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TAXES, PERSONAL PROPERTY—BULK SALES ACT—PROPOSED SALE, TRANSFER OR ASSIGNMENT IN BULK OF WHOLE OR ANY PART OF STOCK OF MERCHANDISE AND FIXTURES—CONDUCT OF BUSINESS OTHERWISE THAN IN ORDINARY COURSE OF TRADE AND REGULAR AND USUAL PROSECUTION OF BUSINESS—WHERE TENDER MADE TO COUNTY TREASURER OF CURRENT TAXES AND DELINQUENT TAXES ACCRUED IN 1932 AND SUBSEQUENT YEARS, DEMAND MADE BY TAXPAYER UPON TREASURER FOR CERTIFICATE TO SHOW ALL TAXES DUE AND PAYABLE HAVE BEEN PAID, SECTION 11102 G. C., DUTY OF TREASURER TO REFUSE TO ISSUE CERTIFICATE IF DELINQUENT PERSONAL AND CLASSIFIED PROPERTY TAX LIST INCLUDES UNPAID TAXES AGAINST SUCH TAXPAYER, WHICH ACCRUED PRIOR TO 1932.

SYLLABUS:

If, in connection with a proposed sale, transfer or assignment in bulk of the whole or any part of a stock of merchandise and fixtures pertaining to the conducting of a business otherwise than in the ordinary course of trade and in the regular and usual prosecution of the business, a tender is made to the county treasurer of current taxes and such delinquent taxes as accrued in 1932 and years subsequent thereto and a demand is made by such taxpayer upon the treasurer for the issuance of a certificate showing that all taxes due and payable have been paid, as provided in Section 11102, General Code, it is the duty of the treasurer to refuse to issue such certificate if the delinquent personal and classified property tax list includes unpaid taxes against such taxpayer which accrued prior to 1932.

Columbus, Ohio, December 23, 1947

Hon. D. Deane McLaughlin, Prosecuting Attorney, Stark County
Canton, Ohio

Dear Sir:

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

“Our county treasurer has numerous accounts on his books showing charges for personal property taxes extending before 1932. Your attention is called to Section 5398-2 which establishes

a limitation on actions etc., brought by the county treasurer to enforce payment of personal property taxes prior to 1932. Section 11102 (Bulk Sales Act) provides for a certificate from the county treasurer showing all taxes due and payable have been paid.

In the event that there are unpaid personal property taxes which accumulated prior to 1932, is the county treasurer authorized to accept unpaid taxes which accrue subsequent to 1932 and thereupon issue the certificate referred to in Section 11102?"

Section 11102, General Code, sometimes referred to as the bulk sales law, in its present form reads as follows:

"The sale, transfer or assignment, in bulk, of any part or the whole of a stock of merchandise, or merchandise and the fixtures pertaining to the conducting of said business, or the sale, transfer or assignment in bulk of the fixtures pertaining to the conducting of said business, otherwise than in the ordinary course of trade and in the regular and usual prosecution of the business of the seller, transferrer or assignor, shall be void as against the creditors of the seller, transferrer, assignor, unless the purchaser, transferee or assignee demands and receives from the seller, transferrer or assignor a written list of names and addresses of the creditors of the seller, transferrer and assignor with the amount of the indebtedness due or owing to each and certified by the seller, transferrer, and assignor, under oath, to be a full, accurate and complete list of his creditors, and of his indebtedness; and unless the purchaser, transferee or assignee shall, at least five (5) days before taking possession of such merchandise, fixtures, or merchandise and fixtures, or paying therefor, notify personally or by registered mail, every creditor whose name and address appears in said list, or of which he has knowledge, of the proposed sale and of the price, terms and conditions thereof; and provided further that unless the purchaser, transferee or assignee demands and receives from the seller, transferrer or assignor a certificate, in such form as may be prescribed by the bureau of inspection and supervision of public offices, from the county treasurer showing that *all taxes due and payable have been paid*, such sale, transfer or assignment shall be void as against any county treasurer for taxes due from such seller, transferrer or assignor and the limitation of ninety days contained in section 11103-1 shall not apply to any county treasurer's claim for taxes." (Emphasis added.)

It is thus seen that where a sale or transfer in bulk of merchandise or fixtures of a business is to be made, among other things it is incumbent upon the seller to procure and deliver to the transferee a certificate "from

the county treasurer showing that all taxes due and payable have been paid." If this is not done, the treasurer is permitted at any time to proceed against the goods transferred. It therefore becomes essential to determine if unpaid taxes assessed against the seller prior to 1932 are still "taxes due and payable."

Your question is probably prompted by the provisions of Section 5398-2, General Code, enacted by the Ninety-fourth General Assembly in 1941, which section reads as follows:

"No action, distraint, seizure and sale, or other proceeding to collect taxes on personal property, tangible or intangible, required to be listed and subject to taxation in the years prior to 1932, shall be instituted and carried out, unless a valid assessment of such taxes shall have been made prior to the effective date of this act, and unless such action, distraint, seizure and sale or other proceeding to collect taxes shall be commenced within ninety days after the effective date of this act, or within ninety days after the termination or expiration of any written undertaking entered into under the provision of section 2672-10 of the General Code, respecting such personal property taxes prior to 1932, whichever is later, except as hereinafter provided. In the case of receivership or bankruptcy, the presentation of a claim for such taxes by the county treasurer to the receiver or trustee shall be deemed the commencement of a proceeding to collect such taxes within the meaning of this section."

It will be observed that the General Assembly did not provide for the remission or cancellation of any taxes. It merely withdrew the availability of present affirmative remedies for the collection of such taxes. An attempt to construe the statute as remitting taxes assessed prior to 1932 would probably result in unconstitutionality, for the statute would not operate upon all persons alike, as required by the equal protection clause of Section 2 of Article I of the Constitution, and, as an attempt to release obligations of the past, it would probably be regarded as retroactive and in violation of Section 28 of Article II of the Constitution. *Hostetter v. Hunt*, 132 O. S. 568; and *State, ex rel. Struble, v. Davis*, 132 O. S. 555. In the *Struble* case an act was held unconstitutional as being violative of Section 28 of Article II of the Constitution for the reason that it provided for the exemption of taxes, the assessments of which had been completed at the time the act in question was adopted. However, it is not now necessary to decide whether the application of similar reasoning would

render Section 5398-2, General Code, unconstitutional. Delinquent taxes, even though presently uncollectible, must remain on the delinquent personal and classified property tax list until paid or removed in some other appropriate manner. Payment of part of such delinquent taxes, such as assessments made in 1932 and thereafter, would not be payment of "all taxes due and payable," for the older arrearages would still remain on the delinquent personal and classified property tax list.

In conclusion and answering your question specifically, it is my opinion that if, in connection with a proposed sale, transfer or assignment in bulk of the whole or any part of a stock of merchandise and fixtures pertaining to the conducting of a business otherwise than in the ordinary course of trade and in the regular and usual prosecution of the business, a tender is made to the county treasurer of current taxes and such delinquent taxes as accrued in 1932 and years subsequent thereto and a demand is made by such taxpayer upon the treasurer for the issuance of a certificate showing that all taxes due and payable have been paid, as provided in Section 11102, General Code, it is the duty of the treasurer to refuse to issue such certificate if the delinquent personal and classified property tax list includes unpaid taxes against such taxpayer which accrued prior to 1932.

Respectfully,

HUGH S. JENKINS,
Attorney General.