

1202.

TAXES AND TAXATION—WHERE SUIT BROUGHT TO ENJOIN COLLECTION OF AN ALLEGED ILLEGAL TAX—COUNTY TREASURER COLLECTS AND DISTRIBUTES SAME BEFORE SUIT DETERMINED—SUCH TAXES ARE NOT IN POSSESSION OF COLLECTING OFFICER AND CANNOT BE REFUNDED—WHEN ACTION MUST BE BROUGHT—TO SUSTAIN ACTION PAYMENT MUST BE INVOLUNTARY—TAXES COLLECTED AND DISTRIBUTES SHOULD BE APPLIED TO PURPOSES FOR WHICH LEVY WAS MADE, NOTWITHSTANDING LEVY ILLEGALLY MADE.

1. *Where a suit is brought to enjoin the collection of an alleged illegal tax and before the suit is finally determined, said taxes are collected by the county treasurer and distributed by him to the school district for which they were levied, said taxes are not in the possession of the collecting officer and can not be refunded under the provisions of section 12078-1 (102 O. L. 110).*

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.*

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

COLUMBUS, OHIO, May 3, 1920.

HON. MERVIN DAY, *Prosecuting Attorney, Paulding, Ohio.*

DEAR SIR:—In your communication of recent date you request an opinion on the following statement of facts:

"In re: Grover Hill Rural School District.

On May 16, 1916, Grover Hill Village School District (the same being located in the easterly part of Latty township, Paulding county, Ohio), under favor of section 4682-1 G. C., as amended in 104 O. L., 133, voted to join the contiguous territory of Latty township rural school district. Prior to that time they had erected a new high school building at a cost of approximately \$22,000.00, and had issued the bonds of the village school district in payment therefor. At the time when said village district voted to join the contiguous territory, the outstanding bonded indebtedness was approximately \$21,600.00.

For the years 1916, 1917, for the payment of the accrued interest and said bonds as they became due, there was levied as a sinking fund, by the acting board of education of the abandoned and defunct Grover Hill village school district a certain tax levy on all the taxable property within the territorial limits of the abandoned Grover Hill village school district.

In the year 1918, our taxing authorities, acting upon certain advice received from the Attorney-General's office, made the levy for a sinking fund, for the purpose of paying interest and retiring said school bonds on the taxable property of the entire enlarged district, which comprised, virtually, all of Latty township and the former village school district. On December

21, 1918, certain tax payers, residing in the rural part of this district, filed a petition in the court of common pleas, attacking the legality of this tax levy on the rural part of the district, and prayed for an injunction against the defendant, the county treasurer, (he being the sole defendant) from demanding and collecting any part of said taxes so illegally charged, as aforesaid, and from adding any penalties therefor. No injunction bond was filed, and no injunction was secured until August 5, 1919. The decision was rendered in favor of plaintiffs, declaring that the said levy of taxes for sinking fund on the entire enlarged district was illegal.

At the time this injunction was granted all of said taxes had been paid to the county treasurer, and only a small part thereof had been paid to him under protest. (10 per cent or 15 per cent thereof paid under protest).

Before August 5, 1919, the county treasurer had disbursed to the Latty township rural school district the December, 1918, payment of the so-called illegal taxes, and about the time the decision was rendered the June payment of the so-called illegal taxes were paid over to the same authority, namely, the treasurer of the Latty township rural school district. I will further add that this school treasurer was also one of the plaintiffs in the case securing the injunction. The county treasurer's book shows that the order of disbursement received from the county auditor's office bears date of August 21, 1919.

Thereafter the county board of education detached about twelve square miles of the west end of Latty township, and added the same to Blue Creek township rural school district. This was done on the initiative of the county board of education, under favor of section 4727.

