

4785.

## COUNTY TREASURER—LIABLE PERSONALLY FOR AMOUNT COLLECTED IN EXCESS OF THAT ON TAX DUPLICATE.

## SYLLABUS:

1. *When an overpayment or a double payment of a certain item of taxes is made to the county treasurer such county treasurer is chargeable with such overpayment or double payment as an individual and not as county treasurer.*

2. *Sections 2589 and 2590, General Code, have no application to a recovery of an excess payment or a double payment of items of taxes to the county treasurer. The taxpayer's legal remedy in the event that such sums are not refunded to him voluntarily, is by virtue of Section 12077, General Code, and in an action by virtue of such section the treasurer who received the overpayment or double payment is the proper party defendant rather than his successor in office. A county treasurer who receives from a taxpayer a sum in excess of the amount standing charged against an item of taxes in payment thereof, or who receives a payment of such item of taxes twice is not entitled to require an indemnifying bond before returning such excess to the taxpayer entitled thereto.*

COLUMBUS, OHIO, December 5, 1932.

HON. P. L. A. LIEGHLEY, *Prosecuting Attorney, Cleveland, Ohio.*

DEAR SIR:—I am in receipt of your request for my opinion on the following questions:

“(1) Is the county treasurer chargeable with the over payment or double payment as treasurer?”

(2) Have the claimants any right to a refund excepting as provided in sections 2589 and 2590 of the General Code?

(3) Must the claimant look to the treasurer who received the over payment or double payment, or to the treasurer in office when the claim is presented?

(4) If the procedure of refunding is followed under sections 2589 and 2590 of the General Code, or otherwise, has the treasurer a right to require an indemnity bond or any other form of protection at the time of actually making the refund?”

From the tenor of your inquiry, I assume that by the terms “overpayment” and “double payment” you mean that the taxpayer has paid to the county treasurer a sum in excess of the amount of taxes charged against him or his property upon the tax duplicate and a payment of the item of taxes standing charged against him or his property twice, respectively.

My opinion, as hereinafter expressed, is based upon such meaning of the words “overpayment” and “double payment”. Sections 2589 and 2590, General Code, referred to in your inquiry, read as follows:

Sec. 2589. “After having delivered a duplicate to the county treasurer for collection, if the auditor is satisfied that any tax or assessment thereon or any part thereof has been erroneously charged, he may give the person so charged a certificate to that effect to be presented to the treasurer, who shall deduct the amount from such tax or assessment. If at

any time the auditor discovers that erroneous taxes or assessments have been charged and collected in previous years, he shall call the attention of the county commissioners thereto at a regular or special session of the board. If the commissioners find that taxes or assessments have been so erroneously charged and collected, they shall order the auditor to draw his warrant on the county treasurer in favor of the person paying them for the full amount of the taxes or assessments so erroneously charged and collected. The county treasurer shall pay such warrant from the general revenue fund of the county."

Sec. 2590. "At the next settlement with the auditor of state after the refunding of such taxes, the county auditor shall deduct from the amount of taxes due the state at such settlement the amount of such taxes that have been paid into the state treasury. No taxes or assessments shall be so refunded except as have been so erroneously charged or collected in the five years next prior to the discovery thereof by the auditor. No assessment shall be returned, except from the fund or funds created in whole or in part by the erroneous assessments."

From the language of such sections, it is evident that the remedy therein provided refers to a tax which has been erroneously charged and paid. In Section 2589, *supra*, you will notice that the statute specifically uses the language "charged and collected" and in Section 2590, *supra*, the language is:

"No taxes or assessments shall be so refunded except as have been so erroneously charged or collected \* \* "

The question presented by your inquiry is not concerning a tax which has been erroneously placed upon the tax list and duplicate by the county auditor; but rather the assumption is that the tax as placed upon the duplicate by the county auditor was correct both as to liability of assessment and as to amount.

Your query is directed at the case where the county treasurer has collected from a taxpayer more than appears on the duplicate which you refer to as an "overpayment" and in other cases has collected an item of tax which appears on the duplicate after it has already been paid, and therefore no longer appears thereon.

