

5089

1. ALL PROPERTY, INCORPORATED PUBLIC UTILITIES — TAX COMMISSIONER, WHEN ASSESSING AT TRUE VALUE IN MONEY HAS A DUTY TO INCLUDE ALL REAL PROPERTY OWNED AND HELD WHETHER OR NOT ANY PORTION USED IN CONNECTION WITH PUBLIC UTILITY BUSINESS — EXCEPTION, RAILROAD, STREET, INTERURBAN AND SUBURBAN RAILROAD COMPANIES — SECTIONS 5423, 5451 G.C.
2. COUNTY AUDITOR — NOT AUTHORIZED BY LAW TO ASSESS REAL ESTATE OF INCORPORATED PUBLIC UTILITY — SECTION 5415 G.C. — CERTAIN UTILITIES EXCEPTED.
3. DUTY, TAX COMMISSIONER WHEN ASSESSING PROPERTY, UNINCORPORATED PUBLIC UTILITY, TO EXCLUDE FROM PROPERTY EVALUATED ALL REAL ESTATE NOT USED, OR HELD AS INCIDENTAL IN OPERATION OF SUCH UTILITY.
4. DUTY, COUNTY AUDITOR, TO ASSESS REAL ESTATE OF UNINCORPORATED PUBLIC UTILITY, NOT USED IN ITS OPERATION, OR HELD AS INCIDENTAL TO SUCH OPERATION — SECTION 5548 G.C.

SYLLABUS:

1. It is the duty of the Tax Commissioner, under authority of Sections 5423 and 5451 of the General Code, when assessing at its true value in money all the property of incorporated public utilities, other than railroad, street, interburan and suburban railroad companies, to include in the property so assessed all the real property owned and held by such corporation, whether or not it or any portion thereof is used in connection with its public utility business.

2. A county auditor is not authorized by law to assess the real estate of an incorporated public utility, as defined in Section 5415 of the General Code, other than a railroad, interurban, suburban or street railroad company, even though such real estate is not used by such public utility in the carrying on of its utility business.

3. It is the duty of the Tax Commissioner, when assessing at its true value in money the property of an unincorporated public utility, under authority of Sections 5423 and 5451 of the General Code, to exclude from the property being evaluated all real estate owned by such public utility which is not used in the operation of such utility or held as incidental to such operation.

4. In each county it is the duty of the county auditor, under authority of Section 5548 of the General Code, to assess the real estate of an unincorporated public utility which is not used by it in the operation of the public utility or held as incidental to such operation.

Columbus, Ohio, May 1, 1942.

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

Dear Sir:

I am in receipt of your request for my opinion, which reads as follows:

"You are respectfully referred to an opinion of your office appearing in Opinions of the Attorney General for 1916, Volume 1, Page 351, in which the then Attorney General in commenting upon the provisions of Section 5428, General Code, as applicable to an incorporated gas company, construed such section as requiring the then Tax Commission to deduct from the total value of property of any public utility of any class as assessed by the Tax Commission, the value of real property owned by any public utility as assessed for taxation by the legal authority of the taxing district or districts in which such real property was located. It would seem to follow under the reasoning of such opinion as applicable to an incorporated gas company, and as appearing on Page 355 that it was the holding of your office that real estate not used in operation of any public utility whether incorporated or not is required under the law to be assessed locally rather than by the then Tax Commission.

In a later opinion of your office appearing in Opinions of the Attorney General for 1933, Volume 1, Page 225, reference was made to the 1916 opinion supra as well as to two opinions rendered in 1917 holding that real estate of a railroad company, street, suburban or interurban company not used in operation is assessed locally rather than by the state. While the Attorney General in the rendition of such 1933 opinion commented upon

these previous rulings to the effect that all real estate of all utilities not used in operation must be locally assessed, he expressly stated in the last paragraph thereof that no question was made as to the correctness of such former opinions and they were accordingly neither affirmed or disaffirmed as this was not necessary in determining the question there under consideration.

We do not find that the position taken in the 1916 opinion *supra* has been either affirmed or overruled by any subsequent opinion of your office or by any decision of any court in Ohio in so far as such opinion held that all real estate of all public utilities whether incorporated or not, not used in operation is required to be assessed by local authorities rather than by the state. We have no question as to the power to assess real estate owned by a railroad company, street, suburban or interurban railroad company not necessary to the daily operation of the road as it appears that such power clearly rests with the local authorities; nor do we have any question as to the assessing authority of real estate used in operation of all utilities. Your opinion is respectfully requested as to what authority shall assess real estate of all unincorporated public utilities not used in operation, and as to what authority shall assess real estate of incorporated public utilities other than railroads, street, suburban and interurban railroads, not used in operation."

