

742.

APPROVAL, FINAL RESOLUTION FOR ROAD IMPROVEMENT ON I. C.
H. No. 339, COSHOCTON COUNTY.

COLUMBUS, OHIO, July 15, 1927.

HON. GEORGE F. SCHLESINGER, *Director, Department of Highways & Public Works,*
Columbus, Ohio.

743.

EXCISE TAX—FREIGHT LINES AND EQUIPMENT COMPANIES NOT
SUBJECT TO GENERAL EXCISE TAX PROVIDED FOR BY SECTIONS
5470, ET SEQ., GENERAL CODE—ARE SUBJECT TO SECTIONS 5462,
ET SEQ., GENERAL CODE.

SYLLABUS:

Freight line and equipment companies are not subject to the general excise tax upon public utilities provided for by Sections 5470, et seq., of the General Code, but are subject to the specific excise tax upon those types of companies imposed by Sections 5462, et seq., of the General Code and the general franchise tax upon corporations levied under the provisions of Sections 5495, et seq., of the General Code.

COLUMBUS, OHIO, July 19, 1927.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN—This will acknowledge your recent communication as follows:

“There are a number of corporations which have been reporting to the commission as freight line and equipment companies under Sections 5462 et seq. of the General Code and which at the same time have been reporting and paying franchise taxes under the Dempsey Act as private corporations. Instead of reporting under the Dempsey Act, should they not have been required to report and pay an excise tax under Section 5470 et seq. as public utilities?”

All corporations are required to pay the franchise tax by the provisions of Sections 5495, et seq., of the General Code, which you refer to as the Dempsey Act. There are, however, exceptions to that act which are found in Section 5505 of the General Code in the following language:

“An incorporated company, whether foreign or domestic, owning and operating a public utility in this state, and as such required by law to file reports to the tax commission and to pay an excise tax upon its gross receipts or gross earnings as provided in this act, and insurance, fraternal,

beneficial, building and loan, bond investment and other corporations, required by law to file annual reports with the superintendent of insurance, shall not be subject to the provisions of sections one to five inclusive of this act (G. C. Secs. 5495 to 5499)."

It follows, therefore, that unless a freight line or equipment company is required by law to pay a tax based upon its gross receipts or gross earnings, it must pay the ordinary franchise tax provided in Sections 5495, et seq., of the General Code.

These types of companies are classified as public utilities by Section 5415 of the General Code. That section is in the following language:

"The term 'public utility' as used in this act means and embraces each corporation, company, firm, individual and association, their lessees, trustees, or receivers elected or appointed by any authority whatsoever, and herein referred to as express company, telephone company, telegraph company, sleeping car company, freight line company, equipment company, electric light company, gas company, natural gas company, pipe line company, waterworks company, messenger company, signal company, messenger or signal company, union depot company, water transportation company, heating company, cooling company, street railroad company, railroad company, suburban railroad company, and interurban railroad company, and such term 'public utility' shall include any plant or property owned or operated, or both, by any such companies, corporations, firms, individuals or associations."

By the terms of Sections 5470, et seq., of the General Code there is an apparent effort to levy an excise tax upon all public utilities. Making use of the definition of a public utility found in Section 5415, just quoted, it becomes apparent that the provisions of Section 5470 would be applicable to freight line and equipment companies. That section is as follows:

"Each public utility except street, suburban and interurban railroad and railroad companies, doing business in this state, shall, annually, on or before the first day of August, and each street, suburban and interurban railroad and railroad company, shall, annually, on or before the first day of September, under the oath of the person constituting such company, if a person, or under the oath of the president, secretary, treasurer, superintendent or chief officer in this state, of such association or corporation, if an association or corporation, make and file with the commission a statement in such form as the commission may prescribe."

The succeeding section defines what shall be included in general in the statement and the next three sections provide for the filing of additional specific information as to certain kinds of utilities. Nowhere, however, in these specific sections are freight line or equipment companies mentioned. Section 5474 of the General Code is, however, a general section applicable to all utilities except railroads, street, interurban and suburban railroads and express, telegraph and telephone companies (these being the specific utilities referred to in Section 5373), and it is provided that all these other utilities shall make a statement showing the gross receipts.

I have no difficulty in concluding that the kinds of companies that you mention are required to file a statement showing their gross receipts. When, however, investigation is made of the succeeding sections, the conclusion must be reached that the legislature has entirely failed to include these companies within the remaining provisions relative to the imposition of the excise tax. Thus, Section 5475 provides for

the determination of the gross receipts of electric light, gas, natural gas, pipe line, waterworks, messenger or signal, union depot, heating, cooling and water transportation companies.

Section 5477 similarly applies to railroad companies, and Section 5478 is solely applicable to street, suburban and interurban railroad companies. There is accordingly entirely lacking any authority for determining the gross receipts or earnings of freight line and equipment companies. This is, of course, one of the necessary prerequisites to the determination of the amount of a tax based upon gross receipts or earnings.

The actual charging of the tax is done under authority of Sections 5483 and 5484 of the General Code, and neither one includes freight line or equipment companies.

You are, of course, familiar with the principle that there must be specific authority conferred for the imposition of a tax. I know of no tenable theory on which the imposition of the ordinary excise tax based upon gross earnings or receipts can be held to be applicable to freight line or equipment companies. While as I have pointed out, the sections of law applicable to the filing of the reports upon which the tax is based apparently are broad enough to include these types, yet the succeeding sections relative to determination of value and the actual charging of the tax refer to specific kinds of utilities without mentioning freight line or equipment companies, and without any general words which might be construed as all comprehensive in so far as public utilities are concerned. Under the familiar doctrine of *expressio unius exclusio alterius est* the conclusion must be reached that these companies are not subject to the general excise tax.

This conclusion is strengthened further by the fact that Sections 5462, et seq., of the General Code make specific provision for the imposition of a special excise tax upon sleeping car, freight line and equipment companies. This tax, however, is based upon the proportion of the capital stock of these companies represented by capital and property owned and used within this state.

By the terms of Section 5468 of the General Code the excise tax is charged against these kinds of companies based upon the proportion of the capital stock as determined in accordance with the provisions of the preceding section.

It is quite apparent that there was an obvious reason for the omission of sleeping car, freight line and equipment companies from the general excise tax in view of the specific excise tax assessed under the provisions of Sections 5462, et seq., of the General Code.

The specific tax payable by these companies is not based upon gross receipts and earnings, but upon a proportion of the capital stock represented by property owned and business done within the state. It therefore follows that these companies are not within the terms of the exemption found in Section 5503 of the General Code heretofore quoted.

You are therefore advised that freight line and equipment companies are not subject to the general excise tax upon public utilities provided for by Sections 5470, et seq., of the General Code, but are subject to the specific excise tax upon those types of companies imposed by Sections 5462, et seq., of the General Code and the general franchise tax upon corporations levied under the provisions of Sections 5495, et seq., of the General Code.

Respectfully,
EDWRD C. TURNER,
Attorney General.