor, "Governor Perdue Announced December Revenue Figures," attached report, "Georgia Department of Revenue Comparative Net Revenue Collection" at n.2, *https://etax.dor.ga.gov/pressrel/Governor_Perdue_Announces_December_2009_Revenue_Figures.pdf* (January 8, 2010) (last visited February 26, 2010). The same report also stated, "On December 7th, 2009 DOR issued a Sales tax pro-rata distribution for $24.7M authorized by H.B 181. Of the $24.7M total, $13.8M was for May 2009-July 2009 payments and $10.9M was issued for payments made prior to January 1, 2008. DOR will make quarterly pro-rata sales tax distributions until December 31, 2011." That is, no distribution of unidentifiable proceeds was made with respect to the "gap period."

[9] According to interviews, when the State Accounting Office and Department of Audits and Accounts calculate state surplus as of the end of a fiscal year (the excess in state funds over obligations on state funds), among the amounts "backed out" as an obligation, i.e., liability, is the estimate of pending, undisbursed local sales tax proceeds, which, we are advised, includes unidentifiable proceeds. The amount of pending sales tax disbursements to local governments, including unidentifiable proceeds, is reported as an accounting liability. *See, e.g.,* State Accounting Office, BUDGETARY COMPLIANCE REPORT FOR THE FISCAL YEAR ENDED JUNE 30, 2009, "Combined Balance Sheet (Statutory Basis) All Funds, June 30, 2009," at 6 (web page 22 of 340) ("Undistributed Local Government Sales

been treated as state funds, and their allocation to local governments would not reduce funds reported as available for appropriations in an already tight revenue situation.

O.C.G.A. § 48-8-67

Code section 48-8-67 was enacted in 1998 in response to a large backlog in unidentifiable proceeds.[10] It creates the following general procedure unchanged since original enactment:

> When a dealer makes a return with insufficient information to identify proceeds as being attributable to … a particular special district or particular county, the [State Revenue Commissioner] shall make reasonable efforts to obtain the information needed to make a distribution of those proceeds. When the information cannot be obtained, [e]ach authorized recipient's pro rata share … shall be the same as that authorized recipient's pro rata share of the identifiable proceeds for the same collection period.

O.C.G.A. § 48-8-67(b).[11]

These general instructions were made initially applicable to the existing backlog by subsection (c): "The initial allocation of such unidentifiable proceeds shall be distributed in the manner

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Tax") and "Note 2 Fund Accounting" at 26 ("Liability and expenditure accruals in the General Fund include amounts due to … undistributed sales tax collected on behalf of local governments….") (end of page, web page 42 of 340), *http://www2.sao.georgia.gov/vgn/images/portal/cit_1210/8/6/154251467BCR_121509.pdf* (last visited February 25, 2010). *See also* THE GOVERNOR'S BUDGET REPORT FISCAL YEAR 2010, "Statement of Financial Condition," at 7 (web page 13) (showing liability for "Undistributed Sales Tax" and not including undisbursed, unidentified proceeds in revenue available for appropriation), http://www.opb.state.ga.us/media/9848/2009-01-26_web_fy2010_state%20of%20georgia%20budget.pdf (last visited November 2, 2009).

[10] Because of problems resulting from the revision of its sales and use tax report form and the implementation of a new computer system, the Department of Revenue had a $150 million backlog of undistributed and unidentifiable local option sales tax proceeds which were reported and collected prior to the enactment of O.C.G.A. § 48-8-67. Although DeKalb County is the only jurisdiction that has adopted the HOST tax, the backlog of unidentifiable proceeds also included other local option sales taxes imposed by other jurisdictions that the Commissioner is authorized by law to collect and distribute.

DeKalb County v. State, 270 Ga. 776, 777 (1999); *see also id.* at 779-80.

[11] The Code section first defines "authorized recipient" as follows:

> As used in this Code section, the term "authorized recipient" means the state, special districts, counties, or municipalities, or any combination thereof, as determined by general law, applicable local constitutional amendment, or Section 25 of an Act approved March 10, 1965 (Ga. L. 1965, p. 2243), as amended, the "Metropolitan Atlanta Rapid Transit Authority Act of 1965," which specifies the entities to whom the commissioner is directed to distribute the proceeds of sales and use taxes.

O.C.G.A. § 48-8-67(a).

consistent with subsection (b) ... before July 1, 1998, and such allocation shall include ... unidentifiable proceeds ... collected subsequent to June 30, 1997, and prior to April 1, 1998...." Additional conditions were imposed with this initial allocation, in subsection (f), providing that acceptance of the initial allocation barred "any challenges to this Code section" and that acceptance constituted an "accord and satisfaction" regarding the backlog.[12]

General instructions for subsequent disbursements continue in subsection (d):

> Following the initial allocation under subsection (c) of this Code section, allocations of unidentifiable proceeds shall be made by the commissioner according to a schedule provided for by rules and regulations of the commissioner but in no event less often than twice per year. Any such subsequent distribution of unidentified proceeds to an authorized recipient shall be made separate and distinct from the regular distribution of identifiable proceeds to such authorized recipient.

