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## ASSESSMENTS, SPECIAL:

1. CERTIFIED TO COUNTY AUDITOR—SECTION 3892 G. C.—CITY AUDITOR OR ANY OFFICER OF MUNICIPALITY, HAS NO AUTHORITY OR POWER TO ADJUST, MODIFY OR CANCEL SUCH ASSESSMENTS.
2. AFTER SPECIAL ASSESSMENTS HAVE BEEN CERTIFIED TO COUNTY AUDITOR FOR COLLECTION AS OTHER TAXES, NO AUTHORITY FOR ANY OFFICER OR MUNICIPALITY TO COLLECT SAME.
3. NO AUTHORITY FOR COUNTY AUDITOR TO CANCEL OR REMOVE SPECIAL ASSESSMENTS FROM TAX LIST UPON RECEIPT OF LETTER WITH SUCH REQUEST FROM CITY AUDITOR OR OTHER MUNICIPAL OFFICER.
4. CANCELED OR REMOVED FROM TAX DUPLICATE BY COUNTY AUDITOR—INSTRUCTIONS FROM CITY AUDITOR—COUNTY TREASURER RECEIVED NO PAYMENT—NO AUTHORITY FOR BUREAU OF INSPECTION AND SUPERVISION OF PUBLIC OFFICES TO MAKE FINDINGS TO RECOVER MONEYS DUE MUNICIPAL CORPORATION UNLESS CITY AUDITOR FAILED TO ACCOUNT FOR MONEYS.
5. COUNTY AUDITOR MAY BE COMPELLED TO REINSTATE ASSESSMENTS REMOVED FROM TAX LIST WITHOUT AUTHORITY—COLLECTION TO BE MADE BY COUNTY TREASURER.

## SYLLABUS:

1. When special assessments have been certified to the county auditor in conformity with the provisions of Section 3892, General Code, there is no authority or power on the part of a city auditor, or of any officer of the municipality, to adjust, modify or cancel such assessments.
2. Neither the city auditor nor any other officer of a municipality is authorized by law to collect special assessments after the same have been certified to the county auditor for collection as other taxes.

3. A county auditor is without authority in law to cancel or remove special assessments from the tax list upon receipt of a letter from a city auditor, or other municipal officer, wherein the cancellation or removal of such assessments is sought.

4. Where special assessments have been cancelled or removed from the tax duplicate by the county auditor under authority of instructions received from a city auditor and without payment being received by the county treasurer, the bureau of inspection and supervision of public offices is without authority to make findings for recovery of moneys due the municipal corporation for such assessments unless said city auditor has failed to account for such moneys.

5. Where assessments have been removed from the tax list without any authority in law the county auditor may be compelled to reinstate the same in order for collection to be made by the county treasurer.

Columbus, Ohio, September 13, 1948

Bureau of Inspection and Supervision of Public Offices  
Columbus, Ohio

Gentlemen:

Your request for my opinion reads:

"A recent examination of the records and accounts of the city of 'A' has disclosed the following conditions with reference to the adjustment, cancellation, and removal of Special Assessments from the County Auditor's tax duplicate:

"Said assessments were properly made and levied for the purpose of paying the cost of various street improvements.

"Those assessments not paid in cash were certified to the County Auditor for collection, in the same manner as other city taxes.

"Bonds were issued and sold in anticipation of the collection of said assessments.

"Our examination revealed that the City Auditor has assumed authority to compromise, adjust, and collect assessments, after the same were certified to the County Auditor. In some instances assessments were compromised and settled on the basis of 50% of the original assessment. In other cases the records do not show the basis of settlement.

"In every case adjusted, compromised, or in which collection was made, a letter was written by the City Auditor and addressed to the County Auditor, advising that the assessment levied against a certain lot, or lots, had been settled or paid, and requesting that such assessment be removed from the tax duplicate and cancelled.

“We fail to find any previous ruling on this question in our index of matters pertaining to special assessments. Therefore, in view of the fact that the question or authority to cancel or adjust special assessments after they have been certified to the County Auditor for collection is of state-wide importance, we request your official opinion in answer to the following questions :

“1. When special assessments have been certified to the County Auditor, as provided under Section 3892, General Code, does either the City Council, Auditor, or other officer, possess the power and authority to lawfully adjust, modify, or cancel such assessments?

“2. Is the City Auditor, or any other municipal officer, authorized by law to collect assessments after they have been certified to the County Auditor for collection as other taxes?

“3. Is it lawful for a County Auditor to cancel or remove special assessments from the tax duplicate upon receipt of a letter from the City Auditor, or any other municipal officer, authorizing the cancellation or removal of such assessment?

“4. Where special assessments have been cancelled or removed from the tax duplicate, under authority of instructions received from the City Auditor, or other municipal officer, and without payment being received by the County Treasurer for such assessments is the Bureau of Inspection and Supervision of Public Offices authorized to make Findings for Recovery of moneys due the municipal corporation for such assessments?

