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1. TAXES ILLEGALLY LEVIED AND COLLECTED WHICH ARE UNEXPENDED AND IN THE POSSESSION OF THE OFFICER COLLECTING THE SAME CANNOT BE REFUNDED UNDER THE PROVISIONS OF SEC. 2723.05, R.C., UNLESS THE PAYMENT OF SUCH TAXES WAS INVOLUNTARY, AND IT IS A QUESTION OF FACT TO BE DETERMINED IN EACH CASE WHETHER A PROPER PROTEST WAS MADE—

2. TAXES WHICH ARE VOLUNTARILY PAID SHOULD BE APPLIED TO THE PURPOSE FOR WHICH THE LEVY WAS MADE, EVEN THOUGH ILLEGALLY MADE—§2723.05, R.C.

SYLLABUS:

1. Taxes illegally levied and collected which are unexpended and in the possession of the officer collecting the same cannot be refunded under the provisions of Section 2723.05, Revised Code, unless the payment of such taxes was involuntary, and it is a question of fact to be determined in each case whether a proper protest was made.

2. Taxes which are voluntarily paid should be applied to the purposes for which the levy was made, notwithstanding the levy was illegally made.

Columbus, Ohio, May 11, 1961

Hon. Stanley E. Kolb, Prosecuting Attorney
Warren County, Lebanon, Ohio

Dear Sir:

Your request for my opinion poses a question raised by the city solicitor of the City of Franklin, the pertinent part of that letter reading:

"We have a question concerning the disposition of a certain fund amounting to \$8,745.95, held by the City of Franklin Water Department. The City passed an Ordinance No. 1956-29, which placed a tax on the sewer and water charges of the residents at the rate of 50%, which was placed in the General Fund for operating expenses of the City.

"The validity of the tax was questioned by R. H., who was cited to appear before the Municipal Court of the City for failure to pay the tax, the citation being authorized by the provisions of the penalty section of the above mentioned Ordinance.

"The tax procedure is set forth in the Supreme Court decision cited above. The local Municipal Court ruled that the tax was illegal and was sustained by the Court of Appeals for this County and by the Supreme Court in the above decision.

"Approximately eighteen months ago, the City Officials advised the Water Department to hold all funds collected from this tax in a separate fund, pending the outcome of the litigation. The amount set forth above has been collected since that date.

"Since the tax has been declared illegal, it is the opinion of the undersigned that the amount collected and unexpended should be refunded to those paying same, under the provisions of Section 2723.05, O. R. C.; however, upon contacting the Auditor's Office for this district, we were advised that they do not agree and that they feel no portion of the fund on hand could be refunded unless the proper protest was shown by the taxpayer at the time the collection was made and the provisions of Section 2723.01, et seq., were otherwise complied with.

"We ask that you advise us if it would be proper for us to refund to the taxpayers the amount paid by them which has been held in the fund authorized by the City, the total amount being held set forth above, and if a refund would not be proper without further action, please advise us what action the taxpayers would be required to take in order to recover these funds. Also, we ask that you advise us what use the City might make of any funds which would not be refunded to the taxpayers."

The Supreme Court decision referred to in your request is *City of Franklin v. Harrison, Jr.*, 171 Ohio St., 329, (decided November 30, 1960). In that case the defendant who refused to pay the tax was arrested. Thereafter, he demurred to the affidavit filed against him on the ground that the tax ordinance was unconstitutional and the trial court sustained his demurrer. The decision of the trial court was affirmed by the Court of Appeals which in turn was affirmed by the Supreme Court. It does not appear from the court's opinion or from your request whether any other taxpayers refused to pay the tax, or paid it under protest.

Since the tax has been declared illegal, the question is whether the amount of such tax collected and unexpended should be refunded to those paying it under the provisions of Section 2723.05, Revised Code, reading as follows :

"If, by judgment or final order of any court of competent jurisdiction in this state, in an action not pending on appeal, it is determined that any tax or assessment or part thereof was illegal and such judgment or order is not made in time to prevent the collection or payment of such tax or assessment, then such tax or assessments or such part thereof as is at the time of such judgment or order unexpended and in the possession of the officer collecting the same shall be refunded to the person paying such tax or assessment by the officer having the same in his possession."

