

N.D.A.G. Letter to Hanson (May 31, 1990)

May 31, 1990
Honorable Robert E. Hanson
State Treasurer
State Capitol
600 East Boulevard Avenue
Bismarck, ND 58505

Dear Mr. Hanson:

Thank you for your October 18, 1989, letter inquiring whether interest earned on special funds held by the state inures to the benefit of the respective special fund or the general fund. I apologize for the delay in responding to your request.

N.D. Const. art. X, § 12(l) provides, in relevant part:

All public moneys, from whatever source derived, shall be paid over monthly by the public official, employee, agent, director, manager, board, bureau, or institution of the state receiving the same, to the state treasurer, and deposited by him to the credit of the state and shall be paid out and disbursed only pursuant to appropriation first made by the legislature;

N.D. Const. art. X, § 12 directs that all public moneys from whatever source derived (with the exception of the fees and moneys received by the professional organizations enumerated) are to be paid over to the State Treasurer. It does not, however, direct whether public moneys are to be placed in the general fund or a special fund.

N.D. Const. art. X, § 12 does not require that all public moneys be deposited in the general fund. See Langer v. State, 284 N.W. 238 (N.D. 1939). In Langer v. State, the North Dakota Supreme Court stated:

If moneys are collected for special public purpose (as for instance premiums for the Fire and Tornado Fund) they must be deposited by the State Treasurer to the credit of the State; but it is not contemplated that they shall become part of the general revenue of the State, and disbursed for general governmental purposes. Section 186, as amended, does not abolish or prohibit special funds. It restricts the use of moneys in such funds to the purposes that are designated in the appropriations set out therein, and such further appropriations as may be made by the Legislature.

284 N.W. at 248.

Thus, with the exception of the funds enumerated in N.D. Const. art. X, § 12(l), the Legislature creates the funds that are maintained by the state, determines the moneys to be deposited in the funds, and determines how and to what extent the moneys are spent.

Whether interest inures to the benefit of the general fund or a special fund is a two-part inquiry. The first inquiry is whether the moneys in question are "public moneys" within the meaning of N.D. Const. art X, § 12. The second inquiry is whether the Legislature has directed how the interest earned on the funds is to be used.

If the interest income is public moneys and a constitutional or statutory provision does not designate that the interest be used for a specific purpose, those public moneys inure to the general fund. See 1963 N.D. Op. Att'y Gen. 180, 184.

The North Dakota Supreme Court has recognized that the term "public moneys" does not include all moneys in the custody of the state. In State ex rel. Olson v. Jorgenson, 150 N.W. 565 (N.D. 1915), the North Dakota Supreme Court addressed the question whether the moneys in the state hail insurance fund were subject to N.D. Const. section 186 (the predecessor to N.D. Const. art. X, § 12). The court concluded that the fund was comprised of "premiums paid by owners of crops within the state" and did not constitute state funds. Id. at 567. Accordingly, the court concluded that warrants drawn on the hail insurance fund by the Commissioner of Hail Insurance rather than the State Auditor were not invalid. Id. at 568.

Similarly, in State v. Bonzer, 279 N.W. 769, 771 (N.D. 1938), the North Dakota Supreme Court held that moneys in the state bonding fund "are not state moneys but are held in trust by the state treasurer for the benefit and protection of those who, under the terms of the act, may become claimants under the fund." Id. 771. See also, State ex rel. Linde v. Taylor, 156 N.W. 561 (N.D. 1916).

In an opinion dated October 21, 1964, this office stated in regard to public moneys:

The term "public moneys"... means money which belongs or is under the control of the state as distinguished from private money. It is difficult to envision any money being received by the state which is not money being received by an official of the state at one time or another. Out of necessity the state must act through its officers . . . We are not aware of any statute which authorizes any state official to receive money which does not belong to the state except in specific instances where by statute a state officer is authorized to receive or hold money in trust. In such instances it is clear that the money so held (in trust) is in the nature of a trustee only . . . Moneys received in the form of a gift or grant with conditions attached of course fall in the category of a trust.

1964-1966 N.D. Op. Att'y Gen. 12, 13-14.

On May 23, 1988, I issued an opinion that addressed the question whether certain agencies could expend grant moneys received from the Centennial Commission. In holding that the agencies had such authority, I stated:

The drafters of N.D. Const. art. X, § 12, recognized the trust fund concept by providing a continuing appropriation for the state hail insurance fund, the state bonding fund, the state fire and tornado fund, the worker's compensation fund, the teachers fund for retirement, state tax refunds, and income of the state institutions derived from permanent trust funds. All of the above-mentioned funds are in some respect impressed with a trust for the benefit of a class of individuals with a recognizable equitable interest in the funds. I do not interpret N.D. Const. art. X, § 12's specific enumeration of the various trust funds as creating a negative implication that other funds similarly impressed with a trust cannot be afforded special consideration when applying the requirements of the constitution.

