

OPINION NO. 1521

Syllabus:

1. When a County Budget Commission has made an apportionment of the undivided local government fund for the ensuing calendar year at its regular session pursuant to Section 5739.23, Revised Code, it is without authority, by any subsequent action, to change the percentage shares of the subdivisions entitled to participate in the distribution of aforesaid fund.

2. The extent to which actual receipts are more than estimated receipts from taxes levied and collected pursuant to Section 5707.03, Revised Code, does not result in "excess" funds that can be distributed on some different percentage basis. Such additional funds are supplemental receipts.

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To: Clyde W. Osborne, Mahoning County Pros. Atty., Youngstown, Ohio
By: William B. Saxbe, Attorney General, November 5, 1964

Your request for my opinion reads in relevant part:

"Your opinion is respectfully requested as to whether the first two paragraphs of Section 5739.23, Ohio Revised Code allows the Budget Commission to review its work of the previous years' allocation (local government fund) and distribute funds according to need for the last six months. Your attention is directed to the fact that three separate sections of 5739.23 were enacted and became effective September 16, 1957.

"In Mahoning County the Budget Commission in its 1963 regular session apportioned the local government fund among the various participants according to fixed percentages of the 1964 estimate of funds certified by the Board of Tax Appeals. Mahoning County funds actually received has exceeded this estimate by over \$100,000.00. The Board of Tax Appeals does not certify or re-certify the funds for the last six (6) months of the year as Section 5739.23 contemplates.

"We have various taxing authorities entitled to participate in local government fund distribution in dire need of fund to finish out the year 1964. One of which is receiving no local government money at this time.

"May part of the excess be used at this time to meet the 'needs' of these districts or must they be apportioned on the basis of the fixed percentages made last year?"

In connection therewith I have noted your observations in a supplemental letter to which some brief reference will hereafter be made.

You mention at the outset of your above request the existence of three versions of Section 5739.23, Revised Code. The slight variance in language therein is presently of no particular importance. However, note might be taken of the first branch of the syllabus in *Troy v. Miami*, 168 Ohio St., 418 (1959), wherein the court was concerned as to the validity of the January 16, 1958, action of the Miami County budget commission. This above branch of the syllabus reads:

"1. Where the General Assembly enacts the same section of the Revised Code by three separate acts, effective at the same time, and one of such acts amends the existing section only by changing obsolete year dates, and the other two acts incorporate these date changes, and each adds new matter supplemental to such section which does not delete or change the language of the then existing section, and which acts, considering the purpose of each, are not in conflict with each other, each act of the General Assembly must be given equal effect, and such amended section of the Revised Code must be taken and construed as a composite of all three acts."

The provisions of Section 5739.23, Revised Code, are quite lengthy. However, proper understanding of the matter necessitates setting forth virtually the entire section. In doing so, marginal numbering will be given the paragraphs for subsequent reference thereto. The pertinent paragraphs are as follows:

- (1) "Within ten days after July 15, 1957, the board of tax appeals shall make and certify to the county auditor of each county an estimate of the amount of the local government fund to be allocated to the county for the last six months of the year 1957. Within ten days after receiving the certificate of the board, each auditor shall convene the budget commission of his county in special session for the purpose of reviewing its work of determining the amount of the undivided local government fund to be apportioned to each subdivision entitled to participate in the distribution of the undivided local government fund for the last six months of the year 1957.
- (2) "The auditor shall present to the commission, when so convened, the certificate of the board, the annual tax budget and estimates, and the record showing the action of the commission in its last preceding regular session. The commission, after extending to each subdivision an opportunity to be heard, and considering all the facts and information presented to it by the auditor, shall determine the amount needed by each subdivision for current operating expenses for the last six months of 1957 in addition to revenues available from all other sources, in order to enable it to carry on its essential local governmental functions.
- (3) "Within ten days after July 15, 1957 and within ten days after July 15 in each year thereafter, the board of tax appeals shall certify to the auditor of each county an estimate of the amount of the local government fund to be allocated to the undivided local government fund of the county for the ensuing calendar year, and the estimated amount to be received by the undivided local government fund of each county from the taxes levied pursuant to section 5707.03, of the Revised Code for the ensuing calendar year.

