

Note from the Attorney General's Office:

1958 Op. Att'y Gen. No. 58-2190 was overruled in part by 1980 Op. Att'y Gen. No. 80-003.

2190

INTEREST; EARNED ON INVESTMENTS OF PROCEEDS, BONDS, NOTES OF INDEBTEDNESS—DISPOSITION OF SUCH INTEREST AMONG FUNDS—MUNICIPAL CHARTER—INTEREST EARNED ON OTHER FUNDS, DISPOSITION. 4897 OAG 1942, P. 168, OVERRULED IN PART—1365 OAG 1957, P. 701, MODIFIED.

SYLLABUS:

1. The provision of Section 5705.10, Revised Code, relative to the disposition of interest arising from the investment of proceeds of bonds, notes or certificates of indebtedness is not applicable to municipalities, and such interest may be distributed by a municipality in whatever manner is required by its charter, or, in the absence of a charter as provided by ordinance. Opinion No. 4897 for 1942 overruled in part.

2. Interest received from investment by a municipality of funds arising from sources other than sale of bonds, notes and certificates of indebtedness, may be used for such purposes and distributed in such manner as the municipality may determine. Opinion No. 1365 for 1957, modified.

Columbus, Ohio, June 4, 1958

Hon. James A. Rhodes, Auditor of State
State House, Columbus, Ohio

Dear Sir:

I have before me your request for my opinion reading as follows:

“Amended Section 5705.10, Revised Code, became effective August 27, 1957. That part of the section with which we are concerned is as follows:

‘All proceeds from the sale of a bond, note, or certificate of indebtedness issue, except premium and accrued interest, shall be paid into a special fund for the purpose of such issue, and any interest earned on money in such special fund shall be used for the purposes for which the indebtedness was authorized. * * *’

“The City of Cincinnati operates under a charter, copy of which I do not have available for your use. The council of the city has undertaken to provide a distribution of interest contrary to the provisions of amended Section 5705.10, Revised Code, above set out, by ordering interest on bond funds and special assessment funds, with certain exceptions, to be paid to the sinking or bond retirement fund. Apparently, the phrase ‘bond funds’ is

the designation used to identify the fund into which are paid the proceeds of bonds, notes, or other certificates of indebtedness incurred for the purpose of public improvements. It is the intention of the fiscal officer of the City of Cincinnati to follow the ordinance (a copy of which is enclosed) rather than the statute in this regard.

“In passing it should be noted that a number of provisions in the ordinance, other than that providing for the disposition of interest earned on construction funds, are contrary to several opinions of the Attorney General issued at various times in years past.

“No question is raised with respect to funds held by the municipality under the terms of a trust, will or agreement which require earnings with respect to such fund to be paid to the fund.

“In connection with this matter, I wish to call to your attention Opinion of the Attorney General No. 4897 for the year 1942, in which the then Attorney General concludes that interest earnings on investments should be paid into the general fund other than interest arising out of the investment of funds created by the sale of bonds, notes, or other certificates of indebtedness which, under the statutes then in effect, was distributable to the sinking fund or bond retirement fund and which now is required to be distributed to the ‘construction’ fund. The Attorney General further concludes that the council of a city may not prescribe by ordinance, resolution or otherwise for any other disposition of interest earned on treasury investments.

“In Opinions of the Attorney General for 1956, No. 6183, the then Attorney General refers to the 1942 opinion and agrees with the conclusion set out in the first syllabus of the 1942 opinion.

“Also, in Opinion No. 1365 for the year 1957, you quote with approval excerpts of the 1942 opinion as to the distribution of earnings between the bond retirement fund and the general fund. The 1957 opinion also deals with the problem of loss or accretion upon the sale of investments made under the provisions of Section 135.12, Revised Code, by a board of education.

“I have found no reported cases or opinion of the Attorney General on this subject as it relates to municipalities.

“Under the foregoing circumstances, your opinion to the following questions is requested:

1. May council of the City of Cincinnati effectively provide for the distribution and use of interest earnings on funds created by the issuance of bonds, notes, or other certificates of indebtedness in a manner contrary to the provisions of Section 5705.10, Revised Code?

