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1. COUNTY AUDITOR—DUTY TO ADD AN ITEM REPRESENTING ESTIMATED COLLECTION EXPENSE TO TAX LIST AND DUPLICATE—SPECIAL ASSESSMENTS MADE BY MUNICIPAL CORPORATIONS — MANDATORY DUTY IS CONTINUING ONE — WHERE COUNTY AUDITOR FAILED TO ADD ITEM IN PRIOR YEARS, IT SHOULD BE ADDED BOTH TO CURRENT AND DELINQUENT TAX LISTS—SECTIONS 727.01, 727.65 RC, 3812 ET SEQ., 3852 GC.
  
2. FEE—PROVISION MADE IN SECTION 2624, PARAGRAPH (A), GC—319.54 RC, SHOULD BE COMPUTED ON BASIS OF ALL MONEYS COLLECTED ON ANY TAX DUPLICATE OF COUNTY — DELINQUENT TAX LISTS INCLUDED — MONEYS COLLECTED ON ACCOUNT OF MUNICIPAL ASSESSMENTS NOT INCLUDED—COMPENSATION FOR COLLECTION PROVIDED BY SECTIONS 727.65 RC, 3852 GC—OPINION 3852, OAG 1945, PAGE 340 OVERRULLED.

## SYLLABUS:

1. The provisions of Section 3852, General Code, Section 727.65, Revised Code, are mandatory and they impose on the county auditor the duty to add an item representing his estimated collection expense to the tax list and duplicate with respect to all special assessments made by municipal corporations under the provisions of Section 3812, et seq., General Code, Section 727.01 et seq., Revised Code. Such mandatory duty is a continuing one and where the county auditor has failed to add such item in prior years, it should be added both to the current tax lists and to delinquent tax lists.

2. The fee for which provision is made in Section 2624, General Code, paragraph (A), Section 319.54, Revised Code, should be computed on the basis of all moneys collected on any tax duplicate of the county, including delinquent tax lists, but not including money collected on account of municipal assessments, the compensation for the collection of such assessments being specially provided for by Section 3852, General Code, Section 727.65, Revised Code. Opinion No. 324, Opinions of the Attorney General for 1945, p. 340, overruled.

Columbus, Ohio, October 14, 1953

Hon. Oliver R. Marshall, Prosecuting Attorney  
Painesville, Lake County, Ohio.

Dear Sir:

Your request for my opinion reads as follows:

"Section 2624 of the Ohio General Code provides that in his annual settlement the County Auditor shall be allowed certain compensation for his services.

"Section 3852 of the Ohio General Code, referring to the collection by a county auditor of special assessments, provides as follows:

"'3852. Expenses of collecting to be added to assessment.—In placing such assessment on the tax list, the county auditor is required to add to each assessment such percent as he deems necessary to defray the expenses of collecting it.'

"I am unable to find in the Ohio General Code any procedure for the County Auditor to follow in keeping accounts of special assessments collected or for the allowance of auditor's fees on such collections.

"I am familiar with the opinion of your predecessor contained in 1945 Opinions of the Attorney General, page 340, Opinion No. 324, in which it is held that collections made on special assessments shall be included in determining fees to be allowed to the county auditor as compensation for his services under the provisions of Section 2624 Ohio General Code. In the course of this opinion it is stated that since the County Auditor is required to add collection costs to the amounts of special assessments certified to him, the possibility of creating a deficiency in the special assessment fund is thereby eliminated.

"The Auditor for Lake County, Ohio, has not heretofore added collection charges to special assessments on his tax list, and has not requested nor been credited with any fees for the collection of special assessments. With increased costs, however, he is currently adding collection charges to special assessments in the preparation of his tax lists, in accordance with Section 3852 Ohio General Code, and expects to claim a credit in his annual settlement for money so collected, in accordance with Section 3852 Ohio General Code and in accordance with the opinion of your predecessor referred to above. The Auditor feels that the fees provided in Section 3852 Ohio General Code are adequate to compensate him for the expense of collecting special assessments. My question relates to the correlation, if any, between the

