November 23, 1999

OPINION NO. 99-054

The Honorable James F. Stevenson
Shelby County Prosecuting Attorney
126 N. Main Avenue
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Sidney, Ohio 45365-0987

Dear Prosecutor Stevenson:

We have received your request for an opinion concerning the delinquent tax and assessment collection (DETAC) fund, created under R.C. 321.261. You have raised the following questions:

1. Under what conditions or events may the county auditor and treasurer amend the delinquent tax list and remove from that list the name of a taxpayer?

2. Under what conditions and events, if any, can the county remit moneys paid to the DETAC fund?

We understand that you use the word "remit" to mean remove money from the DETAC fund and return it for distribution in the manner in which it would have been distributed had it not been paid into the DETAC fund—that is, in essence, to "undo" the payment of the money into the DETAC fund. *See Black's Law Dictionary* 1294 (6th ed. 1990) (defining "[r]emit" to mean "[t]o send back").

Your questions concern a situation in which the county issued a personal property tax bill to a local company. The tax bill was mailed to the home office of the company, rather than to the local division, and was not paid in a timely manner. The local division was unaware of the nonpayment of the tax until it received a collection letter some time later. Upon receipt of the collection letter, the local division promptly paid the personal property tax and the assessed penalty and then requested a remission of the penalty. The county treasurer and county auditor agreed to remit the penalty.

Because the tax was not paid in a timely manner, the taxpayer was placed on the delinquent tax list. Because the penalty was remitted, that additional ten percent was not received by the county treasurer. When the delinquent tax was paid, five percent of the amount collected was paid into the county DETAC fund, in accordance with R.C. 321.261. The payment of that five percent into the DETAC fund reduced the amount of personal property tax proceeds available for distribution to the various subdivisions and other taxing units, including the local school district.

The taxpayer in question is a major taxpayer in the county, and the loss of five percent of the payment made by that taxpayer decreased property tax proceeds substantially. As a result, the local school district received noticeably less money than it would have if the tax had been paid in a timely manner or if the penalty had not been remitted. The local school district has complained about the five percent assessment against the personal property tax payment because the assessment significantly reduced the school district's receipts. The county treasurer has asked whether the taxpayer can be removed from the delinquent tax list and the DETAC money returned. The money would then be distributed as other tax proceeds are distributed, thereby increasing the amounts paid to the school district and other taxing units. To address your particular concerns, this opinion considers only the portions of the DETAC provisions that pertain to personal property taxes.

Let us begin our analysis with a review of the provisions governing the collection of personal property taxes. Personal property is subject to taxation as provided by law. *See* R.C. 5705.03; R.C. 5709.01. The taxing authorities of subdivisions and other taxing units may levy taxes on real and personal property, within the limits of their statutory authority. R.C. 5705.03. Following the preparation of tax budgets and action by the county budget commission, the taxing authorities certify their tax levies to the county auditor. R.C. 5705.34; *see also* R.C. 5705.28; R.C. 5705.31; R.C. 5705.32.

The county auditor makes up an auditor's general tax list and a treasurer's general duplicate of personal property for each year. R.C. 319.29; R.C. 5719.03; R.C. 5719.031. The auditor extends on the list and duplicate the appropriate rates of taxation and determines the sums to be levied on personal property. R.C. 319.31. Upon receipt of the duplicate, the treasurer mails tax bills to all persons listed on the duplicate and proceeds to collect the taxes. *See* R.C. 5705.03; R.C. 5719.02-.021; R.C. 5719.03-.031; *see also* R.C. 5711.32-.33. Amounts of personal property tax that are collected are credited to the undivided general tax fund. R.C. 319.14; R.C. 321.08; R.C. 5719.041. The county auditor and county treasurer make periodic settlements of taxes collected. R.C. 319.49; R.C. 321.24. Tax proceeds are apportioned and paid as provided by law, and distributions are made to various taxing districts. R.C. 319.49; R.C. 321.31; R.C. 321.33; R.C. 321.34; *see also* R.C. 321.30; R.C. 321.35.