It is the duty of the county treasurer when an item of tax is paid, to enter such fact of payment upon the duplicate; such payment necessarily extinguishes that item of tax. It is therefore evident that when the second payment of the item of tax was received by the county treasurer he had no authority to receive such amount of money for the purpose for which the payment was made. The county treasurer is an officer whose duties are prescribed by statute, and who has no authority except such as is given him by statute. It has been held that the county treasurer has no authority to receive any sums of money except such as are charged upon the tax duplicate and the delinquent list delivered to him by the auditor for collection or charged upon a warrant delivered to him by the auditor. See *Hull vs. Alexander, Treasurer*, 69 O. S., 75; *Board of County Commissioners vs. Arnold*, 65 O. S., 479; *State ex rel. vs. Smith, County Auditor*, 71 O. S., 13; *State ex rel. Alcorn vs. Mittendorf*, 102 O. S., 229; *Insurance Company vs. Ginder*, 114 O. S. 52.

To use the language of Burket, C. J., in the case of *Hull vs. Alexander, supra*,

"\* \* the county treasurer is strictly a collector of taxes, and not a tax inquisitor or taxing officer. He performs his whole duty when he

collects the money charged upon the tax duplicate and delinquent list delivered to him by the auditor for collection, or charged upon a warrant or draft delivered to him by the auditor authorizing him to receive money; \* \*

It is therefore evident that the county treasurer has no authority in law, as county treasurer, to receive an amount on an item of taxes in excess of the amount placed upon the tax list and duplicate by the auditor and he has no authority to receive a payment of such item of taxes after such item has already been paid. Such over payment or double payment being illegally received, or in other words, received without authority of law, would constitute such person who, as treasurer, received such excess moneys either by way of over payment or double payment, a resulting or constructive trustee for the benefit of the person from whom it was received without authority.

In Opinions of the Attorney General for 1916, page 517, one of my predecessors in office held, as stated in the syllabus:

“Money received from duplicate payments of taxes constitutes a trust fund to be held by the county for the repayment of those who under a mistake of fact made said duplicate payments in the first instance. \* \*

On page 518 of the opinion it is held:

“The money so received from duplicate payments of taxes becomes, is and must continue to be until exhausted a trust fund for the benefit of those who created it by mistake and who are entitled to be repaid from it upon proof of such mistake and their consequent right to such repayment. For this reason I am of the opinion, in answer to your second inquiry, that it would not be proper to report this money under the provisions of section 2642, G. C., nor should it be credited in any event to the undivided general tax fund. As before observed, there are no statutory provisions applicable to this situation, and I, therefore, advise that this money be held by the county treasurer until his semi-annual settlement with the county auditor. In the meantime each treasurer should make every possible effort to return all duplicate payments to those who are entitled to the same. At the time of making the semi-annual settlement whatever amount of such payments remains in the hands of the treasurer should be reported by him to the auditor and turned into the county treasury, to be credited to a special trust fund and thereafter all claims against such fund should be paid upon the allowance of the county commissioners; said allowance to be made upon the written request of the treasurer and upon proof that the party making the claim is rightfully entitled thereto.”

Section 12077, General Code, provides a legal remedy by which the taxpayer may recover these overpayments and double payments of taxes. Such section reads:

“Actions to enjoin the collection of taxes and assessments must be brought against the officer whose duty it is to collect them. Actions to recover back taxes and assessments, must be brought against the officer

who made the collection, or, if he be dead, against his personal representative. When they were not collected on the county duplicate, the corporation which made the levy must be joined in the action."

This section of the statutes was construed by the court of common pleas of Muskingum County in the case of *Herzberg vs. Willey, Treasurer*, 13 Bull., 334, the first paragraph of the syllabus of which reads as follows:

"An action under section 5850, Revised Statutes, (Section 12077, General Code) to recover taxes illegally collected by a county treasurer, must be brought against the person who, as such treasurer, made the collection."

