4403.

CERTIFICATE OF IMMUNITY—INTANGIBLE TAX—MAY BE SECURED BY REPRESENTATIVE OF DECEDENT — ADMINISTRATOR MAY NOT RECOVER BACK TAXES VOLUNTARILY PAID.

SYLLABUS:

When between July 15, 1931 and January 2, 1932, (the date when Amended Senate Bill No. 323, enacted by the 89th General Assembly, became fully operative), the county auditor finds that a person then deceased, had, during the five years immediately preceding, made a false return, withheld from, or failed to include in his return certain property, and after due notice, the personal representative of the decedent produces a certificate of immunity as described in Section 5698-1, General Code, such county auditor is thereafter without authority to assess a tax which might accrue by reason of such omission of this property for taxation by the decedent.

When an administrator has paid taxes which were added by the county auditor by reason of the failure of the deceased to list taxable items of property for taxation during the preceding five years the administrator or personal representative cannot recover such payment unless such payment was an involuntary one.

COLUMBUS, OHIO, June 8, 1932.

HON. ROBERT N. GORMAN, *Prosecuting Attorney, Cincinnati, Ohio.*

DEAR SIR:—I am in receipt of your request for my opinion on the following questions:

> "1. In matters of estates, between July 15, 1931 and January 2, 1932, when the new law became effective, where the Auditor found that a deceased person has made a false return, or has evaded making a return, or has withheld from, or failed to include in a return certain taxable personal property and taxes are assessed for the years 1926 to 1931, can the taxes so found be defeated by the estate through a certificate of immunity as provided in amended section 5398?
>
> 2. In cases where the Auditor, during the year 1931, found taxes due and assessed taxes for the years 1926 to 1931 as stated above, *and the taxes were paid,* will the estates be privileged to apply for a refunder of said taxes?"

Your first inquiry necessitates an interpretation of Sections 5398 and 5398-1, General Code, which sections, in so far as material to your inquiry, read as follows:

Sec. 5398—

> "If a county auditor believes or has reason to believe that a person, required by the law then in force to list property or make a return thereof for taxation in any prior year or years beginning with 1926 and ending with 1931, has made a false return, or has evaded making a return, or has withheld from, or failed to include in such return any property, either tangible or intangible, required by the law in force in

any such year or years to be listed for taxation, he shall call such person before him for examination, by giving notice in writing of the time and place when such examination shall be had, to the person, if living, or to his legal representative, if he be dead. Such notice may be served either personally or by registered letter directed and mailed to the last known post office address of the person sought to be served. Unless the person so notified produces a certificate of the tax commission of Ohio to the effect that the person whose returns are proposed to be examined, made a return in the year 1932 and fully and in good faith listed therein all the taxable property required by the law in force in the year 1932 to be so listed, the auditor shall proceed with the examination. * *"

Sec. 5398-1—

"A person, or his legal representatives called before the county auditor under the preceding section, or any person claiming to have made a return in the year 1932, may apply to the tax commission of Ohio for a certificate of immunity from examination under such section and from criminal prosecution.

Upon such application the commission shall proceed to determine whether or not the person whose returns are proposed to be investigated by the county auditor made a return in the year 1932 and fully and in good faith listed therein the taxable property required by the law in force in said year to be so listed; and if it finds such to be the fact shall issue its certificate to that effect. The commission may order the county auditor to stay proceedings on the examination commenced by him pending the investigation which the commission is required thereby to make; but in the event of such stay the commission shall, if it refuses the application for such certificate, forthwith notify the county auditor of its action in the premises.

Such certificate shall constitute a defense in any criminal prosecution for failure to list any personal property, moneys, credits, investments in bonds, stocks, joint stock companies or otherwise for taxation in any year prior to the year 1932, or for making false returns of any such property in any such year, or for perjury in making returns of any such property in any such year."

In the statutes quoted above there are certain ambiguities. In Section 5398, General Code, the provision is that if the county auditor believes, or has reason to believe, that a person required by law, has failed during any year between the years 1926 and 1931, to make a full and complete return of his property he shall call such person before him for examination. There is no provision in such section as to the manner in which such claim against the estate of a decedent may be determined unless additional words are supplied to such section. That is, the statute makes it a condition precedent to the auditor adding an omitted property valuation to the tax duplicate that he call the person who has made such omission before him for examination. Thus the examination of the offender becomes a condition precedent to the levy of the tax.

It is clear, however, that the legislature intended that the estate of the decedent should be subject to the tax, for in the same section it provides that the taxpayer shall be cited to appear for examination, and attempts to lay down

a procedure for the serving of the citation and notice of hearing, as follows:

> "By giving notice in writing of the time and place when such examination shall be had to the person, if he be living or his legal representative if he be dead."