It is my conclusion that moneys held or used by the state, and subject to an equitable interest, are not on the same constitutional level of scrutiny as are general funds in which the state possesses all legal and equitable rights. This would assuredly include moneys that are granted to an agency for a specific purpose. Grants, by definition, include conditions as to their use. As a result, the money is subject to the equitable interest of the grantor or an intended class of beneficiaries and is not available to general appropriation for other purposes by the Legislature. It is my opinion that the Legislature may constitutionally authorize an agency to accept grant moneys and expend such moneys on a continuing basis in accordance with the conditions of the grant.

Letter from Attorney General Nicholas J. Spaeth to Mr. S.F. Hoffner (May 23, 1988).

Thus, both the North Dakota Supreme Court and this office have recognized that not all moneys in the possession of the state are "public moneys" within the meaning of the North Dakota Constitution. Generally, moneys held in state funds are public moneys unless the moneys are held in trust.

Other jurisdictions also have recognized that moneys impressed with a trust do not constitute public funds. For example, in Button's Estate v. Anderson, 112 Vt. 531, 28 A.2d 404, 410 (1942), the court concluded that the "clear construction to be given this [constitutional provision] requiring a legislative appropriation for the expenditure of public moneys is that they intended to have it apply only to such funds, the equitable as well as the legal rights to which are in the State." See also, Navajo Tribe v. Arizona Dept. of Admin., 111 Ariz. 279, 528 P.2d 623 (1975); Opinion of the Justices to the Senate, 375 Mass. 851, 378 N.E.2d 433 (1978).

Thus, if the moneys in a special fund are not public moneys, it is my opinion that the interest earned on those moneys accrues to the special fund.

Whether moneys in a particular fund are public moneys or moneys held in trust depends upon the provisions governing the state's receipt and holding of such funds. For example, N.D.C.C. § 52-03-01 provides, in part: "[a] special fund, separate and apart from all public moneys or funds of this state, and known as the 'unemployment compensation fund', must be maintained in the state treasury and must be administered by the bureau exclusively for the purposes of the North Dakota Unemployment Compensation Law." This statute indicates that the moneys in the unemployment compensation fund are not public moneys of the state. Because the question of whether moneys in a particular fund are public moneys or moneys held in trust depends upon the terms and conditions by which the moneys are held, it is not possible to issue a single opinion that would apply to all special funds.

The second factor to consider to determine whether interest inures to the benefit of the general fund or a special fund is whether the Legislature has directed how the interest on the funds is to be used.

If a constitutional provision or statute specifically directs how interest income is to be treated, the issue is resolved. For example, N.D. Const. art. X, S 12 establishes a permanent coal severance tax trust fund and directs that "[t]he interest earned on the moneys in said trust fund shall be used first to replace uncollectible loans made from the fund, and the balance shall be credited to the general fund of the state."

The unemployment compensation fund provision referred to above also provides that the unemployment compensation fund must include "[i]nterest earned upon any moneys in the fund." N.D.C.C. S 52-03-01(3).

Thus, when a constitutional provision or a statute specifically states what fund is to be credited with interest accruing on moneys held in a special fund, that provision governs. In addition, the Legislature may have included in an appropriation for a specific purpose the estimated interest earned on moneys held in a special fund. In these instances, state officials must follow the legislative directives in determining what fund shall receive the interest from a particular special fund.

In addition, there may be special funds retaining interest income with what appears to be tacit legislative approval. In such instances, this office would be placed in a difficult situation. While not condoning such practices, this office would run the risk of legislating, a power reserved to the people and the Legislature, if we were to issue an opinion holding that the interest in such funds accrues to the general fund. To avoid this predicament, and the potential fiscal hardship to certain special funds, I find it advisable to remedy these situations through legislation rather than by issuing an opinion which potentially imposes an overly broad mandate.

In any event, I am unable to provide you with a simple "yes" or "no" to your question. The fact that the fund is considered a "special" fund does not have a direct bearing on whether interest inures to the benefit of the respective special fund or the general fund. Rather,

the dispositive issues are whether the interest income is public moneys and whether the Legislature has directed how the interest earned on a respective special fund is to be used.

Please do not hesitate to contact me if I can be of further assistance. In particular, please contact our office if you have a question regarding a specific fund.

Sincerely,

Nicholas J. Spaeth