of another district or districts for the admission of its pupils into one or more of the schools of such other districts and the amount of tuition for attendance of pupils may be fixed by the terms of the contract agreed upon by the boards of education of the several districts.

Where the attendance and amount of tuition are determined by the terms of a contract made between the boards of education of such districts, the provisions of section 7736 G. C. and section 7747 G. C. are not applicable. There is no requirement in law that the amount of tuition paid to one foreign board of education need be exactly the same amount paid to another board of education where a contract is had with more than one board.

Where a board of education enters into a contract or contracts with other boards of education for the tutoring of its pupils, and the schedule of pay for such tuition is later desired to be changed, a new contract or contracts should be prepared and agreed upon, for the reason that the limit of the liability resting upon a board of education to pay a pupil's tuition is the maximum amount named in any of the board's tuition contract. In cases where no agreement as to paying the tuition of pupils is entered into, the school to be attended by a pupil eligible to high school can be selected by the pupil holding a diploma."

In reply to your specific inquiries, then, you are advised:

1. Under the provisions of House Bill 216, effective August 16, 1921, the board of education of any village or wholly centralized village school district is authorized to provide transportation to a high school in another district, if none is maintained in a given district, or to a high school in another district of a higher grade than the one maintained in a given district, for those pupils who are entitled to have their tuition in high schools paid by the board of education of the district in which the pupil resides, but such board of education is not compelled to provide such transportation.

2. A board of education may designate the high school to be attended in another school district where it makes a tuition contract with another board of education under the provisions of sections 7734 or 7750 of the General Code, but if no tuition agreement is entered into with another board of education, the high school to be attended can be selected by the pupil holding the diploma.

Respectfully,
JOHN G. PRICE,
Attorney-General.

2361.

CORPORATIONS—WHERE MISTAKE IN SWORN RETURN OF CORPORATION MADE BY ITS OFFICERS AS TO ITS LIABILITIES AND CREDITS—HOW MISTAKE MAY BE CORRECTED—THE HOUSTON FARM COMPANY.

1. *Where the officers of a corporation base their valuation of the mortgages, notes, accounts, etc. of the corporation upon a mistake as to facts reflecting upon such value, the sworn return of the corporation does not preclude it from making a complaint before the board of revision and from appealing to the tax commission*

from an adverse decision of that board. If the commission is satisfied that such a mistake is made, it may determine the true value in money of the taxable credits of the corporation in accordance with the true facts.

2. *Where the officers of a corporation list for taxation its "surplus", meaning the excess of its assets over its liabilities, after having fully listed all of its tangible and intangible personal property in accordance with law, the amount of such so-called "surplus" should be ignored by the taxing authorities in listing the property of the company for taxation, and upon discovery of the mistake of law the company is entitled to relief by complaint before the board of revision and appeal to the tax commission.*

3. *In each of such cases the burden is on the taxpayer to show that an honest mistake was made. Such a mistake cannot be inferred by the commission from the mere fact that the return is erroneous.*

COLUMBUS, OHIO, August 24, 1921.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—The commission has transmitted to this department a copy of its finding of facts in the matter of the appeal of the Houston Farm Company from the decision of the board of revision of Clark county, on an application under section 5609 of the General Code. The commission calls attention to all the findings of fact, and particularly finding No. 9, from which it appears that the company, through its auditor, made its return for taxation to the county auditor of Clark county as of January 1, 1920, and in that return the auditor included the sum of $191,286.00 as the excess of the credits of the company over its debts. It was subsequently discovered, and the commission finds, that—

> "Said return was incorrect in this that on the first day of January, 1920, the bona fide debts of said farm company were in excess of the value of its mortgages, notes, accounts and other credits."

The commission also finds that—

> "At the time this return was made" the officers of the company "believed it to be correct."

The commission asks whether on appeal it may "strike from the return" the item representing credits; that is to say, reduce the value of personal property by this amount.

It further appears from the finding of facts that the sum of $292,000.00 was listed on the blank as "annuities" but is explained as representing the so-called "surplus" of the company. It is also stated that the auditor so explained the items to the deputy county auditor at the time of the listing. The commission finds that—

> "The Houston Farm Company did not own any annuity and it was not intended to return any such item as annuities" and that "by 'surplus' was meant the excess of the assets of the company over its liabilities."

With respect to this the commission submits the following question:

> "In view of the further fact that the second item represents the

excess value of the property of the company generally over and above all its liabilities should it or should it not have been included in the return, and, if not properly included, has this commission the right now to strike it out?"

The jurisdiction of the commission depends upon the interpretation of sections 5597 and succeeding sections of the General Code, from which the following are quoted:

"Sec. 5597. It shall be the duty of the board of revision to hear complaints relating to the valuation or assessment as the same appears upon the tax duplicate of the then current year, of both real and personal property * * * and * * * may increase or decrease any such valuation or correct any assessment complained of * * *."

