

1003.

TAX FUNDS—DEPOSITED IN COUNTY DEPOSITARIES SUBSEQUENTLY CLOSED BY SUPERINTENDENT OF BANKS—DISCUSSION OF LOSS AND DISTRIBUTION—COUNTY AUDITOR'S DUTY IN SUCH CASE—MONEY DEPOSITED WHEN BANK IN STATE OF LIQUIDATION.

SYLLABUS:

1. *When a county treasurer, upon receipt of tax funds levied by the county, municipalities, board of education and other taxing authorities which have levied taxes on the property in such county or a part thereof, has deposited them along with other county funds, under authority of law, in the legally constituted county depositories which thereafter are closed by the superintendent of banks, any loss suffered by reason thereof, is the loss of subdivisions which would be entitled to share in such funds upon distribution in the proportion that the collections by the county treasurer of such taxes levied for such subdivision bear to the total sum in the county depositories.*

2. *When a county depository bank has been taken over by the superintendent of banks and closed to business, such bank ceases to be a depository of the county. The equitable rights of the various taxing subdivisions are fixed as of that date.*

3. *The county auditor in making distribution of the tax funds collected by the county treasurer, should first determine the proportion of interest of the various subdivisions in the frozen or lost moneys deposited in depository banks in the custody of the superintendent of banks for liquidation and deduct such sums respectively from the total amounts collected by the county treasurer for the benefit of such subdivision before making such distribution to it.*

4. *Claims for moneys deposited in a depository bank which was in the process of liquidation prior to the receipt of current taxes, should not be considered in the determination of the distribution of current tax funds; such bank not being a county depository at the time of the receipt of such tax funds, the equitable ownership of such fund having been determined at the time such bank ceased to be a depository.*

COLUMBUS, OHIO, June 28, 1933.

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

GENTLEMEN:—Your recent request for opinion reads:

“We are enclosing herewith a letter addressed to this department by the Auditor of county, relative to the handling of the distribution of funds to the various subdivisions of the county by reason of the large amount of money which is tied up in closed banks.

You are respectfully requested to furnish this department your written opinion upon the questions submitted in this letter.”

The letter from the Auditor of County is as follows:

“At the February settlement, which is soon to be commenced, the Auditor is going to run into serious difficulties as to his duty in regard to frozen bank accounts. * *

Several questions arise. First, is it the right and duty of the county auditor to apportion and deduct from the respective taxing districts in the approaching settlement said frozen deposits?

Second, if it is the duty to apportion them, shall the frozen deposits be apportioned to all of the funds within his trusteeship, meaning by this not only the undivided general tax fund, but also all other funds more or less within the jurisdiction of the county commissioners, such as Road Maintenance and Construction Sec. 1222, Road Maintenance and Construction Sec. 6926, Special Assessment Sinking Fund for roads, Sanitary Sewer and Water Sinking Fund, Undivided Classified Intangibles, Undivided Tangible Personal Property, Excess Payments Property Owners Refund, State Emergency Relief, Road Funds from the sale of bonds or notes not yet completed, Depository Interest Account, Board of Election, Detention Home, Dog and Kennel, Mothers' Pension, One Mill Levy (for Charity) voted by the people, .3 Mill Levy (for Charity) voted by the people.

Third, what amount of deposits may be apportioned? Please have in mind that 'A' went into the hands of the Superintendent of Banks in December, 1931. It is contended by the city of Law Director that the Auditor should have considered the 'A' Bank situation in his February and August Settlements in the year 1932, and having made the Settlements without consideration thereof, he has no right to consider them at this time and make appropriate apportionment of this possible loss. May I, at this point, say that I do not know whether the 'A' Bank or any of the other banks are at this time, or at any other time, have been insolvent. It is probable that part of these funds, perhaps 60% will be unfrozen by a loan from the R. F. C. before such Settlement, but that will not settle the questions involved. It will somewhat relieve the acute financial distress of the taxing districts. * *

Section 2715, General Code, provides for the creation of two types of depositaries: active and inactive. Upon the creation or establishment of such depositaries, the county treasurer is required to place in the active depository the funds "for the purpose of meeting the current expenses of the county" and to place such funds as are not so needed, in inactive depositaries. (§§2715-1 and 2736, General Code.)

