

## OPINION NO. 74-044

**Syllabus:**

The anticipated revenues from a village income tax, which has been levied to provide funds for the construction and repair of storm sewers and streets, which revenues will be sufficient to cover the contract now being performed and which are actually being collected by withholding procedures, are funds "in the process of collection" within the meaning of R.C. 5705.41.

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To: Richard B. McQuade, Jr., Fulton County Pros. Atty., Wauseon, Ohio  
By: William J. Brown, Attorney General, May 31, 1974

I have before me your request for an opinion which states the facts and poses the question as follows:

"Ohio Revised Code Section 5705.41 provides that no subdivision or taxing unit shall enter into a contract unless there is attached thereto a certificate of the fiscal officer that the amount required to meet the same has been lawfully appropriated and is in the treasury or in the process of collection. In 1966 a Fulton County village levied a 1% income tax on its citizens to provide funds for the purpose of the design and installation of storm sewers, street improvements and repair and the acquisition of rights of way for storm sewers and streets. Said tax is collected continually through the year. The village now desires to begin an important street improvement project, but it does not presently have sufficient revenue actually in the treasury to cover the project. By the time the project would be completed (hopefully by the end of this year) more than enough revenue will have been collected from the income tax.

"I am unable to determine the application of the term 'in the process of collection' to the village's income tax. Therefore, I respectfully request your opinion as follows:

"'Are estimated revenues from a village income tax funds 'in the process of collection', pursuant to Section 5705.41, O.R.C.'"

In pertinent part, the Section to which you refer, R.C. 5705.41, reads as follows:

"No subdivision or taxing unit shall:

" \* \* \* \* \*"

"(D) Make any contract or give any order involving the expenditure of money unless there is attached thereto a certificate of the fiscal officer of the subdivision that the amount required to meet the same, \* \* \* has been lawfully appropriated for such purpose and is in the treasury or in process of collection to the credit of an appropriate fund free from any previous encumbrances.

" \* \* \* \* \*"

"Taxes and other revenue in process of collection, or the proceeds to be derived from authorized bonds, notes, or certificates of indebtedness sold and in process of delivery shall for the purpose of this section be deemed in the treasury or in process of collection and in the appropriate fund.

" \* \* \* \* \*"

(Emphasis added.)

The history of this Section shows that it originated in an effort by the General Assembly to curb irresponsible fiscal practices of the municipalities and to impose upon them, so far as possible, a pay-as-you-go policy. Emmert v. Elyria, 74 Ohio St. 185, 191-194 (1906); Comstock v. Nelsonville, 61 Ohio St. 288, 294 (1899); cf. Opinion dated September 16, 1901, Opinions of the Attorney General for 1900-1904, Vol. V, p. 569. The first such act, enacted in 1852, permitted a limited power of taxation and a limited power to borrow against anticipated revenue for the current fiscal year. But it also provided that the municipality could not

" \* \* \* authorize any order or appropriation of money, when there is not in the city treasury money unappropriated sufficient to pay such appropriation \* \* \*." 50 Ohio Laws, 223.

A further act in 1869 (66 Ohio Laws, 145) prescribed that

" \* \* \* the council shall not make appropriations nor contract debts for the ordinary purposes of the corporation exceeding the amount of taxes and revenue from other sources for the current year. \* \* \*"

It soon became apparent that the language of these acts was insufficient to accomplish its purpose. The City of Cincinnati, burdened with a heavy debt, sought help from the General Assembly. The result was the enactment in 1874 of the Worthington law, applicable only to Cincinnati, which authorized that city to borrow a million dollars to pay off its debt, but which further provided that, henceforth,

" \* \* \* no ordinance or other order for the expenditure of money \* \* \* shall take effect until the auditor of said city shall certify to the city council there is money in the treasury especially set apart to meet such expenditure \* \* \*" (Emphasis added.) 71 Ohio Laws, 80; Emmert v. Elyria, supra, 74 Ohio St. at 192-193; State, ex rel. Selter v. Hoffman, Auditor, 25 Ohio St. 328, 329-330.

