3388

A SUBDIVISION OF THE STATE HAS NO POWER TO COLLECT A SPECIAL ASSESSMENT AGAINST STATE PROPERTY WITHOUT THE PERMISSION OF THE LEGISLATURE—THE STATE DEPT. CANNOT EXPEND PUBLIC FUNDS TO PAY TAXES ON STATE PROPERTY WITHOUT THE PERMISSION OF THE LEGISLATURE—§§6117.30, 5703.02, 5713.08, 5717.03, R.C., OPINION 728, 1946, 2685, 1961, 658, 1959, OAG, §2, ARTICLE XII, O.C.

SYLLABUS:

1. In the absence of legislative permission, a political subdivision of the state has no power to levy or collect a special assessment against property owned by the state.

2. In the absence of legislative permission, a state department has no authority to expend public funds to pay taxes levied by a political subdivision of the state on property owned by the state.

Columbus, Ohio, October 31, 1962

Hon. T. J. Kauer, Director
Department of Public Works, Columbus, Ohio

Dear Sir:

Your request for my opinion reads as follows:

"As of June 7, 1954, the State of Ohio purchased a residence at 5758 Onaway Oval, Parma, Ohio, for the sum of $25,000.00, to be used as living quarters for a staff physician of the Cleveland Psychiatric Institute and Hospital, and his family. The using agency, Department of Mental Hygiene and Correction, rented the premises to a staff physician and his family for $100.00 per month.

"At the time of purchase, arrangements were made for the payment of the 1954 taxes by the grantor. In August, 1955, an application was filed for exemption of the property from further taxation, pursuant to the provisions of Revised Code Section 5119.47. Exemption was denied by the State Board of Tax Appeals on the grounds that no public purpose was being served by the use of this property by the State employee. (A copy of the journal entry is enclosed.)

"The Department of Mental Hygiene and Correction has continued the original use of the premises, namely, the rental of the premises to a succession of staff physicians and their families.

"We are now in receipt of tax bills for the years 1955 through 1961, for general taxes, penalties, interest and auditor's certification fees, city lighting assessments, penalties and interest, and county sewer maintenance, penalties and interest, in the total amount of $3,068.45.

"Your opinion is requested as to the State's legal position pertaining to the charges enumerated above."

You request my opinion as to the state's legal position pertaining to the charges enumerated in your letter. Since these charges relate both to taxes and assessments, it is well to keep in mind that a provision exempting real property from taxation does not *ipso facto* exempt such property from assessments. *Lima* v. *Cemetery Associaton,* 42 Ohio St., 128 (1884). I shall proceed, therefore, to discuss the state's legal position pertaining to assessments, and then I shall discuss the state's position regarding exemption from taxation.

Regarding the right of a city to levy an assessment against property owned by the state, I direct your attention to Opinion No. 728, Opinions of the Attorney General for 1946, page 51, wherein one of my predecessors expressed the view to the then director of public works that "a municipality has no power *without legislative permission* to levy a special assessment against property owned by a state." (Emphasis added) Although my predecessor could find no Ohio decision directly in point, he supported this view by citing several cases from other states. The then attorney general also quoted a statement appearing in 48 American Jurisprudence 641, as follows:

> "In the absence of state constitutional restrictions in the matter, a state legislature may subject state property to liability to special or local assessments; whether or not it does so is entirely a question of policy. A constitutional exemption of the property from 'taxation' does not prevent such action by the legislature.
>
> "The minority rule is that state property, unless it is expressly exempted, is subject to a special or local assessment. The majority rule, however, is that in the absence of legislative permission, state property is not subject to special assessment. A grant of the power to levy special assessments on state property is not to be implied from a statute giving a general power to make assessments to meet the cost of local improvements. The intent that the property of the state shall be subject to assessment must be clearly expressed. One reason advanced for the rule that if the statute authorizing special assessments is in general terms, neither excluding nor including specifically the property of the state, such statute is to be so construed as to exclude property of the state, is that it is a general rule in the interpretation of statutes limiting rights and interests to construe them so as not to embrace the sovereign power or government, unless the same is expressly named therein or intended by necessary implication. The rule has sometimes been put on the ground that the property of the state cannot be taken on execution. So, a constitutional provision whereby certain state lands are made inalienable has been said to preclude the levy of a local assessment thereon. A constitutional prohibition against suits against the state has been held to preclude the levy of a special assessment on its property. Still another reason advanced is that it is unreasonable to tax one governmental agency for the benefit of another."

