The first issue of bonds were issued in five hundred dollar denominations with their dates of payment ranging over a period of twelve years, and in as much as the resources of this particular division are very limited the board is anxious to have the additional three thousand dollars also issued in denominations of five hundred dollars ($500.00) each, and the date of the payment thereof deferred until the bonds now outstanding are paid, thus making the first of the new series of bonds payable in twelve years, and one bond payable each year thereafter until the remainder is fully paid, which will extend the entire bond payment over a period of eighteen years. I have been requested by the board to submit the proposition to your office for an opinion as to whether or not payment of additional bonds can be deferred as above stated."

Your letter fails to state whether the bonds under consideration are to be issued under authority of section 7625 G. C. or of 7630-1 G. C. In either event, however, the provisions of sections 7626, 7627 and 7628 are either directly or by reference made applicable.

Section 7627 G. C. provides in part as follows:

"Such bonds shall bear a rate of interest not to exceed six per cent per annum payable semi-annually, be made payable within at least forty years from the date thereof. * * *"

The only limitation placed by law upon the date of payment of such bonds is that they be made payable within at least forty years from their date.

In answer to your question, I am of the opinion that the date of payment of the several bonds comprising the second issue of $3,000 00, referred to in your letter, may be deferred until after the maturity of all of the bonds of the outstanding issue of $6,000.00 or to a later date if deemed desirable, providing that all of the bonds of said issue be made to fall due within forty years from their date of issuance.

Respectfully,
JOHN G. PRICE,
Attorney-General.

1353.

TAXES AND TAXATION—CERTAIN ITEMS COMPRISING THE GROSS EARNINGS OF THE ERIE RAILROAD COMPANY FOR THE YEARS 1911-1915 INCLUSIVE DISCUSSED.

1. *Where iron ore is purchased by Ohio manufacturers from Michigan and Minnesota producers on annual contracts calling for deliveries in equal monthly installments, and in order to effectuate such deliveries sufficient ore is brought down during the season of open navigation on the Great Lakes to lower lake ports, thus producing an accumulation at the close of navigation, the transportation of such ore constitutes interstate commerce until the contract is fully discharged by delivery at the manufactory in Ohio, and the mere fact that the surplus ore is stored at docks or at nearby points in the custody of the railroad company does not amount to a sufficient interruption of the interstate transit to make charges incident to such storage nor freight charges from the point of storage to the manufactory intrastate commerce; nor is the conclusion altered by the mere fact that new bills of lading are issued for the railroad transportation, nor by the fact that the ultimate consignee exercises control over the shipment of the ore from the place of storage*

to the manufactory, so long as such control is exercised substantially so as to carry out the contract in due course. But if such control on the part of the consignee is so exercised as to serve some special purpose or provide for some abnormal circumstance, and as a result thereof the ore is detained for an unusual length of time at the place of storage, the interstate commerce is interrupted and such transportation of the ore becomes intrastate in character.

2. *Under the decision in Ohio Traction Co. vs. State, 92 O. S. 529, interest on deposits of revenues collected by local agents of a railroad company probably does not constitute "earnings from business done" within the meaning of the excise tax law.*

3. *The same decision would seem to indicate that rentals of real estate not used in operation do not constitute "gross earnings," if the railroad company retains no control over such real estate.*

4. *Receipts from advertising privileges constitute "gross earnings" of a railroad company.*

5. *Receipts derived from the rental of joint facilities constitute "gross earnings," though the basis of the charge is not the actual rental value of the use granted.*

6. *The service of meals on dining cars is incidental to commerce, and where the primary transportation is interstate the service itself is interstate. There being no practicable way of separating the figures so as to show receipts from meals served in Ohio to intrastate passengers with exactness, a fair approximation should be arrived at. In arriving at gross earnings in the conduct of such business the cost of food stuffs and supplies may be deducted.*

7. *The exact legal status as "gross earnings from business done within the state" of amounts due railroad companies for hire of equipment, under reciprocal arrangements whereby other companies are charged a uniform rate for the time equipment belonging to the company is on the lines of such other companies, being doubtful, the settled administrative practice of regarding the credit balances due the company only as earnings should be adhered to.*

COLUMBUS, OHIO, June 22, 1920.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—Careful consideration has been given to the letter of the commission of recent date submitting the findings of a special examiner in the matter of alleged omitted gross earnings of the Erie Railroad Company for the years 1911-1915 inclusive, together with a copy of the proceedings had and testimony taken before the tax commission and a copy of the brief filed by the attorneys on behalf of the railroad company.

The commission requests the advice of this department as to whether the Erie railroad company is liable under the law for excise tax upon gross earnings itemized as follows:

"Dining and buffet cars	$55,103
Joint facilities rents	63,452
Miscellaneous rent income	131,326
Interest on deposits	16,609
Shipments of ore from dock storage	527,007
Dock storage charges	25,724
Hire of equipment	5,604,755
Other passenger train income	500"

These items will be taken up in the following order:

Shipments of Ore from dock Storage and Dock Storage Charges

Though it may be a departure from the usual method of presentation, it is believed that in view of the background out of which this question arises a statement of law can most conveniently be made first, to be followed by a discussion of the facts.

