

OHIO BOARD OF TAX APPEALS

City of Portsmouth,)
)
 Appellant,)
)
 vs.) CASE NO. 2002-T-1690
)
) (BUDGET COMMISSION)
 Scioto County Budget Commission,)
 Scioto County Auditor, Scioto County)
 Treasurer, and Scioto County) DECISION AND ORDER
 Prosecuting Attorney,)
)
 Appellees.)

APPEARANCES:

For the Appellant - Chester, Willcox & Saxbe, L.L.P.
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For the Appellees - Lynn Alan Grimshaw
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William K. Shaw
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Entered: March 7, 2003

Mr. Johnson, Ms. Jackson, and Ms. Margulies concur.

The Board of Tax Appeals considers this matter pursuant to a notice of appeal filed by the City of Portsmouth under R.C. 5705.37, challenging the actions of the Scioto County Budget Commission. Portsmouth specifies that the commission erred in refusing to approve the levy of an additional tax of 2.5 mills for the city's

general bond retirement fund. The parties have agreed to waive hearing and to submit this matter upon briefs and the transcript certified to this board by the secretary of the budget commission. R.C. 5705.37.¹

Section 2, Article XII, Ohio Constitution, provides that no property may be taxed according to its value in excess of one percent of its true value; however, additional taxes outside this limitation may be levied if approved by a majority of the electors in the taxing district or if provided by the charter of a municipal corporation. In congruity with the constitutional provisions, R.C. 5705.02 provides that the “aggregate amount of taxes that may be levied on any taxable property in any subdivision or other taxing unit shall not in any one year exceed ten mills on each dollar of tax valuation ***.” This is known as the “ten-mill limitation.” Under R.C. 5705.02, a subdivision or other taxing unit may levy millage in addition to the ten-mill limitation only if “specifically authorized,” i.e., by majority vote of the electors within the taxing district or by a properly adopted provision in a municipal charter.

A municipal corporation may also elect to except itself from the ten-mill limitation by providing in its charter, or in an amendment thereto, a total tax rate that may be levied without a vote of the electorate. R.C. 5705.18. Such a limitation may be for all purposes of the municipal corporation or may be for current operating expenses. The charter or amendment may further provide for the ability to levy taxes

¹ The commission’s motion to supplement record, filed February 14, 2003, is hereby denied. Portsmouth’s January 27, 2003 motion to strike the commission’s supplemental brief and attachments thereto is hereby granted.

in excess of the charter limitation when such levy is approved by a majority of electors at a November election. R.C. 5705.18.²

Portsmouth is a municipal corporation currently operating under a charter adopted on November 6, 1928. Pursuant to a charter amendment adopted in May 1953, Portsmouth elected to provide a limitation on the tax rate that may be levied without a vote of the city's electorate. See R.C. 5705.18. This charter limitation establishes a maximum levy of 8.5 mills "for current operating expenses." The provision further provides that Portsmouth may anticipate a fraction of the proceeds from the levy and issue anticipation notes in an amount not to exceed \$200,000. (City Charter, Section 47-a.)

Also adopted in May 1953 is section 47-b of the city charter, which provides a tax levy for bonds and notes:

"The Council shall annually levy outside the limitations provided in this Chapter a sufficient sum to pay the interest, sinking fund, and retirement charges on all bonds and notes of the City of Portsmouth, lawfully issued, and the expenses incident to the management of the sinking fund, which entire levy shall be placed before and in preference to all other levies. Amounts certified under the laws of the State as necessary for such purposes shall not be subject to change by Council."

² R.C. 5705.18 specifically provides: "Sections 5705.02 and 5705.32 of the Revised Code do not apply to the tax levies of any municipal corporation which, by its charter or amendment thereto, provides for a limitation of the total tax rate which may be levied without a vote of the people for all the purposes of the municipal corporation, or for the current operating expenses thereof. Said charter or charter amendment may also provide for the levying of taxes by said legislative authority in excess of said charter limitation upon approval by the majority of the electors of said municipal corporation voting thereon at a November election. ***"

