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COUNTY BUDGET COMMISSION — WHERE COUNTY UN-DIVIDED LOCAL GOVERNMENT FUND ALLOCATED ONE SUB-DIVISION ERRONEOUSLY RECEIVED MORE THAN ITS PROPER SHARE — SUCH SUBDIVISION SHOULD PAY OVER TO SUBDIVISION ENTITLED TO IT, THE AMOUNT ERRONEOUSLY ALLOCATED AND DISTRIBUTED.

SYLLABUS:

When, on an appeal from the action of a county budget commission allocating the undivided local government fund of a county to and among the several subdivisions of the county, it is determined that one subdivision, at the expense of another, erroneously received more than its proper share, such former subdivision should pay over to the latter the amount erroneously allocated and distributed to it.

Columbus, Ohio, June 22, 1942.

Hon. Ralph J. Bartlett, Prosecuting Attorney,
Columbus, Ohio.

Dear Sir:

Your letter requesting my opinion on questions submitted by the Franklin county auditor relating to the procedure to be followed by the county budget commission and auditor in allocating and distributing the local government fund, was duly received.

The questions submitted involve not only the usual procedure in such matters, but also what may now be done in the matter of compliance with the substituted order made by the board of tax appeals in the Columbus case on November 21, 1941 (affirmed, Thatcher, Auditor v. City of Columbus, 139 Ohio State, 473.)

1. The fund known as the "local government fund," and created by Section 5546-18, General Code, is allocated and distributed to the local subdivisions of the state in accordance with the provisions of Section 5546-19. This latter statute provides that when received into the county treasury the fund shall be credited to the undivided local government fund of the county, and paid to the subdivisions in the respective amounts allowed by the budget commission.

Section 5546-20, General Code, provides that the board of tax appeals shall certify to each county auditor an estimate of the amount of the local government fund to be allocated to the county in the years 1941 and 1942, and that "Immediately upon receiving the certificate of the board of tax appeals each county auditor shall convene the budget commission of his county in special session for the purpose of * * * determining the amount to be distributed in the years 1941 and 1942 from the local government fund in the county treasury." This statute also requires that "Notice of the time and place of such meeting shall be given by mail to the fiscal officer of each subdivision in whole or in part within the county," that the county auditor shall lay before the commission, when so convened, the certificate of the board of tax appeals, and that the budget commission, "after affording to each subdivision an opportunity to be heard, * * * shall determine the amount needed by each subdivision for current operating expenses for the respective years 1941 and 1942," etc. Thereupon, the budget commission is required to apportion the estimated amount of the undivided local government fund among the several subdivisions in which need for additional revenue has been found, in proportion to the amount of the needs of each as so determined, etc.

The same statute further provides that on the basis of such apportionment, the county auditor shall compute the percentage share of each subdivision, and certify such shares to the county treasurer, who shall be governed thereby in making distribution in the years 1941 and 1942.

The next section, Section 5546-21, makes provision for an appeal from the action of the budget commission to the board of tax appeals, as follows:

"The action of the budget commission under the preceding section of this act may be appealed to the tax commission of Ohio (now board of tax appeals) in the manner and with the effect provided in section 5625-28 of the General Code."

(Parenthetical matter mine.)

Section 5625-28, just referred to, so far as pertinent at this time, reads as follows:

"The taxing authority of any subdivision which is dissatisfied with any action of the budget commission may, through

its fiscal officer, appeal to the tax commission of Ohio, which commission shall forthwith consider the matter or matters presented to the budget commission, and shall have power to modify any action of the budget commission with reference to the budget, the estimate of revenues and balances or the fixing of tax rates. The finding of the tax commission shall be substituted for the findings of the budget commission, and shall be certified to the county auditor and the taxing authority of the subdivision affected as the action of such budget commission under this act."

Another statute, Section 1464-1, also confers appellate jurisdiction on the board of tax appeals from the action of the county budget commission.

As you know, the county auditor is a member of the county budget commission, and also its secretary, and as such secretary he is required to keep a full and accurate record of all its proceedings. All this is provided for by Section 5625-19, General Code. He is also the county's fiscal officer under the budget law. Section 5625-1, General Code.

