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## Taxation

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## Taxation

### Erratum

Page 429, lines 18-22 should read: "This holding is not inconsistent with the theory of dividend ownership of leased premises developed in *City of Toledo v. Jenkins*<sup>2</sup> and *Carney v. Ohio Turnpike Commission*.<sup>3</sup> The court expressly overruled its decision in *City of Dayton v. Haines*." <sup>4</sup>

transfer of a contribution rate from one employer to another does not ipso facto affect the subsequent rate of the employer whose rate was transferred, and no appeal need be afforded where the employer found to be the predecessor in interest was already at the minimum statutory rate and did not appear to be aggrieved.

EDWIN R. TEPLE

## TAXATION

The most notable developments in Ohio tax law in 1959 were legislative rather than judicial. Changes are especially significant in the area of sales and use taxation. Some of the more important statutory changes are noted in connection with the various subdivisions in this article.

### EXEMPTIONS OF PUBLIC PROPERTY

The supreme court decided several cases construing Ohio Revised Code section 5709.08, which exempts governmental and public property from taxation. In *City of Dayton v. Haines*,<sup>1</sup> the court held that real property owned by the city and leased to the United States for use as a reserve training area was "public property used exclusively for a public purpose" within the meaning of the statute and therefore exempt from taxation. This holding is not inconsistent with the theory of dividend ownership of leased premises developed in *City of Toledo v. Jenkins*<sup>2</sup> and *Carney v. Ohio Turnpike Commission v. Haines*.<sup>4</sup>

Another problem before the supreme court in connection with the application of Ohio Revised Code section 5709.08 concerned the matter of intended, rather than actual, use "for a public purpose."<sup>5</sup> The City of Cleveland acquired certain property for the purpose of expansion of a library. Numerous structural changes were necessary before the building would be ready for actual library use, and on tax-listing day the city had not started the alterations. The court held that a contemplated use constituted a "use" within the purview of the statute. The court acknowledged that a strict construction of the

1. 169 Ohio St. 191, 158 N.E.2d 201 (1959).

2. 143 Ohio St. 141, 54 N.E.2d 656 (1944).

3. 167 Ohio St. 273, 147 N.E.2d 857 (1958).

4. 156 Ohio St. 366, 102 N.E.2d 590 (1951).

5. *Carney v. Cleveland City School Dist. Pub. Library*, 169 Ohio St. 65, 157 N.E.2d 311 (1959). This decision was followed in *City of Cleveland v. Carney*, 169 Ohio St. 259, 158 N.E.2d 895 (1959), a case in which realty was acquired with the intention of using it as an incinerator site.

exemption statutes would require a different conclusion, but stated that strict construction must be tempered with reason and since "the sole legitimate purpose of taxation is to benefit the public, to tax property already devoted to public use would be merely to divert funds from one public benefit to another."<sup>6</sup> The present case, in effect, extends the rule promulgated under similar statutes, that property being converted to public use in which construction has commenced is exempt,<sup>7</sup> to a situation in which the realty has merely been acquired for an anticipated public use.

### PERSONAL PROPERTY

Several notable cases reached the supreme court in connection with personal property taxes during 1959. Ohio Revised Code section 5711.22 provides that personal property shall be listed and assessed at seventy per cent of its true value, except for certain personal property used in business, which is to be listed and assessed at fifty per cent of its true value. Although this statute was changed in some respects in 1959, the provisions applicable to the following decisions remain unchanged. In one case,<sup>8</sup> an appeal from a decision of the Board of Tax Appeals, the owner of a commercial greenhouse contended that benches, ground beds, fertilizers, water hoses, cultivators, wheelbarrows, and similar equipment should be listed at fifty per cent because the property represented "engines, machinery, tools, and implements" either "of a manufacturer" or "used in agriculture" within the meaning of those words as used in the statute. The judges being equally divided as to the merits of the case (one judge not participating), the decision of the Board of Tax Appeals was affirmed.

A second case concerned the assessment of intangible tax upon income-producing shares of stock where there was a difference in the amounts of dividends paid on various shares of stock having the same market value on tax-listing day.<sup>9</sup> This novel question arose because the appellees owned shares of General Container Corporation, and, by agreement with the St. Regis Paper Company (not pursuant to corporate action by General Container), the shares of General Container were exchanged for shares of St. Regis. Prior to the exchange St. Regis paid \$1.35 per share in dividends. After the exchange St. Regis paid an additional forty-five cents per share dividend to all shareholders of common stock. On January 1, 1956, the taxpayers listed their shares of St. Regis as having an income yield of forty-

6. *Carney v. Cleveland City School Dist. Pub. Library*, 169 Ohio St. 65, 67, 157 N.E.2d 311, 313 (1959).

