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OVERPAYMENT OR DOUBLE PAYMENT OF TAXES SHOULD BE PAID INTO THE COUNTY TREASURY BY THE TREASURER THEREOF TO THE CREDIT OF A TRUST FUND AND RETAINED UNTIL CLAIMED BY THE LAWFUL OWNER. IF NOT CLAIMED IN FIVE YEARS SUCH MONEY WILL REVERT TO THE GENERAL FUND OF THE POLITICAL SUBDIVISION WHERE COLLECTED—OPINION No. 4785, OAG 1932, OPINION 2086, OAG, 1933, SEC. 286, G.C. SEC. 2639, G.C. SEC. 117.10, R.C.

SYLLABUS:

Any overpayment or double payment of taxes should be paid into the county treasury by the treasurer thereof to the credit of a trust fund, and there retained in accordance with Section 117.10, Revised Code, until claimed by the lawful owner; and if not claimed within a period of five years, such money will revert to the general fund of the political subdivision where collected.

Columbus, Ohio, January 27, 1962

Hon. John D. Sears, Jr., Prosecuting Attorney,
Crawford County, Bucyrus, Ohio

Dear Sir:

Your request for my opinion reads as follows:

“I would appreciate your opinion in regard to what the proper procedure would be as to moneys paid into the county treasurer which exceed the amount of taxes due on a particular piece of real estate on which an individual is paying the taxes.

“We have had a change in County Treasurer effective as of September 4, 1961. The previous Treasurer set up a special checking account being in the Treasurer’s name as Crawford County Treasurer and any money paid into his office over and above the correct amount of taxes would be deposited in this special account and he would issue a refund to the taxpayer. I realize there is a procedure set up by statute covering double payments of taxes on a piece of real estate and that this money should be deposited and a warrant issued by the county auditor for the refund, however, what I am concerned about is when a person sends a check or money order for an amount that is less

than or around \$3.00 over and above his taxes, what is the proper procedure for the Treasurer to follow in order that the excess be refunded to the taxpayer?

"I was wondering if it would be proper for the treasurer to set up a trust account in his name as county treasurer, which trust account would only handle the excess money paid by the taxpayers, or whether or not the treasurer must follow the same procedure as is set up for a double payment of taxes. In the course of collecting taxes there would only be a few occasions where a double payment of taxes would be made but there are a number of occasions where a person will send a check for a few cents or a few dollars over and above what he owes. It is my own opinion that the county treasurer should be allowed to set up this trust account in his name as county treasurer and to deposit this excess payment of tax moneys in this trust account and issue a refund from said trust account to the taxpayer.

"I am requesting your opinion on this for the reason that the Examiner who examined the treasurer's records from September 29, 1956 to September 30, 1959 made a finding that any money paid to the treasurer as taxes should be paid into the county treasurer as public moneys and if there is an excess or a double payment the same should be credited to a double payment fund when discovered and a refund to the taxpayer should be made upon the issuance of a county auditor's warrant."

In Opinion No. 4785, Opinions of the Attorney General for 1932, Vol. III, page 1326, it was held that a county treasurer who receives excess moneys either by way of overpayment or double payment of taxes becomes a constructive trustee in his individual capacity, not in his capacity as a public officer, for the benefit of the person making such overpayment or double payment. Under the authority of Opinion No. 4785, *supra*, it would be proper for the treasurer to set up a trust account in his own name to handle excess money paid by taxpayers.

The authority of Opinion No. 4785, *supra*, was restricted, however, in Opinion No. 2086, Opinions of the Attorney General for 1933, Vol. III, page 1991. On page 1992 of Opinion No. 2086, *supra*, the then Attorney General discussed former Opinion No. 4785, *supra*, as follows:

"In such opinion, my predecessor in office follows the reasoning of the court in the cases of *Homberger vs. Case, Treas.*, 13 Bull., 511; *Huzberg vs. Willey, Treas.*, 13 Bull., 334; *McCoy vs. Chillicothe*, 3 Oh. 37; *Loomis vs. Spenser*, 1 O.S. 153; *Champaign Co. Bank vs. Smith*, 7 O.S. 43, I concur with the reasoning and holdings of such cases, in view of the statutes which

existed at the time they were rendered. However, after the date of such court decisions the legislature enacted different statutory provisions. In Section 286, General Code, the legislature has laid down the following rule to be followed by the county treasurer in the disposition of moneys received by him under color of his office:

“The term ‘public money’ as used herein shall include all money received or collected under color of office, whether in accordance with or under authority of any law, ordinance or order, or otherwise, and all public officials, shall be liable therefor. All money received under color of office and not otherwise paid out according to law, shall be due to the political subdivision or taxing district with which the officer is connected and shall be by him paid into the treasury thereof to the credit of a trust fund, there to be retained until claimed by the lawful owner; if not claimed within a period of five years after having been so credited to said special trust fund, such money shall revert to the general fund of the political subdivision where collected.’

“By reason of the provisions of such statute, and the provisions of Section 2639, General Code:

“‘At the expiration of his term of office or on his resignation or removal from office, the county treasurer shall deliver to his successor all moneys, books, papers and other property in his possession as treasurer and in case of the death or incapacity of the treasurer, they shall in like manner be delivered over by his legal representatives.’

It would appear that all double payments of real estate taxes under present statutes, are required to be paid into a special trust fund in the possession of the treasurer and that title to such fund is transferred by one treasurer to his successor in office upon expiration of his term of office. I am therefore, unable to concur in that part of the conclusion of such opinion which holds a former county treasurer personally liable for the return of overpayments of taxes, when he has turned over, or delivered the proceeds of such overpayments to his successor in the manner required by Section 2639, *supra*.

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Sections 286 and 2639, General Code, are now Sections 117.10 and 321.06, Revised Code, respectively.

Although the Attorney General in Opinion No. 2086, *supra*, referred only to double payments of taxes being paid into the county treasury to the credit of a special trust fund, Section 117.10, Revised Code, requires “all” of such payments to be paid into a trust fund. I am impelled to

conclude, therefore, that the same procedure as is set up for a double payment of taxes should be followed for any overpayment of taxes regardless of amount.

It is my opinion, therefore, and you are advised that any overpayment or double payment of taxes should be paid into the county treasury by the treasurer thereof to the credit of a trust fund, and there retained in accordance with Section 117.10, Revised Code, until claimed by the lawful owner; and if not claimed within a period of five years, such money will revert to the general fund of the political subdivision where collected.

Respectfully,
MARK McELROY
Attorney General