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CASHIER'S CHECKS—NOT DEPOSITS WITHIN CONTEMPLATION OF SECTION 5324 G. C.—NOT TAXABLE DEPOSITS WITHIN MEANING OF SECTION 5328-1 G. C.—O. A. G. 1932, VOLUME 2, 4676, page 1165, APPROVED AND FOLLOWED.

SYLLABUS:

Cashier's checks are not deposits within the contemplation of Section 5324, General Code, and hence are not taxable deposits within the meaning of Section 5328-1, General Code. Opinion No. 4676, Opinions of the Attorney General for 1932, Vol. 2, page 1165, approved and followed.

Columbus, Ohio, January 17, 1948

Hon. C. Emory Glander, Tax Commissioner
Department of Taxation
Columbus, Ohio

Dear Sir:

Your request for my opinion reads:

"Your formal opinion is respectfully requested in the following matter:

"The Attorney General in 1932 issued an opinion (A. G. O. No. 4676), which held that deposits in financial institutions represented by cashier's checks were not taxable within the provisions of the Ohio law.

"Subsequent to the date of said opinion, there have been several decisions rendered by both the Court of Appeals and the Supreme Court which appear, as a matter of law, to be in conflict with such opinion.

"For my information and guidance your advice with respect to the foregoing will be greatly appreciated."

Reference will be made at the very outset to Opinion No. 4676, Opinions of the Attorney General for 1932, Vol. 2, page 1165, rendered on October 8 of that year to the then Tax Commission of Ohio. After inviting attention to Sections 5406 to 5414, both inclusive, of the General Code, the Commission then asked among others this question:

"Should cashier's or official checks be included as taxable deposits?"

In the body of said opinion this question was answered categorically as follows:

"I am therefore of the opinion that cashier's or official checks are not deposits within the contemplation of Section 5324, General Code, and therefore are not 'taxable deposits' within the meaning of Section 5328-1, General Code."

While not specifically so stating it is manifest that your inquiry presents for consideration the identical question that was asked of the Attorney General for 1932. You have indicated that, in view of recent decisions, upon re-examination of said question the answer thereto may now be otherwise. Unless it is clearly apparent that this former opinion has been substantially weakened by reason of decisions rendered subsequent thereto I would be reluctant to overrule the same. I fully appreciate, however, that it is your legal duty to see that no property which is required to be returned for taxation should enjoy immunity from taxation. Nevertheless, when compelled to decide whether property is subject to taxation as a matter of law, I am confronted with the well established rule that taxing statutes require a strict construction and any doubt must be resolved in favor of the taxpayer. See Clark Restaurant Co. v. Evatt, Tax Commr., 146 O. S. 86; McNally v. Evatt, Tax Commr., 146 O. S. 443.

For the present the pertinent Ohio statutes will be dismissed from mind and attention directed to text definitions of "deposits," "depositor" and "cashier's checks."

In 7 Am. Jur., Banks, Sec. 405, it is said:

"The term 'deposit', when used in connection with a banking transaction, denotes a contractual relationship ensuing from the

> delivery, by one known as the 'depositor', of moneys, funds, or things into the possession of the bank, which receives the same upon the agreement to pay, repay, or return, upon the order or demand of the depositor, the moneys, funds, or equivalent amount, or things, received; this agreement on the part of the bank is usually a tacit one and implied, and it may include an implied promise to pay interest upon the deposit, depending upon the nature of the deposit and the account into which it is placed."

In 5 Michie Banks and Banking, Chapter 9, Sec. 3, in discussing special and general deposits, this observation is made:

> "* * * A deposit is general where a sum of money is left with a bank for safekeeping, subject to order, and payable, not in the specific money deposited, but in an equal sum, whether it bears interest or not. It is a deposit of money in the usual course of banking business generally to the credit of the depositor to be drawn on in the usual course of such business. In other words, a general deposit in a bank is so much money to the depositor's credit; it is a debt to him from the bank, payable on demand to his order, not property capable of identification and specific appropriation. Where a bank collects notes *and issues cashier's checks for the amount, the funds are on general deposit.* * * *"
> (Emphasis added.)

The word "depositor" is also defined in this same section in this language:

> "A 'depositor', *speaking generally,* is one who delivers to or leaves with a bank money subject to his order, either upon time deposit or subject to check." (Emphasis added.)

