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TAXATION, DEP'T OF—OHIO TANGIBLE PERSONAL PROPERTY TAX—TAX ON SUCH PROPERTY ON *AD VALOREM* BASIS—NOT APPLICABLE TO PROPERTY, TITLE TO WHICH IS IN THE UNITED STATES.

SYLLABUS:

The Ohio property tax levied under the present provisions of Title 57 of the Revised Code on tangible personal property which is used in business is neither a possessory nor a privilege tax but an *ad valorem* tax on such property and such tax is not applicable to property possessed by a person doing business in Ohio which property is titled in the United States under the provisions of a contract with the Federal Government.

Columbus, Ohio, July 30, 1958

Hon. Stanley J. Bowers, Tax Commissioner of Ohio
Department of Taxation, Columbus, Ohio

Dear Sir:

Your request for my opinion reads as follows:

> "Under date of March 3, 1958, the Supreme Court of The United States issued its decision with respect to the case of City of Detroit v. The Murray Corporation of America wherein the Court upheld taxes assessed by the City of Detroit and the County of Wayne, Michigan, against Murray which in part were based on the value of materials and work in process in its possession to which the United States held legal title under the title-vesting provisions of the sub-contract.
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> "Inasmuch as the taxes imposed on Murray were styled a personal property tax by the Michigan statutes, we respectfully request your opinion as to whether or not this Department could assess personal property in the possession of private corporations doing business in Ohio under the terms of similar contracts with the United States under the present provisions of Title 57 of the Revised Code."

The majority opinion in the case of *City of Detroit* v. *The Murray Corporation of America,* 355 U. S., 489, held that the Michigan and Detroit statutory provisions imposed a tax upon the privilege of possessing or using the personal property involved rather than an *ad valorem* tax upon the property. The contract between Murray and the Federal Government contained a title-vesting clause which provided that:

> "* * * upon the making of any partial payments to Murray under the subcontracts 'title to all parts, materials, inventories, work in process and nondurable tools theretofore (and thereafter, upon acquisition) acquired or produced by the (sub)contractor for the performance of (the) contract(s), and properly chargeable thereto . . . shall forthwith vest in the Government.' * * *"

The crux of the majority opinion reads as follows:

> "* * * As applied—and of course that is the way they must be judged—the taxes involved here imposed a levy on a private party possessing government property which it was using or processing in the course of its own business. It is not disputed that Michigan law authorizes the taxation of the party in possession under such circumstances. * * *"

Title VI, Chapter IV, Sections 1 and 7, of the Charter of the City of Detroit provided, *inter alia:*

> "The owners or persons in possession of any personal property shall pay all taxes assessed thereon. * * * In case any person by agreement or otherwise ought to pay such tax, or any part thereof, the person in possession who shall pay the same may recover the amount from the person who ought to have paid the same * * *"

If the Ohio personal property tax law can properly be characterized as a possessory or privilege tax, then it would seem to follow that your department could assess personal property in the possession of private corporations doing business in Ohio under contracts with the United States Government similar to that involved in the *Murray* case. On the other hand, if the Ohio tax can only correctly be described as an *ad valorem* tax upon the property itself, then it follows that there would be no authority for assessing such property.

In 1859, the General Assembly enacted the following statute:

> "Section 1. * * * all property, whether real or personal, in this state * * * except such property as is hereinafter expressly exempted, shall be subject to taxation; * * *" (56 Ohio Laws, 175, Section 2731, Revised Statutes).

The pertinent provisions of this enactment remained substantially unchanged until 1931. In that year the legislature amended the law to provide for the taxation of tangible personal property only when used in business in Ohio.

Section 5709.01, Revised Code, the present provision, reads in part as follows:

> "All real property in this state is subject to taxation, except only such as is expressly exempted therefrom. All personal property located and used in business in this state * * * are (is) subject to taxation, regardless of the residence of the owners thereof. * * * All property mentioned as taxable in this section shall be entered on the general tax list and duplicate of taxable property."

Section 5711.18, Revised Code, provides that personal property be listed at its true value in money. These two sections clearly demonstrate that it is the property which is taxed and that it is taxed according to value. Moreover, this is re-emphasized in other provisions.

Section 5705.03, Revised Code, provides in pertinent part:

> "The taxing authority of each subdivision may levy taxes annually * * * *on the real and personal property* within the subdivision * * * *All taxes levied on the property* shall be extended on the tax duplicate by the county auditor of the county in which the property is located * * *" (Emphasis added.)

Section 5719.01, Revised Code, which establishes a lien for taxes, provides in part:

> "* * * All personal property subject to taxation shall be liable to be seized and sold for taxes. * * *"

Section 5711.05, Revised Code, relating to listing, provides that:

> "*Each person shall return all the taxable propery of which he is the owner,* except property required by this section or the regulations of the tax commissioner to be returned *for him* by a fiduciary; * * *" (Emphasis added.)