There is no provision of statute directing or authorizing the county treasurer to create a separate account for each tax fund received by him. That is, such treasurer is not required by statute to separate the funds forming the component parts of each tax item and deposit each in a separate bank account. Until after the settlement between the county auditor and the county treasurer, the proceeds of a tax collection in the hands of the county treasurer, constitute a single fund, popularly known as "the undivided tax fund."

An examination of such statutes discloses that two classifications are made of the funds received by the county treasurer and that he is authorized to deposit them in the active or inactive depository of the county.

You do not inquire concerning state funds; I am therefore, limiting this opinion to a consideration of the funds of the various subdivisions which might have been included in the sums deposited by the treasurer in the depositaries.

Theoretically, at least, the items of tax collected by the county treasurer are received by him and immediately credited to the various subdivisions assessing a portion thereof although deposited in a general fund with other funds. That is,

an item of taxes amounting to \$75.00 appearing on the tax list and duplicate may have been assessed in part, by various subdivisions or taxing authorities. The county commissioners may have levied a tax of \$20.00 which is included therein and the municipality in which the property is located may have levied \$27.00 thereof for various municipal purposes, the board of education may have levied \$20.00 for various school purposes and there might well have been levied a sum of \$8.00 for the library purposes; all of which items are included in the single item of \$75.00 appearing on the tax list and duplicate which was paid by the taxpayer. The county treasurer, upon receipt of the payment by the taxpayer received not a single item of \$75.00, but rather, the four items of \$20.00, \$27.00, \$20.00 and \$8.00, respectively, each of which, by reason of the provisions of Section 2736, General Code, he was required to deposit in the county depository on or before noon of the day following their receipt; and upon completion of his semi-annual settlement with the county auditor, pay the aggregate of such items to the various boards and subdivisions entitled thereto. (§2688 and 2789, General Code.) Any interest credited on the funds deposited is required to be apportioned by the county auditor among the various taxing authorities or boards entitled to share in the distribution of such fund after the settlement, in the proportion of their interest in such fund. (§2737, General Code.)

From an examination of the above mentioned sections and other sections relating to the duties of the county treasurer, the legislative purpose, as expressed therein, was to make the relation of the collecting authorities to the fund that of a trustee, and that of the various subdivisions and boards entitled to share in the proceeds of a tax collection that of cestui qui trustent.

In an opinion rendered by my predecessor in office (Opinions of the Attorney General for 1931, Vol. II, p. 1245) in which he held that the board of county commissioners had no power under the provisions of Section 2416, General Code, to compromise and settle the obligation of an insolvent county depository and its bondsmen when the deposit therein consisted of undivided tax funds except as to that portion thereof which, upon the settlement of the county treasurer would be due to the county, my predecessor stated at pages 1247 and 1248:

"In the field of tax collecting and distribution to the state and taxing subdivisions, a county treasurer is something more than a local county officer. He is an agency of the state and a constituent part of the scheme of permanent organization in the government of the state, to use the words of Judge Davis in the case of *State ex rel. Guilbert, Auditor vs. Yates*, 66 O. S. 546. See also *State vs. Lewis*, 69 O. S., 202. A county treasurer is charged by statute with the duty of receiving certain property taxes levied on behalf of the state, county, the several municipalities, townships, school districts and other taxing subdivisions within the county. At stated intervals he is required to make settlements or accountings with the county auditor for all such collections made. After these settlement periods he is required to pay to the state, upon the warrant of the Auditor of State, and to other taxing subdivisions upon the warrant of the county auditor, the shares of taxes collected which belong to the state and the several taxing subdivisions upon the warrant of the county auditor at other times than immediately after the settlement periods fixed by law.

After taxes are collected by a county treasurer and until they are distributed as provided by law, they constitute undivided tax funds in the custody of the county treasurer and are deposited by him as directed

by law in the regular county depository together with those funds that are strictly county funds. The legislature has recognized the status of these funds and provided that the depository interest earned on the portion of the funds collected for the state and each political subdivision shall be apportioned to the state and the several political subdivisions in the proportion that the amounts accruing to the state and the several political subdivisions bear to the total amount of undivided tax funds upon which interest is earned. Section 2737, General Code.