Without regard to the sunset clause, the language of O.C.G.A. § 48-8-67 is straightforward. "Following the initial allocation under subsection (c)," the State Revenue Commissioner "shall" continue making allocations of unidentifiable proceeds under subsections (b) and (d) at least twice a year according to a schedule adopted by rule.[13] (That is, when the Commissioner's "authority" is in force under O.C.G.A. § 48-8-67, the provisions are mandatory.) Taking into account the sunset clause in subsection (h), the Commissioner is still directed to make allocations under subsections (b) and (c) until his "authority [under them] shall cease ... *unless* ... extended...." When the authority to act under O.C.G.A. § 48-8-67 is extended after a gap period, it is still a natural reading to apply the Code section to the unidentifiable proceeds of the gap because the proceeds "follow[]" the "initial allocation" and are the kind of proceeds the Code section is intended to address.

Though straightforward, this interpretation is not without difficulty. It shows how O.C.G.A. § 48-8-67 can be applied to the unidentified proceeds of the gap period by its plain language and in light of its history as a response to the problem of unidentifiable proceeds. However, neither the Code section, nor specifically its sunset clause or subsection (d), nor the statutory extensions of the sunset clause expressly provide what is to be done in regard to gap periods. The issue of extensions following periods of ceased authority must further be considered in light of legislative

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> The department shall at the time of the first distribution ... provide each authorized recipient with written notice ... that negotiation of the first distribution shall constitute a release and full accord and satisfaction for any and all refund requests or claims with respect to any sales and use tax collected prior to April 1, 1998.... Negotiation of the first distribution shall also constitute full and complete acceptance of all the terms and conditions set forth in this Code section and shall bar any challenges to this Code section.

O.C.G.A. § 48-8-67(f).

[13] For the present rule, not updated with respect to the 2009 amendment to the sunset clause, *see* GA. COMP. R. & REGS. 560-12-1-.36 (2009) (providing for "periodic allocations no less than twice per year"); *see also supra* note 2.

history and the rules for determining when laws apply to events of the past, the ultimate goal being to ascertain legislative intent.

First of Three Gap Periods

There have been three gap periods in regard to O.C.G.A. § 48-8-67, two in addition to the one under review. The first arose with the original bill. In 1998, after providing for methodology in subsection (b), the Code section applied that methodology by subsection (c) to "proceeds that have been collected subsequent to June 30, 1997, and prior to April 1, 1998." This express retroactive application of the Code section to the antecedent backlog was held constitutional as remedial legislation in *DeKalb County v. State*.[14] However, in an aspect of the situation not discussed in the *DeKalb County* case, the General Assembly passed the bill on March 16, 1998, but did not send the bill to the Governor until after adjournment on March 19, and the bill became law under its terms upon approval by the Governor on April 6, 1998.[15] When the General Assembly passed the bill it could not have known whether the law would be in force by April 1, 1998. Since the bill was not transmitted during the session, under the Constitution it could have become law as late as 40 days after adjournment.[16] Whether unidentifiable proceeds arose in the actual gap period, April 1 through April 5, 1998, the possibility existed upon passage that they might arise during a gap period ending as late as April 28, depending upon approval. This invites the question, what did the General Assembly intend should such a gap occur?

The General Assembly could have intended that subsections (b), (c), and (f) would apply to the initial disbursement of the stated backlog period, "subsequent to June 30, 1997, and prior to April 1, 1998," and subsections (b) and (d) would apply only to unidentifiable proceeds collected from the date of approval. That would mean that the Code section would not apply to the gap between the backlog period and approval date. This interpretation, first, is inconsistent with subsection (d), which by plain language covers unidentifiable proceeds following the initial allocation.[17] Second, the Supreme Court has held that prior to enactment of O.C.G.A. § 48-8-67 "there was no statutory directive regarding the disbursement of unidentifiable proceeds, [and] the Commissioner was left to his discretion in dealing with them." *DeKalb County v. State*, 270 Ga. 776, 778 (1999). It is illogical to attribute to the General Assembly an intent to provide for unidentifiable proceeds of the backlog period by means of the Code section and also the unidentifiable proceeds commencing with its approval, while leaving unidentifiable proceeds of the gap between these periods subject to the very state of the law the General Assembly was remediating. The proceeds were essentially backlog proceeds not considered necessary to be

[14] *See* 270 Ga. at 778-79.
[15] *See* 1998 Ga. Laws 769, 771; 1998 GEORGIA HOUSE JOURNAL REGULAR SESSION 1411 (House passage) (Mar. 5, 1998), 2744 (adjournment) (Mar. 19, 1998); 1998 GEORGIA SENATE JOURNAL REGULAR SESSION 1617 (Senate passage) (Mar. 16, 1998); http://www.legis.ga.gov/legis/1997_98/leg/fulltext/hb1784.htm (legislative history of H.B. 1784 of 1998 session) (last visited November 2, 2009).
[16] *See* GA. CONST., art. III, sec. V, par. XIII(a) (40 day rule). The bill had the usual provision to become "effective upon its approval ... or upon its becoming law without such approval." 1998 Ga. Laws 769, 771
[17] *See* text at page 5.

subject to the conditions of subsection (f). The better interpretation is that subsection (d) made the proceeds of the "approval gap" subject to the Code section.[18] The question then becomes, should the same logic apply to the two gap periods which came later and involved the sunset clause?

