

Note from the Attorney General's Office:

1957 Op. Att'y Gen. No. 57-1365 was modified by 1958 Op. Att'y Gen. No. 1958-2190.

1365

INTEREST, EARNED ON MONEYS IN ANY FUND, REALIZED BY SALE OF BONDS; § 5705.10 RC, EFF. 8/27/57, GOVERNS DISPOSITION OF SUCH INTEREST—SPECIFICATION OF AMOUNTS IN CLASSES OF FUNDS, §§ 133.20, 5705.09 RC—COMBINED DEPOSITS, INTEREST DIVIDED AMONG FUNDS IN RATIO OF DEPOSIT—ACCRETION OF PRINCIPAL, REMAINS PART OF PRINCIPAL OF FUND INVOLVED—DIVIDED AMONG FUNDS IF DEPOSIT IS COMBINED

SYLLABUS:

1. Section 5705.10, Revised Code, as amended by the 102nd General Assembly, effective August 27, 1957, has by implication amended that portion of Section 135.12, Revised Code, pertaining to disposition of interest earned on moneys in any fund the proceeds of which were realized from the sale of bonds, notes or certificates of indebtedness, and any such interest earned by deposit or investment of such fund derived by the sale of bonds, notes or certificates of indebtedness should be used for the purpose for which such indebtedness was authorized. Opinion No. 6198, Opinions of the Attorney General for 1956, p. 39, and Opinion No. 1137, Opinions of the Attorney General for 1949, p. 775, distinguished.

2. A board of education depositing or investing funds in accordance with Chapters 135. and 5705., Revised Code, must, by the terms of its resolution directing the deposit or investment of inactive funds, specify the amount of each class of such funds, within the meaning of Sections 133.20 and 5705.09, Revised Code, that are to be deposited or invested.

3. Interest earned on the consolidated deposit or investment of such funds in accordance with Chapters 135. and 5705., Revised Code, should be divided among such funds in the ratio which the several funds bear to the entire amount deposited or invested.

4. Any accretion of principal of a fund invested in accordance with Chapter 135., Revised Code, remains a part of the principal of the fund involved and in the event of a combined investment of moneys representing several funds any accretion thereof should be divided among the funds in the ratio which the respective funds bear to the entire amount invested.

Columbus, Ohio, November 29, 1957

Hon. James A. Rhodes, Auditor of State
Columbus, Ohio

Dear Sir:

I have before me your letter of request for my opinion which reads as follows:

“House Bill No. 160, passed by the 102nd General Assembly, amended Section 5705.10 of the Revised Code, the fifth paragraph of which now reads:

“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, and any interest earned on money in such special fund shall be used for the purposes for which the indebtedness was authorized. The premium and accrued interest received from such sale shall be paid into the Sinking Fund or the Bond Retirement Fund of the subdivision.’

“Chapter 135 of the Revised Code provides for the investment of active and inactive funds generally. Are we correct in assuming that by the passage of the above referred to House Bill No. 160 that the amendment of Section 5705.10 will change the effect of 1956 O. A. G. No. 6198 which opinion held that whenever the proceeds of the bond issue sale were invested the earned interest thereon went into the Bond Retirement Fund.

“Two other questions have been presented. Section 133.20 of the Revised Code provides for the maturity of bonds, notes or other evidences of indebtedness. It requires the taxing units to designate the life of improvements by classes and requires the specification of the amount of money in each class. Our first question is shall the school district in its resolution for the investment of the proceeds of a bond issue be required to specify just how much out of each class, set out by the above section, is to be deposited or invested and shall the earned interest by reason of such inactive deposit or investment be credited to each class of such bond issue proceeds in proportion to the amount of funds furnished by each of such classes.

“Our second inquiry deals with the investment of bond issue proceeds set out by Section 135.12 of the Revised Code, when such investments are purchased at a lesser cost than that for which they are sold or redeemed at maturity, how shall the resulting accretion or profit be distributed? Shall it be distributed ratably to the various classes supplying the funds in proportion to the total investment made?

In answer to your question pertaining to repeal by implication, it might be well to review the statutes that govern the depositing or investing of public funds on an interest-earning basis.

There are several chapters of the Revised Code which authorize such deposit and investment, namely, the uniform depositories act, Chapter 135., Revised Code, and the uniform tax levy law, Chapter 5705., Revised Code.

