

it appears that the county commissioners are now seeking to issue bonds to reimburse some fund or funds from which moneys have been withdrawn to pay a part of the cost of a road improvement. As above pointed out, the Uniform Bond Act authorizes the issuance of bonds for the purpose of acquiring or constructing a permanent improvement. There is no authority therein to issue bonds to pay part of the cost of a permanent improvement constructed at some remote time in the past.

Specifically answering your question, I am of the opinion that when proceedings became pending in October, 1924, for the construction of an inter-county highway, upon a cooperative basis between the state and the county, and the improvement was completed and paid for in December, 1927, the county's portion of the cost having been paid by appropriations from the proceeds of levies under Sections 1222 and 6926, General Code, bonds may not now be issued for the purpose of reimbursing the fund or funds from which appropriations were heretofore made.

Respectfully,
GILBERT BETTMAN,
Attorney General.

1401.

CORPORATION TAXES—NOTICE OF LIEN FOR 1929 UNPAID PUBLIC UTILITY TAX TO BE FILED WITH COUNTY RECORDER BY TAX COMMISSION—WHAT NOTICE SHOULD STATE—STATE TREASURER TO INFORM COMMISSION OF UNPAID TAXES—WHAT LIENS ALREADY ATTACHED.

SYLLABUS:

1. *The Tax Commission is required to file with the county recorder notice of lien for the 1929 unpaid public utility excise tax as provided in Amended Section 5506 of the General Code.*
2. *The notice of lien as required by Amended Section 5506 of the General Code should state the amount of the delinquent franchise tax or excise tax together with any penalties which have accrued.*
3. *The Treasurer of State is required to notify the Tax Commission of any unpaid excise taxes on December 15 of each year or immediately thereafter.*
4. *A statutory lien has attached for the 1929 delinquent franchise fees and for all the years prior thereto. A similar lien has attached for the delinquent excise taxes for the year 1928 and for all the years prior thereto. It is unnecessary to file notice of lien for franchise fees and excise taxes, the lien for which attached prior to the effective date of the amendment of Section 5506 of the General Code by the 88th General Assembly.*

COLUMBUS, OHIO, January 13, 1930.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I am in receipt of your recent communication which reads as follows:

“Your advice is asked upon the following questions:

Under the provisions of Section 5506 of the General Code as amended at the last session of the Legislature, the franchise fee or excise fee becomes a lien against any property of a corporation or public utility in this state on the day fixed by law for the payment thereof and notice of such lien shall be filed by the Tax Commission in the office of the recorder of the county in

which the principal place of business of the public utility or corporation in this state is located.

The last date prescribed by law for payment of franchise fee is July 15th and at that date, the amendment to the above-mentioned section had not become effective and you held that it would not apply to the franchise tax for 1929, therefore the commission did not file notice of any unpaid franchise fees.

The last date prescribed by law for the payment of the excise tax of public utilities is December 15th. Must the commission, under the provisions of Section 5506 as amended, file with the county recorder notice of lien for any unpaid excise taxes on December 15th, and if so, what kind of notice is to be given—that is must the amount of the unpaid tax, which is a lien, be given, or merely notice filed that there is an amount due the State for excise tax which is a lien against any property of the public utility? Must the Treasurer of State on December 15th or perhaps December 16th, notify the Tax Commission of any unpaid excise taxes?

As to the lien for franchise tax for 1929 and as to which you held the amendment to Section 5506 would not apply, as it was not in effect on July 15th, it is now effective and there are many unpaid franchise fees, not only for the year 1929 but for previous years. Are any unpaid franchise fees for 1929 or previous years or any unpaid excise taxes prior to the year 1929 to be considered and treated as liens under Section 5506 before it was amended, or now that the amendment to this section is in force, must the Tax Commission file notice with the county recorder of any unpaid franchise tax for 1929 or prior years and notice of any unpaid excise tax for 1928 or prior years, assuming that notice of the 1929 excise tax must be filed on December 15th or as soon thereafter as possible?

The Commission is desirous of protecting the State's interests, and as notice of such lien and such lien shall not be valid as against any mortgagee, pledgee, purchaser or judgment creditor whose rights have attached prior to the time notice is filed, it wishes to proceed at once to file proper notices and will appreciate an early reply to these questions."

Section 5506, as amended by the 88th General Assembly and referred to in your letter, reads as follows:

"Annually on the * * * day * * * fixed for the * * * payment of * * * any excise or franchise * * * tax required to be paid by law, such tax, together with any penalties subsequently accruing thereon, shall become * * * a lien on all property in this state of a public utility or corporation, whether such property is employed by the public utility or corporation in the prosecution of its business or is in the hands of an assignee, trustee or receiver for the benefit of the creditors and stockholders thereof. Such lien shall continue until such * * * taxes, * * * together with any penalties subsequently accruing thereon, are paid. Upon failure of such public utility or corporation to pay such tax on the day fixed for payment, the treasurer of state shall thereupon notify the tax commission and the tax-commission shall file in the office of the recorder of the county in which the principal place of business of the public utility or corporation in this state is located (for which filing no fee shall be charged), notice of such lien and such lien shall not be valid as against any mortgagee, pledgee, purchaser or judgment creditor whose rights have attached prior to the time such notice is so filed. When such tax, together with any penalties subsequently accruing thereon, has been paid, the public utility or corporation may record with the recorder of the county in which their principal place of business is located,

notice of such payment, for which recording the recorder shall charge and receive a fee of one dollar. Such notice shall be recorded in a book kept by the county recorder, called the corporation record, and indexed under the name of the corporation."