Further bearing on the definition of a "depositor" is this statement in 5 Zollman Banks and Banking, Sec. 3152:

> "A *general depositor* is one who pays money into a bank to be placed to his credit, subject to his order, evidenced by a demand or time certificate, a bank book, a certificate of deposit, a *cashier's check,* or a draft on another bank, and without any special agreement importing a different character to the transaction. The deposit may be complete before any entry on the books of the bank." (Emphasis added.)

The definition of a "cashier's check" will next be considered. In 7 Zollman, Sec. 4691, it is stated:

> "A cashier's check is a bill of exchange drawn by a bank on itself and accepted by the act of issuance. It is in no sense a check as that term is ordinarily used. It is not drawn by a depositor against a deposit, but is simply an acknowledgment by the bank to the payee. It is in legal effect *as to the payee* a certificate of deposit or certified check or a note."
>
> (Emphasis added.)

See also 6 Michie, Chapter 12, Sec. 13.

It is to be noted from the foregoing that a cashier's check is an instrument which is subject to being issued to a *depositor*. However, such an instrument may also be issued to a *purchaser*. As will later be demonstrated these terms are not synonymous.

Attention will next be invited to this discussion of cashier's checks in 7 Am. Jur., Banks, Secs. 525 and 783:

> "Section 525—The giving of such a check to a *depositor* to cover the amount of a withdrawal, is merely an acknowledgment of an indebtedness on the part of the bank to the payee of the order. *The change thereby made is not in the nature of the debt, but in the evidence of it.* Hence, such a check is held not to be an assignment to the *depositor* of the amount therein specified, as against a receiver taking possession of the property of the bank by order of court, before the check is presented to it for payment." (Emphasis added.)

> "Section 783—In the absence of fraud, the *purchase of a cashier's check,* like the purchase of a draft on a correspondent bank, creates the relation of creditor and debtor, not that of principal and agent, with the result that the *purchaser* or holder thereof is not entitled to a preference over general creditors in the assets of the bank issuing the check, said bank having failed before payment of the check. * * *" (Emphasis added.)

This last mentioned section is found under the topic "Commercial paper drawn by or upon insolvent bank." A statement of similar purport is found in 6 Michie, Chapter 12, Sec. 13, under the heading, "Exchange, money, securities, investment." With respect to a cashier's check, it is said:

> "* * * It is a draft, a primary obligation of the bank, or a form of a check by which the bank lends its credit to the *purchaser* of the check, the purpose being to make it available for immediate use in banking circles. * * * A cashier's check, payable to the order of a person having no knowledge of the trans-

> action or interest in the check, and not intended to be a party to the transaction, may be deemed payable to a fictitious payee."
> (Emphasis added.)

In view of the foregoing text statements the conclusion can be formulated that, when a cashier's check is issued by a bank, whether to a *depositor* or to a *purchaser,* the relationship of debtor and creditor is thereby established. Moreover, as the basis for the issuance of a cashier's check there must be a supporting deposit and it would follow that when a deposit is made there must be a depositor. In this connection I am using the words "deposit" and "depositor" in a comprehensive or general sense and without regard to statutory definitions.

The pertinent Ohio code provisions will now be set out. By virtue of Section 5324, General Code, the General Assembly has seen fit to define "deposits." Therefore, the meaning of the word cannot be enlarged to bring within the scope thereof rights or relationships that were not intended to be covered thereby which, except for such statutory definition, might be within the term when used in a general sense. Said Section 5324 provides:

> "The term 'deposits' as so used, includes every deposit which the person owning, holding in trust, or having the beneficial interest therein is entitled to withdraw in money, whether on demand or not, and whether evidenced by commercial or checking account, certificate of deposit, savings account or certificates of running or other withdrawable stock, or otherwise, excepting (1) unearned premiums and surrender values under policies of insurance, and (2) such deposits in financial institutions outside of this state as yield annual income by way of interest or dividends in excess of four per centum of the principal sum so withdrawable."

Before discussing and analyzing this section I shall invite attention to Section 5406, General Code, which reads:

> "The deposits required to be returned by financial institutions pursuant to this chapter include all deposits as defined by section 5324 of the General Code to the extent that such deposits are made taxable by section 5328-1 of the General Code, excepting deposits belonging to the federal government or any instrumentality thereof; or deposits to the extent of advances or advance payments made under any contract entered into by the federal government or any instrumentality thereof for the production of

materials or supplies or the furnishing of services pursuant to authority of any act to further the war effort; or deposits belonging to the state of Ohio or any county, municipal corporation, school district, township, or other subdivision thereof or to any other financial institution, or to a dealer in intangibles or a domestic insurance company, or to an institution used exclusively for charitable purposes. If any deposit belonging to any of the classes required so to be returned consists in whole or in part of an amount representing uncollected checks and other uncollected items, credited thereto, one-half of the amount so represented shall be considered as withdrawable and to be so included in arriving at the aggregate balance of taxable deposits, required so to be returned, whether or not the depositor is in fact permitted to make withdrawals against the amount so represented and credited."