On November 30, 1915, the commission submitted to this office four hypothetical questions respecting the method of handling iron ore consumed by iron and steel mills in this state. Careful consideration was given by the then Attorney-General to the questions thus submitted, and in an opinion under date of January 8, 1916, he arrived at conclusions which are expressed as follows in the head-note of the opinion, appearing in Volume III, Opinions for the year 1915, p. 2510:

> "The rail transportation of iron ore from lake ports in the state of Ohio to other points in the state of Ohio constitutes interstate business, and the earnings therefrom are not to be computed in ascertaining the basis of the railroad excise tax, if such transportation is a part of a continuous transit begun outside of the state, as by water transportation on the Great Lakes. The continuity of such transit is not affected by the time at which the title to the ore as between the consignor and the consignee passes by the fact that the ore may have been brought down to the ports and delivered to the railroad by its owner in vessels belonging to such owner or chartered by him or it or by the fact that the railroad transportation may be for any other reason upon new and separate bills of lading, but if the ore when landed at the ports is undisposed of, so that it is there held for sale by its owner, and the subsequent Ohio transportation is in pursuance of such sale, it is intrastate in character, and even though ore be contracted for by ultimate consignees, by specification of quality and quantity or otherwise, and quantities of ore are brought down to Ohio lake ports with a general view to discharging such contracts, yet if the ore which is sold lands in Ohio and is there held or detained beyond the strict necessities of transshipment for the convenience of the owner, as distinguished from or in addition to purposes which serve the convenience of transportation, the journey or transit of the commodity must be regarded as having been interrupted at the port, although the detention is in the custody of the railroad company, and in such event the subsequent rail transportation of the ore in Ohio is purely intrastate. Whenever the rail transportation in Ohio is intrastate in character the earnings therefrom must enter into the computation of the basis of the excise tax."

The correctness of the conclusions thus reached does not seem to be questioned. It would appear that both the commission's examiner in his findings and counsel for the railroad company in their presentation of the case to the commission have assumed the correctness of these conclusions of law, and differ only in their interpretation of the facts which will be presently stated. Indeed, decisions of the supreme court of the United States more or less in point, and not noticed by the Attorney-General who rendered the opinion referred to or decided since that opinion was given to the commission, entirely substantiate the view then taken.

Thus, in *Susquehanna Coal Co.* vs. *South Amboy*, 228 U. S., 665, (1913), the cases relied upon by the Attorney-General in the opinion referred to were applied to the following set of facts, as stated by Mr. Justice McKenna in the opinion of the court:

> "Appellant is a Pennsylvania corporation and a dealer in coal * * *. Appellant shipped its coal from its mines in Pennsylvania to New York and the states east thereof by the Pennsylvania Railroad, across New Jersey, to leave the latter state at Harsimus Cove, Greenville, or South Amboy piers, the termini of the road on New York harbor. * * * the coal which

arrived at South Amboy was consigned to appellant at such place, and was intended to be transferred to bottoms at tidewater, and shipped to states east of New Jersey, 'This coal,' we quote from the opinion of the district court, 'was forwarded from the mines on orders from the complainant's Philadelphia agents, who issued such orders upon requisitions made upon them from complainant's New York agents. Neither the agents at the mines nor at Philadelphia knew for which particular customers the coal thus forwarded to South Amboy was intended. Complainant had a number of regular customers east of New Jersey, to whom it promised to make deliveries on monthly contracts, the exact requirements of such customers, in tonnage and kind of coal, were known only to the New York agents. These agents from time to time totaled such requirements, plus other orders for coal, and issued their requisition based upon such totals, to the Philadelphia agents. * * * At South Amboy complainant had an agent who, upon the orders of the New York agents, superintended the loading upon such bottoms of the kind and amount of coal required for designated customers. When so loaded, the master of the bottoms issued bills of lading in the name of the complainant as shipper and particular persons as consignees. * * * Up to the time of loading the bottoms, the title of the coal was in complainant.

'If, upon arrival of the coal at South Amboy, bottoms were on hand to take the kind of coal arriving, such coal was transferred from the cars to the bottoms. If not, such coal was dumped into a coal depot or storage yard of the railroad company, located about 2,000 feet from the piers, equipped with derricks for the loading and unloading of coal, and where the different kinds of coal of the complainant were put into piles, which would be subsequently transferred into bottoms, not necessarily the first bottoms arriving, as the preference was given to coal subsequently arriving and still in cars. * * *'

The conclusion of the district court was that, by the storage of coal, appellant 'obtained two beneficial results: First, cars arriving when no bottoms were on hand could be released and demurrage charges saved, second, when bottoms arrived and no cars were on hand containing the kinds of coal desired, such vessels could be loaded from the piles, resulting in a saving of time in the departure of such bottoms. In other words, there was *something more than the submission to delay in transportation and the acceptance of its consequences. The situation was made a facility of business,—a business conducted through agents and employes. * * * There was something more, therefore, than an incidental interruption of the continuity of its journey through the state.*"

The court held that the coal was taxable as property in South Amboy.

