4607

1. "COMMISSION", SECTION 5517 GENERAL CODE, MUST BE READ AS THOUGH IT WERE "TAX COMMISSIONER" — SECTION 1464 ET SEQ. GENERAL CODE.

2. PUBLIC UTILITY COMPANY — APPLICATIONS TO TAX COMMISSIONER IN RE FINDING OR ORDER, VALUES, TANGIBLE PROPERTY, PROPORTION CAPITAL STOCK, GROSS RECEIPTS OR GROSS EARNINGS — AUDITOR OF STATE — COMPUTATION, EXCISE TAX.

3. SECTION 5517 GENERAL CODE, NOT REPEALED BY IMPLICATION — PUBLIC UTILITY AUTHORIZED TO OBTAIN REVIEW OR REDETERMINATION BY TAX COMMISSIONER OF HIS DETERMINATIONS, FINDINGS OR ORDERS — SEE OPINIONS ATTORNEY GENERAL 1921, VOL. 1, PAGE 647.

SYLLABUS:

1. *The word "commission," as used in Section* 5517 *of the General Code, by reason of the specific provisions contained in Section* 1464,, *et seq., of the General Code, must be read as though it were "tax commissioner."*

2. *Under authority of Section* 5517 *of the General Code, a public utility company, by filing an application in writing with the Tax Commissioner within sixty days after a determination, finding or order relative to the value of public utility tangible property, may be heard as to the correctness of such determination, finding or order, even though such valuation has been certified to the county auditors of the respective counties in which such public utility engages in business. Such public utility may in like manner make a similar application concerning the determination by the Commissioner of the proportion of capital stock, gross receipts or gross earnings allocable to the State of Ohio which has been certified to the Auditor of State for the purpose of computing excise taxes thereon.*

3. *Subsequently enacted legislation has not repealed by implication Section* 5517 *of the General Code in so far as it purports to authorize a public utility to obtain a review or redetermination by the Tax Commissioner of determinations, findings or orders made by him. (Opinion found in Opinions of the Attorney General,* 1921, *Vol. I, page* 647, *No.* 2313, *distinguished.)*

Columbus, Ohio, December 19, 1941.

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

Dear Sir:

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

> "We direct your attention to the opinion of the Attorney General in 1921, Volume I, Number 2313, at page 647, and relative to public utility taxation, in which the Attorney General held, in part, that, under the then effective provisions of Section 5517, G. C., and correlated sections, the Tax Commission of Ohio no longer had authority to entertain a motion for review and

correction of its determination relative to the value of public utility property, after such determination had been certified to the Auditor.

Because of various legislative statutory enactments and amendments since the issuance of the aforesaid opinion, we will appreciate your reconsideration of such opinion relative to the following question. Under the provisions of Section 5517, G. C., may an application to the Commissioner by a public utility, for review of any determination, finding or order made by him, be granted and correction made in such determination, finding or order as may be deemed proper, after such determination relative to the value of public utility tangible property has been certified to the County Auditor, or the value of such public utility intangible property, the amount of the proportion of capital stock, or the amount of gross receipts or gross earnings, as the case may be, has been certified to the State Auditor?"

In view of the query propounded in your request, I assume that you are concerned only with the first and third questions considered by the Attorney General in the opinion cited therein. The first of such questions is as follows:

"May the commission under the authority of section 5517 G.C., upon an application filed by a public utility as provided in said section, make a correction in the value of its property after the same has been certified to the county auditor?"

Such query is answered in the first paragraph of the syllabus as follows:

"The Tax Commission of Ohio no longer has authority under section 5517 of the General Code to entertain a motion for review and correction of its determination respecting the value of public utility property, after such determination has been certified to the county auditor."

The third query presented for consideration in such opinion is:

"What is the latest date upon which a public utility may file an application for a correction of the value of its property as determined by the commission on the dates provided in sections 5423 and 5451 G.C., and upon which the commission may act?"