It is to be observed that excepted from the operative effect of Section 5406 are certain kinds of deposits, i. e., with respect to ownership. In addition, deposits belonging to non-residents of this state are not required to be returned by a financial institution. This is so because of the reference therein to Section 5328-1, General Code, which provides inter alia:

"All moneys, credits, investments, *deposits,* and other intangible property of persons *residing in this state* shall be subject to taxation, excepting as provided in this section or as otherwise provided or exempted in this title; * * *" (Emphasis added.)

The circumstances under which deposits of non-residents may be subjected to taxation are merely noted in passing and, since not here involved, need not be discussed.

I shall now advert to Section 5324, General Code, which has been set out above. One of the conditions therein is that the person having a deposit must be entitled to make withdrawal in money. Furthermore, such right of withdrawal must be evidenced by (1) commercial or checking account, (2) certificate of deposit, (3) savings account or certificates of running or other withdrawable stock. After these enumerated rights then appears the phrase "or otherwise" which must, of course, be given some meaning. Since cashier's checks are not specifically mentioned it is, therefore, essential to ascertain whether it was the legislative intent that the "or otherwise" provision should be so construed as to include this kind of checks.

There is no mystery as to the meaning of the words "or otherwise" when found in a statute following enumerated objects or things. While

there appears to be no Ohio case that throws any light on the subject, decisions in other jurisdictions can be cited which make plain the meaning of said words.

In State, ex rel. Ilvedson v. District Court (1940), 70 N. D. 17, 291 N. W. 620, 628, is found this observation:

> "The words 'or otherwise,' in law, when used as a general phrase, following an enumeration of particulars, are commonly interpreted in a restricted sense, as referring to such other matters as are kindred to the classes before mentioned. Cent. Dict. The phrase 'or otherwise,' when following an enumeration, should receive an ejusdem generis interpretation." (Citing cases.)

To the same effect see State, ex inf. McKittrick v. Wilson, 350 Mo. 486, 166 S. W. 2d 499; Becker Trans. Co. v. Dept. of Public Utilities, 314 Mass. 522, 50 N. E. 2d 817; Ex parte Cook, 67 Cal. App. 2d 20, 153 P. 2d 578.

Can it reasonably be said that cashier's checks, in view of the nature thereof, are unquestionably and undeniably of the same nature as commercial or checking accounts, savings accounts, certificates of deposit, etc.? I do not believe it can be successfully advanced that cashier's checks should be so regarded. Other sections of the General Code fortify this view. Before passing to such other sections I desire to point out that the establishment of a checking or commercial account in a financial institution contemplates a relationship that can reasonably be expected as likely to have some continuity or duration. This is especially true in the case of a savings account or certificate of deposit. While it is entirely conceivable that a checking or savings account may be opened on one day and then closed on the next, this is not usually the situation and would constitute a variation from the customary practice. Banking relations are not usually maintained on such a transitory basis. Therefore the element of continuity of banking relations must have been recognized by the General Assembly when the legislation here under consideration was enacted.

I now direct your attention to Section 5411-1, General Code, which reads in part:

> "On or before the fifth day of December annually, the tax commission of Ohio* shall fix the day as of which the taxable deposits in financial institutions shall be listed and assessed. The day so fixed shall be between the first and the thirtieth days of

November both inclusive and the action of the tax commission shall be taken not more than five days after the day so fixed. * * *"

(*The Board of Tax Appeals now takes the action above provided for. See Section 1464, General Code.)

This comment is found immediately following said Section 5411-1 as contained in the 1941 edition of the Ohio Tax Laws Annotated:

> "This section provides a listing day for deposits during the month of November, to be fixed by the tax commission *after the event,* so that the day will not be known in advance and manipulation of deposits to avoid taxation will be made more difficult." (Emphasis added.)

