

DIRECTOR OF REVENUE:
STATE TREASURER:
INTANGIBLE PERSONAL PROPERTY TAX:
INTEREST:

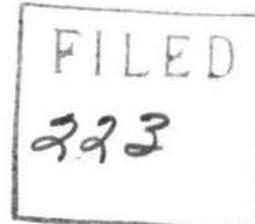
(1) Ninety-eight per cent of the proceeds of intangible personal property tax which are to be returned to the local political subdivisions is not

to be transmitted to the State Treasurer; (2) Treasurer of Missouri is to receive promptly two per cent of the proceeds from the intangible personal property tax and, if he determines that any portion of this two per cent is not needed for current operating expenses, that amount is to be placed at interest for the benefit of the State of Missouri; (3) Director of Revenue is an insurer of that portion of the intangible personal property tax which he retains and is bound to turn over the proceeds to the proper local official on the date as specified by statute. That in discharging this duty he may deposit the portion of the revenue which ultimately is to be returned to the counties for safe-keeping and that he may, in so doing so, deposit these moneys in "time deposit" accounts which draw interest. In the event that the Director chooses to avail himself of the opportunity to place this money at interest, the interest earned is to be returned to the counties in proportion to the amount of revenue produced by that county.

October 27, 1969

OPINION NO. 223

Honorable Don Owens, Senator
Twentieth District
374 South Bernhardt
Gerald, Missouri 63037



Dear Senator Owens:

This is in reply to your request for an opinion of this office concerning the question whether the State Treasurer may invest funds received from the collection of the intangible tax levy in government securities or other investments for the period between the time such taxes are received by the Department of Revenue and the time such taxes are disbursed to the various political subdivisions, and, if so, whether the income earned can be retained by the State.

In a prior Attorney General opinion, dated April 4, 1947, issued to the Honorable Edde B. Pope, this office held that the Missouri Constitution does not require tax monies from intangibles which are to be returned to local political subdivisions to be deposited in the state treasury (copy enclosed). Thus, the State Treasurer does not receive nor have any function regarding the

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funds to be returned to the local political subdivisions, and therefore, the answer to your question with regard to the moneys to be so returned is in the negative.

Article X, Section 4 (x), Constitution of Missouri, 1945, which authorizes the collection of the intangible tax by the State of Missouri in behalf of the local governments provides that two per cent of the proceeds is to be retained by the State. The statutory provisions which implement this tax also provide that the State is to retain two per cent for collection. See, e.g., Sections 146.110, RSMo 1959 and 148.220, RSMo 1959.

Article IV, Section 15, Missouri Constitution, 1945 (as amended 1956) provides:

" . . . All revenue collected and moneys received by the state from any source whatsoever shall go promptly into the state treasury, and all interest, income and return therefrom shall belong to the state. . . "

In a prior Attorney General opinion, dated January 7, 1966, issued to the Honorable M. E. Morris, Treasurer of the State of Missouri, this office held that the Department of Revenue must promptly transmit all moneys received by it to the State Treasurer. (copy enclosed)

The Treasurer of Missouri is directed to determine which funds are not needed for current operating expenses of the state government and to place that amount at interest for the benefit of the State of Missouri. Article IV, Section 15, Constitution of Missouri, 1945 (as amended, 1956); Section 30.260, RSMo 1959.

Therefore, it is our opinion that the Treasurer of Missouri is to receive promptly two per cent of the proceeds from the intangible personal property tax and, if he determines that any portion of this two per cent is not needed for current operating expenses, that amount is to be placed at interest for the benefit of the State of Missouri.

Since the Director of Revenue does not transmit ninety-eight per cent of the proceeds of this tax to the Treasurer, may the Director of Revenue place these funds at interest, and if so, who is to benefit by the interest so earned.

Article X, Section 4(c) provides that the proceeds of the tax on intangible personal property are to be:

" . . . returned as provided by law, less two per cent for collection, to the counties and other political subdivisions of their origin, in proportion to the respective local rates of levy."

