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1. SLEEPING CAR, FREIGHT LINE AND EQUIPMENT COMPANY — TAX COMMISSIONER OF OHIO — REQUIRED TO ASCERTAIN AND ASSESS ALL TAXABLE PROPERTY OF SUCH COMPANIES — VALUATION SO DETERMINED, APPORTIONED AMONG TAXING DISTRICTS — CERTIFIED TO APPROPRIATE COUNTY AUDITORS, EXTENDED ON PROPER TAX LISTS AND DUPLICATES — SECTIONS 5416, 5423, 5425, 5446, 5447, 5448 G.C.

2. TAX COMMISSIONER MUST ASCERTAIN AND ASSESS TAX BASE AGAINST WHICH AUDITOR OF STATE CHARGES TAX "IN THE NATURE OF AN EXCISE TAX" — SECTIONS 5462 TO 5468 G.C.

3. SAID COMPANIES, IF INCORPORATED, SUBJECT TO CORPORATE FRANCHISE TAX ON DOMESTIC AND FOREIGN CORPORATIONS — SECTION 5495 ET SEQ. G.C.

4. FOREIGN CORPORATION, ENGAGED EXCLUSIVELY IN INTERSTATE BUSINESS IN OHIO, AS SLEEPING CAR, FREIGHT LINE OR EQUIPMENT COMPANY, NOT SUBJECT TO OHIO CORPORATE FRANCHISE TAX.

SYLLABUS:

1. Under authority of Section 5423 of the General Code, the tax commissioner of Ohio is required to ascertain and assess all the taxable property, as defined in Sections 5419 and 5425 of the General Code, of each sleeping car, freight line and equipment company, as defined in Section 5416 of the General Code, and apportion the valuation so determined among taxing districts in accordance with the provisions of Section 5446 of the General Code. He must certify such apportionment of valuation to the appropriate county auditors as provided in Section 5447 of the General Code in order that it may be extended on the proper tax lists and duplicates by such county auditors as provided in Section 5448 of the General Code.

2. Under authority of Section 5465 of the General Code, the tax commissioner of Ohio must ascertain and assess the tax base against which the auditor of state, under authority of Section 5468 of the General Code, charges the tax "in the nature of an excise tax" imposed by Sections 5462 to 5468, inclusive, of the General Code against sleeping car, equipment and freight line companies, as defined in Section 5416 of the General Code.

3. Sleeping car, freight line and equipment companies, as defined in Section 5416 of the General Code, if incorporated, are subject to the provisions of Section 5495, et seq., of the General Code, which impose a corporate franchise tax on domestic and foreign corporations.

4. A foreign corporation which is engaged in Ohio exclusively in interstate business as a sleeping car, freight line or equipment company, is not subject to the Ohio corporate franchise tax (Section 5495, et seq., General Code.)

Columbus, Ohio, April 17, 1942.

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

Dear Sir:

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

"Your opinion is respectfully requested upon the following questions:

1. Are sleeping car, freight line and equipment companies required to comply with the provisions of section 5419, et seq., General Code, which sections provide for the determination of the entire or unit value of such companies for public utilities property tax purposes?

2. Are sleeping car, freight line and equipment companies required to comply with the provisions of section 5462, et seq., General Code, which sections provide for the determination of certain values for public utilities excise tax purposes?

3. Are sleeping car, freight line and equipment companies, when incorporated, required to comply with the provisions of section 5495, et seq., General Code, which provide for the determination of valuation for general corporation franchise tax purposes?"

An answer to your request necessitates an interpretation of substantially all of the statutes contained in Chapters 5, 7 and 8 of Part Second: Taxation, of the General Code. Such chapters contain Sections 39 to 135 of an Act enacted in 102 O.L., 224, as they have been amended and supplemented by subsequent General Assemblies. Such chapters may be said to contain, in general, the statutory law with reference to the taxation of public utilities in Ohio and to provide authority, if it exists, for the taxation of sleeping car, freight line and equipment companies in the respects indicated in your request.

From the language contained in Section 5460 of the General Code, it is apparent that it was the intent of the General Assembly that "public utilities," as defined in Sections 5515 and 5516 of the General Code, are not subject to assessment on their personal property in the manner provided for other taxpayers under authority of Chapter 3 of Title I, Part Second of the General Code (Sections 5366 to 5403-8, inclusive, General Code). Such section reads:

"Public utilities shall not be required to make returns under, nor, excepting as hereinbefore provided, be governed by the provisions of chapter three of this title."

The language "excepting as hereinbefore provided," as used in such section, refers to certain incorporations by reference contained in Chapters 5 and 7 of such Title I (Sections 5415 to 5431, inclusive, and 5445 to 5484, inclusive, General Code).

