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TURNPIKE COMMISSION, OHIO—PROPERTIES ACQUIRED UNDER PROVISIONS OF OHIO TURNPIKE ACT—EXEMPT FROM TAXATION WITHIN STATE OF OHIO—SECTION 1212 GC.

SYLLABUS:

By virtue of the provisions of Section 1212, General Code, properties acquired or used by the Ohio Turnpike Commission under the provisions of the Ohio Turnpike Act are exempt from taxation within the State of Ohio.

Columbus, Ohio, July 17, 1953

Hon. Frank T. Cullitan, Prosecuting Attorney
Cuyahoga County, Cleveland, Ohio

Dear Sir :

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

“In carrying out his duties under Section 5561 of the General Code to deduct from the value of lands the amount occupied and used as a public highway the County Auditor has raised the question of whether or not property acquired by the Ohio Turnpike Commission may be exempt from taxation under the provisions of Article XII, Section 2 of the State Constitution and the statutes purporting to grant such exemption but which are limited by such constitutional injunction. The Auditor points out that tolls will be charged for the use of the Turnpike and that the Supreme Court of Ohio has held in the Cleveland and Shaker Heights Transit cases and in the Stadium case that such property owned and operated by a municipality in its proprietary capacity was held not to be exempt from taxation.

“Inasmuch as the Turnpike will cross the northern part of Ohio and the question will arise generally throughout all of the counties through which it is located, I am requesting your legal opinion as to whether or not lands acquired by the Ohio Turnpike Commission to be used for a highway on which tolls will be charged are exempt from taxation under the Constitution and laws of Ohio.”

Section 5560, General Code, provides in part that each parcel of real property shall be valued at its true value in money. Section 5561, General Code, referred to in your letter, reads :

“The county auditor shall deduct from the value of such tracts of land, as provided in the next preceding section, lying outside of municipal corporations, the amount of land occupied and used by a canal or used as a public highway, at the time of such assessment.”

Thus, it will be seen that Section 5561 does not pertain to the *exemption* of property from taxation, but, instead, pertains to the method by which a single parcel of real property is *valued* for the purposes of taxation. This statute declares that in arriving at such a *valuation*, the auditor

should deduct the amount of land occupied or used as a public highway. The purpose of this statute was to exclude such lands in determining the value of a parcel of land standing for tax purposes in the name of the owner of the fee. By such process the owner of the fee was not obligated to pay taxes based partly on a valuation of lands covered by an easement or right-of-way for highway purposes and actually so used, and which lands, therefore, would be of no actual value to the fee holder.

Where a conveyance in fee simple of a portion of a single tract is made, however, such former single parcel becomes, for tax purposes, two separate parcels and Section 5561 has no application. In that event a question of *exemption* is involved, instead of one merely of *valuation*.

Section 1207, General Code, authorizes the Ohio Turnpike Commission to acquire, by purchase, any land, property, rights, rights-of-way, franchises, easements or other interests in land as it may deem necessary or convenient for the construction or operation of any turnpike project.

Section 1208, General Code, authorizes the Commission to acquire by appropriation any land, rights, rights-of-way, franchises, easements or other property necessary for the construction or efficient operation of any turnpike project.

Thus, it will be observed that the Turnpike Commission is authorized to acquire either by purchase or appropriation, *title in fee simple*, as contrasted, for example, with the authority of the Director of Highways who, by virtue of Section 1178-2, General Code, is limited to acquiring only an easement.

I have been informed that all lands which will be occupied by the turnpike proper and on which tolls will be charged are being acquired by the Turnpike Commission in fee simple and, as provided by Sections 1207 and 1208, in the name of the State of Ohio. While certain easements are also being acquired by the Commission, such easements do not cover any of the property where the toll highway will be located and, thus, have no application to the question which you have presented, i.e., the effect of toll charges on the question of tax exemption.

I believe that the answer to your question is contained in the unambiguous language of Section 1212, General Code, which reads:

“The exercise of the powers granted by this act will be in all respects for the benefit of the people of the state, for the

increase of their commerce and prosperity, and for the improvement of their health and living conditions, and as the operation and maintenance of turnpike projects by the commission will constitute the performance of essential governmental functions, the commission shall not be required to pay any taxes or assessments upon any turnpike project or any property acquired or used by the commission under the provisions of this act or upon the income therefrom, and the bonds issued under the provisions of this act, their transfer and the income therefrom (including any profit made on the sale thereof) shall at all times be free from taxation within the state."

Here we find that the General Assembly has exempted from taxation any turnpike project or any property acquired or used by the Commission under the provisions of the Ohio Turnpike Act. No distinction is made in this statute between properties on which a toll is charged and any other properties. In view of the express language of Section 1212, one could say that the lands of the Turnpike Commission would be subject to taxation only by concluding that the General Assembly exceeded its constitutional power in enacting this statute.

