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Taxation

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of the labor dispute disqualification, were reported in the Northeastern Reporter for the first time last year.¹⁰ As reported in the 1955 Survey, this question has now been settled by the Ohio Supreme Court.¹¹

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TAXATION

Most of the judicial decisions on tax questions during this reporting period were concerned with special problems under specific taxes. However, three decisions dealt with problems of exemptions which relate to both real and personal taxation.

Exemptions

Ohio Revised Code section 5709.12 exempts real and personal property belonging to "institutions that are used exclusively for charitable purposes." A non-profit corporation was formed for the purpose of treating and rehabilitating patients having physical disability, especially from poliomyelitis. It purchased a parcel of land and began remodeling and repairing to make the property suitable for the special purposes of the institution. This renovation was in process during the tax year of 1955 and at all previous times while under the institution's control, with expectation that the premises would be ready for use sometime during 1956. The Board of Tax Appeals allowed the exemption for 1955, and the county auditor appealed. The Supreme Court¹ affirmed the Board's actions, holding that its decision was neither unlawful nor unreasonable. In a per curiam opinion the court stated that it could not distinguish this case from a recent prior decision² in which it had held property purchased for charitable uses, being remodeled for such usage, and not being used for a non-charitable purpose, is entitled to exemption during the course of remodeling.

In another exemption case,³ the Supreme Court unanimously held that land owned by a municipal corporation located in an outside Ohio county, prepared for use and to be used in connection with a reservoir to hold water for supplying the municipality and its suburbs, is public property used exclusively for a public purpose. The court relied upon

¹⁰ *Diaz v. Koppers Co.*, 133 N.E.2d 794 (Ohio App. 1951), and *Allen v. Youngstown Municipal Ry. Co.*, 134 N.E.2d 80 (Ohio App. 1954), both previously referred to in the 1954 Survey, 6 WEST. RES. L. REV. 291, 297 (1955).

¹¹ *Cornell v. Bailey*, 163 Ohio St. 50, 125 N.E.2d 323 (1955), discussed in the 1955 Survey, 7 WEST. RES. L. REV. 321, 322 (1956).

prior holdings that property owned by a municipal corporation is public property⁴ and therefore within the coverage of the "public property" exemption provisions of Ohio Revised Code section 5709.08, and that the use of its property by a municipal corporation in supplying a public utility service is for a public purpose,⁵ in bringing the property involved in the principal case under the terms of section 5709.08.

In an earlier case,⁶ the court had determined that the fact that revenue is incidentally derived from public property does not alone alter the public character of the use. The principal case goes further in holding that a public purpose of a proprietary nature is a public purpose under Ohio Revised Code section 5709.08.

Ohio Revised Code section 5709.12 exempting municipal water "works" would not include a reservoir and the real estate under it, under the accepted principle of a "strict" though reasonable construction of tax exemption statutes.⁷

The third exemption case involved the application of Ohio Revised Code section 5709.08 to the personal property used in a retail shop owned by a corporation organized for charitable purposes. While the book shop sold to members of its group it also sold to the general public, and its sales to all classes of purchasers were in excess of cost. The profits from this enterprise were used exclusively for charitable purposes. The Supreme Court affirmed the decision of the Board of Tax Appeals which had held that the operation of the book shop was not exclusively charitable in nature.⁸

¹ Application of Magnetic Springs Foundation, 165 Ohio St. 180, 134 N.E.2d 152 (1956).

² Good Samaritan Hospital Ass'n v. Glander, 155 Ohio St. 507, 99 N.E.2d 473 (1951). Three members of the court dissented on the ground that prospective use of property for an exempted purpose does not warrant its present exemption from taxation. It may be significant that none of these dissenting judges concurred in the later decision.

³ Columbus v. County of Delaware, 164 Ohio St. 605, 132 N.E.2d 747 (1956)

⁴ Toledo v. Jenkins, 143 Ohio St. 141, 54 N.E.2d 656 (1944).

⁵ State *ex rel.* v. Toledo, 48 Ohio St. 112, 26 N.E. 1061 (1891), wherein one of the issues was whether the taxing power could be constitutionally exercised.

⁶ Toledo v. Jenkins, 143 Ohio St. 141, 54 N.E. 2d 656 (1944).

⁷ See *In re* Bond Hill-Roselawn Hebrew School, 151 Ohio St. 70, 84 N.E.2d 270 (1949), for an application of this principle of statutory construction.

