

4389.

APPROVAL, CORRECTED BOND FOR THE FAITHFUL PERFORMANCE OF HIS DUTIES AS RESIDENT DISTRICT DEPUTY DIRECTOR—EARL W. RIBER.

COLUMBUS, OHIO, July 3, 1935.

HON. JOHN JASTER, JR., *Director of Highways, Columbus, Ohio.*

DEAR SIR:—You have submitted for my approval a bond to guarantee the faithful performance of the duties of Earl W. Riber, as Resident District Deputy Director in Preble County, upon which bond the Ohio Casualty Insurance Company appears as surety.

Having examined such bond, and finding that it has been properly corrected in accordance with suggestions contained in Opinion No. 4346, rendered June 20, 1935, same is hereby approved, and is being returned herewith.

Respectfully,

JOHN W. BRICKER,
Attorney General.

4390.

OLD AGE PENSION—"INCOME" AS USED IN OLD AGE PENSION LAW DEFINED.

SYLLABUS:

"Income" as used in the Old Age Pension Law discussed and defined.

COLUMBUS, OHIO, July 3, 1935.

HON. H. J. BERRODIN, *Chief, Division of Aid for the Aged, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your recent letter which reads in part as follows:

"Will you please furnish this Division with a written legal opinion in interpretation of the word 'income,' as contained in the following sections of General Code of Ohio 1359, being the law which provides for the granting of Aid to Aged Persons:

Section 2 (g) 'His *income* from any and all sources does not exceed \$300.00 per year;'

Section 2 (j) 'Has not directly or indirectly deprived himself of property or *income* in order to qualify for aid.'

Section 3. 'The amount of aid payable to any person shall not exceed \$25.00 per month, diminished by such an amount that the total *income* of such person from any and all sources, including such aid, shall not exceed \$300.00 per year.'

Section 4. 'If the applicant for or recipient of aid is married, the total amount of aid payable to the husband and wife shall not exceed \$50.00 per month, diminished by such an amount that the combined *income* of both from

any and all sources, including the aid payable to either or both shall not exceed \$600.00 per year.'

Section 5. 'In computing the annual *income* of an applicant for or recipient of aid, or the *income* of husband and wife together, under the provisions of this act, the annual *income* of any real or personal property (not including household goods, clothing and other personal effects), which does not produce *income or a reasonable income*, shall be considered and computed as five per centum of the net value of such property after deducting the amount of all encumbrances and liens thereon.'

Section 10. 'If at any time a recipient of aid under this act, or his or her wife or husband, becomes possessed of property or *income* in excess of what is allowed by this act in respect to the amount of aid granted to such recipient, the Division or the respective board shall cancel or reduce the amount of aid accordingly; provided that if such excess of property or *income* cease, then the aid shall be restored or increased to the proper amount.' * * *."

The so-called Old Age Pension Law (Secs. 1359-1 to 1359-30, General Code), does not define the word "income." It is necessary, therefore, in answering your inquiry to determine whether the word "income" as used in that law means "gross income" or "net income." You have quoted pertinent provisions of the law wherein the word "income" has been used and it is apparent that whatever meaning was intended wherever the word was used should be applied uniformly throughout, because nowhere is "income" qualified by other words so as to distinguish its meaning in one section from that intended in any other.

The word "income" is definable. However, the broad general definitions given for the word are not sufficient when by common usage it has come to mean either "gross income" or "net income." It cannot be said that wherever "income" is used alone it means "gross income" or that it means "net income" because the great weight of judicial authority holds that the true meaning must be determined by considering the manner in which it is used and the meaning intended to be given to it.

A consideration of the cases in which "income" has been interpreted reveals that quite often when the word is used in a tax statute it is interpreted as meaning "gross income" whereas when used in business affairs it means "net income." Black in his work "Income and other Federal Taxes" defines "income" and at page 41 states:

" * * * But an important distinction must be noted in the signification of this word, according as it is used in the ordinary business affairs of the community (or in statutes relating thereto) or in a tax statute. In the former case it is understood to mean "net income" or profit; in the latter case, it is equivalent to 'gross income' or 'gross receipts' unless otherwise specified in the statute. Thus it is said that the word 'income' as used in commerce and trade means the balance of gain over loss in the fiscal year or other period of computation, or it is the ultimate profit of a business or trade, ascertained by placing the sum total of all gains over against the sum total of losses. * * * But on the other hand, in a statute imposing taxes, 'income' means gross receipts, not net profits, unless it is so specified."

