

OPINION NO. 84-005**Syllabus:**

1. A county auditor, in making an advance tax payment to a political subdivision pursuant to R.C. 321.34, is required to draw separate warrants for the payment of funds allocated to the subdivision's general fund and for the payment of funds allocated to service the subdivision's debt charges. The county auditor is not authorized to make an advance payment to a subdivision's general fund in such instances without making a corresponding payment for the subdivision's debt service, unless no part of the money in the county treasury to the account of such subdivision is allocated to service debt charges of the subdivision.

2. A county auditor, in making a payment to a political subdivision after a settlement of taxes, is not required to draw separate warrants to ensure the payment of the subdivision's debt service.

To: Richard G. Ward, Ross County Prosecuting Attorney, Chillicothe, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, February 21, 1984

I have before me your request for my opinion on the following question:

May (a) county auditor continue to disburse to a city school district money from real estate tax collections for current use, and then withhold the debt service money for tax anticipation notes from the second half personal property tax collections?

You have provided me with certain factual background material concerning your request. In May, 1983, the Chillicothe City School District issued noncallable tax anticipation notes pursuant to R.C. 133.301. The notes matured six (6) months after their issuance. The Ross County Auditor was notified of the issuance of these notes.

The city school district then asked the county auditor to distribute real estate tax collections to the district for current use, and to rely on a forthcoming personal property tax collection to pay the debt service on the above notes. The purpose of this request was to ensure that expenses of the district, in excess of the amount of the notes, would be met. You have asked if it is permissible for the county auditor to engage in such a procedure.

You also have advised that the request by the school district was for an advance payment against future tax settlements, and that the county auditor refused to make such advances. Furthermore, you have indicated that you still desire my opinion on this question, as it relates to both advance payments and to payments after tax settlements. This opinion will, therefore, analyze both aspects of this question.

Ohio Const. art. XII, §11, provides:

No bonded indebtedness of the state, or any political subdivisions thereof, shall be incurred or renewed unless, in the legislation under which such indebtedness is incurred or renewed, provision is made for levying and collecting annually by taxation an amount sufficient to pay the interest on said bonds, and to provide a sinking fund for their final redemption at maturity.

This provision has been interpreted by the Ohio Supreme Court as imposing a mandatory duty upon a political subdivision to pay the interest and principal of its indebtedness before provisions are made for current operating expenses. In State ex rel. National City Bank v. Bd. of Education, 52 Ohio St. 2d 31, 369 N.E.2d 1290 (1977), National City Bank and Cleveland Trust (now Ameritrust) brought an action in mandamus against the Cleveland Board of Education, claiming that the board was under a clear legal duty to pay tax revenues into its bond retirement fund to retire notes issued by the board to relators. The board, citing an estimated multi-million dollar deficit forecast, refused to make the payments, preferring to utilize the tax revenues to ensure the continuation of the day-to-day operation of the Cleveland school system. The Supreme Court of Ohio granted relators' request for a writ of mandamus. The Court, relying upon Article XII, §11, concluded that "an absolute priority exists to retire the tax anticipation notes in preference to general operating expenses of the board." 52 Ohio St. 2d at 35, 369 N.E.2d 1203. The Court went on to state that: "Section 11 of Article XII. . . imposes a mandatory duty upon the state and its political subdivisions to pay the interest and principal of their indebtedness before provisions are to be made for current operating expenses." (Emphasis added.) 52 Ohio St. 2d at 35, 369 N.E.2d at 1203. The Court also found that the failure of the board to repay the notes would cause "irreparable and significant injury" to relators. 52 Ohio St. 2d at 38, 369 N.E.2d at 1204.

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The constitutional prohibition of Ohio Const. art. XII, §11 is supported by relevant statutory provisions. R.C. 133.301, which authorizes the issuance of tax anticipation notes by a school district, states that the sums anticipated from tax settlements "shall be deemed appropriated for the payment of such notes at maturity." R.C. 133.301, however, does not specifically distinguish between real and personal property tax settlements, and refers simply to the "collection of current tax revenues in and for any fiscal year."

R.C. 321.34, however, makes it evident that the procedure proposed by the Chillicothe City School District is impermissible insofar as advance payments are concerned. Under R.C. 321.34, the county auditor is specifically instructed to draw separate warrants for the payments of that part of tax revenue funds allocated to the general fund of the subdivision and the part of tax revenue funds allocated to service the debt charges of the subdivision. There is no statutory authorization

¹ R.C. 133.301 states, in its entirety, as follows:

Notwithstanding section 133.20 of the Revised Code, in anticipation of the collection of current tax revenues in and for any fiscal year, the board of education of any school district may borrow money and issue notes therefor, but the aggregate of such loans shall not exceed one-half the amount estimated to be received from the taxes to be distributed to the district from all settlements of taxes for such fiscal year as estimated by the budget commission, other than taxes to be received for the payment of debt charges, and all advances. The sums so anticipated shall be deemed appropriated for the payment of such notes at maturity. The notes shall mature not later than the thirty-first day of December of the year in which the notes are issued, and the proceeds therefrom shall be used only for the purposes for which anticipated taxes were levied, collected, and appropriated. No school district shall borrow money or issue certificates in anticipation of such taxes before the first day of January of the year of such tax receipts. (Emphasis added.)

