

2833.

TAX AND TAXATION—SPECIAL ASSESSMENTS—DUTY OF COUNTY TREASURER TO COLLECT AT SAME TIME TAXES ARE COLLECTED—MAY RECEIVE TAXES EVEN THOUGH SPECIAL ASSESSMENTS ARE NOT TENDERED.

SYLLABUS:

1. *It is the duty of the county treasurer to proceed in the same manner and at the same time to collect both general taxes and special assessments.*
2. *It is not the duty of the county treasurer to refuse acceptance of the payment of general taxes when tendered, notwithstanding special assessments are due and payable at the same time but are unpaid.*

COLUMBUS, OHIO, November 3, 1928.

*Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.*

GENTLEMEN:—This will acknowledge receipt of your communication which reads:

“The Bureau is in receipt of a newspaper clipping from Youngstown, Ohio, dated March 23, 1928, in which it is stated that the treasurer of Mahoning County was ordered by the Mahoning County Court of Appeals to collect general taxes and special assessments at the same time. It is further stated that the court directed the county treasurer to refuse to accept general taxes without the special assessments; and that it is his duty to do so.

Question: Is it the duty of the county treasurers generally to refuse to accept general taxes from owners of property in a municipal corporation when municipal special assessments are also due and payable at the county treasurer’s office?”

This office endeavored to procure a copy of the opinion of the Court of Appeals for Mahoning County in the above case, but was informed by the prosecuting attorney that the court had not prepared an opinion. However, I have before me a certified copy of the writ of mandamus issued in said case, which is styled *The State of Ohio ex rel., James E. Jones, as Director of Finance of the City of Youngstown, vs. Judson Brenner, as Treasurer of Mahoning County, Ohio*. The writ reads as follows:

“To Judson Brenner as County Treasurer of Mahoning County, Ohio:

Whereas, on the 14th day of March, 1928, a petition for a writ of mandamus, duly verified, was filed in the office of the clerk of said court, \* \* \*

And Whereas, upon the application of said petition to said court, on the 14th day of March, 1928, an Alternative Writ of Mandamus was allowed, and an order was granted against said defendant, and duly entered upon the Journal of said court, of which the following is a true copy:

\* \* \*

Whereas, on this date there was filed in this court and in this cause a Petition for Mandamus against Judson Brenner as County Treasurer of Mahoning County, Ohio, a copy of which petition is hereto attached, and made a part hereof, praying for an Alternative Writ of Mandamus requiring and commanding said defendant therein to collect Special Assessment Taxes levied by the city of Youngstown for public improvements upon lots and lands therein at the same time general taxes are due and payable on such lots and lands at the office of said county treasurer; and to require and command the

said Judson Brenner to discontinue the custom and practice of accepting general taxes upon such lots and lands, without requiring the owners thereof to pay such special assessment at the same time.

It is therefore ordered that said defendant, JUDSON BRENNER, as treasurer of Mahoning County, Ohio, be and he is hereby directed and commanded to perform said acts on being served with this Writ, or to show cause to this court on the ----- day of March, 1928, why the same should not be done."

(Signed by two judges of said Court of Appeals.)

I am informed by the clerk of said Court of Appeals that the foregoing order, on hearing, was made permanent, an entry under date of March 23, 1928, reading:

"Peremptory writ allowed as prayed for."

It will be seen from the above that, as pointed out in the newspaper clipping to which you refer, the decision of the Court of Appeals applied only to future tax collections and not to the collection of special tax assessments now delinquent.

In an opinion of this department, reported in Opinions, Attorney General, 1923, Vol. I, page 169, it was held that:

"County treasurers may accept payment of general taxes independently of special assessments when tendered by taxpayer."

This opinion quoted from an opinion reported in Opinions, Attorney General, 1917, Vol. III, page 2380, and also from an opinion contained in the Annual Report of the Attorney General for 1910-11, at page 1006, in each of which it was held that the county treasurer might accept general taxes when tendered, independently of special assessments.

It would appear, therefore, that the decision of the said Court of Appeals herein noted is in conflict with the said 1923 opinion of this department.