⁸ Lutheran Book Shop v. Bowers, 164 Ohio St. 359, 131 N.E.2d 219 (1955). This decision follows the ruling in *Gospel Worker Society v. Evatt*, 140 Ohio St. 185, 42 N.E.2d 900 (1942), which stated that the test is the present use of the property rather than the ultimate use of proceeds received from the property sought to be exempted.

Specific Taxes

1. *Forfeiture Sales of Real Property for Delinquent Taxes*

The case of *Ratajczak v. Carney*⁹ presented an interesting application of the good faith rule in the payment of real property taxes to void a delinquent tax sale of a property. Two parcels of land were conveyed to the plaintiff by a single warranty deed which described them as one. Plaintiff then notified the county treasurer of the transfer and received the semiannual tax bills which were paid promptly in the belief, in good faith, that the payments covered all of the taxes assessed against all of the property. The county auditor, however, did not make the necessary changes in the tax duplicate, and all of the taxes due were not included in the tax bills sent to the plaintiff. The plaintiff, however, believed that all taxes had been paid, and that he had taken all the necessary steps required of him to pay the tax. Under these circumstances, the court held that the unpaid taxes were deemed to have been paid and therefore a forfeiture sale of that portion of the property for delinquent taxes was unauthorized and void.¹⁰ The county authorities and the tax sale purchaser relied on Ohio Revised Code section 323.13, providing that a failure to receive any bill required by the section did not excuse the failure or delay to pay any taxes due, as a defense. The court held the section inapplicable to the specific circumstances.¹¹

2. *Personal Property*

The Board of Tax Appeals affirmed a determination of the State Tax Commissioner that the value of licensed house trailers should be included in the average inventory of a dealer engaged primarily in selling house trailers, despite the fact that he had licensed them under the statutes prescribing the levy of an annual license tax for motor vehicles. The Supreme Court held that the decision of the Board was not unreasonable or

⁹ 135 N.E.2d 64 (Ohio App. 1956).

¹⁰ The petition of the plaintiff prayed for a decree vacating and setting aside a delinquent tax sale of a portion of the parcel of real estate owned by the plaintiff. The common pleas court rendered judgment for the defendants, county auditor, county treasurer and the purchaser at the delinquent tax sale. On appeal on questions of law and fact, the court of appeals ordered a decree for plaintiff.

¹¹ Footnote mention should also be made of the case of *Hyland v. Pfalzgraf*, 98 Ohio App. 503, 130 N.E.2d 414 (1953), in which it was held that a plaintiff who owned two parcels of land by separate deeds, with parcel No. 1 having a specific reservation of a sewer easement for the benefit of parcel No. 2, having lost parcel No. 1 by forfeiture followed by a sale as forfeited land, with the auditor's deed specifically reserving the sewer easement for the benefit of parcel No. 2, was entitled to a judgment quieting title to a sewer easement over the defendant's parcel purchased at the forfeited land sale.

unlawful, in affirming its decision.¹² The court construed together Ohio Revised Code sections 4501.01 and 5701.03, and determined that the trailers were not removed from the definition of personal property by the latter section because of the exception in the former from the definition of "owner," of a dealer regularly engaged in selling, displaying, offering for sale or dealing in motor vehicles. Also, the fact that the dealer had secured licenses and paid the annual license tax prescribed by statute did not change his status from that of a "dealer" to one of "owner."

Ohio Revised Code section 5711.27 requires a taxpayer to make a proper return of all personal property. In the event the taxpayer does not make a return or omits any item of taxable property, the assessor must add to the assessment of each class or item of taxable property which the taxpayer has failed to return or list, an additional 50 percent of its value. Furthermore, Ohio Revised Code section 323.17 imposes a penalty of ten percent of the amount due and unpaid of any installment of taxes, other than real estate taxes and assessments, for such failure. A principal question raised in a recent Supreme Court case¹³ was whether the ten percent penalty imposed by the latter statute could be added to the amount of the personal property tax derived from the 50 percent additional assessment imposed for nonfiling by the former section. The court concluded that the 50 percent additional assessment was intended by the legislature as a penalty, and held that the ten percent penalty on the additional penalty assessment was illegal, a penalty upon a penalty being concededly unlawful.¹⁴ Even assuming that the intention of the General Assembly was not clear, the majority opinion concluded, the general rule of construction of statutes which levy a tax — that they be strictly construed against the taxing authority and in favor of the taxpayer — would require the holding that the 50 percent assessment is a penalty.

