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RECIPIENTS OF REBATES AUTHORIZED UNDER THE ILLINOIS SPECIAL ASSESSMENT STATUTES

HERBERT R. STOFFELS*

SINCE THE heyday of land-subdivision developments in the boom years of the late 20's, Municipal Attorneys have been plagued with a novel and virtually unsolvable problem involving Special Assessments. The fact that many thousands of dollars are at stake has magnified the gravity of the legal problem handed to the City's Corporation Counsel for solution.

It is the purpose of this paper to suggest as a solution an answer which has been with us these past thirty years but which has not been utilized, absent a positive judicial declaration. As will be shown herein, the Illinois State Legislature, in 1963, has, by amendment, attacked the problem as to Special Assessments spread *after* 1963. It is elementary, however, that legislation does not operate retroactively.

Here, then, is a typical case as presented to the City Attorney. In 1956, the City of Park Ridge spread a Special Assessment for the widening and improving of a designated street. A judgment was entered in the County Court of Cook County assessing property according to law, including specified premises fronting on that street. At that time, the grantor owned these premises, and on December 13, 1957, he paid the full assessment and interest. Following this payment and the completion of the street improvement, the grantor sold the premises. By October 1, 1964, the City of Park Ridge had paid all construction bills and also all vouchers and special assessment bonds issued under the above Special Assessment. There remained on hand a substantial sum to be rebated to those entitled thereto, less 5% for expenses of making a rebate. Accordingly, on October 20, 1964, the City Council adopted an ordinance declaring that the surplus existed, and ordaining that the net surplus be "paid to the owners of record of each . . . parcel *as of this date being the time of the declaration of*

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the rebate." When grantor paid the assessment in 1957, the Illinois statute provided that the rebate be paid "to the persons entitled thereto."¹ After the grantee had bought the property, the statute was amended to read that "such rebate shall be paid to the owner of record of each such . . . parcel at the time of the declaration of the rebate."² To whom shall the municipality refund the proportionate share of the rebate?

The surplus to be rebated are those funds collected through special assessment which remain in the hands of the municipality after it has made final settlement with the contractor and has paid all outstanding charges and bonds. Simply stated, where the total amounts assessed against all the lots is later found to be more than enough to complete the project, a surplus will remain which must be distributed in some manner.

Originally, the law provided that the person making the overpayment was to receive notice thereof, and upon proper proofs was to be paid that amount to which he was entitled.³ This, however, was amended in a later session of the legislature to read that a proportionate rebate was to be declared upon each lot, block, tract or parcel of land assessed, and that rebates were to be paid "to the persons entitled thereto."⁴ The last phrase of that statute left municipal authorities in a quandry. Aware of the fact that they held surplus funds as trustees,⁵ they dared not gamble by guessing who was legally "entitled thereto." In the absence of a clear statutory directive, many refrained from making any distribution.

The words, "shall be repaid to the persons entitled thereto," remained in the statute until August, 1963, when the following words were substituted therefor: "Such rebate shall be paid to the owner of record of each lot, block, tract, or parcel at the time of the declaration of the rebate. . . ."⁶ The questions raised by this change are the following. Did the legislature intend by this amendment to do no more than clarify what it had meant when it used the phrase, "the person entitled thereto," or was this new wording a complete reversal of the former policy of rebating?

¹ ILL. REV. STAT. ch. 24, § 9-3-33 (1957).

³ Ill. Laws § 93, at 133 (1897).

² ILL. REV. STAT. ch. 24, § 9-2-138 (1963).

⁴ *Ibid.*

⁵ *Flanagan v. Chicago*, 311 Ill. App. 135, 35 N.E. 2d 545 (1941).

⁶ *Supra* note 2.