Again, in *Chicago, Milwaukee & St. Paul Railway Co.* vs. *Iowa*, 233 U. S. 334, the supreme court of the United States refused, for lack of evidence, to disturb a finding of fact of the railroad commission of Iowa to the effect that where coal was received in carload lots in the state of Iowa by the person to whom it was consigned and who paid the freight, and placed by the initial carrier at the order of the consignee upon an interchange track and there held until sales were made, when they were put onto another railroad for further transportation to the ultimate vendees in Iowa, the secondary transportation in Iowa was wholly intrastate and subject to regulation by the Iowa railroad commission. This conclusion was reached notwithstanding the principal commented upon in the opinion of the attorney-general which has been cited that

"the question whether commerce is interstate or intrastate must be determined

> by the essential character of the commerce, and not by mere billing or forms of contract",

and in spite also of the fact that there was no unloading of the coal, which remained in the vehicle of interstate commerce after its receipt by the first consignee. While the opinion of Mr. Justice Hughes does not bring out the salient point upon which the case evidently turns, it is believed that the principle upon which the railroad commission acted, and the application of which to the facts of the case was held by the supreme court to be beyond review because of lack of evidence, was that the interruption of the course of transportation was not a matter which was due to the necessities of transportation itself, but was effected to serve the convenience of the shipper.

It thus appears that the two propositions laid down by the attorney-general may be confidently asserted to be the law. These propositions may be separated out from the remainder of the lengthy head-note which has been quoted and repeated here for convenience, as follows!

> "1. It the ore when landed at the ports is undisposed of, so that it is there held for sale by its owner, and the subsequent Ohio transportation is in pursuance of such sale, it is intrastate in character.
>
> 2. If the ore which is (previously) sold lands in Ohio and is there held or detained beyond the strict necessities of transshipment for the convenience of the owner, as distinguished from or in addition to purposes which serve the convenience of tansportation, the journey or transit of the commodity must be regarded as having been interrupted at the port, although the detention is in the custody of the railroad company, and in such event the subsequent rail transportation of the ore in Ohio is purely intrastate."

The examiner seems to have based his finding upon an application of these principles to the following admitted facts:

The Erie Railroad Company did not in the years in controversy have storage facilities at the water's edge in Cleveland, its lowe. lake port. Such storage facilities, however, existed at Randall, Ohio, which is located in Cuyahoga county on the line of the Erie Railroad some miles inland. About twenty-five per cent. of the annual deliveries of ore at the docks of the Erie Railroad Company were unloaded from the boats and taken to Randall and there dumped in piles, corresponding to the respective qualities of ore: the ore thus stored at Randall is, for the most part at least, subsequently moved away, and a considerable portion of it was during the years in controversy transported to Ohio destinations.

The examiner's finding seems to cover the freight charges on the entire amount of ore transported in cars of the railroad company from Randall to points in Ohio. Such a finding could, of course, be based upon either of the two grounds suggested by the attorney-general, and it may be pointed out here that the mere fact that some ore was taken from the ordinary channels of transportation and placed in storage for a considerable length of time would seem fairly to afford prima facie evidence that the interstate progress of the shipment, which began in northern Michigan or in Minnesota, had been brought to an end. In other words, without further information, the inference would be perfectly justifiable that the ore stored at Randall was there held by the owner for sale or other disposition, or, if title to it or any part of it had passed prior to this storage, that it was being held there by the ultimate consignee for purposes suitable to his own convenience rather than purposes having to do with the necessities of transportation as such. However, in the hearing before the commission evidence had been introduced tending to overthrow such a prima facie case in favor of the railroad company, and it was the contention of counsel for the company that none of the ore stored at Randall during the years in question was there held for any purpose other than such purposes as arose out of the necessities of transportation itself.

The basic facts brought out by this testimony are in no material respect different from those briefly referred to in the former opinion which has been mentioned. However, it will be most fair to abstract the testimony of the witness, Mr. Pickands, who dealt with this question. He made the following statements, among others:

> "The iron ore is sold prior to the commencement of a given season, on annual contracts. The ore shipped on the lakes is of a good many different grades * * *· it comes from * * * different ports· from several * * * different mines, delivered at lower lake ports, at perhaps a dozen different ports, and shipped to a great many different consignees. When a cargo of a given grade of ore is ready * * * for shipment from the upper lake ports it is reported to the sales agent of the mining company at Cleveland, and he immediately gets in touch with the purchaser or various purchasers of that grade of ore, and ascertains from them which of one or more of them will receive part or all of that grade. * * * The contracts are generally written to deliver in equal monthly quantities throughout the period of the contract, but they are carried out rather literally. * * *
>
> On the arrival of a vessel at Cleveland or prior to her arrival the agent for the mining company that produced the ore notifies the dock company (a subsidiary of the railroad company), of the probable arrival of a ship * * * and * * * instructs them of the disposition of the cargo."

The following question was then asked the witness by the chairman of the commission.

> "We understand there are three * * * different kinds of shipments of ore: One is that that comes from the mines right through to a point in Ohio, of which there is no question that is interstate and not taxable Another one is where the ore is placed upon the dock and allowed to stay there for reasons in the control of the railroad company, for the convenience of the railroad company· for instance they want to keep moving this ore all winter and spring. * * * The other is the same thing applying to the shipper, whether the traffic is interrupted for the convenience of the shipper. * * * What we would like to know is if you can separate them (the latter two classes of shipments), in your accounts."

To this question the witness answered:

> "As to the motive which causes it to suspend continuous motion at the dock is something that I cannot answer."

One of counsel for the railroad company here interjected the following remark:

> "Some is kept there (i. e., at the storage place) for the convenience of the consignee."

