1313.

APPROVAL, ABSTRACT OF TITLE TO LAND OF ADDIE SELLER IN GILEAD TOWNSHIP, MORROW COUNTY, OHIO.

COLUMBUS, OHIO, December 19, 1929.

HON. JOHN W. THOMPSON, *Commissioner, Division of Conservation, Columbus, Ohio.*

DEAR SIR:—You have submitted for my examination, an abstract of title covering approximately 18.5 acres of land in Gilead township, Morrow county, Ohio, which you propose to purchase for the sum of $2,500.00 from Addie Seller, which property is more particularly described as follows:

> "Situated in the Township of Gilead, County of Morrow and State of Ohio, and known as being two (2) acres in the Northwest quarter and sixteen and three-fourths (16¾) acres in the Northeast quarter of section One (1) Township Thirteen (13) and Range Twenty-one (21):
>
> Commencing at the Southeast corner of land formerly owned by Thomas N. Duncan, now owned by W. S. Shaffer, south of the mill race belonging to House Milling Company, in said northwest quarter and in the center of Mt. Vernon and Sandusky State Road; thence southeasterly along the center of said northeast quarter now owned by A. B. Comins; thence northerly with the said Comins west line to the high watermark of the Dam, belonging to the said House Milling Company; thence westerly with the high water-mark of said Dam and Mill Race to the east line of lands formerly owned by Thomas E. Duncan, south of said Mill race; thence south with said Duncan's east line to the place of beginning, containing in all Eighteen and three-fourths (18¾) acres of land, be the same more or less but subject to all legal highways, and being the same premises as that conveyed to L. H. Breese & W. E. Breese by deed dated January 28th, 1904, from W. W. Rowlinson and wife."

The abstract of title under consideration was prepared by P. H. Wieland, attorney at law, Cardington, Ohio, under date of November 29, 1929, and I am of the opinion that same shows a good merchantable title to said premises in Addie Zeller on said date, subject to taxes for the year 1929, which are a lien upon the premises.

Respectfully,
GILBERT BETTMAN,
Attorney General.

1314.

EXCISE TAX—WHEN RENTALS RECEIVED BY RAILROAD COMPANY FROM LEASE OF ITS REALTY REPORTED AS GROSS EARNINGS—MONEYS PAID TO SUCH COMPANY BY EXPRESS COMPANY ACTING AS ITS AGENT INCLUDED IN ANNUAL STATEMENT.

SYLLABUS:

1. *Rentals received by a railroad company from the lease of real estate owned by it but not used in operation are not required to be reported by such railroad company as gross earnings under Sections* 5418 *and* 5472, *General Code, unless the railroad company retains some control and management of such real estate after leasing the same.*

2. *Under the provisions of Section 5472, General Code, a railroad company is required to include in its annual statement of gross earnings moneys paid over to it by Railway Express Agency, Inc., pursuant to the terms and provisions of the agreement effective March 1, 1929, between said railroad company and Railway Express Agency, Inc., by which the railroad company designated and appointed the express company its agent for the conduct and transaction of the express transportation business over the lines of such railroad company, and to pay an excise tax thereon at the rate prescribed by law, and such duty upon the part of such railroad company is in nowise affected by the fact that Railway Express Agency, Inc., has reported as gross receipts in the statement provided for by Section 5473-1, General Code, all of the moneys received by it in the conduct of such express transportation business over such railroad company, including said moneys paid over by it to the railroad company under such contract.*

COLUMBUS, OHIO, December 19, 1929.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—There was recently held before your Commission a hearing upon the application of the Pennsylvania Railroad Company in which two questions were presented for consideration, both of which have been submitted to me for opinion.

The first question presented is whether the railroad company is required to include in its annual statement of gross earnings rentals received by the company from real estate within the state of Ohio, not used in the operation of its railroad or in the transaction of its transportation business in said state. The real estate to which this question refers is, I assume, such as is subject to local assessment, and not such as is required to be included in the statement of the property of the railroad company for the purpose of assessment by said commission under the unit rule of assessment provided for in Sections 5420, et seq., General Code.