The above section was discussed by the court in *Pennsylvania Railroad Co. v. Scioto-Sandusky Conservancy District*, 101 Ohio App., 61 (dismissed for want of debatable constitutional question in 165 Ohio St., 466) at pages 68 and 69, as follows :

"As above indicated, Section 12078-1, General Code (Section 2723.05, Revised Code), was enacted in 1911. Research has failed to disclose the reason for its enactment. Prior to 1911 the taxpayer had two separate and distinct remedies ; (1) An action to enjoin an illegal levy or collection of taxes, and (2) An action to recover such tax.

"The action to recover was required to be brought within one year, and recovery, as well as injunctive relief, was denied if such taxes had been voluntarily paid.

"The 1911 amendment provided that if, by judgment or final order of a court, in an action not pending upon appeal, it has been or shall be adjudged and determined that any taxes or assessments levied after January 1, 1910, were illegal, and such judgment or order has not been made or shall not be made in time to

prevent the collection or payment of such tax or assessment, then such tax or assessment, or such part thereof as shall remain unexpended and in the possession of the officer, shall be repaid and refunded to the person paying such tax or assessment by such officer.

“It may be noted that the section makes no distinction between a judgment or final order made in equity or at law, but it seems to imply that it would be determined in an action to enjoin levy or collection since it says, ‘is not made in time to prevent the collection or payment of such tax or assessment.’ The language presupposes another action—not one brought pursuant to this section, but a final order or judgment in an action brought pursuant to Section 2723.01, Revised Code.”

In the above case the tax money was “unexpended and in the possession of the officer collecting the same” pursuant to an injunction pending the outcome of that case. In the instant case the tax money is “unexpended and in the possession of the officer collecting the same” pursuant to the advice of the city officials pending the outcome of the litigation in the *Harrison* case, *supra*.

In the *Scioto-Sandusky* case, *supra*, the court held that the individual taxpayers must, if they wish to recover their money, protest the payment of the tax even though it is being held by the officer collecting it pursuant to the outcome of litigation. The court in that case relied on the case of *Trustees v. Thomas*, 51 Ohio St., 285, wherein it was said concerning the payment of tax without protest that, “It may not have been done with alacrity, but it has none the less a voluntary act.” In this regard paragraph two of the syllabus in Opinion No. 1202, Opinions of the Attorney General for 1920, page 523, provides as follows:

“2. An action to recover back taxes illegally levied and collected must be brought by such individual, within one year after the collection. Such an action can not be sustained unless the payment was involuntary and it is a question of fact to be determined in each case as to whether or not a proper protest was made.”

Regarding your question of what use the city might make of any funds which would not be refunded to the taxpayers, paragraph three of the syllabus in Opinion No. 1202, *supra*, provides as follows:

“3. Taxes collected and distributed should be applied to the purposes for which the levy was made, notwithstanding the levy was illegally made.”

Your attention is also directed to the following language in *State on Application of Alter v. Bader*, 56 Ohio St., 718, at page 720:

“It will not be a mis-appropriation of the moneys now in the treasury to the credit of this fund to use them for the purpose for which they were voluntarily paid. They cannot be recovered by those who voluntarily paid them, nor can they be properly devoted to another purpose.”

The only change in the statutes since Opinion No. 1202, *supra*, was written was the enactment of the second paragraph of Section 2723.03, Revised Code, in 1933 (115 Ohio Laws 600). Its import is merely that an action to recover taxes shall not be dismissed on the ground that the taxes were voluntarily paid if they are paid under protest with a notice of intention to sue. Furthermore, the rationale of Opinion No. 1202, *supra*, is in accord with the subsequent *Scioto-Sandusky* case, *supra*.

Based on the foregoing authorities, therefore, I conclude that evidence of involuntary payment must be shown before taxes illegally levied and collected can be refunded under the provisions of Section 2723.05, *supra*. If such taxes cannot be refunded, then they should be applied to the purpose for which the levy was made.

Accordingly, it is my opinion and you are advised:

1. Taxes illegally levied and collected which are unexpended and in the possession of the officer collecting the same cannot be refunded under the provisions of Section 2723.05, Revised Code, unless the payment of such taxes was involuntary, and it is a question of fact to be determined in each case whether a proper protest was made.

2. Taxes which are voluntarily paid should be applied to the purposes for which the levy was made, notwithstanding the levy was illegally made.

Respectfully,
MARK MCELROY
Attorney General