I concur in the view expressed by my predecessor in Opinion No. 728, *supra,* for the reasons stated therein, and note that I followed said view in my Informal Opinion No. 304, Informal Opinions of the At-

torney General for 1961, issued April 26, 1961, wherein I held that the Ohio State University was not liable for a city street cleaning assessmnt. In that regard, I could find no legislative permission for such an assessment against state-owned property. By the same token, I have been unable to find any legislative permission for the city in the instant case to levy an assessment for lighting against the subject property, which is owned by the state. I must conclude, therefore, that the state is not liable for said lighting assessment.

As noted by my predecessor in Opinion No. 728, *supra,* the foregoing conclusion is not predicated on any tax exemption statute. See *Lima* v. *Cemetery Association, supra.*

Regarding the right of a county to levy an assessment against property owned by the state, I direct your attention to Opinion No. 2685, Opinions of the Attorney General for 1961, issued December 11, 1961. In said opinion, after citing Opinion No. 658, Opinions of the Attorney General for 1949, page 315, which referred to the case of *State ex rel. Monger* v. *Board of County Commissioners,* 119 Ohio St., 93 (1928), for the proposition that, in the absence of legislative permission, there is no authority for a county to levy and collect an assessment against property owned by the state, I stated as follows:

> "The only legislative permission which I have been able to find allowing a board of county commissioners to levy an assessment against state property in the case of sewer districts is Section 6117.30, Revised Code, reading as follows:
>
> > " 'The cost and expense of the construction of a main, branch, or intercepting sewer or sewerage treatment or disposal works to be paid by assessment shall be assessed, as an assessment district assessment, upon all the property within such district found to be benefited in accordance with the special benefits conferred, less such part of said cost as is paid by the county at large, and *state lands so benefited shall bear its proportion of assessed cost according to special benefit.*' (Emphasis added)
>
> "You will note that Section 6117.30, *supra,* specifically refers to the cost of construction and makes no reference to the cost of maintenance; and under the doctrine of *expressio unius est exclusio alterius,* I must conclude that the legislature has not granted permission to a board of county commissioners under Section 6117.30, *supra,* to levy a 'maintenance assessment' against state property."

I have been unable to find any change in the law since Opinion No. 2685, *supra,* was issued. I must conclude, therefore, that the state is not liable for the sewer maintenance assessment in the instant case. Let me reiterate that my conclusion is not predicated on any tax exemption statute. I turn now to a discussion of the state's legal position regarding its exemption from taxation.

Article XII, Section 2, Ohio Constitution, pertaining to taxation, provides in part, as follows:

> "* * * general laws may be passed to exempt burying grounds, public school houses, houses used exclusively for public worship, institutions used exclusively for any public purpose, * * *"

Section 5703.02, Revised Code, provides, in part, as follows:

> "The board of tax appeals shall exercise the following powers and perform the following duties of the department of taxation:
>
> "(A) Exercise the authority provided by law relative to consenting to the exempting of property from taxation, and revising the list of exempted property in any county;
>
> "* * * * * * * * *"

Section 5713.08, Revised Code, provides as follows:

> "*The county auditor shall make a list of all real* and personal *property in his county,* including money, credits, and investments in bonds, stocks, or otherwise, *which is exempted from taxation under sections* 511.11, 1721.01, 1721.07, 1721.10, 1743.03, 3313.44, 3349.17, and *5709.07 to 5709.18, inclusive, of the Revised Code.* Such list shall show the name of the owner, the value of the property exempted, and a statement in brief form of the ground on which such exemption has been granted. It shall be corrected annually by adding thereto the items of property which have been exempted during the year, and by striking therefrom the items which have lost their right of exemption and which have been reentered on the taxable list. *No additions shall be made to such exempt lists nor additional items of property exempted under such sections without the consent of the board of tax appeals,* but when any personal property or endowment fund of an institution has once been held by the board to be property exempt from taxation, it is not necessary to obtain the board's consent to the exemption of additional property or investments of the same kind belonging to the same institution, but such property shall appear on the abstract filed annually with the board. The board may revise at any time the list in every county so that no property is improperly or illegally exempted from taxation. *The auditor*

shall follow the orders of the board given under this section. An abstract of such list shall be filed annually with such board, on a form approved by it, and a copy thereof shall be kept on file in the office of each auditor for public inspection. The board shall not consider an application for exemption of property under such sections unless the application has attached thereto a certificate or affidavit executed by the county treasurer certifying that taxes, assessments, penalties, and interest levied and assessed against the property sought to be exempted have been paid in full to the date upon which the application for exemption is filed.

"Taxes, penalties, and interest which have accrued after the property began its use for the exempt purpose, but in no case prior to the date of acquisition of the title to said property by applicant, may be remitted by the auditor, with the consent of the board." (Emphasis added)

Section 5717.03, Revised Code, provides, in part, as follows:

"* * * * * * * * *

"The decisions of the board may affirm, reverse vacate, or modify the tax assessments, valuations, determinations, findings, computations, or orders complained of in the appeals or applications determined by it, and *its decision shall become final and conclusive for the current year unless reversed, vacated, or modified as provided in section 5717.04 of the Revised Code.* When a decision of the board becomes final the commissioner and all officers to whom such decision has been certified shall make the changes in their tax lists or other records which the decision requires." (Emphasis added)

In the entry of the board of tax appeals (Case No. 29293, decided March 13, 1956), a copy of which was enclosed with your request, it is stated as follows:

"The state claims tax exemption on this property by virtue of the provisions of Revised Code Section 5119.47, which reads as follows:

"'Superintendents, wardens, and matrons, if required by the director of mental hygiene and correction, shall reside in the institution in which they are employed and devote their entire time to the interests of their particular institution.'

"However, Revised Code Section 5119.47 is not a tax exemption statute and the Board of Tax Appeals will consider the application on the basis that tax exemption for this property is requested under the provisions of Revised Code Section 5709.08, the pertinent portion of which section reads as follows:

> "'Real * * * property belonging to the state * * * used exclusively for a public purpose * * * shall be exempt from taxation * * *'"

Exemption for the year 1955 was denied by the board of tax appeals on the grounds that the subject property was not being used exclusively for a public purpose because it was being used as a private place of residence for a state employee and his family. Your request does not indicate that the decision of the board of tax appeals in Case No. 29293, *supra,* was appealed. I must assume, therefore, that the decision of the board is now final and conclusive insofar as the year 1955 is concerned. See Section 5717.03, *supra.* I further assume that no other applications for exemption of the property from taxation have been made in the years subsequent to 1955, hence the county auditor has continued to list this property on the tax list and duplicate as subject to taxation. See Section 5713.08, *supra.*

Although the property has been continued on the tax list as subject to taxation, a new application for exemption from taxation, along with an application for remission of taxes for the years since 1955, could now be filed (provided the taxes go up to and including those for 1955 have been paid), because the decision in Case No. 29293, *supra,* is not *res judicata* for the years subsequent to 1955. *The Standard Oil Co.* v. *Zangerle,* 141 Ohio St., 505 (1943); Section 5717.03, *supra.* Although a new application *could* now be filed, the question is whether such an application *should* be filed. As your legal advisor, I would say that a new application should be filed if the prior decision of the board of tax appeals (Case No. 29293, *supra*) were clearly erroneous, or if there has been any change in the law or the facts since the prior decision was rendered, which would lead one to reasonably expect a different result today. Obviously, I would not advise you in good conscience to file a new application if the prior decision were, in my opinion, correct and there has been no change since it was rendered.

