MUNICIPALITY WITHOUT POWER TO LEVY EXCISE TAX ON WATER AND SEWER SERVICE

City of Franklin v. Harrison
171 Ohio St. 329, 170 N.E.2d 739 (1960)

The city of Franklin enacted an ordinance providing for a tax on the water and sewer service which it furnished. The stated purpose of the ordinance was to provide additional revenue for the general fund of the city. Appellee refused to pay the tax and, pursuant to an affidavit filed in the Municipal Court of Franklin, a warrant was issued for his arrest. The appellee's demurrer to the affidavit was sustained on the ground that the ordinance in question contravened state laws.[1] This decision was affirmed by a split court of appeals,[2] and, with two dissenters, by the Supreme Court of Ohio.

Section 6 of article XIII,[3] and section 13 of article XVIII[4] of the Ohio constitution, reserve in the General Assembly the right to establish limitations on the power of municipalities to levy taxes.[5] Section 729.52[6] and section 743.05[7] of the Ohio Revised Code expressly provide for the use of surplus sewer and water rentals. The ordinance in question did not create an additional water rental, but instead levied an excise tax computed on the amount charged for water and sewer service used by the particular consumer. Thus the city urged that the statutes were inapplicable.

In his dissenting opinion, Judge Bell, adopted the city's argument, stating that it is a *non sequitur* to say that a municipal excise tax on these services is precluded solely because surplus water revenues cannot be applied to general governmental expenses. Thus, "an excise tax on water and sewer bills is purely and simply an excise tax upon the consumers of a commodity in a field that has not been pre-empted by the state." It is apparent that the dissenters overlooked (or perhaps would have overruled sub silentio) a case decided by the Ohio Supreme Court in 1946[8] wherein it was held,

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1 City of Franklin v. Harrison, 153 N.E.2d 467 (Franklin Munic. Ct. 1957).

2 City of Franklin v. Harrison, 160 N.E.2d 15 (Ohio Ct. App. 1959).

3 Ohio Const. art. XIII, § 6, provides that "The General Assembly shall provide for the organization of cities, and incorporated villages, by general laws, and restrict their power of taxation . . . so to prevent the abuse of such power."

4 Ohio Const. art. XVIII, § 13, provides that "Laws may be passed to limit the power of municipalities to levy taxes. . . ."

5 See Glander, "Analysis and Critique of State Pre-emption of Municipal Excise and Income Taxes Under Ohio Home Rule," 21 Ohio St. L.J. 343 (1960).

6 Ohio Rev. Code § 729.52 provides that "Any surplus in such fund (sewer rental fund) may be used for the enlargement or replacement of the system . . . but shall not be used . . . for any other purpose."

7 Ohio Rev. Code § 743.05 provides that "After payment of the expenses of conducting and managing the waterworks, any surplus . . . may be applied to the repairs, enlargement, or extension of the works."

8 Haefner v. City of Youngstown, 147 Ohio St. 58, 68 N.E.2d 64 (1946).

on similar facts, that a municipal excise tax on utility service was impliedly pre-empted by virtue of General Code sections 5546-2[9] and 5483.[10]

The majority, citing *City of Cincinnati v. Roettinger*,[11] based their opinion on the belief that the constitutional validity of the statutes in question is predicated on their expression of a legislative intention that municipalities shall not levy a tax on the use of water and sewerage service, in order to provide funds for general municipal purposes. Section 4 of article XVIII of the Ohio constitution established the right of municipalities to "acquire, construct, own, lease and operate . . . any public utility the products or service of which is or is to be supplied to the municipality or its inhabitants." The provisions in this section have been held to be self-executing and the powers granted to be free of restrictions or limitations by the General Assembly.[12] This is to say that the legislature may not pass any law which interferes with or in any way burdens the municipality in acquiring, constructing, owning, leasing, and operating a public utility.[13] At this juncture, it would appear that the statutes in question are hardly reconcilable with the constitutional provision. Yet, reconciliation was accomplished in the instant case (as it was in *Roettinger*) by holding that surplus water rentals were, in effect, excise taxes, thus validating the code sections.

This interpretation began with the opinion of Judge Marshall in the *Roettinger* case. That opinion is quite unique in that it asserts that nothing can interfere with the right of municipalities to own and operate public utilities while at the same time upholding the constitutionality of Revised Code section 743.05.[14] The reasoning of this opinion is that a water rental used for general purposes amounts to a tax on the water users of the community. Thus, the statute does not interfere with the right of municipalities to operate utilities but only limits their power to tax. Such limitation is clearly within the constitutional power of the General Assembly. Cases decided since *Roettinger* which involved a similar question, including the instant case, have unanimously followed this doctrine.[15]

If one accepts the judicial definition of surplus water rentals as taxes then the result in the instant case is quite easily reached; there is a tax limitation statute and a tax of the type proscribed therein, the application

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[9] Now Ohio Rev. Code § 5739.02 provides that "for the purposes of providing revenue with which to meet the needs of the state . . . an excise tax is hereby levied on each retail sale made in the state. . . ."

[10] Now Ohio Rev. Code § 5727.39 provides that "the auditor of state shall charge from each electric, gas, waterworks . . . company, a sum in the nature of an excise tax for the privilege of carrying on its . . . business."

[11] City of Cincinnati v. Roettinger, 105 Ohio St. 145, 137 N.E. 6 (1922).

[12] Pfau v. City of Cincinnati, 142 Ohio St. 101, 50 N.E.2d 172 (1943).

[13] City of Cincinnati v. Roettinger, *supra* note 10; State *ex rel.* McCann v. City of Defiance, 167 Ohio St. 313, 148 N.E.2d 221 (1958).

[14] Ohio Gen. Code § 3959.

[15] City of Lakewood v. Rees, 132 Ohio St. 399, 8 N.E.2d 250 (1937); Hartwig Realty Co. v. City of Cleveland, 128 Ohio St. 583, 192 N.E. 880 (1934).

of the former invalidates the latter. However, the question brought to bear is the desirability and validity of the definition.

There are clear distinctions between the ordinary utility revenue and a tax.[16] The operation of the municipally owned utility is controlled by an administrative agency appointed by the municipal authority. This agency is vested with the authority to fix the rates to be charged for the particular utility service. On the other hand the levy of taxes is a legislative function "and taxes cannot be imposed by an administrative officer."[17] The distinction becomes more apparent if ordinary rates are considered as the measure of a value received and taxes as pecuniary contributions made for the support of government.

When one considers an excess utility revenue which is to be used for general governmental purposes, however, there is no longer a distinction. To the extent that it is excess, that revenue is no longer a rate for it is not a measure of a value received. When it is then applied to the general fund it clearly becomes a contribution for the support of government. The economic impact is undoubtedly the same.

Thus, it may be said that the statutes involved in the instant case are constitutionally valid limitations on the power of a municipality to levy a tax on water and sewerage service. The ordinance in question provides for just such a tax and therefore contravenes the state law.

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[16] See Farrell, "Municipal Public Utility Power," 21 Ohio St. L.J. 390 (1960).

[17] *Supra* note 16, at page 407.