necessary to comply with the order of the state board of health and that said bond issue is not to be submitted to the people.

Respectfully,
JOHN G. PRICE,
Attorney-General.

2378.

TAXES AND TAXATION—WHERE TAXPAYER ERRONEOUSLY VALUES PROPERTY FOR TAXATION IN HIS RETURN—WHEN SUCH ERROR MAY NOT BE CORRECTED UNDER EITHER SECTION 5624-10 G. C. OR 2588-9 G. C.

Where a taxpayer erroneously values property for taxation in the return made by him, because of an honest mistake as to the existence of facts which it was his duty to ascertain in the first instance; and property so listed is entered on the tax list and duplicate by the county auditor at the valuation so made, such over-valuation does not constitute an error which the tax commission of Ohio may correct under section 5624-10 of the General Code.

Such an assessment is not an erroneous one which the county auditor may correct under section 2588-9 of the General Code.

COLUMBUS, OHIO, August 26, 1921.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—The commission encloses in a recent letter copies of letters received by it from the auditor of Stark county and from a firm of attorneys in Dayton, Ohio, and requests the advice of this department as to the power of the county auditor to correct the tax list and duplicate on the basis of facts outlined in these letters respectively, and the power of the commission under section 5624-10 of the General Code to take similar action.

In the one case a corporation making its return for the year 1920 listed certain property at the value at which it had been purchased from a former owner. This value included good will, so that the listed value is considerably in excess of the true value in money of the specific property covered by the return. The corporation's notice was not directed to this until payment of the second half of the taxes was due. In the other case one of two or more testamentary trustees made a tax return in 1920 for the estate, in which he listed certain notes at their face value. His co-trustee has just discovered the facts respecting the value at which these notes were listed and is prepared to show that some of the notes are entirely valueless and others are not worth their face.

The time has gone by when the jurisdiction of the board of revision respecting any complaint that might have been filed on account of these facts under section 5609 G. C. could lawfully have been revoked; hence the questions dealt with in an opinion of the commission of recent date respecting the correction of mistakes of fact by boards of revision and by the tax commission on appeal from the decision of the board of revision do not arise in these cases. This seems to be conceded by both of the commission's correspondents, and it is thought, therefore, that the sections referred to in the commission's letter hereinbefore abstracted are the only ones under which relief, if any, may conceivably be had.

The commission is advised that the county auditor is without authority under section 2589 G. C., or any other section, to take action. The section referred to, together with sections 2588 and 2588-1 (which are in part duplications of each other), reads as follows:

> "Sec. 2588. From time to time the county auditor shall correct all errors which he discovers in the tax list and duplicate, either in the name of the person charged with taxes or assessments, the description of lands or other property or when property exempt from taxation has been charged with tax, or in the amount of such taxes or assessment. If the correction is made after the duplicate is delivered to the treasurer, it shall be made on the margin of such list and duplicate without changing any name, description or figure in the duplicate as delivered, or in the original tax list, which shall always correspond exactly with each other."

> "Sec. 2588-1. The county auditor from time to time shall correct any clerical errors which he discovers in the tax list, in the name of the person charged with taxes, the valuation, description or quantity of any tract, lot or parcel of land or improvements thereon, or minerals or mineral rights therein, or in the valuation of any personal property, or when property exempt from taxation has been listed therein, and enter such corrections upon the tax list and duplicate."

> "Sec. 2589. After having delivered the 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. * * *"

The question as to what constitutes an "erroneous charge * * * in the amount of such taxes" has been frequently considered by the courts of this state. The rule established is that a charge for the amount of taxes can be regarded as erroneous only when it is the result of a clerical error as distinguished from an error of judgment. This is the rule which is applied when the error is concededly an error of the taxing authorities, and in the opinion of this department it has an even stronger application than when the error is that of a taxpayer listing his property for taxation. See State vs. Brewster, 6 Ohio Dec. Rep. 1210; Commissioners vs. Brasher, 6 Ohio Dec. Rep. 1027; Manufacturing Co. vs. Commissioners, 11 Ohio Dec. Rep. 790; State vs. Reine, 47 O. S. 447; State vs. Commissioners, 31 O. S. 271. It seems to be held in Insurance Co. vs. Cappellar, 38 O. S. 560, that the auditor has authority to make a correction of this character where the error originated in the return made by the taxpayer if the error is disclosed by the face of the return itself. This is so because where the taxpayer makes an error in listing his property for taxation which is apparent on the face of the return, it is the duty of the county auditor to list the property for taxation, not in accordance with the face of the return, but in accordance with the law as applied to the facts as apparent on the face of the return. Therefore, under such conditions the mistake which was originally the taxpayer's becomes ultimately the mistake of the taxing officials.

But it is not so here. There is nothing on the face of either of these returns which would advise the county auditor that an error had been made.

The distinction between clerical and fundamental errors applies, and the auditor is without authority to act in the premises.