When personal property taxes are not paid in a timely manner, a penalty of ten percent of the amount due and unpaid accrues. R.C. 5719.03(D). If the taxes are paid within ten days, one-half of the penalty is waived or remitted and not collected. *Id*. The penalty may be remitted in full if: (1) the taxpayer could not make timely payment of the tax because of the negligence or

error of the auditor or treasurer in the performance of a statutory duty relating to the levy or collection of the tax; (2) the taxpayer failed to receive a tax bill or a correct tax bill and made a good faith effort to obtain a bill within thirty days of the last date for payment; (3) the taxpayer died or was seriously injured or hospitalized and the tax was paid within sixty days of the last date for payment; or (4) the taxpayer demonstrates that the payment was properly deposited in the mail in a timely fashion. R.C. 5711.33(D).

If personal property taxes are not paid on time, the county auditor enters them on the delinquent personal and classified property tax list and duplicate, along with the penalties due, and delivers a duplicate to the county treasurer. R.C. 319.49; R.C. 5719.04; *see also* R.C. 5711.33. The treasurer is responsible for collecting delinquent property taxes, penalties, and interest due, and may allow installment payments. R.C. 5719.03; R.C. 5719.04; R.C. 5719.041; R.C. 5719.05. The taxpayer may apply to the auditor for a remission of the penalty. R.C. 5711.33(D); R.C. 5719.03(E). In order to collect delinquent taxes, the treasurer may mail tax bills to all persons charged with delinquent taxes. R.C. 5719.04. The auditor arranges to have the delinquent personal and classified property tax list published in the newspaper. R.C. 5719.04.

The delinquent tax list and duplicate are kept cumulatively from year to year, so that amounts not paid in one year are included on the next tax list and duplicate. Items may be stricken from the delinquent tax list and duplicate after a period of five years, if the county treasurer determines that they are uncollectible and the board of revision and prosecuting attorney concur. R.C. 5719.06.

The DETAC provision states that "[f]ive per cent of all delinquent real property, personal property, and manufactured and mobile home taxes and assessments collected by the county treasurer shall be deposited in the delinquent tax and assessment collection fund, which shall be created in the county treasury." R.C. 321.261. It requires the board of county commissioners to appropriate the money in the DETAC fund in equal shares to the county treasurer and the county prosecuting attorney, to be used "solely in connection with the collection of delinquent real property, personal property, and manufactured and mobile home taxes and assessments." *Id*. The treasurer and prosecuting attorney must report each year on the amounts they receive and the uses they make of the money. *Id.*[1]

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[1] We assume for purposes of this opinion that the provisions of R.C. 321.261 are constitutional. *See, e.g.*, R.C. 1.47(A); *State ex rel. Lukens v. Brown*, 34 Ohio St. 2d 257, 298 N.E.2d 132 (1973); 1998 Op. Att'y Gen. No. 98-035, at 2-212. We note that, pursuant to Ohio Const. art. XII, § 5, proceeds of a tax may be expended only for the purpose for which the tax was levied. We concluded in 1997 Op. Att'y Gen. No. 97-030 that this requirement applies even if taxes are delinquent when collected. We are aware of no authority that has considered the constitutionality of R.C. 321.261 in this regard, but we note that Ohio statutes have long provided for fees relating to the collection of taxes to be paid from tax proceeds. *See, e.g.*, R.C.

Amounts of penalty and interest that accrue on delinquent taxes are, when collected, apportioned among the various funds for which taxes were levied. R.C. 5719.05. When the ten percent penalty is collected, it more than offsets the five percent payment to the DETAC fund. *See* R.C. 5719.03. If one-half of the penalty is waived pursuant to R.C. 5719.03(D) when taxes are paid within ten days of the deadline, the remaining one-half of the penalty is available to offset the payment to the DETAC fund, so the school district and other taxing units receive proceeds in the anticipated amount. The sizeable reduction in proceeds received by the school district in the instant case occurred because the penalty was remitted in its entirety. As noted above, such remission is authorized in certain circumstances, as prescribed by statute. *See* R.C. 5711.33(D).

Let us consider now the conditions under which the county auditor and treasurer may amend the delinquent tax list and remove from it the name of a taxpayer. We note, first, that both the county auditor and the county treasurer hold offices created by statute and have only the powers they are granted by statute. *See State ex rel. Kuntz v. Zangerle*, 130 Ohio St. 84, 197 N.E. 112 (1935); 1983 Op. Att'y Gen. No. 83-045, at 2-176 ("[t]he auditor's authority to make changes in the tax list and duplicate is, as a general rule, very limited"); 1965 Op. Att'y Gen. No. 65-20, p. 2-50.