2. May premiums and discounts on treasury investment purchases be credited to or charged against interest?
3. May gains and losses in the sale of treasury investment securities be credited to or paid from interest?
4. May earnings on treasury investments be paid to particular funds in proportion to the amounts available for investment from such funds where the moneys available for investment do not arise out of the sale of bonds, notes, or other certificates of indebtedness?
5. In the event your answer to No. 4 is in the affirmative, may distribution of interest earnings on treasury investments be made under a formula which establishes for each fund interest in the treasury investment account equal to the average of the balance each fund had in such account on the first day of each month during the period for which distribution is to be made or must the distribution be made on the basis of the amount of money in each fund actually available for investment and invested?"

Not having before us the charter of the city of Cincinnati, and there being no suggestion in your letter that it contains a provision for the disposition of the interest arising on its investments, I can only assume for the purpose of this opinion that the action of the city council is not forbidden by any provision of its charter.

The question involved in your first inquiry is whether the city may determine that interest earnings on its investments of the proceeds of bonds shall be paid into its sinking fund or bond retirement fund, instead of being added to the fund, the investment of which has produced the interest earnings, disregarding the provision of Section 5705.10, Revised Code, as amended by the 102d General Assembly, and which is quoted in your communication.

This at once raises the question of the home rule power of municipal corporations as conferred by the adoption in 1912 of Article XVIII of the Constitution.

It is provided by Section 3 of Article XVIII of the Constitution:

“Municipalities shall have authority to exercise all powers of local self-government * * *.”

Section 6 of Article XIII of the Constitution reads:

“The General Assembly shall provide for the organization of cities, and incorporated villages, by general laws; and restrict their

power of taxation, assessment, borrowing money, contracting debts and loaning their credit, so as to prevent the abuse of such power.”

It is also provided in Section 13 of Article XVIII:

“Laws may be passed to limit the power of municipalities to levy taxes and incur debts for local purposes, * * *.”

These provisions of the Constitution plainly operate to give to the legislature the power, by proper legislation, authority to limit municipalities in incurring debts. The direct question therefore which we have to consider is whether the powers thus reserved to the legislature to “limit” municipalities in their power to “incur debts” give the legislature any authority to control a municipality in investing funds which it has in its hands from the sale of bonds or otherwise and specifically, is Section 5705.10, Revised Code, which you quote in your letter in any way a limitation on a municipality’s power to *incur a debt*?

Certainly putting its funds out at interest or investing them in interest bearing securities does not involve the incurring of a debt. Prior to its amendment by the 102d General Assembly, Section 5705.10, Revised Code, authorized and purported to require the several political subdivisions to do with the interest arising on its bond funds precisely what the city of Cincinnati, by its ordinance, now proposes to do, to-wit, to pay such interest into the sinking fund or bond retirement fund.

There is of course no doubt as to the authority of the legislature to place such restrictions on the state officers and the political subdivisions other than municipalities. That it is under the impression that it has authority to grant, qualify and withhold municipal powers just as it did prior to 1912 is evident from the acts which are passed at each legislative session, conferring powers on municipalities, and limiting powers already granted. That it doubtless supposes that it may govern the action of municipalities in the handling of their funds is evidenced by the enactment in 1927 (112 Ohio Laws, 128) of Sections 4296-1, *et seq.*, General Code, which with several amendments, now appear as Sections 731.56, *et seq.*, Revised Code, whereby a municipal corporation having money in its treasury which will not be required to be used for six months or more, may invest it in certain specified securities.

These statutes are part of a large volume which pretend to confer municipal powers, which are not within the control of the General Assem-

bly. It might be remarked in passing that practically all of Chapter 715., Revised Code, and a great portion of the municipal legislation found in other parts of the Revised Code could well be repealed, since it is misleading to attorneys and to the courts. Much of it far antedates the adoption of Article XVIII.

I can find no authority in the Constitution for actions of the General Assembly in attempting to confer, withdraw or limit *powers* of municipalities, except in limited fields, such as extra-territorial actions which are plainly not within the scope of "local self-government".

The effect of the home rule amendment was recognized by the Supreme Court in the very first case which arose under it. In *State ex rel. Toledo v. Lynch*, 88 Ohio St., 71, the court, though holding that a municipality could only exercise this new power by adopting a charter, yet recognized that the legislature was stripped of its long enjoyed authority to create and destroy. In very guarded language, Judge Shauck said in the opinion:

"But the amended article authorizes the electors of a municipality to secure some immunity from the uniform government which it perpetuates as a primary status of all municipalities, and to entitle their municipality 'to exercise all powers of local self-government'."