An examination of Chapters 5 (Sections 5415 to 5431, inclusive, General Code), 7 (Sections 5445 to 5484, inclusive, General Code) and 8 (Sections 5485 to 5525, inclusive, General Code) of such title will disclose the fact that therein is provided a special method of evaluation and assessment of the property of public utilities for purposes of taxation and also for three special taxes against utilities; thus, there is therein provided:

1. A method of evaluating the properties of sleeping car, freight line, equipment, electric light, gas, natural gas, pipe line,

water works, messenger, union depot, water transportation, heating, cooling, street, suburban and interurban railroad companies and railroad companies by the tax commissioner of Ohio (Sections 5420 to 5448, inclusive, General Code). By this method it seems to be contemplated that a unit value as a going concern on all of the properties of the utility regardless of location is to be made and thereafter an apportioning of such valuation, other than that of properties of the types mentioned in Section 5328-1, General Code (classified intangible personal property), in and out of the state is to be made, and of that part which is allocated to the state a division is to be made among the various taxing districts and counties for the levy of taxes thereon by the state and the various local authorities, empowered to levy taxes, at the rates therein current and as a part of the local duplicates.

2. A special tax denominated a "sum in the nature of an excise tax" upon sleeping car, freight line and equipment companies and based upon the proportion of the value of the capital stock of such companies representing property and business in Ohio, ascertained by comparison of the route mileage of such companies in Ohio with the entire route mileage, wherever located. (Sections 5462 to 5468, inclusive, General Code.)

3. A special excise tax levied upon all public utilities named in Section 5415, General Code, other than sleeping car, equipment and freight line companies, and upon intrastate toll bridge companies, declared to be upon the privilege of carrying on its intrastate business, the value of which is measured by either the "gross receipts" or "gross earnings" of their businesses in this state, with certain exceptions. (Sections 5470 to 5483, inclusive, General Code.)

4. A franchise tax exacted from domestic and foreign corporations, other than public utilities paying the special excise tax measured by their "gross earnings" or "gross receipts," based upon the fair value of the issued and outstanding shares and the ratio of property owned and business done in this state to that everywhere. (Sections 5495 to 5503, inclusive, General Code.)

As above pointed out, Sections 5420 to 5448, inclusive, General Code, specify that the tax commissioner must ascertain and assess all the taxable property of all of the public utilities, other than express, telegraph and telephone companies, as defined in Sections 5415 and 5416 of the General Code, at its true value in money (Section 5423, General Code). Such named utilities include, among others, sleeping car, freight line and equipment companies. Sections 5425 and 5419 of the General Code define taxable property so as to include not only the real and tangible property of the utility but also the classified or intangible property as well. Such Section 5425 reads:

> "The property of such public utilities to be so assessed by the commission shall be all the property thereof, as defined in section forty-three of this act."

"Section forty-three of this act" is Section 5419 of the General Code, which reads:

> "The property owned or operated by a public utility, required to make return to the commission of its property to be assessed for taxation by the commission, shall be deemed and held to include such utility's plant or plants and all real estate necessary to the daily operations of the public utility and all other property, including that mentioned in section 5328-1 of the General Code, owned or operated, or both, by it wholly or in part within this state, used in connection with or as incidental to the operation of the public utility, whether the same be held in common or by the individuals operating such public utility. In the case of incorporated companies, all the real estate and personal property, including that mentioned in section 5328-1 of the General Code, owned and held by such corporation within this state in the exercise of its corporate powers, or as incidental thereto, whether such property, or any portion thereof, is used in connection with such public utility business or not, shall be conclusively deemed and held to be the property of such public utility."

Section 5424 of the General Code provides the manner in which the tax commissioner shall make such valuation of certain public utility companies, including sleeping car, freight line and equipment companies, as follows:

> "In determining the value of the property of each such public utility to be assessed and taxed within the state, the commission shall be guided by the value of the property as determined by the information contained in the sworn statements made by the public utility to the commission and such other evidence and rules as will enable it to arrive at the true value in money of the entire property of such public utility within this state, in the proportion which the value of such property bears to the value of the entire property of such public utility."

Sections 5419-1, 5420, 5421 and 5422 of the General Code provide for the filing of an annual report by the utilities mentioned in your inquiry. Sections 5426 and 5427 of the General Code authorize a hearing of the utility with respect to the valuation of its property by him for taxation by the tax commissioner.

Such statutes then, as I have above pointed out, require the tax commissioner to apportion the values of various utility companies' property among the various counties and taxing subdivisions in which the property is located on several bases. Specific provision is made for the apportionment of such evaluations with respect to street, suburban, interurban railroad (Section 5445, General Code) and railroad companies (Sections 5430 and 5431, General Code), telephone and telegraph companies (Section 5456, General Code), and express companies (Section 5457, General Code). Section 5446 of the General Code then specifically provides the method by which the tax commissioner shall determine and make the allocation of the valuation determined by him with respect to all of the other public utilities mentioned in Section 5415 of the General Code, which would include sleeping car, freight line and equipment companies, among the subdivisions as follows:

> "The commission shall apportion the value of the property of all other public utilities assessed according to the provisions of this act as follows:
>
> (a) When all the property of such public utility is located within the limits of a county, the assessed value thereof, other than that mentioned in section 5328-1 of the General Code, shall be apportioned by the commission between the several taxing districts therein, in the proportion which the property located within the taxing district in question, bears to the entire value of the property of such public utility, as ascertained and valued as herein provided, so that, to each taxing district there shall be apportioned such part of the entire valuation as will fairly equalize the relative value of the property therein located, to the whole value thereof. Each kind and class of property mentioned in section 5328-1 of the General Code, which is separately taxed, shall be so separately assessed according to the rules set forth in section 5388 of the General Code for such property and the assessments thereof shall be certified by the commission on or before the third Monday of May to the auditor of state who shall enter same on the intangible property tax list in his office and make proper duplicate thereof for the office of the treasurer of state in the manner prescribed in chapter four of this title.
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> (b) When the property of such public utility is located in more than one county in this state, the assessed value thereof, other than that mentioned in section 5328-1 of the General Code, shall be apportioned by the commission between the several counties and the taxing districts therein, in the proportion which the property located therein, bears to the entire value of the property of such public utility as accertained and valued, as herein provided, so that to each county and each taxing district therein, there shall be apportioned such part of the entire val-

uation as will fairly equalize the relative value of the property therein located to the whole value thereof. Each kind and class of property mentioned in section 5328-1 of the General Code, which is separately taxed, shall be so separately assessed according to the rules set forth in section 5388 of the General Code for such property and the assessment of each such kind or class shall be certified by the commission on or before the third Monday of May to the auditor of state who shall enter same on the intangible property tax list in his office and make proper duplicate thereof for the office of the treasurer of state in the manner prescribed in chapter four of this title.

(c) When the property of such public utility, required to be assessed by the provisions of this act, is located in more than one state, the assessed value thereof, other than that mentioned in section 5328-1 of the General Code, shall be apportioned by the commission in such manner as will fairly and equitably determine the principal sum for the value thereof in this state, and after ascertaining such value it shall be apportioned by the commission, as herein provided. Each kind and class of property mentioned in section 5328-1 of the General Code taxable in this state as therein provided, or held, managed and controlled in this state in connection with or as incidental to the operation of the public utility in this state, and which is separately taxed, shall be so separately assessed according to the rules set forth in section 5388 of the General Code, for such property and the assessment thereof shall be certified by the commission on or before the third Monday of May to the auditor of state who shall enter the same on the intangible property tax list in his office and make proper duplicate thereof for the office of the treasurer of state in the manner prescribed in chapter four of this title."

Section 5448 of the General Code then provides that the respective county auditors to whom a portion of such evaluation shall have been certified by the tax commissioner shall place such apportionment on the proper tax lists and that taxes shall be levied and collected thereon, in the same manner and at the same rates as real property in the respective taxing districts to which a portion of such valuation has been apportioned, in the manner provided in Section 5446 of the General Code. Such Section 5448 of the General Code reads:

"The county auditor shall place the apportioned value and assessments on the proper tax lists and duplicates and taxes shall be levied and collected thereon, in the same manner and at the same rates, as real property in the taxing district in question."

Sections 5548 and 5579 of the General Code provide that the county auditor, subject to the supervision of the tax commissioner, shall be the

assessor of the real property located in his county; however, in Section 5548 of the General Code there is contained a proviso as follows:

> " * * * provided that nothing herein shall affect the power conferred upon the tax commission of Ohio in the matter of the valuation and assessment of the property of any public utility."

Section 5460 of the General Code then contains the following provision:

> "Public utilities shall not be required to make returns under, nor, excepting as hereinbefore provided, be governed by the provisions of chapter three of this title."

From the above analysis of the sections of the statutes above set forth, it would seem that Sections 5419 to 5431, inclusive, and 5445 to 5461, inclusive, General Code, provide for the assessment and evaluation by the tax commissioner of the property located in this state of all the public utility companies enumerated in Section 5415 of the General Code, including sleeping car, freight line and equipment companies, on a unit basis as a going concern and the allocation of such assessed valuation among the various taxing subdivisions on the bases prescribed therein.

I am not unmindful of Opinion No. 321 of a preceding attorney general found in the Annual Reports of the Attorney General for 1913, Volume I, page 610. Such attorney general therein ruled in the third, fourth, fifth, sixth, seventh, eighth, ninth and twelfth paragraphs of the syllabus that:

> "Although freight line companies would seem to be included within the terms of Section 5320, General Code, requiring all public utilities to deliver before the first day of March to the tax commission a statement with respect to its property, nevertheless, no method of proportionment of value is provided for freight line companies as is the case with respect to other forms of public utilities, enumerated in section 5422, General Code.
>
> From a legislative history of these statutes the intended plan is disclosed to make an assessment of the whole system of public utilities upon a unit basis as a going concern and to apportion the value so ascertained upon the mileage or some other similar basis to the state of Ohio and the various subdivisions therein.
>
> A prescribed method of apportioning such value would seem

to be a necessary part of the procedure and the omission of such prescribed plan with reference to freight line companies must be deemed significant.

