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TAX, EXCISE—WHERE MUNICIPAL ORDINANCE IMPOSES SUCH TAX ON ALL CONSUMERS—COMMODITIES OR SERVICES SUCH AS NATURAL GAS, ELECTRICAL ENERGY, LOCAL TELEPHONE SERVICE AND WATER CONSUMED OR USED IN MUNICIPALITY—BOARD OF EDUCATION PURCHASING AND USING SUCH COMMODITIES OR SERVICE WITHIN MUNICIPALITY LIABLE FOR PAYMENT OF TAX—IN ABSENCE OF ANY EXEMPTION PROVISION IN ORDINANCE.

SYLLABUS:

Where an ordinance of a municipality imposes an excise tax upon all consumers of commodities or services such as natural gas, electrical energy, local telephone service and water, consumed or used in such municipality, a board of education purchasing and using such commodities or service within such municipality, in the absence of any provision in such ordinance exempting it is liable for the payment of such tax.

Columbus, Ohio, Aug. 2, 1944

Bureau of Inspection and Supervision of Public Offices  
Columbus, Ohio

Gentlemen:

Your request for my opinion reads as follows:

"We are attaching hereto a copy of Ordinance 120-44, adopted by the city of Columbus, and providing for the levying of a utilities commodity tax.

May we respectfully request your opinion as to whether or not the Board of Education of the City of Columbus would be exempt from the payment of such tax?"

The ordinance attached to your letter, which appears to have been passed March 20, 1944, provides in part as follows:

"Sec. 2. That for the purpose of providing revenues for the general revenue fund of the city of Columbus for the calendar year ending December 31, 1944, in addition to those raised from general property taxes permitted under the constitutional limitations and from other sources, for the support of local governmental functions, there is hereby levied for the calendar year 1944:

(a) A tax of five per centum computed on the net rate charged for natural gas consumed in the city of Columbus;"

The ordinance proceeds to levy a similar tax on the consumption of electrical energy, local telephone service and water. Let it be noted that the tax is not stated as a tax of five percent *of* the net rate but is five percent *computed* on the net rate charged. The ordinance defines the word "person" as including individuals, firms, partnerships, associations, corporations or companies of whatever form or character.

An examination of the further terms of the ordinance leaves no doubt that the tax levied is levied on the consumer and not on the utility. The ordinance cannot, therefore, be open to the objection that it attempts to levy a tax on the gross earnings of the utility, which has already been subjected to a tax by the state. Section 3 reads as follows:

"Each and every person, including the city of Columbus, selling, furnishing or delivering any of the commodities for or on which a tax is levied by section 2 hereof, and for which a charge is made, shall, in each and every bill or statement rendered therefor after the first day of April, 1944, set forth an item for said tax either as a separate item or in connection with any other tax on said bill, carrying out the amount thereof and include the same in the total of said bill or statement so rendered, and *collect said tax from the consumer or payer of said bill* or statement at the time of the payment thereof."  
(Emphasis added.)

Clearly the burden of paying the tax is imposed directly on the consumer, the only duty cast upon the utility being to collect it. Section 4 further clarifies this proposition. It provides:

“Every person receiving any payment on bills or statements taxable under this ordinance shall, on or before the 15th day of each calendar month, make a return in duplicate under oath to the city auditor in such form as the city auditor may prescribe, showing the aggregate amount of taxable payments for such bills or statements collected during the preceding calendar month, the *amount of tax hereby imposed and collected* on the same, and such other facts and information as the city auditor may require, on the form of return prescribed by him; one copy of such return shall be for the use of the city auditor and the other shall be filed by the city auditor in the office of the city treasurer.

Each person making such return shall, at the time of making the same, pay the amount of taxes shown as due thereon to the city treasurer who shall credit the same to the general fund.”

(Emphasis added.)

Here the utility company having collected the tax levied on the consumer is required to make a return to the city auditor and to pay to the treasurer the taxes which it has collected.

Section 6 of the ordinance makes it a misdemeanor for the utility to fail or refuse to perform the duties imposed upon it. It reads in part as follows:

“Whoever being a person *charged by the provisions of this ordinance with the duty of collecting or paying the tax imposed* by this ordinance wilfully *fails or refuses to charge and collect, or to pay such tax, or to make returns \* \* \**”

(Emphasis added.)

