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BOND ISSUE—SUM DESIGNATED TO PAY INTEREST DURING CONSTRUCTION OF PUBLIC IMPROVEMENT—SUCH SUM TO BE PAID INTO IMPROVEMENT FUND—§133.25 R.C.—CORRECTIONS MAY BE MADE WITHOUT TRANSFER UNDER §5705.14 R.C.

SYLLABUS:

Where there has been included, as a "cost of construction," in the funds realized from a bond issue by a political subdivision for construction of a public improvement, a sum designed to provide for interest on such issue "during construction" of such improvement, as authorized under Section 133.25, Revised Code, such sum should be paid into the improvement fund involved rather than into the bond retirement fund; and if it has been erroneously paid into the latter fund, it may be thereafter paid from that fund into such improvement fund, and utilized for other construction purposes, as the correction of an error and not as a "transfer of funds" within the meaning of Section 5705.14, *et seq.*, Revised Code.

Columbus, Ohio, March 12, 1958

Hon. James A. Rhodes, Auditor of State
State House, Columbus, Ohio

Dear Sir:

Your request for my opinion reads as follows:

"In the Bridgeport Exempted Village School District bonds were sold to provide school improvements. Pursuant to the pro-

visions of Section 133.25 of the Revised Code a part of the proceeds from the bond sales were used to pay the first year's interest. The last sentence reads:

“A sum not to exceed one year's interest on any other issue of notes or bonds may be included in the amount of the issue to the extent necessary to care for interest maturing previous to the receipt of the taxes from which such interest ultimately is to be paid, but the amount of interest on any such bond issue which may be included in the amount of the issue shall be reduced by the amount of interest included in any issue of notes to be retired by the issuance of such bonds.

“In a review of the financial transactions of the Bridgeport Exempted Village School District we find that after the taxes had been collected for the retirement of the bonds and the payment of interest, the sum of \$5,000.00 was transferred out of the Bond Retirement Fund to the Building Fund for carrying out the purposes of the improvements called for by the issuance of the bonds.

“An opinion is respectfully requested as to whether or not a taxing district may, when it uses a portion of the bond proceeds for the payment of a year's interest previous to the receipt of the taxes from which such interest ultimately is to be paid, transfer such sum to the Building Fund provided for by such an issuance of bonds.”

Section 133.25, Revised Code, which you cite in part reads in its entirety as follows:

“The cost of construction by a subdivision of any public utility may include interest payable during construction on bonds and notes issued for such construction. An issue of notes or bonds in anticipation of special assessments may include a sum sufficient to provide for the interest to become due thereon prior to the receipt of the first installment of the assessments. A sum not to exceed one year's interest on any other issue of notes or bonds may be included in the amount of the issue to the extent necessary to care for interest maturing previous to the receipt of the taxes from which such interest ultimately is to be paid, but the amount of interest on any such bond issue which may be included in the amount of the issue shall be reduced by the amount of interest included in any issue of notes to be retired by the issuance of such bonds.”

Particularly to be noted in the foregoing language is the provision that:

“The cost of construction * * * may include interest during construction * * *.”

From this it plainly appears that any interest falling due during construction, if the delay in tax collections warrant such action, may be paid just as any other construction cost, from the construction or improvement fund into which the proceeds of the bond issue have been paid.

In Section 5705.10, Revised Code, there is the following provision:

“* * * All proceeds from the sale of a bond, note, or certificate of indebtedness issue, except premium and accrued interest, shall be paid into a special fund for the purpose of such issue, and any interest earned on money in such special fund shall be used for the purposes for which the indebtedness was authorized.

“* * *

“Money paid into any fund shall be used only for the purpose for which such fund is established.”

In the case at hand, the “purpose of the issue” was clearly the construction of the improvement. The bond proceeds, “except premium and accrued interest,” should have been paid, therefore, into the improvement fund in question, including that portion of the proceeds intended to meet initial interest payments, for as we have seen these interest charges are by statute made a part of the “cost of construction.”

In your query you state that after receipt of tax revenues, and presumably after the meeting of initial interest requirements from that source, the sum of \$5000.00 was transferred from the bond retirement fund to the building fund. From this I infer (1) that this sum was included in the bond issue for possible use to meet interest requirements during the construction period, and (2) that upon the sale of the bonds this amount was paid into the bond retirement fund rather than into the building (or improvement) fund.

If this inference is correct, the solution of the problem is a simple matter. This sum having been erroneously paid into the bond retirement fund, that error should now be corrected by paying it out of that fund into the construction fund. If that is what has been done here, then the matter was properly handled. In this view of the matter it is plain that such “repayment” is in no sense a “transfer of funds” within the meaning of Section 5705.14, Revised Code, but merely the correction of an error.

In passing, I may say that I see no difficulty in the circumstance that a sum was included in the bond issue for initial interest requirements being used for *other* construction costs in the event that timely receipt of tax

revenues which can be used for this purpose for as among the numerous items of construction cost there is no requirement of earmarking in the building or improvement fund.

Accordingly, in specific answer to your query, it is my opinion that where there has been included, as a "cost of construction," in the funds realized from a bond issue by a political subdivision for construction of a public improvement, a sum designed to provide for interest on such issue "during construction" of such improvement, as authorized under Section 133.25, Revised Code, such sum should be paid into the improvement fund involved rather than into the bond retirement fund; and if it has been erroneously paid into the latter fund, it may be thereafter paid from that fund into such improvement fund, and utilized for other construction purposes, as the correction of an error and not as a "transfer of funds" within the meaning of Section 5705.14, *et seq.*, Revised Code.

Respectfully,

WILLIAM SAXBE

Attorney General