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Taxation

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for $1,895; that the defendant delivered to the plaintiff a check and his 1949 automobile in payment; that the plaintiff by its agents put the license plates of the 1949 model on the 1950 car; that the plaintiff received possession of the 1949 car and the defendant received from the plaintiff delivery of the 1950 automobile; and that no certificate of title was issued for either of them. Evidence backed up these allegations.

There also was evidence that, according to the plaintiff's custom, one of its officers had to approve the trade-in allowance for the used car; that there had been no such approval when the defendant received possession of the 1950 automobile; that a few minutes later the officers found out that the 1949 automobile had been repaired as a wrecked car a week before (when the defendant bought it); that the plaintiff immediately after this discovery demanded a return of the 1950 model — which was refused although the defendant's check and 1949 car were returned to him; and that, after gaining possession of the 1950 car at the outset of this action, the plaintiff conveyed it to another buyer.

Sitting without a jury, the trial court gave the defendant judgment for $1,895, with interest, because of this disposal to a third person. The court of appeals reversed the judgment on the ground that, under Section 6290-4 of the Ohio General Code,[13] since the defendant did not have the certificate of title to the 1950 automobile, he did not have any right, title, claim, or interest in or to the automobile; and so the plaintiff, which still had the title certificate, was entitled to possession of the car.

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TAXATION*

Sales and Use Taxes

The cases decided during the time surveyed cover the perennial problems of which person must pay the tax and which transactions are taxable. The supreme court in *DeWitt-Jenkins Realty Co. v. Glander*[1] held that a builder is liable for use tax on the purchase price of a prefabricated home which he purchases from a manufacturer outside of Ohio, and which he erects and completes on the lot of the ultimate home owner. Under the contract between the builder and the home buyer the sales price included the cost of the prefabricated home as well as all other materials installed. The builder was the "consumer" under the use tax[2] not the home buyer, said the

* Constitutional law problems of taxation are considered under the CONSTITUTIONAL LAW article, *supra*.

[1] 156 Ohio St. 339, 102 N.E.2d 441 (1951)

[2] OHIO GEN. CODE §§ 5546-25, 5546-26.

court. *Parrish v. Glander*[3] also was concerned with the problem of who is taxable. In that case Parrish owned a bar and connecting restaurant. He rented the restaurant without charge to others. They took the profits from the sale of food; Parrish took the profits from the sale of liquor served in the bar and restaurant. A cashier hired by Parrish handled all sales. The business was conducted under a single name. The supreme court held Parrish liable for sales tax on food sold by his tenants on the ground that the landlord and tenants constituted a single vendor under Section 5546-1 of the Ohio General Code.

Elder & Johnston Co. v. Glander[4] and *National Tube Co. v. Glander*[5] dealt with the difficult problem of drawing the line between taxable transactions and transactions which are excepted under Section 5546-1 and 5546-25 of the Ohio General Code. In *Elder & Johnston Co.* a department store purchased mats, engravings, etchings and similar materials and delivered them without charge to newspaper publishers for incidental use in the store's advertising. It was clear, said the court, that the materials were not within the exception afforded by Section 5546-1 to goods purchased for resale; and a majority of the court thought the goods were not within the exception granted by that section to materials used "directly in making retail sales." They were used only "indirectly" or "incidentally" said the majority. Judge Taft filed a strong dissent on the question of "direct" use.[6] In the *National Tube Co.* case the court was concerned with the problem of whether machinery purchased was within the exception granted by Sections 5546-1 and 5546-25 for property used " directly in the production of tangible personal property for sale by manufacturing, processing, refining, mining, etc." A unanimous court held that ore unloaders and an ore bridge did not come within the exception. The ore unloaders were used in removing ore and limestone from the hold of a ship. The ore bridge distributed such ore over storage areas and placed the ore in conveyors for transportation to a central point as a preliminary step to its introduction into blast furnaces.