7. *In re Application of Magnetic Springs Foundation*, 165 Ohio St. 180, 134 N.E.2d 152 (1956); *Good Samaritan Hosp. Ass'n v. Glander*, 155 Ohio St. 507, 99 N.E.2d 473 (1951); *Board of Educ. v. Board of Tax Appeals*, 149 Ohio St. 564, 80 N.E.2d 156 (1948).

8. *Yoder Bros., Inc. v. Bowers*, 169 Ohio St. 211, 158 N.E.2d 518 (1959).

9. *Pickering v. Bowers*, 168 Ohio St. 569, 156 N.E.2d 820 (1959).

five cents per share for the year 1955. The Tax Commissioner, upon petition for redetermination, assessed taxes upon the shares on the basis of an income yield of \$1.80 per share, that being the total of dividends paid on St. Regis shares outstanding during the year. The Tax Commissioner's theory was that since \$1.80 was paid on stock which had been outstanding during the whole year and since the intangible tax is a property tax and not an income tax, \$1.80 per share was the income yield<sup>10</sup> as to the taxpayer. However, the Ohio Supreme Court upheld the taxpayers' contention (affirming the decision of the Board of Tax Appeals), stating that the measure for the assessment of intangible tax is dependent upon the dividends paid during the year on the specific shares of stock.

It might be noted that Ohio Revised Code section 5711.22 was amended during 1959<sup>11</sup> and the provision requiring investments that have not yielded any income during the calendar year to be listed and assessed as unproductive investments at their true monetary value on tax-listing day, has been enlarged by including investments that have not been outstanding for the full calendar year next preceding tax-listing day.

In another case, the Board of Tax Appeals, reversing an order of the Tax Commissioner, held that an installation charge for bowling alley equipment, which charge was not refundable in the event that the lease was terminated, constituted a deferred charge and was not subject to taxation as tangible personal property.<sup>12</sup> Under the terms of the lease the taxpayer paid \$500 installation charges for each "pin-spotter." The total amount was not treated on the taxpayer's books as an asset and the amount was being written off at the rate of ten per cent per year for Federal Income Tax purposes. Perhaps the most significant fact was that the lessor paid the personal property tax which was subsequently invoiced to the lessee.

A number of appeals from the Board of Tax Appeals which were disposed of by the supreme court<sup>13</sup> involved the application of Ohio Revised Code section 5701.08 to stored materials and merchandise. Since there has been a major revision in this code section, a detailed discussion of these decisions is unwarranted.

### SALES AND USE TAXATION

Numerous legislative changes were made in chapter 5739 of the Ohio Revised Code. Some of the more significant changes are as follows: The definition of "person" in Ohio Revised Code sections

10. The phrase "income yield" is defined in OHIO REV. CODE § 5701.10 as being "the aggregate amount paid as income by the obligor, trustee, or other source of payment to the owner or holder of an investment, whether including the taxpayer or not . . ."

11. OHIO REV. CODE § 5711.22 (Supp. 1959).

12. *Stone Bowling Co. v. Bowers*, 160 N.E.2d 751 (Ohio Bd. Tax App. 1958).

13. *American Can Co. v. Bowers*, 169 Ohio St. 81, 157 N.E.2d 340 (1959).

5739.01<sup>14</sup> and 5741.01<sup>15</sup> has been amended to include receivers, assignees, trustees in bankruptcy, estates, joint ventures, clubs, and societies; Ohio Revised Code section 5739.01<sup>16</sup> has been amended to include taxation of transactions by which printed, lithographic, multi-lithic, photostatic, or other productions or reproductions of written matter are furnished or transferred, and transactions by which lodgings are furnished by a hotel to transient guests who are occupying sleeping accommodations for not more than thirty days; Ohio Revised Code section 5739.02<sup>17</sup> exempts from taxation building materials sold to construction contractors for incorporation into a structure under a construction contract with the state or a political subdivision thereof, or for incorporation into a house of public worship or religious education, or a building used exclusively for charitable purposes; and, Ohio Revised Code section 5739.01<sup>18</sup> has been amended so that a construction contract, pursuant to which tangible personal property is incorporated into a structure or improvement so as to become a part of the real property, is excluded from the definition of a "sale" where the construction contractor is the consumer of the personal property.