3. *Municipal Income Taxation*

A question of the validity of a classification between persons receiving income primarily from wages, salaries and other compensation of employees, and persons deriving income from net profits, with a different method of assessment as to each, arose under the Cincinnati "Earned Income Tax Ordinance" of 1954. The classification issue had been before the Supreme Court of Ohio in 1955, and the ordinance was sus-

¹² *Trailer Mart v. Bowers*, 164 Ohio St. 354, 130 N.E.2d 793 (1955).

¹³ *In re Estate of Lang*, 164 Ohio St. 500, 132 N.E.2d 96 (1956)

¹⁴ While the Board of Tax Appeals incorrectly denied the remission of the penalty requested, the court held that it properly affirmed the decision of the Tax Commissioner in his dismissal of an application for the remission of the penalty because the OHIO REVISED CODE § 5715.39 had transferred his authority to remit taxes and penalties thereon to the Board of Tax Appeals.

tained.¹⁵ The more elaborate opinion of the court of appeals in support of its 1954 decision, was released during 1956.¹⁶

The ordinance divided earned income into two general classes: (1) wages, salaries and other compensation of employees and (2) net profits of businesses, corporations and self-employed persons. The tax was imposed on both classes from April 1 to October 31, but different methods of calculation were employed. The tax as to the first group was calculated on the gross earnings for the period; the tax on the second group was computed on the basis of 7/12 of the annual net profits. The Supreme Court had held that the basis of classification was unobjectionable as long as the impact was substantially uniform as to each class.¹⁷ Two additional interesting points are made in the court of appeals opinion: (1) a tax law is per se due process since it is designed to raise revenue and within the competency of the city council; (2) where the law is confined to the raising of revenue, the power to classify is broader than it is in relation to other legislation. On the latter point the opinion points out that in choosing the objects and persons to be taxed, there is a certain discrimination between the class which is taxed and that which is not. This type of discrimination does not affect validity. It is only when those similarly situated are unequally burdened that the constitutional requirements of equal protection are violated.

4. *Corporate Franchise Tax*

In a Supreme Court decision¹⁸ upon an appeal from the Board of Tax Appeals, the franchise-fee certifications of the Tax Commissioner under Ohio Revised Code section 5733.05, were questioned. The foreign corporation contended that it was not doing business in Ohio and further that it was erroneous to include general Ohio bank deposits in the tax base. The Supreme Court agreed with the Board's determination that appellant was doing business in Ohio; except for patents and an experimental account, all of its assets and property were in Ohio, practically all of its corporate activity was in Ohio, no business was done elsewhere, all earnings and money were deposited in Ohio banks and all accounts were paid within Ohio, and, in addition, all officers were residents of Ohio. The court also affirmed the determination to include the Ohio

¹⁵ Clark v. Cincinnati, 163 Ohio St. 532, 137 N.E.2d 363 (1955), affirming the judgment in the principal case.

¹⁶ Clark v. Cincinnati, 99 Ohio App. 152, 131 N.E.2d 599 (1954)

¹⁷ Chief Justice Weygant dissented on the ground that the ordinance was inconsistent with OHIO CONST. art. XII, § 8, providing that income taxes may be either uniform or graduated. In his view this ordinance imposed neither. Judge Hart's dissent was based on the discriminatory nature of the tax, in his opinion.

¹⁸ Corner Co. v. Bowers, 164 Ohio St. 429, 131 N.E.2d 581 (1956)

bank deposits in the tax base. Appellant, a Delaware corporation, contended that these deposits had a situs elsewhere, but the court agreed with the Board that the deposits should be included where the company's real estate is in Ohio and its bank deposits are received and disbursed in Ohio alone.¹⁹

Another decision involved a construction of the statute imposing an annual franchise tax on the privilege of being an insurance company.²⁰ The plaintiff sued to recover a franchise tax paid for the year 1951 on the basis that it had already paid that tax once, having already paid a tax in 1951 based on its annual statement for 1950. Plaintiff had obtained permission to dissolve, but this was granted only on the condition imposed by the Superintendent of Insurance that it pay a franchise tax for 1951 based on its 1951 business prior to its dissolution. The tax was then paid under protest.

