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1. BOND RETIREMENT FUND OF TAXING DISTRICT—SECTIONS 5625-13, 5625-13a G. C.—MONIES ARISING FROM COLLECTION OF TAXES, LEVIED TO PAY PRINCIPAL AND INTEREST—MAY NOT BE TRANSFERRED TO GENERAL FUND WITH OR WITHOUT ORDER OF COMMON PLEAS COURT.
2. BOARD OF EDUCATION—SUBMISSION OF PROPOSED BOND ISSUE—FAVORABLE VOTE—TAX LEVIED AND COLLECTED—DOUBT AS TO VALIDITY—RESUBMISSION TO VOTE OF ELECTORS—APPROVED—MONIES PAID FROM GENERAL FUND OF DISTRICT MAY NOT BE TRANSFERRED FROM BOND RETIREMENT FUND TO REIMBURSE GENERAL FUND—SECTIONS 5625-13, 2293-19 G. C.
3. PORTION OF PROPOSED IMPROVEMENT CONSTRUCTED PENDING RESUBMISSION TO VOTERS INCLUDED IN ORIGINAL PLAN—GENERAL FUND MAY BE REIMBURSED FROM PROCEEDS OF BOND ISSUE.

SYLLABUS:

1. Under the provisions of Sections 5625-13 and 5625-13a, General Code, monies in the bond retirement fund of a taxing district arising from the collection of taxes levied to pay the principal and interest of a proposed bond issue, may not be transferred to the general fund either with or without the order of the Court of Common Pleas.

2. When a proposed bond issue has been submitted by a board of education to the electors of its district, pursuant to Section 2293-19, General Code, and following a favorable vote thereon, a tax has been levied to meet the principal and interest of such bonds, and certain monies have been collected from such tax levy and placed in the bond retirement fund, and thereafter, by reason of doubt of the validity of such submission, the proposition is resubmitted and again approved by the electors, monies paid in the meantime from the general fund of the district for the construction of a part of the proposed improvement, may not, under the provisions of Sections 5625-13 and 5625-13a be transferred from said bond retirement fund to reimburse the general fund for the sum so expended.

3. In such case, if the portion of the proposed improvement which was constructed pending the resubmission was included in the original plan for such improvement, the general fund may be reimbursed from the proceeds of such bond issue.

Columbus, Ohio, November 16, 1951

Hon. Harry C. Johnson, Prosecuting Attorney
Guernsey County, Cambridge, Ohio

Dear Sir:

I have your request for my opinion, reading as follows:

"The Board of Education of Senecaville-Richland School District has asked me to ask your opinion on the following set of facts.

"At the primary election in April, 1948, they voted a bond issue for the purpose of selling bonds to use the money for building an addition to their present school building. These bonds were never sold for the reason that no approving opinion could be obtained because of certain errors which appeared in the transcript. The county auditor, upon the passing of said bond issue, placed the levy on the tax duplicate and there was approximately \$8400.00 collected from the taxpayers in this district.

"Immediately after this, the board constructed rest rooms and toilet facilities as an addition to this present building, for which the bond issue was to build an addition thereto. This cost approximately \$13,000.00 and came largely from rehabilitation funds from the Department of Education. However, the local board contributed \$3000.00 of this amount and it was taken from the General Fund.

"At the general election in 1950, the bond issue was resubmitted to the voters and passed. The bonds have been sold, and the remaining part of the addition to this building will be constructed when steel is available. Because of this depletion from the General Fund of \$3000.00 mentioned, the board finds that they will be unable to pay their teachers before January 1, 1952.

"The question is, may they take the \$3000.00 from the \$8400.00 which was collected at the time the first bond issue was voted and place it back in the General Fund?"

Section II of Article XII of the Ohio Constitution, reads as follows:

"No bonded indebtedness of the state, or any political subdivision thereof, shall be incurred or renewed, unless, in the legislation under which such indebtedness is incurred or renewed, provision is made for levying and collecting annually by taxation an amount sufficient to pay the interest on said bonds, and to provide a sinking fund for their final redemption at maturity."

Section 2293-36, General Code, is evidently designed to put this constitutional provision into effect. It reads as follows:

“After the issue of any notes or bonds, the taxing authority shall annually include in its budget a sufficient amount to pay the interest on and to retire at maturity such bonds or notes; and shall levy a tax therefor.”