The statutes outlined above do not provide for amendment of the delinquent tax list and removal of taxpayers from that list. The statutes do provide for the preparation of new delinquent tax lists and duplicates following annual tax settlements by the county auditor and treasurer. R.C. 5719.04; *see also* R.C. 321.24(D). Hence, a taxpayer who pays delinquent taxes will not appear on the next cumulative delinquent tax list. Further, an item may be stricken from the delinquent tax list and duplicate if it has appeared on the delinquent list for five years and is found to be uncollectible. R.C. 5719.06. The statutory procedure, however, does not provide for a taxpayer's name to be removed from the current delinquent list upon the payment of taxes.[2]

Express statutory provisions permit the county auditor to make changes to the tax lists and duplicates to correct clerical errors. R.C. 319.35. The changes may affect the name of the person charged with taxes or assessments, the description or valuation of property, or the amount of taxes or assessments. If the correction is made after a duplicate is delivered to the county treasurer, it is made on the margin of the tax list and duplicate, without changing any name,

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319.49; R.C. 319.54; R.C. 321.26; *State ex rel. Bender v. Lewis*, 73 Ohio St. 101, 76 N.E. 564 (1905). *See generally Kest v. Lucas County Bd. of Comm'rs*, 79 Ohio App. 3d 253, 607 N.E.2d 72 (Lucas County 1992).

[2] Statutory provision is made for a taxpayer's name to be removed from the list of delinquent taxpayers published in the newspaper if the taxpayer has made or arranged for payment sufficiently far in advance of publication. R.C. 5719.04. Removal from the publication list does not remove the name from the delinquent tax list and duplicate.

description, or figure in the original tax list or in the duplicate as delivered, so that the tax list and duplicate always correspond exactly with each other. *Id*. The authority to make such corrections, however, extends only to "an error that can be corrected by the county auditor from the inspection or examination of documents in the county auditor's office or from the inspection or examination of documents that have been presented to the county auditor and have been recorded by the county recorder." *Id*. Other errors are fundamental errors that may be corrected only by the county board of revision, as provided by law. *Id.*; *see also State ex rel. Ney v. DeCourcy*, 81 Ohio App. 3d 775, 612 N.E.2d 386 (Hamilton County), *motion to certify overruled*, 65 Ohio St. 3d 1458, 602 N.E.2d 254 (1992); 1983 Op. Att'y Gen. No. 83-045.

The situation you have described would not allow the removal of a taxpayer from the delinquent tax list pursuant to the authority to correct errors because there was no error when the list was made. The taxpayer in question was included on the delinquent tax list because the tax in question had not been paid. The fact that there may have been a good reason for nonpayment does not negate the fact that payment had not been made.

The function of the delinquent tax list and duplicate is to list the taxpayers whose taxes are delinquent in order to provide the county treasurer with a list of taxes to be collected. In the instant case, the appearance of the taxpayer's name on the list and the notice that followed resulted in payment of the tax. The delinquency and subsequent payment are part of the tax records of the county and there is no statutory authority to change those records in the situation you have described. We conclude, therefore, that if the name of a business enterprise taxpayer appears on the delinquent tax list and duplicate because the taxpayer failed to make timely payment of personal property taxes due, the county auditor and treasurer have no authority to amend the delinquent tax list to remove the name of the taxpayer after payment of the tax is made, even if the failure to make timely payment resulted from the fact that the tax bill was mailed to the home office of the business enterprise rather than to the local division.

Let us now turn to your second question, which concerns the authority of the county to remit moneys that have been paid into the DETAC fund. As noted above, county officials have only the authority they are granted by statute. No statute authorizes them to remove money that has been properly paid into the DETAC fund and return it to the undivided general tax fund to be distributed as if it had not been paid into the DETAC fund.

The statute creating the DETAC fund states that five percent of delinquent real property, personal property, and manufactured and mobile home taxes and assessments collected by the county treasurer "shall" be deposited in the DETAC fund. R.C. 321.261. The statute states that the money "shall" be appropriated to the county treasurer and the county prosecuting attorney and that it "shall" be used solely in connection with the collection of delinquent taxes and assessments. *Id*. The use of the word "shall" indicates that the provisions of the statute are mandatory. *See Dorrian v. Scioto Conservancy Dist.*, 27 Ohio St. 2d 102, 271 N.E.2d 834 (1971) (syllabus, paragraph 1); 1993 Op. Att'y Gen. No. 93-046 (concluding that the board of county commissioners has no authority to appropriate money from the DETAC fund to the clerk

of courts). Hence, the money must be deposited, appropriated, and expended in accordance with the provisions of R.C. 321.261.