With respect to taxes being a lien on deposits, Section 5673-1, General Code, should be noted, wherein it is provided:

> "Taxes assessed on deposits in a financial institution in this state shall be a lien on the deposit of each person as of the day fixed by the tax commission of Ohio for the listing of such deposits. * * * It shall be the duty of every financial institution to pay the taxes on the amount of such deposits and/or withdrawable shares assessed in its name to the treasurer of state and any such institution failing to pay such taxes as herein provided shall be liable by way of penalty for the gross amount of the taxes due on and with respect to all its deposits and withdrawable shares assessed in its name and for an additional amount of one hundred dollars for every day of delay in the payment of such taxes."

Section 5673-2, General Code, provides:

> "A financial institution so required to pay to the treasurer of state the taxes assessed upon its deposit accounts, as taxable property of its depositors, and/or upon its withdrawable shares as taxable property of its shareholders respectively, as provided in the next preceding section, may, upon receipt of notice of the day fixed for the listing of such deposits, charge the amount thereof to and deduct the same from the deposit of each depositor, or from the interest that is due or thereafter becomes due thereon, or from the dividends that are due or thereafter become due thereon, as the case may be, and shall have a lien upon such deposit, interest and/or dividends and on all funds in its possession belonging to such depositor or shareholder, or which may at any time come into its possession, for reimbursement of the taxes so payable, with legal interest. Such lien may be enforced in any appropriate manner at any time within six months after the payment of the taxes to the treasurer."

It is a matter of general knowledge that, whatever may be the reasons therefor, many financial institutions have made it a practice to absorb the tax that is assessed on deposits. This does not alter the proposition, however, that by virtue of Section 5673-2, General Code, a "depositor" is subject to having the amount of such tax charged against his deposit. Note the language of this section. The lien therein provided for is "upon such *deposit,* interest and/or dividends and *on all funds in its possession belonging to such depositor.*" What would be the situation in the case of a person who, having no then existing debtor and creditor relationship with a financial institution, handed such institution a specified amount of currency in exchange for a cashier's or official check? Would he forthwith become a depositor within the intendment of the sections here discussed? As a practical matter how could any tax be deducted from this deposit if it may properly be characterized as a "deposit" within the meaning of Section 5324, General Code? As to whether the name of the *purchaser* of a cashier's check is carried on the records of a financial institution is not a matter as to which I have any definite knowledge. Suppose that the *purchaser* of a cashier's check causes the same to be made payable to someone other than himself. Would such third person, who conceivably could have no knowledge whatever of the transaction, thereby become a depositor within the intendment of Section 5673-2, General Code? When Section 5324 is considered in the light of the other sections above mentioned I think it becomes readily apparent that the relationship of a depositor to a financial institution is one that contemplates some continuity.

I am mindful that in the case of the issuance of a cashier's check to a "depositor"—and in this instance I use the word as denoting one whose relationship is other than merely casual—it is entirely probable that no insurmountable barrier would be met in charging such depositor with the tax assessed against the financial institution. I can find no justification, however, for adopting the view that in some instances a cashier's check may be a deposit within the meaning of Section 5324 whereas in other instances it is not a deposit. Any attempt to so apply the taxing statutes would certainly be contrary to the usual procedure and quite difficult to say the least.

Earlier herein I referred to the fact that the terms "depositor" and "purchaser" in respect of a cashier's check are not synonymous. These relationships are discussed in a note in 111 A. L. R. 225 dealing with the

rights of a purchaser or holder of a draft, *cashier's check,* or certified check to be considered as a "depositor" within statutes relating to guaranty or insurance of deposits or deposit liability. While the cases are not in full accord it would appear that the courts have been somewhat liberal in determining that persons are "depositors" so as to come within the protection of legislation designed to afford relief in the case of insolvent banks. After referring to certain cases the annotator makes this interesting observation which I shall quote in part, to-wit:

> "The cases are not entirely in harmony on the present subject, although reconciliation is, to some extent, possible when the particular facts are taken into consideration. As sometimes indicated, the question whether one becomes or remains a depositor in a bank is often a question of intent. If one who is not a depositor merely purchases a draft on another bank for transmission of funds, it seems clear that he is merely a creditor, and not a 'depositor' (within the common understanding of that term) entitled to protection of a fund guaranteeing deposits. However, if he is already a depositor, and merely purchases a draft with the proceeds of his deposit, and the draft is not paid for some reason, such as the intervening failure of the bank drawing it, the answer to the question is not so clear, and there is some indication in the authorities cited herein that the worthless draft should not be deemed to deprive the depositor of that status, as regards his right to payment from a bank guaranty fund. *With respect to cashier's checks,* also, the transaction out of which the checks are issued must be examined in order to determine whether the purchaser or holder is a depositor. One may conceivably receive such a check in lieu of a deposit slip or certificate of deposit, intending to leave the funds with the bank, in which case it seems that he should be deemed to be a depositor within statutes guaranteeing bank deposits; yet he may purchase such a check for cash, *without ever having been a depositor,* for the purpose of transmitting the funds by this method instead of by a draft, *and it would seem that to call such a purchaser a depositor' would be stretching the term unduly.* * * *"
>
> (Emphasis added.)