above mentioned sections of the Code and with particular respect to the collection of delinquent assessments. The Auditor would like to charge the taxpayer a fixed percentage on all collections as provided in Section 3852 Ohio General Code. At first glance it would seem that to permit the Auditor to claim his fees upon total collections, would result in a fee upon delinquent collections where no provision had been made in the tax list for such collection from the taxpayer. However, let me point out that no deficiency in any special assessment fund would result from such practice. When an assessment becomes delinquent, our Auditor adds a penalty of 10% the first year and charges interest at the rate of 8% per annum on each delinquent installment thereafter. Therefore, the allowance of the Auditor's fees on collections of delinquencies would result only in a reduction in the amount of the penalties and interest paid over to the taxing authority.

"If I am correct that the legislature has not provided any correlation between the above mentioned sections of the Code, it appears to me that the Auditor's proposed solution is both legal and practical and the Auditor should be permitted to now add his collection expenses to all current tax bills, which expenses shall be placed upon his current tax lists and that he should further be permitted to add similar collection charges to delinquencies at the time delinquent tax bills are issued. He would then be enabled to claim his statutory fee (Section 2624 O.G.C.) upon the total amount of his collections for general real estate taxes and special assessments. Therefore my specific questions are as follows:

"1. May a County Auditor who has not heretofore added collection expenses to his tax list of special assessments, now add to current lists a percentage charge to cover his collection expenses?

"2. May a County Auditor who has not heretofore added collection expenses to his tax list of special assessments, now add to delinquent bills a percentage charge to cover his collection expenses?

"3. If the answers to my first questions are in the affirmative, then may the County Auditor in his annual tax settlement compute his fee from his total collections from general real estate taxes, plus special assessments, plus delinquencies on each?"

Provision for the allowance of compensation for the services of the county auditor for the collection of taxes are found in Section 2624, General Code, which 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 percent ; 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.”

We may first examine the question of the application of this section to the collection of delinquent taxes by the county auditor. Because Section 2624, *supra*, is by its terms expressly made applicable to “any tax duplicate of the county,” I have no difficulty in concluding that it is applicable not only to the general tax list and duplicate compiled as provided in Sections 2583 and 2584, General Code, but is applicable as well to the tax list and duplicate of delinquent personal and classified property made up as provided in Section 5694, General Code.

In case of delinquent real property taxes, provision is found in Section 5704, General Code, for the compilation by the auditor of a delinquent land list and duplicate thereof, the original of such list being retained by the auditor and the duplicate being delivered to the treasurer. Collection of delinquent real property taxes by the treasurer is provided for in Sections 5704-1 and 5723, General Code. These sections read :

Section 5704-1 :

“The office of the county treasurer shall be kept open, to receive the payment of delinquent real estate, personal and classified property taxes, from the date of the delivery of the delinquent land lists and the delinquent personal and classified property tax lists, provided for in sections 5694 and 5704 of the General Code, until the final publication of any of such delinquent tax list, as provided in said sections, in order that the name of any taxpayer, paying such taxes prior to forty-eight hours before the first publication of any such list, may be stricken from such list ; and in case payment is made subsequent to the first publication and at any time prior to forty-eight hours before the second publication of any such list the name of such taxpayer shall be eliminated from the second publication.”

Section 5723:

“It shall be the duty of the county treasurer, upon receipt by him of all moneys due him for delinquent taxes, assessments, penalty and interest on any tract of land, city or town lot, to enter upon the tax duplicate and upon his copy of the delinquent land list the word ‘redeemed,’ and it shall be the duty of the county auditor, after each settlement period, to revise the list of delinquent lands, city or town lots, by writing the word ‘redeemed’ (in the margin provided for that purpose) on all such tracts of land, city or town lots entered ‘redeemed’ upon the treasurer’s duplicate, and he shall make a like entry on his tax list.”

The provision in Section 5723, supra, for an entry “on the tax duplicate” by the treasurer with respect to payments of delinquent real property taxes is sufficient, in my opinion, to constitute such collection by him an instance of moneys “collected by the county treasurer on any tax duplicate of the county” as this language is used in Section 2624, General Code. I conclude, therefore, that this section is applicable to collections of delinquent taxes.