Two years later, in an act known as the Burns law, the General Assembly extended this requirement to all municipalities. The pertinent portion of that act, Section 2702 of the Revised Statutes, provided as follows:

"No contract \* \* \* shall be entered into \* \* \* by the council, or by any board or officer of a municipal corporation, unless the auditor \* \* \* shall first certify that the money required for the contract \* \* \* is in the treasury, to the credit of the fund from which it is to be drawn, and not appropriated for any other purpose \* \* \*" (Emphasis added.)

In 1896 the General Assembly applied the same restriction on expenditures to counties, townships and school districts. 92 Ohio Laws, 341. The effect was somewhat modified, however,

by the appearance, for the first time, of the provision that an expenditure could be made if the fund from which it was to be drawn was "in the process of collection." The pertinent part of this act, Section 2834(b) of the Revised Statutes, provides:

"The commissioner of any county, the trustees of any township and the board of education of any school district \* \* \* shall enter into no contract \* \* \* involving the expenditure of money \* \* \* unless the auditor \* \* \* shall first certify that the money \* \* \* is in the treasury \* \* \* or has been levied and placed on the duplicate, and in process of collection and not appropriated for any other purpose \* \* \*." (Emphasis added.)

Over the next thirty years both R.S. 2702 and R.S. 2834(b) were amended or reenacted several times, but only two of the changes have any significance. A proviso was added to what had been R.S. 2702, enumerating several exceptions to its original strict requirement. See R.S. 1536-205, 96 Ohio Laws, 20, 37. And in 1925 the General Assembly added to R.S. 2834(b), by that time G.C. 5660, the following statement as to funds which should be considered "in process of collection" (111 Ohio Laws, 371, 375-376):

"\* \* \* Taxes and other revenues in process of collection or the proceeds to be derived from lawfully authorized bonds, notes, or certificates of indebtedness sold or in process of delivery shall, for purposes of this section, be deemed in the treasury or in process of collection and in the appropriate fund.

" \* \* \* \* \* "

Finally, in 1927 the General Assembly repealed the two separate statutes, and combined their provisions into one Section having application to all subdivisions. G.C. 5625-33; 112 Ohio Laws, 391, 406-407. It reads in part as follows:

"No subdivision or taxing unit shall:

" \* \* \* \* \* "

(d) Make any contract or give any order involving the expenditure of money unless there is attached thereto a certificate of the fiscal officer of the subdivision that the amount required to meet the same \* \* \* has been lawfully appropriated for such purpose and is in the treasury or in process of collection to the credit of an appropriate fund free from any previous encumbrances. \* \* \*

" \* \* \* \* \* "

"Taxes and other revenue in process of collection, or the proceeds to be derived from lawfully authorized bonds, notes or certificates of indebtedness sold and in process of delivery,

shall for the purpose of this section be deemed in the treasury or in process of collection and in the appropriate fund. \* \* \*

It will be seen, from a comparison with the quoted language of R.C. 5705.41, *supra*, that this portion of G.C. 5625-33 remains exactly as originally enacted.

There seems to have been no real effort, by the courts or by my predecessors, to define just when a tax is to be deemed "in process of collection." Perhaps this was because the statute itself has contained, for at least fifty years, the somewhat tautologous statement that

"Taxes and other revenue in process of collection \* \* \* shall for the purpose of this section be deemed in the treasury or in process of collection. \* \* \*"

In 1961, however, the General Assembly provided a further clue to the meaning of the phrase when it enacted R.C. 5705.411 (129 Ohio Laws, 437) which reads as follows:

"Upon the approval of a tax levy by the electors of a county under section 5705.191 of the Revised Code for the purpose of providing funds for the acquisition or construction of a specific permanent improvement or class of permanent improvements for the county, the total anticipated proceeds from such levy are deemed appropriated for such purpose by the taxing authority of the county and are deemed in process of collection within the meaning of section 5705.41 of the Revised Code." (Emphasis added.)

Although this new Section applies specifically only to counties, one of my predecessors, in an opinion dealing with township funds, has read it, and I think correctly, as an indication of the General Assembly's understanding of when any tax was to be deemed "in process of collection." In Opinion No. 167, Opinions of the Attorney General for 1963, after quoting the new Section, he said:

"The effect of this statute is obvious. It defines the meaning of the words 'appropriated' and 'or in the process of collection' contained in Section 5705.41(D), Revised Code, which is the section wherein the fiscal officer's certificate necessary to validate a continuing contract is set forth."