You state that you are not inquiring concerning your right to assess real estate of railroad, street, interurban and suburban railroad companies. I, therefore, herein give no consideration to the assessment of such property and to the extent that such corporations are herein mentioned, it is to be assumed that such mention is coincidental.

Section 5423 of the General Code is the section which requires the Tax Commissioner to assess the property of all public utilities, as defined in Section 5415 of the General Code, other than express, telephone and telegraph companies. Such section reads:

"On the second Monday of June of each year, the commission shall ascertain and assess, at its true value in money, all the property in this state of each such public utility, subject to the provisions of this act, other than express, telegraph and telephone companies."

Section 5451 of the General Code makes similar a requirement of the Tax Commissioner with respect to express, telephone and telegraph companies. Such section reads:

"On the first Monday in July of each year, the commission shall ascertain and assess the value of the property of the express, telegraph and telephone companies in this state."

It is to be noted that each of the above sections refer to the assessment by the Tax Commission, which has since been abolished, rather than by the Tax Commissioner; however, from the language of Sections 1464 and 1464-3 of the General Code, it is evident that such duties are to be performed by the Tax Commissioner.

Section 5425 of the General Code, specifies the property which is to be assessed by the Tax Commissioner, which section reads:

“The property of such public utilities to be so assessed by the commission shall be all the property thereof, as defined in section forty-three (G.C. 5419) of this act.”

“Section forty-three of this act” as referred to in such section is Section 5419 of the General Code, which reads:

“The property owned or operated by a public utility, required to make return to the commission of its property to be assessed for taxation by the commission, shall be deemed and held to include such utility’s plant or plants and all real estate necessary to the daily operations of the public utility and all other property, including that mentioned in section 5328-1 of the General Code, owned or operated, or both, by it wholly or in part within this state, used in connection with or as incidental to the operation of the public utility, whether the same be held in common or by the individuals operating such public utility. In the case of incorporated companies, all the real estate and personal property, including that mentioned in section 5328-1 of the General Code, owned and held by such corporation within this state in the exercise of its corporate powers, or as incidental thereto, whether such property or any portion thereof is used in connection with such public utility business or not, shall be conclusively deemed and held to be the property of such public utility.”

You will observe that Section 5419 of the General Code carries a different meaning for the term “all the property of such public utility” with respect to incorporated utilities as distinguished from unincorporated public utilities. That is, if the public utility is incorporated, for purposes of taxation its property to be assessed consists of all the property owned or held by it in the exercise of its corporate powers, or as incidental thereto, whether used in connection with its public utility business or not, while if unincorporated, its property for the purposes of Section 5423 of the General Code, includes only such as is necessary or incidental to the operations of the public utility.

In Section 5428 of the General Code, we find provision made for the deduction of certain items of property of the utility by the Commissioner before making his valuations. This section reads:

“The commission shall deduct from the total value of the property of each of such public utilities in this state, as assessed by it, the value of the real property owned by such public utilities, if any there be, as otherwise assessed for taxation in this state, and shall justly and equitably equalize the relative values thereof. The commission shall also deduct from such total value the value of all motor vehicles listed in the inventory of personal property contained in the statement and the amount of all deposits taxable at the source as provided in chapter four of this title.”

The patent reason for the deduction of “deposits taxable at the source” is reflected in such phrase. The reason for the deduction of motor vehicles is given in Section 6292 of the General Code, which states that the motor vehicle license taxes imposed by Section 6291 of the General Code shall be “in lieu of all taxes on or with respect to the ownership of such motor vehicles.” The question then remains as to the meaning of the phrase “real property owned by such public utilities, if any there be, as otherwise assessed for taxation in this state.”

From the definition of the term “public utility” contained in Section 5415 of the General Code, it is apparent that such term, as used in taxing statutes, includes “each corporation, firm, individual, and association” etc. engaged in any of the businesses defined in Section 5416 of the General Code. Section 5419 of the General Code, as I have above pointed out, prescribes different rules as to the property of public utilities depending upon whether or not they are incorporated. With respect to real property, if unincorporated, the Tax Commissioner is directed to evaluate only so much thereof as is owned or operated in connection with or as incidental to the public utility enterprise. With respect to the real property of such unincorporated public utility not so used or held, Section 5548 of the General Code, is controlling and the county auditor is required to assess such property. Therefore, not only the language of Section 5428 but also of Section 5419 of the General Code prevents the Tax Commissioner from including in his valuation real property of an unincorporated public utility not used in or incidental to its public utility business, even though Section 5422 of the General Code requires such property to be set forth in the return filed by such public utility.