It is around this latter provision that the disagreement between Portsmouth and the commission converges. Specifically, the issue before us concerns the accumulation of funds in Portsmouth's general bond retirement fund ("fund 401"). On July 9, 2002, Portsmouth submitted to the commission the city's proposed tax budget for 2003.³ As to fund 401, Portsmouth included revenue of \$650,000, of which \$500,000 was estimated to come from the 2.5 mill levy now before us.⁴ Portsmouth estimated expenditures from fund 401 to be \$152,613. Thus the estimated revenue exceeded expenditures by \$497,387. In addition, the budget submitted by Portsmouth showed that fund 401 had an actual surplus balance of \$1,682,539 for 2001 and an estimated surplus for 2002 of \$2,182,839. For its 2003 estimate, Portsmouth concluded that fund 401 would have an ending surplus balance of \$2,680,226. (S.T., page 12.)

On September 17, 2002, the commission met to consider Portsmouth's 2003 budget. There, the commission expressed its concern with the surplus in the bond retirement fund and questioned the city's authority to collect the amounts. Trent Williams, Portsmouth's auditor, testified that, historically, Portsmouth has been issuing bonds and levying tax for payment of those bonds but has been paying any accrued liability from its general fund, allowing fund 401 to accumulate the surplus amounts:

³ R.C. 5705.28(A)(2) requires municipal corporations to adopt a tax budget for the succeeding fiscal year on or before the fifteenth of July.

⁴ The remaining \$150,000 is attributed to a special sidewalk assessment. This revenue is not in dispute.

“Mr. Williams: ‘*** I do not have answers to give you specifically right now but what I can tell you is that we do have more outstanding in debt that, as I understand it, can be paid from that fund, that is in the balance there right now and what will be collected this coming year. Its not that we pay it from there, we don’t have to pay it from there. But as I understand it if we can’t pay it from other sources we can pay it from there. We have an outstanding 4 million dollar general obligation water dept. Normally you hear a water revenue bond that is self-supporting, which it is.... We have the building acquisition note of 2 million dollars and we will be issuing debt for renovation of the building. So I understand that you see a balance growing that is not being used, but on the other hand I think that has been a matter of management’s decision as to let it grow in case where we are paying things from are not sufficient, then that money is there.’

“Mr. Grimshaw: ‘So the city is borrowing money for water, for renovations to buildings, etc. etc. So you have notes out there. You are paying right now on those notes from other sources.’

“Mr. Williams: ‘That is correct’

“Mr. Grimshaw: ‘So you are thinking you can go ahead and accumulate this in case you don’t have sufficient funds to pay from those other sources.’

“Mr. Williams: That’s one possibility.” (Budget Comm. Record of Proceedings, 39.)

Based upon the testimony, the commission concluded that it was “not comfortable” with approving Portsmouth’s budget and decided to reconvene on October 1, 2002, after more information was collected.⁵

⁵ Under date of September 24, 2002, the Tax Commissioner extended to October 18, 2002 the deadline imposed upon the budget commission to complete its work. See R.C. 5705.27.

On September 26, 2002, Portsmouth's mayor sent to the commission a letter setting forth his opinion that it was necessary for the city to make certain appropriations from fund 401 to cover certain debt charges. Those charges were detailed in the letter and certain city ordinances related to the bonds in question were attached. (S.T. 30-47.)

On October 1, 2002, the commission reconvened to consider Portsmouth's 2003 tax budget. At that meeting, Portsmouth offered an amended budget for the commission's review. As to fund 401, the amended budget estimated revenue of \$650,000, including revenue generated by Portsmouth's requested levy of 2.5 mills beyond the charter limitation. Fund 401 also showed \$304,613 in expenditures, which meant that revenue was estimated to exceed expenditures by \$345,387. When added to previous balances, the projected 2003 surplus for fund 401 was \$2,204,206.

The commission again expressed concern for the accumulation in the bond retirement fund. The commission noted that the city's charter provided that outside millage was to be levied only when necessary and to the extent needed. "Mr. Grimshaw: 'The problem appears that the law says unless there is a need we are not supposed to be collecting it and we have been collecting it.'" (Budget Comm. proceedings, 47.) After consideration, the commission voted not to approve the levy of the 2.5 mills. Also on October 1, 2002, the budget commission issued an "Amended Certificate of Estimated Resources," which did not include a renewal of the 2.5 mills in outside millage.

