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1. TAXES AND ASSESSMENTS ERRONEOUSLY ASSESSED AND COLLECTED — RESULT CLERICAL ERROR — MAY BE REFUNDED TO TAXPAYER — WHERE FUNDAMENTAL ERROR, REMEDY, IF ANY, ACTION FOR RECOVERY COMMENCED WITHIN ONE YEAR — SECTIONS 2588, 2589, 2590, 12075 GENERAL CODE.

2. HOW ILLEGAL SPECIAL ASSESSMENT FOR MUNICIPAL IMPROVEMENTS MAY BE CORRECTED, ERROR, CLERICAL OR FUNDAMENTAL.

3. PROCEDURE WHERE SPECIAL ASSESSMENT CERTIFIED TO COUNTY AUDITOR — DUTY COUNTY TREASURER TO COLLECT — MAY OMIT COLLECTION ONLY WHEN LEGALLY ENJOINED — SECTION 3892 GENERAL CODE.

SYLLABUS:

1. *Taxes and assessments erroneously assessed and collected may be refunded to the taxpayer, as provided in Sections* 2588, 2589 *and* 2590, *General Code, only when erroneously collected as a result of a clerical error. If the taxes and assessments were erronously paid as a result of a fundamental error, the taxpayer's remedy, if any, is an action for their recovery, commenced within one year after payment under authority of Section* 12075, *General Code.*

2. *An illegal special assessment for municipal improvements appearing on the general tax list and duplicate cannot be remitted by the municipal authorities and can only be corrected by the county auditor, if the illegality is the result of a clerical error. If the illegality is the result of a fundamental error, the remedy of the taxpayer is an action to enjoin the collection of the assessment under authority of Section* 12075, *General Code.*

3. *When a special assessment has been certified to the county auditor and placed upon the tax list and duplicate as provided by Section* 3892, *General Code, it becomes the duty of the treasurer to collect the*

assessment installments at the same time other taxes and assessments are collected, even though a taxpayer may claim the special assessment against his property is invalid because notice of the asessment was not served upon him. The treasurer, when collecting taxes against such property, is only authorized to omit the collection of the special assessment when he has been legally enjoined.

Columbus, Ohio, October 6, 1941.

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

Gentlemen:

This will acknowledge receipt of your letter requesting my opinion on the following questions:

> "Question 1. How may an assessment erroneously made for street improvements, and collected, be recovered? How may the one remaining assessment now due, be voided?
>
> Question 2. May the legal owner of the improved property be now billed for the entire assessment, regardless of the fact that notice of assessment was never served, considering the fact that said legal owner occupies the property assessed and had knowledge of the street improvement?"

Accompanying your inquiry is a letter from a city auditor from which it appears that improvements were made on a certain street in his city with the cost thereof assessed against the properties bounding and abutting on the improvement in proportion to the foot frontage. The letter further indicates that through error no notice of the assessment was served on the owner of one of the properties abutting on the improvement, and for that reason it is asserted the assessment, as to this property, was illegal. A method was sought by the city auditor to reimburse this taxpayer for the installments of the assessment already paid and to abate the remaining installment.

Sections 2588, 2589, and 2590, General Code, authorize the refunding of taxes paid as a result of a clerical error in the tax lists and duplicates. Particularly pertinent is Section 2588, General Code, which is as follows:

> "From time to time the county auditor shall correct all clerical errors which he discovers in the tax lists and duplicates either in the name of the person charged with taxes or assessments, the description of lands or other property, the valuation or assessment thereof or when property exempt from taxation has been charged with tax, or in the amount of such taxes or assessment, and shall correct the valuations or assessments on the tax lists and duplicates agreeably to amended, supplementary or final assessment certificates issued pursuant to law. If the correction is made after a duplicate is delivered to the treasurer, it shall be made on the margin of such list and duplicate without changing any name, description or figure in the duplicate as delivered, or in the original tax list, which shall always correspond exactly with each other."

Authority for correction of clerical errors is also found in Section 5571, General Code, which is as follows:

> "A county auditor, from time to time, shall correct any clerical errors which he may discover in the name of the owner, in the valuation, description, or quantity of any tract or lot contained in the list of real property in his county."