Another Attorney General was asked whether township trustees could proceed to let contracts for the construction of a fire house, approved by the voters and estimated to cost \$48,000. A levy in the amount of \$12,000 had been authorized by the voters in 1952; \$6000 of this had been collected in 1952; the other \$6000 was due to be collected by the end of August 1953. The Attorney General treated this second \$6000 as "in process of collection" since it had been levied but not yet actually collected. In Opinion No. 2839, Opinions of the Attorney General for 1953, he said:

"In the situation you have described above, it would appear that the subdivision concerned has only \$6000.00 of the amount required 'in the treasury', and a like amount 'in process of collection.' As to the amounts which are expected to be collected in the future, under authority of the favorable vote of the electors in the 1952 election, it will be observed that such amounts will actually be levied by resolution of the taxing authority of the township in each succeeding year as provided in Section 5625-25, General Code, and such amounts could not, therefore, be deemed presently to be 'in process of collection.' Accordingly, I conclude that your first question must be answered in the negative."

Some twenty years earlier the then Attorney General was asked whether a weak school district could consider anticipated aid from the educational equalization fund as revenue "in process of collection." In Opinion No. 3608, Opinions of the Attorney General for 1931, he said:

"No complete and satisfactory definition has ever been given of the expression 'in process of collection' as used in section 5625-33, supra. It seems clear, however, that upon the mere application of a school district to participate in the State educational equalization fund it cannot be said that the district's participation in the fund is then in process of collection. Until the director of education determines that the district is entitled to participate in the fund and the amount of such participation that may be granted to the district, it is not known by the district officials or any one else whether or not any funds will be made available by reason of the participation.

"After the application is granted and the amount fixed by the director of education, it may properly be said, in my opinion, that those funds are then in process of collection and it is proper for the fiscal officer of the district to so consider them when making certifications as provided by said section 5625-33, General Code."

There are two very early, and very brief, opinions which rest largely on statutory language which has since been abandoned. Opinions dated June 16, 1903, and September 2, 1903, Opinions of the Attorney General for 1900-1904, Vol. V, pp. 953 and 1018. At that time Section 2834(b) of the Revised Statutes, supra, read, "unless \* \* \* the money \* \* \* is in the treasury \* \* \* or has been levied and placed on the duplicate, and in process of collection \* \* \*." The then Attorney General properly held that a tax could not be held "in process of collection" unless the emphasized language had been complied with. But that language was apparently dropped as redundant when G.C. 5625-33, the immediate predecessor of the present R.C. 5705.41, was enacted in 1927.

In the light of the foregoing, I agree with my predecessors in Opinion No. 167 (1963) and Opinion No. 2839 (1953) that, when any tax levy has been approved for the purpose of providing funds for the construction of a specific permanent improvement or class of permanent improvements, the total anticipated proceeds of such levy are deemed to be "in process of collection." See R.C. 5705.411, *supra*. The facts stated in your letter seem to me to fall within the framework of this definition. The village has properly levied an income tax to provide funds for the construction and repair of storm sewers and streets. The anticipated proceeds are more than enough to complete the particular project now under construction. And the tax is actually being collected continually during the year through withholding procedures. (Cf. R.C. 9.42.) I am satisfied, therefore, that the anticipated revenues from the village income tax are "in the process of collection" within the meaning of R.C. 5705.41. I assume that the contracts to which you refer are all to be completed within the space of one year. If, however, they are in the nature of "continuing contracts", you are referred to Opinion No. 1604, Opinions of the Attorney General for 1958, and Opinion No. 1304, Opinions of the Attorney General for 1960.

In specific answer to your question it is my opinion, and you are so advised, that the anticipated revenues from a village income tax, which has been levied to provide funds for the construction and repair of storm sewers and streets, which revenues will be sufficient to cover the contract now being performed and which are actually being collected by withholding procedures, are funds "in the process of collection" within the meaning of R.C. 5705.41.