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COUNTY TREASURER—COLLECTIONS MADE ON SPECIAL ASSESSMENTS OF MUNICIPALITIES, CERTIFIED TO COUNTY AUDITOR FOR COLLECTION—SHOULD BE INCLUDED IN DETERMINING FEES TO BE ALLOWED TO COUNTY AUDITOR AS COMPENSATION FOR SERVICES—SECTION 2624 G. C.

SYLLABUS:

Collections made by the county treasurer on special assessments of municipalities which have been certified to the county auditor for collection, should be included in determining the fees to be allowed to the county auditor as compensation for his services, under the provisions of Section 2624, General Code.

Columbus, Ohio, June 26, 1945

Hon. Carl W. Rich, Prosecuting Attorney
Cincinnati, Ohio

Dear Sir:

Your office recently requested my opinion as to whether or not the county auditor is entitled to fees under the provisions of Section 2624, General Code, for the collection of special assessments levied by a municipality.

For his services in connection with the preparation of the tax lists and duplicates and in the collection of taxes, the county auditor is allowed graduated fees as provided in Section 2624, General Code, which section reads as follows:

“On all moneys collected by the county treasurer on any tax duplicate of the county, other than the liquor, inheritance and cigarette duplicates, and on all moneys received as advance payments of personal property and classified property taxes, the county auditor on settlement with the county treasurer and auditor of state, shall be allowed as compensation for his services the following percentages:

On the first one hundred thousand dollars, one and one-half per cent.; on the next two million dollars, five-tenths of one per cent.; on the next two million dollars, four-tenths of one per cent.; and on all further sums, one-tenth of one per cent. Such compensation shall be apportioned ratably by the county

auditor and deducted from the shares or portions of the revenue payable to the state as well as to the county, townships, corporations and school districts.”

Separate provisions for fees for his services under the Inheritance Tax Law and for his services in issuing cigarette licenses are found in Sections 2624-1 and 2624-2, General Code. Similar provisions for fees of the county treasurer are found in Sections 2685, 2685-1 and 2685-2, General Code.

Such fees as the county auditor and the county treasurer are entitled to receive by reason of the above provisions are not to be retained by these officers, but are to be paid into the general county fund, as provided in Section 2983, General Code, which is as follows :

“On the first business day of each month, and at the end of his term of office, each of such officers shall pay into the county treasury, to the credit of the general county fund, on the warrant of the county auditor, all fees, costs, penalties, percentages, allowances and perquisites of whatever kind collected by his office during the preceding month or part thereof for official services, provided that none of such officers shall collect any fees from the county; and he shall also at the end of each calendar year, make and file a sworn statement with the county commissioners of all fees, costs, penalties, percentages, allowances and perquisites of whatever kind which have been due in his office, and unpaid for more than one year prior to the date such statement is required to be made.”

Your inquiry presents the question as to whether collections of municipal assessments should be included in the moneys collected by the county treasurer upon which the county auditor’s compensation is to be computed. If municipal assessments are properly placed “on any tax duplicate of the county,” then the moneys collected thereon should be included, for the only exceptions are collections of assessments listed on the liquor, inheritance and cigarette duplicates.

Special assessments made by municipalities are certified to the county auditor for collection, and collections are made by the county treasurer as provided in Section 3892, General Code, which reads in part as follows :

“When any special assessment is made, has been confirmed by council, and bonds, notes or certificates of indebtedness of the corporation are issued in anticipation of the collection thereof, the clerk of the council, on or before the second Monday in Sep-

tember, each year, shall certify such assessment to the county auditor, stating the amounts and the time of payment. *The county auditor shall place the assessment upon the tax list in accordance therewith* and the county treasurer shall collect it in the same manner and at the same time as other taxes are collected, and when collected, pay such assessment, together with interest and penalty, if any, to the treasurer of the corporation, to be by him applied to the payment of such bonds, notes or certificates of indebtedness and interest thereon, and for no other purpose. For the purpose of enforcing such collection, the county treasurer shall have the same power and authority as allowed by law for the collection of state and county taxes. Each installment of such assessments, remaining unpaid after becoming due and collectible, shall be delinquent and bear the same penalty as delinquent taxes. * * *"

(Emphasis the writer's.)

When municipal assessments are certified to the county auditor for collection, it is provided in Section 3905, General Code, that "the amount of such assessment or tax so certified, shall be placed upon the tax-list by the county auditor, and shall * * * be collected with and in the same manner as state and county taxes, and credited to the corporation." The tax list upon which the county auditor is required to place such assessments is the auditor's general tax list of real and public utility property and the treasurer's duplicate which the auditor is required by the terms of Section 2585, General Code, to prepare annually. In making up the tax list and duplicate, the auditor is guided by Section 2594, General Code, which provides:

"The auditor shall set down the amount of taxes charged against each entry in two separate columns, one-half thereof, exclusive of road taxes, in each column, and add all road taxes to the first half with a sufficient blank space at the right of each column to write the word 'paid,' and when payment of either half of such taxes is made, the treasurer shall write in the blank space opposite such tax, the word 'paid.' The auditor of state may prescribe such other forms for tax lists and duplicates as seem proper to him in order to produce uniformity throughout the state, and county auditors shall conform thereto."

Under similar statutes, it was held in the case of *Makley v. Whitmore*, 61 O. S. 587, that "Installments of assessments for municipal improvements which are certified to the county auditor * * * should be placed upon the duplicate of the county * * * and collected as other taxes."

