

OPINION NO. 99-025**Syllabus:**

Pursuant to R.C. 135.21 and R.C. 5705.10, the interest income earned on a special fund containing proceeds of a municipal income tax levied for street improvements must be paid into the general fund of the municipal corporation.

To: Jim Petro, Auditor of State, Columbus, Ohio

By: Betty D. Montgomery, Attorney General, March 22, 1999

We have received your request for an opinion concerning the proper allocation of interest earned on certain funds of a municipal corporation. The question is whether the interest income earned on proceeds of an income tax levied by a municipal corporation for the purpose of street improvements must be credited to the general fund of the municipal corporation or to the special fund that holds the proceeds of the income tax. The municipal corporation in question has not adopted a charter, and this opinion considers only non-chartered municipal corporations.

In the situation with which you are concerned, the city council voted in 1989 to submit to the voters the question of imposing an additional one-half percent municipal income tax for street improvements and related uses. *See* R.C. 718.01. The voters approved the question in 1990. The income tax was levied on January 1, 1991, and will continue until December 31, 2000.

Certain city officials contend that the interest earned on the proceeds of the tax should be credited to the general fund of the municipal corporation, and they have taken action in accordance with that contention. The matter, however, has become one of controversy. Several sources have looked at the question and have reached varying conclusions. You seek to have the matter resolved by a formal opinion of the Attorney General.

In order to address your concerns, let us first look to the provisions governing the adoption of an income tax of the sort in question. Pursuant to Ohio Const. art. XVIII, §§ 3 and 7, a municipal corporation has authority to levy an income tax, subject to such limitations as the General Assembly may impose by statute. *See* Ohio Const. art. XIII, § 6; Ohio Const. art. XVIII, § 13; *Thompson v. City of Cincinnati*, 2 Ohio St. 2d 292, 208 N.E.2d 747 (1965). R.C. Chapter 718 imposes limitations on the municipal power to levy income taxes. *See, e.g., Williams v. City of Columbus*, 40 Ohio App. 3d 71, 531 N.E.2d 1336 (Franklin County 1987). R.C. 718.01(C) requires that income taxes be submitted to the voters in certain circumstances and prescribes the form that the ballot must take.

We understand that the tax in question was submitted to the voters in accordance with R.C. 718.01(C) and that the stated purpose of the levy was "street resurfacing, the installation and maintenance of improvements and appurtenances thereto, and the purchase

of equipment necessary therefor." Because the tax was levied for a particular purpose, the proceeds of the tax must be paid into a special fund and may be expended only for that purpose. Ohio Const. art. XII, § 5; R.C. 5705.01(A) (including a municipal corporation as a subdivision); R.C. 5705.09(D), (F) (requiring subdivisions to establish special funds for special levies and for revenues that are derived from a source other than the general property tax and are required by law to be used for a particular purpose); R.C. 5705.10 (with one exception applicable to school districts, "all revenue derived from a source other than the general property tax and which the law prescribes shall be used for a particular purpose, shall be paid into a special fund for such purpose").

In order to resolve your question, we must now consider the provisions governing the allocation of interest. With respect to interest earned on a special fund, R.C. 5705.10 states:

Except as otherwise provided by resolution adopted pursuant to [R.C. 3315.01, relating to school districts] or as otherwise provided by [R.C. 3315.40, relating to school districts and educational service centers], all revenue derived from a source other than the general property tax, for which the law does not prescribe use for a particular purpose, including interest earned on the principal of any special fund, regardless of the source or purpose of the principal, shall be paid into the general fund.

R.C. 5705.10 (emphasis added). Pursuant to this provision, after money is paid into a special fund, interest earned on that money must be paid into the general fund, regardless of the source or purpose of the money paid into the special fund.

The same result is prescribed by R.C. 135.21. That statute applies to designated subdivisions, including non-chartered municipal corporations. R.C. 135.21; see R.C. 135.01(L). It provides for the apportionment of investment earnings on money belonging to undivided tax funds and the apportionment of investment earnings on custodial funds. R.C. 135.21 goes on to state:

All other investment earnings, except as provided in [R.C. 135.351, relating to counties] and by resolution adopted pursuant to [R.C. 3315.01, relating to school districts], shall be credited to the general fund of the ... municipal corporation ... or other local authority to which the principal sum thereof belongs.

R.C. 135.21 (emphasis added). Pursuant to this provision, investment earnings on moneys belonging to a municipal corporation must be credited to the general fund of the municipal corporation.

