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TAXES—INTANGIBLE AND FRANCHISE—NOT TAXES "OF THE SAME KIND"—CERTIFICATES OF ABATEMENT ISSUED ON ACCOUNT OF OVERPAYMENT OF INTANGIBLE TAXES MAY NOT BE USED TO PAY CURRENT FRANCHISE TAXES—SECTION 1464-3 G. C.

SYLLABUS:

Intangible and franchise taxes are not taxes "of the same kind" within the meaning of Section 1464-3, General Code, and consequently, certificates of abatement issued on account of overpayment of intangible taxes may not be used to pay current franchise taxes.

Columbus, Ohio, June 12, 1950

Hon. Don H. Ebright, Treasurer of State

Columbus, Ohio

Dear Sir:

I am in receipt of your request for my opinion, which reads as follows:

> "I would like to ask for your formal opinion in regard to abatement certificates that are issued by the Department of Taxation in the payment of taxes that can be accepted by the Treasurer of State.
>
> "Prior to the year 1948 all intangible taxes were classed as a part of the general revenue of Ohio and were paid in as collected to the general revenue fund. All domestic and foreign corporation taxes were at that time and are now classified as general revenue and paid into the Treasurer of State as such.
>
> "Section 1464-3 of the General Code of Ohio, under which these abatement certificates are issued, specifies that they may be used in payment 'of any tax of the same kind.'
>
> "I am respectfully requesting your opinion as to whether an abatement certificate issued to cover an overpayment on intangible taxes could be used in payment of the current tax due on either domestic or foreign corporation tax."

Your request presents the question of whether or not certificates of abatement, issued under Section 1464-3, General Code, on account of overpayments of intangible taxes, in so far as such overpayments were

credited to the state General Revenue Fund, may be used in payment of current franchise taxes.

I understand the term "intangible taxes" to mean those taxes levied under Section 5638-1, General Code. This section is as follows:

> "Annual taxes are hereby levied on the kinds and classes of intangible property, hereinafter enumerated, on the intangible property tax list in the office of the auditor of state and duplicate thereof in the office of treasurer of state at the following rates, to wit:
>
> "Investments, five per centum of income yield or of income as provided by section 5372-2 of the General Code; unproductive investments, two mills on the dollar; deposits, two mills on the dollar; shares in and capital employed by financial institutions, two mills on the dollar; shares in and capital employed by dealers in intangibles, five mills on the dollar; and moneys, credits and all other taxable intangibles, so listed, three mills on the dollar.
>
> "The object of such taxes levied on such property so listed are those declared in section 5414-19 of the General Code."

Section 5414-19, General Code, referred to in Section 5638-1, General Code, is, in pertinent part, as folows:

> "The taxes levied by section 5414-9 and section 5638-1 of the General Code and collected under the provisions of this chapter shall be for the use of the general revenue fund of the state and shall be paid into the state treasury, except as herein provided. The taxes levied by said section 5638-1 of the General Code on deposits, on shares in and capital employed by financial institutions, and on shares in and capital employed by dealers in intangibles shall be for the use of the 'local government funds' of the several counties in which said taxes originate as hereinafter provided. * * *"

Prior to October 1, 1947, this section read as follows:

> "The taxes levied by section 5414-9 and section 5638-1 of the General Code and collected under the provisions of this chapter shall be for the use of the general revenue fund of the state and shall be paid into the state treasury."

While you have used the phrase "domestic or foreign corporation tax," I have used the term "franchise tax." I understand the two phrases to mean the same tax, i.e., the tax levied under Section 5495, General Code, and Section 5499, General Code. Section 5495, General Code, is as follows:

"The tax provided by sections 5485 to 5525, both inclusive, of the General Code for domestic corporations shall be the fee charged against each corporation organized for profit under the laws of this state and each corporation not for profit organized pursuant to sections 10185 and 10186 of the General Code and 10186-1 to 10186-30, both inclusive, of the General Code except as provided herein, for the privilege of exercising its franchise during the calendar year in which such fee is payable and the tax provided by sections 5485 to 5525, both inclusive, of the General Code for foreign corporations shall be the fee charged against each corporation organized for profit and each corporation not for profit organized or operating or both in the same or similar manner as corporations not for profit organized under sections 10185 and 10186 of the General Code and 10186-1 to 10186-30, both inclusive, of the General Code, under the laws of any state or country other than Ohio, except as provided herein, for the privilege of doing business in this state or owning or using a part or all of its capital or property in this state or for holding a certificate of compliance with the laws of this state authorizing it to do business in this state, during the calendar year in which such fee is payable."

