4090.

PUBLIC UTILITIES—EXCISE TAX ON GROSS RECEIPTS IMPOSED BY H. B. NO. 43, SECOND SPECIAL SESSION OF 90TH GENERAL ASSEMBLY—HOW COMPUTED—UNION DEPOT COMPANIES.

SYLLABUS:

1. *By the terms of House Bill No. 43, second special session of the 90th General Assembly (effective December 13, 1934), the excise taxes imposed on the gross receipts of public utilities enumerated therein, payable in the year 1935, shall be computed at the rate specified in the sections repealed by said act, on the gross receipts and gross earnings prior to December 13, 1934, and at the rate specified in the sections amended by said Act, in their present form on gross receipts and gross earnings subsequent to December 13, 1934.*

2. *The base upon which to compute such taxes for the period up to December 13, 1934 is the entire gross receipts of the company, including all sums earned or charged, whether actually received or not for business done within this state, excluding therefrom as to each of such utilities all receipts derived wholly from interstate business or business done for the federal government. The base upon which to compute such taxes on and after December 13, 1934, is the entire gross receipts of such utilities, actually received from whatever source derived, from business done within this state, excluding therefrom as to each of such utilities all receipts derived wholly from interstate business, or business done for the federal government.*

3. *In the case of union depot companies, in computing such excise taxes for the period on and after December 13, 1934, all money paid or advanced to such companies, by the railroad company or companies owning them, is to be excluded from the gross receipts actually received, in determining the base.*

COLUMBUS, OHIO, MARCH 23, 1935.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—This will acknowledge receipt of your recent communication, which reads as follows:

> "May we have your immediate formal opinion relative to the manner of computing the excise taxes upon the gross receipts or earnings of public utilities in so far as the method of determining the tax is changed by the provisions of House Bill No. 43 enacted at the Second Special Session of the 90th General Assembly and effective December 13, 1934.
>
> It would appear that the tax is to be computed at the old rate until December 13, 1934 and at the new rate thereafter. The question now arises whether the taxes shall be computed at the old rate upon the base established by the statute as it read prior to December 13, 1934 and computed thereafter upon the base established by the statute as effective December 13, 1934. May we, therefore have your formal opinion regarding both the rate to be employed and the base upon which the tax is to be computed.
>
> We are forwarding herewith a memorandum submitted in support of the conclusion that the base for the computation of the entire year tax liability shall be as provided by section 5474 of the General Code and other pertinent sections as effective December 13, 1934."

House Bill No. 43 of the second special session of the 90th General Assembly, which became effective December 13, 1934, is an act which increases the rate of excise taxes imposed upon gross receipts and gross earnings of certain public utilities for the purpose of securing increased revenues for poor relief and welfare purposes, and to that end amended, inter alia, sections 5474, 5475, 5483, 5485, 5486 and 5487 of the General Code.

The amendments to sections 5485, 5486 and 5487 of the General Code, provide for an increase in the rates of excise taxes levied upon the gross receipts of certain utilities. Section 2 of said House Bill No. 43 reads as follows:

> "That said existing sections 5474, 5475, 5483, 5485, 5486, 5487 and 5491 of the General Code are hereby repealed.
>
> Sections 5483, 5485, 5486 and 5487 as amended by this act shall take effect so that excise taxes payable in the year 1935 shall be computed as follows: First, at the rate specified in the sections hereby repealed on gross receipts and gross earnings on intrastate business up to the effective date of this act; and second, at the rate specified in said amended sections on gross receipts and gross earnings on intrastate business from, on and after the effective date of this act."

The language employed in the above section, with reference to rates, is clear, unambiguous and free from all doubt and it at once becomes apparent that the rate specified in the statutes enumerated in said section, prior to the amendment of said statute, is to be employed in computing the tax up to December 13, 1934, and the rate specified in said statutes as amended is to be employed in computing the tax on and after December 13, 1934. To hold that the new rate should be employed in computing the tax for the entire year, would be to give the act a retroactive effect. It is stated in Ohio Jurisprudence, Volume 37, page 819, as follows:

> "Courts indulge in the presumption that the legislature intended statutes enacted by it to operate prospectively rather than retroactively. Indeed, the general rule is that they are to be so construed if susceptible to such interpretation, unless the law is retroactive in terms which clearly show such legislative intention as to permit, by no possibility, of any other construction."

The text above quoted is supported by the following cases:

Bode vs. *Welch,* 29 O. S. 19;
Bernier vs. *Becker,* 37 O. S. 72;
Allen vs. *Russell,* 39 O. S. 336;
Cincinnati vs. *Seasongood,* 46 O. S. 296;
Cincinnati vs. *Public Utilities Commission,* 98 O. S. 320;
State vs. *Channer,* 115 O. S. 350.

It would therefore appear, not only by the application of the above doctrine, but from the clear language of the act itself, that the old rate would apply prior to the effective date of the act and the new rate subsequent thereto.

