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## Taxation

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## TAXATION

### *Jurisdiction*

The Supreme Court of Ohio decided an important jurisdictional issue in *Youngstown Sheet & Tube Co. v. Bowers*.<sup>1</sup> The taxpayer had imported iron ore from five foreign countries, unloaded the ships bringing the ore in foreign commerce, transported it to storage yards near its mills in Youngstown and thereafter withdrew the ore from storage as it needed specific quantities for manufacturing purposes. It excluded these foreign ores from its inventories for personal property tax purposes. The Tax Commissioner included the value of the ores and the taxpayer appealed to the Board of Tax Appeals which sustained its contention that the foreign ores were exempt from state taxation by reason of the prohibition against taxing imports contained in Article I, Sec. 10, Cl. 2 of the United States Constitution. Upon appeal by the Tax Commissioner, the Supreme Court reversed the Board of Tax Appeals and held the foreign ore subject to state taxation. The majority of the court took the position that fungible imported property should have comparable treatment with packaged imported articles which lose their immunity from state taxation when the original packages have been broken and the contents so acted upon that they have become incorporated with the mass of property within the state. Therefore, iron ore is not immune from Ohio taxation under the following conditions: (1) after it has been commingled with other iron ore imported at a different time, even though the other iron ore is of the same grade and imported from the same place, and (2) after portions of such iron ore have been removed for use in manufacturing.

The other jurisdictional tax case<sup>2</sup> grew out of a prosecution of an employee of the federal government for failure to file a return for 1955 income taxes as required by the Earned Income Tax Ordinance of the City of Cincinnati. The defense was, essentially, lack of jurisdiction to tax because the defendant was a non-resident of Cincinnati, living in suburban Hamilton County, and earning his income as an employee of the Federal government working in the Engineering Center in Cincinnati. Since the jurisdiction of municipalities to enforce an income tax against a non-resident working and earning within its limits had already been decided favorably to the municipalities,<sup>3</sup> the only jurisdictional issue raised and not previously decided in Ohio was whether a non-resident earning and working in a federal instrumentality within a city can be subjected

<sup>1</sup> 166 Ohio St. 122, 140 N.E.2d 313 (1957), probable jurisdiction noted by the Supreme Court of the United States, 355 U.S. 911 (1958).

<sup>2</sup> *City of Cincinnati v. Faig*, 145 N.E.2d 563 (Ohio Munic. Ct. 1957).

<sup>3</sup> *Angell v. City of Toledo*, 153 Ohio St. 179, 91 N.E.2d 250 (1950).

to the city's income tax ordinance. Assuming without deciding that the Federal Engineering Center in Cincinnati is territory ceded to the Federal government, the court relied upon the Buck Act<sup>4</sup> in holding the Cincinnati ordinance applicable to the accused and finding him guilty of violating the ordinance.<sup>5</sup>

### *Specific Taxes; Method of Making Real Estate Assessments*

Section 5713.01 of the Ohio Revised Code, imposes a duty upon the county auditor to make a periodic appraisal of each lot or parcel of real estate. While it requires him to view and appraise each lot or parcel, it authorizes him to employ experts, deputies, clerks, and other employees to assist in fixing the true value. In a case from Montgomery County, the trial court decreed that a reappraisal was illegally made because the county auditor did not personally make the appraisal. The court of appeals<sup>6</sup> declared that this conclusion was erroneous, but it found that the determination was not reversible error under the circumstances because the trial court correctly proceeded to make the determination of true value. The construction of the code section is important, however, as a precedent. The court pointed out that it would be unreasonable and absurd to require the county auditor to actually view each lot and parcel of land within the county. It found that the statutory requirements were not so exacting and stated that the requirements of the statute have been observed when the actual work of assessment has been done by appointees of the auditor under his direction even though the findings are adopted by the auditor without personal knowledge and view.

### *Assessment for Personal Property; Taxation of Merchandise Held For Storage*

Two Supreme Court cases<sup>7</sup> involved the construction of Section 5701.08, Ohio Revised Code, which exempts merchandise or agricultural

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<sup>4</sup> 54 STAT. 1059 (1940), 4 U.S.C. § 105-110. In substance, this act provides that no person shall be relieved from income tax as imposed by any taxing authority within any State by reason of the income having been received from services performed in a federal area within the taxing authority.

