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1. TAX LEVIES, CLASSIFIED PERSONAL PROPERTY—PROVISION, SECTIONS 5639, 5640 GC WERE MANDATORY—DUTY OF COUNTY TREASURER TO DISTRIBUTE PROCEEDS ACCORDING TO STATUTE—DUTY CONTINUING.
2. DISTRIBUTION OF CLASSIFIED PERSONAL PROPERTY TAX PROCEEDS—AMENDMENT OF FORMER SECTION 5639 GC—EFFECTIVE SEPTEMBER 26, 1949—NO EFFECT UPON DUTY OF COUNTY TREASURER WHO HELD PROCEEDS AVAILABLE FOR DISTRIBUTION BUT FAILED TO DISTRIBUTE FUNDS—FUNDS HELD FOR DISTRIBUTION PRIOR TO AMENDMENT SHOULD BE PAID IN ACCORDANCE WITH STATUTE.

## SYLLABUS:

1. The provisions of former Sections 5639 and 5640, General Code, providing for the distribution of the proceeds of classified personal property tax levies, were mandatory, and the duty of a county treasurer to distribute these proceeds in accordance therewith was and is a continuing duty.

2. The amendment of former Section 5639, General Code, which concerns the distribution of classified personal property tax proceeds and which was effective September 26, 1949, has no effect upon the duty of a county treasurer who held proceeds available for distribution on settlement dates prior to the amendment but failed to distribute such funds; and those funds held for distribution prior to the amendment should now be paid out as provided for in such statute.

Columbus, Ohio, February 24, 1955

Hon. Ray Bradford, Prosecuting Attorney  
Clermont County, Batavia, Ohio

Dear Sir:

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

“The State Examiner from the Auditor of State’s office in March, 1952, made the finding that the auditor of Clermont County, Ohio, for the years 1948 and 1949, did not distribute the classified personal property tax in conformity to and with Section 5639, General Code, then in force, and that the money due the common school fund for these years was short \$8,749.55.

“The county superintendent of schools and the county board of education are now insisting that this money be distributed in conformity to Section 5640, General Code, then in force. The question is, should this now be done.

“Apparently the amount stated by the examiner is correct and also apparently the schools of Clermont County received sufficient money to operate during the years 1948, 1949, and 1950. For that reason the county auditor and county treasurer feel that the distribution of this money should not now be made.”

A rewording of your question might read:

Is the county treasurer required, at this time, to distribute funds collected under the classified personal property tax levy for 1948 and 1949, he having failed to distribute such funds at the time designated by statute?

Former Section 5638-1, General Code, read in part:

“Annual taxes are hereby levied on the kinds and classes of intangible property, hereinafter enumerated, on the intangible property tax list in the office of the auditor of state and duplicate thereof in the office of treasurer of state at the following rates, to wit:” \* \* \*

Former Section 5639, General Code, before its amendment in 1949, read in part:

“At the first settlement of undivided classified property taxes, the county treasurer shall distribute the undivided classified property tax fund in the county treasury as follows:

“\* \* \* The residue of the undivided classified property tax fund, \* \* \* *shall constitute the county school tax fund, and be distributed among all the school districts in the county* (excepting the county school district) in the manner provided by law.”  
(Emphasis added.)

Former Section 5640, General Code, read in part:

“At each settlement of undivided classified property taxes, and each August settlement of real and public utility property taxes, *the county treasurer shall distribute the county school tax fund then in the county treasury to and among all the school districts lying in whole or in part within the county* \* \* \*.”  
(Emphasis added.)