Second and Third Gap Periods:
Sunset Extensions following Sunset

Except for typographical corrections,[19] the only changes to O.C.G.A. § 48-8-67 have been to extend it by changing the year in its sunset clause, subsection (h). Under its legislative history, the clause has read as follows: "The authority of the commissioner to make distributions pursuant to this Code section shall cease... on December 31, ~~2000~~ ~~2005~~ ~~2007~~ 2011, unless such authority is extended by a subsequent general Act of the General Assembly."[20] The extension from 2005 to 2007 was enacted *before* the 2005 sunset occurred and therefore did not involve a gap period.[21] The extensions from 2000 to 2005 and from 2007 to 2011 both were enacted *after* the sunset had occurred and followed gap periods.[22] Neither the Code section, the sunset clause, nor the statutory extensions address in specific terms gap periods like those after 2000 and 2007. While it may still appear illogical that the General Assembly meant to leave a hiatus unaffected by remedial measures it has just extended, and also that the General Assembly would intend a different result for the second two gaps from what it intended for the first, there is the difference that the first gap did not involve a sunset.

As opposed to the documented reason for enacting the pro rata allocation procedures,[23] there is no reported explanation known to us for the inclusion of the sunset clause or its extensions. The legislative history does indicate that the sunset clause has been a matter of some interest.[24] The

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[18] *See* text at page 5.
[19] 1999 Ga. Laws 81, § 48.
[20] O.C.G.A. § 48-8-67(h), *enacted by* 1998 Ga. Laws 769, 771; *amended by* 2001 Ga. Laws 984, 998 (replacing 2000 with 2005); 2005 Ga. Laws 159, 173 (replacing 2005 with 2007); 2009 Ga. Laws 723 (H.B. 181, approved and effective May 5, 2009) (replacing 2007 with 2011).
[21] 2005 Ga. Laws 159, 173-74, §§ 24, 27(f) and approval note (effective April 12, 2005).
[22] During the 2001 session the subsection was amended to replace 2000 with 2005. The amendment became law April 27, 2001, leaving a gap from December 31, 2000, through April 26, 2001. *See* 2001 Ga. Laws 984, 998, § 20(a) and approval note (effective April 27, 2001). During the 2009 session the subsection was amended to replace 2007 with 2011. The amendment became law May 5, 2009, leaving a gap from December 31, 2007, through May 4, 2009. *See* 2009 Ga. Laws 723, §§ 1, 2 (Act No. 145, H.B. 181, approved and effective May 5, 2009).
[23] *See supra* note 10.
[24] Attempts to repeal the sunset clause have failed. *See* H. B. 181, § 1, 150th Gen. Assem., 1st Reg. Sess. (Ga. 2009) (as introduced "LC 18 7886"), http://www.legis.ga.gov/legis/2009_10/sum/hb181.htm (then follow hyperlink under "Versions" to "LC 18 7886/a") (last visited March 2, 2010); H. B. 1396, § 1, 149th Gen. Assem., 2d. Reg. Sess. (Ga. 2008), http://www.legis.ga.gov/legis/2007_08/sum/hb1396.htm (then follow hyperlink under "Versions" to "LC 18 7369/a") (last visited March 2, 2010); H.B. 385, § 20, 149th Gen. Assem., 1st Reg. Sess. (Ga. 2007), http://www.legis.ga.gov/legis/2007_08/sum/hb385.htm (then follow hyperlink under "Versions" to "LC 18 6230/a)" (last visited March 2, 2010); H.B. 354, § 19, 149th Gen. Assem., 1st Reg. Sess. (Ga. 2007),

very existence of a sunset clause implies that the problem is perceived as temporary or that the solution is perceived as temporary, perhaps from being unsatisfactory or in the hope of a better solution, and the sunset forces the reevaluation. Perhaps pro rata allocations came into the law under a perceived merit of fairness and approximation or compromise, but the political community at large had doubts or certain jurisdictions felt other methods would serve them more accurately. When DeKalb County litigated with the State over retrospective use of pro rata estimates in the initial allocation provisions of O.C.G.A. § 48-8-67, the Georgia Supreme Court took note that DeKalb County was not the only jurisdiction with a stake in the matter: "[T]he backlog of unidentifiable proceeds also included other local option sales taxes imposed by other jurisdictions." *DeKalb County v. State*, 270 Ga. 776, 777 (1999). In apparent response to such concerns, O.C.G.A. § 48-8-67 requires in subsection (d) that "distribution of unidentified proceeds ... be made separate and distinct from the regular distribution of identifiable proceeds" for each recipient, and further makes a point of transparency in subsection (e) by providing that "[i]nformation regarding proceeds distributed ... pursuant to this Code section shall be identified by the commissioner, and ... made available upon request." Related to these concerns, the apparent purpose of the sunset clause is to force affirmative legislative reconsideration and action to continue or change the statutory remedy of O.C.G.A. § 48-8-67.

Consistent with a purpose of continuity unless there is a change in legislative provisions, the Code section's internal provision for authorization to cease also has internal provision for the authorization to be extended. The built-in provision for "extend[ing]" the authority implies a belief that the pro rata allocations may continue to be better than alternatives, whether the alternatives be simply the status of the law without the Code section or some other solution. In this light, the built-in extension language is evidence of greater intent for continuity than a simple provision for a date of repeal or expiration. In its language, "[t]he authority ... to make distributions pursuant to this Code section shall cease," the sunset clause places the Code section into a dormant posture (authority under the Code section has "ceased") but also invites extension by simple revival of authority as opposed to requiring reenactment following repeal. The meanings of the words "cease" and "extend," and their conjunctive use, support a revival of authority which reaches back.[25]

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http://www.legis.ga.gov/legis/2007_08/sum/hb354.htm (then follow hyperlink under "Versions" to "Sen ctee sub LC 18 6486 S") (last visited March 2, 2010).

