

4311.

SALES TAX—S. B. #68, 91st GENERAL ASSEMBLY, NOT SUBJECT TO REFERENDUM.

SYLLABUS:

An act of the General Assembly defining "retail sale" upon which an excise tax has been levied, is a law "providing for tax levies" and not subject to referendum.

COLUMBUS, OHIO, June 1, 1935.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—Your letter of recent date is as follows:

"We desire your immediate opinion regarding the effective date of Senate Bill No. 68, enacted by the 91st General Assembly, signed by the Governor on May 25, 1935 and filed in the office of the Secretary of State on that day.

It has been ruled by the Secretary of State, we understand, that the bill does not take effect until the expiration of ninety days. It is contended, on the other hand, by the representatives of certain mining interests, that the bill takes immediate effect under the provisions of Article II, Section 1d of the Constitution of Ohio.

May we have your immediate consideration of this matter in view of its importance as to time."

Senate Bill No. 68 is an act "To amend section 5546-1 of the General Code of Ohio, relative to retail sales tax." This section of the General Code contains the definitions of the terms used in the Sales Tax Act. Senate Bill No. 68 amends the paragraph defining "retail sale" so that the same shall read as follows:

" 'Retail sale' and 'sale at retail' include all sales excepting those in which the purpose of the consumer is (a) to resell the thing transferred in the form in which the same is, or is to be, received by him; or (b) to incorporate the thing transferred as a material or a part, into tangible personal property to be produced for sale by manufacturing, assembling, processing or refining, or to use or consume the thing transferred in manufacturing, retailing, processing, or refining, or mining, or in the rendition of a public utility service; or (c) security for the performance of an obligation by the vendor. *Farmers and horticulturists shall be considered manufacturers or processors in the interpretation of this act.*"

Section 5546-2, General Code, being section 2 of the Sales Tax Act, is the tax levying section of the act. It is therein provided *inter alia* that "An excise tax is hereby levied on each retail sale in this state of tangible personal property occurring during the period beginning on the first day of January, 1935, and ending on the thirty-first day of December, 1935," at a rate and with certain exceptions thereafter set forth.

Section 1d of Article II of the Constitution provides that "Laws providing for tax levies * * * shall go into immediate effect." The sole question presented by your inquiry is accordingly one of whether or not Senate Bill No. 68 is a law providing for a

tax levy within the meaning of the phrase as used in Section 1d, Article II of the Constitution and hence not subject to referendum.

The Supreme Court held in *State ex rel. vs. Milroy*, 83 O. S. 301, as set forth in the syllabus:

“An act to amend Sections 5649-2 and 5649-3b and repeal Section 5649-3, General Code, relative to the limitation of a tax rate, passed April 16, 1913, approved May 6, 1913, and filed in the office of the secretary of state May 9, 1913, is not a law providing for tax levies within the meaning of these words, as used in Section 1d of Article II of the Constitution, and the same cannot go into effect until ninety days after it was filed in the office of the secretary of state.”

In the course of the per curiam opinion, at page 304, the court apparently recognized that an act which designated the persons or property against whom a levy is to be made would be “a law providing for tax levies”. The language is as follows:

“The general assembly did not, in this act, impose a tax, stating distinctly the object of the same, nor did it fix the amount or the percentage of value to be levied, nor did it designate persons or property against whom a levy was to be made. It merely imposed certain limitations and created an agency.”

The syllabus of the case of *State, ex rel, vs. Forney*, 108 O. S. 463, is as follows:

“1. Exceptions to the operation of laws, whether statutory or constitutional, should receive strict, but reasonable, construction.

2. The language of Section 1d, Article II of the Constitution, expressly enumerating certain exceptions to the people's right of referendum upon acts of the General Assembly, must be construed and applied with reference to this rule.

3. The express language, ‘laws providing for tax levies,’ is limited to an actual self-executing levy of taxes, and is not synonymous with laws ‘relating’ to tax levies, or ‘pertaining’ to tax levies, or ‘concerning’ tax levies, or any agency or method provided for a tax levy by any local subdivision or authority.”

In the foregoing case the Supreme Court, Robinson and Matthias, JJ. dissenting and Jones, J. taking no part in the decision, held that an act of April 30, 1923, entitled “An act to revise and codify the laws relating to the levy of taxes, and the issue of bonds by taxing subdivisions, and to establish a budget system for local expenditures”, was not a law providing for tax levies and hence subject to referendum. In the majority opinion at pages 470 and 471, it is said:

“The kind of laws contemplated in this first exception to the general constitutional right of referendum, ‘laws providing for tax levies,’ is obviously such as comprehended within Article XII of the Constitution, headed ‘Finance and Taxation,’ which article relates primarily to the taxing power. Special attention is directed to Section 5 of Article XII, as follows:

‘No tax shall be levied except in pursuance of law; and every law imposing a tax, shall state, distinctly, the object of the same, to which only, it shall be applied.’

You cannot have a law ‘providing for tax levies,’ except its public purpose be stated; but, in addition thereto, *such law must state the property sub-*

ject to the tax, the rate of tax, the time when such tax is payable, and other elementary essentials of a taxation law. The Taft Act complies with none of these. It is simply a new scheme and a new agency created for levying taxes and enlarging the power and rate of levy, so far as they relate to the referendum article.

Something has been said that certain sections of the act are admittedly subject to the referendum, but that the act as a whole is not subject to the referendum, because certain sections do 'provide for tax levies,' and those sections save the entire act from being submitted as a whole to a referendum.

If there were any sections of the Taft Act actually 'providing for a tax levy,' then we would agree with this contention; but under Article XII, and its various sections 'providing for tax levies,' this phrase is synonymous with 'making tax levies,' and no claim of that character is made in behalf of the Taft Act." (Italics the writer's)

Here again the Supreme Court has recognized that a law "providing for tax levies must state the property subject to the tax." In the instant case we are concerned not with a tax levy upon property but with an excise tax levied upon retail sales. It seems clear that a law providing for such tax levies must set forth the retail sales which are subject to the tax, just as a law levying a property tax must state the property subject to the tax. The statement as to the retail sales which are subject to the tax is contained in Senate Bill No. 68, defining "retail sale". This act is accordingly inextricably interwoven with Section 5546-2, which is the tax levying section. Certainly a most essential and unseverable part of a law levying a tax on retail sales is the portion of such law defining that which is to be taxed. See Opinions of the Attorney General, 1927. Vol. II, p. 1234.

It is my opinion that Senate Bill No. 68 is a law "providing for tax levies" within the meaning of the term as used in Section 1d of Article II of the Constitution and accordingly not subject to referendum.

Respectfully,

JOHN W. BRICKER,
Attorney General.

4312.

TOWNSHIP—TRUSTEES AUTHORIZED TO GRANT RIGHT OF WAY OVER
TOWNSHIP LANDS WHEN.

SYLLABUS:

1. *Township trustees may grant a right of way over township lands providing they reserve the right to revoke the same when in their opinion the land should be used for other purposes or sold.*

2. *In granting a right of way over township lands, it is not necessary to advertise and conduct an auction as provided in section 3281, General Code, for the sale of such lands.*