As already indicated, Section 5546-20 in clear and concise language requires that the fiscal officer of each subdivision shall be given notice by mail of the time and place of the special meeting of the budget commission convened by the county auditor for the purpose of determining the amounts to be distributed to the subdivisions from the undivided local government fund, and that before determining such matters the budget commission must afford each subdivision an opportunity to be heard with respect to its particular needs. There is therefore no authority under the law for the budget commission and county auditor to allocate and distribute any part of the undivided local government fund until after such notice and opportunity to be heard has been given, and action without such notice and opportunity would not be binding. *State, ex rel. v. Austin, Auditor*, 140 Ohio St., pp. 7 and 11.

While the statute does not in express terms say that the county auditor shall give the notice, nevertheless he is the officer upon whom Section 5546-20 has imposed the duty of convening the budget commission in special session, and under Section 5625-19 he is the secretary of that commission, and, in my opinion, he is the proper officer to give the required notice. In any event, the budget commission must afford each subdivision an opportunity to be heard before any action involving its right to share in the fund can be taken, and before proceeding it should

make sure that the required notice and opportunity have been given.

When the law, particularly Sections 5546-21 and 5625-28, relating to appeals from the action of the budget commission is examined, it will be found that it is absolutely silent with respect to giving notice of an intention to appeal, or with respect to the time within which an appeal may or shall be taken, the language of both sections merely authorizing an appeal. In this connection, however, attention may be called to the fact that the board of tax appeals is empowered by paragraph 8 of Section 1464-1, General Code, to adopt and promulgate rules relating to the procedure of the board in administering the laws which it had the authority or duty to administer, and also by Section 5546-5, which is one of the sections of the same Act of which Sections 5546-20 and 5546-21 are parts. Such rule-making power might be invoked by the board of tax appeals so as to require that subdivisions intending to appeal shall give notice of such intention within a time to be fixed by the board, and also fixing the time within which the appeal shall be filed. I understand, however, that to date no such rules have been adopted by the board of tax appeals.

The statute being silent on the matter, and in the absence of any rule of the board of tax appeals, it would be proper for the budget commission, after making its apportionments, to secure from each subdivision a waiver of appeal, or notice of intention to appeal if it expects to take such action. If all subdivisions should file such waivers, distribution could then be made with safety; but if, on the other hand, any subdivision should refuse to waive, or should fail to perfect its appeal within a reasonable time, the county auditor, as fiscal officer of the county, might arrange with the county commissioners for the filing of an appeal on behalf of the county, making the other subdivisions parties to the proceeding, since the entire fund would be involved, and in this manner bring about a settlement which would enable the auditor and treasurer to distribute the fund with safety.

The subject of the allocation and distribution of the local government fund by the county budget commission of Franklin County was before the Supreme Court in the recent case of Thatcher, Auditor v. City of Columbus, No. 28964, 139 Ohio St., 473. In that case it appears that the budget commission had allocated the fund to the various subdivisions without giving notice of the time and place of its meeting to any of

them, and also without giving any subdivision an opportunity to be heard as to its needs. The action of the budget commission was taken on April 16, 1941. One of the subdivisions, city of Columbus, having first learned of the action of the budget commission on May 19, 1941, filed an appeal with the board of tax appeals about five months later, October 11, 1941. At that time three-fourths of the fund had already been distributed to the local subdivisions. The board of tax appeals decided the appeal on November 21, 1941, in favor of the city by deducting \$40,000 from the amount the budget commission had allocated to the county, and adding that amount to the city's share. The board of tax appeals thereafter certified its findings and order to the county auditor and city of Columbus as and for the action of the budget commission, as provided for in Section 5625-28.

In sustaining the action of the board of tax appeals in assuming jurisdiction, and in affirming the decision of that board, the Supreme Court said:

“There was no notice to or appearance on behalf of the city of Columbus at this meeting of the budget commission and in the absence of a hearing the budget commission cannot be said to have considered the ‘needs’ of the city of Columbus, as required by Section 5546-20, General Code.

Broad powers are conferred upon the Board of Tax Appeals by Section 5625-28, General Code, in appeals from any action of a budget commission. * * * Under this statute, the Board of Tax Appeals had authority to hear the evidence and make an apportionment, even though by reason of lack of notice this was the first hearing in which the city of Columbus had an opportunity to participate.”

The Columbus case will again be referred to later on in this opinion.

