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TAXING IN A CONSERVANCY DISTRICT: DEFINITION OF "TAXING DISTRICT"; ANNUAL PAYMENT; CALCULATIONS AND FORFEITURE; AND CONSTITUTIONALITY—§§6101.151, 6101.01 TO 6101.84, 5705.01 R.C.

SYLLABUS:

1. The power of determining whether a statute is constitutional is lodged solely in the courts.
2. The provisions of Section 6101.151, Revised Code, apply only to real property acquired by a conservancy district on or after September 16, 1957, the effective date of such section.
3. The term "taxing districts" as used in Section 6101.151, Revised Code, means a political subdivision or other governmental agency or district having authority to levy taxes on the property in such subdivision or district.
4. The first annual payment in lieu of taxes required by Section 6101.151, Revised Code, for real property removed from the tax duplicate in the year 1960, is payable commencing with the year 1961.
5. In making the calculations or computations provided for in Section 6101.151, Revised Code, to determine the amount in lieu of taxes payable by a conservancy district in any given year, there should be a separate computation for each parcel, lot or tract of real property which is removed from the tax duplicate, and the county auditor is required under such section to apportion this amount to each taxing district in which such parcel, lot or tract is located, as if the amount had been levied and collected as a tax on such parcel, lot or tract.
6. Payment in lieu of taxes by a conservancy district is required under Section 6101.151, Revised Code, only when the greater of the figures arrived at by the calculations provided for in parts (1) and (2) of division (B) of such section is less than the "combined revenue from real estate taxes of all the taxing districts in which such property is located in the tax year immediately prior to the removal of such acquired property from the tax duplicate."

7. If there are changes in a taxing district subsequent to the year in which real property located in such district is removed from the tax duplicate, then it will not be possible to make the calculations provided for in Section 6101.151, Revised Code, and without such calculations it is impossible to determine the amount, if any, which should be paid by a conservancy district in lieu of taxes.

8. Payments in lieu of taxes by a conservancy district under Section 6101.151, Revised Code, become due when the calculations provided for in such section are completed and the amount of the payment is known.

9. The penalty and forfeiture provisions with respect to delinquent taxes as provided for in Sections 5719.17, 5719.18, and 5721.01, *et seq.*, Revised Code, are not applicable to delinquent payments in lieu of taxes under Section 6101.151, Revised Code.

10. In the event of a dispute between a conservancy district and a taxing district over the amount of the payment in lieu of taxes required by Section 6101.151, Revised Code, the parties should settle their dispute by recourse to the courts in an appropriate action to determine their rights and duties.

11. If the annual payments provided for in Section 6101.151, Revised Code, have at any time ceased pursuant to law, the conservancy district may not be required to again make such payments.

Columbus, Ohio, January 19, 1962

Hon. Harlan R. Spies, Prosecuting Attorney
Tuscarawas County, New Philadelphia, Ohio

Dear Sir:

Your request for my opinion poses twelve questions concerning Section 6101.151, Revised Code, which section reads as follows:

“When real property is acquired which is located either within or without the acquiring conservancy district and which is removed from the tax duplicate, the board of directors of the conservancy district shall pay annually to the county treasurer of the county in which such property is located, commencing with the tax year after the removal of such property from the tax duplicate, an amount of money in lieu of taxes equal to the smaller of the following:

“(A) The last annual installment of taxes due from the acquired property before removal from the tax duplicate;

“(B) An amount equal to the difference between the combined revenue from real estate taxes of all the taxing districts in which such property is located in the tax year immediately prior to the removal of such acquired property from the tax duplicate, and (1) the total revenue which would be produced by the tax rate of each such taxing district in the tax year immediately

prior to the removal of such acquired property from the tax duplicate, applied to the real estate tax duplicate of each of such taxing districts in each tax year subsequent to the year of removal, or (2) the combined revenue from real estate taxes of all such taxing districts in each tax year subsequent to the year of removal, whichever is the greater.