There is no Illinois case in which this question was considered. There are cases in which comments seem to touch on the problem, but when scrutinized, they afford little help. Since the precise question was not involved, precise definition was not achieved. Thus, in *Chicago v. McCormick*,⁷ a suit in assumpsit to recover a rebate, the court said, "the remainder (\$4,766.33) belonged to the property owners who paid it in. The city held the ratable proportion of this remainder due on appellee's lot as money had and received by it for their use."⁸

It should be noted that the plaintiff, McCormick, who successfully sought recovery, was the owner at the time the lot was assessed and continued to be the owner to and including the time when suit was filed. Significant, also, is the use of the two phrases, "property owners who paid it in" and "due on appellee's lot." The implication appears inescapable that it is the *lot* which is to be considered in determining to whom the rebate is to be given.

In the case of *Flanagan v. Chicago*,⁹ involving the special assessment to improve Wacker Drive, there appears the following:

There can be no question but that the surplus in the hands of the city of the assessments collected over and above the cost of completion of the project constituted a trust fund of which the assesseees are the beneficiaries and the city the trustee. It has been repeatedly held that the proceeds of special assessments are trust funds for the payment of bonds issued for the cost of improvements. It necessarily follows that special assessment collections over and above the cost of the completion of the improvement must be trust funds held by the city as trustees for the benefit of *the assesseees*.¹⁰

In *Fort Dearborn v. Chicago*,¹¹ the court dealt primarily with the right of the municipality which contributed to the cost of the improvement through a public benefit payment, to share in the rebate. As in most of the cases, the court used language which might be interpreted as bearing on rights to the surplus. It said, "the general public and the private property owners should share in the rebate according to the same ratio that controlled the apportionment of the cost of the improvement between them."¹² The court, considering the

⁷ 124 Ill. App. 639 (1906).

⁸ *Id.* at 640.

⁹ *Supra* note 5.

¹⁰ *Id.* at 155, 35 N.E. 2d at 553 (emphasis added), citing with approval, *Conway v. Chicago*, 237 Ill. 128, 86 N.E. 619 (1908); *Rothschild v. Calumet Park*, 350 Ill. 330, 183 N.E. 337 (1932).

¹¹ 318 Ill. App. 139, 47 N.E. 2d 561 (1943).

¹² *Id.* at 148, 47 N.E. 2d at 565.

apportionment of the cost of the improvements,¹³ stated that assessment was to be in proportion to the benefits, with no one "assessed a greater amount than benefited."¹⁴ The court further substantiated its holding that the individual paying the assessment was entitled to the rebate by stating that the law as to joint ventures in public improvements¹⁵ clearly provided that "the excess shall be refunded 'ratably to those against whom the assessment was made.'"¹⁶

In the more recent case of *Waukegan v. Drobnick*,¹⁷ the court held that the surplus is to be rebated to "such owners", describing them as "owners of property which has been assessed."¹⁸

A review of the statute as originally written, and as it is now amended, discloses clearly that the assessment is levied against property and not against persons. A special assessment is a peculiar breed of municipal operation not existing at common law, devised by statute solely for the purpose of improving property. We do not do violence to the concept on which the Special Assessment is founded by referring to its lien as one running with the land or by stating that the special assessment operates *in rem* and not *in personam*. Although the courts have not deviated from that concept, their opinions have nevertheless created confusion by the use of language such as "the assessee."¹⁹ The fact remains that no person in a special assessment proceeding is assessed. On the contrary, a lien is placed against land owned by someone who may elect to pay, or not to pay, the amount of the assessment in order to relieve the property from the lien. That person is not compelled to make such payment and is not the target of the assessment. To refer to him as an assessee departs from the concept of special assessment. This principle is supported by a leading authority²⁰ on assessments, who states:

In the absence of a statute it would seem clear, upon principle that the owner cannot be made personally liable for the assessment and that a statute imposing a personal liability in addition to an assessment upon the land should be held unconstitutional. Where a personal liability is recognized there is anomaly. A tax is imposed on the theory of a pecuniary benefit to the lot and if not paid the property may be sold.²¹

¹³ ILL. REV. STAT. ch. 24, § 84-39 (1941).

¹⁴ *Supra* note 11 at 145, 47 N.E. 2d at 563.

