

OPINION NO. 74-047

Syllabus:

1. Where a building has been omitted from the real property tax duplicate in a county having no certified building department, R.C. 5713.17 requires that the county auditor shall, upon discovery of the omission, place it upon the duplicate for all the years from the date of completion of the building to the date of discovery of the omission, plus a fifty percent tax penalty for each year.

2. Under R.C. 5719.01 the county auditor can apportion real property taxes only between the seller and the purchaser of a portion of a single tract. Where an entire tract is sold the law leaves the matter of apportionment of the taxes to an agreement between the parties.

To: Norman P. Smith, Shelby County Pros. Atty., Sidney, Ohio
By: William J. Brown, Attorney General, June 3, 1974

Your request for my opinion states the facts and poses the question in the following language:

"This office requests your opinion on the following question: 'May a county auditor, subsequent to a mid-year change of ownership in a parcel of property and following a discovery that a building had been omitted from the list of real property, add that building to the list, charge the taxes for the entire year or must the county auditor pro-rate the taxes chargeable since the last change of ownership?'

"We submit to you the following facts:

"In 1969, an incorporated trucking company doing business in Sidney, Ohio, Shelby County, owned a parcel of real estate in Shelby County, Ohio. It erected a building on the premises but said building for some unexplained reason, not violate of any criminal statute, was omitted from the tax list and continued to be omitted from the tax list. On July 20, 1972, the incorporated trucking company transferred the property to another corporation not engaged in trucking or transportation business for valuable consideration, the second corporation being a bona fide purchaser.

"The controlling section of law is Section 5713.20 of the Ohio Revised Code, which provides as follows:

"If the County Auditor discovers that any building, structure, or tract of land or any lot or part of either, has been omitted from the list of real property, he shall add it to the list, with the name of the owner, and ascertain the taxable value thereof and place

it opposite such property. In such case he shall add to the taxes of the current year, the simple taxes of every preceding year in which such property has escaped taxation, not exceeding five years, unless in the meantime the property has changed ownership, in which case only the taxes chargeable since the last change of ownership shall be added; or the owner thereof, if he desires, may pay the amount of such taxes into the County Treasurer on the order of the Auditor.'

"Under said section there appears to be no question that the county auditor may not go back and add taxes for the years 1970 and 1971. Section 5719.01 of the Ohio Revised Code provides in part as follows:

"The lien on the state for taxes levied for all purposes on the real and public utility tax list and duplicate for the year 1954 and each year thereafter, shall attach to all real property subject to such taxes on the 1st day of January, annually, and continue until such taxes and any penalties, interest, or other charges accruing thereon are paid . . .

"During the year 1973, by addition order, the county added to the tax list, the building of a total value of \$101,730.00 and assessed taxes in the amount of \$3,817.93 for the tax year 1972. As you know, 1972 taxes are collected in 1973. The addition order was sent to the trucking company, who owned the property as of January 1, 1972. The taxes have been paid by the bona fide purchaser, however, in light of Section 5719.01 of the Ohio Revised Code, a serious question has been raised as to the interpretation of Section 5713.20 and the right of the county auditor to assess for the entire year of 1972, rather than pro-rate the amount of taxes from the last change of ownership."

As I understand the situation, the trucking company owned land in an unincorporated portion of Shelby County upon which it constructed a building in 1969. On July 20, 1972, the trucking company sold the land and the building to another corporation which is not engaged in the trucking business. Sometime thereafter the county auditor discovered that the new building had never been included on the general tax list of real property. In 1973 the auditor added the building to the list, with a valuation of \$101,730.00, and he sent the bill for the additional 1972 taxes to the trucking company in whose name the property stood on January 1, 1972. The bill has been paid by the purchaser corporation. Apparently the trucking company never gave notice to the auditor in 1969 that the building had been completed or was in process of construction. If Shelby County had had a building department, certified by the state Board of Building Standards to enforce state building regulations, the auditor could have obtained information as to the new construction from its records. See R.C. 3781.10(E). I am, however, informed by the Board of Building Standards that Shelby County has no such certified department.

Since we are concerned here with a remedial procedure, relating to the manner in which omissions from the general tax list are to be supplied, the statutes should be construed liberally in favor of the taxing authority. Heuck v. Cincinnati Model Homes Co., 130 Ohio St. 378, 381-383 (1936). We must, therefore, seek such an interpretation as will enable the county auditor to effectively charge the taxes to the omitted property. Under the circumstances I think that the controlling statute is, not R.C. 5713.20 to which you have referred, but R.C. 5713.17 which provides, in pertinent part, as follows:

"To enable the county auditor to determine the value and location of buildings * * *, every individual, partnership, incorporated company, or otherwise, * * * who erects or constructs any building * * * upon any lot or land within any township or municipal corporation not having a system of building registration and inspection shall within sixty days after said building * * * has been commenced notify the county auditor * * * that said building * * * has been completed or is in process of construction. * * *

"Upon failure to give notice as provided in this section * * *, the county auditor, upon discovery of such building * * * after the same has been erected or constructed, shall appraise it and place it on the duplicate, at its taxable value, together with a tax penalty of fifty percent for each of the years from the date of the erection or construction to the date of discovery."

