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To: Emmanuel Welsh, Chief of Staff  
Andrew Schaufele, Deputy Comptroller

From: Brian L. Oliner, Principal Counsel *BLO*

Date: May 25, 2022

Re: Tax-General § 9-305(b); § 9-306

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You have forwarded to me a letter dated May 23, 2022, from Governor Hogan to Comptroller Franchot. In this letter the Governor calls on the Comptroller to provide tax relief to Maryland citizens by halting or minimizing the motor fuel tax increases dictated by Md. Code Ann., Tax-Gen. § 9-305(b) and § 9-306. You have asked me whether the Comptroller has any authority to disregard the requirements of these two statutory provisions. For the reasons stated below it is my conclusion that the Comptroller has no authority to disregard these provisions.

It is well settled that the power to impose a tax rests exclusively with the Legislature. Md. Decl. of Rights, Art. 14 (“No...tax...ought to be rated or levied, under any pretense, without the consent of the Legislature”); *Shell Oil Co. v. Brownley*, 181 Md. 8, 13 (1942) (“no tax can be levied without express authority of law.”) *See also, Benson v. State*, 389 Md 615 (2005). The duty to enforce the tax laws as enacted by the Legislature rests with the Comptroller. Constitution of Maryland, Art. 6, § 2 (“The Comptroller shall...superintend and enforce the prompt collection of all taxes and revenues.”) And the failure to carryout those duties can have significant legal consequences such as removal from office, Constitution of Maryland, Art. 6, § 6, or criminal charges for misfeasance, malfeasance, and/or nonfeasance. *Duncan v. State*, 282 Md. 385, 388 (1978).

Maryland’s Legislature, like most states and the federal government, has imposed taxes on the sale of motor fuel in this State. Tax-Gen. Title 9, subtitle 3. With certain

exemptions, not relevant here, the motor fuel tax is imposed on each gallon of gasoline to be sold in Maryland. Tax-Gen. § 9-305. In general, the tax is imposed “at the pump” when a consumer purchases motor fuel from a retailer. COMAR 03.03.01.02A. The retailer then remits the tax collected to the Comptroller with the tax return required by law for reporting such motor fuel sales. Tax-Gen. § 9-314; COMAR 03.03.01.05A. In general, the returns, with the payments, are required to be filed monthly. Tax Gen. § 9-308(a); COMAR 03.03.01.05A.

Tax-General § 9-305 sets forth the tax rates for Maryland’s motor fuel tax. Prior to 2013, motor fuel was taxed at a fixed rate as set forth by statute. The motor fuel tax was not periodically adjusted for inflation. (2013 H.B. 1515, Fiscal and Policy Note, p. 7.) Any change to the tax rate required action by the General Assembly. In addition, unlike some states, Maryland did not impose a sales tax or equivalent tax on motor fuel. (*Id.*)

2013 Laws of Maryland, Ch. 429 changed the motor fuel tax rate to index it to inflation. The Legislature set forth a mandatory method to be used by the Comptroller for calculating the annual motor fuel tax rate. The initial rate, codified at Tax-Gen. § 9-305(a), remained unchanged. On an annual basis, the tax rate is increased. Tax-Gen. § 9-305(b)(1). The formula for calculating the annual increase is indexed to inflation vis á vis the Consumer Price Index. Tax-Gen. § 9-305(b).

Chapter 429 also added a sales and use tax equivalent along with the motor fuel tax. Again, the Legislature set forth a mandatory method to be used by the Comptroller for determining the sales and use tax equivalent rate each year. Tax-Gen. § 9-306.

After making certain distributions, the revenue attributable to the sales and use tax equivalent rate imposed under Tax-Gen. § 9-306 and to the revenue attributable to the increase in the motor fuel tax rate imposed under Tax-Gen. § 9-305(b) are distributed to the Transportation Trust Fund. Tax-Gen. § 2-1103.

The two statutory provisions at issue clearly and explicitly set forth the precise manner by which the Comptroller is to determine the additional tax rates. For indexing the motor fuel tax rate to inflation, the Comptroller has no discretion and must use the “‘Consumer Price Index [“CPI”] for all urban consumers’...published by the Bureau of Labor Statistics of the U.S. Department of Labor.” Tax-Gen. § 9-305(b)(3). The statute further specifies which CPI period is to be used and the mathematical formula to use. *Id.* Similarly, Tax-Gen. § 9-306(d) and (e), set forth the data source and formula for calculation of the sales and use tax equivalent rate. In each instance where the statute sets forth a specific instruction it is preceded by the word “shall.” In such context, considering the words in conjunction with the context in which they appear, the word “shall” followed by a specific instruction denotes an imperative obligation inconsistent with the idea of

discretion. *Fox v. Baltimore City Detention Center*, 235 Md. App. 37, 60-61 (2017); *State v. Coale*, 250 Md. 1, 37 (2021).

Each of the above provisions places a mandatory duty and responsibility upon the Comptroller to calculate, set, and collect the motor fuel tax and sales and use tax equivalent on motor fuel. The Comptroller has no independent authority to not use these specific formulas, to substitute some alternative approach, or to ignore the laws altogether.

The Comptroller has limited authority, when good cause is shown, to grant an extension to file a motor fuel tax return. Tax-Gen. § 9-308(1)(iii).<sup>1</sup> This limited authority to grant an extension cannot be interpreted to convey authority to grant a blanket waiver of any tax imposed under the Tax General Article, including those taxes imposed under Title 9, Subtitle 3 of the Tax General Article.

The mandatory language used by the Legislature, the constitutional duty of the Comptroller to collect the taxes legally imposed by the Legislature, and the lack of any discretionary authority given to the Comptroller not to collect taxes levied by the Legislature, leads to only one conclusion: the Comptroller has no legal or regulatory authority at his disposal to halt or minimize the taxes imposed by Tax-Gen. § 9-305(b) and § 9-306.

**THIS IS AN OPINION OF COUNSEL AND NOT AN OFFICIAL OPINION OF  
THE OFFICE OF THE ATTORNEY GENERAL**

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<sup>1</sup> The Comptroller has similar authority to extend the due dates for returns for some other types of taxes he administers. *See, e.g.* Tax-Gen. § 10-823 (for good cause, Comptroller can extend income tax return filing deadline); Tax-Gen § 11-503 (for good cause, the Comptroller can extend sales and use tax return filing deadline). But none of these provisions gives the Comptroller authority to unilaterally declare that the income tax or sales and use tax is waived.