[25] We are to give the words of a statute their "ordinary signification" for the context. *See* O.C.G.A. § 1-3-1(b). "Cease" has connotations of desisting from performing a process or activity. *See* THE AMERICAN HERITAGE DICTIONARY 250 (2d Coll. Ed. 1982). "Extend" primarily means to open or stretch something out and has connotations of causing something to last longer, including particularly "[t]o prolong the time allowed for payment." *See id.* 479; *see also* THE AMERICAN HERITAGE DICTIONARY (online) at "extend" ¶ 7b, http://education.yahoo.com/reference/dictionary/entry/extend;_ylt=AhAXJxsej62.E7_IjijtA82sgMMF (last visited February 26, 2010).

Although the sunset clause does not use language of repeal, the caption of the original legislation recited among its purposes the purpose "to provide for automatic repeal." 1998 Ga. Laws 769. "The title or caption of the act ... while no part thereof, may always be examined by the court when the act is doubtful, for the purpose of finding the legislative intent thereof..." *Moore v. Robinson*, 206 Ga. 27, 40 (1949). "[I]n construing a doubtful statute, there is no better source" than a statement of purpose. *Id.* "[I]n attempting to ascertain legislative intent of a doubtful statute, a court may look to the caption of the act and its legislative history." *Sikes v. State*, 268 Ga. 19, 21 (1997).

Status during and after a Gap

During a cessation of authority, the language of the sunset clause only blocks distributions pursuant to the Code section, suggesting that dispositions of unidentifiable proceeds not made "pursuant to this Code section"[26] are allowed if otherwise authorized. In *DeKalb County v. State,* the Georgia Supreme Court addressed this issue by implication: "Since there was no statutory directive regarding the disbursement of unidentifiable proceeds, the Commissioner was left to his discretion in dealing with them." *DeKalb County v. Georgia*, 270 Ga. 776, 778 (1999). The Court was referring to the status of the law prior to enactment of O.C.G.A. § 48-8-67. Except for O.C.G.A. § 48-8-67, the relevant law then in effect has not changed. Since all activities of public officers must be authorized by law,[27] and no other provisions appear pertinent, the Court necessarily referred to the general discretion the Commissioner has to administer the various sales tax laws, power which has since remained unchanged.[28]

"However, it is fundamental that the preamble or caption of an act is no part thereof and cannot control the plain meaning of the body of the act." *State v. Ware*, 282 Ga. 676, 678 (2007).

The captions in the first two extensions do not use language of reenactment or repeal of prior repeals. They are in the form of amendments to an existing section and recite as purposes "to extend the date for distribution of certain unidentifiable sales and use tax proceeds," 2001 Ga. Laws 984; and "to extend the sunset provision for distribution of unidentifiable sales and use tax proceeds." 2005 Ga. Laws 159. The caption to the extension in 2009 recites the purpose "to repeal certain provisions regarding limitations on the state revenue commissioner's authority to make certain distributions." 2009 Ga. Laws 723. Note that in this most recent caption the word "repeal" refers to "limitations" on authority, not to the "authority." In an early version the bill was, in fact, written to repeal the sunset clause, but as enacted the only change it made was to change the year of the date. *See* H. B. 181, § 1, 150th Gen. Assem., 1st Reg. Sess. (Ga. 2009) (as introduced "LC 18 7886"), http://www.legis.ga.gov/legis/2009_10/sum/hb181.htm (then follow hyperlink under "Versions" to "LC 18 7886/a") (last visited March 2, 2010). Each of captions after the first is consistent with finding an intent for continuity in extending the sunset date, even after a gap, especially the most recent, especially since it was left unchanged after the substantive provision changed.

Apart from captions in the bills, the sunset clause contains no language of repeal. If it had been repealed as of sunset dates, subsequent amendments without reenactment language would have been of doubtful force. *See Lampkin v. Pike*, 115 Ga. 827 (1902) ("While the general assembly has full power to amend its legislative enactments, an amendatory act, to be valid as such, must relate to an existing statute, and not to one which, having been repealed, is wholly inoperative.") (syllabus by court, summarizing cited foreign authority). In continuing to extend the sunset clause by amendment, the General Assembly implicitly understood it to be in force as law, and this is of some weight in interpreting the clause. *See Moore v. Georgia Pub. Serv. Comm.*, 242 Ga. 182, 184 (1978) ("In construing statutes, subsequent acts ... on the same subject may be considered.")

[26] O.C.G.A. § 48-8-67(h).

[27] *See* O.C.G.A. § 45-6-5; *Bentley v. State Bd. of Med. Exam'rs*, 152 Ga. 836, 838 (1922).

