

1995.

TAXPAYER—DUTY OF COUNTY TREASURER TO CREDIT PAYMENT IN EXCESS OF CURRENT INSTALLMENT OF TAXES TO THOSE TAXES, PENALTIES AND INTEREST FOR GREATEST TIME DELINQUENT—SUCH PAYMENT APPLIED AT DISCRETION OF TREASURER WHEN.

SYLLABUS:

1. *When, prior to the enactment of Amended Senate Bill No. 42, enacted by the 90th General Assembly, a taxpayer at a time when the county treasurer is collecting a semi-annual installment of real estate taxes, pays to the county treasurer a sum of money greater than the amount of the current installment of taxes then due and payable, and one-fifth of the existing delinquent taxes, penalties and assessments, it is the duty of the county treasurer to credit such payment in payment of the current tax, and any remainder existing should be credited toward the payment of the installment of taxes, penalties and interest which have for the greatest time remained delinquent.*

2. *When a taxpayer, at a time other than that at which semi-annual installments of taxes and assessments are payable, pays to the county treasurer a sum of money to be applied toward the payment of an installment of delinquent taxes without designating the manner of application it is within the discretion of the tax collecting authorities to apply such moneys toward the payment of the longest delinquent or the latest becoming delinquent items of taxes appearing upon the tax duplicate.*

3. *When a taxpayer induces the county treasurer to receive moneys to be credited in payment of delinquent taxes in a manner other than as authorized by statute such taxpayer is in particeps criminis with the county treasurer in such illegal payment and by reason thereof, should not be heard to complain that such taxes were credited in payment of the item of taxes for which such moneys were paid.*

COLUMBUS, OHIO, December 12, 1933.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I am in receipt of your request for my opinion concerning the following question:

“When a person, firm or corporation, charged with or legally authorized to pay real property taxes and assessments, has tendered the county treasurer partial payments on delinquent taxes, assessments, penalties and interest, and the amount so tendered has been accepted, how should the county treasurer apply the money so received in relation to the taxes, penalties and interest then due and payable?”

The partial payments so tendered and accepted were made as follows: January 4, 1932, \$2,540.03; September 19, 1932, \$1,000.00; April 29, 1933, \$449.66. The taxes paid do not comply with the requirements of Section 2672 relating to installment payments and only one payment was made after the effective date of Amended Senate Bill No. 42, passed March 30, 1933, as an emergency measure.”

Your inquiry arises, no doubt, by reason of the provisions of Sections 2654 and 2655 of the General Code. Such sections read:

"Sec. 2654. When such taxes charged against the property of a person are so paid by installments, each such payment shall be apportioned among the several funds for which taxes have been assessed in such manner as the tax commission shall prescribe."

Sec. 2655. 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."

Section 2672, General Code, enacted by the 89th General Assembly, operates as an exception to the provisions of the above quoted sections. Section 2672 authorizes the county treasurer to receive payments of delinquent taxes in five consecutive semi-annual installments. Such section reads:

"Delinquent taxes, assessments and penalties charged on the tax duplicate against any entry of real estate may be paid in installments at and during five consecutive semi-annual tax paying periods, whether such real estate has been certified as delinquent or not. Such installment payments may be made at the times provided by law for the payment of current taxes and shall be received with the full amount of current taxes then payable *and not otherwise*. Each installment payment shall be applied to the items of taxes, assessments and penalties so charged in the order in which such items became due. Each installment shall be not less than one-fifth of the total principal amount of the taxes, assessments and penalties so charged, unless the collection of a particular tax has been legally enjoined, together with the full amount of interest, if any, accrued on the unpaid portion of the principal at the time of the payment of such installments, unless, at any payment period, less than one-fifth of such total principal amount remains unpaid, in which event the entire balance, together with interest shall be paid; the last of such installments shall also include the costs of certification of such land as delinquent, as prescribed by section 5713 of the General Code." (Italics the writer's.)

In an opinion of my predecessor rendered under date of November 3, 1932 (II O. A. G., 1932, p. 1235) it was held in effect that *at that time* no other method of installment payment of taxes was authorized by statute than that contained in Section 2672, *supra*. In other words, such holding was that since the county treasurer has no authority to collect taxes in any other manner than that authorized by statute, the county treasurer could not then receive installment payments of taxes except in five consecutive semi-annual installments. Upon examination of such opinion and the statutes then under consideration, I do not perceive of any reason to depart from such ruling.

