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TAX — TELEGRAPH COMPANY, DOING BUSINESS IN OHIO AFTER JUNE 30 — SUBJECT TO TAX "IN THE NATURE OF AN EXCISE TAX, FOR THE PRIVILEGE OF CARRYING ON ITS INTRASTATE BUSINESS" — TAX COMPUTED UPON AMOUNT OF GROSS RECEIPTS RECEIVED DURING PRECEDING YEAR ENDING JUNE 30.

DUTY OF TAX COMMISSIONER TO DETERMINE AND COMPUTE SUCH RECEIPTS AND CERTIFY AMOUNT OF GROSS RECEIPTS TO AUDITOR OF STATE — "GROSS RECEIPTS TAX" — RATE SPECIFIED BY STATUTE — IF CORPORATION SUBSEQUENTLY CEASES TO ENGAGE IN BUSINESS IN OHIO IT IS NOT ENTITLED TO REFUND OR REMISSION OF TAX COMPUTED AND ASSESSED.

SYLLABUS

When a telegraph oompany is doing business in Ohio after the thirtieth day of June, it is subject to a tax "in the nature of an excise tax, for the privilege of carrying on its intra-state business" computed upon the amount of the gross receipts received by it during the preceding year ending on such June 30th and that it is the duty of the Tax Commissioner of Ohio to determine and compute such receipts and certify the amount of such gross receipts to the Auditor of State for the purpose of computing the "gross receipts tax" at the rate specified by statute and if the corporation subsequently, during the ensuing year, ceases to engage in business in the State of Ohio, it is not entitled to a refund or remission of any portion of the tax so computed and assessed.

Columbus, Ohio, March 28, 1944

Hon. William S. Evatt, Tax Commissioner
Columbus, Ohio

Dear Sir:

Your request for my opinion reads as follows:

"Your opinion is respectfully requested as to the method of computing the excise tax upon a telegraph company for any year beginning July 1 and ending June 30 of the following year, measured by such company's gross receipts for the previous year end-

ing June 30 when such company discontinues its business as a public utility in Ohio during the year for which such excise taxes are imposed.

Specifically, the property and assets of the Ohio Postal Telegraph-Cable Company were acquired by the Western Union Telegraph Company on October 7, 1943, on which date the Postal ceased operations in Ohio. The question arises as to whether or not the Postal is liable for an excise tax computed upon the entire gross receipts derived from doing a public utility business in Ohio during the period July 1, 1942 through June 30, 1943, or whether or not such company is liable for an excise tax computed upon a fraction of such gross receipts representing the portion of the year July 1, 1943 through October 7, 1943.

In this connection, your attention is directed to an opinion of one of your predecessors appearing in the Annual Report of the Attorney General for 1914, Vol. II, page 1697, the syllabus of which is as follows:

> 'An express company, which goes out of business on midnight of June 30th in a given year is not liable for excise taxes on the basis of its report of gross receipts for the year ending on that date.'

In the body of the opinion, perhaps by way of obiter, the then Attorney General said:

> 'I do not find it necessary, in answering the specific question, to determine when or as of what date the privilege starts, save to hold that it must be exercised after June 30th of a given year. That is to say, I do not find it necessary to determine whether, if the company had done business for a few days after June 30th, but had gone out of business on the date on which the report was required to be filed, viz., the first of August, it would have been liable for the tax. I incline, however, to the view, without officially stating it as such, that the division point is the thirtieth day of June; so that if a company continues in business after the thirtieth day of June it is exercising the privilege and is liable for the tax. In such a case the mere fact that after a few days have elapsed the company may go out of business does not change the result if the company had the privilege of doing business for a year or indefinitely in the future, and asserted that privilege by doing some business after the division date; so that if of its own volition it abandoned the exercise of the privilege before the year elapsed, this would not detract from the value of the privilege.' "

Section 5485 of the General Code levies an excise tax against a

telegraph company "for the privilege of carrying on its intra-state business" in the amount of three per cent of its gross receipts as determined by the Tax Commissioner, but in no case less than ten dollars. Section 1 of House Bill No. 172, as enacted by the General Assembly on April 9, 1941 (119 O. L. 59) as amended in Section 1 of House Bill No. 196 of the present General Assembly, levies an additional excise tax of .65% on such gross receipts until April 30, 1945.

