

OPINION NO. 66-089**Syllabus:**

1. Where land is leased for a term of years and the lease contains a provision that the building erected by the lessee shall not become a part of the realty, although said lease is binding between the lessor and lessee, said lease does not bind the taxing authorities of the State of Ohio. (Paragraph 1 of the syllabus of Opinion No. 3453, Opinions of the Attorney General for 1938, approved and followed.)
2. The land and the lessee's buildings should be carried on the real estate tax list and duplicate as "real property" and "land."
3. The county auditor must, pursuant to Section 5713.03, Revised Code, include in the taxable value of each lot, tract or parcel of real estate, the value of each building, structure or improvement on the real estate.
4. Where a lessee's buildings on real estate have been omitted over a period of years from the assessments made in the name of the owner of the realty, during which period these buildings were erroneously assessed in the name of the lessee, on discovery of such error, it is the duty of the county auditor to add these buildings to the tax list and duplicate of real property in the name of the owner on the current duplicate and, in addition thereto, where there has been no change in ownership, to add to the taxes for the current year the simple taxes on such omitted property for each of the preceding five years.
5. The simple taxes upon such omitted property are collectible and become "delinquent" at the same time and in the same manner as the current taxes.
6. The adjustment of taxes on such real estate is a matter for the lessor and lessee and not for the taxing authorities.

To: Neil M. Laughlin, Licking County Pros. Atty., Newark, Ohio
By: William B. Saxbe, Attorney General, May 12, 1966

Your request for my opinion reads in part as follows:

"This office together with and in co-operation with the Licking County Treasurer

and Licking County Auditor is preparing to clear the tax duplicate existing in Licking County as to all delinquent taxes. This office finds upon investigation that in the aforesaid areas there exists a number of subdivisions where there are duly recorded plats with lot numbers that appear upon the tax duplicate as acreage rather than as lots. Most of these lots are leased to individuals who by the terms of the lease own the dwelling houses or cottages located thereupon. For the past forty-five to fifty years the Licking County Auditor's Office has billed the lessor, the owner of the subdivision, one tax statement covering the entire acreage involved as to land valuation only without consideration of the value of any of the buildings or cottages located thereon. The lessees have been billed as and for real estate taxes on separate tax statements for the value of the buildings. In other words instead of treating each individual lot as a separate unit setting forth the value of the land, the buildings thereon, and assessing the same against the owner of the real estate, they have created a separate tax duplicate and are billing the lessees as and for the taxes on the buildings as though they were the owners of real estate, when in fact and in reality they are not.

"There now exists in this area approximately \$11,000.00 in delinquent taxes which appear on the real estate tax duplicate; however, the individuals owning this delinquent tax are merely lessees and do not own the real estate. The lessors have paid their tax and do not appear as being delinquent in the payment of any of their real estate tax.

"It is the opinion of this office that we cannot collect real estate taxes against the lessees nor can we make the owners or lessors of said real estate liable for said delinquencies because they have never been certified as against said owners, and never published as such as required by law.

"Therefore, this office requests your opinion as to the duties of the County Auditor, County Treasurer, and this office relative to the afore-described situation, and what, if anything can we do to collect this delinquent tax which should have been assessed against the owners of said real estate."

You have further informed me that the leases are for periods from ten to fifteen years each and that at the terminations, the lessees have the right to remove their buildings.

Section 5701.02, Revised Code, provides:

"As used in Title LVII of the Revised

Code, 'real property' and 'land' include land itself, whether laid out in town lots or otherwise, all growing crops, including deciduous and evergreen trees, plants, and shrubs, with all things contained therein, and, unless otherwise specified, all buildings, structures, improvements, and fixtures of whatever kind on the land, and all rights and privileges belonging or appertaining thereto."

Section 5713.01, Revised Code, designates the county as the unit for real estate taxation purposes and the auditor of the county as the real estate assessor for the unit. Section 5713.03, Revised Code, as amended effective November 5, 1965, 131 Ohio Laws, H. B. 337, provides in part:

"The county auditor, from the best sources of information available, shall determine, as nearly as practicable, the taxable value of each separate tract, lot, or parcel of real property and of buildings, structures, and improvements located thereon. * * *

"* * * He shall record pertinent information and the value of each building, structure, or improvement to land, which value shall be included as a part of the value of each tract, lot, or parcel of real property."

In 1938, a substantially identical question was raised, concerning, however, a filling station on leased land rather than a cottage, and in Opinion No. 3453, Opinions of the Attorney General for 1938, page 2349, the then Attorney General held, as disclosed by the syllabus:

"1. Where land is leased for filling station purposes for a term of years and the lease contains a stipulation that the building erected by the lessee shall not become a part of the realty, is binding as between the lessor and lessee, it does not bind the taxing authorities of the State of Ohio.

"2. The land and building should be carried on the real estate duplicate as 'real estate' or 'land,' as provided by Section 5322, General Code.

"3. The adjustment of the taxes on such real estate is a matter for the lessor and lessee and not for the taxing authorities and if the lessee attempts to remove such buildings from the real estate before all taxes charged against the particular real estate during the existence of the lease are fully paid, such attempted removal should be enjoined.

"4. The remedy in such case is the foreclosure of the State's lien for taxes.