Inasmuch as this tax stated to be in the nature of an excise tax operated equally upon the property of such freight line companies, whether they are engaged in the business of interstate commerce or intrastate commerce, such tax must not be seemed to be made upon the privilege of doing business and therefore not properly an excise tax, but rather a tax upon the instrumentalities of the business, i.e., the physical properties. Under the rule of uniformity, therefore, prescribed by article 12, section 2 of the constitution the legislature could not well have intended that the physical properties of such company should be subjected in addition to this tax designated in the nature of an excise tax, but which is in reality a property tax, should also be subject to the general property tax upon its physical properties, which is applied to other forms of public utilities.

Inasmuch, therefore, as in the plan of procedure set out, no provision is made for a complete report of the properties of freight line companies and no plan of procedure is set forth for the apportionment of the value of such properties, and as a property tax is to all particular purposes imposed by the statutes and described as a tax in the nature of an excise tax upon the rolling stock of such companies, they are not to be deemed within the terms of the statutes prescribing a method of property tax for public utilities generally.

Although the statutes provide for a report of the gross receipts of public utilities generally, nevertheless freight line companies are not included in the provisions defining the duty of the tax commission in ascertaining the gross receipts and gross earnings of the public utilities for the regular excise tax purposes. A statement of gross receipts is, therefore, not required by the statutes of freight line companies. * * *

Under the terms of the statutes, only the rolling stock of freight line companies is to be assessed for taxation by the tax commission; the other property being returned locally."

As is to be observed from the above quoted portion of the syllabus, my predecessor in office arrived at his conclusion that the property of a freight line company, which is taxed in precisely the same manner as sleeping car and equipment companies, was assessed by the respective county auditors rather than by the then existing tax commission, and he correctly observed that the provisions of Section 5420 of the General Code and subsequent sections provide for the valuation and assessment by the tax commission rather than by the county auditors. Under such major premise, he uses as his minor premise the statement that "no

method of proportionment of the value is provided for freight line companies as is the case with respect to other forms of public utilities," and then deduces that by reason of such lack of provision for apportionment of value of such public utility's property required by Section 5423 of the General Code, the legislature could not have intended that the tax commission make an assessment of the value of such utility's property and thereafter do nothing with the results of such efforts. The attorney general reasons that the legislature never requires a public official to do vain acts. However, as I have above pointed out, Section 5446 of the General Code specifically provides for the apportionment of the valuation assessment as made by the tax commissioner with respect to the property of all types of public utilities, as enumerated in Section 5415 of the General Code, other than the various types of railroads and express, telephone and telegraph companies. When we correct such defect in the reasoning contained in such opinion of my predecessor, we must, upon the logic of such opinion, come to the conclusion that the tax commissioner must, under authority of and in the manner prescribed in Sections 5419 to 5431, inclusive, and 5445 to 5448, inclusive, General Code, value and assess the property of sleeping car, freight line and equipment companies and allocate such valuations among the appropriate taxing subdivisions as required by Section 5446 of the General Code, so that the taxes may be levied against the same as provided in Section 5448 of the General Code. For such reason, it would seem that such opinion of my predecessor must be overruled in so far as it is inconsistent with the conclusion hereinabove reached.

Section 5422 of the General Code, in prescribing the detail statements which must be contained in the property tax return required to be filed by sleeping car, freight line and equipment companies, requires the company to list the real estate owned by it and located in this state and that located outside of the state (subparagraphs 7 and 9); likewise, with respect to tangible personal property, itemization must be made of that owned and located in this state with the specific location thereof (subparagraph 8) and that located outside of the state (subparagraph 10). No provision is made in such return for the listing of that class of personal property which is located at no particular place, but which is in constant movement and is not intended to remain at any particular place for a period of time longer than is required by the exigencies of the business and which is ordinarily referred to as rolling stock.

Section 5424 of the General Code, in prescribing the method by

which the tax commissioner shall arrive at the value of the taxable property of sleeping car, equipment and freight line companies, provides that the tax commissioner "shall be guided by the value of the property as determined by the information contained in the sworn statements made by the public utility" in order to enable him to arrive "at the true value in money of the *entire property* of such public utility *within this state.*" From such statutes, it would appear that the commissioner, if he were to follow their provisions, would necessarily arrive at a tax valuation which would place no value whatsoever on those classes of tangible property which are not located at any particular point either in this state or elsewhere, ordinarily known as "rolling stock;" he would only evaluate the real estate, those items of classified personal property enumerated in Section 5328-1 of the General Code and tangible personal property which are definitely located in Ohio. However, as observed by Mr. Justice Shiras in American Refrigerator Transit Company v. Hall, 174 U.S., 70, 82, 43 L. Ed., 899, 904:

> "It having been settled, as we have seen, that where a corporation of one state brings into another, to use and employ, a portion of its movable personal property, it is legitimate for the latter to impose upon such property, thus used and employed, its fair share of the burdens of taxation imposed upon similar property used in like way by its own citizens, we think that such a tax may be properly assessed and collected, in cases like the present, where the specific and individual items of property so used and employed were not continuously the same, but were constantly changing, according to the exigencies of the business, and that the tax may be fixed by an appraisement and valuation of the average amount of the property thus habitually used and employed. Nor would the fact that such cars were employed as vehicles of transportation in the interchange of interstate commerce render their taxation invalid. Marye v. Baltimore & O. R. R. Co., 127 U.S., 123 (32:96); Pullman's Palace Car Co. v. Pennsylvania, 141 U.S. 18 (35:613, 3 Inters. Com. Rep. 595)."