Since the 1923 opinion was rendered, Section 3892 of the General Code has been amended (112 v. 61). This section formerly read 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, \* \* \* shall certify such assessment to the county auditor, \* \* \*. 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 as other taxes are collected, and when collected pay such assessment to the treasurer of the corporation, \* \* \* ."

The section as amended reads:

"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, \* \* \* shall certify such assessment to the county auditor, \* \* \* . 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, \* \* \* . (Italics the writer's.)"

It will be noted that there is added in the amended section the words "and at the same time as" and also the words "together with interest and penalty, if any." The section as amended also provides that each installment of such assessments after becoming due shall bear the same penalty as delinquent taxes. A city solicitor, or the legal representative of the municipality, is authorized and directed to act as attorney for the county treasurer in collecting such delinquent special assessments.

It is necessary to determine whether Section 3892, as amended and containing the provision that the county treasurer shall collect the special assessment in the same manner and at the same time as other taxes are collected, changed the law as set forth in the opinion of 1923 above referred to.

The question before my predecessor in 1923 was as to whether or not the county treasurer could receive the real estate taxes and street assessments without injuring the right later to collect the Dow tax as provided by law. Language was quoted from an opinion reported in the Annual Reports of the Attorney General, 1910-11, page 1006, as follows:

" \* \* \* It is elementary that such special assessments are not taxes. Certainly they are not taxes for general county or municipal purposes. In the absence of a statute like 2655 of the General Code, I know of no principle which would preclude the treasurer from accepting payment of all taxes otherwise on the general duplicate against property of the taxpayer, together with all other property in the county or taxing district, without being tendered payment of the special assessment."

Said opinion also quotes from the opinion reported in Opinions, Attorney General, 1917, Vol. III, page 2380, as follows:

"The act of 1917 in no wise changes the law respecting the authority of the county treasurer to accept payment of general taxes without payment of assessments charged against the land."

In the foregoing opinions it was considered that the provision of Section 3892, as it then read, to the effect that the county treasurer shall collect special assessments "in the same manner as other taxes are collected," did not compel the collecting of the special assessments at the same time that other taxes were collected.

It is my opinion that Section 3892, supra, as last amended, does not alter the situation insofar as your question is concerned. Said section in its present form simply requires the county treasurer to collect such assessments at the same time and in the same manner that other taxes are collected. In my opinion No. 990, issued under date of September 12, 1927, and reported in Opinions, Attorney General, 1927, Vol. III, page 1721, it was held, as stated in the third branch of the syllabus, that:

"By the provisions of Section 3892 of the General Code, as amended in Amended Senate Bill No. 27 (87th General Assembly), the installments of assessments when certified to the county auditor are to be collected in the same manner and at the same time as other taxes are collected and, accordingly, one-half of each annual installment is payable with the December collection and the other half thereof with the June collection. Interest upon unpaid installments should be computed as to each half from the last day for the payment of taxes."

While assessments are to be collected in the same manner and at the same time as taxes, it must be kept in mind that, as pointed out in the opinion of the Attorney General, reported in the Annual Report for the year 1910-11, heretofore quoted from, there is a distinction between taxes and special assessments. Also see *Wastaney vs. Schott, Treas., etc.*, 58 O. S. 410. It must be remembered that taxes are levied for the purpose of raising revenue to defray the operation of the various branches of government of the state, whereas assessments are made upon the theory of special benefits being conferred upon the property assessed, and the authority for the respective powers are derived from different provisions of the constitution.

It is obvious that one could well have a valid defense to the collection of an assessment when no such right would be available as to the tax due and payable at the same time. In the Youngstown case, *supra*, all of the facts do not appear. It does appear, however, in the memorandum submitted by the solicitor of said city that:

"In the instant case the city of Youngstown has been obliged to sit by for years, in some instances as much as ten years, for the collection of these delinquent special assessments; the number and the amount have been increasing from year to year until now it reaches a total that affects the general taxation scheme of the city, is seriously affecting the bonded indebtedness of the city and the individual taxpayer, and the condition has become acute."