The above language became effective on September 4, 1947 but the prior language, for present purposes, was not substantially different.

Section 5499, General Code, is, in pertinent part, as follows:

"On or before June 15th the auditor of state shall charge for collection from each such corporation a fee of one-tenth of one per cent. upon such value so certified and shall immediately certify the same to the treasurer of state, * * *."

The tax so levied is credited to the state General Revenue Fund under Section 5491, General Code, which, in pertinent part, is as follows:

"* * * All remaining excise taxes and all franchise fees or taxes received by the treasurer of state, under the provisions of this act, shall be credited to the general revenue fund. * * *"

Abatement of overpayments of tax is provided for in Section 1464-3, General Code, which, in pertinent part, is as follows:

"* * * 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 representative and showing the amount of the overpayment and the kind of tax overpaid. One copy of such statement shall be entered on the journal of the tax commissioner, one shall be certified to the attorney general and one certified copy shall be delivered to the taxpayer. All copies of the certificate of abatement shall be transmitted to the attorney general, and if the attorney general finds the certificate to be correct, he shall so certify on each copy, and deliver one copy to the taxpayer, one copy to the tax commissioner, and the third copy to the treasurer of state. The taxpayer's copy may be tendered by the payee or transferee thereof to the treasurer of state as payment, to the extent of the amount thereof, of any tax of the same kind; * * *"

From the foregoing section it seems clear that an abatement certificate may be used only for payment "of a tax of the same kind" as that for which the certificate was issued. This raises a question as to what is meant by a "kind" of tax.

Taxes have often been classified as excise and franchise, license, income, poll, property or ad valorem, special assessment and inheritance. See: 38 O. Jur., 718-725, Taxation, Sections 8-14. If these classes are "kinds" of tax, there is no doubt that the two here involved are not of the same "kind." The intangible tax is a property or ad valorem tax, see Section 5328-1, General Code, while the franchise tax is either a separate class or "kind" in itself or is an excise tax, a separate class or "kind."

On the other hand, the word "kind" may have been intended to be interpreted in the light of the overall scheme of taxes in Ohio so that "kinds" are to be determined by reference to the different levying statutes. For example, the intangible tax is levied, with respect to those payable to the Treasurer of State, under Section 5638-1, General Code, whereas the franchise tax is levied under two other sections, Sections 5495 and 5499, General Code. Under such interpretation, two separate kinds of tax would be involved under the two different sets of statutes.

The latter interpretation appears to have been that placed on the phrase by those officials who are charged with the administration of the abatement procedure. In accordance with Section 1464-3, General Code, abatement certificates have contained a space to be filled in when prepared by the Tax Commissioner which is entitled "Kind of Tax." The

descriptions actually entered in such space have been terms such as "Intangible," "Franchise," etc. These descriptions have been accepted by the Attorney General and by the Treasurer of State.

It might also be possible to define "kind of tax" in greater detail by reference to different categories mentioned in a statute. For example, Section 5638-1, General Code, levies taxes, at varying rates in some cases, on income producing investments, unproductive investments, deposits, shares in and capital employed by financial institutions, shares in and capital employed by dealers in intangibles, moneys, credits and other taxable intangibles. It is possible that each of these might be considered as a separate "kind of tax."

Your request for opinion implies that a different criterion for definition of the word "kind" might be found by reference to the fund into which the tax proceeds are to be paid. Under such definition all tax proceeds paid into the General Revenue Fund would be the same "kind of tax."

If this had been intended by the General Assembly, it would seem that more apt language might have been used. In addition, the word "kind" implies class, nature or characteristic whereas the fund into which the money is to be deposited implies purpose, two completely different concepts.

Assuming that there may be doubt between which approach should be taken, however, the administrative interpretation followed for many years, which is discussed above, weights the balance in favor of a definition of the word "kind" in terms of the nature of the tax as defined in the statutes. Such administrative practice has been based upon a reasonable interpretation of the word "kind." Where such interpretation is reasonable, it is entitled to great weight. See 37 O. Jur. 698, 699, Statutes, Section 388, and cases there cited.

Such administrative practice has termed the franchise tax as a kind of tax and the intangible tax as a kind of tax, even though both were at one time paid into the General Revenue Fund and at present one is and part of the other is so paid.

It is, therefore, my opinion that intangible and franchise taxes are not taxes "of the same kind" within the meaning of Section 1464-3, General Code, and, consequently, certificates of abatement issued on

account of overpayment of intangible taxes may not be used to pay current franchise taxes.

Respectfully,

HERBERT S. DUFFY,
Attorney General.