Going on in his statement the witness said:

> "The principal cause that determines the necessity of storing ore on the dock is the fact that lake navigation discontinues in December and is not resumed until the following May. If it were possible to operate the boats throughout the year there would be no storage provided at those lake ports. That is the principal cause. There are other minor causes due to the impossibility of regulating the total movement of forty or fifty or

sixty million tons of ore in eight months to meet the conditions of all the various transporting agencies and consumers.

* * * Practically and generally it is all supposed to be sold (when it is stored on dock) * * *.

There are amounts of unsold ore get on the docks by accident and incident, it is not a considerable portion of the total, if any even, and usually hard to determine * * *.

* * * the total balance on the dock on the average over a period of years is in the neighborhood of four hundred to four hundred and fifty thousand tons.

* * * * * * * * * * * * *

The maximum tonnage on dock would ordinarily be on the close of navigation, about December first.

* * * * * * * * * * * * *.

That would be in the neighborhood of seven hundred and fifty thousand to eight hundred thousand.

* * * * * * * * * * * * *

During my early experience, twenty years or nearly that ago, there was a considerable amount of ore on Lake Erie docks that was brought down there unsold and stored there for sale.

* * * * * * * * * * * * *

That custom * * * was virtually abandoned in 1900 when practically all of the unsold ore on the dock as far as I know was sold and delivered, and since that time that practice has not prevailed."

Asked the following question:

"You say that where it now happens it is the result of accident or incident, can you illustrate by a concrete case how it may arise?"

the witness answered:

"that might arise in a good many different ways, a case where a furnace has ordered or bought and had put on the dock more than it expected to use and by reason of its quality being otherwise than anticipated they find they are unable to use it."

Asked to explain the method of shipment with respect to the character of bill of lading, etc., the witness made the following statement:

"The ore is shipped from the mine to the upper lake docks consigned to the agent at the upper lake dock for the account of the shipper and is loaded on instructions of the shipper into vessels, and the railroad agent at the upper lake docks acting as several agent for the shippers, issue a bill of lading to the agent of the shipper at Cleveland, the agent of the shipper notifies the agent of the vessel before docking at Cleveland, and asks the cargo delivered. * * * When the boat arrives at Cleveland and is unloaded in accordance with the orders of the shipper, the railroad at Cleveland issues a new bill of lading for the ore to its destination.

* * * * * * * * * * * * *

When the consignee tells the dock he is ready for it the shipper issues the order in accordance with the consignee's wishes.".

The chairman of the commission then asked the following leading question:

"It is held on the dock then waiting the order of the consignees, through the shipper, is that it?"

to which the witness answered:

"Yes, in a general way."

A fair summary of the witness' testimony is embodied in the following question and answer:

"Q. Now, as I understand you, Mr. Pickands, this storage of twenty-five per cent. of the shipments is the outgrowth of the exigency of the limited time in which the ore must be shipped from the mine, and not for the convenience either of the consignees, or the railroad company?

A. Primarily it is due to the necessity for transporting twelve months' supply of ore in seven months of navigation. I have no doubt that it incidentally does at times prove of convenience—it provides an elasticity of operation which must be of convenience to all concerned."

The witness also stated that payments by consignees are "made originally in twelve equal monthly payments on the twenty-fifth of each month, * * * regardless of the quantity delivered."

The difficulty in applying this evidence to the principles of law, which have been stated first for convenience, lies in the fact that it is open with respect to one of the principles laid down by the former Attorney-General to two opposing interpretations, depending on the point of view and the placing of emphasis. It is quite clear that the testimony of the witness, if believed by the commission disposes of any possible claim or presumption that the ore at Randall is there held awaiting sale by the consignor. In other words, the witness very positively states that since 1900 no ore is brought down from upper lake ports which has not been contracted for and in that sense sold to the consignee. The first of the two legal possibilities on which the conclusion that the subsequent transportation of the ore might be characterized as intrastate was based therefore disappears.

It is with respect to the second legal principle that the doubt is engendered. Is the storage at Randall of ore, all of which has been sold (if the witness is to be believed), due to the necessities of transportation or to the convenience of the consignee? Reflection seems to establish the conclusion that the true facts are about as follows:

The mills—the consignees—desire a supply that will enable them to operate twelve months in the year if they so desire, the railroads desire a movement of traffic that will be comparatively uniform, so that it can be effected by the use of the minimum of equipment operating at the highest possible degree of efficiency, the shippers, however, are unable to furnish to the railroads the aggregate amount of ore required by the contracts with the consignees in a steady stream, but because of the physical conditions of water transportation must bring down to lower lake ports during part of the year what must move on and be consumed during the whole year.

If one emphasizes the weight of the physical limitations of lake transportation and the convenience of the railroad, it is easy to say that the detention of the ore in storage at lower lake ports is merely dictated by the necessities of transportation. On the other hand, it is perfectly obvious that the necessities of manufacturing, and hence the convenience of the consignees, has a great deal to do with the result that actually happens. In other words, as Mr. Pickands well puts it, the storage at the docks is really for the convenience of all concerned. There would be no storage at

docks if navigation were uninterrupted by the winter season, but it is equally true that there would be no storage if the mills ran only during the period of navigation.