I come now to the question regarding the base to be used in computing the tax payable in 1935.

Sections 5474 and 5475 of the General Code which deal with the report to be

filed by certain utilities with the Tax Commission, and for a determination by the Tax Commission of the gross receipts of such utilities, now read as follows:

"Section 5474.

In the case of all such public utilities except railroad, street, suburban and interurban railroad companies and express, telegraph and telephone companies such statement shall also contain the entire gross receipts of the company, * * * actually received * * * from whatever source derived, for business done within this state for the year next preceding the first day of May, including the company's proportion of gross receipts for business done by it within this state in connection with other companies, firms, corporations, persons or associations, but this shall not apply to receipts from interstate business, or business done for the federal government. Such statement shall also contain the total gross receipts of such company for such period in this state from business done within the state."

"Section 5475.

On the first Monday of September the commission shall ascertain and determine the entire gross receipts actually received from whatever source derived of each electric light, gas, natural gas, pipe line, waterworks, messenger or signal, union depot, heating, cooling and water transportation company for business done within this state for the year then next preceding the first day of May, and of each express, telegraph, and telephone company for business done within this state for the year ending on the thirtieth day of June, excluding therefrom, as to each of the companies named in this section, all receipts derived wholly from interstate business or business done for the federal government, and excluding therefrom, as to union depot companies, all money paid or advanced to such companies by the railroad company or companies owning them."

Said sections in their form prior to the amendment (House Bill No. 43, second special session, supra) read as follows:

"Section 5474.

In the case of all such public utilities except railroad, street, suburban and interurban railroad companies and express, telegraph and telephone companies, such statement shall also contain the entire gross receipts of the company, including all sums earned or charged, whether actually received or not, from whatever source derived, for business done within this state for the year next preceding the first day of May, including the company's proportion of gross receipts for business done by it within this state in connection with other companies, firms, corporations, persons or asociations, but this shall not apply to receipts from interstate business, or business done for the federal government. Such statement shall also contain the total gross receipts of such company for such period in this state from business done within the state."

"Section 5475.

On the first Monday of September the commission shall ascertain and determine the entire gross receipts of each electric light, gas, natural gas, pipe line, waterworks, messenger or signal, union depot, heating, cooling and water transportation company for business done within this state for the year then

next preceding the first day of May and of each express, telegraph and telephone company for business done within this state for the year ending on the thirtieth day of June, excluding therefrom, as to each of the companies named in this section, all receipts derived wholly from interstate business or business done for the federal government."

It will be noted that section 5474, General Code, supra, in its present form provides that the statement to be furnished by the utility shall "contain the entire gross receipts of the company, actually received," and that in its form prior to the amendment provided that such statement shall "contain the entire gross receipts of the company, including all sums earned or charged, whether actually received or not."

Likewise section 5475, General Code, supra, was amended by inserting the words "actually received from whatever source derived," immediately after the words "gross receipts," and by adding the following: "and excluding therefrom, as to union depot companies, all money paid or advanced to such companies by the railroad company or companies owning them."

Again it becomes necessary to turn our inquiry to section 2 of the act. It is noted that said section provides that the excise taxes payable in the year 1935 shall be computed as follows:

"First, at the rate specified in the sections hereby repealed on *gross receipts* and *gross earnings* on intrastate business up to the effective date of this act; and second, at the rate specified in said amended sections on *gross receipts* and *gross earnings* on intrastate business from, on and after the effective date of the act." (Italics ours.)

It now becomes important to determine what constitute gross receipts and gross earnings up to the effective date of the act. To do this we can look nowhere but to the statutes in force prior to December 13, 1934. As stated, section 5474, General Code, supra, as in effect prior to December 13, 1934, provided that the statement to be filed "shall contain the entire gross receipts of the company, including all sums earned or charged, whether actually received or not," and section 5475, General Code, supra, as in effect prior to December 13, 1934, provided that "the commission shall determine the entire gross receipts."

"Gross receipts" from and after the effective date of the act, however, by the terms of amended sections 5474 and 5475, General Code, are "the entire gross receipts actually received."

The fact that the General Assembly in the enactment of said section 2 referred to gross receipts and gross earnings before and after the effective date of the act, might well indicate that it was its intention that a different base should be employed in computing taxes prior to December 13, 1934, from the one to be used in computing taxes after said date. If such were not the case and it was the intent of the act to use a new base for the entire year and apply both the old and new rates thereto, said section 2 might well read as follows:

"The rates specified in the section hereby repealed, shall apply up to the effective date of this act, and the rate specified in said amended section shall apply from, on or after the effective date of this act."

While language more expressive might have been employed, yet it appears that the intent of said section can be clearly ascertained from a reading thereof. Further-

more, to hold otherwise and to construe the language of said section so that the new base would apply for the entire year, would be to give the act in part a prospective operation and in part a retrospective operation, and the terms of the act do not of themselves make such intention clear and certain. While it is true that a retrospective law in a legal sense is one which takes away or impairs vested rights or creates a new obligation and imposes a new duty, yet in the instant case where the terms of the act do not clearly show a legislative intention to have the same operate retrospectively, a prospective rather than a retrospective construction of the same is required.