Chapter 135., Revised Code, has two sections, namely, Section 135.12, and Section 135.23, which deal with interest on public moneys, and which read in pertinent parts as follows:

Section 135.12, Revised Code:

“The treasurer is responsible for the safe-keeping of all securities acquired by him under this section. Any of such securities may be deposited for safekeeping in the Federal Reserve Bank of Cleveland or with any trust company which has its principal place of business in and is qualified to do a trust business in this state. 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. * * *”

This statute became effective March 5, 1956.

Section 135.23, Revised Code, reads as follows:

“All interest realized on money included within a public deposit and belonging to undivided tax funds shall, except as otherwise expressly provided by law, be apportioned by the auditor pro rata, among the separate funds or taxing districts in the proportions in which they are entitled to receive distribution of such undivided tax funds, due allowance being made for sums transferred in advance of settlements. All interest arising from other moneys deposited by a treasurer, which, by reason of being custodial funds, or funds belonging in the treasury of a taxing, assessment, or other district of which he is acting as ex officio treasurer, or for any other reason, do not belong in the treasury of the state or subdivision, shall be apportioned among and credited to the funds to which the principal sums of such deposits, or portions thereof belong.

“All other interest realized on any public deposit shall be credited to the general fund of the state or the county, municipal corporation, township, taxing district, assessment district, or other local authority to which the principal sum thereof belongs. The auditor shall inform the treasurer in writing of the amount apportioned by him to each fund, district, or account.”

The applicable section of Chapter 5705., Revised Code, Uniform Tax Levy Law, reads in pertinent part as follows in Section 5705.10, Revised Code:

“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, *and any interest earned on money in such special fund shall be used for the purposes for which the indebtedness was authorized.* The premium and accrued interest received from such sale shall be paid into the sinking fund or the bond retirement fund of the subdivision. * * *.” (Emphasis added.)

This section was amended to read as above by the 102nd General Assembly, the amendment becoming effective August 27, 1957. The former pertinent portion of this section 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. * * *.”

It is to be noted that the words “*and any interest earned on money in such special fund shall be used for the purposes for which the indebtedness was authorized,*” have been added as an amendment to the previous language of this section.

The added language as emphasized above when followed by the sentence, “The premium and accrued interest received from such sale shall be paid into the sinking fund or the bond retirement fund of the subdivision” leave no doubt that the legislature intended to differentiate between (1) interest earned on the depositing of or the investing of public funds and (2) premium and accrued interest received from the sale of bonds.

It will be noted that the language used in Section 135.12, *supra*, is very general in nature and would be governed by the limitations and directive requirements of Section 135.23, Revised Code, which differentiates between interest arising from deposit or investment of tax funds and interest arising from “other moneys” deposited by a treasurer. This section further states that such interest “shall be apportioned among and credited to the funds to which the principal sums of such deposits, or portions thereof belong.”

Such language is clear and unambiguous when considered in the light of the most recent amendment to Section 5705.10, Revised Code, as outlined above.

It is stated in 37 Ohio Jurisprudence, page 409, with citation of many cases:

“As a general rule, general statutory provisions do not control, or interfere with specific provisions. To the contrary, to the extent of any irreconcilable conflict, the special provision generally operates as an exception to the general provision, which, accordingly, must yield to the former. * * *”

And it is further well established that the above principle may apply where the general statute is later in time of enactment. 37 Ohio Jurisprudence, 413. In the case of Commissioners v. Bond, 30 Ohio St., 628, it was held:

“4. A local and special act is not repealed or otherwise affected by the conflicting provisions of a subsequent general statute on the same subject, unless the legislative intent that such effect be given the later enactment is clearly manifest.”

To like effect, see Crawford on Statutory Construction, Section 230.

There is nothing in the general language of Section 135.12, *supra*, that indicates an express intention to repeal the special provision of Section 5705.10, *supra*, relative to the disposition of interest earned on the proceeds of sale of bonds.

As to the applicability of these actions to boards of education and school districts, the definition sections of these Chapters 135. and 5705., Revised Code, state respectively that the chapters are applicable to school districts as being “subdivisions” and to boards of education as a “taxing authority” or “bond issuing authority.” Section 3313.51, Revised Code, provides that a clerk of a board of education is the treasurer thereof.

It is apparent, therefore, that the 102nd General Assembly has by the amendment of Section 5705.10, Revised Code, effective August 27, 1957, rendered nugatory the rule in Opinion No. 6198, Opinions of the Attorney General for 1956, p, 39, wherein it was held that interest earned by deposit or investment of money derived from the sale of school district bonds should be paid into the sinking fund or bond retirement fund.