¹⁵ ILL. REV. STAT. ch. 24, 84-59 (1965).

¹⁶ *Supra* note 11 at 145, 47 N.E. 2d at 563.

¹⁷ 31 Ill. 2d 580, 202 N.E. 2d 519 (1964).

¹⁸ *Id.* at 585, 202 N.E. 2d at 521.

¹⁹ See *supra* note 5.

²⁰ MASON, SPECIAL ASSESSMENTS (1898).

²¹ *Id.* at 24.

It has been suggested that when a special assessment is spread, the law gives the municipality a limited right beyond which it may not go; that is, that it may not assess a greater amount against a parcel than that parcel is benefited. The argument is then presented that any excess over the actual benefit²² is a void tax. Finally, it is suggested that the void tax is returnable to the *person* who paid it. That argument, however, proceeds on a false premise. By statute, the lien is created against the property immediately upon the confirmation of the Assessment Roll. Be the amount assessed by that roll either too large or too small, the lien is just as effective in its inception in respect of the amount later determined to be a surplus as it is in respect of the amount actually expended in making the improvement. It is, therefore, improper to say that the excess levy against the property is illegal. An improvement cannot be commenced until funds are assured for the payment of that improvement. At the time of the commencement of any building project, it is practically impossible to be assured of the ultimate cost. As was stated in *Chicago v. Noonan*,²³ "the best estimate that can be made will generally, if not universally, prove too low or too high."²⁴ If the assessment is too high, the Illinois Supreme Court, in the case of *Winnetka v. Taylor*,²⁵ has stated, the estimate can be reduced by refunding the excess ratably to those against whom the assessment is made . . . The theory of the [local improvement] act is to charge the cost of the assessment to the property that is benefited by the improvement. . . .²⁶

Significant, again, is the confusion caused by use of the words in the statute as well as in this decision. The last sentence of the above quotation discloses that the assessment is a charge against the property. The next-to-the-last sentence uses the words, "against whom the assessment is made." It becomes obvious that the assessment is not made against any person. Rather, it is made against the property. In both over-estimates and under-estimates, it is the property, and not the owner, which is the object upon which the law operates.

This principle is further demonstrated by the portions of the statute which provide that if the assessment is not paid and a surplus develops, that surplus is first credited to the unpaid portion of the

²² A surplus is considered such an excess.

²³ 210 Ill. 18, 71 N.E. 32 (1904).

²⁴ *Id.* at 23, 71 N.E. at 34.

²⁵ 301 Ill. 147, 133 N.E. 2d 653 (1921).

²⁶ *Id.* at 154-55, 133 N.E. 2d at 656-57.

tax, thereby reducing the special assessment lien against the property, and this is true irrespective of who happens to be the owner at the moment.

Throughout the statute, there appears the intent of the legislature to operate on property and not on persons. This is clearly demonstrated by the language of the section dealing with apportionment of the assessments which provides that the official

shall apportion and assess the amount so found to be of benefit to the property upon the several lots, blocks, tracts and parcels of land, in the proportion in which they will be severally benefited by the improvement. No lot, block, tract, or parcel of land shall be assessed a greater amount than it will be actually benefited.²⁷

That the special assessment procedure does not work *in personam* is also seen in the section describing the assessment roll as containing a list of all the lots, blocks, tracts and parcels of land assessed for the proposed improvement, the amount assessed against each, and the name and address of the person who paid the General Tax in the last preceding calendar year in which taxes were paid.²⁸ Parenthetically, it should be noted that in many cases, a present owner may not be legally notified by way of a summons because a former owner who paid the last General Tax would receive an *in rem* notification. This principle is supported by Mason, who states,

[i]n abating the assessment, the surplus must be distributed pro rata among all the lots where the assessment was reduced . . . The issue of benefit and pro rata share of the cost must be settled in the confirmation proceeding and the surplus must be distributed according to the judgment of confirmation.²⁹

It should therefore seem that in the interests of consistency, the statute should continue to operate on property and not on persons, and that the rebate in the hypothetical case presented above should follow the property and be payable upon proper proof to the property owner and not a payor.