On the whole, however, it is the opinion of this department that under normal circumstances and in the normal case the storage of ore is to be referred to the necessities of transportation rather than to the convenience of the consignee. For though the ore is shipped from Randall to points in Ohio on what amounts to the order of the consignee, yet, unless in a given case the uniformity of the flow of ore to the consignee is considerably interrupted, the detention of a portion of the ore actually brought down to the port must be regarded as serving the purposes of transportation. That is to say, the normal thing is for the ore to flow out from the port to the furnace in a substantially uniform stream, and where this is the case any procedure which is necessary to bring about that result is to be regarded as a process of transportation, though directed in a sense by the consignee. Mr. Pickands' testimony, however, discloses the possibility of variation from the normal, which he says is due to "accident and incident." Some of the kinds of accidents and incidents which might happen are referred to by him. There may conceivably be others. Thus, through the occurrence of a strike in the mill, or any other condition that would interrupt the process of manufacture, the consignee might himself interrupt the continuity of the stream of transportation to him and by failing to order sufficient ore from Randall cause a storage to take place at that point referable solely to his convenience, and in nowise dependent upon the problems and requirements of transportation. In such event, when transportation is ultimately ordered it would be clearly intrastate, at least until the time when the normal state of affairs should be again restored.

This would seem to be the strictly legal view to take of the situation. Unfortunately, however, no figures have been compiled to show what proportion of the shipment from Randall to points in Ohio might be characterized as interstate within the principles thus laid down, and how much is to be regarded as intrastate. The books of the railroad company may not show this, although it would not seem difficult to keep the accounts in such wise that an inspection of them might afford at least a fair basis of settlement.

The Commission must find the facts. This department must content itself with declaring its opinion of legal principles. The conclusion on this question is that the commission, by amicable adjustment or otherwise, should arrive at a figure which fairly represents such part of the freight earnings reported by the examiner as may be referable to transportation following the detention of ore at Randall beyond the time when, in the normal course of transportation in discharge of the contract for the purchase of ore, it should have gone forward. This suggestion is made because it is believed that although the examiner's figures include some—perhaps a predominant amount of—interstate earnings, yet there is also some intrastate business which is covered by such figures. In so far as the earnings do represent intrastate business they should be included in the basis of computing the excise tax. The burden should be placed upon the company to make the separation. An opportunity to make the division suggested was offered to the company. So far the company has neglected to avail itself of that opportunity. Until it does so the burden should rest upon it. As a mere matter of administration, therefore, the commission should include at least a fair proportion of the entire sum reported by the examiner in the omitted intrastate earnings of the railroad, unless a showing as to the exact amount which in accordance with the principles of this opinion is intrastate shall be forthcoming from the company.

Dock Storage Charges:

In his report the examiner does not comment upon this finding. The charge represents the service rendered by the railroad company through its subsidiary, the Erie Dock Company, in handling the ore from the vessel into its cars and unloading "the

cars at Randall into the storage pile and afterwards reloading the ore into the cars for final destination." (Testimony of witness, C. E. Hildum). The witness very positively states that this is not really a storage charge at all, as no time factor enters into it. It is merely a charge for a service incidental to transportation. It is also claimed that the charge represents, in part at least, services rendered prior to the time when the ore has come to a position of rest in the storage piles at Randall. This last statement is certainly incontrovertible.

Nevertheless, the charge is exclusively for a service incidental to rail transportation, and it is believed that, ignoring certain technical aspects of the question, the fair result is to regard it as an incident to the subsequent transportation rather than as an incident to that part of the transportation which is clearly interstate. That being the case, this item should be treated in the same way in which the items for freight charges on ore carried from storage is treated.

Interest on Deposits:

It appears from the report and proceedings that this item represents the interest on deposits made by local freight and passenger agents of collections of revenue made by them. The question is as to whether this item represents earnings "for business done" within the meaning of section 5418 of the General Code.

As this section will require interpretation in more than one respect in the course of this opinion it may be quoted here in full.

> "Sec. 5418. The term 'gross earnings' shall be held to mean and include the entire earnings 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 earnings for business done by an incorporated company, engaged in the operation of a public utility, shall be held to mean and include the entire earnings 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 section is to be read in connection with section 5472, which provides as follows:

> "Sec. 5472 In the case of each railroad company, such statement 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."

and in connection with section 5477 and succeeding sections which need not be quoted but which provided for the assessment of a tax on the basis of the reported earnings.

Looking at all these sections it is clear that the following are requisites of the sums that may enter into the assessment of the tax:

(1) They must be "earnings," as distinguished from "receipts," which is a term used in other sections, such as section 5417. The general assembly will not be presumed to have used these terms in the same sense.

(2) They must be earnings "for business done." Though the business done need not be the operation of the utility, yet it must be business as distinguished from mere investment: the tax is a business tax and not an income tax.

(3) The business which gives rise to the earnings must be done "within this state." Of course, there is also the limitation previously dealt with in this opinion that the business giving rise to the earnings must not be interstate or foreign commerce or business done for the federal government.

Gross income excluded by any of these requirements can not lawfully be made to enter into the basis of the tax.

