may be joined in a single affidavit in a prosecution instituted in a municipal court where all the defendants participated in the same offense.

Respectfully,
GILBERT BETTMAN,
Attorney General.

536.

STREET RAILROAD COMPANY—OPERATING BUSSES PRIOR TO 1925—LIABLE FOR FREEMAN-COLLISTER TAX—NOT LIABLE FOR EXCISE TAX ON GROSS EARNINGS FROM BUS BUSINESS—SUNDRY CLAIMS BOARD MAY NOT OFFSET CLAIMS.

SYLLABUS:

1. *The Sundry Claims Board has no authority to offset against a present liability for taxes, payments theretofore unnecessarily made.*

2. *Prior to the amendment of Section* 614-84, *of the General Code, in* 1925, *a street railroad company, operating bus lines as supplementary to its street railroad service was liable for the payment of the Freeman-Collister tax, but such company was not required to pay the excise tax imposed by Section* 5484 *of the General Code upon the gross earnings derived from its bus business.*

COLUMBUS, OHIO, June 17, 1929.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—This will acknowledge your recent communication in which you request my opinion concerning certain claims filed with the Sundry Claims Board by the Youngstown Municipal Railway Company and the West End Traction Company. These claims have been referred by the Sundry Claims Board to your Commission, and all of the facts on which the claims are based are set forth in the file which you enclose with your letter.

The claimant, the Youngstown Municipal Railway Company is a public utility which for many years has been operating an electric street railway in the city of Youngstown and in the contiguous city of Campbell. In 1922 it inaugurated a system of motor bus transportation to supplement the service rendered by its street railway. Both of these services have continued until the present time.

The claimant, the West End Traction Company was similarly engaged in the city of Warren and the supplementary bus service by that company commenced in 1924.

During the years 1924 and 1925 each of the claimants paid into the state treasury what is popularly known as the Freeman-Collister tax levied upon motor transportation companies under authority of Section 614-94 of the General Code. In those years the section was so worded as to apply to all motor transportation companies as defined in Section 614-84 of the Code, and that section made no exemption covering a company operating wholly within the territorial limits of a municipal corporation. In 1925, Section 614-84 was amended so as to exclude from the provisions of law covering motor transportation companies any such company which operated wholly within the limits of a municipal corporation or within such limits and the territorial limits of municipal corporations immediately contiguous thereto. At the present time, therefore, the motor bus operation of the claimants is not subject to the tax imposed by Section 614-84 of the General Code, which tax is stated to be levied "for the expense of the administration and enforcement of the provisions of Section 614-84

to 614-102 of the General Code, and for the maintenance and repair of the highways of the State."

From the facts set forth in the claim submitted, the Tax Commission is now asserting the liability of the two claimants to pay the excise tax levied by virtue of Section 5484 of the General Code, upon street railroad companies upon the total gross earnings of the companies on their intrastate business at a rate of one and two-tenths per cent of all gross earnings. As I understand it, the claimants are not denying their present liability for taxes upon the entire gross earnings at the rate prescribed by street railroad companies for the years since 1925, but their contention is that the claim of the State for the excise tax upon the total gross earnings should be offset against the amounts which the companies have already paid under the Freeman-Collister Act. Otherwise, it is contended that there would in effect be double taxation. Neither company has paid any excise tax since the year 1923.

At the outset, I desire to call to your attention the fact that these claims are, in my opinion, not properly presented. The objection I have is to the request that the Sundry Claims Board offset the amount paid under the Freeman-Collister Act against the amount claimed by the State for excise tax. The Sundry Claims Board has no such authority of offset or credit. The Tax Commission has apparently acted on the amount due for the excise tax from this company and these amounts have been properly certified and are now in this office for collection. No authority exists in the Sundry Claims Board to act in reference thereto unless and until the taxes are paid, when the Sundry Claims Board, upon the proper presentation of facts, might conceivably grant a claim for refund payable out of the state treasury of some part of the amount already paid. The Sundry Claims Board might further, in a proper case, grant a refund of the Freeman-Collister tax, if it be shown that that tax was improperly assessed and the board is of the opinion that there exists a moral obligation of repayment.

The claims in this instance are, however, of a different character. They ask a credit for an amount heretofore paid, which, as I have pointed out, is beyond the authority of the Sundry Claims Board. It remains to be seen whether the facts involved in these claims are such as to entitle the claimants to any relief at all.