Nor does this suggested procedure burden municipal procedures. The problem in the past has resulted from inability to locate the former owner or other interested person who may have relieved the property of the lien by payment of the assessment, and the inability of such reputed payor to prove such payment. As a practical fact, the "redemption" from the lien may have been made by a mort-

²⁷ ILL. REV. STAT. ch. 24, § 9-2-45 (1965).

²⁸ ILL. REV. STAT. ch. 24, § 9-2-47 (1965).

²⁹ *Supra* note 20.

gage man whose security was impaired by virtue of the prior lien created through the special assessment. Experience has indicated that in most of these rebate procedures, there existed an inability on the part of a payor to prove his right to a refund, and this problem has been compounded by the passage of time, deaths and inheritances. On the other hand, it is a fact that all property, at any given moment, has an owner. The present owner may not have directly paid the special assessment on which a rebate now has accrued, but it is equally true that in buying the property he bought it "as is" in respect of mechanic's liens, special assessment liens, judgment and mortgage liens, and it seems certain that in establishing the price, all improvements and their costs and values were taken into account both by the seller, who paid for the improvements, including special assessments, and by the buyer, who verified the presence of the improvements and was accordingly, willing to pay a higher asking price.

As previously indicated, municipalities have not had the benefit of any judicial guidance. Some of them have considered the rebate as refundable to the person who presents a receipt evidencing payment of the initial assessment by that person. It is suggested that the 1963 amendment³⁰ was adopted as a clarification or restatement of the law as it heretofore existed, and that the statutory phrase, "the person entitled thereto" was in fact, and in legislative intent, the owner of the property at the time of the municipal determination of the existence of a surplus, rather than the payor of the initial assessment.

The courts of other states have touched on this problem. In *Moffatt v. Salem*,³¹ and in *Neer v. Salem*,³² the court held that the grantee, and not the grantor, was entitled to the refund. It must be recognized that the statute of Oregon differed materially from that of Illinois, but it should be noted that the underlying principle of an operation *in rem*, or a concept of a right running with the land, has prevailed elsewhere.

It will occur to the lawyer engaged in handling real estate transactions that any doubt as to the proper person to receive the rebate or surplus may be resolved by contract entered into at the time of the closing of the real estate sale. Neither the standard printed form of "Contract for the Sale of Real Estate," nor a "letter of opinion"

³⁰ *Supra* note 2.

³¹ 81 Ore. 686, 160 Pac. 1152 (1916).

³² 77 Ore. 42, 149 Pac. 476 (1915).

issued by a Title Company, nor a Torrens Certificate, make any provision for rebates or surpluses, and not the slightest suggestion is presented that there may be a rebate payable at some future date or even at the moment of the conveyance. Obviously, the conveyancer could provide the seller or the buyer, as the case may be, is entitled to special assessment rebates, if any are or become due. Unfortunately, if this practice has prevailed in the past, it has been in only rare and isolated instances. Most practitioners are not put on their guard, there being no showing in current title papers that there ever was a special assessment spread and paid for. Even in the practice involving the examination of abstracts of title, there would be no indication that a surplus of Special Assessment Funds had been collected and was available for distribution. Perhaps the cautious practitioner will hereafter insert an appropriate clause in the real estate sales contract, thereby protecting his client against the remote possibility that the 1963 amendment³³ may be declared unconstitutional and ineffective.

Finally, we must be aware of the fact that amendments in the nature of the 1963 amendment occur in a most sensitive area and may well be the subject of an attack in respect of their constitutionality. The prudent City Attorney will continue to exercise caution, it is believed, and will refrain from advising his municipal authorities to pay out the thousands of dollars presently held in a trust account until a court of last resort has expressed itself affirmatively, and has declared the rights of the parties in and to such surplus funds.

³³ *Supra* note 2.