

**OPINION NO. 80-044****Syllabus:**

The Director of the Department of Liquor Control has no authority to transfer to the state general revenue fund any portion of the application fee moneys on deposit in the state depository trust fund since such moneys are, pursuant to R.C. 131.05 and 4303.24, contingent receipts.

**To: Clifford E. Reich, Director, Department of Liquor Control, Columbus, Ohio**  
**By: William J. Brown, Attorney General, August 25, 1980**

I have before me your request for my opinion concerning the following question:

May the Director of the Department of Liquor Control, under existing statutes, transfer a portion of the fee monies on deposit in the State Depository Trust Fund, representing application fees for new permits available only under a quota, where there is no opening under the quota and no opening will be available under the quota for the foreseeable future, to the General Revenue Fund, with safeguards for the return of the fee from the General Revenue Fund to the Depository Trust Fund if required but maintaining the application on file until an opening would occur or a request for cancellation of the application and a refund of fee would be received?

As you have noted in your letter, R.C. 4301.12 provides for the custody, use, and deposit of moneys received by or on behalf of the Department of Liquor Control. Specific provision is made therein for permit fees which are deposited upon filing for a liquor permit. R.C. 4301.12 provides, in relevant part, that "all moneys received from permit fees shall be paid to the treasurer of state and a separate account of such moneys shall be kept by the department, the auditor of state, and the treasurer of state."

After the deposit of such initial permit fees, R.C. 4303.24 provides for such fees to be kept on deposit until the requested permits are issued, with the exception that "[i]f a permit is not issued within one hundred twenty days from the

date of such remittance, such initial fee shall, at the request of the applicant, be returned to him." Such return of the fee pursuant to request does not affect the priority of the application. Rather, a fee which has been returned may be redeposited when an opening occurs.

Thus, the initial permit fee is contingent in nature, and is to be retained on file along with the permit application by the Department of Liquor Control. It is only after the termination of the one hundred twenty day period that such permit fee may be returned to the applicant, and then only if the applicant specifically makes application therefor. In the absence of such request for return, the permit fee remains on deposit as a receipt contingent upon issuance of a permit.

R.C. 131.04 establishes the state depository trust fund for the deposit of contingent funds such as liquor permit fees. It provides: "For the purpose of providing a method to properly collect, deposit, and audit contingent receipts received by various state departments, there is hereby created the 'state depository trust fund' of which the treasurer of state shall be the custodian."

R.C. 131.05 provides specifically for the types of funds which are required to be deposited in this special fund. In relevant part, it states:

Every state officer, state institution, department, board, commission, receiving fees or advances of money, or which, under section 131.01 of the Revised Code, collects or receives fees, advances, or money, shall deposit all such receipts to the credit of the state depository trust fund, when such receipts may be subject to refund or return to the sender, or when such receipts have not yet accrued to the state. (Emphasis added.)

The nature of contingent funds has been discussed on several occasions in Attorney General opinions. 1945 Op. Att'y Gen. No. 284, p. 302, provides, at 308:

Sections 24-3 and 24-4 [G.C. 24-3 and 24-4, predecessors to R.C. 131.04 and 131.05] relate to "contingent receipts" by the several departments, which are of such nature that they "have not accrued to the state" but "may be subject to return to the sender." Those sections would apply to the disposition of permit fees collected [by the Department of Liquor Control], but the revenues of your department which go to make up the rotary fund, derived mainly from sales of commodities and intended to "meet the maturing obligations of the department and as working capital for its future operation" do not fall within the class of "contingent receipts". . . .

1957 Op. Att'y Gen. No. 1230, p. 631, considered a situation in which the Department of Highways sought to transfer funds already on deposit in the general fund to the state depository trust fund. In rejecting such procedure, the opinion stated at 633:

None of the money sought to be deposited by the department can be properly designated as contingent in the sense that word is used in Section 131.04, supra. There is not the slightest possibility that these funds are to accrue to the state, but rather they will be definitely paid in satisfaction of an obligation of the state, nor is there basis for an assumption that these funds will be returned to the "sender", for the "sender" in this case could be only the state treasurer. . . .

Obviously, the specific funds here sought to be deposited do not meet the requirements of Section 131.05, supra, in any respect. A deposit of such funds is, therefore, not authorized by statute.

. . . Section 131.05, supra, provides for the procedure for handling receipts which may be subject to refund or return to the sender or

when such receipts have not yet accrued to the state. Funds collected or received described by Section 131.05, supra, are deposited in the state depository trust fund, being credited to the account in that fund as provided in Section 131.06, Revised Code. . . .

I find no provision in law which would authorize state officers, departments, boards or commissions to retain receipts contrary to the provisions of Sections 131.01 and 131.05, Revised Code.

