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EDUCATION—TRANSFER OF TERRITORY—TAX LIEN DATE —§ 5705.34 RC—DISCUSSION OF TRANSFER AND APPLICATION OF TAX LIEN DATE.

SYLLABUS:

The effect of the transfer, after tax lien date, of school district territory on the authority of the receiving school district to levy a tax on the real property in such territory by action in the current year under Section 5705.34, Revised Code, discussed.

Columbus, Ohio, December 20, 1957

Hon. Edward E. Holt, Superintendent of Public Instruction
Department of Education, Columbus, Ohio

Dear Sir:

I have before me your request for my opinion reading as follows:

"I have been directed by the State Board of Education to secure your opinion in answer to the following question:

"Where the State Board of Education has under consideration the question of determining, pursuant to Section 3311.06 of the Revised Code, whether or not certain territory that has been annexed to a city shall become a part of the said city school district, what would be the effect of delaying such determination to a date subsequent to January 1, 1958, in view of the fact that January 1 is tax lien date?"

Section 5719.01, Revised Code, in so far as pertinent, reads as follows:

"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 penalities, interest, or other charges accruing thereon are paid, * * *"

Prior to the amendment of that section, effective October 10, 1953, the date fixed for the attachment of the tax lien was the day preceding the second Monday in April.

Section 5705.03, Revised Code, authorizes each taxing subdivision, which includes school districts other than county districts, to levy taxes annually to pay "current operating expenses".

The procedure by which the rate of the tax to be levied in any year against real estate is to be determined, as well as the process of making the levy, is set forth in Chapter 5705., Revised Code, and briefly stated, begins with the preparation by each taxing subdivision of a budget showing an estimate of its contemplated revenue and expenditures for the ensuing fiscal year. This budget is to be presented to the county auditor on or before July 20, and by the auditor sent to the budget commission. Following review by the budget commission its action is certified to the subdivisions concerned, together with an estimate by the auditor of the rate of each tax necessary to be levied by each taxing subdivision. The subdivisions are then required by ordinance or resolution to levy the tax and certify to the county auditor the levy so made on or before October 1, or at such later date as may be approved by the Board of Tax Appeals. Section 5705.34, Revised Code. It is this levy that is extended upon the general tax list and duplicate by the county auditor, and by him certified to the county treasurer for collection. Sections 319.28 and 319.30, Revised Code.

I have outlined this procedure only to show that the process of arriving at the tax that is to be assessed, and levying the same on the real estate which forms part of the area of a school district, has been going for most of the year preceding the time when it will be collected and made available for expenditure.

It will be noted that the lien of the tax is to attach to the land long prior to the levy and collection of the same, and that the lien is reserved to the *state,* obviously for the benefit of the subdivisions which will ultimately be entitled to receive the proceeds of the tax.

The tax lien has for its only purpose the creation of a security in favor of the state and the subdivisions for which it acts, and against the property owner for the payment of the tax. As between parties to a sale of real estate, the existence of this tax lien may have an important meaning. As to taxing subdivisions in whose territory certain lands are located, and over which control may change, it appears to me to have no meaning whatsoever, except as it constitutes security for the payment of

the taxes. Even as to that, the day of the year when the lien is to attach seems inconsequential, since the lien is, by the terms of the law, continuing and uninterrupted.

In Opinion No. 7420, Opinions of the Attorney General for 1956, page 805, my immediate predecessor had occasion to consider the respective rights of school districts to receive taxes levied prior to the transfer of school territory, and held:

> "3. Where territory is transferred from one school district to another district subsequent to the authorization by resolution of a levy of taxes upon the real property in said territory by the board of education of the district as theretofore constituted, the proceeds of such levy of taxes should be paid, as provided by law, to the board of education which authorized such levy.
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> "4. Where territory is transferred from one school district to another or a new school district created from territory in another district, the distribution of funds and indebtedness between the affected school districts is within the discretion of the county board of education as provided in Sections 3311.22 and 3311.26, Revised Code, but the proceeds of tax levies not then in possession of the previously existing boards of education for such districts do not constitute 'funds' of the districts and are not subject to division under such sections. The circumstance that such proceeds will be paid in the future to the district which authorized such levies by resolution are provided in Section 5705.34, Revised Code, may be accorded such weight as the county board of education may deem proper in arriving at its distribution of such funds and indebtedness of the districts as are properly the subject of division. Opinion No. 3409, Opinions of the Attorney General for 1954, page 16, approved and followed."

In the course of the opinion, after outlining the steps leading up to the levy and collection of taxes, it was said:

> "The problem presented by the instant request is the interjection of a change in the territory included within a taxing unit into this statutory scheme for assessment and levy of taxes on real property for the current year. The problem is therefore one of determining the time at which taxes on real property are levied, or the time at which the tax authority has finally exercised its authority as to the levy of taxes upon real property in the taxing unit. *Although Section 5719.01, Revised Code, provides for the attaching of the lien for real property taxes as of January 1, of each year, this date is not significant in the actual procedure for the levy of taxes, or the time when such taxes are levied.* See State ex rel., v. Roose, 90 Ohio St., 345; City of Cincinnati v. Roettker, 41 Ohio App., 269." (Emphasis added)

The fact that in a transfer of territory made pursuant to Section 3311.06, Revised Code, the "equitable division of the funds and indebtedness between the districts involved shall be made under the supervision of the state board of education," instead of by the county board of education, as in the case considered in the opinion just referred to, is not sufficient to distinguish that case from that here under consideration.

Your attention is invited also to Cincinnati v. Roettker, 41 Ohio App. 269, the headnotes in which are as follows:

> "1. Though tax lien on property annexed to city attaches on day before second Monday of April, amount of tax later ascertained according to municipal rate is collectable (Sections 5625-20 and 5625-25, General Code).
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> "2. Levy of tax at municipal rate on property annexed to city after lien attached held not denial of due process or equal protection (Article XIV, Section 1, Amendments U. S. Constitution; Sections 5625-20 and 5625-25, General Code).

In this case the annexation was effected on June 4, 1930, and the county auditor proceeded to apply the municipal levy against the property involved. The owner raised questions of due process and equal protection under Section 1, Article XIV, U. S. Constitution, but raised no question under the laws or Constitution of Ohio. On this latter point the court nevertheless observed, p. 271:

> " ** * The petition makes no claim that the tax levy offends against the laws of Ohio. Plaintiff could not successfully do so, since the question has been heretofore determined by the court, establishing the right to levy the municipal tax upon annexed property. * * *"

I find no report of such a ruling and so conclude that it was possibly made at an earlier stage of the same suit.

As to the point with which we are here concerned the court observed, p. 274:

> "* * * Thus is the law of Ohio established that, notwithstanding the lien attaches on the property on the day preceding the second Monday of April, the amount of the tax, later ascertained by proceedings under the law, based on the tax rate of the municipality to which the property has been annexed, is collectable upon the annexed property. The lien is to secure payment of taxes to be later ascertained and assessed. * * *"

Although this case lends no support in the conclusion reached in Opinion No. 7420, *supra,* it does clearly reject the theory that only that property located in a subdivision on tax lien date may be taxed by such subdivision on the current year's list and duplicate.

It is thus my view that if the transfer here in question is made effective after January 1, 1958, it will be possible nevertheless to include the real property, located in the area transferred, as subject to taxation by the receiving school district on the tax list and duplicate which will be compiled by the county auditor "on or before the first Monday in August" in 1958. As indicated in Opinion No. 7420, *supra,* the receiving district may impose a levy, as provided in Section 5705.34, Revised Code, on all such property that is "within the subdivision" on the date the levy is actually imposed by ordinance or resolution as therein provided.

