

3246

SYLLABUS:

A board of education may, pursuant to Section 3313.17 and 3313.36, Revised Code, accept a donation of a sum of money the use of which is restricted to the purchase of items of equipment for interscholastic teams or groups of students in connection with the athletic program conducted by said board of education, and the purchase of such equipment by said board of education with the funds so donated are exempt from sales tax pursuant to the provisions of Section 5739.02 (B) (1) Revised Code, regardless of the fact that said funds may have been given to the board of education for the purpose of causing the equipment so purchased to be so exempt.

Columbus, Ohio, August 31, 1962

Hon. James A. Rhodes, Auditor of State
State House, Columbus, Ohio

Dear Sir:

I have your request for my opinion which reads as follows:

“Enclosed please find a copy of a special bulletin issued by the Ohio High School Athletic Association, 4161 North High Street, Columbus, Ohio, relative to the purchase of athletic equipment on a tax exempt basis. This bulletin has been mailed by the Association to all member schools and sporting goods dealers, and concludes that an athletic board may donate money to a board of education with said board of education proceeding with the ‘mechanics’ of purchasing athletic equipment on a tax exempt basis. The athletic equipment purchased to be used for interscholastic teams or group sports.

“The procedure contemplated, and as set forth in the special bulletin presumably is based upon qualifications for tax exemption under Section 5739.02 (B) (13). The suggested procedure contemplates a donation or gift of money to the board of education under the provisions of Section 3313.36, Revised Code, with such

donation or gift being given for the specific purpose of purchasing athletic equipment for interscholastic teams and/or other group sports.

“Under date of June 10, 1948, the then Attorney General issued his Opinion No. 3293 which relates to this matter. The syllabus of the opinion is as follows:

“‘Where a board of education establishes football practice and playing among the students in its school as a part of its physical education program and permits the organization of groups or teams for that purpose, it may not lawfully use public funds to purchase such items of equipment as helmets, shoulder pads and uniforms to be worn by the students participating.’

“In view of the above opinion, a question arises as to whether boards of education have authority to procure athletic equipment, etc. whereby the purchasing procedures of the school district may be used solely for the purpose of overcoming or bypassing the statutory sales tax requirements in connection with the purchase of such equipment.

“It is noted that Section 3313.36, Revised Code, provides that a board of education may by the adoption of a resolution accept any bequest made to it by will or accept any gift or endowment from any person or corporation upon the conditions and stipulations contained in the will or connected with the gift or endowment. Also, for the purpose of enabling the board of education to carry out the conditions and limitations upon which a bequest, gift or endowment is made, it may make all rules and regulations required to fully carry them into effect.

“The question arises, therefore, as to whether a procedure which permits the making of a gift to a board of education for the sole purpose of using the board’s purchasing facilities and tax exempt status to procure items for use by interscholastic teams or groups in the various sport activities of the school, may be considered to fall within the scope of the meaning of the word ‘gift,’ as used in Section 3313.36, Revised Code.

“In this connection, attention is invited to 26 Ohio Jurisprudence 2nd, under ‘gifts’ (Page 146-148), wherein a gift contemplates a donation between living persons consisting of an immediate voluntary, gratuitous, unconditional and irrevocable transfer of property made by a donor who is competent to act. It is also noted that not only must there be an intention to relinquish the right of dominion, but there must exist as well an intent to invest the donee or his trustee or agent with the complete control of the subject matter of the gift.

“Thus, if the donation was intended to give less than complete control of the money to the board of education, but was

done solely for the purpose of permitting the purchase of athletic equipment or other items for use by interscholastic teams or groups in various sport activities of the school, a doubt arises as to the authority of a board of education to use its purchasing authority for the purpose of securing items which would otherwise not fall within a tax exempt status.

“As this question is of statewide concern, will you please issue your formal opinion on the following question :

“ ‘May a board of education accept as a gift or donation a sum of money whose use is restricted to the procurement of items of equipment for use by interscholastic teams or groups in connection with the athletic program of the school, for the purpose of placing the purchase of such items of equipment, etc. in a tax exempt status, as provided by Section 5739.02 (B) (13), Revised Code?’ ”

The syllabus of Opinion Number 3293, Opinions of the Attorney General for 1948, page 279, quoted in your request, will not be requoted herein.

It should be pointed out that said opinion, as can be seen by reading of said syllabus, dealt with the expenditure of “public funds” for the purpose of purchasing items of equipment for students participating in interscholastic sports. The funds which are to be used for the purchase of said items in accordance with the proposal set forth in your request would not be “public funds” of the nature considered in Opinion No. 3293, *supra*.