Thereafter, late in the season of 1919 the county board of education on their own initiative, and under favor of section 4736 G. C., abolished the Latty township rural school district and two other school districts, lying to the east of Grover Hill, and out of the territory comprised in the abolished districts, the county board of education creating a new district out of the territory comprised within the abolished districts, and named the newly created district the Grover Hill rural school district said district comprised, roughly speaking, about two-thirds of the territorial limits of the civil township of Latty, and practically all of Washington township, lying to the east thereof, and thereby placing the village of Grover Hill a mile or two from the geographical center of the newly created Grover Hill rural school district. The officials of the abolished districts were ordered to turn over their funds to the newly created district, and thereupon the Latty township rural school district did so, and turned over their funds, which included the sinking fund hereinbefore mentioned, and which amounted to the sum of a little more than \$2,000.00.

A few of the tax payers in the original Latty township rural school district have demanded the return to them of the illegal taxes paid in by them. Some of these who have demanded back their taxes protested at the time they paid their taxes, and others did not protest. The \$2,000.00 in question raised for sinking fund purposes is now in the hands of the treasurer of the recently created Grover Hill rural school district. The county auditor sometime ago made a written request upon him to return it to the

county treasury, and he refused. He is now holding the money awaiting some specific instructions just how it might be legally disposed of.

1. The county auditor wishes to know what he should do in the matter of securing a refund of illegal taxes to the tax payers who paid in the same, under the circumstances as I have heretofore outlined them.

2. The board of education of the newly created Grover Hill rural school district wishes to know if they have legal authority to apply the \$2,000.00 sinking fund coming to them in this way, on the payment of these bonds and interest, which are now past due and a subsisting obligation upon them to pay.

3. Can refunders be issued by the county officials to reimburse these tax payers before this money has been returned by the school board, who now has possession of it, and can the school board be legally required to return it to the county?

* * * "

In this connection two other letters have been received from you, one enclosing a copy of the judge's opinion; also correspondence of the auditor of Paulding county with the bureau of inspection and supervision of public offices has been submitted; all of which have been considered.

In view of all the facts submitted, it seems clear that the levy which the court held to be illegal was collected by the county auditor while the suit was pending and prior to August 5, 1919, the date upon which the injunction was granted by the court of common pleas perpetually enjoining said collection. It further appears that the first half of said illegal taxes were distributed by the county treasurer to the school district in March, 1919, and the last half was distributed in September, 1919. It further appears that no temporary injunction was granted and that no bond was given.

Let us now consider section 12078-1 G. C., 102 O. L. 110, to which you refer in one of your letters, which provides:

"That if, by judgment or final order of any court of competent jurisdiction in this state, in an action not pending on appeal or error it has been or shall be adjudged and determined that any taxes or assessment or part thereof levied after January 1, 1910, was 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 at the time of such judgment or order be then unexpended and in the possession of the officer collecting the same, shall be repaid and refunded to the person paying such tax or assessment by the officer having the same in his possession."

It will be conceded that it was the duty of the county treasurer to distribute the money he had collected at the regular time provided by law. In the case of *Ratterman vs. State*, 44 O. S. 641, it was held:

"The county treasurer can not refuse to pay to the city treasurer, the city's share of taxes collected by the county treasurer, even though such taxes were paid under protest and to avoid distraint, and although the county treasurer may be personally liable therefor."

In view of all the facts, it is believed that the treasurer in the case at hand was justified in making the distribution of said taxes. It is further observed that the first collection was not "in the possession of the officer collecting the same" within the meaning of section 12078-1 supra, and that said first collection can not be refunded under its provisions. It is further evident that there can be no relief granted to the taxpayers in reference to said first collection excepting under section 12075 G. C., which provides:

"Section 12075. Common pleas and superior courts may enjoin the illegal levy or collection of taxes and assessments, and entertain actions to recover them back when collected, without regard to the amount thereof, but no recovery shall be had unless the action be brought within one year after the taxes or assessments are collected."