"Sec. 5601. The county board of revision shall not decrease any valuation complained of nor reduce the listed amount of any taxable property complained of, unless the party affected thereby, or his agent, makes and files with the board a written application therefor, verified by oath * * *."

"Sec. 5609. * * * Any taxpayer may file such complaint as to the valuation or assessment of his own or another's property * * *. The determination of any such complaint shall relate back to the date when the lien for taxes for the current year attached, or as of which liability for such year was determined * * *. Each complaint shall state the amount of over-valuation, under-valuation, or illegal valuation, complained of; * * *."

"Sec. 5610. An appeal from the decision of a county board of revision may be taken to the tax commission of Ohio * * * by * * * any complainant * * *."

"Sec. 5611. * * * The commission shall ascertain and determine the true value in money of the property complained of and certify its action to the county auditor, who shall correct the tax list and duplicate in the manner provided by law for making corrections thereon."

The first point as covered by the commission's finding of facts may present an instance of pure mistake of fact. While the basis for the commission's conclusion does not appear, it will be assumed that the mistake consisted in the over-valuation of the mortgages, notes and accounts of the company rather than in the under-statement of the aggregate deductible debts. While there are cases holding that, in some instances, a taxpayer is concluded by his own sworn return on questions of value, yet it is not believed that these cases go so far as to prevent the taxpayer from complaining of his own mistake, where the mistake was a real one and material, as affecting the figures which he listed in his return. It must, of course, be remembered that the value of most property is a mere matter of opinion; in fact, this is always so where the property has no market value. In the case of credits the value may depend upon the solvency or insolvency of the debtor. If all the facts are known to the taxpayer, and on the basis of the

known facts he overestimates the value of property of this sort, it is not believed that such erroneous estimate on his part could be characterized as a "mistake"; and in that instance the sworn return of the taxpayer, or its duly authorized agent in the case of a corporation, would be conclusive as against his or its own complaint.

But if the facts upon which an opinion was based were misconceived, and if at least there was no negligence on the part of the person making the return in failing to ascertain the true facts, then the mere fact that the ultimate result of his calculations contained an element of opinion does not militate against the conclusion that a mistake lies at the bottom of such calculations, and may be rectified. Such are the principles upon which the courts proceed in matters of this kind, and no good reason appears why the administrative tribunals, in exercising jurisdiction like that clearly conferred upon the board of revision and the tax commission by the statutes above quoted, should not be governed by the same principles.

It is believed proper to suggest that considerable care must be exercised to avoid a misapplication of this rule, as it could only be properly applied in cases where the evidence shows such an actual mistake, or, to put it in another way, where the taxpayer, for want of knowledge or information, or because of being misinformed as to facts or conditions upon which his judgment as to the value of the property is based and which want of information or misinformation could not have been foreseen or prevented by the taxpayer by the use of ordinary diligence, has in good faith been materially misled or misinformed as to the facts upon which his valuation is embraced, and this would exclude from the rule cases where the taxpayer did not use ordinary diligence in the ascertainment of the material facts, or in cases where the return was intentionally made on an exaggerated basis for the purpose of commercial credit or for like purpose.

Assuming, then, that the commission has found not the mere erroneous exercise of judgment on the part of the officer of the company, but an actual mistake, or series of mistakes, lying at the basis of the exercise of his judgment, the commission is advised that it may rectify that mistake, and, proceeding on the basis of the true facts, exercise its own judgment as to what the value of the bills payable, etc., of the corporation on January 1, 1920, was; and if it finds that that value was less than the sum of the legal bona fide debts owing by the company at that time, it may find that the company had no taxable credits on that date, and so certify to the county auditor.

The basis of the second finding is a mistake of law rather than of fact. The "surplus" of a corporation, representing the difference between its book assets and its book liabilities, is not taxable property. The property of a corporation is to be listed for taxation the same as that of an individual, and the so-called element of "corporate excess" is not taxable in Ohio. While there is a principle that money paid under a mistake of law cannot be recovered, no reason is perceptible why that principle should be applied to prevent the rectification of a tax return. A taxpayer might list for taxation in Ohio tangible personal property not located in this state in the belief that all of his personal property should be listed here. That belief would, of course, be erroneous, and upon discovery of his mistake he would be entitled to relief by the board of revision at least. Such a case would not be as easy a one for the application of the principle as the present one, for in that instance the return would not show on its face, as does this one, that a mistake had been made. As a matter of fact the county auditor, strictly speaking, had no authority to list the item of $292,000 among the taxable property of the company, or, more properly speaking, should have deducted that amount

from the return in listing the aggregate personal property of the corporation for taxation. This he should have done because he should have been advised on the face of the return itself that something had been included in the list that did not constitute taxable personal property.

