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TAX LEVY — MUNICIPALITY, GENERALLY, MAY LEVY IN ANY FIELD, NOT ALREADY OCCUPIED — IF SPECIFICALLY EMPOWERED, MAY SIMULTANEOUSLY LEVY IN AN OCCUPIED FIELD — TAXING UNITS, SECTION 5625-1 G.C., OTHER THAN MUNICIPALITIES, MAY ONLY LEVY TAXES WHEN DIRECTLY AUTHORIZED BY THE GENERAL ASSEMBLY IN FIELDS UNRESTRICTED BY CONSTITUTION — EFFECT, PROPOSED SENATE BILL 85.

## SYLLABUS:

*Unless restricted or limited by the Constitution or the General Assembly, municipalities generally may levy taxes in any field not already occupied by the state and, if specifically empowered, may simultaneously levy taxes in an occupied field. Taxing units, as defined in Section 5625-1 of the General Code, other than municipalities, may only levy taxes when directly authorized by the General Assembly in fields unrestricted by the Constitution. Proposed Senate Bill No. 85, if enacted in its present form, would limit and restrict the present taxing powers of municipalities and would constitute a grant of taxing power to taxing units other than municipalities.*

Columbus, Ohio, April 22, 1941.

Hon. Lawrence A. Kane, Chairman, Senate Taxation Committee,  
Ohio Senate,  
Columbus, Ohio.

Dear Sir:

This will acknowledge receipt of your recent request for my opinion as to whether "cities or political subdivisions have authority to levy income taxes without additional legislation and if they do not, would the passage of proposed S. B. No. 85 — Mr. Baertschi, or similar legislation give them that authority?"

The right of the state to collect taxes is an inherent and indispensable

incident of sovereignty. It exists independent of the constitutional provisions, the object of such provisions being to limit and restrict the rights of the state so as to protect its people from unjust and arbitrary action. *McCullough v. Maryland*, 4 Wheat., 316; *Western Union Telegraph Company v. Mayer, Treasurer*, 28 O. S., 521; *Cooley on Taxation*, Volume I, 4th Edition, page 149, section 57. The right to levy taxes is a legislative power which has been expressly delegated to the General Assembly by Section 1 of Article II of the Constitution. *State, ex rel. Toledo, v. Cooper*, 97 O. S., 86; *Harter Bank v. McKinley Lumber Company*, 136 O. S., 465. Thus it may be said that the General Assembly is free to levy taxes in Ohio, subject only to the limitations of the federal and state constitutions.

Municipalities are also privileged to levy taxes. The right to tax is recognized by the Constitution. Their general powers are found in Section 3 of Article XVIII, which reads:

“Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws.”

The right to levy taxes, except as restricted by the General Assembly, is found in Section 6 of Article XIII:

“The General Assembly shall provide for the organization of cities, and incorporated villages, by general laws; and restrict their power of taxation, assessment, borrowing money, contracting debts and loaning their credit, so as to prevent the abuse of such power.”

Section 13 of Article XVIII also recognizes the right of municipalities to levy taxes, subject to any limitations imposed by the General Assembly:

“Laws may be passed to limit the power of municipalities to levy taxes and incur debts for local purposes, and may require reports from municipalities as to their financial condition and transactions, in such form as may be provided by law, and may provide for the examination of the vouchers, books and accounts of all municipal authorities, or of public undertakings conducted by such authorities.”

Thus it is seen that the right of municipalities to levy taxes flows directly from the Constitution without the necessity of any enabling legislation

or the delegation of power by the General Assembly. Municipalities do not enjoy unlimited taxing powers however, for, as I have pointed out, Section 6 of Article XIII of the Constitution authorizes the General Assembly to "restrict their power of taxation" and Section 13 of Article XVIII states that "laws may be passed to limit the power of municipalities to levy taxes." The powers and limitations of municipalities to levy taxes have been summarized in the second and third branches of the syllabus of *State, ex rel., Toledo, v. Cooper*, 97 O.S., 86, wherein it was held:

"2. The power of all municipalities to levy taxes may be limited or restricted by general laws. Such limitations or restrictions are warranted by Section 6, Article XIII, adopted in 1851, and by Section 13, Article XVIII of the Amendments adopted September 3, 1912.

3. Taxation is a sovereign function. The rule of liberal construction will not apply in cases where it is claimed a part of the state sovereignty is yielded to a community therein. It must appear that the people of the state have parted therewith by the adoption of a constitutional provision that is clear and unambiguous."

See also *State, ex rel. Toledo, v. Cooper*, 97 O.S., 86; *State, ex rel. Zielonka, v. Carrel*, 99 O.S., 220; *Cincinnati v. A. T. & T. Company*, 112 O.S., 493; *Opinions of the Attorney General for 1938*, No. 2777, Volume II, page 1477.