[28] *See* O.C.G.A. §§ 48-2-12(a) (The commissioner shall have the power to make ... reasonable rules ... not inconsistent with this title [the Revenue Code] or other laws ... for the enforcement of this title and the collection of revenues under this title."). *See also* O.C.G.A. §§ 48-8-95 (power to promulgate rules for LOST); 48-8-109 (rulemaking authority for HOST), 48-8-119 (rulemaking authority for SPLOST); 48-8-141 (rulemaking authority for E-SPLOST); 48-8-210 (rulemaking authority for water and sewer sales tax). These Code sections, along with O.C.G.A. § 48-8-67(g), are cited as authority for the regulation issued for implementing pro rata disbursements. *See* GA. COMP. R. & REGS. 569-12-1-.36 (2009).

Two points are relevant here. First, in regard to each of the gap periods, the power to provide for disposition of unidentifiable proceeds by discretionary rulemaking has not been exercised.[29] On the basis of interviews and pertinent law, it appears that unidentifiable proceeds of the most recent gap have simply accumulated and that unidentifiable proceeds of prior gaps, if any, were processed pursuant to O.C.G.A. § 48-8-67 after sunset extensions.[30] Second, in exercising administrative discretion and rulemaking, the Commissioner is necessarily confined to boundaries of the sales tax statutes themselves and their constitutional bases,[31] as well as the rule that his discretion must be reasonable, not arbitrary. *See Strickland v. Douglas County*, 246 Ga. 640, 640-643 (1980); *see also Matheson v. DeKalb County*, 257 Ga. 48, 50 (1987). The local sales tax statutes and the constitutional sources of authority for them expressly provide that they exist to raise revenue for local governments.[32] Under these general parameters, any disposition

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[29] There has apparently been no rule except GA. COMP. R. & REGS 560-12-1-.36 (2009), which recites Code Section 48-8-67 and the various rulemaking powers of the Commissioner as its basis, and which has been substantially in the same form since its first promulgation, with sunset clauses matching the sunset clauses of Code Section 48-8-67. The rule currently contains the December 31, 2007, sunset date.

[30] *But see supra* note 8.

[31] "Where a constitutional provision expressly provides that funds derived from taxes levied and collected may be used only for particular purposes, such funds cannot be utilized for or diverted to any other purpose." *Wright v. Absalom*, 224 Ga. 6, 8 (1968). Just as "DeKalb County's right to the tax proceeds extended no further than the HOST statute granted," *DeKalb County v. State*, 270 Ga. 776, 779 (1999), the Commissioner's authority to promulgate regulations is confined to the boundaries of the statutes and Constitution. *See Georgia Hosp. Assoc. v. Ledbetter*, 260 Ga. 477, 479 (1990) ("[W]hen a rule of an administrative agency conflicts with a law of general application, the rule cannot stand.").

[32] The sales taxes in question are imposed, collected and disbursed pursuant to statutory law, which in turn is based on certain tax clauses in the Constitution. The State collects a state sales and use tax for state government purposes under Article 1 of Chapter 48-8 of the Code. O.C.G.A. §§ 48-8-1 through -67; *see especially* O.C.G.A. §§ 48-8-1 (legislative intent to exercise "full and complete power to tax" in regard to sales taxes) & -30 (imposition of state sales and use tax). The primary constitutional basis for the state sales and use tax is in the general taxing power: "Except as otherwise provided in this Constitution, the power of taxation over the whole state may be exercised for any purpose authorized by law." GA. CONST., art. VII, sec. III, par. I; *see also* GA. CONST., art. VII, sec. I, par. I ("the right of taxation shall always be under the complete control of the state"). The general tax power is also a sufficient basis for the General Assembly to authorize the collection of local sales taxes. *Cf. Board of Comm'rs v. Cooper*, 245 Ga. 251, 255-56 (1980) (analogous alternative holding under 1976 Constitution). However, the general and local laws which authorize the local sales taxes under study here actually recite more specific constitutional clauses as the source of the authority for their enactment. *See, e.g., id.* (discussing initial "special district" clause as a basis for LOST). These constitutional clauses confer a power on the General Assembly to create special tax districts, a power to authorize local sales taxes for educational purposes, and a power to authorize a local sales tax in Fulton and DeKalb Counties for local government support of MARTA.

Taking them up in order, the special district clause provides:

> As hereinafter provided in this Paragraph, special districts may be created *for the provision of local government services* within such districts; and fees, assessments, and taxes may be levied and collected within such districts *to pay, wholly or partially, the cost of providing such services therein and to construct and maintain facilities therefor*. Such special districts may be created and fees, assessments, or taxes may be levied and collected therein by any one or more of the following methods:
> (a) By general law which directly creates the districts....

GA. CONST., art. IX, sec. II, par. VI ("special district clause") (emphasis added). This is the recited basis for LOST, *see* O.C.G.A. §§ 48-8-81, -82; HOST, *see* O.C.G.A. § 48-8-102(a), (b), and SPLOST, *see* O.C.G.A. § 48-8-110.1(a),

of unidentifiable sales tax proceeds under discretionary authority must necessarily take into account the various possibilities of their constitutional and statutory origins and purposes, as does O.C.G.A. § 48-8-67.

