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FLOOD WALL—MUNICIPAL CORPORATION—WITHOUT LEGAL AUTHORITY TO LEVY AND COLLECT SPECIAL ASSESSMENT FOR CONSTRUCTION OF FLOOD WALL, TO EXTENT CHARGE IS MADE AGAINST PROPERTY BELONGING TO STATE OF OHIO.

SYLLABUS:

A municipal corporation is without legal authority to levy and collect a special assessment for the construction of a flood wall to the extent that the same is made against property belonging to the state of Ohio.

Columbus, Ohio, February 1, 1946

Hon. Frank L. Raschig, Director, Department of Public Works
Columbus, Ohio

Dear Sir:

Your request for my opinion reads:

"We are in receipt of two notices from the County Treasurer of Hamilton County, for assessments against the State of Ohio.

The notices carry the following information:

1. STATE OF OHIO, THE

223 2 9
MITCHELL AVE. 223 2 9
181.68 x 326 IRR.,
LYING N. OF & ADJ. TO PT. LOT 11
WEST EST. & SW LINE OF MITCHELL
AVENUE EXEMPT

Code CFW
AMOUNT DUE - $4.64

2. STATE OF OHIO, The

223-2-10
MITCHELL AVE. 223-2-10
175.45 x 302 IRR., 0.97 AC.
LYING WEST & ADJ. TO LOTS 1-2-3
KESSLER PARK SUB.
EXEMPT

Code CFW
AMOUNT DUE - $2.49

The Code CFW represents the total of the respective amounts levied by the City of Cincinnati by Ordinance #36-1945, passed February 14, 1945, for the construction of a flood wall. These amounts were certified to the Hamilton County Auditor under date of August 24, 1945.

While we recognize that a municipality may not levy a tax against the State of Ohio, we would like your opinion as to the state's obligation, if any, for the assessment made against it in this instance."

Attention is directed to Section 3812, General Code, which provides in part that:

"Each municipal corporation shall have special power to levy and collect special assessments, to be exercised in the manner provided by law. The council of any municipal corporation may assess upon the abutting, adjacent and contiguous or other specially benefited lots or lands in the corporation, any part of the entire cost and expense connected with the improvement of any street, alley, dock, wharf, pier, public road, etc."

It is manifest that the assessment referred to in your aforesaid inquiry was made by the City of Cincinnati as a municipal corporation pursuant to the terms of said Section 3812.

Special assessments are to be distinguished from taxes. In this connection it is stated in Home Owners Loan Corporation v. Tyson, et al., 133 O. S. 184, 188 that:

"As is pointed out in City of Lima v. Lima Cemetery Assn., 42 Ohio St., 128, 51 Am. Rep., 809, in a broad sense an assessment is a tax and a tax an assessment. While there is a generic difference in that taxes are levied to pay the expense of government and an assessment is levied upon property abutting or adjacent to a public improvement with reference to the special benefits conferred for the purpose of paying the cost thereof, yet both are levied under the sovereign power of the state upon the assumption that they are for the public weal and both give rise to liens which have generally been held superior to all others. 30 L. R. A. (N.S.), 761; Hamilton on Laws of Special Assessments, 699, Section 708; 2 Page & Jones on Taxation by Assessment, 1770, Section 1068; 19 Ruling Case Law, 412, Section 192. In keeping with these principles courts of other jurisdictions have held that special assessments are a peculiar species of taxation."

The court then cited a number of cases from other jurisdictions.

It is also pertinent to observe at this point that following the condensed description of the two parcels of real estate mentioned in your inquiry there appears the word "exempt". This fact naturally leads to the assumption that at some prior date said real estate must have been found not subject to general taxes. Such determination was probably made under the provisions of Section 5351, General Code. By virtue of this section as presently in force and effect, and as it heretofore existed, real property owned by the state of Ohio may be exempted from taxation. However, it cannot be maintained said section authorized or now authorizes said real estate to be exempted from the special assessment mentioned in your inquiry. In other words, certain property which the General Assembly has provided may be exempted from general taxes is not necessarily exempt from a special assessment. It is stated in 48 Am. Jur., 636 that:

> "It is a general rule, to which there are few execptions, that a constitutional or statutory exemption from taxation is to be taken as an exemption from ordinary taxes only, and does not include special assessments for local improvements."