If there is to be an examination of the deceased and not of the administrator, the serving of the notice on the administrator would be an absurdity.

In Section 5, of Amended Senate Bill 323, as enacted by the 89th General Assembly, of which Sections 5698 and 5698-1, General Code, quoted above, are a part, there is further reference to this application by the personal representative. Such Section 5, in so far as material, reads as follows:

> "Any person or his legal representatives against whom an assessment of omitted property shall have been made in the year 1931 for any prior year or years under sections 5398, 5399, 5401 or 5402 of the General Code, hereby repealed may at any time prior to the first day of April, 1932, apply to the tax commission of Ohio in the manner provided by section 5398-1 of the General Code, hereby enacted, for a certificate of immunity from the collection of any omitted taxes so found. Upon such application the commission shall proceed to make the determination mentioned in said section 5398-1, and *if it finds the facts therein mentioned* shall issue its certificate to that effect, which shall constitute a defense in any action brought to recover the amount of such omitted taxes, or a cause of action in any proceeding to enjoin the collection thereof; and all proceedings for the collection of omitted taxes assessed in the year 1931 shall be stayed until the first day of June, 1932; or if, in any case, application for a certificate of immunity shall have been made to the commission as herein authorized, then all such proceedings for the collection of omitted taxes in such case shall be stayed until ten days after final action by the commission upon such application." (Italics the writer's.)

In the interpretation of statutes, it is never presumed that the legislature intended to enact an absurdity. *Hill* vs. *Micham,* 116 O. S., 549; *Moore* vs. *Given,* 39 O. S., 661, and as stated in 2 Lewis' Sutherland Statutory Construction, Section 497:

> "It is presumed, as well on the ground of good faith as on the ground that the legislature would not do a vain thing, that it intends its acts and every part of them to be valid and capable of being carried into effect."

It would be impossible to cite the deceased before the county auditor for examination. Such interpretation would place an absurd meaning on the statute. In view of the fact that in the same section the legislature has made provision for giving notice to the personal representative in the event that the taxpayer is deceased, I am of the opinion that the intent of the legislature was that the taxpayer should be cited to appear whenever omissions were found in listings for taxation and if he be deceased, the personal representative should be cited to appear for the examination provided by the statute.

It must further be borne in mind that any taxes levied or penalties assessed

against such deceased must of necessity be a tax in rem. By reason of the facts, there can be no personal liability to pay any such tax. This fact is clearly recognized by the provision of Section 10509-81, General Code, which reads as follows:

> "Taxes or penalty lawfully placed on a duplicate or added by the county auditor or the tax commission of Ohio because of a failure to make a return, or of making a false or incomplete return for taxation, shall be a debt of the decedent, to have the same priority and be paid as other taxes, and collectible out of the property of the estate either before or after distribution, by any means provided by law for collecting other taxes. No distribution, or payment of inferior debts or claims shall defeat such collection; but no such tax or penalty can be added before notice to the executor or administrator, and an opportunity is given him to be heard. All taxes omitted by the deceased must be charged on the tax lists and duplicate in his name."

While this section uses the language "shall be a debt of the decedent" the subsequent language used in such section makes the tax obligation of greater priority against the decedent's estate than a mere debt. The intent of the legislature is clear that the tax on the estate is to be a prior lien against the estate and not a mere debt.

If this argument is sound, it would likewise follow that the legislature by the use of the language "the person whose returns are proposed to be examined, made a return in the year 1932" intended such words to mean "the person whose returns are proposed to be examined, *or his personal representative,* made a full return in the year 1932."

It is therefore evident that when the returns which are to be investigated, are those of the decedent, the legislature intended that the county auditor should make an examination of the taxpayer prior to the making of the additional assessment which examination of the decedent would be impossible. However, the language of the legislature as used subsequently in the same section, makes the same provision for examination of the administrator as it does for calling the taxpayer, if alive. It is therefore my opinion, from an examination of the entire act, that the legislative intent was to make provision for the levy of a tax against the decedent's estate if the decedent has omitted taxes beween 1926 and 1930 and likwise to grant such estate immunity under similar conditions as might exist in the case of a living taxpayer.

From the language of the statute it is evident that the legislature intended to place the sole duty as to whether a certificate of immunity should be issued, upon the Tax Commission of Ohio, in which it has vested the duty of the supervision of all tax listings, assessments and collections throughout the state. I therefore do not believe the county auditor has any jurisdiction to determine whether or not the Tax Commission properly issued the certificate of immunity which these sections require as a condition precedent to the injunction against the assessment by the county auditor.