That the portion of undivided tax funds in the custody of a county treasurer which are the proceeds of taxes levied for the state and the several taxing subdivisions of the state, and which have been collected as such belong to the state or taxing subdivisions, as the case may be, for which the tax had been levied, and therefore do not belong to the county and can not for that reason be said to be a debt due the county when deposited in a depository bank, was recognized by the legislature in the enactment of sections 2688 and 2689, General Code, by the 89th General Assembly. 114 O. L. (Amended Senate Bill No. 323.)

* * * * *

Clearly, if a portion of these undivided tax funds belong to the state and taxing subdivisions other than the county, as stated in the above statutes, they do not belong to the county and do not, when deposited in a county depository, constitute a debt due the county.

As I read the statutory law of Ohio, pertaining to the collection and distribution of taxes, in the light of such pronouncements of the Supreme Court as that of Judge Davis in the case of *State ex rel Guilbert vs. Yates*, *supra*, I am impelled to the conclusion that no other interpretation of these statutes is tenable than that county auditors, county treasurers, county commissioners and county depository banks are not strictly county agencies with respect to matters of taxation, but are, on the other hand, a part of the governmental machinery of the state established for the purpose of collecting, holding and distributing to the state and the several taxing subdivisions thereof the revenues derived from tax levies made for and on behalf of the state and the several taxing subdivisions.

A county treasurer, although for some purposes a county officer whose bond is fixed and approved by the county commissioners, is not the agent of the county in the collection and distribution of taxes, nor is a county depository bank the agent of the county in receiving on deposit the proceeds of tax levies pending distribution, in the sense that the county is responsible for their acts in accordance with the principles of agency. They act for the state and each of the taxing subdivisions in a governmental capacity as a part of the governmental machinery of the state for the purposes of taxation."

The whole duty of the county treasurer with reference to taxes is performed by him when he has collected in lawful money the taxes certified to him for collection by the county auditor, deposited such sums in the depositories, provided for such purpose, in the manner provided by statute, and paid out such funds upon valid warrants of the county auditor or auditor of state. *Hull vs. Alexander*, 69 O. S. 75, 90; *Aetna Insurance Company vs. Ginder*, 114 O. S. 52; Section 2633; *Ratterman vs. State*, 44 O. S. 641.

Similar reasoning would lead to the conclusion that the duties performed

by the county auditor with reference to the collection and distribution of tax funds were performed by him in a similar capacity.

The county auditor is the financial officer of the county in the collection and disbursement of tax funds. That is, no tax may be collected by the county treasurer until the county auditor places the assessment on the tax list and duplicate, or delivers a warrant therefor to the county treasurer. *Hull vs. Alexander, supra; Aetna Insurance Company vs. Ginder, supra*. Likewise, no funds other than state funds collected by the county treasurer, may be paid out except upon warrant issued by the county auditor. (Section 2674, General Code.) However, in the execution of such warrants the county auditor has no more authority than is specifically granted him by the statutes. *Jones, Auditor vs. Commissioners of Lucas County, 57 O. S. 189; Peter vs. Parkinson, Treas., 83 O. S. 36; Elder vs. Smith, Aud., 103 O. S. 369*.

Sections 2596 and 2683, General Code, provide that the county treasurer must make a semi-annual settlement of taxes collected by him. The next section, 2684, General Code, provides that the county treasurer shall make a complete settlement annually with the auditor.

Section 2598, General Code, provides that the county auditor in making such settlement, shall determine the amount of taxes collected by the county treasurer, also the amount remaining in his hands belonging to the various funds. It is axiomatic that if the money received by the county treasurer was deposited in a bank which subsequently became insolvent and thus not subject to withdrawal on demand but rather an obligation against, or claim to an interest in the assets of such closed bank, payable if, as, and when realized upon by the superintendent of banks, is not money or funds in his hands.

Such sums so deposited, not being funds in the hands of the county treasurer at the time of settlement, the question arises as to the amounts of the warrants to be drawn by the auditor on the county treasurer in distribution of funds after the semi-annual settlement to the various subdivisions or boards entitled to share in the distribution of such tax.

