

Note from the Attorney General's Office:

1960 Op. Att'y Gen. No. 60-1244 was overruled by
1981 Op. Att'y Gen. No. 81-006.

1244

COUNTY AUDITOR—IS WITHOUT AUTHORITY TO MAKE ANY DEDUCTIONS FROM SALARIES OF COUNTY EMPLOYEES FOR THE PURPOSES OF A MUNICIPAL CORPORATION INCOME TAX ORDINANCE—OAG 2592, 1948 APPROVED AND FOLLOWED—OAG OPINION NO. 835, 1946 APPROVED AND FOLLOWED.

SYLLABUS:

A county auditor is without authority to make any deductions from the salaries of county employees for the purposes of a municipal corporation income tax ordinance.

Hon. George E. Schroeder, Prosecuting Attorney
Putnam County, Ottawa, Ohio

Dear Sir:

I have your request for my opinion in which you include a letter from the judge of the court of common pleas of Putnam county said letter reading in part:

“I am Common Pleas Judge of Putnam County and was elected by all the voters of the County;

“I draw a salary as Common Pleas Judge of Putnam County in the amount of \$3029.00 and this salary money comes from the County Treasurer on a budget furnished by me showing what I am to receive each month. This money that I get comes from the taxpayers of the County.

“I live in the Village of Leipsic, Ohio and have lived there for 76 years continuously.

“I am not employed by any individual firm or corporation located in the Village of Ottawa.

“I own no property in the Village of Ottawa.

“For some reason which is unknown to me, the County Auditor since last July 1st has been withholding from my monthly salary as Common Pleas Judge of Putnam County one (1%) per cent of the gross salary.

“Now, General what I want to know is under what authority of law or reason could I be assessed one per cent on my monthly salary received as Judge of the entire County of Putnam to support the Municipality of the Village of Ottawa?”

From the facts as given I gather that the village of Ottawa has levied a municipal income tax which includes a levy on the salaries of nonresidents earned in the village.

Regarding the levying of an income tax, Section 8 of Article XII, Ohio Constitution, reads:

“Laws may be passed providing for the taxation of incomes and such taxation may be either uniform or graduated, and may be applied to such incomes as may be designated by law; but a part of each annual income not exceeding three thousand dollars may be exempt from such taxation.”

The effect of this constitutional provision on the right of a municipal corporation to levy an income tax was discussed in the case of *Angell v. Toledo*, 153 Ohio St., 179. This case presented two questions for decision: (1) Did the city of Toledo have the power to provide by its charter or ordinance for the assessment and collection of an income tax? (2) If the municipality had the power to enact such legislation, could it impose such a tax upon nonresidents who worked and received their pay in Toledo? Answering these questions, the syllabus of the case reads as follows:

"1. Ohio municipalities have the power to levy and collect income taxes in the absence of the pre-emption by the General Assembly of the field of income taxation and subject to the power of the General Assembly to limit the power of municipalities to levy taxes under Section 13 of Article XVIII or Section 6 of Article XIII of the Ohio Constitution.

"2. The state has not pre-empted the field of income taxation authorized by Sections 8 and 9 of Article XII of the Constitution, and the General Assembly has not, under authority of Section 13 of Article XVIII or Section 6 of Article XIII of the Constitution, passed any law limiting the power of municipal corporations to levy and collect income taxes.

"3. A municipal income-tax ordinance may provide for collection of the tax at the source.

"4. Ordinance No. 18-46, enacted pursuant to the charter of the city of Toledo, January 28, 1946, is a valid enactment.

"5. Section 6 of Ordinance No. 18-46 of the city of Toledo, providing for the collection at the source of the income tax assessed, commonly known as the pay-roll income tax ordinance, is a valid enactment."

Under this decision, therefore, a municipal corporation may levy an income tax both on residents and on the income of nonresidents (earned in the municipal corporation).

Whether any particular person should pay the municipal income tax of the village of Ottawa appears to me to be a question between that person and the municipal corporation. As I understand it, however, your question concerns the right of the county auditor to withhold the amount of the income tax from the salary of an employee of the county.