“The county auditor of each county in which such property is located shall apportion each such annual payments to each taxing district as if such annual payment had been levied and collected as a tax.

“Such annual payments shall never again be made after they have ceased.”

According to the facts given in your request, the Muskingum Watershed Conservancy District, which owns large areas of real estate located in several counties, filed separate applications with the Board of Tax Appeals in 1960 for exemption from taxation of certain portions of such real estate located in each of said counties. On January 23, 1961 the Board of Tax Appeals entered an order granting the application for exemption on the parcels or portions of parcels located in Tuscarawas County, subject to the provisions of Section 6101.151, *supra*.

I turn now to your questions.

1. Is Section 6101.151, *supra*, constitutional?

I have been unable to find any decision of a court of this state holding Section 6101.151, *supra*, unconstitutional. I can only advise you, therefore, to proceed under this section on the assumption that it is a valid law. In this regard, your attention is directed to the statement of Jones, J. in *The State ex rel. Davis v. Hildebrant*, 94 Ohio St., 154 (1916) at page 169 as follows:

“* * * The record in this case discloses that the defendants, as ministerial officers of the state, are refusing to proceed under an act of the general assembly which they claim to be an invalid law. *The power of determining whether a law or constitutional provision is valid or otherwise is lodged solely in the judicial department. * * **” (Emphasis added)

2. Does Section 6101.151, *supra*, apply to real estate acquired by the conservancy district prior to the effective date of said section, but not removed from the tax duplicate until subsequent thereto?

Section 6101.151, *supra*, was enacted by the 102nd General Assembly as part of Amended House Bill No. 615 and became effective on September 16, 1957 (127 Ohio Laws, 796). The title of that bill reads as follows:

“An Act”

“To amend section 719.02 and to enact section 6101.151 of the Revised Code relative to the acquiring of property by a municipal corporation, and conservancy districts.”

Section 6101.151, *supra*, begins, “When real property is acquired, etc.” Since this section became effective on September 16, 1957, the presumption is that such section refers to real property acquired on or after that date. In this regard, it is provided in 37 Ohio Jurisprudence 819, Statutes, Section 500, as follows:

“Courts indulge in the presumption that the legislature intended statutes enacted by it to operate prospectively rather than retroactively. Indeed, the general rule is that they are to be so construed if susceptible of such interpretation or unless the law is retroactive in terms which clearly show such legislative intention as to permit, by no possibility, of any other construction. When the intention of the legislature is to give a statute a retroactive effect, such intention must not be left to inference or construction, but must be manifested by express and unequivocal expression. If it is doubtful whether it was intended that the act should operate retrospectively, the doubt should be resolved against such operation. * * *”

I must conclude, therefore, that the provisions of Section 6101.151, *supra*, do not apply to real estate acquired by a conservancy district prior to the effective date of such section.

3. What is the meaning of the term “taxing districts” as used in Section 6101.151, *supra*?

I have been unable to find any statutory definition of the term “taxing districts” as used in Section 6101.151, *supra*. Your attention is directed, however, to Section 6101.01, Revised Code, reading in part as follows:

“As used in sections 6101.01 to 6101.84, inclusive, of the Revised Code:

* * *

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* * *

“(C) ‘Public corporation’ or ‘political subdivision’ means counties, townships, municipal corporations, school districts, road districts, ditch districts, park districts, levee districts, and all other

governmental agencies clothed with the power of levying general or special taxes.

“* * *

* * *

* * *”

Considering the context in which the term “taxing district” is used in Section 6101.151, *supra*, it is my conclusion that such term refers to political subdivisions or other governmental agencies clothed with the power of levying taxes. I am strengthened in this conclusion by the definition of “subdivision” and “taxing unit” used in the uniform tax levy law as set forth in Section 5705.01, Revised Code, reading in part as follows:

“As used in sections 5705.01 to 5705.47, inclusive, of the Revised Code:

“(A) ‘Subdivision’ means any county, municipal corporation, township, township fire district, township waste disposal district, or school district, except the county school district.