The arrangement described in your request creates, in my opinion, a relationship more in the nature of a trust than that which results from a gift. There can be no question that the donor, the person or persons who give to the various boards of education the funds for the purpose of purchasing equipment, are not giving to said boards of education monies for their exclusive use but are in effect giving to said boards the right to handle said monies for the benefit of the entire community which is served by said board. In this respect your attention is directed to 26 Ohio Jurisprudence 2nd, 142, Gifts, Section 3, which reads in part as follows :

“The distinction between a gift and a voluntary and irrevocable trust is purely technical. In the case of a gift, the legal title passes to and vests in the donees ; whereas in a trust, the equitable title vests in the cestui que trust, while the naked legal title, carrying with it the control of the property, rests in the trustee. In respect to a trust, there is no delivery to the cestui que ; while in a gift, possession, as well as legal title, must pass to the donee. * * *”

Whether the transaction described in your request is a gift or a trust, is, in my opinion, of no effect in determining the question involved herein, because said transaction meets the requirements of Section 3313.36, Revised Code, and is, therefore, one which a board of education is authorized to approve. Section 3313.36, Revised Code, reads as follows:

“By the adoption of a resolution, a board of education may accept any bequest made to it by will or *may accept any gift or endowment from any person or corporation upon the conditions and stipulations* contained in the will or *connected with the gift or endowment*. For the purpose of enabling the board to carry out the conditions and limitations upon such a bequest, gift, or endowment is made, it may make all rules and regulations required to fully carry them into effect. No such bequest, gift, or endowment shall be accepted by the board if the conditions thereof remove any portion of the public schools from the control of such board.” (Emphasis Added)

It will be noted from a reading of the above quoted statutory language that a board of education may accept a gift upon which conditions are placed and may establish regulations to carry out such conditions. Under a strict definition of the word gift, as stated in your request, a conditional title cannot be given. However, as can be seen from the above, the legislature while using the term “gift” has provided in Section 3313.36, *supra*, for the acceptance of a gift with conditions attached. The transaction described in your letter amounts to a gift with a condition attached and accordingly is a transaction similar to that described in said statute. For this reason I conclude that it is not necessary to determine whether the transaction in question establishes a trust or establishes a gift in accordance with the generally accepted requirements of law pertaining to either.

The question which next arises is whether the board of education, which is precluded from expending public funds for the purchase of equipment of the type described in your letter, may accept funds from outside sources for such purpose. It will be noted that in addition to the provisions of Section 3313.36, *supra*, a board of education is by Section 3313.17, Revised Code, granted power to accept gifts. That section reads as follows:

“The board of education of each school district shall be a body politic and corporate, and, as such, capable of suing and being sued, contracting and being contracted with, acquiring, holding, possessing, and disposing of real and personal property,

and taking and holding in trust for the use and benefit of such district, any grant or devise of land and any donation or bequest of money or other personal property.”

In the case of *Harriet C. Blume, Administratrix, vs. Charles J. Thompson, et al*, 23 Ohio Dec. 512, the Court of Common Pleas of Auglaize County had before it a question dealing with the right of a board of education to accept a bequest in a will for the purchase of land and the erection and maintenance of a building thereon to be used for the combined purposes of a public library and a Young Mens Christian Association. The court, taking note of Section 4749, General Code, the provisions of which are now found in Section 3313.17, *supra*, beginning at page 533 of said case, stated :

“There can be no question then as to the authority of the board of education of the school district including Wapakoneta to receive a bequest and use the same for library purposes. The question then arises whether such bequest shall fail because of the provision in said item seven that such building shall be maintained for a public Library for Young Men’s Christian Association Building. Trusts created by gift in the interest or promotion of education are universally recognized as charitable, and are to be liberally construed and operated to the end that the intention of the donor may be carried out as near as can be done under all the circumstances. They are highly favored by the law and should receive such construction as would tend to preserve rather than to destroy them.

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“Among the charitable trusts most liberally construed, have been those created for the promotion of religion and education.

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“Surely then unless this trust is impossible of execution, it should not be permitted to lapse. It is held in *State v. Toledo*, 13-23 O.C.C. 327 (3 N.S. 468) that ‘Although such power is not expressly conferred a municipality has authority to receive property in trust for education and other purposes beneficial to its inhabitants.’ It does not appear to us that this trust is impossible of execution by the trustee named; if it were, rather than permit the trust to fail, we think the rule would apply which would authorize a court of equity to appoint a trustee. The exercise of the powers conferred by the trust we do not believe inconsistent with duties imposed upon boards of education. By the law of the state Young Men’s Christian Associations seem to be regarded as belonging to the class known as ‘Charities’, and are

authorized to accept legacies, devises and bequests. They therefore cannot be regarded as incompatible. It is to be observed, too, that this bequest to the board of education is 'for the purchase of the necessary land, erection of a building and maintenance of same, for a combined public library and Young Men's Christian Association Building, to be called the "Blume Library Y.M.C.A.," for the use and benefit of all the people and citizens' of Wapakoneta and vicinity, the same to be in charge of, and under the control of said board of education.' The board is authorized to use this bequest for the purchase of land and the erection and maintenance of a building thereon, which building is to be in charge of and under the control of said board. The bequest is not made for the maintenance of a library or the management or maintenance of a Y.M.C.A., but rather to provide and maintain a building, insofar as the funds will serve that purpose, which building is to be given the name specified.