We come now to the next part of your inquiry, the suggested requirement that a school board, in its resolution for investment of proceeds of a bond issue shall specify just how much of each class of improvement moneys should be invested.

Section 133.09, Revised Code, reads in part as follows :

“The taxing authority of any subdivision may submit to the electors of such subdivision the question of issuing any bonds which said subdivision has power to issue. When it desires or is required by law to submit any bond issue to the electors, it shall pass a resolution declaring the necessity of such bond issue and fixing the amount, purpose and approximate date, interest rate, and maturity, and also the necessity of the levy of a tax outside the limitation imposed by section 2 of Article XII, Ohio Constitution, to pay the interest on and to retire said bonds. * * *”

Section 133.36, Revised Code, reads in pertinent part as follows:

“The money from the principal, on the sale of such bonds or notes, shall be credited to the fund on account of which the bonds or notes are issued and sold and used only for the purpose set out in the resolution or ordinance of the taxing authority, and all moneys from premiums and accrued interest shall be paid into the sinking fund or bond retirement fund from which said bonds or notes are to be redeemed. * * *”

Section 5705.09, Revised Code, reads as follows in regard to the establishment of funds :

“Each subdivision shall establish the following funds :

“(A) General fund ;

“(B) Sinking fund whenever the subdivision has outstanding bonds other than serial bonds ;

“(C) Bond retirement fund, for the retirement of serial bonds, notes, or certificates of indebtedness ;

“(D) A special fund for each special levy ;

“(E) A special bond fund for each bond issue ;

“(F) A special fund for each class of revenues derived from a source other than the general property tax, which the law requires to be used for a particular purpose ;

“(G) A special fund for each public utility operated by a subdivision ;

“(H) A trust fund for any amount received by a subdivision in trust.”

Section 133.20, Revised Code, establishes by class of construction the maximum maturities on bonds, notes or other evidences of indebtedness, dividing the same into twelve classifications based on land acquisition, type of construction and usage of the facility.

That section considered in relation to Section 133.21, Revised Code, which provides for the certification of the fiscal officer as to the maximum maturity of bonds or indebtedness calculated in accordance with the maximum utilization expectancy of the utility or facility being financed, indicates the intent of the legislature to effect a limitation on expenditures of funds obtained from bond issues to the end that the construction or facility lasts as long or longer than the time required to retire the bonds.

It is, therefore, apparent that the establishment of special funds for the purpose of each issue as required by Section 5705.10, *supra*, must be accomplished even though certain bond issues are by virtue of Section 133.20, Revised Code, combined for the purpose of the issue. Such action will enable the taxing authority to properly obligate and spend the funds in accordance with the original "resolution of necessity" and the "resolution to proceed." It is readily conceivable that funds for the purchase of a real estate site may be needed much earlier than funds for the equipment of a building to be built thereon.

In view of the fact that these funds have, in compliance with Section 133.20, Revised Code, been "allocated" in specific amounts for specific classes of improvements, as required by Section 5, Article XII, Ohio Constitution, and Section 133.36, Revised Code, it is necessary that the temporary investment or deposit thereof be by class or designation of the fund and amount thereof.

The authority to make this determination to deposit or invest lies with the "taxing authority" and is thus their responsibility.

As to any proportionate disposition of interest earned by the combined deposit or investment of separate funds, reference is made to Opinion No. 4897, Opinions of the Attorney General for 1942, p. 168, wherein my predecessor passed upon a somewhat similar problem under former Section 5705.10, Revised Code, which reads:

"* * * If money from the special fund into which the proceeds of bonds, notes and certificates of indebtedness are required to be paid and also from another fund or funds is used to make treasury investments, the interest earned on such investments should be paid into the sinking fund or the bond retirement fund, and the general fund. The amount payable to the sinking fund or the bond retirement fund is in the ratio which the amount invested from the special fund bears to the entire amount invested."

We come now to your question in regard to the distribution or disposition of any "accretion" in the investment made within the provisions of Section 135.12, Revised Code.

Bouvier's Law Dictionary defines accretion as being derived from the Latin word "*accrescere*" meaning to grow ; to increase.

Although this word is in most instances applied in law to matters pertaining to land and water rights it has other connotations in law.

In 1 Corpus Juris Secundum, 758, accretion is defined, when applicable to financing, as having a distinct meaning indicating additions to the assets by way of "net earnings" or "natural increase" from business.