Section 5475 of the General Code provides that on the first Monday of September of each year the Tax Commissioner shall ascertain and determine the gross receipts of each telegraph company *for the year next preceding the 30th day of June* from intra-state business. Section 5476 of the General Code provides that the amount so to be determined and ascertained by the Tax Commissioner in each instance shall be the gross receipts of the telegraph company for the business done within the state for *such* year.

Section 5417 of the General Code defines the term "gross receipts" for the purposes of such determination and for the purpose of such tax levy. Such section reads:

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

Section 5481 of the General Code provides that on the *First Monday of October* the Tax Commissioner shall certify the amount of such gross receipts so determined to the Auditor of State "for the year covered by its annual report". The "annual report" therein referred to is that report required to be filed by Section 5470 of the General Code on or before the first day of August which must set forth, in addition to the information specified in Section 5471 of the General Code as to the nature of the corporation or taxpayer, "the entire gross receipts, including

all sums earned or charged, whether actually received or not, for the year ending the thirtieth day of June, from whatever source derived, whether messages, telephone tolls, rentals, or otherwise, for business done within this state, 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 excluding therefrom all receipts derived wholly from the interstate business or business done for the federal government. Such statement shall also contain the total gross receipts of such company, for such period, from business done within this state." (See Section 5473-1 of the General Code.)

Section 5485 of the General Code then requires the Auditor of State to charge the sums above described, to-wit: the three per cent and the .65 of one per cent.

Section 5488 of the General Code requires that the Auditor immediately certify such charge to the Treasurer of State who, upon receipt of such certification, must bill the telegraph company for the amounts so certified to him.

From your inquiry I must assume that the company about which you inquire filed its return on or before the first day of August, 1943, setting forth its gross receipts received during the year ending on the 30th day of June, 1943 as required by Section 5470 of the General Code. You do not raise the question as to whether if the corporation had continued in business during the year from July 1, 1943 to June 30, 1944, it would have been your duty, on or before October 1, 1943, to have certified to the Auditor of State the amount of such gross receipts so returned. Your sole inquiry is as to whether, by reason of the fact that the company ceased to do business on October 7, 1943, it was not entitled to remission of a portion of the tax so determined.

The first question that arises by virtue of your inquiry is as to whether it is within the power of the Tax Commissioner to alter his determination after October 1, 1943, the date on which you are required to certify the same to the Auditor of State.

We must keep in mind that public officials have such powers and such only as have been specifically granted to them by statute and such additional implied powers as will enable them to perform the duties

specifically imposed upon them and that when the General Assembly grants a power to do a thing in a particular manner, such designation of manner is likewise a limitation upon the manner of exercising the power and it may be exercised in no other manner. Frisbee Company v. East Cleveland, 98 O. S. 266; Anderson v. P. W. Madsen Investment Co., 72 Fed. (2nd) 768; Botany Worsted Mills v. United States, 278 U. S. 282. I must, therefore, assume that the Tax Commissioner made the certification which he was required to certify to the Auditor of State on October 1, 1943 and examine the statutes to see whether any power has been granted to him to amend or correct his determination as to the amount of gross receipts after such certification.

Section 5480 of the General Code authorizes the Tax Commissioner to amend or correct the determination of the amount of gross receipts of a telegraph company made by him either upon the application of the taxpayer or upon his own motion at any time between the first Monday in September and the first day of October. Such section reads:

> "Between the dates herein fixed for the determination of the amount of the gross receipts or earnings of any such public utility, and the dates herein fixed for the certification to the auditor of state of such amount, as provided in this act, the commission may, on the application of any person or company interested, or on its own motion, review and correct its findings."

In the case of State of Ohio v. The Buckeye Pipe Line Company, 14 O. N. P. (N. S.) 401, the court of Common Pleas of Franklin County had before it the question of whether the predecessor of the Tax Commission had jurisdiction to alter its determination of gross receipts after certification to the Auditor of State. Such court held as stated in the first paragraph of the syllabus that:

> "The state board of appraisers and assessors having once made a determination as to the amount of gross receipts of a corporation subject to the excise tax, which amount has been certified to the state auditor and the tax levied thereon and paid, is without jurisdiction to thereafter reopen the matter and make a new and different determination as to the amount of the receipts of such corporation subject to the excise tax."