This statute, first enacted in 1919 as Section 5564 of the General Code, 108 Ohio Laws, 606-607, remains today substantially in its original form. It was enacted to cure a loophole in earlier legislation which, for some years, left the county auditor without authority to assess back taxes on buildings which had been improperly omitted from the real estate tax list. For tax purposes, "real property" has always been defined to include the land and all buildings thereon, unless otherwise specified in the law. R.C. 5701.02. Prior to 1915 the county auditor had authority to assess back taxes against both the land and the buildings whenever he discovered that either or both had been omitted from the real property tax duplicate. This appeared in G.C. 5574 which was in all essential aspects the same as R.C. 5713.20 to which you have referred. See Opinion No. 3013, Opinions of the Attorney General for 1922, p. 309. In 1915 the legislature enacted a general revision of the laws on taxation of real and personal property. 106 Ohio Laws, 246-272, 433-434. Because of defects not here material, the Supreme Court held certain essential sections of this new act to be unconstitutional. State, ex rel. Godfrey v. O'Brien, 95 Ohio St. 166 (1917). Within three months the General Assembly pushed through emergency legislation to remedy the defects. 107 Ohio Laws, 29-46. In doing so it repealed G.C. 5574 (107 Ohio Laws, 45) and separated the treatment of the land from the treatment of the buildings. The addition of back taxes was still prescribed for land discovered to have been omitted from the duplicate. G.C. 5573, 107 Ohio Laws, 34. But no such provision was made for omitted buildings. G.C. 5564, 5576; 107 Ohio Laws,

34. Within a short time action was taken to close the loophole. In 1919, as has already been noted, the General Assembly, by an amendment of G.C. 5564 (108 Ohio Laws, 606-607), enacted what is now R.C. 5713.17, requiring that the county auditor be notified of the commencement of construction of buildings in counties not having a certified building department with records of building permits. In 1922, the then Attorney General was asked whether the county auditor has authority under the law to assess back taxes for a building which had been omitted from the real property duplicate for some years. My predecessor recited the history which has just been set out, except for the last step - the amendment of G.C. 5564, and concluded that the auditor had no such authority as to buildings. Opinion No. 3013, Opinions of the Attorney General for 1922. When his attention was directed to G.C. 5564, he responded that the auditor's authority under that statute was strictly limited to those counties not having a system of building registration. Opinion No. 3738, Opinions of the Attorney General for 1922. Early in 1923 the General Assembly finally closed the loophole completely by amending G.C. 5573, now R.C. 5713.20, to include buildings as well as land, thus restoring to the auditor all the authority he had enjoyed prior to the repeal of G.C. 5574 in 1916. 110 Ohio Laws, 59. There is nothing in this last act, however, to indicate any intention to repeal the special authority previously granted county auditors in what is now R.C. 5713.17.

In the light of the foregoing my conclusion is that, since Shelby County has no certified building department, R.C. 5713.17 is the controlling statute here instead of R.C. 5713.20. The former does not, as does the latter, contain any limitation, based on an intervening change of ownership, on the number of omitted years to be included in the addition notice. It provides that all years, "from the date of the erection or construction to the date of discovery", shall be placed on the duplicate, plus a fifty percent tax penalty for each year. This was the conclusion of my predecessor in Opinion No. 3738, *supra*. The addition order here should, therefore, be for 1970, 1971 and 1972, and perhaps also for 1969.

The question remains whether the additional taxes and penalties should be prorated between the seller and the purchaser because of the change of ownership in 1972. The liability for real estate taxes, resting on the state's lien upon the property, generally follows the ownership of the property. R.C. 5719.01; *Bank & Trust Co. v. Bolce*, 165 Ohio St. 201, 208 (1956); *Howard v. Realty Co.*, 200 Ohio App. 2d 191, 193-194 (1969). In order to be able to record his title, the purchaser is required by R.C. 319.20 to present proof to the auditor, and thereupon,

"* * * the county auditor shall transfer
any land or town lot or part thereof * * *
charged with taxes on the tax list, from the
name in which it stands into the name of the
owner * * *

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(Emphasis added.)

As you point out, there is a provision in R.C. 5719.01 for apportionment of the taxes between seller and purchaser in certain circumstances. That Section provides in pertinent part:

"The lien of the state for taxes levied for all purposes on the real and public utility tax list and duplicate for the year 1954 and each year thereafter shall attach to all real property subject to such taxes on the first day of January, annually, and continue until such taxes and any penalties, interest, or other charges accruing thereon are paid, but taxes, assessments, penalties, interest, or other charges may be apportioned in case of transfer of a part of any tract or lot of real estate, in which case the lien of such taxes, special assessments, penalties, interest, or other charges shall extend to the transferred part and the remaining part only to the extent of the amounts allocated to such respective parts. * * *"

(Emphasis added.)

It is clear that this apportionment is to take place only between owners of portions of a single tract, divided subsequent to the attachment of the lien for taxes on January 1. The real property tax can, of course, be apportioned by private contract between the seller and the purchaser of an entire tract. But the law does not provide for such an apportionment, absent an agreement between the parties. I conclude, therefore, that apportionment in the case presented by your request is a matter for the parties and not for the taxing authorities. Opinion No. 66-089, Opinions of the Attorney General for 1966; Opinion No. 3453, Opinions of the Attorney General for 1938.

In specific answer to your request it is my opinion, and you are so advised, that:

1. Where a building has been omitted from the real property tax duplicate in a county having no certified building department, R.C. 5713.17 requires that the county auditor shall, upon discovery of the omission, place it upon the duplicate for all the years from the date of completion of the building to the date of discovery of the omission, plus a fifty percent tax penalty for each year.

2. Under R.C. 5719.01 the county auditor can apportion real property taxes only between the seller and the purchaser of a portion of a single tract. Where an entire tract is sold the law leaves the matter of apportionment of the taxes to an agreement between the parties.