If the facts stated in the said memorandum are true, it would appear that no proper effort was being made to collect the assessments involved in the case referred to in your communication. There can be no doubt that the treasurer, in the event the taxes and assessments become delinquent, should proceed to collect both. It is very probable that the court in the Youngstown case, *supra*, was considering the question of total failure on the part of the treasurer to make collection rather than the question of receiving payments of taxes in the ordinary procedure and that the language of the entry is broader than really intended by the court. In any event the court's decision in the case in question is binding upon the treasurer of Mahoning County. It is a fact that the Tax Commission of Ohio, county treasurers and other state and county officials have for years been following the former rulings of this office upon the question, which administrative interpretation should be given great weight, the rule upon this proposition being so well settled as to require no citation of authority herein. Unless, therefore, it is clear that, by the amendment of Section 3892, *supra*, the Legislature intended to change the law with reference to the receiving of either taxes or assessments without receiving both, the interpretation heretofore given and followed should be adhered to.

It will be noted that when a complaint is filed as to the valuation or assessment, under Section 5609, General Code, the treasurer may accept any amount tendered. The following is quoted from said statute:

" \* \* \*

Each complaint shall state the amount of over-valuation, under-valuation, or illegal valuation, complained of; and the treasurer may accept any amount tendered as taxes upon property concerning which a complaint is then pending, and if such tender is not accepted no penalty shall be assessed because of the non-payment thereof. The acceptance of such tender, however, shall be without prejudice to the claim for taxes upon the balance of the valuation or assessment. A like tender may be made, with like effect, in case of the pendency of any proceeding in court based upon an illegal (alleged) excessive or illegal valuation."

It is evident that the section last mentioned refers to taxes and not special assessments. If taxes may not be paid without the payment of assessments, in cases arising under Section 5609, *supra*, the question would be raised as to whether assessments in those instances could be paid when there was a controversy involved. This is only one instance of the many in which taxes must be distinguished from special assessments from the standpoint of collections. The court in the Youngstown case, *supra*, did not write any opinion thereby enlightening us upon the law and logic upon which its conclusions were based.

What has preceded herein compels the conclusion that the collection of taxes and the collection of special assessments are two separate and distinct functions to be exercised by the county treasurer. It is my opinion that, while it was the intention of the Legislature, when amending Section 3892 to read as it now reads, to make it the duty of the county treasurer to collect assessments in the same manner and at the same time as other taxes are collected, it was not the Legislature's purpose to provide that the county treasurer could not receive the one without the other.

In addition to the reasons above given, I believe this to be the correct conclusion, for the further reason that, if it were to be held that taxes might not be received unless special assessments were received at the same time, in case there should be a general refusal or failure to pay special assessments levied by a municipality, the inability of the county treasurer to receive taxes due the state, county, township, school districts, as well as the municipality, might serve seriously to cripple the operation of government in one or all of these various taxing districts. Moreover, there might be cases in which taxpayers were able to pay the general taxes due from such taxpayers when they were due and payable and unable because of lack of funds to pay certain special assessments. To hold that the county treasurer might not receive taxes unless he also received special assessments might not only serve to cripple the operations of the various political subdivisions, to which the taxes were due, but might also cause the taxpayer to pay a penalty on his general taxes when he was able, ready and willing to pay the same.

It may again be repeated that it is the duty of the county treasurer to collect the special assessments at the same time and in the same manner as the general taxes. And this being a duty especially enjoined by statute, it is my opinion that mandamus would clearly lie to compel him to perform this duty. However, it does not follow that, because it is the duty of the county treasurer to collect both taxes and special assessments and because he may be compelled by an action in mandamus to perform either or both of these duties, he may be enjoined from performing the one duty unless he at the same time performs the other. The mere statement of such a proposition is its own refutation.

In view of the foregoing, and in specific answer to your question it is my opinion that, while it is the duty of the treasurer to proceed in the same manner and at the same time to collect both the general taxes and special assessments, it is not the duty of the county treasurer to refuse acceptance of the payment of general taxes when tendered, notwithstanding special assessments are due and payable at the same time but are unpaid.

You are further advised that the decision of the court in the case of *State ex rel. James E. Jones, Director, vs. Judson Brenner, Treasurer, supra*, is clearly the law in that case and insofar as the facts in that case were concerned, is binding upon the treasurer of Mahoning County unless the order shall have been, or is hereafter vacated, modified or reversed.

Respectfully,  
EDWARD C. TURNER,  
*Attorney General.*