The question here presented is one relating to excise taxes. Such taxes are based upon the gross earnings of the railroad company as such term is defined by Section 5418, General Code. This section reads as follows:

> "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 associations, 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."

For the purpose of enabling the Tax Commission to determine the gross earnings of a railroad company for excise tax purposes, said company is required to file annually the statement provided for by Section 5472, General Code, which provides as follows:

> "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, and excluding also all earnings derived from the business of carrying and transporting persons or property, or both, as a common carrier for hire in motor propelled vehicles not operated

or driven on fixed rails or track. Such statement shall a'so contain the total gross earnings of such company for such period in this state from business done within this state."

Touching the question here presented, it is noted that this department in an opinion directed to the Tax Commission of Ohio, under date of June 22, 1920, (Opinions of the Attorney General for 1920, Vol. I, page 683, 691) upon consideration of the pertinent provisions of Sections 5418 and 5472, General Code, above quoted, said:

"Looking at the sections it is clear that the following are requisites of the sums that they 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."

Conformable to the principle of construction above noted, it was held in said opinion that rentals from real estate owned by railroad companies but not used in operation do not constitute "gross earnings," if the railroad companies do not retain control and management of such real estate. The opinion above referred to followed a former opinion of the Attorney General directed to the then Auditor of State under date of March 17, 1916, (Opinions of the Attorney General for 1916, Vol. I, page 498). In this opinion it was held that a railroad company was not liable for excise taxes on that part of receipts or earnings received by it as rentals from real property which had been acquired as a right of way, but which had not been used as such, and had been leased so as to produce such rentals. In this opinion it was said:

"The company acquired for right of way purposes in the city of Cincinnati certain tracts of real estate, some of which it purchased and some of which it leased. The sole purpose of the company in making these acquisitions was to procure land on which to build tracks and perhaps other terminal facilities. The purpose of the company failed of achievement because of the fact that it was unable to complete the acquisition of the real estate necessary for its right of way. The real estate being on its hands, in the meantime the company leased that which it had purchased and subleased that which it had originally leased. Assurance is given by the company to the effect that such leasing was solely for the purpose of making the property for the time as productive as possible, and that as a matter of fact no real profit accrued to the company as a result of the transaction. Moreover, the company does not conduct any managerial or strict business activity with respect to the property so owned or controlled by it. The rentals which the company receives constitute the 'earnings' upon which the tax has been computed.

I am of the opinion, for the following reasons, that this claim is not collectible:

In the first place, I am convinced that under the facts as stated the company does not appear in these transactions as 'doing business.' It is

clear, of course, that the receipts are from a source other than the operation of a utility or anything incidental thereto."

After quoting the provisions of Section 5418, General Code, above referred to, the Attorney General in this opinion further said:

"While this section undoubtedly has the effect of enlarging the liability of incorporated public utilities in so far as it has proper application, yet it is not broad enough in its scope to include every species of income which such a company may receive in the exercise of its corporate powers, but only that which arises from 'business done.'

It is the understanding of this department that the Supreme Court observed this distinction in arriving at its decision in the recently decided, but unreported, case of *Ohio Traction Company* vs. *The State*, 92 O. S. 529, in which it was held that receipts or earnings from mere passive investments, not attributable in any way to business management and operation, are not within the scope of the statute.

From the facts as stated it appears that the property is not being used for the business purposes for which it was acquired by the company, nor indeed for any other business purpose whatsoever, but that the company is acting with respect to it as a mere owner rather than in a business way.

I am impelled by the foregoing considerations to the conclusion that the charge against the Louisville & Nashville Railroad Company is not collectible. It should, therefore, be cancelled."

On the other hand it is noted that in the case of the *Ohio Traction Company* vs. *The State of Ohio*, 92 O. S. 529, referred to in the former opinion of this department above quoted, the Supreme Court by affirming the judgment of the Court of Appeals of Franklin County, as modified by it, held that said company was required to include in its statement of gross earnings for excise tax purposes, rentals received by said company from an office building owned and managed by said company.

