

the amount of its capital stock, it will be required to pay the franchise fee computed at the prescribed rate upon the full amount of its subscribed, issued and outstanding stock in the sum of \$400,000.00."

Cooley in his recent work on Taxation, Vol. II, page 1753, adopts the same view, and bases such view upon the same authorities as those cited in the Opinions of the Attorney General above quoted.

"Stock once issued is outstanding within the meaning of a tax statute, although returned to and owned by the corporation issuing it, until retired and cancelled as required by the statute relating to the reduction of capital stock."

Cooley, Taxation, Vol. II, page 1753.

In view of these authorities, I find no reason for reversing the previous opinion of this department, and you are therefore advised that the franchise tax of the G. W. Bobb Company should be computed upon the entire amount of capital stock originally issued.

Respectfully,

C. C. CRABBE,  
*Attorney-General.*

1873.

TAXES AND TAXATION—CHURCH PROPERTY USED EXCLUSIVELY FOR PUBLIC WORSHIP IS EXEMPT FROM TAXATION—APPLICATION FOR EXEMPTION BY TAXPAYER IS NOT NECESSARY.

SYLLABUS:

*Church property used exclusively for public worship since January, 1921, is exempt from taxation from that date, although no application was made for exemption until May 1, 1924.*

COLUMBUS, OHIO, October 27, 1924.

*The Tax Commission of Ohio, Columbus, Ohio.*

Gentlemen:—

The Commission requests the opinion of this department upon the facts stated in the following communication:

"A church organization purchased a piece of real estate in January, 1921, and since that date said property has been used exclusively for public worship. No application for exemption was made until May 1, 1924. Tax has been assessed on this property from the years 1921, 1922 and 1923, which tax remains unpaid and delinquent.

Query: Is this property exempt from taxation from the date of its purchase and use or from the date of filing the application for exemption?

The answer to this question involves an interpretation of section 5570-1 G. C., 110 O. L., 77."

The Constitution of Ohio provides as follows :

Article XII, Section 2:

"Laws shall be passed, taxing by a uniform rule,\* \* \* all real \* \* \* property according to its true value in money,\* \* \* but \* \* \* houses used exclusively for public worship \* \* \* may, by general laws, be exempted from taxation; \* \* \*."

Houses used exclusively for public worship are exempted from taxation under the provisions of Section 5349, General Code, which reads :

"\* \* \* houses used exclusively for public worship, \* \* \* and the ground attached to such buildings necessary for the proper occupancy, use and enjoyment thereof and not leased or otherwise used with a view to profit, \* \* \* shall be exempt from taxation, \* \* \*."

The Commission asks, in substance, if it was necessary for the church organization to make application for exemption during the years 1921, 1922 and 1923, in order to hold the property exempt from taxation.

It will be noted that Section 5349, General Code, herein quoted, expressly provides that said named property "shall be exempt from taxation," and no condition that exemption is based upon the fact that application has been first made and exemption granted thereon, is expressed.

Section 5570, General Code, provides :

"Return of exempted real estate.

An assessor at the time of making the assessment of real property subject to taxation, shall enter in a separate list pertinent descriptions of all \* \* \* houses used exclusively for public worship \* \* \* which are exempt from taxation."

This property was erroneously placed upon the tax duplicate and, upon discovery of said error, it is the duty of the county auditor to correct the same.

Section 2588, General Code, reads :

"Corrections of errors on tax list and duplicate—

From time to time the county auditor shall correct all errors which he discovers in the tax list and duplicate, \* \* \* when property exempt from taxation has been charged with tax."

Section 2588-1, General Code, provides as follows :

"The county auditor from time to time shall correct any clerical errors which he discovers in the tax list, in the name of the person charged with taxes, the valuation, description or quantity of any tract, lot or parcel of land or improvements thereon, or minerals or mineral rights therein, or in the valuation of any personal property, or when property exempt from

taxation has been listed therein, and enter such corrections upon the tax list and duplicate."

Section 2589, General Code, provides as follows:

"After having delivered the duplicate to the county treasurer for collection, if the auditor is satisfied that any tax or assessment thereon or any part thereof has been erroneously charged, he may give the person so charged a certificate to that effect to be presented to the treasurer, who shall deduct the amount from such tax or assessments. \* \* \*

Section 1038 R. S. is now Section 2588 G. C. Before the amendment of this section adding the words, "or when property exempt from taxation has been charged with tax," it was by our Supreme Court distinctly held in construing section 1038 R. S. that neither the county auditor nor the commissioners could correct an error and order a refunder where the property charged was exempt from taxation, no matter upon what account. *State vs. Commissioners of Montgomery County*, 31 O. S., 271.

In the case of *Mannix Assignee vs. County Commissioners* 10 Bul. page 53, it was held that:

"It would seem that this amendment was made to clothe the county auditor and commissioners with the needed authority to correct errors arising in connection with property on the tax list found to be exempt from taxation, and to order a refunder of taxes erroneously paid thereon."

Continuing, the court further held as follows:

"The amendment noted, vests the auditor with the power to correct an error that has occurred in *charging taxes* upon property exempt from taxation. The auditor's duty in connection with property found upon the tax list that is exempt from taxation, where it has been charged with taxes \* \* \*, is something more than a mere ministerial duty."

Section 1036 R. S. (2585 G. C.) provides that the auditor shall determine from various rates and sums to be levied, the sum to be levied upon each tract and lot of real property, *subject to taxation*.

Section 2621 R. S. (5626 G. C.) reads:

"After receiving from the Auditor of State the percentum required by the general assembly to be levied for the payment of the principal and interest of the public debt, etc., which percentum shall be levied by the county auditor *on the taxable property* of the county, etc."

From these sections it would seem that the auditor is charged with something more than mere ministerial duties. He is invested with the authority to determine for himself what is taxable property, for the command is, not that he shall assess or charge the tax upon all the real estate *returned by the district assessor*, but upon that only, "that is taxable" or "that is subject to taxes."

The Supreme Court, in the case of *Frost vs. Shaw*, 3 O. S., 270, in construing the exemption law in relation to personal property exempt from execution, where a public officer was concerned said:

"There are certain enumerated articles which are absolutely exempted

from execution, and which the officer is bound at his peril to notice and not take on execution, unless turned out by the debtor, by a waiver of his right of exemption."

The church property in question has been used exclusively for public worship and has been and is absolutely exempt from taxation.

This is not the case of a taxpayer asking the auditor to reduce or alter the valuation put by the assessor upon this property; neither is it an application for a refunder of taxes erroneously paid upon property exempt from taxation under the laws of the state; but it is a case in which the county auditor has erroneously placed upon the tax duplicate property which, under the laws of the state is exempt from taxation, and upon which no taxes have been paid.

Being absolutely exempt from taxation, it is believed that no application was necessary in order to hold said property free from taxation; but the county auditor should, as stated in Section 2588 G. C., "correct all errors which he discovers in the tax list and duplicate, \* \* \* when property exempt from taxation has been charged with tax."

Answering the specific question, the Commission is advised that in the opinion of this department, the church property mentioned is exempt from taxation from the date of its purchase and use.

The suggestion is made by the Tax Commission that the answer to their inquiry involves an interpretation of supplemental section 5570-1 G. C., 110 O. L., 77, which reads:

"It shall be the duty of the county auditor to make a list of all the property, both real and personal, in his county, and including moneys, credits and investments in bonds, stocks, or otherwise, which is exempted from taxation under Sections 3410-6, 4759, 5349, 5350, 5351, 5352, 5353, 5353-1, 5356, 5357, 5359, 5361, 5362, 5363, 7915-1, 10093, 10101, 10105 and 10192 of the General Code. In each case in addition to the name of the owner, such list shall show the value of the property exempted and a statement in brief form of the reason for or ground on which such exemption has been granted. It shall be corrected annually by adding thereto such items of property as may have been exempted during the year and by striking therefrom such items as shall have lost their right of exemption and which shall be re-entered on the taxable list. After this act takes effect no additions shall be made to such exempt lists nor additional items of property exempted under any of the sections enumerated herein without the consent of the Tax Commission, but when any personal property or endowment fund of an institution has once been held by the Tax Commission to be properly exempt from taxation, it shall not be necessary to obtain the commission's consent to the exemption of additional property or investments of the same kind belonging to the same institution; but such property shall appear on the abstract filed annually with the commission. The tax commission shall, prior to January 1, 1925, revise the list in every county so that no property is improperly or illegally exempted from taxation; and shall have power to make further revision at any time thereafter. The county auditor shall follow the orders of the tax commission given under this section. An abstract of such list shall be filed annually with such commission on a form to be approved by it, and a copy thereof shall be kept on file in the office of each county auditor for public inspection."

This act prescribes certain duties to be performed by the county auditor and certain procedure for the tax commission to follow. It will be noted that Section 5349 specifically provides for the exemption of such property. The act referred to does not provide that the tax payer shall make any application for exemption. It is a well settled rule of law that repeals by implication are not favored.

We are of the opinion that no obligation is placed upon the tax payer to claim exemption by this act. It is the use of the property which determines its right to exemption. The auditor must ascertain whether the property is exempt from taxation. By the act referred to, if he places additional property on the exempt list after the act becomes effective, it is his duty to first obtain the consent of the Tax Commission. The apparent object to be accomplished by the act was to prevent taxable property from escaping taxation. To that end it was provided that all property exempted should be brought to the attention of the Tax Commission, the supreme taxing authority in the state. The secondary object to be accomplished by the law was the preparation of the lists of exempted property which it is provided shall be kept in the office of each county auditor, for public inspection.

Respectfully,

C. C. CRABBE,  
*Attorney General.*

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1874.

APPROVAL, BONDS OF VILLAGE OF SHAKER HEIGHTS, CUYAHOGA COUNTY, \$95,000.00, STREET IMPROVEMENTS.

COLUMBUS, OHIO, October 27, 1924.

*Retirement Board, State Teachers' Retirement System, Columbus, Ohio.*

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1875.

APPROVAL, BONDS OF VILLAGE OF SYLVANIA, LUCAS COUNTY, \$9,522.50, STREET IMPROVEMENTS.

COLUMBUS, OHIO, October 27, 1924.

*Department of Industrial Relations, Industrial Commission of Ohio, Columbus, Ohio.*

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1876.

APPROVAL, BONDS OF NEWARK CITY SCHOOL DISTRICT, LICKING COUNTY, \$15,000.00, FOR CERTAIN SCHOOL IMPROVEMENTS.

COLUMBUS, OHIO, October 27, 1924.

*Retirement Board, State Teachers' Retirement System, Columbus, Ohio.*