The present question requires us to deal with the second limitation. Is interest on the deposit of moneys derived from the sale of tickets or the collection otherwise of transportation charges a *business* earning? Of course, it is "good business" to utilize the collections of the company by placing them on deposit under an arrangement whereby interest is secured. However, in Ohio Traction Co. v. State, 92 O. S., 529, (which case is not fully reported), the Supreme Court, by a vote of four to three, held that dividends on securities owned by a traction company and income derived from subsidiary companies did not constitute earnings from business done (see journal entry p. 530). While the reasoning of the court is not apparent from the journal entry, it is supposed that the distinction was made between the conduct of active business and a mere investment whereby income was derived through interest, dividends, rentals and the like. The term "business" does indeed import some degree of activity and management. The question can not be said to be fully settled by the case, especially in view of the failure of the supreme Court to report it; yet it is believed that to the extent that that case affords a precedent it must be regarded as having proceeded upon a principle which would exclude from the category of "earnings for business done" mere interest received on deposits, even though the arrangement whereby such deposits are made and such interest secured might be regarded as an advantageous business transaction. The question is not free from doubt, and if its importance warrants, might with profit be made the subject of litigation in order to secure an authoritative determination of the question. I feel obliged, however, to give the commission my impression as to the state of the law, which is unfavorable to the finding of the examiner on this point.

Miscellaneous Rent Income:

It appears that this item is separable into two accounts—one for advertising privileges and the other for the rent of real estate not used in operation. It is believed that the principles involved in the case last cited dispose of the rental of real estate not used in operation, at least where the railroad company is not actively engaged in the business of managing such properties but is merely exercising with respect thereto the function of an owner. In the case cited the court by affirming in part the judgment of the court of appeals held that income derived from the ownership and management of an office building in which the company had its business offices constituted business earnings. It is believed, however, that the ownership of other lands and the receipt of the rents and profits thereof falls on the other side of the line. It is therefore concluded as to this part of the item entitled "Miscellaneous Rent Income" that the examiner's findings can not be sustained.

The nature of the receipts from advertising is not disclosed. These receipts are small in amount and the question may not be of great importance. It would seem that if the advertising revenue is derived from permission to use the cars or stations and other property used in operation it should be classed as "business earnings." To this extent, in the absence of an explanation throwing further light upon the facts, the findings of the examiner should be sustained.

Joint Facilities Rents.

It appears that this income is derived by the company from other railroad com-

panies having occasion to use jointly with it some of the operating facilities provided by the company primarily for its own use, such as tracks, stations, and water facilities. It is alleged (and the figures seem to bear out the allegation) that the charges made are wholly nominal and are arrived at upon a reciprocal basis, no attempt being made to measure what might be called the actual rental value of the use granted to the other company. In no case is the facility leased or rented in any exclusive sense to the other utility, but is used by the Erie Company and others jointly or in common. Because of the peculiarity of the arrangement it is submitted by counsel that this income does not constitute business earnings. The case of State vs. St. P. M. & M. R. R. Co., 15 N. W. (Minn.) 307, is cited in support of this contention. This case is not in point. The statute therein involved defined the earnings to be taxed as follows:

> "On account of the operation of said railroad."

The court well said:

> "Rent or compensation paid to the company for the right to operate the railroad can not be called receipts on account of the application (operation) of it."

The Ohio statute which has been quoted, however, makes it clear that the basis of computation of the tax is to include not only earnings from operation but also any other business earnings. For this reason the finding of the examiner with respect to joint Facilities Rents must be sustained.

Dining and Buffet Cars.

The earnings arising from the rendition of dining and buffet car service were assumed by the examiner to be taxable and, no report whatsoever of such earnings having been made by the company, the examiner sought to ascertain what those earnings were. He faced a task of considerable difficulty arising from the fact that no division or segregation of earnings was made on the books of the company. The discussion already indulged shows that a theoretically proper basis is to ascertain:

First: What earnings of this character arose from business done in Ohio, and

Second: What proportion, if any, of the business of this character done in Ohio was intrastate.

Counsel for the company have contended that none of the business was intrastate because dining cars were operated in Ohio only on interstate trains. Technically, this objection is not well founded, whatever practical difficulties may appear for while it must be conceded that the serving of meals and refreshments to travelers on board a train is an incident of the transportation of such passengers, and therefore may partake of the character of the transportation itself, yet, strictly speaking, the dining service accorded to each passenger is incidental to the transportation service accorded to him, so that if he is an intrastate passenger his meal, so to speak, is an intrastate meal.

The examiner's report shows that he either did not find any figures which would enable him to arrive at the amount of dining car income derived in Ohio or that he did not deem the available figures trustworthy, for he arrived at the amount of his finding as follows:

> "The amounts entered in red ink are percentage amounts of the total annual dining car revenues of the entire Erie Railroad system, (no segregation of this item having been applied to the several roads operated in the company's accounting). These amounts I have determined or arrived at by

dividing the gross annual passenger earnings in Ohio by the total annual passenger earnings of the entire Erie system, to obtain the intrastate percentage * * * of passenger earnings in Ohio, the total dining car earnings for the entire system then being multiplied by this percentage to determine the intrastate earnings entered on statement sheets 1 to 6."

This statement is not clear, or rather, taken at its face value it follows an improper *basis* of arriving at a fair percentage, itself more or less arbitrary, of course, but justified by the inherent difficulties of the case. That is to say, if, as the examiner states, he has actually taken the gross annual passenger earnings in Ohio as a basis of comparison, he has chosen a basis which itself includes interstate elements, that is, the gross annual passenger earnings of the Erie system "in Ohio" may include interstate as well as intrastate earnings, if the term be literally applied. If, however, the examiner means by the phrase now under examination, not the gross annual Ohio passenger earnings, but the *"gross annual Ohio intrastate passenger earnings,"* then in the judgment of this department a fair basis of arriving at the Ohio intrastate proportion of the total has been adopted by the examiner. This question is one of fact which the commission it is believed can ascertain.