I do not feel that I am justified in departing from the former ruling of this department with respect to the construction to be placed upon the provisions of Sections 5418 and 5472, General Code, with respect to the question here presented; and I am accordingly of the opinion that the only rentals received by the Pennsylvania Railroad Company from real estate owned by it but which is not used in the operation of said railroad, which said company is required to include in its statement of gross earnings, are such rentals as it may have received from property controlled and managed by said company; and that said company is not required to report rentals received by it from property leased by said company where no control or management of the same is retained.

The second question here presented is whether the Pennsylvania Railroad Company is required to include in its annual statement of gross earnings, moneys paid over to it by Railway Express Agency, incorporated, in accordance with the terms and provisions of the agreement effective March 1, 1929, between Railway Express Agency, Inc., and the railroad company, by which the railroad company designated and appointed the express company its agent for the conduct and transaction of the express transportation business over the lines of said railroad company.

In the consideration of this question it is to be noted that Railway Express Agency, Inc., as an express company and public utility is likewise required to pay excise taxes for the privilege of transacting its business in this state. Excise taxes paid by an express company are based upon the gross receipts of the company as that term is defined by the provisions of Section 5417, General Code. This section reads as follows:

"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, co-partnerships 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."

As a predicate to the determination of the gross receipts of an express company, and for the purpose of enabling the Tax Commission to make such determination, such express company is required to file with the Tax Commission the statement provided for by Section 5470, General Code, and also that provided by Section 5473-1, General Code. The provisions of Section 5473-1, so far as they pertain to express companies, are as follows:

"In the case of express companies, such statement shall also contain the entire receipts including all sums earned or charged, whether actually received or not, from whatever source derived, for business done within this state, for the year ending the thirtieth day of June, for and on account of such company, 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 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."

In the determination of the question here presented, it will be pertinent to consider the essential provisions of the agreement between the Pennsylvania Railroad Company and Railway Express Agency, Inc., under which the express company conducted and transacted express transportation business over the lines of said Railroad Company during the period of time for which reports are required to be filed by said public utilities under Sections 5472 and 5473-1, respectively, of the General Code.

The provisions of said agreement, insofar as they exhibit the nature and essential requirements of the contract between said public utilities, are fairly stated in the able and comprehensive brief submitted by counsel for the Pennsylvania Railroad Company as follows:

"In this agreement it is recited that the Railroad Company:

'has united with other carriers operating railroads in the continental United States to acquire through their own express agency the properties of the American Railway Express Company employed in the express business, and to conduct through such express agency the future operations of the express business;'

It is further recited that 'the Express Company has been organized as the joint express agency or facility of the Rail Company, and other carriers uniting as aforesaid, all of which have undertaken to enter into agreements with the Express Company identical herewith.' (Express Agreement, page 2).

By the Express Agreement the Railroad Company expressly constitutes and appoints Railway Express Agency, Inc., its exclusive agent:

'(a) for the conduct and transaction of the express transportation business, including the off line auxiliary service (commonly known and referred to as pick-up and delivery), upon such passenger, express or mail trains of the Rail Company as may be agreed to, over the main lines, branches and extensions of all railroads now or hereafter, during the continuance of this agreement, owned or leased, and operated by the Rail Company, and (b) for the collection and disbursement and/or division under this agreement of all revenues accruing under this agreement; but nevertheless subject to the conditions and limitations in this agreement contained.' (Express Agreement, Article II, Section 1.)

Classifications, tariffs and other rules or regulations relating to the transportation of express matter required or permitted to be filed with the Interstate Commerce Commission or other public body may be filed by Railway Express Agency, Inc., on its own behalf, and/or on behalf of the Railroad Company, and the Railroad Company 'constitutes the Express Company its true and lawful agent for the purpose of filing with the Interstate Commerce Commission and any other proper public body, domestic or foreign, all necessary classifications, tariffs and other rules or regulations relating to the transportation of express matter.' (Express Agreement, Article II, Section 1.)