The Common Pleas Court of Logan County in the case of *Hornberger vs. Case, Treasurer*, 13 Bull., 511, 9 O. D. Reprint, 426, rendered a similar decision interpreting such section. The first paragraph of the syllabus reads:

"An action to recover back an assessment illegally collected by the county treasurer must be brought against such treasurer individually and not in his official capacity."

Price, J., on page 512 of the opinion says:

"True, this section of the statute says the action must be brought against the officer who made the collection, but evidently it does not mean that the action shall be brought against him in his official capacity. This is evident from the fact of the further provision, in the same section, that if the person making the collection is dead, the action must be 'against his personal representative.'

Such would not be the case if the action might be brought against the officer in his official capacity. The action should be brought against the person who made the collection, or if he be dead, against his personal representative. \* \*

'An action against one "as treasurer" is an action against the county and not against an individual. This statute rests upon the principle that an officer who compels payment of money, without authority of law, is liable as a trespasser.'

*Herzberg vs. Willey, Treasurer*, Muskingum Common Pleas; Law Bulletin, vol. 13, p. 334. See also, *McCoy vs. Chillicothe* 3d O. R. 370, *Loomis vs. Spencer, et al.*, 1 O. S. R. 153; *The Champaign County Bank vs. Smith*, 7 O. S. R., 43."

While each of these cases was decided by the Common Pleas Court, the reasoning therein contained, as well as the conclusion, is amply supported by the authorities and the conclusion follows that, when a county treasurer receives moneys in excess of or more than the amount charged upon the duplicate, he does not as county treasurer receive such moneys, but rather receives them as an individual, and his obligation is to immediately return the moneys which he has thus received, without authority of law, to the person paying it; for he should have, at the time such payment was tendered, refused to receive the same by reason of the fact that the taxes had already been paid and did not stand charged upon the tax list and duplicate.

The situation may arise that the county treasurer, who received the tax, has retired from office and has turned over the funds received through overpayments to his successor in office. In such case, I do not intend to, nor do I, hold that such funds in the possession of the successor in office cannot be recovered by the taxpayer from him. It is self-evident that such succeeding county treasurer could have no more right, title or interest in such funds than his predecessor had. The excess payment, as I have hereinbefore pointed out, is not the property of the county treasurer, but of the taxpayer, and can be recovered from whomsoever may become in possession thereof, upon proof of ownership.

It is thus apparent that the county treasurer who receives an amount in excess of the amount charged against an item of taxes on the duplicate in payment thereof had no legal right to receive such taxes; and, as held by the court in the Herzberg and Hornberger cases cited above, the county treasurer in retaining such money is a trespasser. It would create an unusual situation in the law if the courts were to hold that a person who has received some article wrongfully and who had no right to retain it, might require a bond from the rightful owner before restoring him to his rightful possession of such property.

The legislature, in the enactment of Section 12077, General Code, has provided a remedy for the taxpayer, and in this section has not required, as a condition precedent to obtaining relief, that the taxpayer must deposit a bond. I therefore do not believe that the county treasurer can require a bond before restoring these moneys to the possession of the taxpayer.

In specific answer to your inquiries, it is my opinion:

1. When an overpayment or a double payment of a certain item of taxes is made to the county treasurer, such county treasurer is chargeable with such overpayment or double payment as an individual and not as county treasurer.

2. Sections 2589 and 2590, General Code, have no application to a recovery of an excess payment or a double payment of items of taxes to the county treasurer. The taxpayer's legal remedy, in the event that such sums are not refunded to him voluntarily, is by virtue of Section 12077, General Code, and in an action by virtue of such section the treasurer who received the over payment or double payment is the proper party defendant rather than his successor in office. A county treasurer who receives from a taxpayer a sum in excess of the amount standing charged against an item of taxes in payment thereof or who receives a payment of such item of taxes twice is not entitled to require an indemnifying bond before returning such excess to the taxpayer entitled thereto.

Respectfully,

GILBERT BETTMAN,

*Attorney General.*