Two further cases considered the exception contained in Section 5546-1 of the Ohio General Code, which states: " 'Price' shall not include the consideration received for labor or services used in installing, applying, remodeling or repairing the property sold if the consideration for such services is separately stated from the consideration received for the tangible personal property transferred in the retail sale." In *Cogan v. Glander*[7] the

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[3] 157 Ohio St. 274, 105 N.E.2d 249 (1952)

[4] 156 Ohio St. 445, 103 N.E.2d 392 (1952)

[5] 157 Ohio St. 407, 105 N.E.2d 648 (1952).

[6] Elder & Johnston Co. v. Glander, 156 Ohio St. 445, 447, 103 N.E.2d 392, 393 (1952)

exception was denied a jewelry repairman who serviced and repaired watches and who did not separately state either on his invoices or books the cost of labor and materials. He, therefore, had to charge sales tax on the full amount he charged customers.[8] *Roberts v. Glander* makes it clear, however, that if a repairman separately states his charges for services and for materials on his books alone (and not necessarily on his invoices) he need not compute sales tax on the amount he charges for services.

Inheritance and Estate Taxes

Two death tax cases of primary importance decided by the Ohio Supreme Court in the past year dealt not with the Ohio inheritance tax but with the problem of apportionment of the federal estate tax. With two exceptions,[10] the federal estate tax leaves the job of determining the burden of the tax among the beneficiaries to state law or the expressed intention of the testator. Ohio does not have a statute apportioning the burden of the federal estate tax. In fact, a famous Ohio case, approved by the United States Supreme Court, held that, where the testator has not expressed an intention, the residuary beneficiary shall bear the whole burden of the tax, even where it is a charitable institution and the assets going to it would not be subject to tax.[11]

Miller v. Hammond[12] presented a new twist to this problem. Here the surviving widow took against the will. She was entitled under the statute[13] to one-third of the estate, the other two-thirds going to the two children. The one-third going to the widow qualified for the federal estate tax marital deduction[14] and, therefore, would not form a part of the net taxable estate. The question before the court was whether or not the one-third distribution to the widow should bear a proportionate part of the federal tax. A majority of the court held that the widow's share should not have to bear a proportionate part of the tax because her share was not subject to federal estate tax. In a

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[7] 156 Ohio St. 263, 102 N.E.2d 1 (1951).

[8] The court also construed Section 5546-2(9) of the Ohio General Code under the facts of the case. The Section states that sales tax shall not apply to the following sales: "Professional, insurance or personal service transactions which involve sales as inconsequential elements, for which no separate charges are made." Under this Section, the court held no sales tax need be charged where the repairman merely serviced a watch without supplying new parts. On the other hand, the repairs cost the repairman $2,297.20 over five years during which his gross sales from repairing were $36,996.91.

[9] 156 Ohio St. 247, 102 N.E.2d 242 (1951).

[10] INT. REV. CODE §§ 826(c), 826(d).

[11] Y.M.C.A. v. Davis, 106 Ohio St. 366, 140 N.E. 114 (1922), *aff'd*, 264 U.S. 47, 44 Sup. Ct. 291 (1924).

[12] 156 Ohio St. 475, 104 N.E.2d 9 (1952); 52 COL. L. REV. 945 (1952).

[13] OHIO GEN. CODE §§ 10504-4, 10504-55.

[14] INT. REV. CODE § 812(e).

cogent dissent, Judge Taft pointed out that the majority failed to follow the logic of their former decision[15] because in that case the charitable beneficiary had to bear the whole burden of the tax, even though the assets bequeathed to it were not subject to the federal tax.[16] And, he further argued that the Ohio statutory provisions[17] requiring the executor or administrator to pay the federal estate tax, or make provision for its payment, before the estate may be distributed demonstrated an intention by the legislature that the estate to be distributed in thirds is the estate after the payment of the federal estate tax.[18]

The second apportionment case, *McDougall v. Central National Bank of Cleveland*,[19] involved the question of whether non-probate assets, which were included in computing the net taxable estate for federal estate tax purposes, should bear their proportionate share of the federal estate tax. Here decedent died intestate. Fifteen years earlier decedent had created a trust reserving to herself the income for life and giving the remainder to her sister. The trust property constituted the non-probate assets. The court held that the trust must bear its proportionate share of the tax.