It will be noted that the constitutional provision requires provision for levying and collecting such taxes to be included in the legislation under which the bonds are authorized. Where the proposed bond issue is to be authorized by a vote of the electors, it is required by Section 2293-19, General Code, that the resolution of the taxing authority shall declare the necessity of a tax levy outside of the one per cent limitation, and thereupon the county auditor shall calculate and certify to the taxing authority the amount of the average levy during the life of the bonds, and this, in turn, is certified to the board of elections. In the case which you present, the bonds proposed to be issued could not be said to have been duly authorized until the board of education had by resolution declared the necessity of such bond issue as required by Section 2293-19 and submitted it to a vote of the electors and they had approved it. Of course, if there was some vital defect in the proceedings which prevented the issuance of these bonds it could hardly be said that they were duly authorized.

Section 2293-23a, General Code, requires the board of elections to certify the result of the election to the county auditor, and requires that the tax levy be placed on the tax lists. It appears from your letter that the county auditor, doubtless relying upon the result of the vote so certified, placed the required levy on the tax duplicate and that there was collected thereon the sum of \$8,400.00. It does not, however, appear that the action of the auditor was contrary to law. On the other hand, it has been held that the provision of Section 11 of Article XII of the Constitution, above quoted, does not require that the issuance of the bonds shall precede the legislation for the tax levy. *State v. Zangerle*, 95 Ohio St., 58. In this case legislation had been passed authorizing the issuance of bonds of the City of Cleveland, for sewage disposal and prevention of river pollution and ordering the submission of the proposition of issuing such bonds to a vote of the electors, and such submission had been had and approved by the electors. The case arose out of the refusal of the county auditor to place the required tax on the duplicate, such refusal being based on his contention that the bonds must first be issued. The court granted the writ of mandamus, saying in the course of the opinion:

“There is in this provision of the constitution no requirement

that the bonds shall have been first issued before the legislation providing for the levy of taxes for the purposes stated shall be passed. That is a matter that is left to the wisdom and discretion of the legislative body having authority to act for the municipality. That the bonds had not actually been issued is no reason why legislation to provide money to meet them when issued and matured could not be adopted. It is the duty of the council to safeguard the interest of the municipality, and in doing so to strictly conform to the constitutional and legislative requirements under which the council acts. This power and this duty of council continue throughout. If from change in the public undertaking, or in the plans or arrangement, the bonds should not be issued; or if it should develop that a less amount was needed, or that there was no necessity for a levy, it would be the duty of the city authorities to reduce or omit entirely the levy in accordance with the circumstances."

Section 5625-9, General Code, provides in part as follows:

"Each subdivision shall establish the following funds:

"(a) General fund.

"(b) Sinking fund whenever the subdivision has outstanding bonds other than serial bonds.

"(c) Bond retirement fund, for the retirement of serial bonds, or of notes or certificates of indebtedness. * * *"

Accordingly, the monies collected from the tax levy in question, should have been paid and doubtless were paid into the bond retirement fund. It appears that at the general election in 1950, the bond issue in question was resubmitted to the voters and passed, and the bonds were then sold. Your letter does not state the facts which gave rise to the unfavorable opinion as to the validity of the original submission, and I can only assume that the proposition was resubmitted in order to allay any doubt that might interfere with the sale of the bonds. Considering the identity of purpose between the two submissions and the reasons therefor, I would regard the second submission merely as a continuation of the original procedure and would consider that the money collected from taxes to meet such bonds, and now in the bond retirement fund would be applicable to the bonds issued pursuant to the second vote of the electors.

We have then to consider only the possibility of transferring from the bond retirement fund a portion of the taxes thus collected, to reimburse the general fund for an expenditure which has been made from it in carry-

ing out a portion of the proposed improvement. The only authority for such transfers is to be found in Section 5625-13 and 5625-13a, of the General Code. Section 5625-13 provides in part, as follows:

“No transfer shall be made from one fund of a subdivision to any other fund, by order of the court or otherwise, except as hereinafter provided:

“a. *The unexpended balance in a bond fund that is no longer needed for the purpose for which such fund was created shall be transferred to the sinking fund or bond retirement fund from which such bonds are payable.*

“b. The unexpended balance in any specific permanent improvement fund other than a bond fund, after the payment of all obligations incurred in the acquisition of such improvement, shall be transferred to the sinking fund or bond retirement fund of the subdivision; provided that if such money is not required to meet the obligations payable from such funds, it may be transferred to a special fund for the acquisition of a permanent improvement or improvements or, with the approval of the court of common pleas of the county wherein such subdivision is located, to the general fund of the subdivision.