The payment of five percent of delinquent taxes into the DETAC fund reduces by a corresponding amount the tax proceeds that are available for distribution to school districts and other taxing units. If no penalty is collected to offset that reduction, the taxing units receive a smaller amount of proceeds than anticipated. However, the General Assembly has made payments to the DETAC fund mandatory and has prescribed that the payments be used for the collection of delinquent taxes and assessments, rather than permitting them to be distributed to the various taxing units that receive other property tax proceeds. The county is not authorized by statute to remit money from the DETAC fund. Rather, money in the DETAC fund must be used for the purposes prescribed by statute. Therefore, we conclude that the county has no authority to take delinquent personal property tax proceeds that have been properly paid into the DETAC fund in accordance with R.C. 321.261, remove them from that fund, and return them to the undivided general tax fund for distribution as if they had not been paid into the DETAC fund.

Although the direct remission of DETAC money is not authorized by statute, provisions of law establish limited circumstances in which money may be transferred by a subdivision from one fund to another. R.C. 5705.14-.16. Those provisions were considered by a prior Attorney General, who was asked whether unused moneys in the DETAC fund could be transferred to the county's general fund to be made available for purposes other than those prescribed by R.C. 321.261. 1994 Op. Att'y Gen. No. 94-015. The conclusions were that money in a county DETAC fund could not be transferred to another fund pursuant to R.C. 5705.14 (in part because the collection of delinquent taxes is a continuing activity and the need for the fund does not terminate), and that if the money could be transferred to the county general fund at all, the transfer could be made only pursuant to the provisions of R.C. 5705.15 and R.C. 5705.16, which would require a resolution of the taxing authority (in this case, the board of county commissioners) declaring the necessity for the transfer of funds, the approval of the tax commissioner, and a finding by the court of common pleas that there is good reason or necessity for the transfer and that no injury will result. *Id.*; *see* R.C. 5705.14-.16. We concur in the conclusions reached in that opinion. Thus, the only means by which money in a DETAC fund might possibly be used for purposes other than those prescribed by R.C. 321.261 would be through the rigorous transfer procedures set forth in R.C. 5705.15 and R.C. 5705.16.

Whether the transfer of money from a DETAC fund pursuant to the provisions of R.C. 5705.15 and R.C. 5705.16 would be allowed in particular circumstances is subject to determination by the tax commissioner and the courts and exceeds the scope of this opinion.[3]

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[3] The purpose of giving the tax commissioner (under prior law the tax commission) discretion to determine whether to approve or disapprove the transfer of money from one fund to another was discussed by the Ohio Supreme Court as follows:

We note, however, that there is serious question whether such transfer would ever be permitted, given the source of the money and the continuing nature of the statutory purpose of the DETAC fund. *See* 1994 Op. Att'y Gen. No. 94-015; *see also In re Petition for Transfer of Funds by Perry Twp.*, 52 Ohio App. 3d 1, 556 N.E.2d 191 (Montgomery County 1988) (R.C. 5705.15 is unconstitutional under Ohio Const. art. XII, § 5, as applied to the transfer of funds from special levies enacted for a particular purpose to funds that may be expended for a different purpose); note 1, *supra*. We are informed as a matter of fact that the tax commissioner has refused to approve transfers of money from a DETAC fund to the county general fund.[4]

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We conclude, therefore, that if money in a county DETAC fund may be transferred from that fund, such transfer may be made only pursuant to the provisions of R.C. 5705.15 and R.C. 5705.16, upon a resolution of the board of county commissioners declaring the necessity for the transfer of funds, with the approval of the tax commissioner, and upon a finding by the court of common pleas that there is good reason or necessity for the transfer and that no injury will result. As a practical matter, we question whether such a transfer would ever be permitted.