The courts have had before them on many occasions the questions as to the jurisdiction of the various states to tax the rolling stock of a utility when a portion thereof is used in and out of the state seeking to assess the tax, and, in so far as I have observed, such courts have upheld the right to tax such property when the tax value of such property or proportion thereof has been arrived at in a fairly equitable manner.

See:

Pullman's Palace Car Co. v. Pennsylvania, 141 U.S.,18

Pullman's Palace Car Co. v. Commonwealth of Pennsylvania, 107 Pa., 156

Great Northern Ry. Co. v. Flathead Co., 61 Mont., 263

American Refrigerator Transit Co. v. Hall, 174 U.S., 70

Marye v. Baltimore & O. R. R. Co., 127 U.S., 123.

As I have above pointed out, Sections 5462 to 5468, inclusive, General Code, provide for the levy and collection of a tax from sleeping car, freight line and equipment companies, denominated "a sum in the nature of an excise tax" (Section 5468, General Code). In order to determine the norm for the measurement of the quantity of such tax, the commissioner must determine what is referred to in the statute as "the amount and value of the proportion of the capital stock" of such companies "representing capital and property of such companies owned and used in this state," which determination must be made as provided in Section 5465 of the General Code, which reads:

> "On the first Monday in July, the commission shall ascertain and determine the amount and value of the proportion of the capital stock of sleeping car, freight line and equipment companies, representing capital and property of such companies owned and used in this state, and in so determining shall be guided in each case by the proportion of the capital stock of the company representing rolling stock, which the miles of railroad over which such company runs cars, or its cars are run in this state, bear to the entire number of miles in this state and elsewhere over which such company runs cars, or its cars are run and such other rules and evidence as will enable the commission to determine, fairly and equitably, the amount and value of the capital stock of such company representing capital and property owned and used in this state."

Section 5468 of the General Code requires such determination and reads:

> "On the first Monday in August, of each year, the commission shall certify such amount to the auditor of state, who shall charge a sum in the nature of an excise tax, to be collected from each sleeping car, freight line and equipment company, doing business or owning cars which are operated in this state, to be computed by taking one and thirty-five one-hundredths per cent. of the amount fixed by the commission as the value of the portion of the capital stock representing the capital and property of each company owned and used in this state."

Section 5469 of the General Code provides for the collection of such tax as follows:

> "On or before the first day of September of each year, the auditor of state shall certify to the treasurer of state, as herein provided, for collection from each sleeping car, freight line and equipment company, doing business or owning cars which are operated in this state, the amount so charged."

It is thus to be seen that such statutes (Sections 5462 to 5468, inclusive, General Code) not only in terms levy a tax "in the nature of an excise tax" against sleeping car, freight line and equipment companies, but also provide for its assessment and collection. It must necessarily follow that your second inquiry must be answered in the affirmative unless there is something in the statutes levying a "tax in the nature of an excise tax" against such companies which renders such statutes unconstitutional, which question I will consider in answering your third inquiry.

Your third inquiry probably arises by reason of the provisions of Section 5503 of the General Code, which reads:

> "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 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 this act."

From the provisions of the statute just quoted, it is evident that if sleeping car, freight line and equipment companies pay an excise tax on their gross earnings or gross receipts, they are specifically exempted from the corporate franchise tax levied by Section 5495, et seq., of the General Code.

As pointed out in an opinion of one of my predecessors in office in Opinions of the Attorney General for 1927, Volume II, page 1279, sleeping car, equipment and freight line companies are not mentioned in those statutes which levy an excise tax on certain public utility companies measured by their "gross receipts" or "gross earnings." (See Sections 5483, 5485, 5486 and 5487, General Code.) After an examination of those provisions of statute which levy a tax "in the nature of

an excise tax" against the public utility companies, enumerated in Section 5415 of the General Code, I believe they may be summarized as follows:

1. That against sleeping car, equipment and freight line companies is measured by the proportion of their capital stock representing the property owned and business done in this state by such companies (Section 5468, General Code).

2. That against express, telephone, telegraph, electric light, intrastate toll bridge, gas, natural gas, waterworks, messenger, union depot, heating, cooling, water transportation and pipe line companies is measured by the "gross receipts" of such companies as defined by Section 5417 of the General Code (Sections 5483, 5485 and 5487, General Code).

3. That against railroad, street, interurban and suburban railroad companies is measured by the "gross earnings" of such companies, as defined by Section 5416 of the General Code.

See Opinions of the Attorney General for 1927, Volume II, page 1279; Annual Reports of the Attorney General for 1913, Volume I, page 610.