“* * *

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* * *

“(H) ‘Taxing unit’ means any subdivision or other governmental district having authority to levy taxes on the property in such district, or issue bonds which constitute a charge against the property of such district, including conservancy districts, metropolitan park districts, sanitary districts, road districts, and other districts.

“* * *

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* * *”

4. Is the first annual payment in lieu of taxes payable for the year 1960 or the year 1961?

Section 6101.151, *supra*, provides for annual payments “commencing with the tax year *after* removal of such property from the tax duplicate.” (Emphasis added) The Board of Tax Appeals ordered the property in question to be placed upon the tax exempt list for the tax year 1960, thus removing it from the tax duplicate in that year. The tax year after removal of the property from the tax duplicate would, therefore, be the year 1961.

5. This question concerns the manner of making the calculation provided for by Section 6101.151, *supra*, to determine the amount payable by the conservancy district in any given year in lieu of taxes, and states as follows:

“(a) Do the words ‘the combined revenue from real estate taxes of all the taxing districts in which such property is located’,

appearing in the fore part of paragraph (B), and like expressions elsewhere therein, require that in computing the payment in lieu of taxes one computation shall be made for all the exempted property throughout the Conservancy District, using the combined tax revenues of all taxing districts in which any of the exempted property is located in the fourteen counties involved?

“(b) If the answer to (a) is ‘No’, then is the computation to be made individually for each county so that there would be one computation using the combined tax revenues of each taxing district in which any of the exempted property is located in the county; or

“(c) Is a separate computation to be made as to each separate taxing district in which exempted land is located using only the tax revenues, the tax duplicate valuations and the tax rates for that particular taxing district?

“* * *

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“(d) If the payment to be made by the Conservancy District in lieu of taxes is to be computed for the fourteen counties involved as a unit or for Tuscarawas County as a unit, how does the Auditor determine the distribution thereof to the various taxing districts involved? Am I correct in assuming that if the payment in lieu of taxes is determined separately as to each taxing district, no problem is presented and the distribution would be the same as if the amount paid in lieu of taxes was real estate taxes paid for property in the particular taxing district?”

The calculation or computation provided for in Section 6101.151, *supra*, pertains to “* * * real property * * * removed from the tax duplicate * * *” (Emphasis added) Note that the word “duplicate” is singular. Since each county has its own tax duplicate (Section 319.28, Revised Code), there cannot be one computation for all of the counties involved. My answer to question 5 (a), therefore, is no.

Regarding question 5 (b), it must be assumed that the legislature in enacting Section 6101.151, *supra*, was familiar with how real property is removed from the tax duplicate. Real property is removed from the tax duplicate by parcel, lot, or tract, just as it is listed for taxation by parcel, lot, or tract. See Sections 319.28 and 319.30, Revised Code. When the legislature referred to “real property removed from the tax duplicate,” therefore, it must have meant a given parcel, lot, or tract of real property. In the instant case, several parcels of real property were removed from the tax duplicate of Tuscarawas County. In my opinion, there should be a separate computation for each of these parcels.

The legislature must also have been aware, in enacting Section 6101.151, *supra*, that each parcel is located in at least two taxing districts, i.e. a school district and a city, village or township. While a school district and a township, for example, may have exactly the same boundaries, they are, nevertheless, separate taxing districts. The general assembly, therefore, provided that "the combined revenue from real estate taxes of all the taxing districts in which such property is located" should be used in making the computation of the amount to be paid in lieu of taxes.

In view of the foregoing comments, it will not be necessary to consider question 5 (c) and (d) other than to point out that the county auditor is required under Section 6101.151, *supra*, to apportion the annual payment to each taxing district as if such annual payment had been levied and collected as a tax. This should not present any problem as the distribution would be the same as if the amount paid in lieu of taxes were real estate taxes paid for the particular parcel involved.