(b). The special district clause requires that districts be "created for the provision of local government services" and "taxes ...be levied and collected within such districts to pay, wholly or partially, the cost of providing such services." Accordingly, LOST proceeds are collected "for the purpose of ... funding all or any portion of those services which are to be provided by such governing authorities pursuant to ... Article IX, Section II, Paragraph III of the Constitution...." O.C.G.A. § 48-8-89(a)(2). The cross reference is to the basic local government services which the Constitution expressly empowers local governments to perform. GA. CONST., art. IX, sec. II, par. III(a) (the "supplementary powers"). Similarly, HOST is enacted pursuant to the special district clause to replace funds lost due to a homestead exemption, i.e., to "be used only for the purposes of funding capital outlay projects and of funding services within a special district equal to the revenue lost to the homestead exemption ...." O.C.G.A. § 48-8-102(c)(1). Finally, SPLOST proceeds must be used for certain listed capital outlay purposes benefitting the district as more fully defined by notice and approved by referendum. O.C.G.A. § 48-8-111.

In certain cases when a county does not approve an intergovernmental contract for participating in a SPLOST for water, sewer or water and sewer capital outlay projects, a municipality may impose a "special sales and use tax for a limited period of time for the purpose of funding water and sewer projects and costs" of the municipality under requirements of O.C.G.A. §§ 48-8-200 through -212. *See* O.C.G.A. § 48-8-201(b). In this case the constitutional basis may become the general tax power rather than the special district power, but the General Assembly is still authorizing a local government tax. *See Board of Comm'rs v. Cooper*, 245 Ga. 251, 255-256 (1980); *cf. Youngblood v. State*, 259 Ga. 864, 865 (1990). In the case of a municipal water or sewer tax imposed only by the municipality, when there is no intergovernmental agreement for a joint tax under Code Section 48-8-111, the "proceeds received from the tax" must "be used by the municipality exclusively for" water and sewer projects and costs or repayment of related debt. O.C.G.A. § 48-8-212(b). The proceeds must "be exclusively administered and collected ... for the use and benefit of the municipality imposing the tax." O.C.G.A. § 48-8-204.

The "sales tax for educational purposes" is provided for by the Constitution as follows:

> The board of education of each school district in a county in which no independent school district is located may by resolution and the board of education of each county school district and the board of education of each independent school district located within such county may by concurrent resolutions impose, levy, and collect a sales and use tax for educational purposes of such school districts conditioned upon approval by a majority of the qualified voters residing within the limits of the local taxing jurisdiction voting in a referendum thereon. This tax shall be at the rate of 1 percent and shall be imposed for a period of time not to exceed five years, but in all other respects, except as otherwise provided in this Paragraph, shall correspond to and be levied in the same manner as the tax provided for by Article 3 of Chapter 8 of Title 48 of the Official Code of Georgia Annotated, relating to the special county 1 percent sales and use tax, as now or hereafter amended.

GA. CONST., art. VIII, sec. VI par. IV(a) (emphasis added). The sales tax for educational purposes expressly recites that is "enacted pursuant to the authority of" the education sales tax clause just quoted. *See* O.C.G.A. § 48-8-140. The tax is "for educational purposes" and is distributed within the district among school districts as provided in the education sales tax clause or by local law. *See* GA. CONST., art. VIII, sec. VI, par. IV(g); O.C.G.A. § 48-8-143.

The MARTA sales tax is a major local tax imposed in Fulton and DeKalb Counties pursuant to local constitutional amendment and local law authorizing local government support of a public transportation authority. *See* 1964 Ga. Laws 1008, 1009 (preserved by GA. CONST., art. XI, sec. I, par. IV(d) (preserving 1945 Constitution amendments which "created or authorized the creation of metropolitan rapid transit authorities") and the 1976 Constitution, art. XIII, sec. I, par. II); see also GA. CONST., art. IX, Appendix Two "1945 CONSTITUTION OF GEORGIA - AMENDMENTS OF LOCAL APPLICATION" at "Atlanta, City of"); 1965 Ga. Laws 2243, *as amended* (act creating MARTA).

When there has been no administrative disposition during a gap and the General Assembly has then extended O.C.G.A. § 48-8-67, it is once again more logical to believe that the General Assembly intends to restore continuity through the gap period (the Commissioner and the legislature having each determined that the remedy of O.C.G.A. § 48-8-67 remains the best acceptable solution). Without express language to the contrary, it is illogical that the General Assembly, in extending the Code section, has intended for the Commissioner to continue to be responsible for devising a remedy for three gap periods, each of which is bracketed by periods of time when the statutory remedy is in force. "The construction [of statutes] must square with common sense and sound reasoning." *Blalock v. State*, 166 Ga. 465, 470 (1928); *accord, State v. Mulkey*, 252 Ga. 201, 204 (1984); *see also DeKalb County v. State*, 270 Ga. 776, 779 (1999) ("It is not logical that DeKalb County has a vested right in tax proceeds that were not identifiable as belonging to it.") The conclusion that the Code section applies to the gap periods preceding extensions is supported by similar reasoning and results in similar problems of statutory interpretation in the opinions and the cases.[33] It is supported by the presumption that remedial laws apply to pending matters of procedure.[34]

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[33] *See Trichilo v. Sec'y of Health & Human Serv.*, 823 F.2d 702, 707 (2d Cir. 1987) (following *Sierra Club, infra)*; *Sierra Club v. Sec'y of Army*, 820 F.2d 513, 521-523 (1st Cir. 1987) (notwithstanding technical arguments distinguishing repeals of repeals, reenactments, and amendments, Congress intended to look back to an original benchmark in the "Consumer Price Index" for certain payment increases rather than reset the benchmark in legislation passed after sunset); *Barrett v. Perry*, 229 Ga. 267, 268 (1972) (5-2 decision) (repeal of repeal restores prior voting rule); 1973 Op. Att'y Gen. 73-99 (repeal of repealing statute by legislation not fully occupying the field left original legislation to provide continuing authority over 17-year-olds and avoid illogical result that 16-year-olds and 18-year-olds were to be treated more favorably).