At this point, however, it should be stated that at the hearing the company, through the witness who is its superintendent of dining car service, produced figures showing the exact amount of income from meals served in the state of Ohio. There is first shown a total gross income from this source of $658,960.96, whereas the examiner's figures constitute only a small percentage of this amount, namely, $55,086.00. It is not quite clear from the record that the first named figure represents only the Ohio income. The following quotations from the record will show the ambiguity of the testimony:

"Judge Okey: *We can lay before the commission a statement of revenue and expense of these cars within the state of Ohio,* covering a period from November, 1915 to 1916, if that will be of any help along the line of a suggestion of the chairman. * * * It simply shows the meals served in the state of Ohio and the revenue received therefrom, and the expenses of those meals, the cost of the service.

* * * * * * * * *

Q. I will ask the witness whether he is able to state the revenue and expenses arising *from the operation of the dining cars in the state of Ohio* covering the period from November 15, 1915, to June, 1916, and if you can just read that into the record.

A. This statement I have here is the actual figures of meals served on trains from one point to another within the state of Ohio. There was no way that we could tell whether they were intrastate passengers or interstate passengers, and from my personal knowledge I should say there would not be any more than five per cent. of the passengers served in dining cars intrastate passengers. * * *.

Q. Well, you might read your figures into the record, Mr. Canning.

A.	Train 3 * * * the revenue	$2,918 95
	Train 4 * * * revenue	3,927 00
	Train 624 * * * revenue	3,185 25
	Train 5 * * * revenue	2,854 75
	Train 6 * * * revenue	218 05
	Total revenue	$13,104 00"

This is from November, 1915, to June, 1916; whereas the item entering into the total of $658,960.96 previously mentioned for the period from January 1, 1916, to June 30, 1916, is $66,933.50, which would indicate for the corresponding period substantially a total of $90,000 as entering into the total of $658,960 96. A ratio is thus suggested amounting to between one sixth and one seventh of the whole It is quite evident therefore that the figure $658,960.96 represents the entire gross income from dining and buffet car service over the whole system, instead of, as previously assumed, Ohio receipts only, and that for the entire period the dining and buffet car income derived in Ohio would approximate $100,000. The question now being as to whether approximately half of the dining car income in Ohio can be looked upon as derived from or incidental to intrastate commerce, we have the opinion of the witness that only about five per cent of it can be regarded as having been so derived, whereas the method of calculation adopted by the examiner works out approximately 55 per cent which is evidently too high.

But the company has still another contention at this point. The claim is made that the actual earnings of the dining and buffet car business of the company are much less than the total amount on which the examiner's calculations are based, in that a considerable part of this business represents a conversion of capital. That is to say, the cost of provisions, bar supplies, cigars and tobacco "should be deducted," say counsel for the company, "from the gross revenue in order to arrive at the gross earnings."

Counsel do not dispute the general proposition that the term "gross earnings" permits of no deductions for operating expenses, so they say the repairs and up keep of the dining cars, the compensation of employes, the maintenance and replacement of equipment, etc., need not be deducted from the gross revenue. If such deduction were made they claim to be able to show that the business as a whole was conducted during the years in question at an actual loss. But they do not claim the benefit of any deduction save for the cost of provisions and other commodities sold to the passengers. In other words, counsel rely upon the difference between the term "gross receipts" as used in some of our statutes and "gross earnings." There is evidently some difference here. If the term used were "gross receipts" there would be no reason for the contention now made, but it is clear that the income derived from a conversion of capital assets is not an earning, though it may be a receipt. Authorities are cited by counsel in their brief on this question, but it is so elementary as to require no elaborate discussion. The gross income of a mercantile business could hardly be considered as the "earnings" of that business, even though the object of investigation were the "gross earnings" instead of the "net earnings." Such mercantile business consists primarily in making investments of capital in goods, which are then sold at an advance called "profit." Gross profits are measured by the difference between the cost price and the selling price; net profits are arrived at by deducting overhead charges and operating expenses.

Now wherever the nature of a business consists in the purchase and sale of a commodity, even though it be worked upon, or its condition altered by the purchase and sale, it is obvious that the only way such a business can earn is through the profit reaped. The contention of counsel is believed to be well founded. The figures are furnished in their brief at page 12. It thus appears that the gross earnings for the whole period instead of being $650,960.96 should be reduced approximately fifty per cent in accordance with the figures furnished; then as against this fifty per cent should be applied the factor of one to six and one-half or seven indicated by the figures furnished for a portion of one year as being the proportion of the business done in Ohio to the total dining car business of the company. When that process is completed there should be a further allowance for interstate business in Ohio. No suggestion is made as to what that allowance should be, the commission being the judge of the facts and having the experience requisite to enable a fair percentage to be arrived at.

In other words, approximately $332,000 would represent the actual gross earnings of the entire system. This would make $50,000, or some such sum, the gross earnings of the Ohio dining and buffet car business. Some proper proportion of this—certainly much less than half of it (as it is almost common knowledge that the percentage of dining car service incidental to interstate transportation must be relatively high) should be regarded as Ohio's share. In other words, the finding of the examiner is at least five or six times too high, but some fair amount should be arrived at and included in the omitted gross earnings of the company for the years mentioned on account of dining and buffet car business.