“5. If the answer to question number 4 is in the affirmative, against whom shall such findings be made?

“6. Where assessments have been removed from the tax duplicate without any authority of law can the County Auditor be compelled to reinstate such assessments on the tax duplicate for collection?”

The authority of municipalities to levy and collect special assessments has long been the subject of statutory regulation. Dealing particularly with the collection of assessments are Sections 3892 to 3911, both inclusive, of the General Code. In this connection Section 3892, General Code, provides in part :

“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. Each installment of such assessments, remaining unpaid after becoming due and collectible, shall be delinquent and bear the same penalty as delinquent taxes. \* \* \** (Emphasis added.)

Before proceeding further it should be made perfectly plain that this opinion will be confined to answering only those questions that are presented by the factual situation as disclosed by your aforementioned request. What are regarded as collateral questions will not be considered or passed upon. It is not suggested that *city council* of the municipality in question took any action whereby authority was conferred upon any officer to settle, compromise or adjust any assessments and hence accept in payment or discharge thereof an amount less than the liability of the taxpayer as reflected on the county auditor's tax list. The matter of the authority of city council in respect of such matter of adjustment, modification or cancellation of assessments is mentioned in your questions numbered one and two.

Furthermore it has not been stated specifically that the city auditor of the municipality in question, although apparently assuming to exercise the power and authority of compromising, adjusting and collecting assessments, actually failed to turn over or account to the city treasurer for any moneys which may have been obtained in the exercise of the above assumed authority. Consequently it should be quite apparent that this opinion must be limited to passing upon such facts as are officially before me. This last observation is particularly pertinent since your question number four deals with the authority to make findings for recovery of moneys due the municipal corporation for whose benefit the city auditor purports to have acted.

With the foregoing in mind questions numbered one, two and three will be considered together since the answers thereto depend in the main

on the construction to be given to Section 3892, General Code, and its operative effect in a situation where the same has been availed of by a municipality.

Perhaps the first matter to be determined is whether special assessments are to be regarded as "taxes" as that word is used in Section 3892, General Code. It is to be noted that that section requires the county treasurer to collect assessments "in the same manner and at the same time as other taxes are collected." Further bearing on the duty of the treasurer in regard to the collection of taxes is Section 2655, General Code, which provides *inter alia* :

"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. \* \* \*"  
(Emphasis added.)

In *State, ex rel. Brown v. Cooper*, 123 O. S. 23, the argument was advanced that special assessments to pay for public improvements could not be regarded as taxes. For reasons that need not here be recited this argument was rejected and the court, held, as disclosed by the second branch of the syllabus, as follows :

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

The matter next to be considered is whether the terms of Section 3892, General Code, are mandatory in so far as the same deal with the services to be rendered by the treasurer. And as to that the first branch of the syllabus in *State, ex rel. Brown v. Cooper*, *supra*, states :

"1. The duty enjoined upon county treasurer 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."

It should be readily apparent from the foregoing that Section 3892, General Code, cannot possibly be regarded as conferring upon any city officer the power or authority to adjust, modify or cancel assessments after the same have been certified to the county auditor. Moreover, there is no other section of the General Code that purports to confer any such power. If such right were to exist then it would be difficult to conceive how, as

stated by our Supreme Court, the duty on the part of the treasurer is mandatory. This same reasoning is applicable in respect of the authority of a city auditor or any other municipal officer to collect special assessments. The fact that the duty to make collection of assessments is imposed upon the county treasurer completely negatives the thought that any other person is also entitled to perform that same duty.

Thus far the discussion has centered around the duty of a county treasurer under the terms of Section 3892, General Code. Your third question concerns the duty of the county auditor under that same section. Before discussing this phase of your inquiry a few preliminary observations should be made.

It is stated in your inquiry that the assessments in question "were properly made and levied." This fact is not regarded of particular significance since the general rule is to the effect that an assessment will be regarded as valid until the contrary has been made to appear to a court vested with authority to determine the matter. *Bolton v. Cleveland*, 35 O. S. 319.

If a county auditor has no authority in law to correct an illegal assessment unless such illegality results from a clerical error then the imagination is not severely taxed when the view is arrived at that a valid assessment may not be cancelled or removed from the tax duplicate at the instance of a city auditor. Much in point as to this matter is Opinion No. 4276, Opinions of the Attorney General for 1941, wherein paragraphs two and three of the syllabus respectively provide:

"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 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." (Emphasis added.)

I have been unable to find any language in Section 3892, General Code, that even remotely suggests a county auditor may cancel or remove special assessments from the tax list merely because the city auditor, or some other officer of the municipality for whose benefit said assessments are to be collected, has requested that the above mentioned action be taken.