It is thus evident that the utilities mentioned in your inquiry are not in terms expressly exempted from the corporate franchise tax levied by Section 5495, et seq., of the General Code.

It might be urged that if the tax levied by Section 5468 of the General Code is an excise tax upon the privileges for which the tax is levied by Section 5495 of the General Code for the engaging in business in the corporate form in this state, then there would be two specific taxes for the same privilege, which could scarcely be presumed to have been the intent of the General Assembly. There are several reasons why such argument cannot prevail.

First. The tax "in the nature of an excise tax" levied by Sections 5462 to 5469, inclusive, of the General Code is levied against all persons engaged in the business of a sleeping car, equipment or freight line company, as defined in Section 5416 of the General Code, whether incorporated or not. Section 5495, et seq., of the General Code do not purport to levy a tax on any thing or person other than corporations, foreign and domestic.

Second. Section 5499 of the General Code states that the corporate franchise tax is levied against domestic corporations "for the privilege

of exercising its franchise during the calendar year in which it is levied" (see also Cliffs Corporation v. Evatt, Tax Commissioner, 138 O.S., 336), while the tax "in the nature of an excise tax" is levied and is due and payable whether or not the utility is possessed of a corporate franchise.

Third. Section 5499 of the General Code states that the corporate franchise tax levied on foreign corporations is "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." Thus, it is levied only against a corporation, while the utility tax is levied whether or not the utility is incorporated.

From the foregoing, it would seem that the tax "in the nature of an excise tax," mentioned in your second inquiry, is not a tax on the privilege of exercising the corporate franchise in this state and is therefore not an excise tax upon the exercise of the same privilege as that upon which the corporate franchise tax is levied.

When we examine into the nature of the tax mentioned in your second inquiry, it would seem that any question with respect to conflict between that tax and that mentioned in your third inquiry disappears.

In the case of Pullman's Palace Car Company v. Pennsylvania, 141 U.S., 18, 35 L. Ed., 613, the court had under consideration the nature of a tax similarly laid to that mentioned in your second inquiry. The state of Pennsylvania laid a tax against the capital stock of the Pullman Company, the amount of which was ascertained by taking as a basis the proportion which the number of miles of track over which its cars were operated in Pennsylvania bore to the whole number of miles of track over which its cars were operated everywhere and without regard to the place where any particular cars were operated, used or located.

Mr. Justice Gray, in disposing of one of the contentions of the plaintiff, said on page 617 of 35 L. Ed.:

> "Much reliance is also placed by the plaintiff in error upon the cases in which this court has decided that citizens or corporations of one state cannot be taxed by another state for a license or privilege to carry on interstate or foreign commerce within its limits. But in each of those cases the tax was not upon the property employed in the business, but upon the right

to carry on the business at all, and was therefore held to impose a direct burden upon the commerce itself. Moran v. New Orleans, 112 U.S. 69, 74 (28: 653, 655); Pickard v. Pullman S. C. Co. 117 U.S. 34, 43 (29: 785, 788); Robbins v. Shelby County Tax. Dist. 120 U.S. 489, 497 (30: 694, 697); Leloup v. Port of Mobile, 127 U.S. 640, 644 (32: 311, 313). For the same reason, a tax upon the gross receipts derived from the transportation of passengers and goods between one state and other states or foreign nations has been held to be invalid. Fargo v. Michigan, 121 U.S. 230 (30:888); Philadelphia & S. S. Co. v. Pennsylvania, 122 U.S. 326, (30: 1200).

The tax now in question is not a license or a privilege tax; it is not a tax on business or occupation; it is not a tax on, or because of, the transportation, or the right of transit, of persons or property through the state to other states or countries. The tax is imposed equally on corporations doing business within the state, whether domestic or foreign, and whether engaged in interstate commerce or not. The tax on the capital of the corporation on account of its property within the state, is, in substance and effect, a tax on that property. Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196 (29: 158, 164); Western U. Teleg. Co. v. Massachusetts, 125 U.S. 530, 552 (31: 790, 794). This is not only admitted, but insisted on, by the plaintiff in error.

The cars of this Company within the state of Pennsylvania are employed in interstate commerce; but their being so employed does not exempt them from taxation by the state; and the state has not taxed them because of their being so employed, but because of their being within its territory and jurisdiction. The cars were continuously and permanently employed in going to and fro upon certain routes of travel. If they had never passed beyond the limits of Pennsylvania, it could not be doubted that the state could tax them, like other property within its borders, notwithstanding they were employed in interstate commerce. The fact that, instead of stopping at the state boundary, they cross that boundary in going and coming back, cannot affect the power of the state to levy a tax upon them. The state, having the right, for the purposes of taxation, to tax any personal property found within its jurisdiction, without regard to the place of the owner's domicil, could tax the specific cars which at a given moment were within its borders. The route over which the cars travel extending beyond the limits of the state, particular cars may not remain within the state; but the Company has at all times substantially the same number of cars within the state, and continuously and constantly uses there a portion of its property; and it is distinctly found, as matter of fact, that the Company continuously, throughout the periods for which these taxes were levied, carried on business in Pennsylvania, and had about one hundred cars within the state.