It thus appears that the Railroad Company united with other carriers to acquire through their own agency the properties of the American Railway Express Company, theretofore employed by it in the express business, and thereafter to conduct through their own agency the future operations of the express business. The agency created to accomplish and carry out the purposes stated is the Railway Express Agency, Inc., which has been organized as the joint agency of the Railroad Company, and of the other carriers, uniting for such purposes, each of which undertook to enter into an agreement with Railway Express Agency, Inc., identical with the agreement between The Pennsylvania Railroad Company and Railway Express Agency, Inc.—Express Agreement—by which the Railroad Company has expressly appointed and constituted Railway Express Agency, Inc., its exclusive agent to conduct and transact the express transportation business in the manner provided for in such agreement over all of the main lines, branches and extensions of all railroads now or hereafter, during the continuance of the Agreement, owned or leased and operated by the Railroad Company, and as such exclusive agent to collect, disburse and account for all revenues accruing under the agreement, in the manner therein provided for.

The agreement makes ample provision for the manner in which Railway Express Agency, Inc., as the agent of the Railroad Company, shall conduct the express transportation business for the Railroad Company. The agreement also makes ample provision for the collection, disbursement and accounting by Railway Express Agency, Inc., as such agent, of all revenues accruing from the conduct and operation by it of such express transportation business.

Article V of the Express Agreement, pages 10-19, provides in detail for ascertaining the revenues and income accruing from the operation of the express transportation business by Railway Express Agency, Inc.; the operating expenses and all other expenses to be deducted from the gross revenues, and the disposition and distribution of the balances remaining. By the provisions of Article V of the Agreement, the Agent, Railway Express Agency, Inc., collects the revenues accruing from express operations conducted under the Agreement, pays the expenses incurred by it in conducting such express

operations, including taxes, and after deducting such expenses, including taxes, distributes the balance remaining among the Railroad Company and other carriers who have executed the Express Agreement, in the manner therein provided, and pays to each its proportions of such balance. The effect of this is that The Pennsylvania Railroad Company receives from its agent, from time to time, payments which reflect the net revenue remaining after the operation by the agent of the express transportation business over the lines of railroad owned or leased and operated by the Railroad Company."

It quite clearly appears from the summary statement of the provisions of agreement here in question, that the same is an agency contract by which the Pennsylvania Railroad Company appoints and designates Railway Express Agency, Inc., its agent for the conduct and management of express transportation business over the lines of said Railroad Company with the duty of paying over to the Railroad Company all moneys received by the express company over and above the expenses incurred by it in the conduct of the business over the lines of said Railroad Company. In this situation, the question is suggested whether Railway Express Agency, Inc., as such designated agent, is required to include in its statement of gross receipts filed with the Tax Commission any moneys received by it in the conduct of said express transportation business over the lines of the Pennsylvania Railroad Company, except the amount of such receipts over and above what it is required to pay to the Railroad Company under said contract. See *State of Ohio* vs. *Coshocton Gas Co.*, 12 N. P. (N.S.), 570. In this case, it was held as stated in the headnote of the report of the case as follows:

"The words 'gross receipts' as used in the act providing for the collection from public utility corporations of an excise tax and penalties (101 O. L., 399) embraces only such receipts as are the property of the corporation making the payment, and do not include that part of the proceeds from a joint enterprise which have been collected and are still in hand but which belong to another."

This decision which was rendered by the Common Pleas Court of Franklin County (Rogers, J.), was affirmed by the Circuit Court of said county, and later, without opinion, by the Supreme Court in the case of *State of Ohio* vs. *Coshocton Gas Co.*, 88 O. S. 608. It is quite clear, however, that whatever may be the obligation of Railway Express Agency, Inc., with respect to the matter indicated by the question above suggested, the Pennsylvania Railroad Company, as the principal under the contract by which such express transportation business is conducted, is required to include in its statement of gross earnings all moneys paid by Railway Express Agency, Inc., under said contract; and this obligation of the Railroad Company to include in its statement of gross earnings moneys paid to it by the express company and to pay an excise tax thereon at the prescribed rate, is not affected by the fact that the express company has reported in its statement of gross receipts all of the moneys received by it in the conduct of express transportation business over the lines of the Railroad Company, including the moneys paid over by it to the Railroad Company under said contract.

It follows from a consideration of the above that the second question here presented is required to be answered in the affirmative.

Respectfully,
GILBERT BETTMAN,
Attorney General.