

**OPINION**  
**59-210**

October 6, 1959           (OPINION)

MUNICIPAL GOVERNMENT

RE: Special Assessment Funds and Disbursements Thereof - Interest  
and Penalties - Improper Distribution

Re: Penalty and Interest on Unpaid Special Assessments

This is in reply to your letter in which you ask an opinion on the following facts:

In the early part of 1959, the City Auditor's office discovered that the County Treasurer of Burleigh County was not paying over to the City Treasurer of the City of Bismarck interest and penalty which he had added to special assessments, and which he had collected under Section 40-2417. Auditors employed by the City, as well as the State Bank Examiner, have since confirmed this to be true. The County Treasurer has changed his practice to conform to Section 40-2417 as of January 1, 1959. He has, however, failed to account for or pay over any of the penalty and interest added to special assessments and collected by him prior to January 1, 1959. It has further been established that the County Treasurer, prior to January 1, 1959, did pay over the penalty and interest collected under Section 40-2417 to all units of government in the same manner as delinquent property taxes, that is, to the Park District, School District, County and State."

You then ask a number of questions which can all be consolidated under one question, "What is the proper solution to this situation?"

The section involved is 40-2417 and is specific and clear. There appears to be very little left for construction. This section imposes a duty on the county treasurer to pay over to the municipal treasurer all such interest and penalties collected.

From the facts given it is neither stated nor implied that embezzlement or unlawful conversion of funds is involved. It appears as if the nonpayment to the municipal treasurer is the result of being not fully aware of the statute and its contents. As a general rule every person is charged with knowledge of the statute. The old saying that ignorance is no excuse applies here. It not only applies to the county treasurer but also to the other officials, including the municipal, state and school. The county treasurer has a direct statutory duty to pay over these moneys to the municipal treasurer, and the municipal officers have a similar duty to see that such moneys are paid over. Such implied duty is ascribed to all officers who handle affairs of the people. The county treasurer did not maliciously withhold such moneys nor did he maliciously pay it to the other political entities. In the absence of further information we must assume that it was merely the result of mistake in fact and law

and unfamiliarity with the specific statute.

It is observed that the nonpayment of the interest and penalty to the city treasurer is not of recent vintage, but relates back to an indefinite period. It also appears that unless a detailed search of the records were made and etc., it would be difficult to determine just when the first misdistribution occurred.

It also appears it will require extensive research and examination of the records to determine exactly the amount of money derived from penalty and interest which should have been paid to the city treasurer. It is conceivable that the amount expended can equal or exceed the amount of penalty and interest involved. In addition to this it would also require extensive research to determine to whom such moneys were paid (county, park district, school district, state, etc.). This brings us to a matter of no small concern. Who is to stand the expense for searching and examining the records? Is it the city, county, or the recipients of the money? It would be somewhat difficult to justify making the recipients pay for such efforts for they are in a sense an innocent party. For that matter, it would be difficult to assess any expenses to them until it is first learned that they did receive such moneys and the amounts. In addition to this we must also determine if the statute of limitations has any application.

Regarding the applicability of the statute of limitations in this situation, *Rosedale School Dist. No. 5 v. Towner County*, 56 N.D. 41, 216 N.W. 212, is authority to the effect that the statute of limitations is applicable. In that case it was held that: (1) Where one governmental entity received money to which another such entity is entitled the recipient holds that money in the capacity of implied or involuntary trustee for the entity to whom the money should have been distributed (see also 56 N.D. 505) and (2) the statute of limitations does run in the favor of the trustee against the cestui que trust where the relationship is one of involuntary or implied trust. The county treasurer's position is that of an involuntary trustee. The city, then, is barred from recovering any of the penalties and interest collected and misdistributed more than six years from date the misdistribution was discovered.

