3169

WHEN IT IS DISCOVERED THAT REAL PROPERTY HAS ERRONEOUSLY BEEN EXEMPTED FROM THE TAX LIST FOR MORE THAN FIVE YEARS WHILE OWNED BY ONE PERSON, THE COUNTY AUDITOR MUST ADD SAID PROPERTY TO THE LIST OF TAXABLE PROPERTY AND CHARGE IN ADDITION TO THE CURRENT TAXES, THE TAXES FOR THE PREVIOUS 5 YEARS—§§5713.20, R.C., 319.40, R.C.

SYLLABUS:

When it is discovered that real property has erroneously been carried on the tax list as exempt from taxation for more than five years, during which time said property was owned by the same person, the county auditor must add said property to the list of taxable property in accordance with the provisions of Section 5713.20, Revised Code, and charge, in addition to the taxes for the current tax year, the taxes for the five preceding years in which said property had escaped taxation.

Columbus, Ohio, July 27, 1962

Hon. Thomas E. Ray, Prosecuting Attorney
Morrow County, Mt. Gilead, Ohio

Dear Sir:

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

> "'Whether real estate property owned by a Union Cemetery, which has for thirty (30) years been improperly carried on the county tax duplicate as "exempted from taxation", is now liable for back tax for the full period of its ownership?'

"The problem arose out of the following fact situation: The Rivercliff Union Cemetery received a bequest of a block of

business buildings in Mount Gilead, Ohio, in 1932, which it has been renting to the general public. Since that time the building has been carried as 'exemption from taxation' by the County Treasurer. The exemption was not based a certificate issue by the Board of Tax Appeal, nor is there even a record of application for exemption on file with the County Auditor or State Board of Tax Appeals.

"In May 1962, this office issued its opinion, that the property could not be exempted because the buildings did not meet the prerequisites required under the general statutory exemption of public property, because the property was leased to the general public for commercial use, we then ordered the property placed on the tax duplicate."

As is inferred from the statement in your request, an exemption from real property tax may not be granted without the authorization of the Board of Tax Appeals. This requirement is presently found in Section 5713.08, Revised Code, and a similar requirement was, in 1932, found in Section 5770-1, General Code, which was enacted in 1923 by the 85th General Assembly, 110 Ohio Laws 77. Based on the facts stated in your request, it appears that the property in question could not have been exempt from real estate taxes from 1932 to date.

In connection with the general authority of the taxing body to compromise, release, or abate taxes, the Supreme Court of Ohio said in the case of *The State ex rel. Donsante, a Taxpayer, Appellant,* v. *Pethel, Auditor, et al., Appellee,* 158 Ohio St., 35, at page 39:

"* * * * * * * * *

"The general rule is that the power to tax does not include the power to remit or compromise taxes. A tax is not predicated on contract and cannot be discharged by reason of contractual considerations. Where taxes are legally assessed, the taxing authority is without power to compromise, release or abate them except as specifically authorized by statute, and is for the reason that, if such contracts can be made and performed on the part of a municipality, uniformity and equality are destroyed, and the burden of obligation so remitted is inequitably cast upon the payers of general taxes in the taxing district."

The first paragraph of the syllabus of the *Pethel,* case, *supra,* reads as follows:

"1. Where taxes are legally assessed, the taxing authority is without power to compromise, release or abate them except as specifically authorized by statute."

While the *Pethel,* case, *supra,* is not dispositive of the question raised in your request, the above quoted matter is of importance herein in that it clearly sets forth the basic proposition that any general tax must be levied and collected with equality and that when a tax is lawfully levied, no public officer has a right to abate its imposition except as expressly provided by statute.

With regard to the statutory obligation of the county auditor in connection with property omitted from the tax list, your attention is called to Section 5713.20, Revised Code, which reads as follows:

> "If the county auditor discovers that any building, structure, or tract of land or any lot or part of either, has been omitted from the list of real property, he shall add it to the list, with the name of the owner, and ascertain the value thereof and place it opposite such property. In such case he shall add to the taxes of the current year the simple taxes of every preceding year in which such property has escaped taxation, not exceeding five years, unless in the meantime the property has changed ownership, in which case only the taxes chargeable since the last change of ownership shall be added; or the owner thereof, if he desires, may pay the amount of such taxes into the county treasury, on the order of the auditor."

Also in this regard, your attention is directed to Section 319.40, Revised Code, which reads as follows:

> "When the county auditor is satisfied that lots or land on the tax list or duplicate have not been charged with either the county, township, municipal corporation, or school district tax, he shall charge against it all such omitted tax for the preceding years, not exceeding five years, unless in the meantime such lands or lots have changed ownership, in which case only taxes chargeable since the last change of ownership shall be so charged."

It appears from the provisions of Section 5719.20 and 319.40, *supra,* that property omitted from the tax list or listed on the tax list but omitted from taxation, must be immediately placed upon the duplicate when such an issue is discovered, and that the county auditor must at the same time charge against such property the taxes for the preceding five years.