Black's Law Dictionary has defined accretion in its applicability to trust property as being :

"Receipts other than those ordinarily considered as income."

Such definitions and language show that the legal definition of accretion well befits Webster's definition thereof when the same is defined as :

"Growth ; specifically, organic growth, the result of growth or accumulation ; also, the matter added."

The antithesis of accretion has been defined by F. A. March's Thesaurus Dictionary of the English language as being "diminution or decrease."

Accretion of moneys deposited in a financial institution cannot be visualized as being an event likely to happen. However, accretion of securities purchased in accordance with the Uniform Depository Act, Chapter 135., Revised Code, is a frequent happening in investment banking. The purchase of a security at one price and the sale thereof at another is a common happening.

It is a well settled rule of law that any increase in the trust *res* of moneys in the hands of a trustee, belongs to principal and is not considered as income. See 40 Ohio Jurisprudence, page 411, Section 158, wherein the rule is stated :

"Where the trustee invests moneys of the trust estate in stocks, bonds, or other property, and subsequently sells such trust *res* at a profit and invests in other property, the gains belong to the trust and will go to the remainderman or to the estate, rather than to the life tenant. * * * The diminution or accretion belongs to the capital, and not to life tenant. * * *"

It therefore follows that such increase is an increase in the principal and not income.

Coming then to the statutory provision in regard to such increase or decrease in the principal of such funds when deposited or invested, we find that the Uniform Depository Act, Section 135.12, *supra*, reads as follows:

“* * * 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.” (Emphasis added.)

The legislature has by Section 135.12, *supra*, provided that losses sustained thereby should be paid from the treasury “as other expenses of the treasurer’s office.”

It becomes apparent, therefore, that it is the intent of the legislature that such loss should not be sustained by the particular fund but instead the loss should be sustained by the “treasurer’s office” as other expenses are paid.

In the light of Section 5705.09, *supra*, the only fund available from which to pay such loss would be the “general fund.”

Combining the legislative intent that investment losses should be paid “as other expense of the treasurer’s office”, Section 135.12, Revised Code, and the further expressed intention of the legislature that any interest earned on the said invested moneys should be used for the purposes for which the indebtedness was authorized, Section 5705.10, Revised Code, it is apparent that the preservation of, and enhancement of such invested funds was the intent of the legislature.

The accretion being an increase or growth of the principal and the legislature having not provided for any other disposition thereof, and having given every indication of intent to preserve and enhance the same in so far as interest and earned increment is concerned, it is logical to conclude that such accretion follows the fund to be used for the purpose for which the indebtedness was authorized. In regard to proportionate disposition thereof, the rule stated in Opinion No. 4897, Opinions of the Attorney General for 1942, p. 168, *supra*, would apply and in the event of combined investment of several funds any accretion thereof would be

divided between the funds in the ratio which the respective funds bear to the entire amount invested.

It is my opinion and you are, therefore, advised:

1. Section 5705.10, Revised Code, as amended by the 102nd General Assembly, effective August 27, 1957, has by implication amended that portion of Section 135.12, Revised Code, pertaining to disposition of interest earned on moneys in any fund the proceeds of which were realized from the sale of bonds, notes or certificates of indebtedness, and any such interest earned by deposit or investment of such fund derived by the sale of bonds, notes or certificates of indebtedness should be used for the purpose for which such indebtedness was authorized. Opinion No. 6198, Opinions of the Attorney General for 1956, p. 39, and Opinion No. 1137, Opinions of the Attorney General for 1949, p. 775, distinguished.

2. A board of education depositing or investing funds in accordance with Chapters 135. and 5705., Revised Code, must, by the terms of its resolution directing the deposit or investment of inactive funds, specify the amount of each class of such funds, within the meaning of Section 133.20 and 5705.09, Revised Code, that are to be deposited or invested.

3. Interest earned on the consolidated deposit or investment of such funds in accordance with Chapters 135. and 5705., Revised Code, should be divided among such funds in the ratio which the several funds bear to the entire amount deposited or invested.

4. Any accretion of principal of a fund invested in accordance with Chapter 135., Revised Code, remains a part of the principal of the fund involved and in the event of a combined investment of moneys representing several funds any accretion thereof should be divided among the funds in the ratio which the respective funds bear to the entire amount invested.

Respectfully,

WILLIAM SAXBE

Attorney General