In the later case of *State, ex rel. Jones, v. Brenner*, 31 O. App., 465, it was held that :

“It is the duty of a county treasurer in his official capacity to collect installments of special assessments in the same manner and at the same time that other taxes are collected.”

In *State, ex rel. Brown, v. Cooper*, 123 O. S., 23, the Supreme Court held :

“1. The duty enjoined upon county treasurers by Section 3892, General Code, to collect installments of special assessments upon real estate in the same manner and at the same time as other taxes are collected is mandatory.

2. Special assessments upon real estate for public improvements are taxes within the meaning of Sections 2655 and 3892, General Code.

3. By virtue of Section 2655, General Code, county treasurers are not permitted to receive payments of general taxes without at the same time receiving payment of installments of special assessments for public improvements certified to the county treasurer for collection.”

From the foregoing, it clearly appears that municipal assessments, after certification to the county auditor for collection, are to be regarded as taxes. Such assessments are to be placed on the tax list and duplicate and the installments thereof collected in the same manner and at the same time as the general taxes. It would seem, therefore, that the provisions of Section 2624, General Code, would entitle the auditor to include the collections of such special assessments as a part of the “moneys collected by the county treasurer” upon which the auditor’s compensation is to be computed.

Some doubt regarding the above conclusion appears to exist, however, because of an opinion written by a former Attorney General. This opinion is reported in the *Opinions of the Attorney General for 1920*, Vol. II, page 22, the syllabus thereof being as follows :

“County auditors are not entitled to any fees whatsoever in connection with the collection of county road assessments. County treasurers are entitled to fees of one-half of one per cent on the amount of such collections, to be paid upon the warrant of the county auditor upon the general fund of the county, and not deducted from the special assessments.”

At the outset, it should be noted that this opinion dealt with road assessments as distinguished from municipal assessments. It was said therein that road assessments were "not placed on a tax duplicate as such, but on a special assessment duplicate (see section 6923 G. C.)." Section 6923, General Code, provides that a special duplicate shall be kept for assessments levied for county road improvements. It was therefore reasoned that assessments collected for county road improvements were not "moneys collected by the county treasurer on any tax duplicate of the county, other than the liquor, inheritance and cigarette duplicates." It is unnecessary to analyze the soundness of such reasoning at this time, for municipal assessments, as has been previously shown, are entered on the general tax list and duplicate.

To permit the auditor to include road assessment collections when computing his fee under Section 2624, General Code, it was suggested in the 1920 opinion, would cause a deficiency in the special assessment account which could not be made up in any manner. It was said that "The state and county road statutes have been examined and without quotation of them it may be said that they do not expressly or by inference provide that such fees are to be considered in arriving at the total cost and expense of the improvement for which assessments are to be made." In this respect also, municipal assessments may be distinguished from road assessments. When municipal assessments are uncollected by the municipality and are certified over to the county auditor for collection, the county auditor is given express authority to add the expenses of collection to the assessments. Such authority is found in Section 3852, General Code, which reads:

"In placing such assessment on the tax-list, the county auditor is required to add to each assessment such per cent as he deems necessary to defray the expenses of collecting it."

Thus, we see that no deficiency need exist in the case of municipal assessments.

Some question might arise as to whether Section 3852, General Code, has general application to all municipal assessments. Such inquiry might well be inspired by the headings of Sections 1536-230 and 1536-231 of Bates' Annotated Ohio Statutes and by footnotes found in certain other publications. Sections 1536-230 and 1536-231, *supra*, were substantially

the same as the present Sections 3851 and 3852, General Code. Respectively they bore the headings "(Assessment for sprinkling, etc., lien on land charged.)" and "(Expense of collecting to be added to assessment.)" These sections were originally enacted in 1869 (66 O. L., 145, 221, 222), at which time they clearly referred to the preceding section of the act, known as Section 436, which provided for the payment of the sprinkling of streets by assessing the abutting lands. In 1874, Section 436 was amended in 71 O. L., 72, so that, in addition to sprinkling, Section 436 included the improvement of streets, keeping the same in repair, and the planting and taking care of shade trees. Obviously, the effect of this amendment was to broaden the application of Sections 437 and 438, which are now Sections 3851 and 3852, General Code. Section 436, which had become Section 2312, Revised Statutes, was repealed in 1902 as a part of the act embracing the "Municipal Code of 1902" (96 O. L., 20 to 110, inclusive). The repeal of this dominant section left the sections now known as Sections 3851 and 3852, General Code, standing alone, and their references to "such assessments" were left open to interpretation. Upon the adoption of the General Code in 1910 following the report of the Codifying Commission, Sections 3851 and 3852, in substantially their original language, were re-enacted. It appears most significant that at least since the adoption of the General Code these sections have been included as a part of the general provisions authorizing municipal corporations to make special assessments and providing for the collection thereof. It is also significant that Section 3851, General Code, is the only section providing that special assessments shall be liens upon the realty. Such liens have been uniformly regarded as applying to all types of municipal assessments. In the same manner, Section 3852, General Code, is the only section authorizing the auditor to add collection expenses to the amount of the municipal assessments certified for collection. The conclusion seems logically to follow that the auditor is required to add collection expenses to all municipal assessments when certified to him for collection, thereby eliminating the possibility of creating a deficiency in the special assessment fund.

In view of the foregoing and in specific answer to your inquiry, it is my opinion that collections made by the county treasurer on special

assessments of municipalities which have been certified to the county auditor for collection, should be included in determining the fees to be allowed to the county auditor as compensation for his services, under the provisions of Section 2624, General Code.

Respectfully,

HUGH S. JENKINS

Attorney General