The conclusion is therefore reached that the commission on appeal from the decision of the board of revision has authority to deduct this item.

Since the above was prepared a brief has been received from the attorney for the village of South Charleston, Ohio, which resists the appeal of the company. This brief relates in part to procedural matters not submitted by the commission to this office for opinion. It deals, however, with the question of estoppel, which has been referred to in the above opinion. Very strong argument is made to the effect that the adjustment of tax rates on the basis of mistaken returns constitutes such a change of position on the part of the taxing districts involved as to assist in the building up of the estoppel against the taxpayer whose own mistake is to blame for an alleged erroneous assessment. It is true that this fact may and should be taken into account by the administrative tribunals who are asked to act upon a complaint of this character, but that in and of itself it is conclusive so as to prevent the taxpayer from relying upon accident, fraud or mistake is believed not to be sustained upon principle or by authority.

Some of the other cases cited support the proposition conceded in the above opinion, that where the mistake is one of judgment or title an estoppel is raised. The following is quoted from the brief submitted to show that the general principles of law contended for are substantially the same as those stated in this opinion:

> "It appears therefore, from the rule of law stated, that in most states the taxpayer is conclusively estopped from disputing his return even though he asks for its correction before his taxes are paid. The only exception to this rule made in any state is in case the taxpayer has made an honest mistake in submitting his returns. The exceptions do not extend to a case where a mistake is one arising from pure negligence of the taxpayer or where the return is knowingly false."

This statement may be accepted as correct, with some question raised as to whether the rule is quite so strict against the taxpayer when he is asking for administrative relief as it would be where he is asking a court of equity to interfere by injunction.

The foregoing opinion is to be accepted by the commission merely as a statement of what the commission may do if it finds a mistake to have occurred within the purview of the principle above outlined. It is very strongly argued in the brief that no such mistake occurred in the case before the commission, in that as to the credits, which it now appears were erroneously listed not so much from overvaluation of the bills receivable as the overlooking or suppression of bills payable, the facts were such as that they must have been known by the officers of the company when they made the return. If this is so, and if the officers of the company have made no satisfactory explanation to the commission as to how they came to insert erroneous figures in the return, then the commission is not entitled to assume that the error occurred through mistake, but must assume that it was intentional. In other words, the burden is on the complainant to show that an honest mistake was made, and the commission is not entitled to infer such a mistake from the mere fact that an error has occurred in the return.

The brief also argues that the error with respect to the listing of the surplus did not occur through a mistake of law but was intentional. This, of course, is a question of fact. The opinion as drafted assumes that the commission has correctly found that a mistake of law occurred, but here again the burden is on the taxpayer to show that such was the case.

Respectfully,
JOHN G. PRICE,
Attorney-General.

2362.

DEPARTMENT OF COMMERCE—WHAT POSITIONS IN SAID DEPARTMENT ARE IN UNCLASSIFIED SERVICE OF STATE CIVIL SERVICE.

The following positions in the department of commerce are definitely in the unclassified service of the state civil service:

Director of commerce, superintendent of insurance, superintendent of building and loan associations, fire marshal.

If in the department of commerce an assistant director of commerce has been appointed and made the head of a division, other than the division of building and loan associations, fire marshal, insurance or banks, and created under section 154-8 *of the General Code, such assistant director of commerce is in the unclassified service.*

The director of commerce may designate, in addition to the foregoing positions, three positions in the department as in the unclassified service. One of these positions must be a personal stenographer of the director; one other may be an assistant, who may or may not be the head of a division created under section 154-8 *of the General Code; the third may be a secretary in the department, who may or may not be the employe designated as acting secretary of the public utilities commission; or the director of commerce may, in lieu of designating an assistant as in the unclassified service, designate two secretaries as in such service, including such acting secretary of the public utilities commission.*

The superintendent of banks is, for the purposes of the civil service law, to be regarded as the head of a principal department, though for the purpose of the Administrative Code, the division of banks is regarded as within the department of commerce. The superintendent of banks, as head of such division, is therefore himself in the unclassified service and entitled to two secretaries or assistants and one personal stenographer immune from the classified civil service.

The employes of the department of commerce performing service under the public utilities commission are in general, for the purposes of the civil service law, regarded simply as employes of the department of commerce. The authority of the public utilities commission to designate two secretaries, assistant or clerks and one personal stenographer as exempt from the classified service can be exercised only with respect to such employes as the governor shall determine shall be fully subject to the appointing authority of the utilities commission.

All other employes in the department of commerce for whose positions it is practicable to determine merit and fitness by competitive examination are within the classified civil service of the state.

COLUMBUS, OHIO, August 24, 1921.

Department of Commerce, HON. W. H. PHIPPS, *Director, Columbus, Ohio .*

DEAR SIR:—Your letter of recent date requests the advice of this department, as follows: