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1. DEPOSITS MADE IN FINANCIAL INSTITUTION — BY SUPERINTENDENT OF BANKS OR SUPERINTENDENT OF BUILDING AND LOAN ASSOCIATIONS — CAPACITY — LIQUIDATION OF FINANCIAL INSTITUTION — NOT “DEPOSITS” BELONGING TO STATE OF OHIO OR OF ANOTHER FINANCIAL INSTITUTION AS SUCH TERMS ARE USED IN SECTION 5406 G. C.

2. FINANCIAL INSTITUTION IN MAKING RETURN OF “TAXABLE DEPOSITS” UNDER AUTHORITY OF SECTION 5411-2 G. C. MAY NOT DEDUCT FROM GROSS DEPOSITS AMOUNTS REPRESENTING DEPOSITS OF SUPERINTENDENT OF BANKS OR SUPERINTENDENT OF BUILDING AND LOAN ASSOCIATIONS ON THEORY SUCH DEPOSITS ARE DEPOSITS OF FINANCIAL INSTITUTIONS OR BELONGING TO STATE OF OHIO.

SYLLABUS:

1. Deposits made in a financial institution by the Superintendent of Banks or the Superintendent of Building and Loan Associations in his capacity as liquidator of a financial institution do not constitute “deposits” belonging to the State of Ohio or of another financial institution as such terms are used in Section 5406, General Code.

2. A financial institution, in making its return of “taxable deposits” under authority of Section 5411-2, General Code, may not deduct from the gross deposits amounts representing deposits of the Superintendent of Banks or Superintendent of Building and Loan Associations on the theory that such deposits are deposits of financial institutions or belonging to the State of Ohio.

Columbus, Ohio, May 19, 1944

Hon. William S. Evatt, Tax Commissioner of Ohio
Columbus, Ohio

Dear Sir:

Your request for my opinion reads:

“On December 31, 1943 in the case of Lien, Supt. of Banks

(The Guardian Trust Company) vs. Evatt, Tax Commissioner, and in the case of Merion, Supt. of Building and Loan Assns. (The American Loan and Savings Assn.) vs. Evatt, Tax Commissioner, both of which were closed institutions under the jurisdiction of the authorized Superintendent for liquidation purposes, the Board of Tax Appeals held that the deposits in such closed institutions were not taxable deposits within the provisions of Section 5324, General Code, and it follows, within the provisions of Section 5406, General Code.

Section 5406, General Code, includes in exemptions from deposits which are required to be returned for taxation by financial institutions, deposits belonging 'to the state of Ohio', as well as 'to any other financial institution'. The monies and funds of such closed institutions collected by the Superintendent in the process of liquidation are, as required by statute, deposited in state and national banks subject to his order. The question has been raised as to the taxability of such deposits of the Superintendents.

Your opinion is respectfully requested as to whether such funds, which were on the books of the depository financial institution as belonging to the Superintendent of Banks or the Superintendent of Building and Loan Associations, as the case may be, are entitled to exemption from deposits taxation as 'deposits' (1) belonging 'to the state of Ohio', or (2) belonging 'to any other financial institution'."

By virtue of the inferences contained in your inquiry, I am assuming that you have no question but that the deposits in question come within the definition of "deposits" as defined in Section 5324, General Code. I, therefore, assume for the purposes of this opinion that the deposits are taxable unless they come within the exceptions contained in Section 5406 of the General Code.

The "deposits" required to be returned by a financial institution for purposes of taxation are those described in Section 5406, General Code, which reads in part as follows:

"The deposits required to be returned by financial institutions pursuant to this chapter include all deposits as defined by section 5324 of the General Code to the extent that such deposits are made taxable by section 5328-1 of the General Code, excepting deposits belonging to the federal government or any instrumentality thereof; or deposits to the extent of advances or advance payments made under any contract entered into by the federal government or any instrumentality thereof for the production of materials or supplies or the furnishing of services pur-

suant to authority of any act to further the war effort; or deposits belonging to the state of Ohio or any county, municipal corporation, school district, township, or other subdivision thereof, or to any other financial institution, or to a dealer in intangibles or a domestic insurance company, or to an institution used exclusively for charitable purposes. * * *

I do not believe that it will be contended that a bank in liquidation comes within the concept of any of the following exemptions mentioned in Section 5406 of the General Code: "the federal government or any instrumentality thereof", "the state of Ohio or any county, municipal corporation, school district, township, or other sub-division thereof", "a domestic insurance company", or "an institution used exclusively for charitable purposes".