Such question is answered in the third paragraph of the syllabus of such opinion as follows:

"The commission may entertain an application for correction of the initial valuation placed by it upon public utility property at any time between the making of that valuation and the date of certification thereof to the county auditor."

Such conclusions were arrived at through a line of reasoning that may be outlined as follows:

a. Section 5517 of the General Code contemplated action by the Tax Commission after the date of the certification of the assessment to the county auditors under authority of Section 5447 and other sections of the General Code.

b. Sections 5426 and 5453 of the General Code afforded public utilities the right to be heard with reference to the correctness of the valuation before such certification.

c. Sections 5427 and 5454 of the General Code authorized the Commission at any time prior to the certification to correct the valuation.

d. Sections 5609 to 5611-3 of the General Code granted to public utility companies, along with other taxpayers, the right to appeal to the Board of Revision, to the Tax Commission, and then to the courts concerning any valuation of property.

e. Since Section 5611-1 of the General Code contained the language hereinafter quoted, it was the intention of the legislature that the provisions contained in such section and Sections 5609 to 5611-3 of the General Code were to provide an exclusive method for the review of all assessments of valuation after they shall have been certified to the county auditors and placed by them on the tax duplicates. Such language read:

> "Whenever the tax commission of Ohio determines the valuation, or liability, of property for taxation, whether in case of an original valuation or other original proceeding of such board, or in case of a determination of an appeal from the decision of a county board of revision, it shall, by registered mail, certify its action to the person in whose name the property is listed, * * * and such determination shall become final and conclusive for the current year, unless reversed, vacated, or modified as hereinafter provided."

The then Attorney General deduced that since Section 5611-1 of the General Code, as then in effect, contained the language "such determination *shall become final and conclusive for the current year, unless reversed, vacated, or modified as hereinafter provided,*" and since Section 5517 of the General Code, in terms, authorized a redetermination after such certification to the county auditors, Section 5611-1 of the General

Code, as then in effect, superseded the provisions of then existing Section 5517 of the General Code, at least in so far as it purported to authorize reviews or redeterminations as to valuation or liability of property for taxation, whether the property be owned by a bank, public utility, corporation or any other taxpayer.

Present Section 5517 of the General Code reads:

> "Any bank, public utility or corporation may be heard by the commission upon the question as to the correctness of any determination, finding or order of the commission after the same has been made. Application to the commission for a review of any determination, finding or order by it made, must be filed in writing within sixty days from the date of the certification thereof by the commission to the proper officer.
>
> The commission, upon such application, if it finds the same has been filed within the time limited in this section, may make such correction in its determination, finding or order, as it may deem proper, and its decision in the matter shall be final. Such correction shall be certified to the proper official, who shall correct his records and duplicates in accordance therewith. In case any such bank, public utility or corporation has paid the tax or fee assessed against it under mistake, and such mistake is corrected by the commission, upon application so filed, so that the amount due from such bank, public utility or corporation, under such corrected determination, finding or order, is less than the amount of the taxes or fees 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 bank, public utility or corporation, for the amount so erroneously paid by it.
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> The county treasurer shall thereupon pay such warrant out of any moneys in the general fund of the county not otherwise appropriated."

The opinion above referred to was based upon the rule of statutory interpretation which is stated in the first paragraph of the syllabus of Goff v. Gates, 87 O.S., 142, as follows:

> "An act of the legislature that fails to repeal in terms an existing statute on the same subject-matter must be held to repeal the former statute by implication if the later act is in direct conflict with the former, or if the subsequent act revises the whole subject-matter of the former act and is evidently intended as a substitute for it."

However, as stated by Newman, J., in In re Hesse, 93 O.S., 230, 234:

> "It is settled that where there are contradictory provisions in statutes and both are susceptible of a reasonable construction which will not nullify either, it is the duty of the court to give such construction, and further, that where two affirmative statutes exist one is not to be construed to repeal the other by implication unless they can be reconciled by *no* mode of interpretation." (Emphasis mine.)