In answer to your second inquiry I would direct your attention to the third paragraph of the syllabus of the case of *State* vs. *Pulskamp,* 119 O. S. 504, which reads as follows:

> "Where one claims to have paid an illegal assessment, he can not recover the amount so paid unless the payment was an involuntary one.

A simple protest against the validity of the assessment is, even coupled with notice to the treasurer that the taxpayer will institute legal proceedings to recover back, not sufficient, but it must appear that payment was necessary in order to avoid the legal steps incident to tax collection. *(Whitbeck, Treas.,* vs. *Minch,* 48 Ohio St., 210, 31 N. E., 743, approved and followed.)"

Section 2589, General Code, reads as follows:

"After having delivered a 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 assessment. If at any time the auditor discovers that erroneous taxes or assessments have been charged and collected in previous years, he shall call the attention of the county commissioners thereto at a regular or special session of the board. If the commissioners find that taxes or assessments have been so erroneously charged and collected, they shall order the auditor to draw his warrant on the county treasurer in favor of the person paying them for the full amount of the taxes or assessments so erroneously charged and collected. The county treasurer shall pay such warrant from the general revenue fund of the county."

I find no other provision of the statutes authorizing the refunder of a tax already paid except that section above quoted.

In order to have a right to recover the tax back, the payment must not have been a voluntary payment. That is, the taxpayer must have been compelled to pay the tax. If the taxes in question were assessed between July 15th and January 2, 1932, the taxpayer would not have been subjected to a penalty for non-payment as distinguished from the penalty for failure to list until after the payment of taxes for the first half of 1931 had expired, that is, December 20, 1932, unless the time of payment had been extended by the county commissioners in the manner provided by statute. The statutes do not provide any authority for the county treasurer to proceed to collect taxes by suit until after they shall have become delinquent.

Following the reasoning of the Pulskamp case, supra, even though the taxes in question may have been paid under protest, they can not be said to have been paid involuntarily.

Specifically answering your inquiries I am of the opinion that:

1. When, between July 15, 1931 and January 2, 1932 (when Amended Senate Bill No. 323, enacted by the 89th General Assembly became fully operative) the county auditor finds that a person then deceased had, during the five years immediately preceding, made a false return, withheld from, or failed to include in his return certain property, and that after due notice, the personal representative of the decedent produces a certificate of immunity, as described in Section 5698-1, General Code, such county auditor is thereafter without authority to assess a tax which might accrue by reason of such omission of this property for taxation by the decedent.

3. When an administrator has paid taxes which were added by the county auditor by reason of the failure of the deceased to list taxable items of property for taxation during the preceding five years the administrator or personal repre-

sentative can not recover such payment unless such payment was an involuntary one.

Respectfully,
GILBERT BETTMAN,
Attorney General.

4404.

TRUST COMPANY—TREASURER OF STATE AND SUPERINTENDENT OF BANKS UNAUTHORIZED TO CHANGE NATURE OF DEPOSIT REQUIRED BY SECTION 710-150, G. C.

SYLLABUS:

Neither the Treasurer of State nor the Superintendent of Banks has the legal authority to enter into an agreement concerning the depositing of securities under Section 710-150, General Code, on any other terms and conditions than those set forth in that and succeeding sections.

COLUMBUS, OHIO, June 8, 1932.

HON. I. J. FULTON, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your request for opinion, as follows:

"Peoples-Pittsburgh Trust Company is a foreign corporation qualified to transact a trust business in the State of Ohio, and as such, is maintaining on deposit with the Treasurer of State securities in the amount of $100,000, as provided in Section 710-150 of the General Code of Ohio. I am advised that this corporation has in the past, in order to protect itself against possible loss of said securities by fire, theft or otherwise, carried insurance upon the State Treasurer. Premiums on this type of insurance, according to my information, have been increased substantially and said corporation desires to be relieved of the burden of paying the premiums thereon.

Peoples-Pittsburgh Trust Company, therefore, desires to have the securities which it may deposit with the Treasurer of State in accordance with Section 710-150, registered in the namee of 'Peoples-Pittsburgh Trust Company, Pittsburgh, Pennsylvania', and it desires to file with the Superintendent of Banks a declaration in writing providing that in case all or any part of said securities which will be described specifically in the instrument or the proceeds thereof are required to satisfy any lawful claim or demand in any way arising from or growing out of the failure of Peoples-Pittsburgh Trust Company to faithfully discharge the duties undertaken by it under any trust being administered by it in the State of Ohio, that the Superintendent of Banks of the State of Ohio may upon giving said Peoples-Pittsburgh Trust Company———— days notice of his intention to do so, request the registrar of such securities to transfer upon the books of the company, a sufficient principal amount of said securities to satisfy any such claim or demand.