A generally used definition of "income" is that to be found in *Stratton's Independence vs. Howbert*, 231 U. S. 399, wherein the United States Supreme Court held that "income" is "a gain derived from capital, from labor, or from both combined." That case involved the Corporation Excise Tax Act of 1909. That definition received an

addition in a subsequent income tax case known as *Eisner vs. Macomber*, 252 U. S. 189. The fifth branch of the headnotes in that decision reads:

"5. Income may be defined as the gain derived from capital, from labor, or from both combined, including profit gained through sale or conversion of capital."

The sixth branch of the headnotes in the "Eisner" case supra reads:

"6. Mere growth or increment of value in a capital investment is not income; income is essentially a gain or profit in itself of exchangeable value, proceeding from capital, severed from it, and derived or received by the tax payer for his separate use, benefit and disposal."

The seventh branch of the headnotes in the "Eisner" case supra reads:

"7. A stock dividend—evincing merely a transfer of an accumulated surplus to the capital account of the corporation—takes nothing from the property of the corporation and adds nothing to that of the stockholder; a tax on such dividend is a tax on capital increase and not on income, and to be valid under the constitution such taxes must be apportioned according to population in the several states."

After citing the "Stratton" and "Eisner" cases supra, Mr. Justice Clarke in *Merchants' Loan and Trust Co. vs. Smietanka*, 255 U. S. 609, stated:

"In determining the definition of the word 'income' thus arrived at, this court has consistently refused to enter into the refinements of lexicographer or economists, and has approved, in the definitions quoted, what it believed to be the commonly understood meaning of the term which must have been in the minds of the people when they adopted the Sixteenth Amendment to the Constitution. * * * Since the fund here taxed was the amount realized from the sale of the stock in 1917, less the capital investment * * * it is palpable that it was a 'gain or profit' 'produced by' or 'derived from' that investment and that it was 'severed' or rendered severable from it by the sale for cash, and thereby became that 'realized gain' which has been repeatedly declared to be taxable income within the meaning of the constitutional amendment and the Acts of Congress."

In the case of *Stanton vs. Zercher*, 101 Washington, 383, Holcomb, J. stated at page 395:

"Income is defined as that *gain* which proceeds from labor, business or property of any kind; the profits of labor, commerce or business. 4 words and Phrases 3501. *Gain* signifies the difference between the receipts and expenditures. In the ordinary and popular meaning, where representation of 'income' is made, one would necessarily understand that it meant the 'net income'. It would certainly not be taken to mean merely the gross receipts of a business or property." (Italics the writer's.)

In *Niland vs. Niland*, 154 Wisc. 514, the court had under consideration a statute which provided that "the widow and minor children, or either, constituting the family

of the deceased testator or intestate, shall have such reasonable allowance out of the personal property or the income of the real estate of the deceased as the county court shall judge necessary for their maintenance during the progress of the settlement of the estate." In the decision Kerwin, J. stated:

"The question raised by the assignment of error is whether the court erred in its decision finding the word 'income' in the statute means net income. There is some apparent confusion in the authorities respecting the meaning of the word 'income,' but we think that the word as used in the statute under consideration was intended by the legislature to mean net income. True the word 'income' has been construed to mean gross income or revenue derived from specific property, where from the language of the statute or contract gross income appeared to have been intended. Seligman in his work on Income Tax says that 'income' is to be distinguished from mere receipts or gross revenue; that it is more than that which simply comes in from any economic activity. He further says: 'by income is always meant net income, as opposed to gross income.' In other words, from the receipts in any enterprise we must, in the first place, deduct the expenses of the enterprise—that is, the outlay incurred in securing the gross product—p-19.

The amounts paid by the administrator for taxes, insurance, and repairs were necessary to preserve the estate and secure the income; so we think it obvious that the income designated by the statute means net income after the payment of such charges."