The General Assembly may limit or restrict the taxing powers of municipalities either directly by general laws, *State, ex rel. Toledo, v. Cooper*, 97 O.S., 86, or impliedly as when a particular field of taxation is invaded by the state. That the state may dominate any field of taxation to the exclusion of its municipalities was held in *Cincinnati v. A. T. & T. Company*, 112 O.S., 493, in which case it was said in the opinion by Robinson, J.:

"That the levying of a tax is an exercise of sovereign power, that the sovereignty of the state extends to each of its four corners, within the municipalities as well as without, is not a subject of debate; that such sovereignty would be impaired by construing the Constitution so as to give a subdivision of the state equal sovereignty in so important a subject as that of taxation cannot be gainsaid.

To the end that the sovereignty of the state may be superior

to that of any of its subdivisions in a matter so essential to that sovereignty as that of taxation, this court adheres to the interpretation of the power conferred by the Constitution upon municipalities to levy an excise tax announced in *State ex rel. Zielonka v. Carrel*, supra, with the limitation therein expressed."

When the state has preempted a field of taxation, its municipalities are impliedly powerless to levy a similar tax in addition to that levied by the state. *Cincinnati v. A. T. & T. Company*, supra; *Firestone v. Cambridge*, 113 O.S., 57; *Cincinnati v. Oil Works Company*, 123 O.S., 448; and *Cincinnati Oil Works Company v. Cincinnati*, 40 O.App., 8.

The right of municipalities to levy property taxes on real and tangible personal property is limited by Section 2 of Article XII of the Constitution. This limitation is discussed in the Opinions of the Attorney General for 1938, No. 2777, supra, wherein it is said:

"It is believed that little comment is necessary as to the established authority of municipalities to levy taxes upon land and improvements thereon, as well as upon tangible personal property which under the present law is locally taxed according to value. Section 2, Article XII of the Constitution provides that '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. \* \* \*' This ten mill limitation, generally speaking, is applicable, of course, to land and improvements thereon since such property is required by such Section 2, Article XII to be taxed by uniform rule according to value. This limitation is likewise applicable to any other property which is taxed according to value under authority of the legislature, such, for instance, as tangible personal property under our present scheme of taxation. It may, however, be observed that there is no constitutional mandate to the effect that personal property, whether tangible or intangible, shall be taxed either by uniform rule or according to value and it therefore follows in my judgment that should the General Assembly see fit to tax tangible personal property by some other rule than according to value, as is the case with intangible personal property, it must follow that the so-called ten mill limitation contained in the Constitution would have no application."

It therefore appears that, in the absence of any restrictions or limitations, municipalities have the right generally to levy taxes in any field not already occupied by the state.

While it has been uniformly held that the state has a paramount right to invade the various fields of taxation, the question as to whether

the state could authorize its municipalities to occupy simultaneously the same fields was affirmatively answered by the former attorney general in his 1938 Opinion No. 2777, wherein he held in the second branch of the syllabus:

“The Constitution does not prohibit the General Assembly from authorizing municipalities to levy excise taxes or personal property taxes upon property not taxed by uniform rule according to value, when the state has invaded the field, but municipalities would be limited in the exercise of power so conferred in that such local taxes when added to any such state levies must have some reasonable relation to value of the right, privilege, franchise, or property so taxed.”

Since the General Assembly, as I have already pointed out, cannot confer taxing powers upon municipalities, Senate Bill No. 85 now being considered by your committee, if enacted in its present form, must be regarded as a restriction or limitation of the taxing power now enjoyed by municipalities. Municipalities would be restricted in that if they wished to levy an income tax, they would first have to submit the question to the electors and, if a favorable vote was cast, the maximum rate of tax is fixed at one per cent of the amount earned and the taxes collected could be used only for current expenses and funded debt reduction.

The Baertschi bill is not restricted to municipalities, but includes “political subdivisions or taxing authority” which has been defined in the bill to include “any county, township, municipality, school district, any assessment district, or any other authority which has the power to levy taxes for its own use.” Taxing units, other than municipalities, must look to the General Assembly rather than the Constitution for their authority to levy taxes. In 38 O. Jur., 746, section 25, it is said:

“There seems to be no doubt that the legislature may delegate the power to tax to political subdivisions or taxing districts or units, with such limitation as it sees fit as to rates, purposes, and subjects, provided such power is limited to taxation for purely local purposes, and does not exceed the power which the state, itself, possesses or violate the restrictions of the organic law. For purposes of state taxation, the taxing authorities of each taxing district or unit of the state are authorized to tax annually both the real and personal property within the respective taxing units.”