In the light of the earlier provisions it cannot be said that the words “paying the tax” and “to pay such tax” imply a primary liability on the company furnishing the commodity or service. Those words refer only to the obligation imposed by Section 4 to pay over the taxes which it has collected.

Section 7 is directed specifically at the consumer or payer of bill for service. It reads:

“Whoever, *being a consumer or payer*, refuses to pay the

full and exact tax as required by this ordinance, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than twenty-five dollars nor more than one hundred dollars, and upon conviction for a second or other subsequent offense shall be fined not less than fifty dollars nor more than two hundred dollars.”

(Emphasis added.)

It would be absurd to claim that the ordinance imposes a tax upon the utility furnishing the commodity and then charges that person with the duty of collecting the tax from itself.

The word “person”, as above defined, apparently relates to the person or corporation furnishing the service and not to the consumer. Nowhere in the ordinance is the word used as referring to the consumer. It therefore does not become important to determine whether or not a board of education would be included within the scope of the word “person”, as above defined. By the terms of the ordinance, the tax is levied against the consumer of the commodity, and the “person” furnishing or delivering the commodity is required to collect the tax and remit it to the city treasurer.

Accordingly, it appears to me that the only question we have to consider is whether, under the constitution and laws of Ohio, a board of education is exempt from paying a tax of this character. It may be remarked at the outset there is nothing whatever in the text of the ordinance which suggests any exemption. It does provide that “the tax hereby levied shall not apply when the consumer or user is the state of Ohio or the United States Government.”

The power of a municipal corporation to levy an excise tax in a field that has not already been preempted by the state, was upheld in the case of *State ex rel. v. Carrel*, 99 O. S. 220, where it was held:

“1. The State of Ohio, under the provisions of Section 10, Article XII of the Constitution, has authority to levy excise taxes in the form of an occupational tax.

2. Under the grant of power of local self government provided for in section 3, Article XVIII of the State Constitution, the city of Cincinnati, as long as the State of Ohio through its general assembly does not lay an occupational tax on businesses, trades, vocations and professions followed in the state,

may raise revenue for local purposes, through the instrumentality of occupational taxes.”

This case was approved and followed in *Loan Company v. Carrel*, 106 O. S. 43,, and in *Foundry Company v. Landes*, 112 O. S. 166.

The Constitution of Ohio, Article XII, Section 2, contains a provision which contemplates the possibility of exemption from taxation of public school *property*, but goes no further than to commit the power to grant such exemption to the Legislature. This section, after specifically mentioning certain bonds which are to be exempt from taxation, provides:

“\* \* \* general laws may be passed to exempt burying grounds, public school houses, houses used exclusively for public worship, institutions used exclusively for charitable purposes, and public property used exclusively for any public purpose, but all such laws shall be subject to alteration or repeal; and the value of all property so exempted shall, from time to time, be ascertained and published as may be directed by law.”

Pursuant to this authority, the Legislature has in Section 5349, General Code, exempted certain property. A portion of that section is as follows:

“Public school houses and houses used exclusively for public worship, the books and furniture therein and the ground attached to such buildings necessary for the proper occupancy, use and enjoyment thereof and not leased or otherwise used with a view to profit, public colleges and academies and all buildings connected therewith, and all lands connected with public institutions of learning, not used with a view to profit, shall be exempt from taxation. \* \* \*”

In Section 5350, General Code, similar exemption is granted as to lands used for burial grounds, and by Section 5351, General Code, property belonging to the state or the United States, and public property used for public purposes, is exempt from taxation.

It must be observed, however, that these exemptions relate only to property, and do not grant immunity from taxes imposed upon the right of enjoyment of privileges or use of property. This proposition was emphasized in the case of *Rose Institute v. Myers*, 92 O. S. 267, where the court pointed out that the constitutional provision, authorizing the

Legislature to grant exemption to certain public or quasi-public bodies, was limited to an exemption from taxes on the property of these organizations, and the court, at page 266 of the opinion, used this language:

“The exemption is not a release *in personam* but a release *in rem* and the *res* to which the release applies must be found and identified by the officer or no exemption can be recognized.”

It is also a rule of law that exemption laws are to be strictly construed. 38 O. Jur. 852; *Lima v. Cemetery Association*, 42 O. S. 148; *Cincinnati College v. State*, 19 O. 110.

In the case of *Lima v. Cemetery Association*, supra it was held that cemetery property, though exempt from “taxation”, is not exempt from the levy of special assessments for local improvements.