In *Andrew vs. Boyd*, 5 Maine, 199, Weston J. said:

"It does not appear to us that any fair distinction can be raised between income and net income. Net is a term used among merchants, to designate the quantity, amount or value of an article of commodity, after all tare and charges are deducted. The income of an estate means nothing more than the profit it will yield, after deducting the charges of management; or the rent which may be obtained for the use of it. The rents and profits of an estate, the income, or the net income of it, are all equivalent expressions."

These decisions indicate a wealth of authority in support of the proposition that the word "income" may mean "net income" in the absence of a specific statutory provision to the contrary. There is no such specific statutory provision in the Old Age Pension Law. We must determine the meaning intended for the word "income" when a majority of the electors voting thereon approved the Old Age Pension Law, November 7, 1933. Was it their intention that the provision "Income from any and all sources does not exceed \$300.00 per year" should mean "gross income from any and all sources does not exceed \$300.00 per year?" I believe not. To so conclude would work a hardship upon those who own some property, the receipts from which equal or exceed \$300.00 but the net income from which is less than \$300.00. Such people would be denied an Old Age Pension even though the need for it may be as great as for the person who owns no property.

There are doubtless numerous cases throughout the state similar to the hypothetical one which I now use to illustrate the practical effect of the statement just made. "X" applies for an Old Age Pension. He owns property from which his receipts annually are \$500.00. His total actual expenses on the property for taxes, assessments, gas, light, water and necessary repairs are \$450.00. Thus his net income for the year is

\$50.00. If "income" in the Old Age Pension Law means "gross income" he is not entitled to a pension because his "income" is in excess of \$300.00. But the provisions of the law would indicate that no such meaning was intended. Section 1359-3, General Code, provides that:

"The amount of aid payable to any person shall not exceed \$25.00 per month, diminished by such an amount that the total income of such person from any and all sources, including such aid, shall not exceed \$300.00 per year."

This would tend to indicate that the purpose of the law was to provide a needy aged person with funds not to exceed \$300.00 per year, the inference being that \$300.00 was regarded as the sum necessary for the maintenance of a person otherwise eligible for the pension. If that is so then to consider "income" as "gross income" under the provisions of the law would be to defeat the purpose of the law. Section 1359-5, General Code, provides:

"In computing the annual income of an applicant for or recipient of aid, or the income of husband and wife together, under the provisions of this act, the annual income of any real or personal property, (not including household goods, clothing and other personal effects), which does not produce income or a reasonable income, shall be considered and computed as five per centum of the net value of such property after deducting the amount of all encumbrances and liens thereon."

By the specific provisions of the section just quoted wherein non-productive real or personal property is to be computed on the basis of five per centum, of the net value of the property it seems apparent that the intention of the Act was to regard "income" for the purposes of this Act as "net income". Five per centum would be regarded as a fair net income for the property whereas that percentage would, of course, be inadequate as the "gross income."

Section 1359-6, General Code, provides that the Division of Aid for the Aged may require the applicant as a condition precedent to the granting of aid to convey the property to the Division of Aid for the Aged to be held in trust by it. "However in all such cases such property shall be deemed to produce income as provided in Section 5 hereof, and the aid granted shall be reduced accordingly, and all taxes and assessments on such property and all necessary expenses of keeping it in good condition and repair shall be paid by the person using or residing upon it." The section (1359-6, G. C.) just quoted, serves to establish the intention that "income" should be regarded as "net income" for the purposes of the Act because to hold otherwise would mean that a person receiving aid, who had conveyed his property to the Division of Aid for the Aged, would have such aid reduced by 5% of the net value of the property, less encumbrances, while another person who owns property is refused aid because his gross receipts therefrom exceed \$300.00 even though the net income may be much less than 5%.