² It is my understanding that the resolution authorizing the issuance of tax anticipation notes by the Chillicothe City School District was not expressly limited to the anticipation of personal property tax revenues, but rather relied upon the estimated amount to be received from current tax revenues from "all settlements of taxes for fiscal year 1983 as estimated by the budget commission, other than taxes to be received for the payment of debt charges and all advances." Accordingly, I express no opinion at this time as to the authority of a county auditor to act upon a request to withhold funds needed to pay debt service on tax anticipation notes from a particular tax where the resolution authorizing the issuance of tax anticipation notes clearly indicates that only revenues derived from a particular tax are being anticipated.

³ R.C. 321.34 states, in pertinent part, as follows:

When the local authorities by resolution so request, the county auditor shall draw and the county treasurer shall pay on such draft to township clerks, treasurers of municipal corporations, the treasurer of any board of education, and the treasurer of any other political subdivision or taxing district whose funds derived from taxes or other sources are payable by law to the county treasurer, any money that may be in the county treasury to the accounts of such local authorities, respectively, and lawfully applicable to the purpose of the current fiscal year in which such request is made. The auditor and county treasurer shall retain any amounts needed to make such payments of obligations of local political subdivisions or

for the county auditor to proceed to provide a subdivision which has requested an advance payment with a single warrant for payment into the general fund, to be followed with separate warrants after a later tax settlement in order to "make up" the earlier failure to pay towards the retirement of the subdivision's indebtedness. It is axiomatic that the power of the county auditor is fixed by statute, and he or she may not exceed the authority granted that office by the General Assembly. State ex rel. Kuntz v. Zangerle, 130 Ohio St. 84, 197 N.E.2d 112 (1965). Accordingly, a single advance payment for general fund use is not permissible.

While R.C. 321.34 explicitly refers to advances against tax settlements, there is no statutory prohibition against the tax distribution proposed by the city school district after a tax settlement has occurred. R.C. 321.24 establishes the dates for tax settlements between the county treasurer and county auditor with respect to real property taxes and assessments and taxes collected on the general personal and classified property duplicates. R.C. 321.21 provides:

Immediately after each settlement with the county auditor, on demand, and on presentation of the warrant of the auditor therefore, the county treasurer shall pay to the township clerk, or the treasurer of a municipal corporation, school district, or any board authorized by law to receive the funds or proceeds of any special tax levy. . . all moneys in the county treasury belonging to such boards or subdivisions.

Neither R.C. 321.24 or R.C. 321.31 mandates that a separate warrant for debt service be issued after the settlement. Accordingly, I am unable to conclude that a county auditor must draw a separate warrant for that part of a subdivision's taxes that is allocated for debt service after each tax settlement. The city school district, however, is constrained to follow the provisions of Ohio Const. art. XII, §11 and State ex rel. National City Bank, which make the retirement of the notes an absolute priority over ensuring general operating expenses.

In conclusion, it is my opinion, and you are hereby advised, that:

1. A county auditor, in making an advance tax payment to a political subdivision pursuant to R.C. 321.34, is required to draw separate warrants for the payment of funds allocated to the subdivision's general fund and for the payment of funds allocated to service the subdivision's debt charges. The county auditor is not authorized to make an advance payment to a subdivision's general fund in such instances without making a corresponding payment for the subdivision's debt services, unless no part of the money in the county treasury to the account of such subdivision is allocated to service debt charges of the subdivision.
2. A county auditor, in making a payment to a political subdivision after a settlement of taxes, is not required to draw separate warrants to ensure the payment of the subdivision's debt service.

taxing districts as are required by law to be paid directly by the county authorities.

The auditor, in making such advance payment, shall draw separate warrants for the payments for that part of the funds allocated to the general fund of the subdivision and the part allocated to service the debt charges of the subdivision. That part of the advance payment allocated to servicing of debt charges shall be payable to the officer, board of trustees, or commission of the subdivision charged with the payment and retirement of the bonds and notes of such subdivision, and shall be used for no other purpose. Any officer, board, or commission receiving such advance payment shall return a certificate, in the form prescribed by the bureau of inspection and supervision of public offices, to the auditor that the funds so advanced and received have been paid into the bond retirement fund. . . .
(Emphasis added.)