Regarding the matter of the recovery by the city of the money to which the city was entitled but which money the county treasurer misdistributed to other governmental entities including the state, the case of *Agnes Township v. Grand Forks County*, 56 N.D. 505, 218 N.W. 212, proffers a possible solution. In that case it was held that, "Where public money is paid by mistake or without authority of law, and the public official has money of the recipient in his hands, he is not compelled to pay such money over and sue to recover the illegal payments, but may hold subject to the decision of the court when the claimant sues." On the basis of this case, it would seem that the county treasurer could deduct from the money due those entities the amounts they received that belonged to the city. If the amount due the city from the various units is considerable, these deductions could be spread over such a period of time as would not work a hardship on the repaying units. Certainly the city, which has not missed till now the funds that have been misdistributed for so many years, is in a position too awkward and embarrassing to complain

of installment payments so to speak.

However, it is to be noted that this method of repayment would not be possible as far as the recovery of money belonging to the city which was paid to that state. The authority for this point is *State v. Nelson*, 72 N.D. 402, 7 N.W. 2d. 735, in which case it was held that: "County treasurer who collected state taxes could not withhold such taxes and apply them in satisfaction of a claim of county against state by way of a set-off for prior overpayments, since such taxes were never in possession of county or part of county funds."

The court went on to hold that uncollected taxes due the state are public moneys and that such money must be paid to the state treasurer and cannot be disbursed except pursuant to legislative appropriation and on warrant drawn upon the state treasurer.

This brings us to another question which can be stated, "Must the different entities except the state such as the park district, school district, county, etc., return the moneys they erroneously received within the six year limitation?" There seems to be no question that they were not entitled to it. But having received it in good faith and most likely having expended it, are they compelled to resort to special taxation or other means to repay this money? We do not believe that entities should resort to special taxation but at the same time every effort should be made to repay this money from available funds. One political subdivision or entity should not be unduly enriched at the expense of another by any deliberate act on the part of one or the other. In this instance, however, it was not a deliberate act but an oversight.

This brings us to what we might consider the crucial question. Must the political entities, agencies or departments at all costs restore all such entities to a status quo by making a detailed examination of the records to determine how much money, if any, is to be repaid and then to pay such money to the city treasurer? We think equity and common sense should dictate the procedure to be followed.

All of the members concerned are in a broad sense members of the same political family. They are all governmental bodies of the state and are all located within Burleigh County, and a major portion of the recipients are in the city of Bismarck. By incurring additional expense for a detailed accounting the people of these subdivisions would be the ultimate losers. Such procedure would then not be looked upon with favor.

As to compromise and settlement, a municipal corporation unless forbidden by statute has the power to settle and compromise claims. Generally the power to compromise doubtful and disputed claims is necessarily incident to the power to sue and liability to be sued.

The North Dakota law does not prohibit municipalities from compromising and settling doubtful claims. From what law is available we do not believe a municipal corporation must perforce engage in a litigation, the expense of which would be certain, but the result doubtful.

The facts in the instant case are not in dispute, but to ascertain

them with a degree of final certainty would reportedly entail considerable effort and cost. It is uncertain by whom such cost would be borne or who by law must absorb them. Also the law on the matter whether certain defenses are available to the park district, school district, etc. is not fully developed in North Dakota.

Under the circumstances in this instance, we do not deem it necessary or advisable that the entities involved should resort to costly litigation to determine and establish the point of law involved.

It would therefore seem that the practical solution to the question involved is to first determine from what records are readily available the reasonable amount of money involved and to which agency, department, etc. such money was erroneously paid within the last six years. The governing bodies of the entities by a conference can determine from the information available the reasonableness of such figures and agree upon the amounts involved. The search into the records at this point should be to the extent that a reasonable estimate can be made. We are also impressed with the general statement of law that the law does not require the impossible.

It is our opinion that the statute of limitations does apply on the basis that an involuntary trust existed and still exists.

It is our further opinion from the facts given and the circumstances surrounding the matter involved that the amount of money involved can be determined by arbitration and compromise between the political entities concerned.

It is our further opinion that the county treasurer can withhold or set off, over a period of time to be agreed upon, taxes payable to the political entities concerned until such amount equals the amount erroneously paid to the political entity, except to the State of North Dakota.

It is our further opinion that any moneys erroneously paid to the State of North Dakota can be recovered only by an appropriation by the Legislature.

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