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BOARD OF EDUCATION INVESTS PROCEEDS OF SALE OF BONDS IN U. S. BONDS OR NOTES—LATER SELLS AT LOSS —LOSS BORNE BY SPECIAL FUND INTO WHICH SALE PROCEEDS WERE PLACED AND INVESTMENT WAS MADE.

SYLLABUS:

Where a board of education has pursuant to the authority of Section 135.12 Revised Code, invested the proceeds of the sale of bonds in United States bonds or notes, and later sells such securities at a loss, such loss must be borne by the special fund into which under the provisions of Section 5705.10 Revised Code, the proceeds of such bonds were placed, and from which such investment was made.

Columbus, Ohio, November 28, 1956

Hon. Joseph W. McNerney, Prosecuting Attorney
Muskingum County, Zanesville, Ohio

Dear Sir:

I have before me your communication in which you request my opinion, your letter reading as follows:

“On February 1, 1956, your Opinion No. 6198 held that interest earned on securities purchased by school boards from funds derived from bond issues, should be paid into the bond retirement fund of the district.

“Authority for these investments stems from Revised Code Section 135.12, while you held disposition of the interest earned shall be by authority of Revised Code Section 5705.10.

“Now, the only provision for loss occasioned by the sale of such securities is found in Revised Code Section 135.12 which provides:

“* * * Any loss or expense incurred in making such sales shall be payable as other expenses of the treasurer's office * * *

“It is submitted this would be from the general fund.

“X School Board in our county was authorized by the 1954 November election to issue building bonds in the amount of \$420,000.00. Upon receiving the proceeds from the sale of these bonds, \$300,000.00 in United States Treasury bonds were purchased at a cost of \$299,730.98. On September 18, 1956, the board desired to sell these securities; and due to market conditions the selling price was \$289,555.94, or a loss of \$10,175.04. The interest to date in the amount of \$10,125.00 has been placed in the bond retirement fund under your opinion of February 1, 1956, and is still being held in that fund, not having been paid out. Two questions therefore arise:

“1. May the loss of \$10,175.04 be charged to the bond retirement fund since that is where the interest was placed, leaving only a net loss of \$50.05?

“2. If the answer to No. 1 is negative, to what fund shall the loss be charged?

“Certainly, the quandary becomes apparent when we realize the general fund cannot bear this loss. It is submitted that it would be only fair and reasonable if the result may legally be

obtained, that the loss and the interest received should be covered by the same fund, since the principle which had been voted by the public for the building of a school, suffered a shrinkage while attempting to earn interest; and in taking the final picture as a whole, there being no actual overall earnings to the bond issue itself, in fact incurring a net loss of \$50.00."

In my Opinion No. 6198, issued February 1, 1956, to which you refer, I had under consideration the question of the disposition of interest arising from proceeds of a bond issue of a school district, which had been invested in federal securities, pursuant to the provisions of Section 135.12 of the Revised Code. Particular attention was called to one of the provisions of that section, reading as follows:

"* * * Interest realized on any investments authorized by this section shall be collected by the treasurer and credited by him to the general fund of the state or subdivision."

The above provision seemed to be in direct contradiction to the provisions of Section 5705.10 Revised Code, which reads as follows:

"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*. The premium and accrued interest received from such sale and *interest earned on such special fund shall be paid into the sinking fund or the bond retirement fund of the subdivision.*"

(Emphasis added.)

In discussing this conflict, it was pointed out that while Section 135.12 Revised Code, was a later enactment than Section 5705.10 Revised Code, yet Section 135.12 is a general statute, whereas Section 5705.10 is special, relating specifically to the interest arising from the *proceeds of bonds*.

It was accordingly held as stated in the syllabus of that opinion:

"Under the provisions of Section 5705.10 Revised Code, interest earned on money of a school district derived from the sale of bonds, whether deposited in a public depository as provided in Sections 135.01 et seq., Revised Code, or invested in securities as authorized by Section 135.12, Revised Code, should be paid into the sinking fund or bond retirement fund of the district."

I still adhere to the distinction there pointed out and the conclusion therein reached. However, we were concerned there only with the dis-

position of the interest earnings of the bond fund, and the holding was that such earnings went into the bond retirement fund. Your question and the argument which you present suggest that because the bond retirement fund has profited by interest earned on treasury investments, that fund should bear the loss if the investment has proven unprofitable. I can see no basis for such proposition. Nor can I find any ground for the suggestion in your statement relative to such loss: "It is submitted this fund be from the general fund."

Referring again to Section 5705.10 Revised Code, from which I have quoted, you will note that "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.*" In the case you present there was a bond issue for a school building.

Section 135.12 Revised Code, states the circumstances under which a subdivision may make investments in certain securities including obligations of the United States and certain obligations of the State of Ohio. The legislature evidently realized that the purchase and resale of such securities might result in a loss and so provided:

"Neither the treasurer nor the members of the board shall be held accountable for any loss occasioned by sales of securities at prices lower than their cost. Any loss or expense incurred in making such sales shall be payable as other expenses of the treasurer's office."

The provision that loss or expense incurred in making such sales is to be paid "as other expenses of the treasurer's office," does not in any wise signify that a loss would be payable out of the general fund. The language used certainly does not refer to the expense of operating the treasurer's office, which of course, come from the general fund. The word "expenses" means "expenditures," and since the treasurer will have in his custody a variety of funds, the expenditures relating to any fund will be made from that fund. In the case you present, an expenditure by way of investment was made from the "special fund," in which, pursuant to Section 5705.10 supra, the proceeds of a bond issue must be deposited. When a portion of the money in such fund was withdrawn and invested in United States securities; which were later sold, the proceeds were returned to the same special fund. If there had been a profit on this transaction the profit would certainly have accrued to the benefit of the fund. If it resulted in a loss, it seems certain that the fund suffers the loss.

I think we must keep in mind that the general fund has had no part in the handling of the funds arising from the sale of these bonds or in the interest earned thereon. Under no circumstances could the general fund profit by interest earnings or by a profitable investment and resale. Nor could it be charged with a loss if the investment proved unprofitable. Likewise, it seems clear that the bond retirement fund which had nothing to do with the investment in question should have no part in either a gain or loss resulting therefrom.

Accordingly, in specific answer to your question it is my opinion that where a board of education has, pursuant to the authority of Section 135.12 Revised Code, invested the proceeds of the sale of bonds in United States bonds or notes, and later sells such securities at a loss, such loss must be borne by the special fund into which under the provisions of Section 5705.10 Revised Code, the proceeds of such bonds were placed, and from which such investment was made.

Respectfully,

C. WILLIAM O'NEILL
Attorney General