These sections, it should be noted, refer solely to clerical errors. Clerical errors generally refer to errors of bookkeeping and copying as distinguished from fundamental errors which are made in the exercise of judgment and are mistakes which occur in original or primary acts. Your inquiry discloses that the cost of the street improvement was assessed against the owners of abutting lots and that "through someone's error, proper service was not made upon the owner of one of these lots." This, the present owner of the lot concludes, has made the assessment illegal. A return of the assessment installments paid to date and a remission of the remaining installment is sought.

A determination of whether or not proper service was made cannot be regarded as an error of bookkeeping or copying, but must be classified as an error of judgment occurring in an original or a primary act — in other words, if an error has been made, it was a fundamental error. Taxes and assessments paid as a result of a fundamental error cannot be refunded under authority of Sections 2588, 2589, 2590 and 5571, General Code. If recoverable at all, such taxes and assessments should be recovered by an action brought under authority of Section 12075, General Code, which provides:

> "Common pleas and superior courts may enjoin the illegal

> levy or collection of taxes and assessments, and entertain actions to recover them back when collected, without regard to the amount thereof, but no recovery shall be had unless the action be brought within one year after the taxes or assessments are collected."

Not only must the action be commenced within one year after the payments of the taxes and assessments, but such payments must have been involuntary payments; that is, payments made under duress and compulsion, actual, present and potential. City of Marietta v. Slocomb, 6 O.S., 471; Whitbeck, Treasurer, v. Minch, 48 O.S., 210; State, ex rel. Pulskamp, v. Commissioners, 119 O.S., 504; Benzoline Company v. State, ex rel. Bettman, 122 O.S., 175. The exception to this rule is found in Section 12077, General Code, which provides in part:

> " * * * If a plaintiff in an action to recover back taxes or assessments or both alleges and proves that he or the corporation or deceased person whose estate he represents, at the time of paying such taxes or assessments, filed a written protest as to the portion sought to be recovered, specifying the nature of his claim as to the illegality thereof, together with notice of his intention to sue under this chapter, such action shall not be dismissed on the ground that the taxes or assessments sought to be recovered, were voluntarily paid."

Your inquiry does not indicate that any written protest was filed. Hence, the general rule stated above, precluding the recovery of voluntary payments, must be regarded as applicable. Furthermore, if the payments were made as a result of a mistake of law, there can be no recovery, even if they were involuntary payments. The rule is briefly stated in Pomeroy's Equity Jurisprudence, 4th Edition, page 1740, section 851:

> "It is well settled at law, and the rule has been followed in equity, that money paid under a mistake of law with respect to the liability to make payment, but with full knowledge, or with means of obtaining knowledge, of all the circumstances, cannot be recovered back."

Phillips, Executrix, v. McConica, Guardian, 59 O.S., 1, 10, 51 N.E., 445; Railway Company v. Iron Company, 46 O.S., 44, 50; Cincinnati v. Gas, Light and Coke Company, 53 O.S., 278, 289; Whitbeck, Treasurer, v. Minch, 48 O.S., 210; and State, ex rel. Pulskamp, v. Commissioners, 119 O.S., 504.

Even if the payments were regarded as having been made under a mistake of fact, recovery will be denied where the mistake of fact is that

of the taxpayer due to his own neglect. Cooley on Taxation, Volume 3, 4th Edition, page 1751, section 856.

In answer to the first branch of your first question, it is therefore my opinion that taxes and assessments erroneously assessed and collected may be refunded to the taxpayer, as provided in Sections 2588, 2589 and 2590, General Code, only when erroneously collected as a result of a clerical error. If the taxes and assessments were erroneously paid as a result of a fundamental error, the taxpayer's remedy, if any, is an action for their recovery, commenced within one year after payment under authority of Section 12075, General Code.

Coming now to a consideration of the second branch of your first question in which you ask how the remaining assessment may be voided, you will note that Sections 2588 and 5571, General Code, require the county auditor from time to time to correct any "clerical errors" which he may discover on the general tax lists and duplicates, with respect to valuation, description or quantity of property. However, the error you have noted is fundamental in character and the county auditor is without authority to make any corrections with respect thereto. The municipal authorities having certified the assessment to the auditor for collection, have thereupon lost their control over such assessment and are without power to make corrections. To this effect the syllabus of Opinion No. 3601, rendered by me on March 24, 1941, reads:

> "After delinquent sewer rental charges have been certified by a city to the county auditor for collection under authority of Section 3891-1, General Code, there is no authority for the city through its council or any of its other officials to order the county auditor to strike an item thereof from the general tax list and duplicate for the reason that such item has been erroneously included therein. After delinquent sewer rentals have been entered on the general tax list and duplicate for collection, corrections of clerical errors therein may be made by the county auditor as provided in Section 2589, General Code."