It was likewise held that assessments could be levied and collected for street improvements against property of a board of education. In the case of *Jackson vs. Board of Education*, 115 O. S. 368, the syllabus in part is as follows:

“Section 3812, General Code, confers upon a municipality general authority to levy assessments for street improvements against property within such corporation belonging to a board of education and being used for school purposes, and no provision exists in the General Code of Ohio exempting such property from that general authority.”

The case of *State ex rel. v. Brown*, 112 O. S. 599, construing a statute providing for the levy of a tax on motor vehicle fuel, pointed out clearly the difference between property taxes and excise taxes, saying at page 596 of the opinion:

“This court is unanimously of the opinion that the act does not levy a property tax, and does levy an excise tax, and does not come within the inhibition of Section 2 of Article XII of the Constitution.”

The “inhibition” mentioned by the court doubtless refers to that portion of Section 2 of Article XII, which relates to the one per centum limitation, and reads as follows:

“No *property*, taxed according to value, *shall be so taxed*

in excess of one per cent of its true value in money for all state and local purposes, \* \* \*."

(Emphasis added.)

In an earlier case, *State v. Guilbert*, 70 O. S. 220, the same proposition was announced by the Supreme Court as found in the second branch of the syllabus, reading as follows:

"Section 2 of Article 12 is a limitation upon the taxing power so far as the same applies to taxation of property, both as to the method of taxation and the character and amount of property which may be lawfully exempted from taxation, and furnishes the governing principle for all laws authorizing taxes for general revenue on property. *But this section has no application to taxes known as excise taxes.*"

(Emphasis added.)

In *Wilson v. Licking Aerie*, 104 O. S. 137, the court, referring to the exemption authorized by Article XII, Section 2, of the Constitution, held:

"The exemption must be clearly and expressly stated in the statute and must be such only as the above section of the constitution authorizes to be exempt."

I find a similar expression in *Lander v. Burke*, 65 O. S. 542, where the court says in the opinion at page 542:

"And it is the rule adopted by the courts that there can be no exemption of property from taxation unless the right of exemption is plainly expressed."

It may be claimed that a board of education is merely an agency of the state and therefore not subject to the imposition of an excise tax. It is true that the school system is set up by the state, but the law makes each district a political subdivision and endows its board with many of the attributes of a private person or corporation.

It is provided by Section 4834, General Code:

"A 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 and of exercising such other powers and privileges as are conferred upon it by law.”

It is said in 51 Am. Juris, p. 551:

“While generally it is assumed, in the absence of expression of clear intent to the contrary in the taxing statutes, that property of municipal corporations and other subdivisions of the state is exempt from property taxes, such exemption does not, according to many courts, exist with reference to excise and privilege taxes, and as to such taxes municipal corporations are liable unless there is an express exemption in the tax statute. Moreover, when there is an express constitutional or statutory provision for the exemption of municipal corporations from taxation, such provision will be construed to apply only to ad valorem taxes on specific property, and not to exempt such bodies from license and excise taxes.”

The Legislature in enacting the sales tax law has seen fit, by the provisions of Section 5546-2, to exempt all political subdivisions from liability to pay the tax. This, of course, includes school boards.

Also in the enactment of the statutes imposing a motor vehicle license tax, the Legislature has provided in Section 6295, General Code, that vehicles owned by any political subdivision should be exempt from the payment of the tax. The Legislature further specifically provided, by a supplemental statute, Section 6295-1, General Code, that school buses owned by a board of education should not be required to pay the tax. This enactment carries with it the implication that school boards would be liable for the payment but for this express exemption.

Finding no exemption either in the Constitution, the statutes or the ordinance under consideration, which would relieve the board of education from the tax imposed by the ordinance in question, I must conclude that the board of education, in so far as it uses the commodities or services comprehended within the ordinance, is liable to the payment of the tax.

I do not consider it necessary for the purpose of this opinion to pass on the constitutionality or legality of the ordinance in question, and for the purpose of this opinion it is assumed to be a valid enact-



ment.

In specific answer to your question, it is my opinion that where an ordinance of a municipality imposes a tax upon all consumers of commodities or services such as natural gas, electrical energy, local telephone service and water, consumed or used in such municipality, a board of education purchasing and using such commodities or service within such municipality, in the absence of any provision in such ordinance exempting it is liable for the payment of such tax.

Respectfully,

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