Hire of equipment:

This item represents by far the greater part in amount of the omitted gross earnings found by the examiner. His statement as to the nature of the item and the manner in which the figures were arrived at is as follows:

> "Hire of equipment income amounts herein stated are determined upon a pooling apportionment of such income accruing on the entire Erie R. R. system. The apportioned amounts to the Nypano division and the Chicago & Erie R. R. are distributed as between the Nypano, the Chicago & Erie and the Erie R. R. on the basis that the car and locomotive mileage on each of these divisions bear to the total roads' car and locomotive mileage. The amounts stated are therefore not indicative of actual intrastate gross earnings, except as to 'Hire of Freight Train Cars,' the proportion of which earnings applicable to the state of Ohio being approximately correct."

This statement must be supplemented by an additional statement of facts in order to make the situation entirely clear. By custom and reciprocal agreements among all the railroads of the country, rolling stock, in order to save the trouble and expense of trans-shipment, is permitted to be transferred beyond the lines of its owner. The railroad over whose lines the foreign car moves keeps an account of the number of days such car or other equipment is detained on its lines, accounting at the end of the period to the owner of the car at the rate of forty-five cents a day for such period of time and receiving credit at a like rate for its cars detained on the lines of the other railroad. The examiner's figures represent apportioned amount of the gross credit charges of the Erie Railroad lines in Ohio without any deduction for the gross debits representing like charges incurred by it in favor of other companies.

The railroad company, challenging the method of the examiner in arriving at his figures, calls attention to the decisions in *State* vs. *McFetridge*, 24 N. W. (Wis.) 140· *State* vs. *Railway*, 118 N. W. (Minn.) 679; *State* vs. *Illinois Central R, R-*, 92 N. E. (Ill.) 814, to the effect that only the credit balances of such earnings, i. e., the net amount actually due to and collected by the company in any of the years on this account, should be regarded as gross earnings of the company

Counsel also rely upon what is alleged to be the uniform practice of the taxing authorities of the state of Ohio prior to 1915, in accord with these rulings. While suggesting adherence to the previous ruling as a fair and satisfactory working arrangement, they continue to object to the inclusion of any revenues from this source in the gross earnings of the company on the ground that it is impossible to separate the intrastate from the interstate earnings of this character, so that a burden on interstate commerce would necessarily be imposed by the taxation of any such earnings.

At the outset it may be stated that it is not believed that the three cases cited by counsel are in point. They all arose under statutes or acts of incorporation imposing taxes in the nature of income taxes on the gross earnings of railroads in lieu of all other taxes. Such taxes are to be sharply distinguished from taxes based upon the privilege of doing business in a given state. Compare *Galveston, Harrisburg & San Antonio R. R. Co.* vs. *Texas*, 210 U. S., 217, with *Express Co. Minnesota*, 223 U. S. 335. Our

own tax is of the latter character and, as previously stated, the gross earnings which are to enter into the computation of the tax must not only be not interstate in character, they must also arise from the transaction of business, and the business thus transacted must have been conducted in Ohio.

Very grave doubt is entertained in this department as to whether or not these receipts arise from business conducted in Ohio. It is not believed that the receipts are interstate commerce receipts, it is not believed that the receipts arise from commerce in any sense; it may even be questioned whether they are business receipts, although they accrue in the ordinary course of business, but the most difficult question to answer is how it can be said that any part of the receipts comes from business transacted in Ohio. A typical case would be that of a car of the Erie Railroad Company passing at Chicago on to the lines of the Chicago & Northwestern Railroad Company, and being hauled to Omaha and back before being placed on the tracks of the Erie. The car may have come originally from an Ohio shop or may have been assigned originally to an Ohio division of the Erie line, such as the Nypano but it can not be said that the arrangement whereby the car was permitted to pass upon the tracks of the Chicago & Northwestern amounted to the transaction of business in Ohio, and it is very difficult indeed to see how there can be any localization of the operation under this arrangement.

On the whole, it is believed that the safest thing to do is to accede to the suggestion of counsel for the railroad company, that this class of business be treated just as it was prior to 1915 and not seek to raise the question at this time. For this conclusion there is the legal ground of yielding to contemporaneous and long-continued construction by those who are charged with the execution of a statute. There is also the precedent afforded by the three cases which have been cited, and although these cases may be criticised as they have been in this opinion as not strictly in point, yet they afford the only available judicial authority even remotely bearing upon the question.

This department is, of course, unable to advise the commission as to just how the application of this principle would affect the findings of the examiner with respect to amounts.

It must be stated in connection with this subject that it has been assumed that the facts as above outlined are the same with respect to all four of the classes of receipts or earnings under this general heading, viz.: Hire of freight cars, rent of locomotives, rent of passenger cars, and rent of work equipment. Indeed, this is necessarily true as to all the years excepting 1915, for in such years there was no separation into these items. If, however, the facts with respect to the rent of locomotives, the rent of passenger cars and the rent of work equipment are materially different from those imagined, and the commission desires a further opinion of this department with respect to such facts, such an opinion will be furnished upon receipt of such statement of facts.

It is understood that the item of $500.00 for "Other Passenger Train Income" is not in controversy.

Respectfully,
JOHN G. PRICE,
Attorney-General.