The board of tax appeals in Case No. 29293, *supra,* based its decision on the case of *Western Reserve Academy* v. *Board of Tax Appeals,* 153 Ohio St., 133 (1950). In the *Western Reserve* case the supreme court stated at page 136 as follows:

> "* * * Residence in a dwelling with a family must necessarily be a private use of the premises. Where the exercise of such private rights constitutes the primary use of property owned

> by a charitable institution such property is no longer used exclusively for a charitable purpose. * * *"

In view of the supreme court's opinion in the *Western Reserve* case, which the board of tax appeals as an inferior tribunal is bound to follow, I can only conclude that the board's decision in Case No. 29293, *supra,* was correct.

According to your letter of request, there has been no change in the facts since 1955, i.e. "The Department of Mental Hygiene and Correction has continued the original use of the premises, namely, the rental of the premises to a succession of staff physicians and their families." There remains then only the question of whether there has been any change in the law.

The rule of law laid down by the supreme court in the *Western Reserve* case, *supra,* has never been overruled. On the contrary, it has recently been reaffirmed in the case of *Doctors Hospital* v. *Board of Tax Appeals,* 173 Ohio St., 283 (decided April 11, 1962). In the *Doctors Hospital* case the supreme court held that residence quarters furnished without charge by a charitable hospital to its married interns and residents are not entitled to exemption, because residence in a dwelling with a family must necessarily be a private use of the premises and not a use exclusively for charitable purposes. The court declined, however, to decide the question as to whether similar quarters furnished to unmarried interns and residents are exempt. Two judges dissented citing *Aultman Hospital Assn.* v. *Evatt,* 140 Ohio St., 114 (1942). In the *Aultman Hospital* case the occupants of the residence quarters were student nurses of the hospital who lived alone in dormitory quarters furnished by the hospital. These quarters were held to be exempt. It is difficult to perceive how unmarried nurses quarters are any less private than married interns quarters, but nevertheless this is the law of Ohio at the present time.

Based on the law and facts in the instant case, I would not deem it advisable to pursue this matter further by filing a new application for exemption.

As far as future taxes are concerned, I might suggest that some arangement be made with the staff physician occupying the premises whereby he would agree to pay the future taxes. Another suggestion would be to move the staff physician and his family into quarters at the

institution. The latter suggestion is based on the implication in the court's opinion in the *Western Reserve* case, *supra,* to the effect that where the private use of quarters does not constitute the "primary use" of the property, such property may be exempted. What to do about the past due taxes, however, presents a real problem.

The problem arises because the taxes must be paid but there must also be authority to pay them. In this regard, it is stated in 44 Ohio Jurisprudence 2d, 381, Public Funds, Section 18, as follows:

> "Public funds can be disbursed only by clear authority of law, and upon compliance with statutory provisions relating thereto. In case of doubt as to the right of any administrative board to expend public moneys under a legislative grant, such doubt must be resolved in favor of the public and against the grant of power. * * *"

I have been unable to find any legislative grant of authority providing for the expenditure of public funds to pay these taxes. Unless and until the legislature grants the authority to expend public funds to pay these taxes, therefore, it is my opinion that such taxes cannot be paid from public funds.

It is my opinion, therefore, and you are accordingly advised:

1. In the absence of legislative permission, a political subdivision of the state has no power to levy or collect a special assessment against property owned by the state.

2. In the absence of legislative permission, a state department has no authority to expend public funds to pay taxes levied by a political subdivision of the state on property owned by the state.

Respectfully,
MARK MCELROY
Attorney General