See also 1979 Op. Att'y Gen. No. 79-030 (fees for attendance at a conference are contingent upon performance of the promise to hold the conference; once the conference is held, the contingency is removed and the funds on deposit accrue to the state); 1938 Op. Att'y Gen. No. 2155-A, vol. I, p. 841 (moneys collected by special counsel of Attorney General and paid over to him are payable into the depository trust fund, and withdrawal may be made through prescribed form of requisition for payment of special counsel fees).

You have proposed that the funds in question be transferred to the general revenue fund, with safeguards for return of particular fees to the depository trust fund if required. It does not appear that such a proposal is authorized under existing law, for moneys may be transferred from the general revenue fund only pursuant to specific appropriation of the General Assembly. Ohio Const. art. II, §22 ("[n]o money shall be drawn from the treasury, except in pursuance of a specific appropriation, made by law. . ."). It was concluded by one of my predecessors in 1939 Op. Att'y Gen. No. 720, vol. I, p. 884, that transfers made from the state depository trust fund into the state treasury may not be withdrawn from the treasury in the absence of a specific appropriation therefor by the General Assembly. That opinion concerned a situation in which insurance companies maintained deposits with the Superintendent of Insurance, which were deposited in the depository trust fund and transferred to the general revenue fund as needed to pay fees of various sorts. It was concluded that, even if funds are transferred to the general revenue fund erroneously, they cannot be transferred back to the depository trust fund, and no accounting adjustment can be made, without action by the General Assembly. See also State ex rel. Rothbacher v. Herbert, 176 Ohio St. 167, 198 N.E. 2d 463 (1964) (holding that when unclaimed deposits of a liquidated building and loan company have been transferred, due to the lapse of time and pursuant to statute, from the treasurer's special trust fund for such deposits into the general revenue fund, the funds may be withdrawn only upon a proper warrant issued by the auditor based upon an appropriation therefor); 1957 Op. Att'y Gen. No. 460, p. 127 (concerning need for a specific appropriation authorizing the expenditure of public moneys). Thus, moneys paid into the general revenue fund cannot remain contingent receipts, but rather become subject to the inhibition of Ohio Const. art. II, §22, that they may not be withdrawn except pursuant to a specific appropriation. No safeguard can be attached which would permit transfer back to the depository trust fund absent such specific appropriation.

You have indicated that your question has arisen because there are a number of application fees which have been on deposit for up to twenty-four years in conjunction with applications for new permits available only under a quota, where it does not appear that any opening will be available in the foreseeable future and where the Department of Liquor Control has been unable to contact the applicants concerning a return of the fee or cancellation of the application. You have indicated that receipts for all fees on deposit must be totaled and balanced every month—a time-consuming and expensive procedure, and one which seems needless with respect to fees which, for all practical purposes, have been abandoned. I appreciate your concern, but I must conclude, nonetheless, that no statutory authority currently exists for the transfer of funds which you propose.

R.C. 131.06, which deals with withdrawal of funds from the state depository trust fund, provides for two instances when funds may be withdrawn. The first such instance is described in the first paragraph of R.C. 131.06, which states, in part:

Withdrawals of money from the fund shall be made by requisition on

the treasurer of state as custodian of the fund by the authorized official of the office or department where the receipt originated. The requisition shall show the purpose of the withdrawal and other information as the treasurer of state requires. The authorized official of the office or department where the receipt originated shall draw a requisition or revenue voucher on his balance in the fund for amount accruing to the state and pay it in to the state treasury through the auditor of state. . . . (Emphasis added.)

From the authorities previously mentioned in this opinion, it is quite obvious that your proposed transfer of contingent permit fees would not qualify as an "amount accruing to the state." Since such fees are not amounts already owed to the state but are instead contingent upon issuance of a liquor permit, they are not proper subjects for transfer under this provision.

The second instance in which funds may be transferred from the state depository trust fund appears in the third paragraph of R.C. 131.06, as follows:

Upon presentation to the treasurer of state of a requisition for payment from the state depository trust fund other than for payment of amounts accruing to the state, the treasurer of state shall issue a check payable to the person named in the requisition drawn on the fund. (Emphasis added.)

As discussed above, it is a contradiction in terms to speak of transferring to the general revenue fund moneys which have not accrued to the state, for moneys channeled into such fund become funds of the state which may be withdrawn only pursuant to specific appropriation therefor. Therefore, this provision does not authorize the transfer of funds to the general revenue fund in the situation you have posed.

In specific answer to your question, then, it is my opinion, and you are hereby advised, that the Director of the Department of Liquor Control has no authority to transfer to the general revenue fund any portion of the application fee moneys on deposit in the state depository trust fund since such moneys are, pursuant to R.C. 131.05 and 4303.24, contingent receipts.