The last legislative change mentioned above would seem to nullify the supreme court's decision in *Marietta Concrete Corporation v. Bowers*,<sup>19</sup> where concrete panels were sold and incorporated into a building under a contract in which the consideration for the panels was agreed upon separately from the consideration of installation.

In another supreme court decision<sup>20</sup> involving the interpretation of Ohio Revised Code section 5739.01, it was held that where an individual was the sole owner and operator of a motor transportation business holding certificates issued by the PUCO and the ICC in his own name, and he transferred all his motor equipment to a corporation in which he was sole stockholder, which transfer was subsequently approved, the fact that the individual used equipment in a public utility service for a time after the sale but before approval of transfers did not deprive the sale of its exempted status under the provision exempting equipment to be used directly in the rendition of a public utility service. In a somewhat related case,<sup>21</sup> the supreme court held that a purchaser of a truck, who entered into a lease with a public utility company whereby the truck was to be used exclusively in the rendition of public utility service, was entitled to a certificate of

14. OHIO REV. CODE § 5739.01 (Supp. 1959).

15. OHIO REV. CODE § 5741.01 (Supp. 1959).

16. OHIO REV. CODE § 5739.01 (Supp. 1959).

17. OHIO REV. CODE § 5739.02(B)(14) (Supp. 1959).

18. OHIO REV. CODE § 5739.01 (Supp. 1959).

19. 168 Ohio St. 510, 156 N.E.2d 312 (1959).

20. *Victory Express Inc. v. Bowers*, 169 Ohio St. 227, 158 N.E.2d 514 (1959).

21. *State ex rel. Paul Stutler, Inc. v. Yacobucci*, 169 Ohio St. 20, 157 N.E.2d 357 (1959).

title without payment of a sales or use tax. The court stressed the fact that it is the use of the thing rather than the character of the user that is determinative of tax exemption, and noted that Ohio Revised Code sections 5741.01(C)(1) and (2) excluded from the definition of "use" a thing consumed directly in the rendition of a public utility service. This code provision was amended in 1959<sup>22</sup> and no longer contains this exclusion.

In *Union Building & Construction Corporation v. Bowers*,<sup>23</sup> an appellate court held that where a parent corporation, which was engaged in the business of highway construction, had a wholly owned subsidiary holding title to construction machinery and equipment, and which subsidiary "rented" such items to the parent corporation, such rentals were subject to use tax. The corporations in question were both foreign corporations and had the same board of directors and officers. At the time of transfer of equipment there was no payment of money. The subsidiary entered on a memorandum of account a debit against the parent for the "rental" and the parent entered a credit to the subsidiary. The above memoranda were records kept in the ordinary course of business by both companies and the entries were not entered on the books of the companies. Subsequently, the subsidiary cancelled the rental charges. The principal argument of the appellant was that since the equipment corporation was a wholly owned subsidiary there was but a single corporation and, hence, no tax due. The court, relying on the decision in *Rochez Brothers, Incorporated v. Bowers*,<sup>24</sup> affirmed the decision of the Board of Tax Appeals and held that the transaction was taxable.

An interesting question was raised in *DeVille Photography, Incorporated v. Bowers*<sup>25</sup> as to the time a taxpayer becomes obligated to pay sales taxes. The appellant sold portraits under contracts calling for payment in installments, and required the purchasers to execute promissory notes. It was the custom of the appellant to refrain from completing the portraits until the contract price was paid. Appellant argued that the sales tax was not due until the price was paid or the property transferred. However, the court held that under Ohio Revised Code section 5739.01(H), the "sale" occurred "upon the assumption of . . . mutual obligations."<sup>26</sup>

### INHERITANCE TAXATION

Although there were no particularly significant decisions handed down in this area during the past year, several statutory amendments

22. OHIO REV. CODE § 5741.01(C) (Supp. 1959).

23. 158 N.E.2d 386 (Ohio Ct. App. 1958). See also discussion in *Corporations* section, p. 364 *supra*.

24. 166 Ohio St. 396, 143 N.E.2d 123 (1957).

25. 169 Ohio St. 267, 159 N.E.2d 443 (1959).

26. *Id.* at 275, 159 N.E.2d at 448.