We are sympathetic to the plight of a school district that receives less tax money than it had anticipated because the tax payment is delinquent and the penalty is remitted. We note that

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> [T]he purpose [of the legislature in requiring the submission of the petition to the tax commission] evidently was to give the Common Pleas Court the benefit of the opinion of the Tax Commission. While the Tax Commission is required to exercise its judgment as to whether or not the petition should be approved, the result of what it does is more in the nature of an expert opinion than a judicial pronouncement. It is to approve or disapprove from a practical point of view, from the point of view of its own particular function.

State ex rel. Caley v. Tax Comm'n of Ohio, 129 Ohio St. 83, 87, 193 N.E. 751, 753 (1934); *see also Lake Twp. of Stark County v. Kinney*, No. 82-F-525, slip op. at 5 (Ohio B.T.A. Mar. 27, 1984) ("the Commissioner is authorized to either approve or disapprove such petition, in his sole discretion. Such provision does not state specific criteria which the Commissioner must use in making such determination"), *aff'd*, *Cassetty v. Kinney*, No. CA-6378, 1984 WL 3889 (Ct. App. Stark County Sept. 24, 1984).

[4] One might also ask, if the county were able to accomplish the transfer of DETAC money to its general fund by the procedures set forth in R.C. 5705.15 and R.C. 5705.16 (which, as discussed above, appears unlikely), whether the county could then pay some or all of the money to the school district or to other taxing units that receive personal property tax proceeds. There is no general statutory authority for a county to make gifts of its funds to a school district or to use the provisions of R.C. 5705.15 and R.C. 5705.16 as a mechanism for remedying a perceived inequity in the operation of the DETAC provisions. Therefore, it does not appear that this indirect method could be used to restore to the school district the lost tax revenues.

questions concerning the purposes for which DETAC funds may be used have arisen in the past. *See* 1994 Op. Att'y Gen. No. 94-015; 1993 Op. Att'y Gen. No. 93-046. The amounts and permissible uses of DETAC funds, and the conditions for remitting penalties, are prescribed by the General Assembly and are subject to change by that body, within constitutional limitations, should it deem such change appropriate.

Therefore, it is my opinion, and you are advised:

1. If the name of a business enterprise taxpayer appears on the delinquent tax list and duplicate because the taxpayer failed to make timely payment of personal property taxes due, the county auditor and treasurer have no authority to amend the delinquent tax list to remove the name of the taxpayer after payment of the tax is made, even if the failure to make timely payment resulted from the fact that the tax bill was mailed to the home office of the business enterprise rather than to the local division.

2. The county has no authority to take delinquent personal property tax proceeds that have been properly paid into the delinquent tax and assessment collection fund in accordance with R.C. 321.261, remove them from that fund, and return them to the undivided general tax fund for distribution as if they had not been paid into the delinquent tax and assessment collection fund.

3. If money in a county delinquent tax and assessment collection fund may be transferred from that fund, such transfer may be made only pursuant to the provisions of R.C. 5705.15 and R.C. 5705.16, upon a resolution

of the board of county commissioners declaring the necessity for the transfer of funds, with the approval of the tax commissioner, and upon a finding by the court of common pleas that there is good reason or necessity for the transfer and that no injury will result. (1994 Op. Att'y Gen. No. 94-015, approved and followed.)

Respectfully,

BETTY D. MONTGOMERY
Attorney General

November 23, 1999

The Honorable James F. Stevenson
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SYLLABUS: 99-054

1. If the name of a business enterprise taxpayer appears on the delinquent tax list and duplicate because the taxpayer failed to make timely payment of personal property taxes due, the county auditor and treasurer have no authority to amend the delinquent tax list to remove the name of the taxpayer after payment of the tax is made, even if the failure to make timely payment resulted from the fact that the tax bill was mailed to the home office of the business enterprise rather than to the local division.

2. The county has no authority to take delinquent personal property tax proceeds that have been properly paid into the delinquent tax and assessment collection fund in accordance with R.C. 321.261, remove them from that fund, and return them to the undivided general tax fund for distribution as if they had not been paid into the delinquent tax and assessment collection fund.

3. If money in a county delinquent tax and assessment collection fund may be transferred from that fund, such transfer may be made only pursuant to the provisions of R.C. 5705.15 and R.C. 5705.16, upon a resolution of the board of county commissioners declaring the necessity for the transfer of funds, with the approval of the tax commissioner, and upon a finding by the court of common pleas that there is good reason or necessity for the transfer and that no injury will result. (1994 Op. Att'y Gen. No. 94-015, approved and followed.)