Furthermore, the object sought by the enactment of House Bill No. 43, supra, was to increase revenue for county statutory relief and welfare purposes. The title of said act reads as follows:

> "To increase the rate of excise taxation imposed on the gross receipts and gross earnings of certain public utilities, and to apply the increased revenues resulting therefrom to the general fund of counties for county statutory relief and welfare purposes and for such purposes to amend sections 5474, 5475, 5483, 5485, 5486, 5487 and 5491 of the General Code and to enact supplemental section 5487-1 of the General Code."

The title of an act is framed in the same manner as the bill, and is sanctioned by the vote of both branches of the General Assembly. While it is true that the title of an act has been declared to be no part thereof, yet the cases in Ohio are legion, which hold that the title of an act is so far a part of the same that it may be resorted to where the meaning of the act is ambiguous for the purpose of ascertaining the true meaning. *Burgett* vs. *Burgett,* 1 Ohio 469; *Kelley* vs. *State,* 6 O. S. 269; *Lehman* vs. *McBride,* 15 O. S. 573; *De Bois* vs. *Coen,* 100 O. S. 17; *State, ex rel Keller,* vs. *Forney,* 108 O. S. 463, and *Crawford County* vs. *Gibson,* 110 O. S. 290.

In the case of *Collings-Taylor Company* vs. *American Fidelity Company,* 96 O. S. 123, it is stated:

> "Where the general assembly of Ohio expressly declares in the title to an act that the purpose of such act is to make the laws on the subject to which it relates conform to the laws relating to a kindred subject, a court, in construing such act, will give effect to the intent and purpose of the lawmaking power unless the language used in the act itself imperatively requires a different construction."

Utilizing, then, in the instant case the title of the act in question, as an aid to construction, it seems manifest that the General Assembly intended the old base to be employed up to the effective date of the act. If such were not the case and if the old rate were applied to the new base for the period up to December 13, 1934, the taxes for such period would be less than if the statutes involved had not been amended.

In specific answer to your question, it is therefore my opinion that:

1. By the terms of House Bill No. 43, second special session of the 90th General Assembly (effective December 13, 1934), the excise taxes imposed on the gross receipts of public utilities enumerated therein, payable in the year 1935, shall be computed at the rate specified in the sections repealed by said act, on the gross receipts and gross earnings prior to December 13, 1934, and at the rate specified in the sections amended by said Act, in their present form on gross receipts and gross earnings subsequent to December 13, 1934.

2. The base upon which to compute such taxes for the period up to December

13, 1934, is the entire gross receipts of the company, including all sums earned or charged, whether actually received or not for business done within this state, excluding therefrom as to each of such utilities all receipts derived wholly from interstate business or business done for the federal government. The base upon which to compute such taxes on and after December 13, 1934, is the entire gross receipts of such utilities, actually received from whatever source derived, from business done within this state, excluding therefrom as to each of such utilities all receipts derived wholly from interstate business, or business done for the federal government.

3. In the case of union depot companies, in computing such excise taxes for the period on and after December 13, 1934, all money paid or advanced to such companies, by the railroad company or companies owning them, is to be excluded from the gross receipts actually received, in determining the base.

Respectfully,
JOHN W. BRICKER,
Attorney General.

4091.

CONSTABLE—REQUIRED TO SERVE WARRANT FOR ARREST OF PERSON CHARGED WITH FELONY REGARDLESS OF FEE—O. A. G. 1934, NO. 2874, FOLLOWED.

SYLLABUS:

1. *Opinion No. 2874, rendered June 29, 1934, approved and followed.*

2. *Where a warrant is issued to a Constable for the arrest of a person charged with a felony such Constable may not refuse to serve the warrant because of the possibility that he may receive no fee for such service.*

COLUMBUS, OHIO, MARCH 25, 1935.

HON. W. J. SCHWENCK, *Prosecuting Attorney, Bucyrus, Ohio.*

DEAR SIR:—This will acknowledge receipt of your request for my opinion which reads as follows:

> "B. was arrested on an affidavit filed in a Justice Court, charging a felony.
>
> A warrant was issued on said affidavit. The prosecuting witness could not be compelled to secure costs because it was a felony. No chief of police or constable would accept the warrant unless his fees were secured.
>
> Under the holding of Opinion No. 2874, rendered June 29, 1934, and former opinions cited therein, these fees can not be paid out of the County fund in the event no conviction was had.
>
> In the rural counties we do not have the Grand Jury in session only a few days in each term, and it frequently happens, as in this case, that action delayed means justice defeated.
>
> We know of no law by which a Chief of Police or Constable can be forced to accept a warrant without the assurance that he is to receive his fees for apprehending, arresting and presenting the body of the defendant in the Court issuing the warrant.