In Title XII of the General Code, relating to municipal corporations, we find that Division III therein relates to the special powers of such corporations. Within Division III we find Chapter 5 on the subject of special assessments, such chapter consisting of Sections 3812 to 3911, General Code. In this chapter provision is made for the imposition of special assessments by municipal corporations to meet the expense of certain public improvements, and provision is made also for the entry of such assessments on the tax list and duplicate and the collection thereof by the county auditor. In the matter of entry of such assessments on the tax list, we find the following provision in Section 3852, General Code:

“In placing such assesment 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.”

In your inquiry you indicate that the county auditor has not heretofore added to his tax list of special assessments any item as required by this section. I am unable to perceive how the failure to do this in prior years would affect his statutory duty to make current entries, as required by this section, on the tax list and duplicate currently being compiled. In view of the plain requirement of the statute, I conclude, therefore, that in making up such current tax list and duplicate of special assessments

the auditor is not only authorized but is required to add to each assessment such per cent as he deems necessary to defray the expense of collecting the unpaid balance thereof.

In this connection it should be borne in mind that Section 3852, *supra*, is applicable only in case of special assessments made by municipal corporations and is not applicable to special assessments made by other taxing authorities.

In your second question you ask whether collection expense may be added under the provisions of Section 3852 to delinquent bills for special assessments. It is to be presumed that "the delinquent bills," to which you refer in the second specific question set out in your inquiry, constitute statements of the balances due and owing as special assessments made by a municipal corporation, and that all of such amounts have been regularly entered on the tax list and duplicate. Such being the case, I see no reason why the auditor should not enter on such tax list and duplicate a charge, as required by Section 3852, General Code, to cover the expense of collection of any amounts still uncollected, regardless of the year in which the liability for payment of the several component parts of such balance accrue.

In this connection also we may note that the balance due in the case of delinquent special assessments will include penalty and interest items. This circumstance, however, is scarcely sufficient to alter the matter, since under the provisions of Section 5678, General Code, the penalty charges on delinquent taxes and assessments are included in the total amounts which "constitute the delinquent taxes and assessments on such real estate to be collected in the manner prescribed by law," and under the provisions of Section 5679, General Code, interest which accrues on unpaid taxes and assessments "shall be charged on the duplicate from the expiration of such year until such taxes, assessments, penalties and interest are paid."

In the *per curiam* opinion in *State ex rel Crotty v. Zangerle*, 133 Ohio St., 532, we find the following statements, pp. 537 and 538:

"\* \* \* It is true that in certain jurisdictions a distinction has been drawn between taxes on one hand and interest and penalties on the other. But the controlling question here is whether they are so considered by the statutes of Ohio. Counsel agree that in this state the law requires that such interest and penalties be *charged* upon the *tax* duplicate, that they be *collected* as a part of the *taxes*, and that they be *distributed* as *taxes*. As illustrative

of this view of the Legislature, Section 5678, General Code, provides that when taxes, assessments and penalties are not paid 'the total of such amounts shall constitute the delinquent taxes and assessments on such real estate to be collected in the manner prescribed by law.' "

"\* \* \* Clearly interest and penalties upon delinquent taxes must be considered as part of the taxes for the purpose of solving the question here presented."

In view of this language we may readily conclude that any penalty and interest items which are included in the balance of special assessments due in cases of delinquency, are to be regarded as delinquent assessments. As such, they are required to be entered annually on the delinquent land list under the provisions of Section 5704, if and when the county treasurer is required, under the provisions of Section 5723, General Code, to make an entry to that effect not only on the delinquent land list but upon the tax duplicate as well.

For these reasons I conclude that where a county auditor has not heretofore added collection expense to his tax list of special assessments, as required by Section 3852, General Code, he should currently enter a charge for such expense on the tax list and duplicate of special assessments made by municipal corporations as to all parcels listed thereon, including delinquent lands; and that such percentage may be applicable to the entire amount due on any such parcel, including the penalty and interest which has accrued on such delinquent special assessments.