6. If the greater of the figures arrived at by the calculations provided for in parts (1) and (2) of paragraph (B) is greater than "the combined revenue from real estate taxes of all the taxing districts in which such property is located in the tax year immediately prior to the removal of such acquired property from the tax duplicate", does this have the effect of relieving the District of any payment in lieu of taxes so that any such payment by the Conservancy District is required only when the greater of the figures arrived at by the calculations provided in said parts (1) and (2) of paragraph (B) is less than "the combined revenue from real estate taxes of all the taxing districts in which such property is located in the tax year immediately prior to the removal of such acquired property from the tax duplicate"?

Paragraph (B) of Section 6101.151, *supra*, provides for the taking of the "difference between the combined revenue etc." and the greater of the figures arrived at by the calculations provided for in parts (1) and (2) of paragraph (B). While it is not entirely clear what the legislature meant by the word "difference," I assume the intention to be to subtract the greater of the figures arrived at by such calculations (which would then be the subtrahend) from the "combined revenue" figure (which would be the minuend). It is a mathematical rule that when the subtrahend is greater than the minuend, the remainder will be a minus number.

According to Section 6101.151, *supra*, the amount of money which is to be paid in lieu of taxes is equal to the smaller of the figures arrived at in paragraphs (A) and (B). If the figure in either (A) or (B) is zero or a minus number, then no amount need be paid since, obviously, no one can pay a negative amount when that is the smaller of the two figures. Payment in lieu of taxes by the conservancy district is required, therefore, only when the greater of the figures arrived at by the calculations provided in parts (1) and (2) of paragraph (B) (the subtrahend) is less than "the combined revenue from real estate taxes of all the taxing districts in which such property is located in the tax year immediately prior to the removal of such acquired property from the tax duplicate." (the minuend figure) Strengthening my conclusion in this regard is the fact that the last sentence of the section assumes that the payments may at some time cease, and the only way that they could cease would be under the interpretation above given.

7. What would be the effect on the calculations referred to above of changes in taxing districts, such as

- (a) transfer of land from one school district to another ;
- (b) consolidation of school districts ;
- (c) annexation of land to a municipality?

I have been unable to find any statutory provisions outlining what procedure to follow to calculate the amount of money to be paid in lieu of taxes in the event of changes in the taxing districts involved. It is obviously impossible to make calculations for "such taxing districts in each tax year subsequent to the year of removal," if there have been changes in "such taxing districts" subsequent to the year of removal. In answer to question seven, therefore, the effect on the calculations would be that no calculations could be made.

8. At what date in each year for which the Conservancy District is required to make such payment in lieu of taxes does the payment become due?

Section 6101.151, *supra*, does not provide on what date the conservancy district is to make the payment in lieu of taxes. The only thing which Section 6101.151, *supra*, provides is that the conservancy district shall make the payment "annually to the county treasurer of the county in which

such property is located commencing with the tax year after removal of such property from the tax duplicate.” It is apparent, however, that the conservancy district cannot make the payment until it knows the amount, and it will not know the amount until after the calculations required by Section 6101.151, *supra*, are completed. Furthermore, such calculations depend on certain data about tax rates and revenues which may not be known until after the end of the tax year for which such payment is required. In answer to question eight, therefore, the payment in lieu of taxes becomes due when the calculations required by Section 6101.151, *supra*, are completed and the amount is known.

9. If not paid when due, is the payment subject to penalty and interest as provided by law with respect to delinquent taxes?

10. If such payment in lieu of taxes is not made, can the forfeiture or tax foreclosure provisions of the law be invoked by the taxing authorities?

Questions nine and ten can be answered together. The law does not favor penalty and forfeiture provisions, hence such provisions have always been strictly construed. 37 Ohio Jurisprudence, Statutes, Sections 421 and 425, pages 747, 752. I have been unable to find any authority making the penalty and forfeiture provisions with respect to delinquent taxes (See Sections 5719.17, 5719.18 and 5721.01, *et seq.*, Revised Code) applicable to the payment in lieu of taxes provided for in Section 6101.151, *supra*. I am constrained to hold, therefore, that such provisions do not apply to a situation where the payment in lieu of taxes has not been made when due.