In *Howard v. Comm'rs. of Louisville*, 344 U.S. 624 (1953), the Supreme Court sustained as an income tax a Louisville ordinance which purported to tax an employee of the federal ordnance plant by virtue of the Buck Act. Thus, for income tax purposes, the tax can be levied and collected within the federal area just as if it were not a federal area.

<sup>5</sup> The Supreme Court of Pennsylvania sustained a similar ordinance of the City of Philadelphia as applied to a non-resident federal employee deriving his income from employment in the Philadelphia Navy Yard, within the city, in *Kiker v. Philadelphia*, 346 Pa. 624, 31 A.2d 289 (1943).

<sup>6</sup> *Reibold v. Haines*, 138 N.E.2d 407 (Ohio Ct. App. 1956).

<sup>7</sup> *Allied Stores of Ohio, Inc. v. Bowers*, 166 Ohio St. 116, 140 N.E.2d 411 (1957),

products belonging to a non-resident from personal property taxation when such property is being held in Ohio for storage only. The taxpayers, both Ohio corporations, had objected, before the Board of Tax Appeals, that a final order of the Tax Commissioner assessing merchandise held in a storage warehouse for storage only and owned by a resident was erroneous because the provision in the statute excepting the merchandise belonging to the nonresident is unconstitutional as a denial of equal protection of the laws to residents. The Board of Tax Appeals affirmed the order of the Tax Commissioner on the ground that the only attack made by the appellants was a charge of unconstitutional discrimination which the Board asserted that it had no jurisdiction to consider. The court of appeals affirmed the decision of the Board, declaring that the classification set up by the legislative exception was neither an arbitrary nor an artificial classification. The Supreme Court took jurisdiction of the appeal on the basis that it involved a debatable constitutional question. The Supreme Court for the second time<sup>8</sup> refused to pass upon the constitutionality of the proviso and affirmed the judgment of the court of appeals. It considered that it was unnecessary to pass upon the validity of the proviso because the taxpayer under the rule of statutory construction<sup>9</sup> which it chose to follow would have been in no better position with the proviso invalidated than it was at that time.

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probable jurisdiction noted by the Supreme Court of the United States, 355 U.S. 911 (1958); *The Kroger Co. v. Bowers*, 166 Ohio St. 121, 140 N.E.2d 415 (1957), decided on the authority of the *Allied Stores* case.

<sup>8</sup> On the previous occasion, in *Goodrich Co. v. Peck*, 161 Ohio St. 202, 118 N.E.2d 525 (1954), the Board of Tax Appeals relieved a foreign corporation from an assessment of merchandise which was held in storage in Ohio. The Tax Commissioner urged the Supreme Court on appeal from the Board of Tax Appeals to reverse the Board because its decision would discriminate against Ohio corporations and residents. The Court, however, found the decision of the Board of Tax Appeals neither unreasonable nor unlawful and refused to depart from the rule of statutory construction applied in the case, namely that any ambiguity in a statute defining the subjects of taxation must be resolved in favor of the taxpayer.

<sup>9</sup> The taxpayer contended that the Court should strike out only that portion of the proviso which read, "belonging to a non-resident of this state," and with this language out of the way, the proviso would prevent taxation of the taxpayer's merchandise held in a storage warehouse for storage only. The Court declared that it had no power to strike out anything less than the whole proviso which would leave the taxpayer without anything upon which to base its claim for relief. This result followed from the application of the following rule of construction: "Although a legislative enactment may be invalid merely because certain limiting language therein makes it repugnant to constitutional limitations, a court cannot cure such invalidity merely by striking such limiting language, if the elimination of such limiting language would substantially extend the operation of the legislative enactment beyond the scope contemplated by all the language of such legislative enactment."

### Corporate Franchise Taxes

*Fisher Brothers Co. v. Bowers*<sup>10</sup> determined which statute of limitations was applicable to a determination of the amount of the franchise tax where the domestic corporation's report contains a complete and honest disclosure of all the corporation's assets as required by law. The Supreme Court held that the controlling limitations section of the Ohio Revised Code is § 5703.05 which limits the time within which the Commissioner must make the determination to the period ending with the first Monday in May following the filing of the report. The five year statute set out in § 5733.15 applies only where a corporation fails to make any report to the Tax Commissioner as required by law or fails to report or reports erroneously any information essential to the commissioner's determination of the amount of the tax.

The annual franchise tax imposed upon a domestic insurance company under § 5725.18 of the Ohio Revised Code is a tax for the year in which the report must be filed and the tax collected and not for the previous year which the report covers.<sup>11</sup>

### Sales and Use Taxation

The leading cases of this period are concerned with the application of exemptions from the sales tax and the grounds for reviewing determinations of law and fact of the Board of Tax Appeals.

