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*State Auditor: Disclosure of Information to
Taxation: Disclosure of Information*

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*5 M.R.S.A. § 243
5 M.R.S.A. § 244*



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State Controller
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In re Access of Auditors to Confidential Tax Records

Gentlemen:

After reviewing the materials which you have submitted, prior opinions of this office, the legislation at issue, and the relevant rules of statutory construction developed by Maine case law, I am of the opinion that 36 M.R.S.A. §§ 2062, 3403, 4641(m), 5340 and 6121 do not bar inspection of otherwise confidential tax records by auditors performing the duties required by them by 5 M.R.S.A. §§ 243, 244 and 1621.

In reaching this conclusion I am aware of the language of each of the sections of Title 36 cited above and the decision of the State of Ohio in Lindley vs. Ferguson, ___ Ohio ___ (No. 75 Ap-475, March 30, 1976) considerably proffered by the Bureau of Taxation.

The Ohio case is based upon circumstances considerably different than the issue at hand. The Ohio Auditor was seeking verification by examination of original tax records of payment

vouchers prior to actual payment. He was acting in a pre-audit capacity; a capacity or function that in Maine has long been legislatively delegated to the State Controller (5 M.R.S.A. § 1541, et seq.). The division of responsibility between the State Controller (pre-audit bookkeeping and accounting functions) and the State Auditor (5 M.R.S.A. § 241, et seq; post-audit function) was the subject of an opinion of this office dated July 9, 1940, (copy attached) in which we observed a statutory bifurcation of function between the State Controller and the State Auditor. That bifurcation of responsibility has remained substantively unchanged over the past 40 years. The State Auditor's function remains limited to the conduct of a continuous post audit of all accounts and other financial records of state government. He maintains no accounts in the Department of Audit. Further, he performs no bookkeeping, accounting or audit-before-payment functions. He remains "a true auditor in every sense of the word" (Opinion of the Attorney General, July 9, 1940 at p. 2).

I have also attached a copy of the opinion of this office of May 1, 1942. (Opinion of the Attorney General, May 1, 1942, Attorney General's Report at pp. 105-108). It generally discussed the importance of the office of State Auditor to the financial integrity of the State, noting in part:

"In him [the State Auditor] is reposed the power of the State, through its Legislature, and its Executive and its Attorney General, to pry into the most closely guarded financial transactions of any department of the State or Agency thereof, and to bring out into the open and scrutinize carefully any financial matters of public concern or any matters that may have a bearing on the financial transactions of the department or body under examination." (Id. at 106)

The next eleven paragraphs of that opinion, although lengthy, are highly pertinent to this issue now under inquiry and are attached herewith.

You should also note the opinion of the Attorney General dated August 11, 1943. (Copy attached) The thrust of that opinion was directed to P. L. 1933, Chapter 148, Section 32, the origin of 36 M.R.S.A. § 3403 and confidentially of Bureau of Taxation records. Old Section 32 like the present § 3403 was designed to protect the confidentiality of Inheritance and Estate tax records. The same general purposes may be attributed to 36 M.R.S.A. §§ 2062, 4641(m), 5304 and 6121. To varying degrees, they all express the same concern for confidentiality expressed by the Legislature in enacting Section 32, Ch. 148, P.L. 1933. However, as expressed by our opinion of August 11, 1943, and the practice followed with respect to audit of the tax records of the State since, the above-cited sections must

not be interpreted as barring the State Auditor from inspection of any and all records in the Bureau of Taxation.

In addition to the foregoing, the rules of statutory construction require this result. Cardinal among those rules are the following precepts: (1) "to save not to destroy," (State v. Davenport, Me., 326 A.2d 1, 1974); (2) to construe so as to form a "consistent and harmonious whole," (Watts Detective Agency v. Inhabitants of Sagadahoc County, 137 Me. 233 (1941)); (3) to "ascertain and carry out legislative intent," (Hanbro, Inc. v. Johnson, 158 Me. 180 (1962)); and (4) to avoid a construction leading to a result not within the contemplation of the lawmaking body, or a result which is "absurd." (Inhabitants of the Town of Ashland v. Wight, 139 Me. 283 (1943)).

The post-audit responsibilities of the State Auditor pre-date the confidentiality provisions of the tax statutes here under consideration. At the time of enactment of the initial confidentiality statute (Section 32, ch. 148, P.L. 1933, precursor of 36 M.R.S.A. § 3403), the Attorney General ruled that the requirements of that section did not bar inspection of tax records by the State Auditor and that the legislature did not intend that the confidentiality statute bar the State Auditor from such inspection. (Opinion of the Attorney General, August 11, 1943). Since that time, the customary and established practice has been that the cited confidentiality statutes do not bar the State Auditor from inspecting the tax records of the Bureau of Taxation. Since Ch. 148 § 32, P.L. 1933 was enacted, the legislature has expanded the Bureau of Taxation and at the same time enacted several additional tax information confidentiality provisions patented after the 1933 provision. Each enactment came with the knowledge of our opinion of 1943; the duties and responsibilities entrusted to the State Auditor; and the Administrative practice of excepting the State Auditor from exclusion under the cited sections of Title 36.


In view of these many considerations, I must conclude that the Legislature sought to remedy mischief of the type alluded to in our opinion of August 11, 1943, and not to exclude the State Auditor from the Bureau of Taxation. His powers are general and pervasive. His charge is to perform a post-audit of all accounts and other financial records of the state government or any department or agency thereof. (5 M.R.S.A. § 243) His post-audit is to be continuous and to include all the "accounts, books, records and other evidence of financial transactions kept in the Department of Finance and Administration or in the other departments and agencies of the state government." (5 M.R.S.A. § 244)

It is inconceivable that the Legislature in enacting the sections of Title 36 here at issue could have intended that the financial transactions of the Bureau of Taxation be kept from review by the

Auditor. Such a construction would be inconsistent with the historic post-audit function assigned the State Auditor by law and the resulting administrative practices which have been observed in the State over the last half century. Such a construction would lead to disharmony and confusion, thwarting rather than effectuating legislative purpose and intent.

Thus, sections 2062, 3403, 4641(m), 5340 and 6121 cannot be interpreted to prohibit disclosure of the records of the Bureau of Taxation to the State Auditor in the performance of his duties pursuant to 5 M.R.S.A. §§ 243 and 244 and to the independent auditors performing their duties pursuant to 5 M.R.S.A. § 1621.

Sincerely yours,


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cc: Jerome S. Matus, Esq.
Roger Larouchelle, Audit