Section 5624-10 is also referred to. It provides that the tax commission of Ohio "may correct an error in an assessment of property for taxation or in the tax list or duplicate of taxes in a county." An earlier part of the same section authorizes the commission to remit taxes "found by it to have been illegally assessed, and such penalties as have accrued or may accrue, in consequence of the negligence or error of an officer required to perform a duty relating to the assessment of property for taxation * * *." If this part of the section controls the interpretation of the whole section, it is clear that no action of the commission is possible in these cases; for no officer required to perform any duty relating to the assessment of property for taxation has been guilty of any error in either of the cases. It is suggested, however, that the latter part of the section is to be construed independently of the first sentence therein, and that the commission has authority to correct any error in an assessment of property for taxation, regardless of whether or not the error was that of an officer and regardless of the nature of the error.

Without attempting a complete analysis of the provision of section 5624-10 now under consideration, it may be given as the opinion of this department that the commission is without authority under that provision to act in the cases described in the communications referred to. In the first place, it may be doubted whether the commission has authority to correct a taxpayer's error which in nowise can be imputed to any taxing officer as his error. In other words, it is believed that the view that the first part of section 5624-10 indicates the sense in which the word "error" is used in the second sentence thereof can be supported by very strong argument.

In the second place, regardless of the identity of the person who made the error to which section 5624-10 refers, there is some warrant for believing that the section was intended to apply as sections 2588 and 2589 have been construed to apply, namely, to errors of a clerical nature, or at least to errors other than those affecting values. The tax laws provide such elaborate and detailed provisions for the correction of improper valuations that it seems hardly likely that the general assembly intended to afford an additional remedy for such a situation by enacting section 5624-10 G. C.

But quite apart from these considerations, the commission's alleged jurisdiction should not be exercised in the cases described because of the manifest negligence of the complaining parties. In the one case it is stated that the corporation paid no attention whatsoever to the matter of its personal taxes, never even calling for the treasurer's bill which was mailed to the company for the purpose of collecting taxes during the July collection. The company is therefore not only chargeable with gross negligence in making this return in the manner in which it did, but also with great delay and inattention in respect of any effort to rectify the alleged mistake.

In the other case the one or more joint trustees of an estate have permitted a co-trustee to make a tax return without consulting them, and have apparently allowed themselves to remain in ignorance of the true condition of the estate. There is no claim that the trustee who made the return was guilty of fraud or that the true facts were not within his reach. The law requires the property of persons for whom property is held in trust to be listed for taxation by the trustee. The trustee is liable for the taxes personally as an incident of his legal ownership of the trust property. In the eye of the law relating to taxation the property is his, and if the trustee's conduct is such as that he would not be in position to secure relief if the

property were his own, the beneficiaries of the trust are equally concluded so far as the estate is concerned, and the question as to whether the loss that ensues because of the negligent act of the trustee is to fall upon the estate or be borne by the trustee personally is one which arises between the trustee and the beneficiaries of the trust.

It is the advice of this department, then, that an incorrect valuation of taxable property made by a taxpayer in his return, through the taxpayer's neglect or inattention, or in a mistaken reliance upon facts which at the time were available to him, cannot, when made the basis of an assessment on the tax list of any county, constitute the predicate of an "error" within the meaning of section 5624-10 of the General Code, whether that section be construed as limited to the errors of officers required to perform a duty relating to the assessment of property or not, and whether it be construed as limited to clerical errors or not. In short, in order to hold that the commission can act under section 5624 in cases of this sort, considered in their most favorable aspect, it would be necessary to hold that the commission's power under that section is as broad as the power which a board of revision has to act upon complaint, and which the commission itself has on appeal from the decision of the board of revision. This is not believed to be the law.

Respectfully,
JOHN G. PRICE,
Attorney-General.

2379.

DISAPPROVAL, BONDS OF WAYNE COUNTY, OHIO, IN AMOUNT OF $17,834.11.

COLUMBUS, OHIO, August 26, 1921.

Department of Industrial Relations, Industrial Commission of Ohio, Columbus, Ohio.

Re: Bonds of Wayne county in the amount of $17,834.11 for the improvement of a road in Green township.

GENTLEMEN:—I have examined the transcript of proceedings of the county commissioners and other officers relative to the above bond issue and decline to approve the validity of said bonds for the following reasons:

(1) The transcript discloses that the resolution of the trustees of Green township agreeing to pay thirty-three and one-third per cent of the cost and expense of said improvement was adopted December 29, 1919. The amendment of section 6929 G. C., which increased the rate of interest which county commisioners may pay upon bonds issued for such road improvements from 5 per cent to 6 per cent, did not go into effect until February 17, 1920. The supreme court of Ohio has held that county commissioners are without authority to issue bonds bearing interest in excess of 5 per cent to pay the cost and expense of road improvements proceedings for which were commenced prior to the going into effect of the amended law referred to. Therefore the resolution of the township trustees agreeing to pay 33 1-3 per cent of the cost of said improvement should be re-enacted.

(2) The transcript fails to show that the county commissioners have determined the kind and extent of the improvement under section 6911 G. C. Such determination is necessary.