It cannot be contended with force that by giving the word "income" the meaning "net income" would make it possible for those owning considerable property, but whose net income therefrom is \$300.00 per year or less, to qualify for aid. That possibility was properly guarded by Section 1359-2, General Code, which provides:

"No person shall be entitled to aid under this act unless he fulfills the following conditions:

* * * * *

(i) The net value, less all encumbrances and liens, of all real and personal property of such person does not exceed \$3,000.00; or, if married, the net value of the combined property of husband and wife does not exceed \$4,000.00 * * *"

It may not be logically contended that by granting aid on the basis of "net income" the state is thereby required to increase its expenses beyond that contemplated by the Act for as previously stated Section 1359-6, General Code, provides for the conveyance of property to the Division of Aid for the Aged and further provides:

"All property conveyed to the Division in trust, upon the death of the person or persons entitled to use or reside upon such property as above provided shall be sold by the Division at public sale, and the proceeds applied in the following order: * * * third, repay to the Treasurer of State all amounts paid under this act to the person who conveyed or transferred the property to the Division, and all such amounts paid to his or her spouse, with interest at four per centum per annum; * * *"

Furthermore Section 1359-7, General Code, of the Act states:

"Upon the death of a person, the total amount of aid paid to him under this act and to his or her spouse, with interest thereon at four per centum per annum, shall be a debt of the estate of such deceased person; and it shall be the duty of the Division to present claims to the administrator or executor, if any, to bring suits and to take any other proper action to secure reimbursement from the estate and property of such deceased person.

If upon the death of any person who has received aid under this act, or his or her spouse, it is found that he or she, or both of them, was possessed of property in excess of what is allowed by law in respect to the amount of aid granted, there shall be a penalty or debt in addition to that above provided for, against the estate of such deceased person in an amount equal to the total amount of aid paid in excess of that to which the recipient was by law entitled; and it shall be the duty of the Division likewise to recover the same from the estate and property so found in excess."

Throughout this discussion it has been my purpose to impress the fact that it was the obvious intention of the electors to establish an Old Age Pension Act which would provide for the aged poor without unfair discrimination. To grant a pension to an aged person because the gross receipts from his property are \$300.00 or less while denying a pension to a person whose gross receipts from property exceeds \$300.00 is in my judgment not in harmony with the spirit and purpose of the Old Age Pension Law and not so intended by those who voted for its enactment.

Section 1359-29, General Code, provides:

"This act shall be liberally construed to accomplish the purposes thereof. Nothing herein shall be construed as repealing any other act or part of an act providing for the support of the poor, except insofar as plainly inconsistent

herewith, and the provisions of this act shall be construed as an additional method of supporting and providing for the aged poor."

It is not possible to state specifically those items of expense which may be deducted in all cases from the gross receipts in computing the net income. In the Niland and Andrews cases supra, the courts have indicated what expenses were deductible under the facts there under consideration. Section 1359-5, General Code, establishes the basis for computing the net income on non-productive property. Section 1359-6, General Code, provides what shall be deemed as income after the property has been conveyed to the Division of Aid for the Aged. In all other cases the facts must be the guide in determining what expenses may be deducted in computing the net income. It is obvious that such deductions should be limited to the actual necessary expenses incurred in producing gross income. Taxes, assessments and necessary repairs are examples of deductions which may be properly made. There will be numerous cases no doubt, in which the applicant owns property from which his receipts are derived from rents. In many of such cases the property has been mortgaged. It is my opinion that payments made on the principal of such mortgages are not deductible as an item of expense in computing the net income. Such payments constitute an increase in the capital investment and to permit the deduction would be in effect, employing state funds for the purpose of purchasing property for the applicant. The same reasoning does not apply to the payment of interest on such mortgage indebtedness and I am of the opinion that such interest payments are deductible. If payments on the principal of mortgage indebtedness are deductible, then it may be observed that in many cases the net income from such property would be so small that the Division of Aid for the Aged would be justified in invoking the provisions of Section 1359-5, General Code, which states that if the property does not produce income or a *reasonable income* the annual income shall be considered and computed as five per centum of the net value of such property.

Specifically answering your inquiry, I am of the opinion that the word "income" as used in Sections 1359-2g, 1359-2j, 1359-3, 1359-4, 1359-5 and 1359-19, General Code, is equivalent to "net income" as distinguished from "gross income."

Respectfully,

JOHN W. BRICKER,

Attorney General.

4391.

APPROVAL, BONDS OF VILLAGE OF JEFFERSON, MADISON COUNTY, OHIO,
\$8,750.00.

COLUMBUS, OHIO, July 3, 1935.

Industrial Commission of Ohio, Columbus, Ohio.