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The tax on intangible personal property has been implemented by statute. In Chapter 146, every person, as therein defined, is required to file on or before April 15 of each year a property tax return on intangibles. The tax is payable at the time the return is made and becomes delinquent on June 1 of the year it is due. Section 146.050. The proceeds of the tax are distributed by the Director of Revenue pursuant to Section 146.110. That section provides that the Director of Revenue:

". . . shall annually, on or before the fifteenth day of September, return the amount of intangible taxes collected, less two per cent thereof, which shall be retained by the state for collection, to the county treasury of the county in which the particular taxpayers are domiciled . . ."

Similarly, the intangible personal property tax payable by financial institutions is provided for in Chapter 148. There, the taxpayers shall file a return with the Director on or before the first day of June of each year and the tax imposed by Chapter 148 is due and payable on that date. Sections 148.050 and 148.060. The tax collected shall be returned by the Director, less two per cent for collection, to the county treasurer of the county in which the taxpayer is located on or before December first of each year. Section 148.080.

It is apparent from these sections that the Director of Revenue receives funds several months prior to the date upon which he is obligated to return them to the counties. A review of the statutes governing the duties and obligations of the Director of Revenue does not reveal any section which governs or controls the manner in which he is to handle the funds collected prior to the date upon which the moneys must be turned over to the local government.

The basic duty of the Director of Revenue is to turn over all of the funds which he receives. As to this duty, the Missouri courts have long held that a public official is an insurer of the funds which he receives and is obliged to remit the funds without fail. In City of Fayette v. Silvey, 290 S.W.1019 (K.C.App. 1926) the Court stated:

". . . The general rule, which is the rule in this state, is that one of the duties of a public officer intrusted with public money is to keep such funds safely, and that duty must be performed at the peril of such officer. Thus, in effect, he is

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an insurer of public funds lawfully in his possession." loc. cit. 290 S.W. 1019, 1021.

The following cases support this basic principle: City of Fulton v. Home Trust Co., 78 S.W.2d 445 (Mo. 1934); Glaze v. Shumard, 54 S.W.2d 726 (K.C.App. 1932); The State ex rel. Board of Sup'rs. of Harrison County Drainage Dist. Township v. Powell, 67 Mo. 395 (Mo. S.Ct. 1878); The State ex rel. Mississippi County v. Moore, 74 Mo. 413 (Mo. S.Ct. 1881).

In addition to his obligation as an insurer, a public official is restricted in his actions by the statutory duties imposed upon him. In Lamar Tp. v. City of Lamar, 169 S.W. 12, 261 Mo. 171 (1914) the Court stated:

"Officers are creatures of the law, whose duties are usually fully provided for by statute. In a way they are agents, but they are never general agents, in the sense that they are hampered by neither custom nor law and in the sense that they are absolutely free to follow their own volition. Persons dealing with them do so always with full knowledge of the limitations of their agency and of the laws which, prescribing their duties, hedge them about. They are trustees as to the public money which comes to their hands. The rules which govern this trust are the law pursuant to which the money is paid to them and the law by which they in turn pay it out" loc. cit. 261 Mo. 171, 189

To determine the scope of the duties of the Director of Revenue in holding the proceeds of the intangible property tax the statutes under which it is collected are to be examined. Lancaster v. County of Atchison, 180 S.W.2d 706 (Mo. S.Ct. en banc, 1944). However, the statutes are silent.

A similar situation was presented in City of Fulton v. Home Trust Co., 78 S.W.2d 445 (Mo. S.Ct. 1934). There, the city collector collected certain funds which he was to turn over to the city treasurer monthly. It was his practice to deposit funds that he received during the month in demand deposits and then to transfer these funds at the end of each month by check to the city treasurer. The bank in which the collector deposited his monthly receipts failed and was placed under the control of the State Commissioner of Finance on December 29, 1931, at which time a substantial balance had been accumulated during the month of

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December by the collector. In determining whether the deposit by the collector was proper, the Court stated:

"The sections of our statute relating to the duties of a city collector of cities of the third class and the ordinance of the city of Fulton defining same, above cited and quoted, clearly contemplates that the city collector retains city moneys and revenues, which he collects, in his custody, during the interim between the monthly settlements therein provided for and required. Neither by statute or ordinance is he required, upon making a collection of city taxes or other city revenues, to forthwith pay over or transfer each individual item to the city treasurer and take a receipt therefor, but he is authorized and permitted, if not in fact directed, to retain the various sums so collected during the month until the end of the month at which time he is required to make his monthly settlement and pay over to the city treasurer the total amount of such collections made during the month and take receipts therefor one of which he files with the city clerk. Clearly during such periods he is the lawful custodian of such funds. Neither statute nor ordinance directs how or in what manner he shall hold or preserve the funds while same are in his custody. He is responsible for their safekeeping and under a bond conditioned that he will pay them over to the city treasurer monthly as required by statute and ordinance. The fund in controversy, being the total, as stated, of numerous daily collections made by Brown as city collector during the month, was therefore being lawfully held and retained by him as city collector. . . He was the legal custodian of these funds and certainly was authorized and warranted in depositing them, from time to time during the month, as received, in a bank for safe-keeping, if he chose to do so, and his act in so doing was not in violation or contravention of any statute or ordinance. . . ." loc. cit. 78 S.W.2d 445, 447.

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Thus, it is apparent that since the statutes do not control or designate the manner in which the Director of Revenue is to handle these tax moneys, it is lawful for him to deposit them for safe-keeping. In re Hunter's Bank of New Madrid, 30 S.W.2d 782 (Spr.App. 1930); City of Aurora v. Bank of Aurora, 52 S.W.2d 496 (Spr.App. 1932).

Assuming then that the proceeds of the intangible property tax may be deposited by the Director of Revenue, may these funds be deposited in time deposits to draw interest; and if so, who is to receive the benefit of this interest.

Section 558.220, RSMo 1959, originally enacted in 1853, prohibits public officials from "loaning" money which comes to them in official capacity and reads as follows:

"No officer appointed or elected by virtue of the constitution of this state, or any law thereof, and no officer, agent or servant of any incorporated city or town, or of any municipal township or school or road district, shall loan out, with or without interest, any money or valuable security received by him, or which may be in his possession or keeping, or over which he may have supervision, care or control, by virtue of his office, agency or service, or under color or pretense thereof; . . ."

In The State v. Rubey, 77 Mo. 610 (Mo. S.Ct. 1883), the State sought to recover from the assignee of a defaulting bank moneys which the treasurer of Macon County had deposited prior to the bank failure. The State contended that under the predecessor statute to Section 558.220 the treasurer had no right to make a general deposit of the county revenues because such a deposit "amounted to a loan of the money to the bank". In disposing of this contention, the Court noted:

". . . It is doubtless true that every general deposit is so far, in effect, a loan as to create the relation of debtor and creditor between the bank and the officer; (citation omitted) but, we are not, therefore, inclined to hold that general deposits in bank by county and State officials, other than the State Treasurer, whose duties in this regard are prescribed by the constitution are within the inhibition of section 1327, supra. [Section 558.220, RSMo 1959] . . ." loc. cit. 77 Mo. 610, 620

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The Court construed this and related statutes and found a legislative intention to discriminate between a deposit in a bank for safety and convenience and an ordinary loan. The Court concluded that the conduct prohibited is:

" . . . not the making of a deposit simply,
but the making of a deposit with a view
to profit on the part of the officer . . ."
loc. cit. 77 Mo. 610, 621

The purpose of this section and related sections is to compel the officer to look to the security of the funds in selecting a depository and "not to his own emolument". Although Section 558.220, RSMo 1959, was not discussed, the holdings in City of Fulton v. Home Trust Co., supra; In re Hunter's Bank of New Madrid, supra, and City of Aurora v. Bank of Aurora, supra, recognize that the deposit of funds in a demand deposit are not precluded by Section 558.220, RSMo 1959.