At the time here under consideration, namely the years 1924 and 1925, Section 5484 of the General Code, provided as follows:

> "In the month of November, the auditor of state shall charge, for collection from each street, suburban and interurban railroad company, a sum in the nature of an excise tax, for the privilege of carrying on its intra-state business, to be computed on the amount so fixed and reported to him by the commission as the gross earnings of such company on its intra-state business for the year covered by its annual report to the commission, as required in this act, by taking one and two-tenths per cent of all gross earnings, which tax shall not be less than ten dollars in any case."

This section must be read in the light of other pertinent sections of the General Code. Section 5470, General Code, provides for the filing of the annual report by all public utilities, including street railroads. With respect to street railroads Section 5473, General Code, provides as follows:

> "In the case of each street, suburban or interurban railroad company, such statements shall also contain the entire gross earnings, including all sums earned or charged, whether actually received or not, for the year ending on the thirtieth day of June next preceding, from whatever source derived, for business done within this state, excluding therefrom all earnings derived

wholly from interstate business or business done for the federal government. Such statement shall also contain the total gross earnings of such company for such period in this state from business done within this state."

Standing alone, this section is a clear warrant for the charging of the excise tax upon all the gross earnings of a street railroad company irrespective of whether they arise from the transportation of passengers by street cars or otherwise. The gross earnings to be reported and on which the tax is paid are all actually earned "from whatever source derived."

Since the year 1925, when Section 614-84, General Code, was amended, as heretofore indicated, there is no question but that a street railroad company which operates bus lines as supplementary to its street railroad service must pay the tax prescribed by Section 5484, supra, upon all of its earnings including those from the operation of such bus line. The contention is made, however, that a payment of the excise tax upon all of the gross earnings including bus operations exempts street railroad companies from the payment of the Freeman-Collister tax and therefore the claimants are entitled to what amounts to virtually a refund of the Freeman-Collister tax paid for the years 1924 and 1925.

Public utilities, for the purposes of taxation, are defined by Sections 5415 and 5416 of the General Code. Motor transportation companies are not therein defined as public utilities, but street railroad companies are. Section 5416, General Code, states that any company, etc.,

"When engaged in the business of operating a street, suburban or interurban railroad company, wholly or partially within this state, whether cars used in such business are propelled by animals, steam, cable, electricity, or other motive power, is a street, suburban or interurban railroad company."

Manifestly both of the claimants are street railroad companies within this definition and hence subject to the excise tax prescribed by Section 5484, supra. It is further significant in the consideration of your question that Section 5417, General Code, states:

"The term 'gross receipts' shall be held to mean and include the entire receipts for business done by any person or persons, firm or firms, co-partnership or voluntary association, joint stock association, company or corporation, wherever organized or incorporated, from the operation of any public utility, or incidental thereto or in connection therewith. The gross receipts for business done by an incorporated company, engaged in the operation of a public utility, shall be held to mean and include the entire receipts for business done by such company under the exercise of its corporate powers, whether from the operation of the public utility itself or from any other business done whatsoever."

The language of this section, together with that of Section 5473, supra, would apparently impel the conclusion that whatever the source of the income of the street railroad company may be the excise tax imposed upon it is measured by the entire gross earnings.

As I have before pointed out, Section 614-84, as originally enacted, and in force during the years 1924 and 1925, included within its definition of motor transportation companies operations such as were conducted by the claimants herein. Thus paragraph (c) of that section read as follows:

"The term 'motor transportation company,' when used in this chapter, means every corporation or person, their lessees, trustees, receivers or trustees appointed by any court whatsoever, owning, controlling, operating or managing any motor propelled vehicle not usually operated on or over rails, used in the business of transportation of persons or property or both, as a common carrier for compensation, over any public highway in this state: provided, however, that the term 'motor transportation company' as used in this chapter shall not include any person or persons, firm or firms, co-partnership or voluntary association, joint stock association, company or corporation, wherever organized or incorporated, insofar as they own, control, operate or manage a motor vehicle or motor vehicles used exclusively for the transportation of property and which are operated exclusively within the limits of a municipal corporation, and municipal corporations contiguous thereto, or insofar as they own, control, operate or manage taxicabs, hotel busses, school busses or sight-seeing busses, or busses owned and used exclusively in the promotion of city and suburban home development, or insofar as they own, control, operate or manage motor propelled vehicles, the major use of which is for the private business of the owners and the use of which for hire is casual or disassociated from such business."