With a view to determine the correctness of the opinion in question, let us examine the dates of the enactment of Section 5517 and former Section 5611-1 of the General Code. Section 5517 of the General Code was enacted in 102 O.L., 224, 253, under date of June 2, 1911. On March 3, 1917 (107 O.L., 550), the General Assembly enacted Sections 5611-1, 5611-2 and 5611-3 of the General Code. Such were the conditions of the statutes at the time of the rendition of the opinion of my predecessor which you have requested me to review. However, since the rendition of such opinion, or on March 9, 1923 (110 O.L., 60), the General Assembly enacted present Section 5517 of the General Code. In view of such fact, it is readily apparent that Section 5517 of the General Code is a later enacted section than was Section 5611-1 of the General Code, which was in existence at the date of such opinion.

It is to be noted that in the statements of the rule with reference to repeals by implication, it is the later of two enacted laws that must control in the event that two laws are in irreconcilable conflict. See cases above cited; State, ex rel. Fleisher Engineering and Construction Company, v. State Office Building Commission, 123 O.S., 70; Cleveland v. Purcell, 31 O.App., 495; Thorniley v. State, 81 O.S., 108, 118; State v. Hollenbacher, 101 O.S., 478; Western and Southern Indemnity Company v. Chicago Title and Trust Company, 128 O.S., 422. In view of such fact, the reasoning of the opinion of my predecessor under consideration would, since the reenactment of Section 5517 of the General Code in 110 O.L., 60, impel the opposite conclusion than that stated in the syllabus of such opinion. Section 5517 of the General Code would by reason of its later enactment, to the extent that its provisions were in irreconcilable conflict with those of former sections 5609 to 5611-3 of the General Code, control over the provisions of such sections and would to that extent repeal by implication such provisions. I am therefore of the opinion that Section 5517, General Code, as it now exists, must have been considered

as an exception to the language set forth in former Section 5611-1 of the General Code.

As you are aware, Section 5611-1 of the General Code as it existed at the time of my predecessor's opinion was repealed by Amended Senate Bill No. 159 of the Ninety-third General Assembly and the present Section 5611-1 of the General Code was enacted in its stead (118 O.L., 344). Neither in such newly enacted Section 5611-1 of the General Code nor in its amendment in Amended Senate Bill No. 77 as enacted by the last General Assembly is any such language contained as that which my predecessor in office held sufficient to repeal by implication former Section 5517 of the General Code. An examination of other provisions of law (Sections 5611, 5611-1 and 5611-2, General Code) providing for appeals from determinations of the Tax Commission fails to disclose any such similar language therein.

You do not inquire as to whether the provisions of Section 5517 of the General Code with reference to banks and corporations other than public utility companies, have been modified or are inconsistent with subsequently enacted statutes. I therefore have given no consideration herein to such question and herein express no opinion concerning such proposition.

It may be well to point out herein that by reason of the abolishment of the Tax Commission and the transfer of its functions to the Department of Taxation and then the distribution between the Tax Commissioner and the Board of Tax Appeals by the enactment of Sections 1464, 1464-1, 1464-2 and 1464-3 of the General Code, the term "commission" contained in such Section 5517 of the General Code must now, by reason of the express provisions of Section 1464 of the General Code, refer to either the Tax Commissioner or the Board of Tax Appeals. The last paragraph of Section 1464 reads:

> "Whenever in any law of this state, in effect at, or after the time the tax commission of Ohio and the offices of commissioners or members of said commission shall, by the provisions of this act, be abolished, the term 'tax commission of Ohio,' 'commission,' 'commissioner' or 'member,' meaning the tax commission of Ohio or the offices of commissioners or members of said commission, which by this act shall have been abolished, is used, such term shall be construed as referring to the department of

taxation, the tax commissioner, the board of tax appeals, or the members of said board of tax appeals, as the provisions of this act may require."