In stating these conclusions, I must add the warning that (1) the precise question involved is virtually novel so far as the Ohio judicial decisions are concerned, (2) counsel for the city and county in the case actually pending before the board strongly urge the view that levies imposed as provided in Section 5705.34, Revised Code, are imposed as of the tax lien date, January 1, and (3) a delay in action by the board beyond January 1, 1958, will surely involve litigation by the city and county concerned in an effort to avoid the loss of tax revenue in excess of one million dollars mentioned in my Opinion No. 1308, addressed to you under date of November 19, 1957, p. 667.

Without detailing the arguments made by counsel for the city and county, I may point briefly to the basis of some of them. In Section 709.17, Revised Code, there is this provision:

> "If such territory is annexed subsequent to the day upon which taxes become a lien, the new municipal corporation tax rate shall not apply until the day preceding the second Monday of April next following when the lien of the state for taxes levied attaches. In the meantime the old township tax rate shall apply."

This, it is suggested, is an indication of legislative policy that a receiving subdivision is not to impose a tax on property not within its limits on tax lien date.

In State *ex rel.* Donahey v. Roose, 90 Ohio St., 345, 352, the following language is pointed out:

"* * * it is clear that the amount of taxes is to be determined subsequently, and the assessment then *relates back* to the date at which the taxes became a lieu. * * *" (Emphasis added)

This language, it is claimed, indicates that the actual levy is effective *as of* tax lien date. Still another argument may be advanced against the validity of the ruling in Opinion No. 7420, *supra.* In Section 3311.22, Revised Code, as recently amended, effective January 1, 1958, there is this provision:

"* * * The board of education accepting the transfer shall, prior to the *next succeeding July 1* following the election, file with the county auditor of each county affected by the transfer an accurate map showing the boundaries of the territory transferred." (Emphasis added)

In Section 3311.23, Revised Code, as recently amended, we note this provision:

"When the requirements provided herein have been met the transfer shall be effective on the *next succeeding July 1.*" (Emphasis added)

In Section 3311.231, Revised Code, as recently amended, effective January 1, 1958, there is this provision:

"The transfer of net indebtedness and funds contemplated in the two preceding paragraphs shall be accomplished as of the *next succeeding July 1* following the election." (Emphasis added)

These provisions it may be argued, are indicative of the legislative idea that July 1, marks the beginning of the real property taxing process so far as the taxing subdivisions are concerned, and that the tax list and duplicate should be made up to include all property within the subdivision on that date. This argument finds some support in the fact that by that date the county auditor will have completed the work of valuation adjustments required by Section 319.38, Revised Code, and the fact that shortly after date, by July 15, the subdivision is required to initiate the taxing process by the adoption of the budget. Section 5705.28, Revised Code.

This theory, fixing July 1, as the date of beginning, finds support in Opinion No. 1592, Opinions of the Attorney General for 1920, page 1003, where it was held:

> "The boundaries of a municipal corporation for tax levying purposes are to be determined as of the first Monday of June. Changes of boundaries thereafter made by annexation, or otherwise, do not affect the tax levies for the succeeding year."

The statute at that time fixed the first Monday in June as the time for the submission of the annual budget.

As indicated by the conclusions stated above, I do not regard these arguments as persuasive. I must concede, however, that the question is honestly debatable.

In my Opinion No. 1308, *supra,* I stated that I should not relish the task of defending the board's action in bringing about the million dollar tax revenue loss therein described in a case where the welfare of the schools involved did not compellingly require such loss.

In the instant case, I shall be equally candid. I should relish even less having the board, by delaying action beyond January 1, 1958, make what is in effect a wager of one million dollars of the city and county revenues that the conclusions I have expressed above are correct. Accordingly, I suggest that the conservative course is to avoid the *possibility* of such loss of revenues by action in the pending case prior to January 1, 1958.

Respectfully,
WILLIAM SAXBE
Attorney General