[34] At the common law, the "settled rule for the construction of statutes, is not to give them a retrospective operation, unless the language so imperatively requires." *Moore v. Gill*, 43 Ga. 388, 390 (1871). The rule is codified today in language that affirms the common law:

> Laws prescribe only for the future; they cannot impair the obligation of contracts nor, *ordinarily*, have a retrospective operation. Laws looking only to the remedy or mode of trial may apply to ... rights ... accrued ... prior to their passage; but in every case a reasonable time subsequent to the passage of the law should be allowed for the citizen to enforce his contract or to protect his right.

O.C.G.A. § 1-3-5 (emphasis added).

This codification incorporates not only the common law presumption of future intent in statutory interpretation but also the constitutional prohibition against impairment of accrued rights, GA. CONST., art. I, sec. I, par. X. It is settled that O.C.G.A. § 48-8-67 is remedial and its application to prior unidentified proceeds would not impair vested rights. *See DeKalb County v. State*, 270 Ga. 776, 777-778 (1) (1999). [This assumes *arguendo* that the rule applies between the State and its local governments. *See Sturm, Roger & Co. v. Atlanta*, 253 Ga. App. 713, 719-20 (2002) (saying it does not and noting, "The question of whether a county has the same vested rights as a citizen when applying a statute retroactively was not before the court [in *DeKalb v. State*], nor was it discussed.").]

The only real question in this instance is the whether the interpretative presumption of futurity applies to an extension of a sunset in Code Section 48-8-67 after a gap period. "The general rule is that laws ... usually will not be given a retrospective operation.... They will be given a retroactive effect, however, when the language imperatively requires it, or when an examination of the act as a whole leads clearly to the conclusion that such was the legislative purpose." *Barnett v. D. O. Martin Co.*, 191 Ga. 11, 12 (1940). In a particular context, a law, which expressly applies retrospectively to one specified situation, as Code Section 48-8-67 did for the preceding backlog, may be interpreted as applying prospectively in other situations. *See Focht v. Am. Cas. Co.*, 103 Ga. App. 138, 140 (1961). However, when language of a statute is susceptible to application to antecedent facts, as Code Section

Status as "Treasury" Funds Vel Non

Because the issue has been suggested, I have considered whether the unidentified sales proceeds for the gap period have been placed into the "treasury" and, therefore, under the Constitution they cannot be withdrawn except by appropriation. The Constitution does state that "[n]o money shall be drawn from the treasury except by appropriation made by law." GA. CONST., art. III, sec. IX, par. I. However, it further states: "Except as otherwise provided in this Constitution,[35] all revenue collected from taxes, fees, and assessments *for state purposes*, as authorized by revenue measures enacted by the General Assembly, shall be paid into the general fund of the state treasury."[36] The revenue in issue is collected in part for local government purposes

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48-8-67 is (*see supra* page 5), intent to have it do so may be found in an "examination of the act as a whole." *See Barnett v. D. O. Martin Co.*, 191 Ga. at 12. Further, the presumption in the case of remedial laws is that they apply to pending matters without more. *Cf. Mason v. Home Depot U.S.A., Inc.* 283 Ga. 271, 278-279 (2008) (quoting *Polito v. Holland*, 258 Ga. 54(2) (1988)). *But cf. Pattee v. Ga. Ports Auth.*, 477 F. Supp.2d 1253, 1270 (S.D. Ga. 2006) (no showing of legislative intent to apply new shorter limitations to pending matter). In the case of Code Section 48-8-67, the legislative and administrative history, the language of the whole Code section, and its purpose to remediate unidentifiable proceeds all show legislative intent to "close the gap." *See* O.C.G.A. § 1-3-1(a) ("In all interpretations of statutes, the courts shall look diligently for the intention of the General Assembly, keeping in view at all times the old law, the evil, and the remedy."); *Barnett v. D. O. Martin Co.*, 191 Ga. at 12 ("It is at last and always a question of legislative intent.").

The interpretation is also consistent with the rule promulgated by the Commissioner to implement Code Section 48-8-67. The first paragraph of the rule in its present form provides that "[t]he Commissioner shall make periodic allocations no less than twice per year, generally every six months, of unidentifiable proceeds ... pursuant to the provisions of O.C.G.A. § 48-8-67, beginning on or before July 1, 2001, and ceasing on or before December 31, 2007." GA. COMP. R. & REGS. 560-12-1-.36(1). Thus, the "allocations" are tied to dates before cessation dates. However, in the next paragraph, "unidentifiable proceeds" are not tied to particular dates. "For the purposes of this Rule, unidentifiable proceeds shall mean sales or use tax payments associated with returns that cannot be processed due to the lack of sufficient information." *Id.* (2). The present rule has not yet been amended in response to the 2009 legislation although a distribution of unidentifiable proceeds was announced in January for payments made before and after the gap period. *See* supra note 8.

[35] The exceptions are not relevant. *See, e.g.,* GA. CONST., art. I, sec. II, par. VIII (lottery funds not subject to art. VII, sec. III, par II); 1993 Op. Att'y Gen. 93-28 (discussing exemption for subsequent injury trust fund).