At that time the section only exempted operations of motor vehicles for the transportation of *property,* and it was not until 1925 that the exemption included the transportation of persons.

The claimants in this instance did, in fact, pay the Freeman-Collister tax provided by Section 614-94, which provides a graduated scale of payments per vehicle, according to the capacity thereof.

We are confronted with a situation where one corporation engaged in a dual capacity is apparently subject to two separate and distinct taxes which are in the nature of excise taxes. These taxes are somewhat different in character in that one is levied upon the percentage of the gross earnings, while the other is a fixed amount dependent upon the capacity of the vehicles used, and does not vary with the earnings of the company.

I have great hesitancy in saying that it would be unconstitutional for the Legislature to impose two separate excise taxes upon the same character of business. If, therefore, the legislative intent may be reasonably construed so as not to impose the two taxes on the same business, this question may be avoided.

A somewhat similar, although not entirely analogous question was before my predecessor. In Opinions of the Attorney General for the year 1928, at page 35, is an opinion addressed to your Commission of which the syllabus is as follows:

"A person, firm, association or corporation engaged in the dual business of (1) supplying electricity for light, heat or power purposes, to consumers within this state, and (2) operating a street, suburban or interurban railroad wholly or partially within this state, must file with the Tax Commission reports in both capacities, and should be charged with an excise tax on the receipts from its electric light business at the rate prescribed for electric light companies in Section 5483, General Code, and on the earnings from its street, suburban or interurban business at the rate prescribed for street, suburban or interurban companies in Section 5484, General Code."

In that instance one company was engaged in the operation of both supplying electricity for light, heat and power purposes and operating a street railway. Separate rates of excise taxes were imposed upon the two classes of utilities. It is obvious

that reading the excise tax statutes which I have heretofore cited, together with those dealing with electric light companies, the rather absurd conclusion might be reached that the one company might be compelled to report all of its gross earnings as a street railroad and also all of its gross earnings as an electric light company, thus paying a double excise tax. My predecessor, however, reached what was, in my opinion, the sensible conclusion set forth in the syllabus above quoted. In support of the propriety of segregating the two classes of income he cites in the opinion two cases decided by Common Pleas Courts which reached a like conclusion. The analogy is not perfect, but I feel that the present case should be governed by like reasoning.

While the terms of the excise tax law with relation to the gross earnings of public utilities are broad, I do not feel that it was the legislative intent to require more than the report of all earnings *incidental* to the main purpose of the public utility. Where the incidental or supplemental business has attained such importance as to be the subject of a separate excise tax, as in the case of motor transportation companies, I scarcely feel that the Legislature intended the earnings therefrom to be treated as a part of the earnings of the street railway companies, to which such bus transportation business is auxiliary.

While I cannot of course be governed by considerations of equity in determining the legislative intent, yet I feel that the essential unfairness of the situation is entitled to some weight. If a street railroad company is required to pay an excise tax upon its gross earnings, including its bus earnings, as well as the Freeman-Collister tax, then it is scarcely on an equal basis with a competitive bus line which is only required to pay the Freeman-Collister tax and the ordinary franchise tax of a corporation which, of course, is small compared to the excise tax upon street railroad companies.

What has been said is sufficient to indicate that I am of the opinion that a street railway company operating an auxiliary bus service, should not be required to pay the excise tax assessed against street railway companies upon the gross earnings from the operation of the bus line. In this instance, however, the claimants are apparently claiming the right to the return of the Freeman-Collister tax or the equivalent thereof, a credit for such payment. In my opinion the Freeman- Collister tax was properly assessed and there should be no return thereof. Inasmuch as the excise taxes for the years past have not been paid, but have been certified to this office for collection, it is the duty of these corporations to pay these taxes into the state treasury. When that payment has been made, then there may properly be considered by the Sundry Claims Board claims for the return of the amounts paid by virtue of the bus operations of the claimants. Whether these amounts will be less than, or exceed the amount of the payment made under the Freeman-Collister tax does not appear, and is immaterial. In my opinion, this is the proper and ordinary method whereby these companies may secure relief, if in the discretion of the Sundry Claims Board they are entitled thereto.

The claims and the files relative thereto are accordingly returned to you herewith.

Respectfully,

GILBERT BETTMAN,

Attorney General.