The governing statute referred to the business of the corporation during the preceding year under each of the alternative methods of assessment, and the court concluded plaintiff had a cause of action because the tax levied and paid in 1951, based on the plaintiff's statement for the year 1950, was a franchise tax for the year 1951 and not for the year 1950.²¹

5. Sales Taxation

Ohio Revised Code section 5739.01 (E) (2), excepts from "sale at retail" certain sales of property which are used or consumed directly in the production of tangible personal property. In applying this exemption to a manufacturer's purchases of electrical equipment for the transportation of electrical energy from the factory service inlet to the points in the building where the energy was used, the Supreme Court held that equipment used to channel high voltage current to points in the factory where it had to be transformed into lower voltage current to be utilized in welding machines was not excepted thereunder.²²

The sales tax law excepts from its provisions fuel sold for use in ships

¹⁹ The court distinguished its former opinion and holding in *C.F. Kettering, Inc. v. Evatt*, 144 Ohio St. 419, 59 N.E.2d 370 (1945), which on its special facts held that "general" bank deposits in Ohio banks could not be included in the base for the computation of the franchise tax to be collected from a foreign corporation.

²⁰ OHIO REV. CODE § 5725.18.

²¹ *Columbia Fire Ins. Co. v. Tracy*, 133 N.E.2d 661 (Ohio C.P. 1953).

²² *General Motors Corp. v. Bowers*, 164 Ohio St. 574, 132 N.E.2d 213 (1956). The specific equipment involved was switch gears, used as circuit breakers, and cable-splicing compartments and interrupter switches. This decision follows the holding in *Powhatan Mining Co. v. Peck*, 160 Ohio St. 389, 116 N.E.2d 426 (1953), that property principally used in transportation to or from a manufacturing process was not used "directly in" it.

and vessels used or to be used principally in interstate or foreign commerce.²³ The Supreme Court had to consider a decision of the Board of Tax Appeals which approved a sales tax assessment on fuel sold to a purchaser to be consumed in Ohio and on Lake Erie in dredging operations mainly within waters in the State of Ohio. The taxpayer's operation could be characterized as facilitating interstate commerce rather than transportation in interstate commerce. In applying the principle of strict construction of exemptions or exceptions from sales taxation, the court concluded that taxpayer's activity did not come within the statutory exemption and affirmed the decision of the Board.²⁴

While the Ohio sales tax is levied on retail sales of tangible personal property, the statute also sets out a presumption that all sales made in Ohio are subject to the tax, unless the contrary is shown.²⁵ The statute also set forth a method of establishing non-taxability by a certificate supplied by the purchaser to the vendor, and a failure to supply the certificate within the appropriate time renders the sale subject to the tax.²⁶ The Supreme Court has given literal effect to these provisions,²⁷ holding that there is an absolute obligation upon the vendor to obtain the certificate within the specified time. The court declared that the General Assembly possesses the power to levy a tax on every sale of tangible personal property made in the state and that it has so provided for its collection on other than retail sales when the certificate is not obtained as required by the statute and the regulation.

Ohio Revised Code section 5739.14 imposes a duty upon the purchaser of a business to determine from the Department of Taxation whether the seller has any accrued but unpaid sales taxes due, and to deduct the amount of such taxes from the purchase price. It also provides that the purchaser who fails to withhold the amount from the purchase money shall be personally liable. In a suit brought by the state against the seller and purchaser, an important issue was the affect of the introduction in evidence of the official certificate of assessment. The trial court had dismissed the state's action for insufficient evidence where the only evidence of the amount due was a certified copy of the assessment. The court of appeals reversed the trial court and rendered judgment against the purchaser. The Supreme Court affirmed this judgment,²⁸ holding that a sales tax assessment certificate for taxes due from

²³ OHIO REV. CODE § 5739.02 (B) (18).

²⁴ L.A. Wells Constr. Co. v. Bowers, 164 Ohio St. 357, 130 N.E.2d 803 (1955).

²⁵ OHIO REV. CODE § 5739.02 (B), first unnumbered paragraph.

²⁶ OHIO REV. CODE § 5739.03 (B), second unnumbered paragraph.

²⁷ Bellows Co. v. Bowers, 165 Ohio St. 9, 133 N.E.2d 131 (1956)

²⁸ State v. Sloan, 164 Ohio St. 579, 132 N.E.2d 460 (1956).

the seller is admissible as evidence and *prima facie* establishes the amount for which the purchaser is liable.²⁹

A private hospital was assessed by the Tax Commissioner for a sales tax upon the entire amount of the charges made to patients when its bills to patients did not separate the charges for medicines and supplies from the charges for other services rendered. The hospital records, however, disclosed the nature and character of the various charges which entered into the single bill rendered to the patient. The court of appeals reversed the Board's assessment based upon the entire hospital charge, but denied the contention of the hospital that its bills for medicine and supplies were purely incidental and therefore not taxable. While the tax may be assessed on the medicines and supplies furnished it could not be assessed on the entire hospital bill of the patients under the facts of this case, where there is a clear separation in the making of the composite charge.³⁰