The taxpayer is not wholly without remedy at this stage, however, for it will be recalled that Section 12075, General Code, quoted herein, provides that the courts may enjoin the illegal collection of assessments, and Section 2655, General Code, authorizes the county treasurer to omit the collection of a particular tax when legally enjoined.

In answer to the second branch of your first question, it is my opinion

that an illegal special assessment for municipal improvements appearing on the general tax list and duplicate cannot be remitted by the municipal authorities and can only be corrected by the county auditor, if the illegality is the result of a clerical error. If the illegality is the result of a fundamental error, the remedy of the taxpayer is an action to enjoin the collection of the assessment under authority of Section 12075, General Code.

In your second question you ask whether the owner of the property may be billed for a special assessment if neither he nor his predecessor in title has been served with "notice of assessment." As was also true with respect to your first question, it is difficult for me to understand how a solution of your question will in any manner be of assistance to your office. Furthermore, neither your letter nor the enclosed letter from the city auditor discloses the nature of the improvement. In order to meet the requirements of the due process provisions of the Constitution, some provision for the notice of the adoption of the resolution declaring the necessity of the public improvement and opportunity for a hearing thereon should be given to the owners of properties upon which the special assessments are to be levied. The same is true as to notice of proposed assessments to be made in pursuance of such resolution. For example, Section 3895, General Code, provides for a notice by publication prior to the adoption of an assessment. Section 3812-1, General Code, provides for written notice in the case of water and sewer service connections. Section 3812-4, General Code, provides for notice by publication in the case of assessments for the lighting of streets, alleys and certain other public places. Section 3854, General Code, provides for service of written notice of the resolution to construct or repair sidewalks, curbing or gutters, and if an owner is a non resident or neither the owner nor his agent can be found, notice may be given by publication as provided in Section 3856, General Code. Many other examples might be cited. Furthermore, it is generally held that notice is waived by persons who have signed a petition for an improvement. From this discussion it should be apparent that questions of whether or not proper and sufficient notice have been given or whether notice has been waived are questions of law and if errors have occurred therein, they are fundamental errors which cannot be corrected by either the officials of the municipality or the county auditor after they have been entered on the tax list and duplicate for collection.

When a special assessment has been certified to the county auditor

for collection, it becomes the duty of the county auditor to place the assessment on the tax list and duplicate and thereafter it is the duty of the county treasurer to make collections. Provisions therefor are found in Section 3892, General Code, which is 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 September, 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. * * * "

After a special assessment has been placed upon the tax list and duplicate, the assessment must be regarded as valid until the contrary has been made to appear to a court of competent jurisdiction. Bolton v. Cleveland, 35 O.S., 319, 322. The county treasurer has no discretionary powers in the collection of taxes and assessments. To the contrary, it was held in State, ex rel. Brown, v. Cooper, 123 O.S., 23, as disclosed by the syllabus:

> "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.
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> 2. Special assessments upon real estate for public improvements are taxes within the meaning of Sections 2655 and 3892, General Code.
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> 3. By virture 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."

Section 2655, General Code, so far as it is relevant to the subject of your inquiry, reads:

> "No person shall be permitted to pay less than the full amount of taxes charged and payable for all purposes on real estate, except only when the collection of a particular tax is legally enjoined. * * * "

In specific answer to your second question, it is my opinion that when a special assessment has been certified to the county auditor and placed upon the tax list and duplicate as provided by Section 3892, General Code, it becomes the duty of the treasurer to collect the assessment installments at the same time other taxes and assessments are collected, even though a taxpayer may claim the special assessment against his property is invalid because notice of the assessment was not served upon him. The treasurer, when collecting taxes against such property, is only authorized to omit the collection of the special assessment when he has been legally enjoined.

Respectfully,

THOMAS J. HERBERT,

Attorney General.