It should be noted that the first two of the payments referred to in your inquiry were received by the treasurer prior to the date of such opinion. You do not state whether the payment of January 4, 1932, of \$2,540.03 was the amount of the then current taxes plus some proportion of delinquent taxes, or otherwise. However, I am informed that such item of payment was in excess of the then current tax installment and one-fifth of the then existing delinquencies. I am informed that the then existing current tax installment amounted to approximately \$661.61 and that the delinquent taxes existing at that time were in the amount of \$4,698.84. In other words, such payment was sufficient not only to pay the current taxes but to pay

more than one-fifth of the delinquent taxes. As for the first payment, the provisions of Section 2672, General Code, would require that the county treasurer pay the then current tax and apply the remainder of the payment "to the items of taxes, assessments and penalties * * * in the order in which such items became due."

Concerning the second payment referred to in your request, I am informed that after the receipt of the first payment there yet remained delinquent taxes of \$2,920.42. If I were authorized to assume that the payment of December 19, 1931, was made prior to the time of the settlement between the county treasurer and the county auditor, it would appear that such payment of \$1,000.00 was insufficient to meet the then current taxes and one-fifth of the prior delinquencies. However, I am informed that such assumption is incorrect and that at the time of such payment the county auditor had already placed a penalty against the taxes for the last half of the year 1931.

It might reasonably be argued that at the time of such payment of \$1,000.00, the county treasurer had no tax duplicate in his possession and therefore had no authority to receive the tax except upon warrant of the county auditor. However, it is unnecessary for the purposes of this opinion, to consider such question since Section 2672, General Code, which was the only statute authorizing payment of taxes in less than the full amount then due which existed at the time of such payment provides specifically the time and manner of making installment payments, and specifically states that such payments shall be received "not otherwise."

You do not state in your inquiry whether the taxpayer at the time he made the payments in question directed the application of the payment to any specific installment of tax.

It is a well established principle of law that where a debtor owes two or more obligations, and when so indebted, makes payment of a sum of money which is less than either or any of such obligations, and at the time of such payment directs that the sum so paid, be credited against a particular debt the creditor has no legal right to apply the payment in any manner other than that directed. *Rennick vs. Bank*, 8 O., 529, 533; *Stewart vs. Hopkins*, 30 O. S. 502; *Eureka Ins. Co. vs. Duple & Irwin Co.*, 3 O. D. Rep't. 316; *Cavanaugh vs. Marble*, 80 Conn. 389.

Since it is evident that had the taxpayer at the time of making the payment designated that it be applied in payment of a particular installment, the payment could not be otherwise applied. I am assuming for the purposes of this opinion that no designation as to the application of the moneys was made by the taxpayer.

The question might further arise as to what is a sufficient designation by the taxpayer of the installment to which the moneys should be credited if the taxpayer had designated the particular tax to be credited with the moneys. By reason of the provisions of Sections 2650 and 2651, General Code, which prescribe the contents of a receipt for the payment of taxes and assessments, a question might arise as to whether such receipt is not the best evidence of the purpose for which the payment was made. However, since such question is one of fact, it is not herein considered especially since in your question there is no intimation that the point is raised concerning specific direction as to the application of the payment.

By reason of the limitations of Section 2654, General Code, above quoted, there is considerable doubt in my mind as to whether the county treasurer could receive a sum of money to be applied in payment of a specific installment of taxes rather than apportion the money among all of the taxes appearing upon the books of the county treasurer except as such section has been modified by Section 2672, General Code.

It is a general proposition of law that when a person who is a debtor on two or more obligations, pays to the creditor a sum of money less than either or any of such obligations, the creditor may apply such sum toward the payment of any or all of such accounts at his option. *Bank vs. Cleveland*, 10 O. C. C. 222; *Gill vs. Konwisser*, 32 O. C. A., 542; *Dime Sav. Bank vs. O'Rourke*, 21 O. C. C. (N. S.) 370.

The general rule above set forth with reference to payments by a debtor without designation refers to payments by debtors generally. The question arises whether such rule applies to the payment of a tax which the county treasurer was without legal authority to receive.

In the case of *Wilson vs. Pelton*, 40 O. S. 306, the question was raised as to whether the taxpayer could recover from the treasurer a sum of money which he had voluntarily paid to the treasurer in payment of a tax illegally assessed. In that case the taxes were paid after the time for legal payment of taxes had expired. The court in that case held that since the payment was voluntary and even though the taxes had been illegally assessed, and such illegality had been established by the court, they could not be recovered.