In these statutes, the use of the word “shall” and the meaning of the statutes read in context indicate that no discretionary authority was given

the county treasurer. These statutes were mandatory. See 37 Ohio Jurisprudence, 326, and the extensive authority there cited. These statutes provide for the levy of the tax and for the collection and distribution of the proceeds. These statutes exist today as Sections 5707.03, et seq., Revised Code, and are substantially unchanged except for the amendment in 1949 to Section 5639, General Code, which will be the subject of later comment. The fact remains that these three statutes were in effect and were the law in 1948 and 1949. The public officials were obligated to follow the law. "A law is a rule of action which all persons within the sphere of its operation are compelled to obey." *Plank Road Co. v. Husted*, 5 Ohio St., 378, at page 582.

If it could be shown that the school districts had sufficient operating funds during the period in question, it might well be concluded that the withholding of these funds was the more efficient and economical thing to do. However, the statutory duty was clear and mandatory. The public official had no choice. The duty to distribute to the school districts was obligatory and continuing as to such funds accruing during the year 1948 and such part of the year 1949 as will be hereinafter pointed out.

The amendment of former Section 5639, General Code, which became effective September 26, 1949, made a change in the law important to us in this instance. The last paragraph was changed to read:

"The residue of the undivided classified property tax fund shall be distributed to any board of public library trustees and the school districts of the county. The budget commission shall have authority to determine the amount to be distributed to each participant from the residue, except that any amount allowed to school districts, shall constitute the county school tax fund and be distributed among all the school districts in the county (excepting the county school district) in the manner provided by law."

The legislature, in effect, in this statute repealed the mandatory provisions of the old statute which directed the treasurer to distribute this residue to the county school districts. Thus, effective September 26, 1949, the budget commission was given the discretion to determine the amount of the residue that each participant in the residue would receive. There seems to be no minimum prescribed by the legislature which each participant must receive. It would be illogical to say, on the basis of the first line of the amended last paragraph of former Section 5639, that each participant *must* receive a share of the residue; and then state, as I would

be obliged to do, that the discretionary power of the budget commission permits it to allocate one dollar or one cent to a participant. Thus, for all practical purposes, the budget commission might give nothing to one participant and the entire residue to the other participant, according to the provisions of this statute, as amended.

But the question still remains as to whether the right vested in the school districts by *former* Section 5639, General Code, and the correlative duty of the county treasurer in this instance, was rendered nugatory by the amendment. Section 1.21, Revised Code, formerly Section 26-1, General Code, reads in part:

“When a section or an act or part thereof of the statutes of this state is repealed, such repeal does not:

“(A) Affect any rights or liabilities which exist, have accrued, or have been incurred by virtue of such section or act or part thereof;” \* \* \*

The prescribed recipients of this tax residue were vested with a statutory right to these proceeds by Section 5639, General Code, before it was amended. This amendment of former Section 5639 which repealed that part of the statute creating the right did not, by reason of the above quoted general saving statute, repeal the right itself after it accrued.

In Opinion No. 1138, Opinions of the Attorney General for 1949, p. 777, it was held that funds collected and held at the time of the effective date of this amendment should be distributed according to the amended law. Accordingly, the funds collected and held in the county treasury for *distribution* in 1949 under former Section 5639 *on those settlement days after September 26, 1949*, should be distributed in accordance with the statute as amended. As to those funds collected and available for distribution on settlement days prior to such amendment, however, I am impelled to the view that the mandatory duty on the treasurer to distribute them as provided by the statute then in effect gave rise to a duty which was not affected by the amendment of September 26, 1949.

In specific answer to your question, I am of the opinion that:

1. The provisions of former Sections 5639 and 5640, General Code, providing for the distribution of the proceeds of classified personal property tax levies, were mandatory, and the duty of a county treasurer to distribute these proceeds in accordance therewith was and is a continuing duty.

2. The amendment of former Section 5639, General Code, which concerns the distribution of classified personal property tax proceeds and which was effective September 26, 1949, has no effect upon the duty of a county treasurer who held proceeds available for distribution on settlement dates prior to the amendment but failed to distribute such funds; and those funds held for distribution prior to the amendment should now be paid out as provided for in such statute.

Respectfully,

C. WILLIAM O'NEILL

Attorney General