If we read Section 5517 of the General Code alone, some doubt might arise as to whether the term "commission" as therein contained refers to the Tax Commissioner or to the Board of Tax Appeals. If, however, we refer to Sections 1464-1, 1464-3 and 5611 of the General Code, we may be able to eliminate this apparent ambiguity. Section 1464-1 of the General Code contains the following language with reference to the review of assessments and evaluations made by the Tax Commissioner:

"The board of tax appeals shall exercise the following powers and perform the following duties of the department of taxation: * * *

5. To exercise the authority provided by law to hear and determine all appeals including, among others, appeals from the actions of county budget commissions, from the decisions of county boards of revision, and from the actions of any assessing officer or other public official, including appeals from any tax assessment, valuations, determinations, findings, computations or orders made by the tax commissioner or correction or redetermination made by him; and to hear and determine applications for review of rules of the department of taxation adopted and promulgated by the tax commissioner; * * * "

In Section 1464-2 of the General Code, we find no power granted to the Board of Tax Appeals to hear appeals or make reviews of the Commissioner's determinations. In Section 1464-3 of the General Code, we find the following language:

"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: * * *

9. To make all tax assessments, valuations, findings, determinations, computations and orders which the department of taxation is by law authorized and required to make, excepting, however, such tax assessments, valuations, findings, determinations, computations and orders which the board of tax appeals is by law authorized and required to make; and, pursuant to time limitations now provided by law, on his own motion, to review, redetermine or correct any tax assessments, valuations, findings, determinations, computations or orders which he shall

have made, provided, however, that he shall not review, redetermine or correct any tax assessment, valuation, finding, determination, computation or order which he shall have made as to which an appeal or application for rehearing, review, redetermination or correction shall have been filed with the board of tax appeals, unless such appeal or application is withdrawn or dismissed by the appellant or applicant; * * * "

The power of the Board of Tax Appeals to review the determination of the Tax Commissioner, other than as to the promulgation of rules, is described in Section 5611 of the General Code as follows:

"Appeals from final determinations by the tax commissioner of any preliminary, amended or final tax assessments, reassessments, valuations, determinations, findings, computations or orders made by him, may be taken to the board of tax appeals by the taxpayer or by the person or persons to whom notice of the tax assessment, reassessment, valuation, determination, finding, computation or order, by the tax commissioner, is required by law to be given; or by the director of finance of the state of Ohio if the revenues affected by such decision would accrue primarily to the state treasury; or by the county auditors of such counties, if any, to the undivided general tax funds of which the revenues affected by such decision would primarily accrue. * * * "

It therefore seems evident that the word "commission" as used in Section 5517 of the General Code should be read as though written "commissioner" or "tax commissioner."

Specifically answering your inquiry, it is my opinion that:

1. The word "commission," as used in Section 5517 of the General Code, by reason of the specific provisions contained in Section 1464, et seq., of the General Code, must be read as though it were "tax commissioner."

2. Under authority of Section 5517 of the General Code, a public utility company, by filing an application in writing with the Tax Commissioner within sixty days after a determination, finding or order relative to the value of public utility tangible property, may be heard as to the correctness of such determination, finding or order, even though such valuation has been certified to the county auditors of the respective counties in which such public utility engages in business. Such public utility may in like manner make a similar application concerning the determination by the Commissioner of the proportion of capital stock,

gross receipts or gross earnings allocable to the State of Ohio which has been certified to the Auditor of State for the purpose of computing excise taxes thereon.

3. Subsequently enacted legislation has not repealed by implication Section 5517 of the General Code is so far as it purports to authorize a public utility to obtain a review or redetermination by the Tax Commissioner of determinations, findings or orders made by him. (Opinion found in Opinions of the Attorney General, 1921, Vol. I, page 647, No. 2313, distinguished.)

Respectfully,

THOMAS J. HERBERT,

Attorney General.