In *Rochez Bros., Inc. v. Bowers*,<sup>12</sup> the Supreme Court determined that the Board of Tax Appeals had correctly sustained an order of the Tax Commissioner assessing a sale and use tax on certain property used by a contractor in constructing a public utility project. Since the materials were used before the property was in substantial operation, it did not come within the exemption granted for property used or consumed directly in rendering a public utility service.

But when a determination has been made by the Board of Tax Appeals that certain property is or is not actually used directly in the manufacture of tangible personal property, a majority of the Supreme Court has consistently taken the position that the court's function is not to substitute its judgment for that of the Board of Tax Appeals on factual

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<sup>10</sup> 166 Ohio St. 191, 140 N.E.2d 777 (1957). The Supreme Court took the position that § 5733.15 is a special statutory provision which applies to a specific subject matter and constitutes an exception to the general statutory provision governing the time in which the assessment could be made, namely § 5703.05.

<sup>11</sup> *Columbia Fire Insurance Co. of Dayton v. Tracey*, 139 N.E.2d 482 (Ohio Ct. App. 1954).

<sup>12</sup> 166 Ohio St. 396, 143 N.E.2d 123 (1957).

issues, but only to determine from an examination of the entire record whether the decision reached by the board is unreasonable or unlawful.<sup>13</sup>

On the other hand, if there are judicial precedents indicating that particular personal property is an integral part of a manufacturing plant, it is much easier to show that a Board of Tax Appeals decision which holds that specific personal property is not used directly in manufacturing of personal property for sale, is unreasonable and unlawful.<sup>14</sup>

### *Inheritance Taxation*

Three important areas within this field received treatment in the cases to be discussed: transfers to take effect at or after death; the succession to joint bank accounts; and charitable exemptions.

Section 5731.02 (c) (2) of the Ohio Revised Code, applies to successions intended to take effect at or after the death of the donor of the property.

In *In re Garby's Estate*,<sup>15</sup> the court held that the reservation of a life estate, while conveying the fee of the lands to her sons, was a transfer intended to take effect as to possession and enjoyment at her death. Though the sons took over complete management and control of the land after receiving the deed, the court insisted that the decedent had done nothing inconsistent with her full right of possession and enjoyment of her interest in the land.

In *In re Schroeder's Estate*,<sup>16</sup> the probate court had the dual task of deciding the nature of the succession to bank deposits and their inclusion in the estate as probate assets. Four accounts were involved. In the first three, certificates were issued to John and Nettie Schroeder, without any rights of survivorship; the fourth account was opened under a deposit contract contained on the signature card which made the entire amount payable to Nettie upon the death of John. The court held that the first three deposits created tenancies in common to which there was a succession to one-half the amount upon the death of John, with one-half going into the estate as probate assets. The fourth account was considered fully taxable to Nettie, in the absence of a showing of any

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<sup>13</sup> *Union Carbide & Carbon Corp. v. Bowers*, 166 Ohio St. 419, 143 N.E.2d 710 (1957). The minority opinion expressed the view that the determinations of the Board were inconsistent in these cases and therefore its decision was unreasonable.

<sup>14</sup> *Boardman Supply Co. v. Bowers*, 145 N.E.2d 543 (Ohio Ct. App. 1956). The guiding principle here is that the exemption applies to all component property when all of the property has a use in the finished product and without each item there could be no finished product.

<sup>15</sup> 138 N.E.2d 321 (Ohio Ct. App. 1956).

<sup>16</sup> 144 N.E.2d 512 (Ohio Prob. 1957).

contribution, and none of it could be placed in the estate as probate assets.

Two cases were concerned with the exemption of a succession to a charitable organization.

In *In re estate of Bremer*,<sup>17</sup> the testator devised a gift to an "institution" of public charity not in existence at the time of testator's death, without limiting the use of its benefits in whole or in substantial part to Ohio. While considering that a bequest to "the corporation to be" was a succession to an "institution" within the meaning of § 5731.09, Ohio Revised Code, the court held the succession taxable for lack of any requirement that substantial benefits be made available in Ohio. When the institution is not in existence at testator's death, the issue of exemption is to be determined solely by the terms of the will creating the succession.