The county treasurer, as above pointed out, is only the collector and custodian of tax funds for the various subdivisions, and when there has been a loss of a portion of the funds in the hands of a collector, which have been commingled into a common mass, it is difficult, if not impossible to determine which particular item has become lost. In other words, the moneys received by reason of levies by various subdivisions or taxing authorities are of much the same variety as are referred to in the "uniform warehouse receipts act" as "fungible goods", which term is defined therein (§8508 General Code) as "goods of which any unit is, from its nature or by mercantile custom, treated as the equivalent of any other unit." When such goods belonging to individual owners are commingled by the warehouseman, each depositor or owner is treated as the owner of a pro rata interest in the common mass (Section 8479, General Code), and was even before the enactment of such act (*Inglebright vs. Hammond, 19 Ch. 337; Gibb vs. Townsend, 19 O. C. C. 409, affirmed, 55 O. S. 652.*)

The moneys authorized to be received by the county treasurer in payment of an item of taxes levied for municipal purposes are exactly the same as those authorized to be received by him in payment of items levied for state, county, board of education, township, or other purposes (§2646, General Code) and when deposited in the county depository, or paid into the county treasury each item of money is, by general custom, treated as the equivalent of any other item, that is, in general business usage United States notes are receivable for the same purpose

as an equivalent of the face amount thereof in currency and notes of solvent national banks as the equivalent of an equal face amount of notes of the United States.

In the case of *Commissioners vs. Springfield*, 36 O. S. 643, a somewhat similar question to that raised by your inquiry was presented, except that the deficit in the fund was caused by reason of the fault of the treasurer rather than the fault of the depository. The syllabus in such case reads:

“W. was treasurer of C. county from September, 1870, until September, 1872. He was ex-officio treasurer of the city of S. and of its board of education, and also treasurer of the township of S., in which the city is situated, and of its board of education. As received, he mingled and kept the moneys of these various corporations together. During his term of office there was a deficit. The county commissioners having, at W.’s settlement in September, 1872, found money in the treasury precisely sufficient to satisfy the amount due from W., as such treasurer, to the county directed the same to be placed to the credit of the county and appropriated to county purposes. The money was appropriated as directed. HELD, that the moneys so mingled together belonged to the several corporations pro rata, and the county commissioners could not appropriate the whole to the exclusive use of the county, and that, consequently, the county is liable in equity to account to the other corporations for their proportionate share of the fund so appropriated.”

Under the statutes that then existed (1872) the county treasurer, by virtue of his office, was also treasurer of various taxing subdivisions within the county. The court in effect, held that the entire mass of funds in his hands belonged to the various taxing subdivisions pro rata, and that no particular portion thereof belonged to any one subdivision.

In the case of *Richards vs. New Hampshire Insurance Company*, 43 N. H. 263 the court had before it for consideration the question as to the right of several principals to a fund in the hands of a trustee but which was insufficient to pay all of the principals. The court held as stated in the syllabus, that:

“An agent or trustee who holds the claims of different persons, to each of whom he is under the same obligation, is bound to apply any money he receives generally, without an appropriation by the debtor, upon those claims pro rata.”

I am unable to find any statute which purports to give the claim of a municipality, board of education, township, county or other taxing authority a preferred claim over the others in the event that there is a shrinkage or loss in tax funds collected by a county treasurer. I am therefore, of the opinion that when the “undivided tax fund” of the county treasurer is placed in the county depository each of the subdivisions is a joint owner of such fund in the proportion that such fund is composed of taxes levied for its benefit and that when there is a shrinkage in such fund by reason of the subsequent insolvency of the bank, such loss must be borne pro rata by such taxing subdivisions.

I do not intend to imply that the only funds that might be included in the deposit with the depository are the treasurer’s “undivided general tax fund”, “undivided liquor tax fund”, “undivided cigarette tax fund” and “undivided in-

heritance tax fund" mentioned in Section 2568, General Code, for after the settlement between the county auditor and county treasurer and after the distribution to the various subdivisions there would remain what we might designate as "county funds", that is, those which, upon such distribution became the sole property of the county as its distributable share of the tax funds, as well as those county funds which were derived from other sources. Section 2690, General Code, further provides that the township trustees, the council of a city or village, or the board of education may permit their proportion of the tax funds to remain with the county treasurer and be withdrawn in amounts of not less than \$100.00. Such moneys are likewise required to be deposited by the county treasurer in the county depository, and if such funds were a part of the funds in the public depository the owners thereof would likewise be entitled to share therein and to pro rate the losses.