In the case of *Heuck, County Auditor, et al.,* v. *The Cincinnati Model Homes Co.,* 130 Ohio St., 378, the Supreme Court considered the provisions of the above quoted statutes in an earlier form as well as other provisions of the taxing laws in connection with the authority of the county

auditor to correct an error in connection with the computation of the tax, which correction resulted in the assessment of taxes over and above the amount charged for five preceding years. The court said in the *Heuck* case, *supra,* beginning at page 381:

"* * * * * * * * *

"These laws do not relate to the imposition and creation of tax obligations but wholly to the mechanics of tax valuation and enforcement. They are therefore remedial in their nature and require a liberal construction to the end that taxable real estate shall not escape just taxation. *State, ex rel. Poe, v. Raine,* 47 Ohio St., 447, 454, 25 N.E., 54; *Gager, Treas., v. Prout,* 48 Ohio St., 89, 108, 26 N.E., 1013.

"Counsel for the defendant in error contend that there was no omission of the building or any part of it within the meaning of Section 5573, General Code, during the five years involved, but merely an undervaluation or mistake in valuation within the meaning of Section 5573, General Code, and that the auditor has no authority to assess a 'back tax' for an under-valuation or a mistake in valuation. Their argument is that the entire building was in fact listed on the tax duplicate and valued and assessed thereon, and that the mistake made in 1925 was in the valuation itself and had nothing to do with the inclusion of the building on the tax list or its subjection to the tax.

"If this meaning can be derived from these two sections at all, it is by a strict and narrow construction of them taken apart from all other related sections. These various sections cover both tax additions and refunders. It would be but logical to expect the legislature to treat the correction of an undercharge and overcharge in a similar manner. Obviously to take a few sentences literally and apart may mislead as to the spirit and intent of the law. While, by a broad construction of Section 5573, General Code, taken alone, it would seem that the omission of part of a building may be cured by adding the omitted part; yet all the sections referred to are *in pari materia* and must be construed together. When this course is pursued it is evident that a curable omission in valuation of a building is one which results from an error which is clerical and not fundamental; if fundamental there is no omitted property which may be supplied. In the latter case the valuation is in the exact amount that the taxing authorities intended. A change of valuation wrong fundamentally, would result, not in a corrected valuation, but in a new one. *State, ex rel. Sisters of Notre Dame v. Commissioners of Montgomery County,* 31 Ohio St., 271; *State, ex rel. Poe v. Raine, supra; State, ex rel. Pulskamp, v. Commissioners of Mercer County,* 119 Ohio St., 504, 164 N.E., 755; 38 Ohio Jurisprudence, 1035, Section 253. Where a clerical error in computation results in a

> wrong or mistaken valuation which is not in accord with the universal class formula adopted for its determination, there is an omission of part of a building from the tax list and duplicate and the omitted part may be added. Any other construction would not be in accord with the policy of our law that no taxable real property should escape just taxation."

Considering the above quoted language of the court, it appears that in order to determine whether the provisions of Section 5713.20 and/or 319.40, Revised Code, are applicable in the instant case, it must first be determined whether the error which caused said property to be carried as exempt for thirty years was in the nature of a clerical error or a fundamental error as described by the court in the passage quoted above. The court said that a fundamental error is one where the amount of the tax imposed is what the taxing authorities intended. It is clear from a reading of said passage that this infers that the taxing authority had a right under law to assess said intended amount even though said assessment may have been contrary to practice. In the instant case, as is pointed out above, the taxing authorities had no right under the law to provide for an exemption of the property in question. I am, therefore, of the opinion that the error involved herein is not a fundamental error as described by the court in the *Heuck* case, *supra*, but is in fact a clerical omission and that such omission must be rectified in accordance with the applicable provisions of the Revised Code.

Considering Sections 5713.20 and 319.40, *supra*, in connection with the above conclusion it is obvious that the Rivercliff Union Cemetery must be required to pay the current taxes as well as the taxes for five preceding years. The question as to which of these two statutes controls is therefore moot. However, since the error in question was apparently an error whereby the property in question was omitted from the general tax list as required by Section 319.28, Revised Code, as opposed to an error wherein the property was placed on such tax list but was not duly taxed, it would appear that the provisions of Section 5713.20 should govern in the instant case. I am assuming in this statement that the auditor kept two separate lists, one the general taxing list as required by Section 5713.01, Revised Code, and the other a tax exempt list as provided for in Sections 5713.07 and 5713.08, Revised Code.

Finally, your attention is directed to the case of *The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company*, v. *The County Treas-*

urer, Clark County, 78 Ohio St., 227, wherein the court considered a question involving the provisions of Section 2803, Revised Statutes, which contained language analogous to that now found in Section 5713.20, *supra*. The first paragraph of the syllabus of the *Clark County* case, *supra*, reads as follows:

> "In the interpretation of Section 2803, Revised Statutes, the expression 'current year' should be construed to mean the current tax year, and not the current calendar year."

It will be noted that Section 5713.20, *supra*, still contains the phrase "current year," and in accordance with the above quoted syllabus said language should be construed to mean the current tax year. Accordingly, the five years of taxes which the county auditor may assess under the provisions of said section would be those five years which immediately precede the current tax year.

In accordance with the foregoing, I am of the opinion and you are advised that when it is discovered that real property has erroneously been carried on the tax list as exempt from taxation for more than five years, during which time said property was owned by the same person, the county auditor must add said property to the list of taxable property in accordance with the provisions of Section 5713.20, Revised Code, and charge, in addition to the taxes for the current tax year, the taxes for the five preceding years in which said property had escaped taxation.

Respectfully,
MARK MCELROY
Attorney General