[36] GA. CONST., art. VII, sec. III, par. II (emphasis added). A provision in the Budget Act reads similarly but does not contain the phrase "for state purposes." It reads:

> All ... budget units charged with ... collecting taxes ... or other moneys, the collection of which is imposed by law, shall pay all revenues ... into the state treasury on a monthly basis.... No allotment of funds shall be made to any budget unit which has failed to comply fully with this Code section. "

This provision in the Budget Act is the "statutory counterpart" to the constitutional clause, *see* 1977 Op. Att'y Gen. 77-77, and should be read in harmony with it. *IBM v. Evans*, 213 Ga. 333, 338-39 (1957) ("The legislative acts ... must be construed in pari materia with the Constitution."). The provision for denying allotment requests indicates that the concern is collection of state revenues, and there is no provision in the Budget Act for thinking otherwise or that the Budget Act intends by the Code section to capture for state purposes local government revenue collected by a state agency.

pursuant to constitutional and statutory authority, and that part is outside the express scope of this mandate by its emphasized phrase.

The previously described statutory provisions and administrative practices are consistent with this interpretation. The disbursements by the Office of Treasury and Fiscal Services, pursuant to administrative instructions of the Department of Revenue, of identified and pro rated sales tax proceeds without an appropriation, and the recognition of a liability for undisbursed local sales taxes in calculating state surplus, are consistent with the view that the deposits of sales tax proceeds with OTFS are custodial and not a recognition or assertion of state ownership. *Cf. Youngblood v. State,* 259 Ga. 864, 865 (1990) ("The hotel/motel tax is not a state tax as the Act does not require the municipalities or special districts to levy the tax nor are the revenues paid into the state general fund."). While sales tax proceeds centrally collected are transferred to OTFS as required by O.C.G.A. § 48-2-17, and initially credited to the account that holds state-owned general funds, they are held there custodially pending identification or pro rata distribution for both state and local governments, under both state revenue measures and local revenue measures.[37] Indeed, if the deposits with OTFS made unidentifiable proceeds part of the state-owned treasury requiring appropriation for removal, it would be hard to distinguish identifiable proceeds which are treated in the same manner.[38]

Also consistently, the General Assembly, in providing for the central administration of sales taxes collected for both state and local governments,[39] has laid out in specific terms the extent to which the State and dealers may keep the proceeds collected for local governments. Both the State and dealers are to be paid for their costs in collecting and disbursing the local taxes.[40] Also, the State is to have priority in the application of proceeds: "[A]ll moneys collected from each taxpayer by the commissioner shall be applied first to such taxpayer's liability for taxes owed the state."[41] That is, to the extent that a return is sufficiently complete to identify the amount in sales and services subject to the state tax, the associated proceeds must first be applied to amount owed the State. Under the rule that express provision for one thing implies the exclusion of another,[42] the Revenue Code otherwise limits the State's interest in unidentifiable

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[37] *See* pages 2 through 4 *supra*.
[38] If the proceeds were treated as state revenue, there would be a potential issue under the rule requiring uniformity in taxation because different rates apply in different jurisdictions. *Cf. Youngblood v. State,* 259 Ga. 864, 865-66 (1990).
[39] *See generally supra* note 1.
[40] Dealers are allowed a deduction "at the rate and subject to the requirements" of the state sales and use tax. O.C.G.A. §§ 48-8-87 (LOST); -104(a) (Homestead); -113 (SPLOST); -141 (E-SPLOST); -204 (water and sewer projects and costs tax). The Department of Revenue is required to cause "[o]ne percent of the amount collected [to] be paid into the general fund of the state treasury in order to defray the costs of administration." O.C.G.A. §§ 48-8-89(a)(1) (LOST); *see also* -104(c)(1) (homestead); -115(a)(1) (SPLOST); -141 (E-SPLOST); -206(1) (water and sewer projects and costs tax). *See also* 1965 Ga. Laws 2243 (MARTA), *amended by* 1971 Ga. Laws 2082, 2083, § 25; 1974 Ga. Laws 2617.
[41] O.C.G.A. §§ 48-8-87 (LOST); -104(a) (homestead); -113 (SPLOST); -141 (SPLOST for educational purposes); -204 (water and sewer projects and costs tax).
[42] *See Focht v. Am. Cas. Co.*, 103 Ga. App. 138, 140 (1961).

proceeds to that of the other recipients under O.C.G.A. § 45-8-67[43] and would similarly limit the State's interest in the absence of the Code section or during a period of ceased authority under the Code section.

Conclusion

For the foregoing reasons it is my official opinion that when the General Assembly extends a sunset date in subsection (h) of Code section 48-8-67 in the manner of 2009 Ga. Laws 723, the extended authority to process unidentifiable sales tax proceeds pursuant to the Code section applies to undisbursed, unidentifiable proceeds of a preceding period of time, which began with the earlier sunset date and ended with its extension (the "gap period").

Issued this 9th day of March, 2010.

Sincerely,

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[43] *See* O.C.G.A. § 48-8-67(a) (defining state as one recipient, quoted *supra* note 11); *see also* O.C.G.A. § 1-3-8 ("The state is not bound by the passage of a law *unless* it is named therein.") (emphasis added).