This section became effective July 28, 1929. You will note that this section provides that the lien for franchise and excise taxes attaches "on the day fixed for the payment of any excise or franchise tax required to be paid by law."

Prior to this amendment, Section 5506 provided that the franchise fee and excise tax shall become the first and best lien "on the last day of the month fixed for the filing of its excise or franchise report with the Tax Commission of Ohio." The question as to the applicability of amended Section 5506 to the franchise fee for the year 1929 was discussed by me in Opinion Number 705, directed to Hon. H. Ross Ake, Treasurer of the State of Ohio. The syllabus of said opinion is as follows:

"Provisions of Section 5506, as contained in House Bill Number 264 of the 88th General Assembly are not applicable to the 1929 franchise tax."

The time fixed for the payment of the excise tax is set forth in Section 5491 and was amended by the last session of the Legislature and reads in part as follows:

"* * * If any public utility fails or refuses to pay, on or before the fifteenth day of December, the tax assessed against it, or if any corporation fails or refuses to pay, on or before the dates or within the time fixed by law, the fee charged against it, the treasurer of state shall certify the list of such utilities or corporations, so delinquent, to the auditor of state, who shall add to the tax or fee due, a penalty of fifteen per cent thereon. * * * ."

The dates for the filing of the annual reports with the Tax Commission by public utilities are set forth in Section 5470, which reads as follows:

"Each public utility except street, suburban and interurban railroad and railroad companies, doing business in this state, shall, annually, on or before the first day of August, and each street, suburban and interurban railroad and railroad company, shall annually, on or before the first day of September, under the oath of the person constituting such company, if a person, or under the oath of the president, secretary, treasurer, superintendent or chief officer in this state, of such association or corporation, if an association or corporation, make and file with the commission a statement in such form as the commission may prescribe."

It will be observed that Section 5506, as amended, became effective on a date subsequent to the time when annual statements are required to be filed with the Tax Commission by public utilities doing business in this state.

It must therefore be concluded that since the final day for the filing of the reports by the public utilities and the final day for the payment of excise taxes occur after July 28, 1929, therefore all the provisions contained in Amended Section 5506 are applicable to the 1929 unpaid excise taxes for public utilities which were due December 15, 1929.

In specific answer to your first question, I am of the opinion that the Tax Commission is required to file with the county recorder notice of lien for the 1929 unpaid excise tax as provided in Amended Section 5506 of the General Code.

Your second question relates to the contents of the notice of lien as provided in Amended Section 5506. That section indicates that the notice of lien shall be in

writing and shall be filed with the recorder of the county in which the principal place of business of the public utility or corporation in this State is located. Inasmuch as the amount of the tax due is ascertained on the day fixed for the payment of such tax, I am of the opinion, in specific answer to your second question, that the amount of the tax due on the day fixed for the payment of the same, together with any penalties which may have accrued, should be stated in the notice of the lien.

Your third question relates to the duties of the Treasurer under Amended Section 5506. The provision of that section applicable to this question is as follows:

“ * * * Upon failure of such public utility or corporation to pay such tax on the day fixed for payment, the treasurer of state shall thereupon notify the tax commission * * * . ”

The language above quoted indicates that prompt action is expected from the Treasurer of State on the failure upon the part of the corporation or public utility to pay its taxes on the day fixed for the payment of the same. The word “thereupon” is defined in Webster’s Dictionary as “immediately after that,” “at once,” and “without delay.” I am therefore of the opinion, in specific answer to your third question, that it is the duty of the Treasurer of State to notify the Tax Commission of any delinquent excise taxes on December 15 of each year, or immediately thereafter.

In answering your fourth question, your attention is again called to Section 5506 as it existed before its recent amendment. You will note that a statutory lien had attached to the property of the corporation or public utility for all the delinquent franchise and excise taxes “annually on the last day of the month fixed for the filing of its excise or franchise report with the Tax Commission of Ohio.” A lien has therefore attached to the property of all corporations, foreign and domestic, for delinquent franchise fees covering the year 1929 and all previous years. A similar lien has attached to the property of all public utilities for all delinquent excise taxes for all years prior to the year 1929. Such lien continues in force and effect until the obligations are paid.

In view of the above considerations, I am of the opinion

1. That the Tax Commission is required to file with the county recorder notice of lien for the 1929 unpaid public utility excise tax as provided in Amended Section 5506 of the General Code.

2. The notice of lien as required by Amended Section 5506 of the General Code should state the amount of the delinquent franchise tax or excise tax together with any penalties which have accrued.

3. The Treasurer of State is required to notify the Tax Commission of any unpaid excise taxes on December 15 of each year or immediately thereafter.

4. A statutory lien has attached for the 1929 delinquent franchise fees and for all the years prior thereto. A similar lien has attached for the delinquent excise taxes for the year 1928 and for all the years prior thereto. It is unnecessary to file notice of lien for franchise fees and excise taxes, the lien for which attached prior to the effective date of the amendment of Section 5506 of the General Code by the 88th General Assembly.