Your inquiry presents a further question by reason of the fact that one of the banks referred to in the letter accompanying your request has been closed and in the process of liquidation since early in December of the year 1931, or was closed prior to the collection by the county treasurer of any of the taxes for the year 1931. Upon the closing of such bank for the purposes of liquidation, it ceased to be a county depository since it no longer had a right to function as such. The relation between the bank and the depositor at such date, was definitely fixed as that of debtor and creditor. If, as I have held above, the county treasurer was the trustee or agent having the custody of the funds theretofore deposited for certain definite beneficiary subdivisions, it is elemental that such beneficiaries could not be changed without some act on their part. It is my opinion that the ownership of the fund in such bank was definitely fixed at the date of the closing of such bank, likewise, the subdivision which should bear the loss suffered thereby, should be determined from the ownership at such date. You do not present any facts concerning such ownership; I therefore can express no specific opinion as to the division of such loss.

Such bank not being a depository during the time the taxes for the tax years 1931 and 1932 were assessed, it is my opinion that such amount in the bank closed in December of 1931, should not be considered in determining the allocation of funds received by the county treasurer from the tax collections of the tax years 1931 and 1932, it being a well established rule that tax funds can be used only for the purposes for which they were levied.

The county tax collecting officials could not therefore use the funds levied by certain subdivisions and collected for the tax years 1931 or 1932, for that purpose for the purpose of repaying a loss to other subdivisions occurring during a preceding year.

I have assumed herein that at the settlement of the county treasurer of taxes for the year 1931, the moneys tied up in the closed bank "A" were considered in the making of such settlements, and the loss pro rated among the various subdivisions required to share therein. If I have made an assumption which does not correspond with the fact, and the county auditor has improperly considered such moneys in the closed bank as being the loss of a particular subdivision rather than the loss of the various subdivisions jointly, in such event the subdivisions which should have shared in such loss, but by reason of such erroneous payment did not, would be indebted to the county treasury for such excess, which might be recovered in an action at law upon proper evidence. I am unable to find any provision of law authorizing the county to collect debts owing from a subdivision to the county or another subdivision by withholding tax funds due such debtor subdivision which have been levied for specific subdivision purposes, except as contained in Section

5348-12, General Code, which exception could have no application to the facts contained in your request.

Specifically answering your inquiry, it is my opinion that:

1. When a county treasurer, upon receipt of tax funds levied by the county, municipalities, board of education and other taxing authorities which have levied taxes on the property in such county or a part thereof, has deposited them along with other county funds, under authority of law, in the legally constituted county depositories which thereafter are closed by the superintendent of banks, any loss suffered by reason thereof, is the loss of subdivisions which would be entitled to share in such funds upon distribution in the proportion that the collections by the county treasurer of such taxes levied for such subdivision bear to the total sum in the county depositories.

2. When a county depository bank has been taken over by the superintendent of banks and closed to business, such bank ceases to be a depository of the county. The equitable rights of the various taxing subdivisions are fixed as of that date.

3. The county auditor in making distribution of the tax funds collected by the county treasurer, should first determine the proportion of interest of the various subdivisions in the frozen or lost moneys deposited in depository banks in the custody of the superintendent of banks for liquidation and deduct such sums respectively from the total amounts collected by the county treasurer for the benefit of such subdivision before making such distribution to it.

(4) Claims for moneys deposited in a depository bank which was in the process of liquidation prior to the receipt of current taxes, should not be considered in the determination of the distribution of current tax funds, such bank not being a county depository at the time of the receipt of such tax funds, the equitable ownership of such fund having been determined at the time such bank ceased to be a depository.

Respectfully,

JOHN W. BRICKER,
Attorney General.

1004.

APPROVAL, NOTES OF KEY RIDGE RURAL SCHOOL DISTRICT, BELMONT COUNTY, OHIO, \$1,500.00.

COLUMBUS, OHIO, June 29, 1933.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

1005.

APPROVAL, LEASES TO RESERVOIR LAND AT INDIAN LAKE, LOGAN COUNTY, OHIO, FOR RIGHT TO USE AND OCCUPY FOR COTTAGE SITE AND DOCKLANDING PURPOSES—EDNA COOPER, J. C. WYLIE.

COLUMBUS, OHIO, June 30, 1933.

HON. EARL H. HANEFELD, *Director, Department of Agriculture, Columbus, Ohio.*

DEAR SIR:—By recent communication over the signature of the Chief of the