Apportionment of the federal estate tax can be controlled in Ohio by provision in the will. Absent such a provision, or absent a will, the results can be quite haphazard, *viz.*, the *Miller* case where, as a result of the court's ruling, the widow's share exceeded those of each of the children by $198,000. It would seem that the time is ripe in Ohio for the legislature to follow the example of fifteen other jurisdictions and enact a general apportionment statute.[20]

The state lost two reported contemplation of death cases, In re *Kilgour's Estate*[21] and In re *Faulkner's Estate*,[22] in spite of the fact that in the *Kilgour* case the estate had to overcome the statutory presumption that gifts made within two years of death are in contemplation of death.[23] In that case the estate was able to introduce strong evidence of "life" motives in making the gifts rather than "death" motives. For example, the estate showed that at the time of the gifts the decedent had no intimations of pending disease; that he wanted to give present financial assistance to the donees; and that

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[15] Case cited note 11 *supra.*

[16] Miller v. Hammond, 156 Ohio St. 475, 501-502, 104 N.E.2d 9, 22 (1952).

[17] OHIO GEN. CODE §§ 10509-121, 10509-181, 10509-182.

[18] Miller v. Hammond, 156 Ohio St. 475, 497, 104 N.E.2d 9, 19 (1952)

[19] 157 Ohio St. 45, 104 N.E.2d 441 (1952).

[20] See Note, *Apportionment of Federal Estate Tax*, 3 WEST. RES. L. REV. 164 (1951); 4 WEST. RES. L. REV. 92 (1952)

[21] 105 N.E.2d 73 (Ohio App. 1951).

[22] 108 N.E.2d 118 (Green Probate Ct. 1952).

[23] OHIO GEN. CODE § 5332-2.

he wanted to escape tax on the income to be earned by the donated property in the future.

In the *Faulkner* case the court also had to decide the interesting question of whether the inter-vivos transfer was "intended to take effect in possession or enjoyment at or after death."[24] Decedent deeded two farms to two unrelated grantees about two and one-half years before his death. In separate contracts the grantees promised to pay the decedent $1,000 a year until his death, and $600 a year to his wife until her death, if she survived the decedent. The court held the gifts were not taxable under the above statutory language. The deeds to the donees created a fee simple title in them. Their obligations were merely personal. A number of courts in other jurisdictions have arrived at the same conclusion.[25]

Real Property Tax

Exemption from the real property tax was the issue of primary importance considered in the cases under this heading reported during the period of the survey. The cases arose in the Cincinnati area and were all brought by one Goldman under Section 5616 of the Ohio General Code. *Goldman v. Friars Club, Inc.*[26] involved several actions brought against the Y.M.C.A., Y.W.C.A. and similar organizations which maintained centers providing rooms, restaurants and other services for which charges were made. Despite these activities, the property in each case was held exempt from tax. These activities were considered incidental to the organizations' main objective of an over-all program of social, educational and religious service to persons in peculiar need without distinction as to race, color or creed.

Exemption was denied in *Goldman v. L. B. Harrison.*[27] Here a wealthy family established a building to provide rooms, meals and recreational facilities for young workingmen between the ages of 18 and 30. For a nominal weekly charge, the young men were provided a room, two meals a day and the use of recreational facilities. All profits inured to the institution. The court agreed with the Board of Tax Appeals that exemption should be denied because the rental of rooms and serving of meals was not incidental to an over-all charitable purpose. The court disagreed with the

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[24] OHIO GEN. CODE § 5332(3)(b).