Section 5548 of the General Code, in prescribing the duties of the county auditor with respect to the assessment of real estate, provides in part that:

“Each county is made the unit for assessing real estate for taxation purposes. The county auditor, in addition to his other duties, shall be the assessor for all the real estate in his county for purposes of taxation, provided that nothing herein shall affect the power conferred upon the tax commission of Ohio in the matter of the valuation and assessment of the property of any public utility. * * *”

Section 5579 of the General Code further describes the duties of the county auditor with reference to the assessment of real property and contains the following provisions:

“In addition to all other powers and duties vested in or imposed upon it by law, the tax commission of Ohio shall direct and supervise the assessment for taxation of all real property in the state. County auditors shall, under the direction and supervision of the tax commission of Ohio, be the chief assessing officers of their respective counties, and, shall list and value real property for taxation, within and for their respective counties, except as may be otherwise provided by law. * * *”

It would thus seem that the direct supervision of the assessment of all real estate is in the Department of Taxation; that subject to such supervision and direction the county auditor must assess all real property in his county other than that which the Tax Commissioner is required to assess. As was held in the first paragraph of the syllabus, *Stanton v. Tax Commission*, 28 O.App. 398:

“State tax commission, as distinguished from county auditor of each county, *held* to have authority to assess real estate of telephone company for tax purposes under Section 5548, General Code, requiring county auditor to assess all real estate for taxation subject to powers of tax commission in valuing and assessing property of public utilities, and Sections 5449 to 5452, requiring commission to ascertain and assess value of property of telephone companies and to consider value of their entire property without deductions such as are provided for by Sections 5455 and 5456 relating to apportionment.”

In the earlier opinion of this office reported in Opinions of the Attorney General for 1916, Volume I, page 351, reference to which is made in your letter, certain language is used which, standing alone, would tend to indicate that the Tax Commissioner in making his determination

as to the value of a public utility's property must include only such real property as was necessary for its daily operations. That comment was in no manner connected with the question being considered by him which was in regard to the day as of which the property became liable for taxes. From the opinion as a whole it is apparent that the second sentence of Section 5419 of the General Code was not even considered by such Attorney General.

In an opinion of a later Attorney General, reported in Opinions of the Attorney General for 1933, Volume I, page 225, as well as in others reported in Opinions of the Attorney General for 1917, Volume II, pages 1047 and 1054, the soundness of such obiter dicta of the former Attorney General is questioned but not ruled upon. However, since the last sentence of Section 5419 of the General Code is specific in its provisions that "all the real estate * * * held by such corporation within this state in the exercise of its corporate powers, or as incidental thereto, whether such property, or any portion thereof, is used in connection with such public utility business or not, shall be conclusively deemed and held to be the property of such public utility" and since Section 5425 of the General Code specifically states that the property to be assessed by you is that defined in the language above quoted as property of the incorporated utility company, I am of the opinion that with respect to the property of the incorporated public utility companies mentioned in your inquiry you, as Tax Commissioner, are required to assess for property taxation all the taxable property thereof including real estate, whether used in the public utility business or not.

Specifically answering your inquiry, it is my opinion that:

1. It is the duty of the Tax Commissioner, under authority of Sections 5423 and 5451 of the General Code, when assessing at its true value in money all the property of incorporated public utilities, other than railroad, street, interurban and suburban railroad companies, to include in the property so assessed all the real property owned and held by such corporation, whether or not it or any portion thereof is used in connection with its public utility business.

2. A county auditor is not authorized by law to assess the real estate of an incorporated public utility, as defined in Section 5415 of the General Code, other than a railroad, interurban, suburban or street rail-

road company, even though such real estate is not used by such public utility in the carrying on of its utility business.

3. It is the duty of the Tax Commissioner, when assessing at its true value in money the property of an unincorporated public utility, under authority of Sections 5423 and 5451 of the General Code, to exclude from the property being evaluated all real estate owned by such public utility which is not used in the operation of such utility or held as incidental to such operation.

4. In each county it is the duty of the county auditor, under authority of Section 5548 of the General Code, to assess the real estate of an unincorporated public utility which is not used by it in the operation of the public utility or held as incidental to such operation.

Respectfully,

THOMAS J. HERBERT
Attorney General.