The listing requirements are consistent with the statutory provision defining "taxpayer." That provision, Section 5711.01, Revised Code, states that:

> " 'Taxpayer' means any owner of taxable property and includes every person residing in, or incorporated or organized by or under the laws of this state, or doing business in this state, or owning or having a beneficial interest in taxable personal property in this state and every fiduciary required by sections 5711.01 to 5711.41, inclusive, of the Revised Code to make a return for or on behalf of another. * * *"

It will be observed that the procedural provisions of the personal property tax law follow the pattern of the substantive provisions relating to the subject matter of the tax, *i. e.,* the property itself. That the owner of the property is ultimately the person upon whom the tax falls, regardless of whether it is listed *by* or *for* him, is established by Section 5719.14, Revised Code, which provides in part:

> "A person against whom taxes, except those levied upon real estate, are assessed as fiduciary for another person * * * shall, upon payment of such taxes, have a claim against such person * * * for reimbursement of the taxes paid, with legal interest, and a lien upon all funds and property of such person * * * in his possession or which come into his possession. * * *"

That the Ohio statutes impose an advalorem property tax rather than a privilege tax appears so clear that, so far as I can find, such an issue

has never been directly raised or adjudicated in our Supreme Court in a case involving tangible personal property. However, the Ohio tax upon intangible personal property has been on several occasions characterized as an ad valorem property tax. The Supreme Court of Ohio in the case of *Bennett, et al.,* v. *Evatt,* 145 Ohio St., 587 (1945), stated:

> "The Constitution of Ohio * * * provides for the taxation of property, and authorizes the General Assembly to 'determine the subjects and methods of taxation or exemptions therefrom,' * * *
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> "Concededly a tax based on the income yield of intangible property is not an income tax, an excise tax or a franchise tax. It necessarily is *a tax upon property,* and authority for this tax must be found in Section 2 of Article XII.
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> "The word 'subjects,' as used in the constitutional provision, connotes and includes all kinds and classes of property upon which a tax may be imposed. 'Methods' means the manner of the assessment or imposition of the tax. The tax in question here is clearly authorized, and the method adopted is the application of a 'yardstick of value' in that the amount of income realized from an investment is a potent if not a controlling factor in fixing the value of the stock * * *
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> "The conclusion seems inescapable that the assessment of a tax upon intangible property under these statutes is made according to value." (Emphasis added.)

The Supreme Court of the United States in commenting upon the Ohio intangible personal property tax in *Wheeling Steel Corp.* v. *Glander,* 337 U.S., 562 (1949), stated, at page 572:

> "* * * Ohio holds this tax on intangibles to be an *ad valorem* property tax, *Bennett* v. *Evatt,* 145 Ohio St., 587, 62 N.E. 2d 345, and in no sense a franchise, *privilege,* occupation or income tax." (Emphasis added.)

At page 218 of the opinion in *Smilack* v. *Bowers,* 167 Ohio St., 216 (1958), the following language appears:

> "As a preliminary observation, it is important to note that the taxes levied on intangible property defined in Sections 5707.03 and 5707.04, Revised Code, inclusive of investments, are *not* taxes levied on income or income yield but are taxes levied directly on the kinds of property designated *at a rate based on income yield.* Plainly, the tax is one on the property itself and not on income as such."

The probelm of taxation of property utilized by a company in connection with the performance of a government contract has been previously subject to judicial interpretation in this state. In the case of *Herring Hall Marvin Safe Company* v. *Evatt,* 32, O.O., 555 (BTA 1945), there was involved a contract between a manufacturer and the Navy Department. That contract contained a provision vesting title in the Government upon final inspection and delivery of the completed items. A tax was assessed upon the property in the possession of the manufacturer prior to delivery of the property to the Government. The Board of Tax Appeals, in passing upon this problem, observed that the determination turned upon the issue of who owned the property at the time of the assessment. The Board then observed, at page 559, of the opinion:

> "* * * When the government has desired to have title to property vested in it upon delivery to its contractors it so provided in its contracts. There is no such provision in this contract."

Thus the tax was upheld by the Board upon a finding that the manufacturer had not divested itself of the ownership of the property.

In *Wright Aeronautical Corp.* v. *Glander,* 151 Ohio St., 29 (1949), a situation very similar to the one presented in your request was involved. Under the terms of the contract between Wright and the Government, upon partial payment title to the property in the possession of Wright vested in the Government. In filing its personal property tax returns for the years in question, the corporation included the value of the tangible personal property titled in the Government, of which it has possession, but neglected to make an application for adjustment on the basis that such property was owned by the Government. Thus the matter was presented to the Supreme Court essentially as a problm of procedure. As stated by Judge Stewart, at page 44, of the opinion:

> "In two cases which are not in the briefs of either party in the present case, no taxes were finally assessed on goods claimed to belong to the government under contracts similar to the ones involved herein. Those cases are *Craig, Tax Collector,* v. *Ingalls Shipbuilding Corp.,* 192 Miss., 254, 5 So. (2d), 676, and *Douglas Aircraft Co., Inc.,* v. *Byram, Tax Collector,* 57 Cal. App. (2d), 311, 134 P. (2d), 15.
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> "In both those cases, however, the assessments of taxes against those who had construction contracts with the government were disputed from the start, and no returns of claimed government owned property were ever made by the contractors.

> In the present case, if Wright had omitted from its return the property which it now claims belonged to the government, or had filed a '902 claim' with its return, a different question would be presented to us."

The inference to be drawn from the court's opinion is that if the correct procedural steps had been taken by the taxpayer no problem would have been presented as to exemption of the property owned by the Government.

Accordingly, and in specific answer to your inquiry, it is my opinion that the Ohio property tax levied under the present provisions of Title 57 of the Revised Code on tangible presonal property which is used in business is neither a possessory nor a privilege tax but an *ad valorem* tax on such property and such tax is not applicable to property possessed by a person doing business in Ohio which property is titled in the United States under the provisions of a contract with the Federal Government.

Respectfully,
WILLIAM SAXBE
Attorney General