There is a long line of decisions in Ohio to the effect that taxes voluntarily paid cannot be recovered back. However, it is not essential to consider what constitutes a voluntary payment at this time because the section above quoted expressly provides that "no recovery shall be had unless action be brought within one year after the taxes or assessments are collected." It clearly appearing that more than one year has expired since said first collection was made, there is no remedy available in so far as this collection is concerned regardless of whether the said taxes were voluntarily paid or paid under protest.

In considering the status of the second collection, it will be observed that while the distribution of this fund was made after the judgment was rendered by the court of common pleas perpetually enjoining said collection, an appeal was taken to the court of appeals. The effect of this appeal was to sustain the judgment of the court of common pleas (*Jenney vs. Walker*, 80 O. S., 100). It is assumed that the judgment of the court of common pleas had not been affirmed at the time the second distribution of the illegal levy had been made; therefore the conclusion must be that the August collection of the illegal levy was not "in the possession of the officer collecting the same" within the meaning of section 12078-1 when the final order or judgment was rendered by the court of appeals and no refunding of said taxes can be made in pursuance of said section.

It therefore follows that the only relief available to the taxpayers in reference to the second collection at this time is an action to recover back the taxes paid. It is evident that if this remedy exists at all in this case it would extend only to such of said taxpayers as paid under protest and, as above stated, this could only apply to the second collection and distribution. It is not believed under the circumstances that any refund of said taxes can be made. If there are those who properly protested and desire to avail themselves of the remedy, each must individually bring his action to recover back the taxes paid. In the case of *Trustees vs. Thoman*, 51 O. S., 285, it was held:

"One taxpayer can not sue on behalf of himself and others to recover back payments of illegal taxes, but each must sue for himself."

It may be further said that each individual case must stand upon its own merits as to whether the action taken by the taxpayer constitutes a payment under protest. In other words, whether or not a proper protest was made is a question of fact that must be determined in each individual case before a recovery can be made. Therefore it is not considered essential to discuss herein what constitutes a proper protest.

In specific reply to your first inquiry, you are advised that there is no action that

the auditor is required or permitted to take at this time in connection with the refunding of said taxes.

In considering your second inquiry it will be remembered that the newly created district (Grover Hill rural school district) is obliged to pay the sums for which said levy was made and the funds are in the possession of the treasurer of said school district. It has been held:

"Money paid into the county treasury voluntarily by taxpayers under a levy of taxes to meet the interest and create a sinking fund for the payment of bonds at maturity, issued under an unconstitutional law, must be devoted to the purpose for which it was collected; and the treasurer of the county can not be enjoined at the instance of a taxpayer from paying the same to the holders of the bonds; the treasurer, however, will be enjoined from collecting any levy of taxes for such purpose in the future."

State ex rel. vs. Gibson, 8 O. N. P. 367, 11 O. D. (n. p.) 90.

It is the opinion of this department that the board of education should use said funds for the purpose for which they were levied and collected. It perhaps should be further pointed out that if a suit can be and is successfully maintained against the county treasurer by one or more individual taxpayers to recover back this second collection, the treasurer in such a case should pay the judgment and retain the amount from the next distribution to the school district under the provisions of section 5700 G. C.

In view of the foregoing, it is believed to be unnecessary to specifically answer your third inquiry other than to say that there is no authority in view of the facts in the case at hand which authorizes or would permit the board of education to return said funds to the county treasurer.

Respectfully,
 JOHN G. PRICE,
Attorney-General.

1203.

APPROVAL, BONDS OF TRUMBULL COUNTY, OHIO, IN AMOUNT OF
 \$58,600 FOR ROAD IMPROVEMENTS.

COLUMBUS, OHIO, May 4, 1920.

Industrial Commission of Ohio, Columbus, Ohio.

1204.

APPROVAL, BONDS OF SPECIAL SCHOOL DISTRICT, MAD RIVER
 TOWNSHIP, CLARK COUNTY, IN AMOUNT OF \$45,000 FOR SCHOOL
 HOUSE.

COLUMBUS, OHIO, May 4, 1920.

Industrial Commission of Ohio, Columbus, Ohio.