Your question number four will now be considered and, for convenience, the same will be restated. Said question is as follows:

"4. Where special assessments have been cancelled or removed from the tax duplicate, under authority of instructions received from the City Auditor, or other municipal officer, and without payment being received by the County Treasurer for such assessments is the Bureau of Inspection and Supervision of Public Offices authorized to make Findings for Recovery of moneys due the municipal corporation for such assessments?"

Dealing generally with the powers and duties of the bureau of inspection and supervision of public offices is Section 274, General Code. By virtue of Section 286, General Code, the reports that are to be made thereunder shall set forth the results of examination. In this connection said section reads in part as follows:

"\* \* \* If the report sets forth that any public money has been illegally expended, or that any public money collected has not been accounted for, *or that any public money due has not been collected*, or that any public property has been converted or misappropriated, the officer receiving such certified copy of such report, other than the auditing department of the taxing district, may, within ninety days after the receipt of such certified copy of such report, institute or cause to be instituted, and each of said officers is hereby authorized and required so to do, civil actions in the proper court in the name of the political subdivision or taxing district to which such public money is due or such public property belongs, for the recovery of the same and shall prosecute, or cause to be prosecuted the same to final determination. \* \* \*"

(Emphasis added.)

It is apparent, in view of the contents of your letter, there is no basis for assuming that any money (1) has been illegally expended, or (2) has not been accounted for. Consequently the matter boils down to

this: Whether any public money due has not been collected. But who is the collecting authority? In respect of that matter Section 3892, General Code, states in part as follows:

“\* \* \* The county auditor shall place the assessment upon the tax list \* \* \* 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, \* \* \* to the treasurer of the corporation. \* \* \*”

Whether the city auditor in question, under a mistaken belief as to his authority, or for any reason or purpose, arrogated unto himself the duty of collecting special assessments is quite beside the point so far as concerns the matter of whether findings for recovery may be made. A taxpayer, however, may find himself in the unfortunate position of having made payment to a person not authorized by law to make collection. But again that is beside the point and has no bearing on the matter of whether findings may or should be made.

Before concluding this discussion as to your question number four it might be pointed out that in Opinion No. 3228, Opinions of the Attorney General for 1940, the second branch of the syllabus reads:

“2. Under the provisions of Section 284, et seq., General Code, when a report of examination by the Bureau of Inspection and Supervision of Public Offices sets forth that *public money due a municipality from a county has not been collected*, said Bureau is authorized and required to render findings for recovery of the same against the county and in favor of the municipality.” (Emphasis added.)

It might appear at first blush that the views heretofore expressed are in conflict with that opinion. Such is not the situation. It is recited in the body of the above 1940 opinion that:

“In the instant case, we have a situation wherein the City of Cleveland *has been expending its funds* to support, etc. certain children when, as pointed out earlier in the opinion, the money for such support, etc. should be forthcoming from the treasury of Cuyahoga County. \* \* \*” (Emphasis added.)

The dissimilarity in the factual situation is evident and hence the aforesaid 1940 opinion is readily distinguishable.



Since I have concluded that the acts of the city auditor in question are insufficient to constitute a basis for findings against him, no necessity exists for answering your fifth question. In this connection it is reiterated that such conclusion results from a consideration of only those facts contained in your letter.

Your sixth and last question is as follows:

“6. Where assessments have been removed from the tax duplicate *without any authority of law* can the County Auditor be compelled to re-instate such assessments on the tax duplicate for collection?” (Emphasis added.)

If it can be assumed that said assessments were removed “without any authority in law,” which is undeniably the situation, then the question itself suggests the answer. It was held nearly a century ago that mandamus will lie against a county auditor to compel him to enter a tax upon the duplicate. *State, ex rel. Morgan v. Moore*, 5 O. S. 444. Cf. *City of Zanesville v. Richards*, 5 O. S. 590. Section 12283, General Code which defines “mandamus,” and the many reported cases interpreting said section suggests its applicability to the present situation.

In specific answer to your several questions you are therefore advised as follows:

1. When special assessments have been certified to the county auditor in conformity with the provisions of Section 3892, General Code, there is no authority or power on the part of a city auditor, or of any officer of the municipality, to adjust, modify or cancel such assessments.

2. Neither the city auditor nor any other officer of a municipality is authorized by law to collect special assessments after the same have been certified to the county auditor for collection as other taxes.

3. A county auditor is without authority in law to cancel or remove special assessments from the tax list upon receipt of a letter from a city auditor, or other municipal officer, wherein the cancellation or removal of such assessments is sought.

4. Where special assessments have been cancelled or removed from the tax duplicate by the county auditor under authority of instructions received from a city auditor and without payment being received by the county treasurer, the bureau of inspection and supervision of public offices

is without authority to make findings for recovery of moneys due the municipal corporation for such assessments unless said city auditor has failed to account for such moneys.

5. Where assessments have been removed from the tax list without any authority in law the county auditor may be compelled to reinstate the same in order for collection to be made by the county treasurer.

Respectfully,

HUGH S. JENKINS,  
Attorney General.