Because of Section 2 of Article IV of the Constitution, which requires the agreement of six of the seven members of the Supreme Court of Ohio to declare a statute unconstitutional, except in the affirmance of a judgment of a Court of Appeals declaring a law unconstitutional and void, even five of the seven members of the Supreme Court, in certain cases, may not declare a statute unconstitutional. For example, see *In Re Application for Exemption from Taxation of Real Property of Cincinnati Metropolitan Housing Authority*, 155 Ohio St., 570, wherein the constitutionality of Sections 5356 and 1078-36, General Code, was upheld although five of the seven members of the Court were of the opinion that such statutes were in violation of Section 2, Article XII of the Ohio Constitution. With such constitutional limitations even on the power of the Supreme Court, it should be readily apparent that, as an executive officer of the state government, I would be exceeding my constitutional and statutory power by attempting to declare a statute enacted by the General Assembly unconstitutional.

I might add, however, that the reported cases would indicate to me, beyond doubt, that no successful challenge of the constitutionality of Section 1212, General Code, could be made. While there is a split of opinion in the Supreme Court as to whether, since the 1929 amendment

of Section 2, Article XII, the legislative power to determine exemptions from taxation is limited by that section, as held by the majority, or whether it is limited only by Article I, as held by the minority, (see *In Re Exemption*, etc., *supra*; *City of Cleveland v. Board of Tax Appeals*, 153 Ohio St., 97,) and while the members of the Court have disagreed at times in particular cases as to whether, within the meaning of Section 2, Article XII, certain property was "public property used exclusively for any public purpose," I do not believe that any of the decisions of the Supreme Court could be construed as leading to the conclusion that Section 1212 would be unconstitutional.

In the *Cleveland Transit* case, *Zangerle v. City of Cleveland*, 145 Ohio St., 347, the Court denied exemption by holding that the property of the *Cleveland Transit Company*, being used in the field of a private competitive business for profit, was *not* public property used exclusively for a *public purpose* within the meaning of Section 2 of Article XII. The decisions in the *Shaker Heights Transit* cases, *City of Shaker Heights v. Zangerle*, 148 Ohio St., 361, and the *Cleveland Stadium* case, *City of Cleveland v. Board of Tax Appeals*, 153 Ohio St., 97, were predicated on the same basis, i.e., that the property in question was not used exclusively for a *public purpose*. In arriving at such conclusion, the Court made a distinction between the *proprietary* functions and the *governmental* functions of a municipal corporation. I know of no cases in this state making such distinction as to the functions of the state government. The claim that such a distinction could be made as to the Department of Liquor Control was rejected by the Supreme Court in *State, ex rel. Williams v. Glander*, 148 Ohio St., 188, wherein Turner, J. stated, at page 203:

"Too much emphasis has been placed upon the claimed distinction between the governmental and proprietary functions of state government. * * *"

It is true that in the case of *Division of Conservation and Natural Resources of Ohio v. Board of Tax Appeals*, 149 Ohio St., 33, certain real property owned by the state was held to be subject to taxation, but here the property had been rented to a *private citizen* who used it exclusively for *private purposes*.

Returning to Section 1212, General Code, we find that the General Assembly has declared that:

“The exercise of the powers granted by this act will be in all respects for the benefit of the people of the state, for the increase of their commerce and prosperity, and for the improvement of their health and living conditions, and as the operation and maintenance of turnpike projects by the commission *will constitute the performance of essential governmental functions.* * * *

(Emphasis added.)

Bearing in mind that the Supreme Court could declare Section 1212 unconstitutional only by finding that the property in question was not “public property used exclusively for a public purpose,” the holding of this Court in the case of *State, ex rel. Kauer v. Defenbacher*, 153 Ohio St., 268 should be noted. The tenth paragraph of the syllabus of this case reads as follows:

“The Ohio turnpike commission is a public organization created for a public purpose.”

This holding was reaffirmed by the Court in the case of *State, ex rel. Allen v. Ohio Turnpike Commission*, 158 Ohio St., 168.

In view of the specific language of Section 1212, General Code, and the pronouncement of the Supreme Court that the Ohio Turnpike Commission is a public organization created for a public purpose, it would be difficult to perceive how any argument could successfully be advanced as to the unconstitutionality of Section 1212, General Code.

In conclusion, it is my opinion that by virtue of the provisions of Section 1212, General Code, properties acquired or used by the Ohio Turnpike Commission under the provisions of the Ohio Turnpike Act are exempt from taxation within the State of Ohio.

Respectfully,

C. WILLIAM O'NEILL

Attorney General