"It is our opinion that the authority of the board of education is ample to receive this bequest and execute the trust which it carries.

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The funds to be donated in the question herein are, as the fund in the *Blume* case, *supra*, to be held and controlled by the board of education. Similarly the purpose for which said funds are to be used is one which is not inconsistent with the duties of the board of education. As recognized by my predecessor in Opinion Number 3293, *supra*, the athletic activities involved therein were directly related to the athletic programs conducted in connection with the physical education and training of the students involved. The equipment to be purchased in accordance with the proposal as set forth in your request, therefore, while not being considered by my predecessor in said opinion as being necessary "apparatus," so as to use public funds for its purchase, is, nevertheless, equipment which will be used in connection with the maintenance of the physical education program of the schools involved. Accordingly, I am of the opinion that a board of education may accept the donations described in your request and use them in accordance with the conditions therein set forth.

Coming now to the question of whether the board of education is entitled to an exemption from sales tax upon its expenditure of the funds donated to it as set forth in your request, your attention is directed to Opinion Number 5751, Opinions of the Attorney General for 1936, Volume II, page 944, wherein one of my predecessors considered a question of whether material purchased by a board of education for the construction

of an athletic field and playground was exempt from sales tax when all or part of the funds for said purchase were contributed to the board of education for the purpose of construction of said facilities. My predecessor said, at page 946 of said opinion :

“As to this, it is noted that Section 4755, General Code, provides that a board of education may accept gifts upon conditions connected with such gifts and that for the purpose of enabling the board to carry out the conditions upon which the gifts are made, such board may make rules and regulations required to carry into effect the conditions upon which the gifts were made. The moneys subscribed and paid into the school treasury in this case were so made and paid, I assume, upon the express or implied condition that these moneys were to be used for the purpose of purchasing materials to be used in the construction of the stadium. In any view, it may be said that when the moneys subscribed for this purpose were paid into the school treasury they became the property of the school district as much as any other moneys in the school treasury appropriated for the purpose of constructing this stadium, and the purchases of materials for the construction of the stadium made by the board of education out of moneys thus paid into the treasury were as clearly exempted from the incidence of the sales tax provided for by Section 5546-2, General Code, as if all of the moneys used by the board of education in the purchase of these materials had come into the school treasury as the proceeds of taxes or otherwise. I am of the opinion, therefore, by way of specific answer to the question presented in your communication that the sale or sales of the materials therein referred to are not subject to the sales tax provided for by the section of the General Code above referred to.”

(The provisions of Section 4755 General Code are now found in Section 3313.36 Revised Code).

It should be noted that the exemption referred to in Opinion Number 5751, *supra*, is now found in Section 5739.02 (B (1)), Revised Code, which reads in pertinent part as follows :

“(B) The tax does not apply to the following :

“(1) Sales to the state, or any of its political subdivisions ;

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Boards of education are agencies of the state, 48 Ohio Jurisprudence 2nd, 452, Schools, Section 56, and therefore sales to said boards are exempt from sales tax in accordance with Section 5739.02 (B) (1), *supra*.

It may be noted that while the proposal set forth in your letter appears to be one whereby an exemption is being granted to a donor to

which he would otherwise not be entitled, a closer look shows that the benefit of the exemption is not actually being reaped by the individual donor. The school districts in question would receive either a gift of equipment from a donor which would cost a certain sum plus sales tax or, under the plan proposed in your letter, would receive a certain sum of money, presumably the sum paid for the equipment with the sales tax included, from which sum the districts would be able to acquire more equipment than they would have received had the donor of the monies purchased the equipment and donated the same to the board. Thus, the people of the school district are the real beneficiaries of the tax exemption granted to the board under such circumstances, and they are the ones for whom the legislature undoubtedly intended the benefit of such exemption. Accordingly, I do not feel that it can be said that permitting the exemption in situations such as that described in your request permits a tax benefit to flow to the donor indirectly when he would not have had said benefit had he purchased the material directly. The donor as, a member of society, benefits no more than other persons of the same area.

In accordance with the foregoing, I am of the opinion and you are advised that a board of education may, pursuant to Section 3313.17 and 3313.36, Revised Code, accept a donation of a sum of money the use of which is restricted to the purchase of items of equipment for interscholastic teams or groups of students in connection with the athletic program conducted by said board of education, and the purchases of such equipment by said board of education with the funds so donated are exempt from sales tax pursuant to the provisions of Section 5739.02 (B) (1) Revised Code, regardless of the fact that said funds may have been given to the board of education for the purpose of causing the equipment so purchased to be so exempt.

Respectfully,
MARK McELROY
Attorney General