2. I have noted the reference in your letter to the “conflicting requirements” of Sections 5546-20, 5625-27 to 5625-30, inclusive, 5625-30 and 5625-33, General Code, but you do not specify in what particular manner any two or more of these sections may conflict. I have carefully examined these statutes and can find no conflict between them.

3. One of your questions relates to the effect of the board of tax appeals' order of reallocation on contracts that may have been entered into by one of the subdivisions affected by the order, presumably Franklin County, in reliance on the county auditor's Section 5625-33 certificate that the money necessary to meet the contracts has been lawfully ap-

propriated and is in the county treasury. A case similar in principle was presented to this office about ten years ago. Opinions of Attorney General, 1933, No. 974, page 938. In that opinion, at page 943, it was said:

“Section 5625-33 provides that any such certificate of the fiscal officer attached to a contract ‘shall be binding upon the political subdivision as to the facts set forth therein.’ The Court of Appeals of Summit County had under consideration a certificate of a fiscal officer required by Section 5625-33, which was false, in the case of Carmichael vs. Board of Education, 32 O.A. 520. In this case, decided October 3, 1929, the court held as set forth in the syllabus:

‘In the absence of fraud, the certificate of a fiscal officer, required by Section 5625-33, General Code (112 Ohio Laws, 406), attached to a contract, certifying that the amount required to meet the same is in the treasury or in process of collection, is, as to the facts set forth therein, binding upon the political subdivision and upon the taxpayers of said subdivision, though the statements set forth in said certificate are not true.’ * * *

In view of the language of Section 5625-33, General Code, and the decision in the Carmichael Case, *supra*, it must be concluded that certificates of the fiscal officer attached to any contract or order involving the expenditure of money, reciting that the amount required to meet the same has been lawfully appropriated and is in the treasury or in process of collection to the credit of an appropriate fund free from any previous encumbrances, in the absence of fraud or collusion, is binding upon the subdivision and the taxpayers thereof, even though the certificate was false and such moneys were not in the fund or in process of collection. As stated in the case of *State ex rel. vs. Cleveland Trinidad Paving Co.*, with respect to this matter ‘when the certificate of the public officer to that effect is made the amount of the contract is thereupon charged against the fund,’”

It would follow from the foregoing opinion that any contract entered into by the board of county commissioners of Franklin County in reliance on the county auditor’s certificate as to available funds, although later found to be erroneous, would be enforceable against the county, regardless of whether or not the county should return the excess allocation made to it by the budget commission.

4. Reference has already been made to the action of the board of tax appeals in the Columbus case, and also to the decision of the Supreme Court affirming the order of that board. *Thatcher v. City of Columbus*, *supra*.

In that case it appears that although Columbus did not file its appeal with the board of tax appeals until about six months after it had actual knowledge of the budget commission's action, no question as to the right of the board of tax appeals to hear the appeal because of lapse of time was made, and no such question was raised in the Supreme Court. The brief filed by the prosecuting attorney in behalf of the county did, however, refer to "the effect of the belated appeal," but nothing was said about any limitation of time. The closest the Supreme Court came to this particular point was the statement already quoted to the effect that the board of tax appeals had authority to hear the evidence and make the apportionment. It also appears that the auditor of Franklin County was of the same opinion, because he filed an appeal in behalf of the county four days after the appeal of the city of Columbus was filed.

5. Inasmuch as I have been advised that the board of tax appeals or Supreme Court may be asked by the city of Columbus to assume jurisdiction in the matter of the enforcement of the board's order, questions submitted by you relating to the recovery of the funds paid out prior to the city's appeal, and the procedure to be followed, will not be discussed in their legal aspects at this time. However, I do not consider it inappropriate to state that it is my view that Franklin County, through the irregular action of the budget commission composed of three of the county's own elected officers, and one of whom also is the county's fiscal officer, has been unduly enriched at the expense of the city of Columbus to the extent of \$40,000. Both the board of tax appeals and the Supreme Court have held that this money belongs to the city, and in my opinion should, as a matter of simple justice, be paid over to its rightful owner without the necessity of resorting to litigation. If the county auditor and the other members of the budget commission would present the matter to the county commissioners, none of whom were parties to the irregular action of the budget commission, the necessary appropriation, \$40,000, could and should be made from the county general fund, that being the fund into which the money was paid under the budget commission's erroneous allocation.

Respectfully,

THOMAS J. HERBERT

Attorney General.