In the case of *State, ex rel. Fritz, v. Gongwer*, 114 O.S., 642, Judge Robinson said at page 649:

"That the Legislature in the exercise of its police power has the authority for special purposes to create taxing districts other than the political subdivisions, or to create taxing districts overlapping the political subdivisions recognized and provided for in the Constitution, has been directly or impliedly held in many cases, such as *Bowles v. State*, 37 O.S., 35; *Chesbrough v. Commissioners*, 37 O.S., 508; *County of Miami v. City of Dayton*, 92 O.S., 215.

That the Legislature has power to authorize the commissioners of a county to pledge the faith and credit of the entire county for the payment of bonds issued and sold in anticipation of the collection of assessments upon property specially benefited was held in the case of *State v. Commissioners*, 37 O.S., 526, and has been consistently adhered to ever since."

It may therefore be said that taxing units, other than municipalities, have only such rights of taxation as may be specifically granted to them by the General Assembly. See also *State, ex rel. Toledo, v. Cooper*, supra.

As to taxing units, other than municipalities, the bill, if enacted without amendment, would operate as a grant of power, permitting such units to levy income taxes in the manner and to the extent provided in the bill.

In coming to the above conclusion I am aware of the fact that Chief Justice Nichols appeared to reach an opposite conclusion in the case of *State, ex rel. Zielonka, v. Carrel*, 99 O.S., 220. In that case the constitutionality of an occupational tax levied by the city of Cincinnati was upheld. While the facts there in issue did not involve an income tax and the question of law presented did not require a consideration thereof, Judge Nichols did discuss in a limited manner his views on the effect of Sections 7, 8 and 9 of Article XII of the Constitution, which sections are as follows:

#### Section 7.

"Laws may be passed providing for the taxation of the right to receive, or to succeed to, estates, and such taxation may be uniform or it may be so graduated as to tax at a higher rate the right to receive, or to succeed to, estates of larger value than to estates of smaller value. Such tax may also be levied at different rates upon collateral and direct inheritances, and a portion of each estate not exceeding twenty thousand dollars may be exempt from such taxation."

## Section 8.

"Laws may be passed providing for the taxation of incomes, and such taxation may be either uniform or graduated, and may be applied to such incomes as may be designated by law; but a part of each annual income not exceeding three thousand dollars may be exempt from such taxation."

## Section 9.

"Not less than fifty per centum of the income and inheritance taxes that may be collected by the state shall be returned to the county, school district, city, village, or township in which said income or inheritance tax originates, or to any of the same, as may be provided by law."

Regarding these sections, it was said:

"It may be said in this connection that it is clearly to be implied from the constitution that municipalities are without power to levy an income or inheritance tax.

This implication necessarily arises from the language of Section 9, Article XII, where we find mandatory provision to the effect that 'not less than fifty per centum of the income and inheritance taxes that may be collected by the state shall be returned to the city, village or township in which said income and inheritance tax originate.'

It would seem quite certain, then, that the state alone can initiate taxation of this character."

Inasmuch as an income tax was not in issue and a determination of the validity of the occupational tax did not require a consideration of the effect of the constitutional provisions pertaining to inheritance and income taxes, the observations of Judge Nichols must be regarded solely as his personal views at that time. As said in 11 O. Jur., 799, section 147:

"An obiter statement in an opinion is only valuable as the view of the judge rendering the opinion of the law on the subject."

Sections 7, 8 and 9 of Article XII of the Constitution, when read together, clearly refer to taxes to be levied by the state. That was conceded in Judge Nichols' observations. There is no direct constitutional provision limiting to the State of Ohio the right to levy income and inheritance taxes. Neither is there an implied constitutional limitation.

The state is authorized to adopt a graduated tax, grant exemptions up to \$3,000.00 annually and is required to return at least fifty per centum of the tax to the taxing unit from which the tax originates. There is no reference of any kind to the levying of income or inheritance taxes by any of the state's taxing units. Hence the sections must be regarded as limitations upon the state taxing power only, leaving the taxing units in the same position as they would have occupied had Sections 7, 8 and 9 of Article XII of the Constitution never been enacted.

Answering your questions specifically, it is my opinion that unless restricted or limited by the Constitution or the General Assembly, municipalities generally may levy taxes in any field not already occupied by the state and, if specifically empowered, may simultaneously levy taxes in an occupied field. Taxing units, as defined in Section 5625-1 of the General Code, other than municipalities, may only levy taxes when directly authorized by the General Assembly in fields unrestricted by the Constitution. Proposed Senate Bill No. 85, if enacted in its present form, would limit and restrict the present taxing powers of municipalities and would constitute a grant of taxing power to taxing units other than municipalities.

Respectfully,

THOMAS J. HERBERT,

Attorney General.