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- (4) "On the basis of such apportionment, the auditor shall compute the percentage share of each such subdivision in the undivided local government fund and certify such percentage shares to the county treasurer who shall be governed thereby in making distribution of the money in the undivided local government fund, and the auditor, when the amount of such shares is in the custody of the treasurer in the amounts so computed to be due the respective subdivisions, shall at the same time certify to the auditor of the state the percentage share of the county as a subdivision.

(5) "All money received into the treasury of a subdivision from the undivided local government fund in a county treasury shall be paid into the general fund and used for the current operating expenses of the subdivision."

On July 16, 1963, the Board of Tax Appeals made the certification required by paragraph three of Section 5739.23, Revised Code, which was handled by two entries. One entry concerns the situation as to the allocation of sales tax but need not be here considered (see Section 5739.21, Revised Code). The other entry states in part:

"This matter came on to be considered by the Board of Tax Appeals in compliance with the provisions of Sec. 5739.23 of the Revised Code, requiring the Board to certify to the auditor of each county an estimate of the amount to be received by the undivided local government fund of each county from the taxes levied pursuant to Sec. 5707.03 of the Revised Code for the ensuing calendar year. The amounts in the following schedule are ESTIMATES of the amounts to be distributed to each of the 88 counties for the calendar year 1964.

"The Board of Tax Appeals, being fully advised in the premises, hereby makes and certifies the following estimates of the amounts to be allocated to the "Undivided Local Government Fund" from taxes levied pursuant to Sec. 5707.03, Revised Code, and distributed as provided in Sec. 5725.24, Revised Code."

(Emphasis added)

(Then follows a listing of the counties and the estimate for each.)

It is my understanding that actual receipts from taxes levied and collected from the various kinds of intangible property that are mentioned in Section 5707.03, Revised Code, were more than \$100,000 over the Board's estimate for your county. You refer to this amount as an "excess." However, I can find no legal basis for concluding that such "excess" can now be allocated and paid to the various subdivisions in the county on a different percentage basis than originally determined by the Mahoning County Budget Commission in its 1963 regular session.

Paragraphs one and two of Section 5739.23, Revised Code, were obviously intended to relate to the last six months of 1957. The word "reviewing," which you emphasize in your supplemental letter, appears only in the first paragraph of Section 5739.23, Revised Code, but is not elsewhere found in the section. Moreover, the word "reviewing" is identified with the Budget Commission's action in "special session." They are words of limitation because a special or unique situation was to be dealt with for the last six months of 1957. They have no application to any later period. The \$100,000, which you denominate as an "excess," is in reality a supplementary amount.

A somewhat similar situation gave rise to Opinion No. 551 of Opinions of the Attorney General for 1951 wherein the first

branch of the syllabus reads:

"1. The excess net collection of revenues for the fiscal year ending June 30, 1951, as determined and certified by the Director of Finance in the amount of \$9,042,390.00, the same being the 30% of the excess net collection, credited to the local government fund, is to be considered as supplementary to the \$12,000,000.00 appropriated for the local government for the year 1951-1952 and is to be distributed in the same period of time, in the same manner and in accordance with the same formula as is the \$12,000,000.00 sum."

The above conclusion is applicable to your inquiry.

In reaching my conclusion I am not unmindful of the financial plight of the county subdivision that was not a participant in the original allocation nor of the present needs of some actual participants. However, their plight and needs at this time cannot be the basis for distorting the provisions of Section 5739.23, Revised Code, to accomplish what might be a desirable result. Any other conclusion would operate to the financial disadvantage of other participating subdivisions and would produce inequitable results so far as they are concerned. The assumption that there is an "excess" and that "need can be substituted for specific statutory requirement must necessarily be rejected. Accordingly, it is my opinion and you are advised that:

1. When a County Budget Commission has made an apportionment of the undivided local government fund for the ensuing calendar year at its regular session pursuant to Section 5739.23, Revised Code, it is without authority, by any subsequent action, to change the percentage shares of the subdivisions entitled to participate in the distribution of aforesaid fund.

2. The extent to which actual receipts are more than estimated receipts from taxes levied and collected pursuant to Section 5707.03, Revised Code, does not result in "excess" funds that can be distributed on some different percentage basis. Such additional funds are supplemental receipts.