I realize that the addition of the service or expense charge to assessments which have already been on the tax duplicate, and which have already been paid in part, may seem harsh and unfair to purchasers of property who have relied on the record as to the amount of the balance of the assessment, but such hardship, or the neglect of the auditor to perform his duty, cannot change the law, and I can find no theory under which the property owner should escape a liability which the law imposes, even though the county is slow in asserting it. A county cannot be estopped by the wrongful act of its officers. 16 Ohio Jurisprudence, 652. In the case of *Neil v. Barron*, 7 O. N. P., 84, it was held that the wrongful action of the county treasurer in reporting taxes and assessments on property as paid, did not discharge the lien, or estop the state or the city from enforcing it.

We come now to your third specific inquiry which, for the purpose of convenience, is herein again set out :

“If the answers to my first two questions are in the affirmative, then may the county auditor in his annual tax settlement compute his fee from his total collections from general real estate taxes, plus special assessments, plus delinquencies on each?”

If the auditor does his duty under Section 3852, he will charge and collect *from the property owners* the entire county expense involved in collecting the assessments, and if, further, the percentages set out in Section 2624 are applied to the amount of the assessments collected, as well as to taxes and other moneys, *the municipality will pay* the same expense so far as the auditor's services are concerned. And it should be noted in this connection that Section 2685, General Code, allows the treasurer the same fees as are given the auditor by Section 2624 on all collections. Thus the county would be paid twice for the same service.

If we hold that the basis for applying the percentage “compensation” provided by Section 2624 as to the auditor and 2685 as to the treasurer, is to include all moneys collected on account of assessments, then it would include also the expense percentage contemplated by Section 3852, and the county would be receiving a percentage based on the expense charge which the auditor adds for the collection of assessments.

I cannot believe that the Legislature intended any such injustice. Rather, I should regard the expense allowance provided by Section 3852 as a special provision for reimbursement to the county for its service to the municipality, and taking the place, *pro tanto*, of the general provisions of Section 2624.

It is said in 50 American Jurisprudence, Statutes, Section 367, p. 371 :

“It is an old and familiar principle, closely related to the rule that where an act contains special provisions they must be read as exceptions to a general provision in a separate earlier or subsequent act, that where there is in the same statute a specific provision, and also a general one which in its most comprehensive sense would include matters embraced in the former, the particular provision must control, and the general provision must be taken to affect only such cases within its general language as are not within the provisions of the particular provision. \* \* \*”

In arriving at the conclusion which I have indicated, I find myself in disagreement with an opinion of one of my predecessors, to wit, Opinion No. 324, Opinions of the Attorney General for 1945, page 340, where it was held :



“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.”

In reaching that conclusion the then Attorney General apparently overlooked the fact to which I have called attention, that such construction of the law would give the county a double reimbursement for its expense. He also appeared to consider that the imposition and collection of the service charge imposed by Section 3852, *supra*, would eliminate the possibility of a deficiency in the assessment fund. I see no substance in that theory, because under Section 3892, General Code, all that the county treasurer can remit to the municipality is the “assessment, together with interest and penalty, if any,” and the municipality would under no circumstances receive any part of the service charge authorized by Section 3852, General Code.

Accordingly, I feel under the necessity of overruling the 1945 opinion above referred to, and answering your third question in the negative.

For these reasons, in specific answer to your inquiries, it is my opinion that:

1. The provisions of Section 3852, General Code, Section 727.65, Revised Code, are mandatory and they impose on the county auditor the duty to add an item representing his estimated collection expense to the tax list and duplicate with respect to all special assessments made by municipal corporations under the provisions of Section 3812, *et seq.*, General Code, Section 727.01 *et seq.*, Revised Code. Such mandatory duty is a continuing one, and where the county auditor has failed to add such item in prior years, it should be added both to the current tax lists and to delinquent tax lists.

2. The fee for which provision is made in Section 2624, General Code, paragraph (A), Section 319.54, Revised Code, should be computed on the basis of all moneys collected on any tax duplicate of the county, including delinquent tax lists, but not including moneys collected on account of municipal assessments, the compensation for the collection of such assessments being specially provided for by Section 3852, General Code,

Section 727.65, Revised Code. Opinion No. 324, Opinions of the Attorney General for 1945, p. 340, overruled.

Respectfully,

C. WILLIAM O'NEILL  
Attorney General