Judge Bigger supports his conclusion by many citations of authority and observed on page 410 that:

> "* * * It is a well established principle of law upon the subject of the right of taxing officers and boards to amend and correct an assessment after it has been made and placed in the hands of the officer charged with its collection that they are without power or authority to do so, unless such power is expressly conferred by statute. * * *"

Since you do not state that an application was filed prior to October 1, 1943, I must assume that such was not the fact. In Section 5517 of the General Code the General Assembly has authorized a telegraph company to have a review and redetermination of the determination made by the Tax Commissioner of the amount of such gross receipts if application is made therefor within thirty days after the Treasurer of State has mailed to it his bill for the "gross receipts tax" as required by Section 5488 of the General Code. Section 5517 of the General Code provides that:

> "* * * Upon such hearing, the commissioner may make such correction in his determination, finding or order, as he may deem proper, and his decision in the matter shall be final subject to appeal as provided in section 5611 of the General Code. Such correction shall be certified to the proper official, who shall correct his records and duplicates in accordance therewith. In case any such public utility has paid the tax assessed against it under mistake, and such mistake is corrected by the tax commissioner, upon application so filed, or pursuant to a decision of the board of tax appeals or of any court to which such decision may have been appealed, so that the amount due from such public utility, under such corrected determination, finding or order, is less than the amount of the taxes paid and if such payment has been made to the county treasurer of the proper county the county auditor shall upon certificate of such correction, as herein provided, draw his warrant on the treasurer, in favor of the public utility for the amount so erroneously paid by it. * * *"

In view of the date of your inquiry I assume that the matter is now before you on an application for review and redetermination under authority of Section 5517 of the General Code; otherwise, the matter appears to be beyond your jurisdiction. It is to be observed that such section authorizes the Tax Commissioner to make corrections in the determinations formerly made by him. The ordinary connotation of the term "correct" is to make right or to alter in such manner as to make the determination comply with the requirements of law. If, then, under the requirements of Section 5473-1 of the General Code, the Tax

Commissioner correctly determined the amount of gross receipts of the company "for the year ending the thirtieth day of June" and under authority of Section 5481 of the General Code certified such amount to the Auditor of State, it would seem that Section 5517 of the General Code grants to the Tax Commissioner no authority to correct a determination which is already correct in amount and in conformity with the mandate of the statute. Such Section 5517 of the General Code grants to the Tax Commissioner no authority to make any alteration in his determination other than to correct the same. If his determination in the first instance fully complies with the statute, it is difficult to perceive how the language of Section 5517 of the General Code now grants to him the authority to alter such determination.

In Section 1464-3, sub-paragraph 2 of the General Code the Tax Commissioner is granted certain authority to remit or refund certain taxes. Such statute, in so far as material to your inquiry, reads:

> "All other powers, duties and functions of the department of taxation, other than those mentioned in sections 1464-1 and 1464-2 of the General Code, are hereby vested in and assigned to, and shall be performed by the tax commissioner, which powers, duties and functions shall include, but shall not be limited to the following powers, duties and functions: * * *
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> 2. To exercise the authority provided by law relative to remitting or refunding taxes or assessments, including penalties and interest thereon, illegally or erroneously assessed or collected, or for any other reason overpaid except as provided in paragraph 9, section 1464-1 of the General Code; and, in addition to the authority so provided by law, the tax commissioner shall have authority as follows: On written application of any person, firm or corporation claiming to have overpaid to the treasurer of state, at any time within five years prior to the making of such application but not prior to January 1, 1938, any tax payable under any law which the department of taxation is required to administer, or on his own motion, to investigate the facts and to make, in triplicate, a written statement of his findings; and, if he shall find that there has been an overpayment, issue, in triplicate, a certificate of abatement, payable to the taxpayer or his or its assigns or legal representatives and showing the amount of the overpayment and the kind of tax overpaid. * * *"

The "authority provided by law" referred to in such section is that contained in Section 5624-10 of the General Code, which, in so far as material to your inquiry, reads:

> "The tax commission of Ohio may remit taxes and penalties thereon, found by it to have been illegally assessed, and such penalties as have accrued or may accrue, in consequence of the negligence or error of an officer required to perform a duty relating to the assessment of property for taxation, or the levy or collection of taxes. * * *"

It is to be observed that the power contained in such Section 5624-10 is limited to taxes and penalties illegally assessed or accrued in consequence of negligence or error of an officer in the performance of his duty. Section 1464-3 of the General Code further gives to the Tax Commissioner, on his own motion, authority to abate or refund overpayment when such overpaid taxes are illegally exacted. From the facts stated in your inquiry, it is difficult to find any error or negligence on the part of the tax commissioner when he has determined as provided by law the exact amount of gross receipts which had been received by the company during the preceding year ending on the thirtieth day of June 1943. It can hardly be said that the Tax Commissioner is in error or has been negligent when he made his computation exactly in conformity with the provisions of statute. It would, therefore, appear that unless under authority of Section 1464-3 of the General Code the tax is found to have been illegally assessed, the Tax commissioner has no authority to make any alteration in the determination of the amount of gross receipts of the company made by him on October 1, 1943.