“c. The unexpended balance in the sinking fund or bond retirement fund of a subdivision, after all indebtedness, interest and other obligations for the payment of which such fund exists have been paid and retired, shall be transferred in the case of the sinking fund to the bond retirement fund and in the case of the bond retirement fund to the sinking fund; provided that if such transfer is impossible by reason of the non-existence of the fund herein designated to receive the transfer, such unexpended balance, with the approval of the court of common pleas of the county wherein such subdivision is located, may be transferred to any other fund of the subdivision. * * *” (Emphasis added.)

I cannot think that the condition set forth in the above statute can be met in your case, in view of the fact, as your letter states, that the school district in question has issued and sold the bonds pursuant to the second submission to the electors and the bond retirement fund clearly has an obligation to meet.

Section 5625-13a provides as follows:

“In addition to the transfers authorized in section 5625-13, the taxing authority of any political subdivision may, in the manner hereinafter provided, transfer from one fund to another any public funds under its supervision *except the proceeds or balances of loans, bond issues, or special levies for the payment thereof,*

and except the proceeds or balances of funds derived from any excise tax levied by law for a specified purpose or purposes, and except the proceeds or balances of any license fees imposed by law for a specified purpose or purposes." (Emphasis added.)

Here it will be noted that the authority of the Common Pleas Court to act under this section is expressly limited in that there may not be transferred the proceeds of bond issues or of special levies for the payment thereof.

Accordingly, it is my opinion and you are advised that the Senecaville-Richland School District having paid from the general fund of the district the sum of \$3,000 toward the cost of certain improvements to school property it cannot reimburse such general fund out of the taxes levied and collected to meet the principal and interest on bonds issued for the purpose of completing such improvement.

The conclusion here stated may seem to be out of accord with my opinion No. 859 issued October 25, 1951, where it was held that under the provisions of Section 6600 et seq. General Code, relating to county garbage disposal districts, the proceeds of revenue bonds issued to pay the cost of establishing such district, may be applied in part to reimburse the general fund of the county for expenditures from such fund in making the preliminary plans and surveys therefor. That opinion was grounded on the provisions of the statute indicating that such preliminary posts were a specific part of the cost to be paid out of the proceeds of such bonds, and that the proposed reimbursement did not amount to a transfer of money from a fund in which it had been placed, but was rather the direct application of a portion of the proceeds of the bond issue to the payment of necessary expense incurred prior to the issuance of bonds. In the present case, by contrast, we are dealing with the proceeds of a collected tax which under the law have been paid into the bond retirement fund, which fund under the circumstances stated, is not subject to transfer.

Since the above opinion was prepared, I have received your supplemental letter requesting my opinion on an additional phase of the same matter. Your communication reads in part, as follows:

"Assuming that your answer to my original request of October 3, 1951, should be in the negative, would it be possible to take the \$3,000.00 which was taken from the general fund and used together with \$10,000.00 which was supplied as rehabilitation funds from the Department of Education of Ohio, and was

used to construct rest rooms and toilet facilities as an addition to the present building and is a permanent fixture and will not have to be reconstructed in the building of the addition, which the present bond issue was voted for from the money derived from the sale of the bonds and placed in the general fund of the school district?"

You do not state whether the rest rooms and toilet facilities were included in the plans for the addition to the school building, for the construction of which the bonds were intended to be issued under the submission had in 1948 and resubmitted in 1950. For the purpose of my answer to the question which you are now submitting, I will assume that they were so included.

If such be the case, then the principle of the opinion to which I have referred, to wit, No. 959 issued October 25, 1951, would appear to apply. The use of a portion of the proceeds of the bonds to pay the cost of constructing a portion of the very improvement for which the bonds were issued, to wit, the rest rooms and toilet facilities would certainly be a proper application of such proceeds. Furthermore, where general funds had been advanced for that purpose, I am of the opinion that the general fund could properly be reimbursed out of such bond proceeds. The situation here differs only from the factual situation involved in the opinion referred to in that the advance from the general fund in that case was for necessary preliminary expense, while in your case it was for carrying out what was considered an essential part of the proposed improvement, the full construction of which had to await the resubmission of the bond issue.

Respectfully,

C. WILLIAM O'NEILL
Attorney General