11. If payments in lieu of taxes tendered by the Conservancy District are in an amount less than the amount determined by the County Auditor to be due, what procedure or remedy do the taxing authorities have to collect the full amount they have determined to be the amount due?

Under the provisions of Section 6101.08, Revised Code, a conservancy district is a body corporate with all the powers of a corporation with power to sue and be sued. If the payment in lieu of taxes tendered by the conservancy district is in an amount less than the amount determined by the county auditor to be due, then the taxing authorities may sue the conservancy district in an appropriate action to determine the rights and duties of the parties concerned.

12. What is the meaning of the last sentence of Section 6101.151?

The last sentence of Section 6101.151, *supra*, provides :

“Such annual payments shall never again be made after they have ceased.”

In order to determine the meaning of this sentence, it must be read in connection with the rest of the section. The first paragraph of the section requires annual payments with no indication that they will ever cease. In discussing your sixth question concerning the calculations required in connection with paragraph (B) of the section, however, we noted that no payment need be made in a given year when the figure arrived at in paragraph (A) or (B) is zero or a minus number. If the figure in the next year were more than zero, then a payment would be required, except for the last sentence of the section. When the payment for a given year has ceased, therefore, it shall never again be made even though the calculations for the next year would show that a payment is due.

In conclusion, it is my opinion and you are advised :

1. The power of determining whether a statute is constitutional is lodged solely in the courts.

2. The provisions of Section 6101.151, Revised Code, apply only to real property acquired by a conservancy district on or after September 16, 1957, the effective date of such section.

3. The term “taxing districts” as used in Section 6101.151, Revised Code, means a political subdivision or other governmental agency or district having authority to levy taxes on the property in such subdivision or district.

4. The first annual payment in lieu of taxes required by Section 6101.151, Revised Code, for real property removed from the tax duplicate in the year 1960, is payable commencing with the year 1961.

5. In making the calculations or computations provided for in Section 6101.151, Revised Code, to determine the amount in lieu of taxes payable by a conservancy district in any given year, there should be a separate computation for each parcel, lot or tract of real property which is removed from the tax duplicate, and the county auditor is required under such section to apportion this amount to each taxing district in which such parcel, lot or tract is located, as if the amount had been levied and collected as a tax on such parcel, lot or tract.

6. Payment in lieu of taxes by a conservancy district is required under Section 6101.151, Revised Code, only when the greater of the figures arrived at by the calculations provided for in parts (1) and (2) of division (B) of such section is less than the "combined revenue from real estate taxes of all the taxing districts in which such property is located in the tax year immediately prior to the removal of such acquired property from the tax duplicate."

7. If there are changes in a taxing district subsequent to the year in which real property located in such district is removed from the tax duplicate, then it will not be possible to make the calculations provided for in Section 6101.151, Revised Code, and without such calculations it is impossible to determine the amount, if any, which should be paid by a conservancy district in lieu of taxes.

8. Payments in lieu of taxes by a conservancy district under Section 6101.151, Revised Code, become due when the calculations provided for in such section are completed and the amount of the payment is known.

9. The penalty and forfeiture provisions with respect to delinquent taxes as provided for in Sections 5719.17, 5719.18, and 5721.01, *et seq.*, Revised Code, are not applicable to delinquent payments in lieu of taxes under Section 6101.151, Revised Code.

10. In the event of a dispute between a conservancy district and a taxing district over the amount of the payment in lieu of taxes required by Section 6101.151, Revised Code, the parties should settle their dispute by recourse to the courts in an appropriate action to determine their rights and duties.

11. If the annual payments provided for in Section 6101.151, Revised Code, have at any time ceased pursuant to law, the conservancy district may not be required to again make such payments.

Respectfully,
MARK McELROY
Attorney General