Portsmouth contends that the commission erred in not approving the levy in question. Portsmouth argues that the commission had no discretion to omit a levy needed to meet the debt charges. The commission responds that Portsmouth demonstrated through its budget submissions that the city had sufficient funds to pay all debts without the collection of the 2.5 mills in additional tax and that the commission had the authority to deny the collection of a tax that would only add to the accumulating surplus in the bond retirement fund. In addition, the commission now questions whether the levy sought by the city was properly authorized, in that the bond-issuing ordinances authorizing each levy were not voted upon by the city's electorate.

R.C.5705.31 provides:

“The county auditor shall present to the county budget commission the annual tax budgets submitted to him under sections 5705.01 to 5705.47 of the Revised Code, together with an estimate prepared by such auditor of the amount of any state levy, the rate of any school tax levy as previously determined, the tax commissioner's estimate of the amount to be received in the county library and local government support fund, and such other information as the commission requests or the tax commissioner prescribes. The budget commission shall examine such budget and ascertain the total amount proposed to be raised in the county for the purposes of each subdivision and other taxing units therein.

“The commission shall ascertain that the following levies have been properly authorized and, if so authorized, shall approve them without modification:

“(A) All levies in excess of the ten-mill limitation; ***

“Divisions (A) to (E) of this section are mandatory, and commissions shall be without discretion to reduce such

minimum levies except as provided in such divisions.

“If any debt charge is omitted from the budget, the commission shall include it therein.”

Portsmouth contends that the commission, when reviewing certain levies and after ascertaining that those levies have been properly authorized, is mandated by R.C. 5705.31 to approve the levies without modification. Moreover, Portsmouth maintains that the commission was required by R.C. 5705.31 to include the debt charges even though they were originally omitted from its original fund 401 estimates. Portsmouth relies upon *Stauss v. Cty. of Cuyahoga* (1935), 130 Ohio St. 64, in support of the mandatory nature of the statute.

We concur with Portsmouth that Ohio law requires the city to levy a tax sufficient to provide for a sinking fund and other debt charges. Such tax must be levied regardless of other needs. See *Stauss*, supra. See, also, *Rabe v. Bd. of Edn. of the Canton City School Dist.* (1913), 88 Ohio St. 403. However, while the court in *Stauss* did find the omission provisions of R.C. 5705.31 to be mandatory, it further concluded that “[n]otwithstanding the mandatory character of a statute, it cannot command the doing of a vain thing.” *Id.* at paragraph five of the syllabus. Thus the court ruled in *Stauss* that the budget commission was not required to include in its budget a charge for a debt that was to be refunded during the year in issue. Moreover, we do not believe this to be a situation in which the commission omitted from Portsmouth’s budget all necessary debt charges. Instead, this is a situation in which the commission determined that the levy of an additional tax was not required where it

appeared that debt charges were fully met in the city's operational budget and where previous levies resulted in a surplus in the bond retirement fund.

R.C. 5705.31(A) does state that the commission shall approve, without modification, all outside millage that is properly authorized.⁶ However, there are other provisions in the tax levy law that also set forth a budget commission's authority, and the limitations thereon. Germane to this discussion is R.C. 5705.341, which provides:

“ *** Nothing in this section or any section of the Revised Code shall permit or require the levying of any rate of taxation, whether within the ten-mill limitation or whether the levy has been approved by the electors of the taxing district, the political subdivision or the charter of a municipal corporation in excess of such ten-mill limitation, *unless such rate of taxation for the ensuing fiscal year is clearly required by a budget of the taxing district or political subdivision* properly and lawfully advertised, adopted, and filed pursuant to the provisions of sections 5705.01 to 5705.47 of the Revised Code. ***” (Emphasis added.)