Dealing generally with the same subject see annotations in 73 A. L. R. 66 and 86 A. L. R. 1310.

It is to be borne in mind that there is a statutory definition of deposits with which we are here concerned. Consequently whatever may be the situation as to who should be regarded as a "depositor" for the purpose of being protected in the case of insolvency of a bank is somewhat beside the point. The authorities dealing with that question are

therefore not of persuasive effect so far as concerns your question and hence will not be dealt with herein. I can concur in the above observation of the annotator that it would be stretching the term unduly to regard the *purchaser* of a cashier's check as a depositor.

A few words will be here added with respect to recent Ohio cases dealing with deposits. While no case has been specifically called to attention, a Court of Appeals decision is noted which may have been regarded by you as having some bearing on the subject matter here considered. See Fulton vs. Byrns, (1933) 16 O. L. A. 21. That case involved questions of preference in the case of an insolvent bank. The headnotes read:

> "1. A person to whom a bank has issued a cashier's or banker's check is a mere creditor of the bank and not entitled to a preferred claim against its assets on insolvency, even though the check is forwarded in the regular course of mail and is in possession of the bank, but not paid, at the time it is closed; under §711 GC such a check must be returned to the person from whom it is received.
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> "2. The provisions of §§712, 713 and 714 GC are not determinative of the right to a preference in the funds of an insolvent bank by the holder of a cashier's or banker's check issued by the bank and unpaid at the time of insolvency."

As should be apparent, the conclusion reached by the court is not determinative of the question raised by your inquiry.

In Fulton, Supt. v. Rundell, (1934) 128 O. S. 205 the syllabus reads:

> "Where certificates of deposit are exchanged for drafts drawn by the issuing bank upon another bank and the issuing bank is closed for liquidation before presentment of the drafts for payment, the original owner of such drafts is not entitled to a preference under Section 714, General Code."

Here again the inquiry was with respect to a preference growing out of the liquidation of a financial institution. I can find no Ohio case which, as you have suggested, appears to be in conflict with the opinion rendered to the then Tax Commission.

Only a moment will be spent to point out the line of reasoning that was adopted for the conclusion arrived at in said 1932 opinion. It is stated therein:

> "While it—(a cashier's check)—is similar in some respects to a 'certificate of deposit payable on demand' in that the obligation of the bank to pay on presentment is the same, yet the language of the contract set forth in the certificate of deposit is to the effect that such certificate represents a deposit which has been made by the person to whom issued. In the issuance of a 'cashier's' or 'official check' as such instrument is generally known, and as distinguished from corporate checks of the bank issued in payment of the obligations of the corporation, the bank receives a payment for the issuance of such negotiable paper, which is never treated either by the bank or the purchaser as a deposit, and in so far as I have been able to ascertain, *the banks have never credited or paid interest.* The intent of the parties is not to create a deposit and legal fiction will scarcely create a condition which the parties never intended to create."
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> (Emphasis added.)

I am inclined to the view that whether interest is or is not paid may, perhaps, be immaterial. As a general rule interest is not paid on commercial or checking accounts which, nevertheless, are deposits within the meaning of Section 5324, General Code. However, the conclusion of my predecessor did not pivot on that proposition.

As the result of my reexamination of the question that was presented in 1932 for the consideration of the then Attorney General I am obliged to conclude it was correctly determined that cashier's checks are not generally to be regarded as taxable deposits. Having so decided it necessarily follows, and you are so advised that:

Cashier's checks are not deposits within the contemplation of Section 5324, General Code, and hence are not taxable deposits within the meaning of Section 5328-1, General Code. Opinion No. 4676, Opinions of the Attorney General for 1932, Vol. 2, page 1165, approved and followed.

Respectfully,

HUGH S. JENKINS,
Attorney General.