The mode which the state of Pennsylvania adopted to ascertain the proportion of the Company's property upon which

> it should be taxed in that state, was by taking as a basis of assessment such proportion of the capital stock of the Company as the number of miles over which it ran cars within the state bore to the whole number of miles, in that and other states, over which its cars were run. This was a just and equitable method of assessment; and, if it were adopted by all the states through which these cars ran, the Company would be assessed upon the whole value of its capital stock, and no more.
>
> The validity of this mode of apportioning such a tax is sustained by several decisions of this court, in cases which came up from the circuit courts of the United States, and in which, therefore, the jurisdiction of this court extended to the determination of the whole case, and was not limited, as upon writs of error to the state courts, to questions under the Constitution and laws of the United States."

As was held by the court in Educational Films Corporation of America v. Ward, 282 U.S., 379, 75 L. Ed., 400, the nature of a tax "must be determined by its operation rather than by particular descriptive language which may have been applied to it." If, therefore, the tax mentioned in your second inquiry is a property tax, as held by my predecessor in Reports of the Attorney General for 1913, Volume I, page 610, and as described in Pullman's Palace Car Company v. Pennsylvania, supra, it would appear that there could be no conflict between such tax and the corporate franchise tax levied by Section 5495, et seq., of the General Code.

It must be remembered, however, that there are two methods by which property or persons may escape a tax, first, by reason of express exemption in the language of the act which otherwise would include the property or person within the taxing provisions, and, second, by reason of the fact that the language of the act levies no tax on the specific property or person. The first of such methods I have already discussed. Let us now examine the provisions of the act which levies the corporate franchise tax with a view to determining whether its language lays a tax on sleeping car, freight line and equipment companies which have been incorporated.

Section 5499 of the General Code, which levies the franchise tax on domestic and foreign corporations, provides in 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, provided, however, that no fee shall be charged from any corporation which shall have been adjudicated a bankrupt, or for which a receiver shall have been appointed or which shall have made a general assignment for the benefit of creditors, except for the portion of the then current year during which the tax commission shall find such corporation had the power to exercise its corporate franchise unimpaired by such proceedings or act. But in no case shall the fee be less than twenty-five dollars."

In order to understand the meaning of the phrase "each such corporation" as used in the statute just quoted, we must refer to Section 5495 of the General Code which reads:

> "The tax provided by this act for domestic corporations shall be the fee charged against each corporation organized for profit under the laws of this state, 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 this act for foreign corporations shall be the fee charged against each corporation organized for profit 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."

Section 5495-1 of the General Code contains this further provision with respect to foreign corporations:

> "For the purposes of this act * * * foreign corporations shall be considered admitted to do business in Ohio when the statement for admission has been filed with the secretary of state or upon obtaining from such secretary a certificate of compliance with the laws of Ohio. * * * Failure on the part of any foreign corporation for profit to proceed according to law to obtain from the secretary of state proper authority to do business or to own or use property in this state shall not excuse such corporation from liability to make proper excise or franchise tax report or return or to pay a proper excise or franchise tax or penalty, if such liability would have attached had such proper authority been obtained."

As is to be seen from Sections 5499, 5495 and 5495-1 of the General Code, the tax levied by such sections with respect to domestic corporations is *for the privilege* of engaging in business in corporate form, regardless of the nature of the business for the conduct of which the

franchise is held. See Cliffs Corporation v. Evatt, Tax Commissioner, 138 O.S., 336. As to foreign corporations, the tax is levied with respect to several things, (1) for the privilege of doing business in this state, (2) for the privilege of owning or using a part or all of its capital or property in this state, or (3) for holding a certificate of compliance with the laws of this state.

As was held in The Southern Gun Company v. Laylin, 66 O.S., 578:

> "1. The state is a sovereignty, with sovereign powers, except as limited by the constitution of the United States.
>
> 2. While there is no express limitation upon the power of the general assembly to tax privileges and franchises, such power is impliedly by those provisions of the constitution which provide that private property shall ever be held inviolate, but subservient to the public welfare, that government is instituted for the equal protection and benefit of the people, and that the constitution is established to promote our common welfare.
>
> 3. By reason of these limitations a tax on privileges and franchises can not exceed the reasonable value of the privilege or franchise originally conferred, or its continued annual value hereinafter. The determination of such values rests largely in the general assembly, but finally in the courts.
>
> 4. An excise tax may also be imposed upon corporations to compensate the state for the additional burden caused by the aggregation of capital in an artificial body, and the exemption, in part at least, of the individuals composing such body from liability for its debts.
>
> 5. A franchise tax may be imposed by the general assembly upon corporations, both domestic and foreign, doing business in this state."

See also The Delaware Railroad Tax, 18 Wall. (U.S.), 206; Silver Horn Mining Company v. New York, 143 U.S., 305; Bass, Ratcliff & Gretton v. State Tax Commission, 266 U.S., 271.