Judge Donahue, in a concurring opinion was much more positive. After referring to the former domination by the legislature, he said:

"* * * It was this condition of affairs that this provision of the constitution intended to change, and this, I think, these amendments have accomplished. It would therefore follow that the provision of Section 2, authorizing the enactment of general laws *for the government of cities and villages*, and additional laws for the government of municipalities adopting the same, *does not authorize the legislature to grant any powers to municipalities, or to expand the powers already granted by the people, or to fix any date or any condition precedent to the exercise of these powers.* The grant of powers found in Section 3 *is full, absolute and complete within itself.* Therein is granted authority to exercise all powers of local self-government. Nothing further remains to be granted, and *no authority* is lodged anywhere, except in the donors of the grant, *to impose conditions* or delay the exercise of the rights conferred." (Emphasis added)

The principles thus so emphatically expressed have been followed in a long succession of decisions by all of our courts and numerous opinions of this office.

The limitation that these broad powers could only be enjoyed by a municipality by adopting a charter was later removed in the case of *Perrysburg v. Ridgway*, 108 Ohio St., 245, wherein it was held:

“The grant of power in Section 3, Article XVIII is equally to municipalities that do adopt a charter as well as those that do not adopt a charter, the charter being only the mode provided by the Constitution for a new delegation or distribution of the powers already granted in the Constitution.”

In Opinion No. 4897, Opinions of the Attorney General for 1942, p. 168, a question substantially identical with the one which you are here presenting, was under consideration. At that time, the statute, Section 5625.10, General Code, Section 5705.10, Revised Code, provided that all interest earned on money arising from the proceeds of the sale of bonds or certificates of indebtedness should be paid into the sinking fund or the bond retirement fund of the subdivision. The city council in that case undertook by ordinance to provide that such interest should be paid into the fund for the purposes for which the bonds were sold. It was held in the opinion in question that such interest must be paid as the statute directed and not in accordance with the provisions of the ordinance. The second paragraph of the syllabus of that opinion reads as follows:

“A council of a city may not prescribe by ordinance, resolutions, or otherwise for any other disposition of interest earned on treasury investments.”

An examination of that opinion shows that no consideration whatsoever was given to the powers of a municipality conferred by home rule amendment and since I am of the opinion that the action of the city council in the case which you present is a legitimate exercise of the power of the city and not controlled by any power of limitation reserved by the constitution to the legislature, I find it necessary to overrule the syllabus above quoted from that opinion.

You refer also to Opinion No. 6183, Opinions of the Attorney General for 1956, p. 39, and Opinion No. 1365, Opinions of the Attorney General for 1957, p. 701, both of which referred with approval to the 1942 opinion, *supra*. I have no quarrel with those later opinions, as they both referred to funds of a school district. However, paragraph 1 of the 1957 opinion, *supra*, should be modified so as to exclude municipal funds.

Your second question is whether premiums and discounts on treasury

investments by a municipality may be credited to or charged against interest. This and your third question relating to gains and losses appear to me to be practically identical. If my answer to your first question is sound, then it would follow that the disposition or distribution of premiums and discounts on investments, and gains and losses due to investment would be as the municipal council may determine.

Your fourth question relates to interest earnings on investment of moneys which do not arise from the sale of bonds, notes or other certificates of indebtedness. In view of my discussion of your first question, and my conclusion thereon, it appears to me that the right of a municipality to decide as to the investment of its surplus funds, and the disposition of the interest arising from such investments would apply equally to moneys arising from any and all sources, unless limited by terms imposed by a donor.

If, as to such miscellaneous funds the municipality determines to distribute the interest earnings to the several funds which have been joined in a single investment, in proportion to their several contributions, that is certainly within the power of the municipality.

In view of what has been said above, your fifth question does not appear to require discussion.

Accordingly, in specific answer to the question submitted, it is my opinion:

1. The provision of Section 5705.10, Revised Code, relative to the disposition of interest arising from the investment of proceeds of bonds, notes or certificates of indebtedness, is not applicable to municipalities, and such interest may be distributed by a municipality in whatever manner is required by its charter, or, in the absence of a charter as provided by ordinance. Opinion No. 4897, Opinions of the Attorney General for 1942, p. 168, overruled in part.

2. Interest received from investment by a municipality of funds arising from sources other than sale of bonds, notes and certificates of indebtedness, may be used for such purposes and distributed in such manner as the municipality may determine. Opinion No. 1365, Opinions of the Attorney General for 1957, p. 701, modified.

Respectfully,

WILLIAM SAXBE
Attorney General