See also, *Whitbeck, Treasurer vs. Minch*, 48 O. S. 210; *State ex rel. Fulscamp*, 119 O. S. 504; *Executors of Est. of Long vs. State*, 21 O. A. 412.

The court in the opinion in the case of *Wilson vs. Pelton supra*, ignores the question as to whether the receipt of the taxes after the time for payment has expired, would alter the decision. Such contention does not appear to have been pressed by counsel.

It would seem reasonable to believe that if when an illegal tax had been paid it could not be recovered there would be much more reason to hold that when a legal tax had been illegally paid it could not be recovered. The same reasoning would impel such holding, that is, the subdivisions receiving a portion of such taxes would be similarly affected. The provisions of statute concerning the recovery of such payment are the same.

For the purposes of your inquiry it therefore would not appear to be material that the county treasurer did not have the legal authority to receive the tax payment in the manner received since the payment was a voluntary payment. A voluntary payment of taxes is one made without duress and without compulsion. It would therefore appear to me that it is within the discretion of the tax collecting authorities as to the manner in which such payment of September 19, 1932, should be applied. It is highly improbable that the court would disturb the application made by the taxing officials, inasmuch as each of the parties, that is, the taxpayer and the county treasurer are *particeps criminis* in the illegal payment. While it may be contended by the taxpayer that he was ignorant of the provisions of the statute as to payments, there is an old and well established conclusive presumption of law, that *ignorantia legis neminem excusat*.

While the payment of April 29, 1933, in the sum of \$449.66 was made subsequent to the enactment of Amended Senate Bill No. 42, there is no indication that the payment in question was made pursuant to its provisions. By similar reasoning we would reach the same conclusion as I have herein reached concerning the \$1,000.00 payment.

Specifically answering your inquiries it is my opinion that:

(1) When prior to the enactment of Amended Senate Bill No. 42, enacted by the 90th General Assembly, a taxpayer at a time when the county treasurer is collecting a semi-annual installment of real estate taxes, pays to the county treasurer a sum of money greater than the amount of the current installment of taxes

then due and payable, and one-fifth of the existing delinquent taxes, penalties and assessments it is the duty of the county treasurer to credit such payment in payment of the current tax, and any remainder existing should be credited toward the payment of the interest on all delinquent installments of taxes, penalties and interest which have for the greatest time remained delinquent.

(2) When a taxpayer at a time other than that at which semi-annual installments of taxes and assessments are payable, pays to the county treasurer a sum of money to be applied toward the payment of an installment of delinquent taxes without designating the manner of application it is within the discretion of the tax collecting authorities to apply such moneys toward the payment of the longest delinquent or the latest becoming delinquent items of taxes appearing upon the tax duplicate.

(3) When a taxpayer induces the county treasurer to receive moneys to be credited in payment of delinquent taxes in a manner other than as authorized by statute such taxpayer is in particeps criminis with the county treasurer in such illegal payment and by reason thereof, should not be heard to complain that such taxes were credited in payment of the installment of taxes for which such moneys were paid.

Respectfully,

JOHN W. BRICKER,
Attorney General.

1996

SUPERINTENDENT OF PUBLIC WORKS—UNAUTHORIZED TO CONSTRUCT RESERVOIRS OR ARTIFICIAL LAKES SOLELY FOR PARKS OR RECREATIONAL PURPOSES—CONSERVATION COUNCIL AUTHORIZED SO TO DO WHEN.

SYLLABUS:

The Superintendent of Public Works is not authorized by sections 412-1 to 412-15, inclusive, General Code, to construct reservoirs or artificial lakes solely for parks or recreational purposes, but such authority may be exercised by the Conservation Council where such Council deems it proper in the construction, maintenance, use, extension or enlargement of state parks.

COLUMBUS, OHIO, December 12, 1933.

State Water Conservation Board, Columbus, Ohio.

GENTLEMEN:—I acknowledge receipt of your communication, which reads as follows:

“In view of the fact that there is a demand for the establishment of artificial lakes in the State of Ohio for the carrying out of a more complete water conservation program, I desire to ask for your opinion as to the interpretation of the possibilities of advanced ideas and present developments as set forth in Section No. 412, et seq., of the General Code.

We hope that the interpretation of this part of the conservation laws of the State of Ohio will give our Public Works Department the privilege of utilizing the water benefits for the public good as amortizing possibilities