In accordance with R.C. 135.21 and R.C. 5705.10, when a municipal income tax is levied for a particular purpose pursuant to R.C. 718.01, the proceeds of the tax must be paid into a special fund for the named purpose, and interest earned on the special fund must be paid into the general fund of the municipal corporation. Therefore, pursuant to R.C. 135.21 and R.C. 5705.10, the interest income earned on a special fund containing proceeds of a municipal income tax levied for street improvements must be paid into the general fund of the municipal corporation.

It is suggested in an attachment to your opinion request that the interest earned on proceeds from an income tax levy for street improvements should be deposited into the special fund holding the proceeds. This suggestion is based on the language of R.C. 5705.10 which states that "[a]ll revenue derived from a special levy shall be credited to a special fund

for the purpose for which the levy was made." While it might be possible in some circumstances to construe the term "revenue derived from a special levy" to include interest earned on levy money held in a special fund, that construction cannot be adopted in the instant case. Although R.C. 5705.10 contains the "revenue derived from a special levy" language, it also contains the more specific language quoted above that requires interest earned on the principal of a special fund to be paid into the general fund. R.C. 5705.10 expressly provides that interest earned on the principal of a special fund is included as "revenue derived from a source other than the general property tax, for which the law does not prescribe use for a particular purpose" (and thus paid into the general fund), rather than as revenue derived from a special levy (which is credited to the special fund). R.C. 5705.10; *see* 1985 Op. Att'y Gen. No. 85-072.

An examination of the legislative history reveals that the General Assembly amended R.C. 5705.10 specifically to provide that interest earned on the principal of a special fund must be paid into the general fund rather than the special fund. 1981-1982 Ohio Laws, Part I, 2079, 2109 (Am. Sub. H.B. 230, eff. March 15, 1982). As a prior Attorney General stated:

Am. Sub. H.B. 230 amended R.C. 5705.10 expressly to draw a distinction between the principal of any special fund and the interest earned thereon. By amending R.C. 5705.10, the General Assembly specifically determined that interest earned on the principal of any special fund, regardless of the source or purpose of the principal, is revenue derived from a source other than the general property tax for which the law does not prescribe use for a particular purpose and shall be paid into the general fund.

1985 Op. Att'y Gen. No. 85-072, at 2-283 (footnote and citations omitted). A reading of R.C. 5705.10 in its entirety, together with the corresponding language of R.C. 135.21, compels the conclusion that the General Assembly has deliberately determined that "interest earned on the principal of any special fund, regardless of the source or purpose of the principal, shall be paid into the general fund." R.C. 5705.10; *see also* R.C. 135.21; 1985 Op. Att'y Gen. No. 85-072.

One of the attachments to your opinion request suggests that 1980 Op. Att'y Gen. No. 80-003 may be relied upon as authority for the proposition that interest earned on the proceeds of a special levy must be allocated to a special fund for the purpose for which the levy was made. While that is the conclusion reached in 1980 Op. Att'y Gen. No. 80-003, the 1980 opinion was overruled on that point by 1985 Op. Att'y Gen. No. 85-072. 1985 Op. Att'y Gen. No. 85-072, quoted in part above, contains a detailed analysis of the reasons for overruling the 1980 opinion, centered on the subsequent enactment by the General Assembly of the language of R.C. 5705.10 which requires that interest earned on the principal of a special fund be paid into the general fund, regardless of the source or purpose of the principal. The analysis set forth in 1985 Op. Att'y Gen. No. 85-072 is sound and has been followed. *See* 1985 Op. Att'y Gen. No. 85-085; *see also* 1986 Op. Att'y Gen. No. 86-013, at 2-62 n.2. *See generally* 1997 Op. Att'y Gen. No. 97-043; 1986 Op. Att'y Gen. No. 86-100, at 2-559 n.1. Therefore, 1980 Op. Att'y Gen. No. 80-003 is no longer valid authority for the argument proposed.

It is suggested, further, that there may be various exceptions to the rule that interest earned on money in a special fund must be paid into the general fund. Our research has

disclosed no exception that would operate to exclude the interest in question from the requirement of payment to the general fund.¹

For the reasons set forth above, it is my opinion, and you are advised, that pursuant to R.C. 135.21 and R.C. 5705.10, the interest income earned on a special fund containing proceeds of a municipal income tax levied for street improvements must be paid into the general fund of the municipal corporation.