In Opinion No. 835, Opinions of the Attorney General for 1946, page 234, one of my predecessors considered the question of whether under the city of Toledo income tax ordinance the state was required to make

deductions from payrolls on the salaries of employees earned in that city. The syllabus of that opinion reads as follows:

“Neither the state of Ohio nor any of its departments, officers, institutions, board or commissions are under any legal duty or obligation to make any deductions from payrolls, file any returns or pay any money to the Commissioner of Taxation of the city of Toledo under the terms of Ordinance No. 18-46 of the city of Toledo providing for the levying of a tax on residents of such city or persons who have earned compensation for services rendered in said city.”

In considering a similar question relating to the income tax of the city of Columbus, another of my predecessors in Opinion No. 2592, Opinions of the Attorney General for 1948, page 12, held in the syllabus:

“The provisions of income tax ordinance No. 658-47 of the city of Columbus which impose on ‘employers’ as therein defined the duty of collecting at the source the tax therein provided for and paying the same to the city of Columbus are without operative effect so far as concerns the state of Ohio or the auditor of state. Said auditor of state is, therefore, under no legal duty to make any deductions from the salaries of state employees by reason of the fact that they may be residents of the city of Columbus or have earned compensation for services rendered in the city of Columbus. Opinion No. 835, Opinions of the Attorney General for 1946, page 234, approved and followed.”

At pages 14 and 15 of Opinion No. 2592, *supra*, it is stated:

“The state of Ohio is not, in express terms, sought to be brought within the definition of an ‘Employer.’ The only language which could conceivably be regarded as attempting to accomplish that purpose must be found in the phrase ‘governmental body or unit or agency.’ For reasons hereinafter stated the conclusion must follow that even if the ordinance were expressly so to provide, the state of Ohio would nevertheless not be amenable thereto. Doing by indirection that which could not otherwise be accomplished would, of course, be without legal effect.

“As an officer of this state you are charged with the performance of certain legal duties. It is a well established principle of law that, as a public officer, you have only such powers as are expressly delegated by statute and such as are necessarily implied from those so delegated. 32 C. J., Public Officers, Sec. 74. Precisely how the city of Columbus, by action of its council, could increase or enlarge your duties is not immediately apparent.

“The city of Columbus is a creature, if that term may be used, whose existence, authority and power emanates from the

state of Ohio as a body politic. The city's power is clearly subordinate to that of the state. And as a municipal corporation said city is without any legal authority whatsoever to command the state as a superior power to perform the duty of collecting at the source the tax which is levied by the said ordinance."

It is well settled that a county officer is an agent of the state. In this regard, it is stated in 14 Ohio Jurisprudence 2d, page 239, Section 52:

"It has been said that all the governmental powers with which county officers are entrusted are the powers of the state, and all the duties with which they are charged are the duties of the state. *Such officers as members of boards of county commissioners, county auditors, and treasurers are mere state agencies, and not legal or corporate personages.* Since county offices are created by the legislature, the determination of the powers and duties of the incumbents of these offices is likewise wholly a matter for the legislature. In other words, county officials have only such powers and duties as are expressly given them by statute, or as are naturally and necessarily implied from the language of the statute. The county has no board vested with legislative powers; its officials must follow the procedure established by statute, and be guided in the administration of their duties only by legislative provisions. Acts of county officers which exceed the limits of their powers are void." (Emphasis added)

The office of the county auditor is created by statute and the auditor can exercise only such powers as are expressly delegated by statute, and only such implied powers as are necessary to carry into effect the powers expressly delegated. (14 Ohio Jurisprudence 2d, page 278.) He has no power or authority whatever to deal with the money of the county except as directed by law, or by those having lawful authority to issue orders and directions in regard thereto. (14 Ohio Jurisprudence 2d, page 282.)

On reviewing the statutory duties and powers of the county auditor I have been unable to find any provision authorizing the auditor to make any deductions from the salaries of county employees for the purposes of a municipal income tax. Further, since the county auditor is an agent of the state and is bound only by the statutes of the state, a municipal ordinance which would attempt to require the auditor to make such deductions would be clearly invalid. I am of the opinion, therefore, that the reasoning and conclusion of Opinion No. 2592, *supra*, as to the duties of the auditor of state, is equally applicable to the duties of a county auditor and that a county auditor is not required or authorized to make deductions from the salary of a county employee for the purpose of a municipal income tax.

In specific answer to your question, it is my opinion and you are advised that a county auditor is without authority to make any deductions from the salaries of county employees for the purposes of a municipal corporation income tax ordinance.

Respectfully,
MARK MCELROY
Attorney General