Unless there is a specific agreement to the contrary, a deposit in a bank is presumed to be a general deposit establishing a relationship of debtor-creditor. Security Nat. Bank Savings & Trust Co. v. Moberly, 101 S.W.2d 33 (Mo. S.Ct. 1936); Cassell v. Mercantile Trust Company, 393 S.W.2d 433 (Mo. S.Ct. 1965); First National Bank of Clinton v. Julian, 383 F.2d 329 (C.A. 8, 1967), applying Missouri law.

These authorities indicate further that a debtor-creditor relationship is avoided only when a "special deposit" is made and the depositor and the bank agree that the asset deposited may not be used by the bank, but must be kept intact to be returned to the depositor.

Since the enactment of the predecessor to Section 558.220, extensive regulations have been enacted governing the banking industry. This office has previously held in Opinion No. 177, dated December 20, 1963, issued to Robert B. Mackey, a copy of which is attached, that county courts in making deposits of county funds are not limited to demand deposits, but may place a portion of the funds in interest-bearing time deposits. Although this opinion was based upon Chapter 110 -- Depositories for Public Funds, certain conclusions reached there are relevant. The writer determined on the basis of Section 362.010, RSMo Supp. 1967, of the banking statute that the sole distinction between "demand deposits" and "time deposits" is that the payment of demand deposits can be legally required within thirty days, whereas time deposits cannot be required within such period. The distinction between "demand deposits" and "time deposits" is of importance since under federal regulation and Section 362.385, RSMo Supp. 1967, it is unlawful for banks to pay interest upon demand deposits.

For the Director to obtain interest upon his deposits, therefore, the deposit must be made in time deposit accounts. In the case of either demand deposits or time deposits, a debtor-creditor relationship is established. Of course, the Director may not preclude himself by contract from the ability to perform his statutory duty of turning over the funds. It would not be proper to enter into a contract which would in any way limit his ability to turn over the funds on the date prescribed by statute. He must be prepared at the appointed time to turn over the funds in his hands. Where this duty can be fulfilled and, at the same time, interest can be obtained, it is the opinion of this office that the authority which allows the deposit of funds in demand deposits provides equal authority to deposit funds in time deposits so that interest may be earned.

In certain circumstances, the legislature has specified the account to which interest is to be credited. For example, Section 30.240 provides that all interest derived from the deposit or investment of "state moneys" shall be credited by the State Treasurer to the general revenue account. As has been previously noted, the proceeds of the intangible personal property tax that are to be returned to the county are not state funds. This office has previously held in Opinion No. 84, dated May 24, 1965, addressed to Mr. Lee C. Fine, a copy of which is attached, that interest earned, the allocation of which is not governed by statute, is viewed as an accretion to the fund which produces it. Based upon the authority cited therein, it is therefore our opinion that the interest earned from the deposit of the proceeds of the intangible personal property tax which are to be returned to the counties should be allocated to the counties in proportion to the amount of revenue produced by that county.

CONCLUSION

It is the opinion of this office that:

(1) Ninety-eight per cent of the proceeds of the intangible personal property tax which are to be returned to the local political subdivisions is not to be transmitted to the State Treasurer;

(2) The Treasurer of Missouri is to receive promptly two per cent of the proceeds from the intangible personal property tax and, if he determines that any portion of this two per cent is not needed for current operating expenses, that amount is to be placed at interest for the benefit of the State of Missouri;

(3) The Director of Revenue is an insurer of that portion of the intangible personal property tax which he retains and is bound to turn over the proceeds to the proper local official on the date as specified by statute. That in discharging this duty he may

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deposit the portion of the revenue which ultimately is to be returned to the counties for safe-keeping and that he may, in doing so, deposit these moneys in "time deposit" accounts which draw interest. In the event that the Director chooses to avail himself of the opportunity to place this money at interest, the interest earned is to be returned to the counties in proportion to the amount of revenue produced in that county.

The foregoing opinion, which I hereby approved, was prepared by my Assistant, John C. Craft.

Yours very truly,



JOHN C. DANFORTH
Attorney General

Enclosures:

Opinion No. 71, Pope, 4/4/47
Opinion No. 28, Morris, 1/7/66
Opinion No. 177, Mackey, 12/20/63
Opinion No. 84, Fine, 5/24/65