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FILE NO. S-1004

TAXATION:
Payment of Personal
Property Taxes Under
Protest

Honorable James M. Carr
State's Attorney, DeKalb County
DeKalb County Court House
Sycamore, Illinois 60178

Dear Mr. Carr:

This responds to your request for an opinion as to whether the County Treasurer of DeKalb County may safely make distribution to the various taxing bodies of the sums collected in the form of personal property taxes on decedents' estates in the years 1972 and 1973. You state that the county treasurer is holding in escrow the personal property taxes on decedents' estates collected in 1972 and 1973. These taxes have not been distributed because they were "paid under protest". However, in this context, "paid under protest" means only that a notation, in substantially those words was made on the receipt issued by the county treasurer at the time of payment. None

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of these payments were accompanied by a protest in the form prescribed by section 195 of the Revenue Act of 1939 (Ill. Rev. Stat. 1973, ch. 120, par. 676), or on any form substantially similar thereto. You state further that in no instance has any taxpayer, having paid such tax, filed a petition in the circuit court requesting a refund of his payment as set forth in the above referenced section, and that the time in which to file such a petition has expired.

Initially it must be noted that in Hanley v. Kusper, Docket Nos. 47036, 47117 cons. — Agenda 28 — May, 1975, the Supreme Court overruled in part its opinion in Lake Shore Auto Parts Co. v. Korzen, 54 Ill. 2d 237. In the Hanley case the Supreme Court decided that the 1969 amendment to the Constitution of 1870 (art. IX-A), inter alia, did abolish personal property taxes on personal property held by a fiduciary when "the fiduciary relationship comes into being because the law prevents a particular class of natural persons (heirs or legatees of decedents, incompetents or minors) from exercising property rights that are available generally to other natural persons". Thus, the taxes under consideration here were levied and collected under a mistake in law. However, voluntary payments of taxes, even those which are illegal or otherwise void, cannot be recovered unless paid under protest. (Snyderman v. Isaacs, 31 Ill. 2d 192; People ex rel. Carpentier v. Morgan Trucking Co., 16 Ill. 2d 313; and The People v. McKibbin, 380 Ill. 447.) Thus, whether

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the taxes can be recovered depends on whether the protest and other procedures taken by the taxpayer are sufficient.

For the reasons discussed below, I am of the opinion that under the facts presented that the protest of the taxpayer was not sufficient and that the county collector is required, pursuant to section 195 of the Revenue Act, to distribute the moneys collected in 1972 and 1973, withheld from distribution to the various taxing bodies entitled thereto, and that he may safely do so.

The procedure for the payment of personal property taxes under protest, is set forth in section 195 of the Revenue Act of 1939 (Ill. Rev. Stat. 1973, ch. 120, par. 676), which provides in pertinent part:

"Any person desiring to contest personal property taxes because of illegal tax rates shall be required to pay the same under protest. Any payment of personal property taxes under protest shall be accompanied by 2 copies of a written protest in substantially the following form:

* * *

The above language explicitly states that any payment of personal property taxes under protest "shall" be accompanied

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by two copies of a written protest substantially in the form set forth in the statute. Generally, the word "shall", when used in a statute, is mandatory and not merely directory.

(Weill v. Centralia Service and Oil Co., 320 Ill. App. 397; People ex rel. Crowe v. Marshall, 262 Ill. App. 128.) Thus, in order for personal property taxes to be paid under protest, it is mandatory that written protest be in substantially the statutory form.

In People ex rel. Darr v. Alton R. Co., 380 Ill. 380, the Supreme Court in considering whether written protests were in substantial compliance with the protest form set forth in an analogous provision, section 194 of the Revenue Act of 1939 (Ill. Rev. Stat. 1973, ch. 120, par. 675) determined that the exact language of the statute did not have to be followed. It stated at page 384:

"The words 'in substantially the following form' as used in section 194 must be given a meaning as evidencing an intent to permit a taxpayer to protest by giving notice in a form slightly variant from that prescribed. It means that the notice should, in the main, contain all the essential requirements of the form prescribed but that something less than exact compliance in every detail will be sufficient."

The court held that the grounds for an objection could be stated in general terms. However, the notice of protest must

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enable the collector to ascertain the amount and origin of the protested tax and the grounds for that protest. See In re Application of County Collector, 23 Ill. App. 2d 923.

As indicated by your letter, the payments in question were not accompanied by a protest in the form prescribed by section 195 of the Revenue Act, or anything substantially similar to it. Instead, at the time of payment, a notation was made on the receipt issued by the county treasurer that the taxes were paid under protest. Regardless of what other information may be ascertainable from the receipt, no ground for the protest is found therein. It is, therefore, my opinion that the personal property taxes in question were not paid under protest pursuant to section 195 of the Act, supra.

Furthermore, no petition for return of the taxes has been filed. Section 195 of the Revenue Act further provides that "if no such petition is filed * * *, the protest shall be deemed abandoned and the county collector shall distribute the moneys so withheld to the various taxing bodies thereto". Thus, by statute, the protest is deemed abandoned and the county collector must distribute the moneys.

Very truly yours,

A T T O R N E Y G E N E R A L