I therefore desire to make it perfectly plain that the conclusion I have reached as hereinafter stated is not predicated on the proposition that exemption from the payment of this special assessment can be claimed by reason of the provisions of aforementioned section 5351.

With respect to special assessments against public property, it is stated in 36 O. Jur., 943 that:

> "It has been held in a number of cases in which it did not appear that any provision was made for the levying or payment of an assessment upon public property, or property devoted to a public use, for the cost of public improvement, that such property is not subject to an assessment for such purpose. But it appears to be established in Ohio, as a general rule, that an assessment may be levied against public property *where the payment or collection of such assessment may be enforced by means or remedies other than the sale of the property*. However, property belonging to the United States is not subject to assessment for the cost of public improvements by the state or by local taxing units thereof. And it is said that the legislature cannot delegate to the authorities of a local taxing unit the power to levy and collect an assessment against property owned by the state."
>
> (Emphasis added.)

Although somewhat lengthy I now quote a statement appearing in 48 Am. Jur., 641, to-wit:

> "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 of the state from 'taxation' does not prevent such action by the legislature.
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> 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."

There is no Ohio decision that appears to be directly in point. However, there are decisions in other states which will amply sustain the view that a municipality has no power without legislative permission to levy a special assessment against property owned by a state. In People, ex rel. Auditor General v. Ingalls (1927) 238 Mich. 423, 213 N. W. 713, it was held, as disclosed by the third branch of the syllabus, as follows:

> "In the absence of any law authorizing a municipality to levy taxes or assessments against State property, the city of Detroit has no power to levy assessments against the Michigan State fairgrounds, owned by the State, to cover the cost of sewers, street paving, sidewalks, and street widening, and it is

> immaterial whether or not such grounds are used for governmental purposes."

In Polk County Sav. Bank v. State (1886). 69 Iowa 24, 28 N. W. 416, where it was stated that no specific statute existed as to the right to assess public property for benefits of improvements, it was held that property of the State used for a public purpose was not subject to a sewer assessment by the city in which the property was located.

See also Cotting v. Com. (1910) 205 Mass. 523, 91 N. E. 900. In that case, where a state legislative commissioner sold land belonging to the commonwealth with a covenant against encumbrance, and a sewer assessment was later imposed on the land, the court said:

> "We may assume that, under our decision, no assessment could be enforced against the commonwealth so long as it held the title."

The Ohio case most nearly in point is State, ex rel. Monger, Director, v. Board of County Commissioners, 119 O. S. 93, decided in 1928. The conclusion of the court is contained in one although somewhat lengthy sentence. In order to make plain the holding of the court, the entire opinion is set forth, to-wit:

> "The demurrer to the petition will be sustained and a mandatory writ denied upon the ground that the present use of the state property, known as Buckeye Lake, is proprietary and the proposed improvement being in part for the benefit of such state property, the imposing of an assessment for the entire expense of such improvement upon a district less than the state, under the provisions of Chapter 4, Title III, Part Second, General Code, whether the proposed improvement be constructed under that Chapter as it existed at the time the director of health ordered the commissioners of Fairfield county to proceed or as it exists now would amount to an imposition on such district of a burden that belongs in part to and ought to be borne in part by the state at large and which amount cannot be apportioned to and collected from the state under Section 6602-33c, General Code, *fore the reason that the Legislature is without power to delegate to a board of county commissioners the legislative power to levy and collect an assessment against the state.*"
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> (Emphasis added.)

It is believed that the emphasized matter in this opinion indicates, at least to some extent, that there is no authority to levy and collect an

assessment against property belonging to the state. Therefore in the absence of any legislative permission with respect to the matter, I am compelled to conclude, and it is my opinion, that a municipal corporation is without legal authority to levy and collect a special assessment for the construction of a flood wall to the extent that the same is made against property belonging to the state of Ohio.

Respectfully,

HUGH S. JENKINS

Attorney General.