[25] See Notes, 67 A.L.R. 1253 (1930), 49 A.L.R. 885 (1927); *cf. In re* Estate of Weber, 24 Ohio N.P. (N.S.) 33 (Williams Com. Pl. 1921), *aff'd,* Court of Appeals, Sixth Dist., October 22, 1921, *rehearing denied,* November 9, 1921. See also *In re* Wampler's Estate, 103 N.E.2d 303 (Ohio App. 1950) in which the court held that the probate court has the power during term to modify its order determining inheritance tax on the ground of a mistake of fact, where the tax paid has not been distributed to the county treasurer.

[26] 158 Ohio St. 185, 107 N.E.2d 518 (1952).

[27] 158 Ohio St. 181, 107 N.E.2d 530 (1952).

Board's holding, however, that the part of the building used for noncharitable purposes could be determined on a percentage basis and subjected to tax and the rest exempted under the 1949 amendment to Section 5560 of the Ohio General Code. The court seemed to feel that a division would have to be made on an "entity" basis. Such an interpretation is questionable in view of the specific language of the amendment. The court, in two further cases,[28] also reaffirmed its earlier position that veterans' organizations devoted principally to fraternal and social activities are not entitled to exemption as "charitable organizations."

Personal Property Tax

In *American Oak Leather Co. v. Peck*[29] the Board of Tax Appeals held a dissolved corporation, which was still winding up its affairs, a taxable entity subject to the personal property tax.[30] It was further decided that property of which it was disposing was "used in business" within Section 5325-1 of the Ohio General Code and, therefore, subject to valuation at 70% of its true value. On the other hand, an incubator for hatching chicks was held in *Miller v. Peck*[31] to be used in a manufacturing process and, therefore, under Section 5388 of the Ohio General Code, was assessable at 50% of its true value.

Other Taxes

In *Soderquist v. Glander*[32] it was held that a contract under which an employee received payments for improvements made to machines, or for

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[28] Goldman v. Guckenberger, 158 Ohio St. 210, 107 N.E.2d 526 (1952); Goldman v. Robert E. Bentley Post, 158 Ohio St. 205, 107 N.E.2d 528 (1952).

[29] 108 N.E.2d 179 (Ohio Bd. Tax App. 1951)

[30] OHIO GEN. CODE §§ 5366 *et seq.*

[31] 158 Ohio St. 17, 106 N.E.2d 776 (1952). See also Westerhaus Co. v. Peck, 157 Ohio St. 88, 104 N.E.2d 453 (1952) (upholding the Tax Commissioner s application of a depreciation formula for pinball machines); Personal Finance Co. v. Glander, 156 Ohio St. 379, 102 N.E.2d 709 (1951) (upholding the Tax Commissioner's rule determining the amount of reserve against accounts receivable in the case of banks and similar financial institutions, and dealers in intangibles, under both the personal property tax and the intangibles tax)

[32] 156 Ohio St. 287, 102 N.E.2d 465 (1951); *cf.* Estate of French v. Glander, 146 Ohio St. 225, 65 N.E.2d 61 (1946).

[33] OHIO GEN. CODE § 5323.

[34] 156 Ohio St. 583, 103 N.E.2d 756 (1952), *aff'd on rehearing*, 158 Ohio St. 15, 106 N.E.2d 625 (1952) (three judges dissenting) The court concluded that the tax was illegal under 16 STAT. 272 (1870), as amended, 31 U.S.C. § 742 (1946). *Cf.* New Jersey Realty Title Ins. Co. v. Division of Tax Appeals, 338 U.S. 665, 70 Sup. Ct. 413 (1950) A majority of the court also believed that the franchise tax itself excluded federal securities.

[35] State *ex rel.* Sherrick v. Peck, 158 Ohio St. 122, 107 N.E.2d 145 (1952) (assessment of sales tax by registered mail) is discussed in the ADMINISTRATIVE PROCEDURE article, *supra.*