It should be remembered that not all foreign corporations are required to obtain or hold a certificate of compliance with the laws of this state. The requirements for such certificate is contained in the Foreign Corporation Act (Sections 8625-1 to 8625-33, inclusive, General Code). Section 8625-3 of which reads:

> "This act shall not apply to corporations engaged in this state solely in interstate commerce, nor to banks, trust com-

> panies, building and loan associations, title guarantee and trust companies, bond investment companies, insurance companies, nor to public utility companies engaged in this state in interstate commerce."

Thus, under the express provisions of such section, a foreign public utility corporation engaged in interstate commerce in this state need obtain no such certificate. In Opinions of the Attorney General for 1932, Volume III, page 1368, one of my predecessors in office ruled that:

> "The provision contained in Section 8625-3, General Code, exempts public utility corporations from the provisions of the Foreign Corporation Act when they are engaged in this state in interstate commerce as a principal business as distinguished from an incidental business."

I have examined the reasoning supporting such paragraph of the syllabus and see no reason to disagree therewith. As above pointed out, the tax is imposed on a foreign corporation not only by reason of its holding a certificate of compliance with the laws of this state but also for the privilege of doing business in this state and for the privilege of owning or using a portion of its capital or property in Ohio. It should be remembered, however, that a state may not impose a franchise tax against a foreign corporation for the privilege of engaging in interstate commerce exclusively within such state. Ozark Pipe Line Corporation v. Monier, 266 U.S., 555, 69 L.Ed., 439; East Ohio Gas Company v. Tax Commission, 283 U.S., 465, 75 L.Ed., 1171; State Tax Commission of Missouri v. Interstate Natural Gas Company, Inc., 284 U.S., 41, 76 L.Ed., 156; Wells Fargo & Company v. Nevada, 248 U.S., 165; Crutcher v. Kentucky, 141 U.S., 47; Matson Navigation Company v. State Board of Equalization, 297 U.S., 441. It would therefore seem that if an incorporated foreign sleeping car, equipment or freight line company is engaged in only interstate business in Ohio, it is neither required to qualify to do business in this state by the Foreign Corporation Act nor required to pay the franchise tax imposed by Section 5495, et seq., of the General Code, unless it owns property or uses a part of its capital in this state and such fact is sufficient to subject it to the franchise tax so imposed. An examination of the cases above cited will lead to the conclusion that if the property or capital of a foreign corporation is held within a state other than that of the corporation's domicile and is used exclusively for the furtherance of its interstate business, such state may not exact a corporate franchise tax for such privilege. However, if such

corporation also engages in intrastate commerce in addition to its interstate activities, such right may be made the subject of a corporate franchise tax.

Matson Navigation Company v. State Board of Equalization, 297 U.S., 441

Western Cartridge Company v. Emmerson, 281 U.S., 511

Ford Motor Car Company v. Beauchamp, 308 U.S., 331

Horn Silver Mining Company v. New York, 143 U.S., 305

Postal Telegraph-Cable Company v. Richmond, 249 U.S., 252

Underwood Typewriter Company v. Chamberlain, 254 U.S., 113

Looney v. Crane Company, 245 U.S., 178

Cheney Brothers Company v. Massachusetts, 246 U.S., 147

Hump Hair Pin Manufacturing Company v. Emmerson, 258 U.S., 290

It would therefore seem that if a foreign incorporated sleeping car, equipment or freight line company engages only in interstate commerce in Ohio, it could not be liable for the franchise tax in Ohio; if, however, it engages in both interstate and intrastate business in Ohio, it would be subject to the Ohio franchise tax imposed by Section 5495, et seq., of the General Code, and such taxation is not prohibited by the federal constitution.

Specifically answering your inquiries, it is my opinion that:

1. Under authority of Section 5423 of the General Code, the tax commissioner of Ohio is required to ascertain and assess all the taxable property, as defined in Sections 5419 and 5425 of the General Code, of each sleeping car, freight line and equipment company, as defined in Section 5416 of the General Code, and apportion the valuation so determined among taxing districts in accordance with the provisions of Section 5446 of the General Code. He must certify such apportionment of valuation to the appropriate county auditors as provided in Section 5447 of the General Code in order that it may be extended on the proper tax lists and duplicates by such county auditors as provided in Section 5448 of the General Code.

2. Under authority of Section 5465 of the General Code, the tax commissioner of Ohio must ascertain and assess the tax base against

which the auditor of state, under authority of Section 5468 of the General Code, charges the tax "in the nature of an excise tax" imposed by Sections 5462 to 5468, inclusive, of the General Code against sleeping car, equipment and freight line companies, as defined in Section 5416 of the General Code.

3. Sleeping car, freight line and equipment companies, as defined in Section 5416 of the General Code, if incorporated, are subject to the provisions of Section 5495, et seq., of the General Code, which impose a corporate franchise tax on domestic and foreign corporations.

4. A foreign corporation which is engaged in Ohio exclusively in interstate business as a sleeping car, freight line or equipment company, is not subject to the Ohio corporate franchise tax (Section 5495, et seq., General Code.)

Respectfully,

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Attorney General.