In *In re Seaman's Estate*,<sup>18</sup> a majority of the Supreme Court held that the Salvation Army is an "institution for purposes only of public charity" within the meaning of § 5731.09, Ohio Revised Code. The Court approved prior holdings that charitable purposes include religious purposes and determined that an institution organized for religious and charitable purposes, whose benefits are open and available to the public generally, is exempt.

### Highway Use Taxation — The Axle-mile Tax

The Supreme Court of Ohio in *George F. Alger Co. v. Bowers*<sup>19</sup> decided some very fundamental questions concerning the administration and the basic validity of the axle-mile tax.<sup>20</sup> A Michigan trucker, engaged in interstate commerce, attacked an assessment of this tax before the Board of Tax Appeals which found the assessments reasonable and lawful. The Alger Company attacked the tax act as discriminatory, contending that it bore no reasonable relationship to its purpose. The petitioner also attacked the authority of the Ohio Reciprocity Board to cancel a reciprocal agreement for tax exemption between Ohio and Michigan,

<sup>17</sup> 166 Ohio St. 233, 141 N.E.2d 166 (1957).

<sup>18</sup> 166 Ohio St. 51, 139 N.E.2d 17 (1956). A strong dissenting opinion contended that applying the rule of strict construction against exemptions, the Salvation Army with emphasis on religious purposes could not qualify as an "institution for purposes only of public charity."

In *In re Augustein's Estate*, 140 N.E.2d 569 (Ohio Prob. 1956) in the court considered the date at which a tax became effective for determining the running of interest. Deceased was entitled to an interest in her husband's father's estate, through her husband's estate, but the interest had not been determined at her death (determined in presumptive death proceedings). The accrual date of the succession was determined to be the date on which her husband's interest was finally determined.

<sup>19</sup> 166 Ohio St. 427, 143 N.E.2d 835 (1957).

<sup>20</sup> This tax is imposed by OHIO REV. CODE § 5728.01 ff.

and finally asserted that the tax act required the Reciprocity Board to enter into agreements. The Supreme Court affirmed the decision of the Board. In a per curiam opinion, the court asserted it was discretionary with the legislature to determine that trucks with more than two axles should pay the tax. There was no unreasonableness here nor any discrimination between interstate and intrastate commerce since the same formula applied to each.<sup>21</sup> Furthermore, the court determined that the statute was adequate if it bore a reasonable relationship to the purpose for which created. The Reciprocity Board was held to have statutory authority to cancel the agreement between Ohio and Michigan. Finally, the opinion asserted that the General Assembly did not provide for automatic reciprocity.<sup>22</sup>

### Taxpayers' Remedies

In *Riebold v. Haines*<sup>23</sup> the court decided that a trial court could properly order a refund of overpaid real estate taxes voluntarily paid pursuant to the valuation fixed by the County Auditor and the Board of Revision during the pendency of the appeal from that very valuation.

In *State v. Carney*,<sup>24</sup> the Supreme Court determined a question as to the jurisdiction of the Board of Tax Appeals. The City of Cleveland had filed application for the exemption and remission of the taxes assessed against certain lands because they were public property used for a public purpose. The Board held that it did not have jurisdiction because it could not, on such an application, pass upon the validity of a tax. The Supreme Court reversed the Board's denial of the application for remission, and held that the statute<sup>25</sup> expressly authorized the Board to determine the legality of a tax whenever considering an application for a refund.

In *Carney v. City of Cleveland*,<sup>26</sup> the Supreme Court reiterated a frequently applied rule, that the Supreme Court cannot substitute its judgment for that of the Board of Tax Appeals on factual issues. Its sole function is to determine from an examination of the entire record whether the decision reached by the board was unreasonable or unlawful.

<sup>21</sup> The power to cancel is based upon OHIO REV. CODE § 4503.37.

<sup>22</sup> OHIO REV. CODE § 5728.15, is considered to grant permissive authority. The Court also relies upon a general principle of tax law interpretation: that exemptions from taxation are strictly construed, to determine that the foregoing statute vests discretion in the reciprocity board.

<sup>23</sup> 138 N.E.2d 407 (Ohio Ct. App. 1956). The case is discussed elsewhere, see note 6, *supra*, relative to the requirement that the county auditor personally view and assess real property.

<sup>24</sup> 166 Ohio St. 339, 139 N.E.2d 81 (1956).

<sup>25</sup> This specific jurisdiction is predicated upon OHIO REV. CODE §§ 5703.02, 5715.39.

<sup>26</sup> 167 Ohio St. 22, 145 N.E.2d 664 (1957).