Was there any illegality in the determination by the Tax Commissioner? As I have above pointed out, your letter suggests that the determination of the Tax Commissioner on October 1, 1943 was strictly in conformity with the provisions of statute and that such determination would concededly have been correct and the tax assessed pursuant to such determination would have been in strict compliance with the law. Your own inquiry then is as to whether the fact that the telegraph company ceased to engage in business in the State of Ohio on October 7, 1943 has the effect of rendering the determination and assessment theretofore made illegal.

As we have pointed out above, there could be no illegality in the assessment of the tax in question unless it be by reason of the fact that the state did not have the power to collect the tax by reason of the fact that the company ceased to do business on October 7, 1943. It has

been repeatedly held that an excise tax for the privilege of doing business may be measured by the gross receipts of the taxpayer from business done either during the current year or during the preceding year. See National Leather Company v. Massachusetts, 276 U. S. 413, 423; Main v. Grand Trunk Railway Co., 142 U. S. 217; Aluminum Company of America v. Evatt, 140 O. S. 385. Such is true even though the taxpayer is a foreign corporation if such measure is limited to the gross receipts from intra-state business or business done within the state exacting the tax. See same cases.

It is self-evident that if the tax assessed in 1943 was for the privilege of doing business during the preceding year ending on June 30, 1943 there could be no possible illegality in the exaction of the tax since the measure of the tax was the business done during the same period. In the opinion of one of my predecessors in office, rendered under date of December 31, 1914 (Opinions of the Attorney General for 1914, Vol. 11, page 1697), the nature of the tax in question was considered. The type of utility under consideration in that opinion was an express company against which a tax is levied by reason of the same sections as are now under consideration with respect to a telegraph company.

On page 1699 of such opinion that Attorney General observed:

> "The fact that a privilege tax assumes the form of an excise rather than a license does not change its fundamental nature. The effect is the same. Ordinarily a license fee is exacted as a condition precedent to the doing of the thing in the future, but this is not necessarily the case. It may be conceded that the privilege may be taxed after its exercise if the law will bear that interpretation, or that the privilege may be valued and taxed as a thing in being on a certain day, subject to indefinite prolongation rather than as the privilege of doing the thing contemplated for any definite period of time, as a year."

After analyzing the statute and tracing the history of the sections under consideration the then Attorney General came to the conclusion that the excise tax under consideration was exacted for the *privilege* of engaging in business during the year commencing July 1st of the year in which the return was filed. On page 1702 of such opinion the then Attorney General made the following observation:

> "* * * I do not find it necessary to determine whether, if

> the company had done business for a few days after June 30th, but had gone out of business on the date on which the report was required to be filed, viz., the first of August, it would have been liable for the tax. I incline, however, to the view without officially stating it as such, that the division point is the thirtieth day of June; so that if a company continues in business after the thirtieth day of June it is exercising the privilege and is liable for the tax. In such a case the mere fact that after a few days have elapsed the company may go out of business does not change the result if the company had the privilege of doing business for a year or indefinitely in the future, and asserted that privilege by doing some business after the division date; so that if of its own volition it abandoned the exercise of the privilege before the year elapsed, this would not detract from the value of the privilege."

For the purposes of this opinion it is not necessary to decide whether such Attorney General was correct in his deduction that the tax in question is imposed with respect to the year commencing July 1st of the year in which the report is filed for the reason that the tax in question is one on the privilege of engaging in business during the year and is in no sense measured by the quantum of business done during such period. Upon the filing of the report and the payment of the tax the corporation acquires the privilege of engaging in the business of a telegraph company within the State of Ohio during the ensuing year. For that privilege it is required to pay the percentages above mentioned, computed against the gross receipts of the preceding year. It is immaterial, under the terms of the act, whether it engages in any business whatever during such period. If it does not elect to engage in business to the same extent that it did during the preceding year, the cost of the privilege was the percentage of the preceding year's business.