"5. If the lease was in fact a permanent lease renewable forever, a different rule would obtain, as such a leasehold is realty in Ohio, and the county auditor upon proper application would be required to adjust the taxes as provided by Section 2573, General Code, in accordance with the rule laid down by the Supreme Court of Ohio, in the case of Cincinnati College vs. Yeatman, Auditor, (sic) O. S. 276."

Again in 1943 a leased land situation, similar to the one raised in your request, was presented in Opinion No. 5841, Opinions of the Attorney General for 1943, page 89 and after an extensive examination of the applicable statutes and prior decisions and opinions, the then Attorney General held as disclosed by the first paragraph of the syllabus:

"1. The county auditor is required to list each tract, lot or parcel of real property on the general tax list of real and public utility property in the name of the owner thereof, even though such property is actually occupied by a lessee and in determining its value the auditor should include all buildings, structures and fixtures located thereon."

Since the dates of the rendition of these two opinions, the Ohio Supreme Court, in the case of Reed v. Board of Revision of Fairfield County, et al., 152 Ohio St., 207, decided in 1949, held, in the second and third paragraphs of the syllabus:

"2. The General Assembly has the power to provide that personal property shall be taxed by the same method and to the same extent as land and improvements thereon must be taxed.

"3. Even if a structure or building located on land is personal property, such structure or building will, for purposes of taxation, be included within the definition of 'real property' as that term is defined in Section 5322, General Code, unless the General Assembly has otherwise specified."

In addition, the Ohio legislature has, in 131 Ohio Laws, H. B. 337, amended Section 5713.03, supra, effective November 5, 1965, to provide in pertinent part:

"The county auditor * * * shall determine * * * the taxable value of each separate tract, lot, or parcel of real property and of buildings, structures, and improvements located thereon * * *

"* * * He shall record * * * the value of each building, structure, or improvement

to land, which value shall be included as a part of the value of each tract, lot, or parcel of real property."

After a review of the authorities cited and the reasoning applied in Opinions numbered 3453 and 5841, supra, the Supreme Court decision in the Reed v. Board of Revision case, supra, and the most recent amendment of Section 5713.03, supra, I herewith express my approval of and follow the conclusions stated in the syllabus of Opinion No. 3453, Opinions of the Attorney General for 1938.

You further inquire as to what can be done to collect the real estate taxes which should have been assessed against the landowner. In this respect, your attention is directed to Section 5713.20, Revised Code, which provides:

"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 treasury, on the order of the auditor."

There is no question but that the cottages to which you refer in your request letter are, from the standpoint of assessing real estate, omitted property.

In this respect, see Opinion No. 5841, supra; the second branch of the syllabus states:

"2. Where the buildings on real estate have been omitted over a period of years from the assessments made in the name of the owner of the realty, during which period these buildings were erroneously assessed in the name of a lessee, on discovering such error it is the duty of the county auditor to add these buildings to the listing of the real property in the name of the owner on the current duplicate and, in addition thereto, where there has been no change of ownership, to add to the taxes of the current year the simple taxes on such omitted property for each of the preceding five years."

Therefore, the county auditor, pursuant to the provisions of Section 5713.20, supra, is required to add such omitted property to the real estate tax list with the name of the owner of the real estate, and to ascertain the value of the omitted property and place it opposite such property.

In your letter of request, you use the term "delinquent" to describe the taxes that should have been assessed on the omitted real estate. However, from the standpoint of assessing and collecting taxes on real estate, the taxes on omitted real estate do not become delinquent until nonpayment and compliance with the applicable statutes.

Section 319.28, Revised Code, provides in part:

"On or before the first Monday of August, annually, the county auditor shall compile and make up a general tax list of real and public utility property in the county * * * Such lists shall be prepared in duplicate. * * * The copies prepared by the auditor shall constitute the auditor's general tax list and the treasurer's general duplicate of real and public utility property for the current year."

Section 319.41, Revised Code, provides in part that:

"The county auditor shall set down the amount of taxes charged against each entry on the tax lists or duplicates * * *"

In addition to the current taxes, Section 5713.20, *supra*, requires the inclusion, on this list and duplicate of the taxes on the aforesaid omitted property, since there is only one legally authorized tax list and duplicate for real estate taxation purposes. See *Bernhard, et al., v. O'Brien, Treas., et al.*, 97 Ohio App., 359, at 363. In the event of nonpayment within the prescribed time, the simple taxes upon the omitted property which were added to the list would become legally delinquent at the same time and in the same manner as would the nonpayment of the current tax.

Therefore, it is my opinion and you are hereby advised as follows:

1. Where land is leased for a term of years and the lease contains a provision that the building erected by the lessee shall not become a part of the realty, although said lease is binding between the lessor and lessee, said lease does not bind the taxing authorities of the State of Ohio. (Paragraph 1 of the syllabus of Opinion No. 3453, Opinions of the Attorney General for 1938, approved and followed.)
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to add these buildings to the tax list and duplicate of real property in the name of the owner on the current duplicate and, in addition thereto, where there has been no change in ownership, to add to the taxes for the current year the simple taxes on such omitted property for each of the preceding five years.

5. The simple taxes upon such omitted property are collectible and become "delinquent" at the same time and in the same manner as the current taxes.

6. The adjustment of taxes on such real estate is a matter for the lessor and lessee and not for the taxing authorities.