“R.C. 5705.341 imposes a specific duty on the budget commission to deny outside millage unless such revenue is clearly required by the budget of the taxing district or subdivision.” *South Russell v. Geauga Cty. Budget Comm.* (1984), 12 Ohio St.3d 126, 131. In *Wise v. Twinsburg* (1973), 326 Ohio St.2d 114, and *Waite Hill v. Lake Cty. Budget Comm.* (1976), 46 Ohio St.2d 543, the court considered situations in which a subdivision had a levy outside the ten-mill limitation, approved by the voters. In each case, the budget commission refused to certify the levy for collection

⁶ We acknowledge that R.C. 5705.31(A) refers to millage outside the ten-mill limitation, a limitation that does not apply here due to the charter limitation adopted pursuant to R.C. 5705.18.

because the budget submitted by the municipality set forth expenditures that were less than the amounts to be generated by the levies. The court upheld the determinations of this board that found that the budget commission was prohibited from certifying a levy that is not clearly required. Similarly, both the original and the amended budget submitted by Portsmouth in this matter demonstrate that the outside millage requested by the city would generate more revenue than required. The record shows that this had been the case since 1998, when fund 401 first began to accumulate a surplus balance.

In *South Russell*, supra, the court further held that the phrase “properly authorized,” as contained in R.C. 5705.31, should be read in pari materia with R.C. 5705.341:

“Currently, the phrase ‘properly authorized,’ as employed in R.C. 5705.31, requires the budget commission to determine that such tax is one which the taxing authority had the power to impose, either by its own action or by vote of the people, and that the enactment of the measure imposing the tax was in compliance with statutory requirements. *Additionally, the term encompasses the requirement that the budget commission determine whether any rate of taxation is clearly required by the budget of the taxing district or the political subdivision.* We hold this latter consideration to include the determination of whether the funds to be derived from a levy approved for a specific purpose are indeed budgeted for that purpose.” Id. at 132. (Emphasis added.)

From our review of the foregoing, we believe that the commission acted properly in refusing to certify a levy of an additional tax that would have generated revenue in excess of the estimated expenditures.

Portsmouth nevertheless seeks to distinguish this matter by referring to section 47-b of its city charter, which provides that the city “*** shall annually levy outside the limitations provided in this Charter a sufficient sum to pay ***” debt charges like those covered by fund 401. We are not persuaded that this provision mandates the levy of outside millage in all circumstances. A review of the ordinances authorizing the issuance of bonds that were submitted to the budget commission establishes that they do authorize the levy of a tax outside Portsmouth’s charter limitation for purposes of paying interest on the bonds and for the retirement of said debt. However, the ordinances clearly state that the levy is not mandatory where funds are available from other sources. See, for example, the statutory transcript at 35. (“***provided however, that to the extent that funds from other sources are available and appropriated for such purpose, said tax need not be levied.”) See, also, S.T. at 40, 63, and 66. That Portsmouth has been able to generate fund 401 revenue in excess of its debt charge obligations, while still meeting all its other obligations, suggests that the levy of the 2.5 mills in additional tax may not be required for 2003.

The secondary issue raised in this matter concerns the extent to which the budget commission may take into account the surplus balance in the bond retirement fund when determining the amount of millage outside the charter limitation to be levied. In other words, may the budget commission deny the certification of the additional levy where there is a sufficient surplus balance in the bond retirement fund to pay the accrued debt charges during the budget year? We hold that the commission may.

Ohio's uniform public securities law provides the procedure for the issuance of bonds by a taxing authority. R.C. 133.23 specifies what is to be included in any bond-issuing legislation. Additionally, R.C. 133.23(C) provides a contingency to be invoked when a surplus occurs in the bond retirement fund:

“ *** [T]he legislation shall provide for the levying of a property tax sufficient in amount to pay the debt charges on the bonds issued under the legislation, but *the amount of that tax to be levied or collected in any year may be reduced by the amount to be available for the purpose from *** any surplus in the funds from which such bonds are to be retired*, or other moneys specifically assigned by law or by legislation of the taxing authority for payment of such debt charges.”(Emphasis added.)