6. *Inheritance Taxation*

A probate court decision³¹ dealt with the liability of the non-probate estate for payment of debts against the estate in determining the estate for inheritance tax purposes. The widow had previously obtained an order setting aside as her sole property the value of two joint bank accounts which value, however, was properly included in the estate for inheritance purposes. The widow made a notation beside these items in the inventory, that the survivor waives the right to the joint account as it was property of the decedent. The widow was seeking to have the joint accounts included in the assets of the estate, so that the exempt property and the year's support could be deducted therefrom in calculating the value of the estate to which the inheritance tax would be applied. The court held that only such amount of the debts may be deducted in calcu-

²⁹ The strong dissent by Judge Bell (concurring in by Stewart and Taft, JJ.) raises considerable doubt concerning the wisdom of the court's holding. In the first place, he could find no provision in the statute whatever which would apply the prior assessment to the purchaser of the business. In the second place, he urged that the giving of *prima facie* effect to the certificate of amount owed against subsequent purchasers worked such a hardship on them as not to be within the legislative competence or intent. The following paragraph from the dissenting opinion effectively states the position against the majority's holding:

"The duty imposed by statute on the subsequent purchasers is to pay the taxes, interest and penalties accrued and unpaid on account of the operation of the business by the former owner. It does not impose a duty upon them to defend against an assessment which was not made against them, of which they had no notice and against which they had no opportunity to protest. If pay they must, let it be after the state has adduced in evidence the basic facts from which it can be determined whether there are taxes due and unpaid, and if so how much."

³⁰ *St. Francis Hospital Ass'n v. Bowers*, 99 Ohio App. 133, 131 N.E.2d 624 (1954)

³¹ *In re Williams Estate*, 138 N.E.2d 189 (Ohio Prob. 1956)

lating the inheritance tax as does not exceed the assets (probate) in the estate on the date of death.

Another case³² required the court to define the phraseology "any person dissatisfied" as used in Ohio Revised Code section 5731.38 and to determine whether a village could appeal from the probate court's decision on origin of the inheritance tax. The court held that this section made no provision for the filing of exceptions by a municipality to a determination by the probate court of the place of origin of the inheritance tax and, therefore, an appeal could not be maintained by the village.

Remedies

1. *Administrative Appeals*

The Supreme Court³³ continues to hold that the provisions of Ohio Revised Code section 5717.02, regulating the procedure of appeals from the Tax Commissioner to the Board of Tax Appeals, are *jurisdictional*, and a failure to give the notice of appeal to the Tax Commissioner is a proper basis for the Board's dismissing the appeal. The reasoning in support of this position is more elaborately set forth in a 1946 decision of the Supreme Court.³⁴

2. *Suits to Recover Taxes*

A taxpayer's action was brought to enjoin the levy and collection of a tax by a conservancy district. This action resulted in a temporary injunction against the collection of the tax. In the meantime, however, the plaintiff and about 70,000 other taxpayers proceeded to pay the levy. No action was brought by any of these taxpayers within one year of the payment to recover the taxes so paid under the provisions of Ohio Revised Code sections 2723.01 and 2723.03.³⁵ The trial court gave judgment for a refund. The court of appeals held that a taxpayer could not

³² *In re Estate of Hutson v. Village of Bethel*, 100 Ohio App. 473, 137 N.E.2d 407 (1953).

³³ *Zephyr Room v. Bowers*, 164 Ohio St. 287, 130 N.E.2d 362 (1955).

³⁴ *American Restaurant & Lunch Co. v. Glander*, 147 Ohio St. 147, 70 N.E.2d 93 (1946). See also *Kent Provision Co. v. Peck*, 159 Ohio St. 84, 110 N.E.2d 776 (1953), wherein the appellant apparently attempted in good faith to comply with the mandatory provisions of the statute. See 1953 Survey, 5 WEST. RES. L. REV. 227 (1954).

³⁵ OHIO REV. CODE § 2723.01 authorizes both injunction suits against levy or collection of taxes and assessments and actions to recover them when collected within one year after they are collected.

OHIO REV. CODE § 2723.03, indicates that the filing of a written protest strictly in accordance with its provisions at the time of payment of a tax or assessment will prevent a dismissal of an action to recover on the ground that it was voluntarily paid.