

OPINION NO. 80-025**Syllabus:**

Due to the absence of any provision specifically imposing a penalty on the state for late payment, the state is not required to pay the penalty imposed by R.C. 5719.17 for failure to pay county ditch assessments on or before the date specified in that section.

To: Thomas E. Ferguson, Auditor of State, Columbus, Ohio
By: William J. Brown, Attorney General, May 13, 1980

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

Where county ditch assessments have been properly assessed against the state pursuant to Section 6131.22, Ohio Revised Code, and payments have not been made on or before the due date as required by Sections 6131.23 and 5719.17, Ohio Revised Code, is the State of Ohio required to pay the penalty specified by the latter section?

R.C. Chapter 6131 provides generally for the creation of single county ditches and related improvements through the authority of the board of county commissioners. As noted in your opinion request, R.C. 6131.22 specifies the manner in which the board of county commissioners determines the payment of assessments for improvements. As applied to the state, the statute provides, in part: "Such part of the assessment as is found to benefit state roads or highways shall be assessed against the state payable from motor vehicle revenues. . . ." These assessments shall be payable in not less than two semiannual installments. R.C. 6131.23.

A ditch assessment is not identical to a property tax. As discussed in State v. Carney, 166 Ohio St. 81, 83, 139 N.E. 2d 339, 340 (1956), "[i]t is an assessment against real property based on the proposition that, due to a public improvement of some nature, such real property has received a benefit."

The penalty for late payment of assessments, however, is contained in R.C. 5719.17, which also provides a penalty for late payment of real estate taxes. R.C. 5719.17 states:

If one half the taxes, assessments, and recoupment charges charged against an entry of real estate is not paid on or before the thirty-first day of December in that year, a penalty of ten per cent shall be added to such half of said taxes, assessments, and charges on the duplicate. If the total amount of such taxes, assessments, charges and penalty is not paid on or before the twentieth day of June, next thereafter, a like penalty shall be charged on the balance of the amount of such unpaid taxes, assessments, and charges. The total of such amounts shall constitute the delinquent taxes, assessments, and recoupment charges on such real estate, to be collected in the manner prescribed by law.

Thus, your question is whether the penalty allowed by R.C. 5719.17 may be properly imposed on the state.

It is a fundamental principle of statutory construction that the state is not bound by the terms of a general statute unless it is expressly named or referred to therein. State ex rel. Williams v. Glander, 148 Ohio St. 188, 74 N.E. 2d 82 (1947); Palumbo v. Industrial Commission, 140 Ohio St. 54, 42 N.E. 2d 766 (1942); State ex rel. Attorney General v. Cincinnati Central Railway Co., 37 Ohio St. 157 (1881); State ex rel. Parrot v. Board of Public Works, 36 Ohio St. 409 (1881). See also 1975 Op. Att'y Gen. No. 75-003; 1974 Op. Att'y Gen. No. 74-016. This time-honored principle has its roots in the doctrine that a sovereign state can make or remake laws and that general laws are intended to regulate the conduct of the citizenry, rather than the conduct of the state. Palumbo, supra; Parrott, supra.

Accordingly, the aforementioned rule of statutory construction has been applied in cases which have examined the liability of the state for the payment of interest. In Parrott, supra, the syllabus states: "In the absence of a statute requiring it, or a promise to pay it, interest cannot be adjudged against the state for delay in the payment of money." In the Parrott case, the state Board of Public Works breached a contract by failing to pay deferred payments upon maturity. The court disallowed interest to be paid on the amount overdue in the absence of a promise, expressed or implied, to make the payments.

In the case of Industrial Commission v. Phillips, 114 Ohio St. 607, 151 N.E. 769 (1926), the court concluded that there was no authority for the Industrial Commission to pay interest on deferred payments of awards. It was the position of the court that, until the legislature made provision for the allowance of interest, no right existed for such a payment.

The Parrott and Phillips decisions were recently cited with approval in Lewis v. Benson, 60 Ohio St. 2d 66, 397 N.E. 2d 396 (1979), in which the Supreme Court of Ohio reversed a lower court's determination that a wrongfully discharged civil service employee was entitled to back pay and interest upon reinstatement. The court noted that there was no statutory authority for the award of interest under these circumstances and that, in the absence of such authorization, the state was not liable to pay interest on its debts. These cases make it clear that the state is not liable for the payment of interest unless there is specific statutory or contractual authority for the making of the payment.

It would appear that the aforementioned authorities pertaining to the liability of the state for interest payments are equally applicable to the penalty provisions of R.C. 5719.17. Interest or penalties often are assessed for a delay in the payment of an amount fixed and due. The amount of penalty or interest due is based upon the fixed amount that has not been paid within a prescribed time period. In certain instances, interest or penalty charges may be regarded as compensation for the detention of money found to be due. R.C. Chapter 5719 sets forth a general statutory scheme governing the collection of taxes. R.C. 5719.17 is a general penalty provision applicable to "taxes, assessments, and recoupment charges against an entry of real estate" which are not paid within a statutorily prescribed time period. R.C. 5719.17 makes no mention of assessments charged against the state. In the absence of such a special provision, I am of the opinion that no penalty may be charged against the state for late payment under that statute. See Lewis, supra.

Thus, it is my opinion, and you are advised, that due to the absence of any provision specifically imposing a penalty on the state for late payment, the state is not required to pay the penalty imposed by R.C. 5719.17 for failure to pay county ditch assessments on or before the date specified in that section.