In re Transfer of Funds of Eastern Local School Dist. (1960), 14 O.O.2d 209, 85 Ohio Law Abs. 577, concerned the request of a school district to transfer to the general fund the unexpended funds in its bond retirement fund. In denying the request, the court found that R.C. 133.23 required the subdivision to adjust the amount of outside millage it levied in order to prevent any surplus in the bond retirement fund. Where a surplus did exist, the subdivision was required to adjust the millage levied to prevent a surplus from being maintained, i.e., the levy needed to be decreased to the extent necessary to eliminate the surplus in the fund. The court further concluded that, if a subdivision fails to make this adjustment, the budget commission has the authority to deny the certification of an additional levy that would either create or maintain a surplus in the fund:

“*** [I]t is the opinion of this court that if the taxing subdivision does not heed [R.C. 133.23] and persists in requesting an ‘outside’ levy for debt charges that will create or maintain a surplus in the bond retirement fund, it

is the duty of the county budget commission to adjust such millage. Were the law otherwise the taxpayer would be powerless to prevent subdivisions from creating or maintaining surpluses with a view to syphoning [sic] it periodically or transferring a substantial sum when all debts are retired.” Id. at 6-7.

The *Eastern* court noted that the imposition of an additional tax places a burden on the taxpayer, a burden which, if not met, could result in foreclosure. Thus, “[w]hen a majority accedes to the urgings of taxing subdivisions and votes an outside levy for debt charges, the taxing authorities of the subdivision and of the county should keep faith and outside millage should be confined to the purposes stated ***.” Id. at 7.

Fund 401 held an unexpended balance more than sufficient to meet the debt charges estimated for 2003, and the levy of any additional tax beyond the city’s charter limitation would have only added to or maintained that surplus.⁷ Accordingly, we find that the budget commission acted within the scope of its authority in declining to certify Portsmouth’s requested outside millage. In reaching this determination, we do not seek to limit a municipality’s ability to properly establish reserve balance accounts. See R.C. 5705.13. However, this matter concerns a special fund established

⁷ On October 9, 2003, Portsmouth attempted to submit to the commission a third “amended” budget for fund 401, along with a request for reconsideration. (S.T. 60.) This document shows a projected fund 401 revenue of \$655,000, including the 2.5 mills in issue, and expenditures of \$654,613, resulting, again, in the maintenance of a surplus balance in the fund. As this document was submitted after the commission issued its certification, we decline to consider it. Moreover, we find that this document does not alter the commission’s authority to consider the unexpended balance when determining the proper rate of levy. Although this third estimate included nearly as much revenue as expenditures, it would have maintained a surplus balance of \$1,859,266.

for the sole purpose of servicing specific debt charges. Since Portsmouth elected to satisfy those charges from the general fund while nevertheless levying the additional tax, it was within the purview of the commission to take action to prevent further accumulation of bond fund revenue that was not needed for purposes of meeting the city's debt charges.

As a final matter, we note that the budget commission maintains it properly denied approval of the levy because the levy was neither authorized by the vote of the electorate nor enacted in accordance with the city's charter. Given our foregoing determination, we find consideration of these issues to be supererogatory.

Therefore, acting in substitution for the Scioto County Budget Commission, the Board of Tax Appeals hereby fixes the estimate of revenues and balances for the city of Portsmouth as follows for the fiscal year beginning January 1, 2003:

<u>Fund</u>	<u>Est. Unencumbered Balance as of 1/1/2003</u>	<u>Taxes</u>	<u>Other Sources</u>	<u>Total</u>
General Fund	\$100,000.00	\$1,515,000.00	\$8,221,347.00	\$9,836,347.00
Special Revenue Funds	\$2,089,232.00	\$280,000.00	\$3,408,000.00	\$5,777,232.00
Debt Service Funds	\$2,182,839.00	0.00	\$150,000.00	\$2,332,839.00
Capital Projects Funds	\$5,000.00	0.00	\$1,100,000.00	\$1,105,000.00
Special Assessment Funds	0.00	0.00	0.00	0.00
Enterprise Funds	\$2,545,000.00	0.00	\$7,690,000.00	\$10,235,000.00
Internal Service Funds	\$49,000.00	0.00	\$2,508,000.00	\$2,557,000.00
Fiduciary Funds	<u>\$578,000.00</u>	<u>0.00</u>	<u>\$243,000.00</u>	<u>\$821,000.00</u>
Totals:	\$7,549,071.00	\$1,795,000.00	\$23,320,347.00	\$32,664,418.00

It is further ordered that this decision and order be certified to the Tax Commissioner of Ohio, the Scioto County Auditor, and to each of the parties hereto by and through their respective representatives.

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