In view of the fact that such Section 5406 excepts the deposits of other financial institutions from the return of a financial institution, it would seem that consideration should be given as to whether, under the circumstances, when the Superintendent of Banks is in possession of the business and property of a bank for purposes of liquidation and makes deposits of liquidation proceeds in a financial institution, such deposits are deposits of a financial institution for purposes of taxation.

Among the opinions of the Board of Tax Appeals to which you refer in your request is that rendered in the case of Rodney P. Lien, Superintendent of Banks in charge of the business and property of the Guardian Trust Company for purposes of liquidation vs. Evatt, B. T. A. No. 2157, wherein it was contended that the assessment made on the claims of depositors of the Guardian Trust Company as deposits was improper for the reason that during the time the bank's assets were being liquidated, the bank was not a "financial institution" as defined by Section 5407, General Code, and that it could, therefore, have no "deposits" as defined by statute. The pertinent portion of Section 5407, General Code, which defines "financial institutions", reads:

"The term 'financial institution' as used in this chapter includes every person who keeps an office or other place of business, in this state, and engages in the business of receiving deposits, and of lending money, buying or selling bullion, bills of exchange, notes, bonds, stocks, or other evidences of indebtedness, with a view to profit. * * *

In sustaining such contention, the Board of Tax Appeals, in effect,

held that a bank in liquidation is no longer a financial institution as defined by Section 5407 and that, therefore, the deposit claims therein were not taxable as deposits within the meaning of the taxing statutes.

From an examination of the statutes authorizing the Superintendent of Banks to take possession of the business and property of a bank for purposes of liquidation and to liquidate the same (Sections 710-89 to 710-107a, General Code), it would appear that his powers are those of converting the assets of such bank into money with a view to and of distributing the liquidation proceeds in the payment of the creditors of such bank. No powers are therein granted to him to engage in the business of receiving deposits, lending money, buying or selling bullion, bills of exchange, notes, bonds, stocks or other evidences of indebtedness with a view to profit.

The deposits referred to in your inquiry, by reason of their very nature, do not represent moneys of the bank whose assets are in liquidation, but rather represent moneys of the Superintendent of Banks in his capacity of liquidator of the business and property of such institution. In such capacity he is somewhat in the nature of a statutory receiver. *State, ex rel. Merion, Superintendent of Building and Loan Associations v. Unemployment Compensation Board of Review*, 142 O. S. 628. To the extent that the moneys were once the funds of the closed bank, to that extent, by virtue of the express terms contained in Section 710-91, General Code, the title passed to the Superintendent of Banks upon his having taken possession of the business and property of the bank under authority of Section 710-89, General Code. The first sentence of Section 710-91, General Code, reads:

“Immediately upon the posting of notice on the door or doors of a bank by the superintendent of banks, as provided in section 710-90 of the General Code, the possession of all assets and property of such bank of every kind and nature, wheresoever situated, shall be deemed to be transferred from such bank to, and assumed by the superintendent of banks; and such posting shall of itself, and without the execution or delivery of any instruments of conveyance, assignment, transfer, or endorsement, *vest the title of all such assets and property in the superintendent of banks.* * * *”

(Emphasis added.)

Since, as we have above pointed out, the powers of the Superintendent

of Banks with respect to the liquidation of a financial institution are not broad enough to include him in such capacity within the definition of a "financial institution", it could scarcely be contended that deposits in a financial institution belonging to him are deposits belonging to "financial institutions" as such term is used in Section 5406, General Code.

Were it not for the decision in the case of Merion, Superintendent of Building and Loan Associations v. Unemployment Compensation Board of Review, 142 O. S. 628, it might be urged that deposits of such nature are deposits "belonging to the state". However, the Supreme Court in that case held that the Superintendent, in liquidating the business and property, did not act on behalf of the state, but was similar to an ordinary receiver or trustee; that his acts in such capacity were for the benefit and in the interest of creditors, depositors, shareholders of the company and other affected persons and not for the benefit of the State of Ohio in any direct sense. It, therefore, seems to me that the deposits in question are not exempt from taxation as being deposits of the state.

Specifically answering your inquiry, it is my opinion that:

1. Deposits made in a financial institution by the Superintendent of Banks or the Superintendent of Building and Loan Associations in his capacity as liquidator of a financial institution do not constitute "deposits" belonging to the State of Ohio or of another financial institution as such terms are used in Section 5406, General Code.

2. A financial institution, in making its return of "taxable deposits" under authority of Section 5411-2, General Code, may not deduct from the gross deposits amounts representing deposits of the Superintendent of Banks or Superintendent of Building and Loan Associations on the theory that such deposits are deposits of financial institutions or belonging to the state of Ohio.

Respectfully,

THOMAS J. HERBERT

Attorney General