The correctness of such proposition is illustrated by the fact that if a corporation enters into the business of a telegraph company at any time after the thirtieth day of June of any one year it is entitled to the privilege of engaging in the business during the period following until the thirtieth day of the following June, without having made any payment whatsoever for the privilege of thus engaging in business. If it commenced to do business in the state at some time prior to the thirtieth day of June, its tax would nevertheless be based upon the gross receipts received during that part of the year prior to June 30th. It is thus to be seen that the tax in question is one upon the privilege of engaging in business and not upon the doing of the business; that is, if the Ohio

act authorized the corporation to engage in business for a period of time and then exacted a tax for the doing of business within such period measured by the gross receipts received during such period, it would necessarily follow that if the corporation ceased to do business during the year no assessment could be made with respect to that part of the year in which it did not engage in business.

It would, therefore, seem that it is immaterial whether we regard the tax in question as an excise tax, using the term in its broadest sense, or as a privilege tax for, in either case, the tax becomes due upon the filing of the report and the making of the determination by the Tax Commissioner. It does not seem to me that the situation is dissimilar from those provisions levying a tax on real property. Section 5671 of the General Code fixes the tax lien date as the day preceding the second Monday in April. Section 5605 requires that the Auditor, on or before the second Monday in June, lay before the board of revision a list of all of the taxable property within the county valued at its true value in money. The board of revision is then required to determine whether the property listed by the Auditor has been listed at its true value in money and when such determination has been made and approved by the Board of Tax Appeals, on October 1st the county auditor assesses such property with respect to ownership by applying thereto the tax rate computed by him as allowed by the budget commission. With respect to real estate taxes, it should be observed that Section 2591 of the General Code authorizes the county auditor to amend the valuation at any time prior to October 1st by deducting therefrom the value of any property destroyed between the commencement of the second Monday in April and October 1st. No similar provision is contained in the public utility gross receipts tax authorizing the deduction of any amount after the Tax Commissioner has made his determination.

In the memorandum submitted along with your inquiry it is suggested that the case of People, ex rel. Mutual Trust Co. v. Miller, 177 N. Y. 52, is inconsistent with the view herein above expressed. In that case the court had before it a law wherein the State of New York levied a tax with respect to the year in which the corporation engaged in business, measured by the capital employed during such period. Under the facts recited in such opinion the corporation in question was created on the 24th day of December and engaged in business only

during the remaining six days of the year. The assessing officials assessed a tax for the privilege of engaging in business during the year of creation at the same rate as would have been exacted had the corporation been authorized to do business during the entire year. The court held that inasmuch as the General Assembly had not created the corporation until the 24th day of December, it was unreasonable to so construe the law as to require it to pay for a privilege which it did not obtain until after all of the year, with the exception of six days, had expired. In that case it should be observed that the tax was not measured by the gross receipts and was the converse of the present case in which the taxpayer, at the time of the filing of the return, acquired the privilege of engaging in business for another year if it sought to use the same, which tax, under the Ohio law, is measured by the business done during the preceding year.

In the opinion of the Mutual Trust Company case there is dictum which would indicate that in the mind of the judge writing the opinion under the then existing law of New York, which is not similar to the Ohio law, a proportionate tax only would be exacted; that is, the amount of capital employed in business should be divided by the number of days during which the company engaged in business. My examination of the Ohio statutes fails to disclose any provision authorizing the Tax Commissioner, or any board or court, to make such adjustment and I am unable to find anything contained in the Ohio statutes which would indicate any illegality in the assessment in question. If it is the contention of the taxpayer that the statute in question is unconstitutional, such question is a matter which must be passed upon by the courts rather than by an administrative official whose duty it is to assume that all acts of the Legislature are constitutional.

Specifically answering your inquiry, it is my opinion that when a telegraph company is doing business in Ohio after the thirtieth day of June, it is subject to a tax "in the nature of an excise tax, for the privilege of carrying on its intra-state business" computed upon the amount of the gross receipts received by it during the preceding year ending on such June 30th and that it is the duty of the Tax Commissioner of Ohio to determine and compute such receipts and certify the amount of such gross receipts to the Auditor of State for the purpose of computing the "gross receipts tax" at the rate specified by statute and if the corporation

subsequently, during the ensuing year, ceases to engage in business in the State of Ohio, it is not entitled to a refund or remission of any portion of the tax so computed and assessed.

Respectfully,

THOMAS J. HERBERT

Attorney General