REPORT OF

DONALD M. WAESCHE

PRESIDENT

STATE BOARD OF TAX APPEALS

ON APPEALS FROM ASSESSMENTS

ON RAILROAD PROPERTIES

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State Board of Tax Appeals
State House
Trenton, New Jersey

Gentlemen:

I had planned to prepare, with your help, a comprehensive account of the work of the State Board of Tax Appeals for the first year following my appointment as a member of the Board, but I have been so occupied with railroad tax appeals that I have had no time to work on such an all inclusive report. The appeals during my first year as Presidnet of this Board from the taxes assessed against railroad properties dwarf, by comparison, all other matters with which the Board has been concerned during the past year and they have become an important subject in themselves for a report. My report will, therefore, relate only to railroad tax appeals.

When I became a member of the Board in July, 1942, railroad tax appeals were pending for the taxing years 1940, 1941, and 1942. No hearings had been started on the railroad tax appeals for any of these three years. The railroads concerned were The Central Railroad of New Jersey; New York Central Railroad System; Lehigh Valley Railroad System; Delaware, Lackawanna and Western Railroad System; Erie Railroad System; Pennsylvania Railroad System; New York Susquehanna and Western Railroad System; Hudson and Manhattan Railroad Company; Hoboken Railroad Warehouse and Steamship Connecting Company; and the Hoboken Manufacturers Railroad.

The municipalities concerned in these appeals were Jersey City, Newark, Hoboken, Secaucus, and Harrison.

All of the appeals for the three years, 1940, 1941, and 1942, had been set down by the Board for hearing on September 15, 1942. On that day I directed the attention of the attorneys for the railroads and for the municipalities to that section of the statute which provided that the State Board of Tax Appeals shall conclude its hearings on or before October 15, following the filing of the appeals and that, therefore, the Board would not continue its hearings on the 1942 appeals beyond October 15, next. I adjourned the hearings on the 1940 and 1941 appeals to January 19, 1943. Since those appeals were then beyond the statutory date for hearing appeals for those respective years, no harm could be done by getting them out of the way of hearing the 1942 appeals.

Pursuant to the statute, the 1942 railroad appeals had been filed with the Board on the third Monday of June, 1942. At that time the Board fixed September 15, 1942, as the date to begin hearings. As a result of this delay, only The Central Railroad appeal and the cross-appeal by Jersey City could be heard within the statutory time.

The hearings on the 1942 Central Railroad appeal and Jersey City's cross-appeal began Monday, September 21, and continued every weekday, except Saturday, until, and

including, October 15, 1942. The 1942 appeals not heard before October 15, were dismissed by the Board for lack of jurisdiction. (See Opinion of the Board, 28 Atl. Rep. (2d) 618; 20 N. J. Misc. Rep. 484; N. J. Tax Reports for 1942, page 164.)

The testimony of the 1942 hearings was transcribed and typed as fast as it was taken. The stenographers taking the testimony worked in relays and they had assistants who immediately typed the testimony. Each morning during the hearings, I received a typed copy of the testimony taken the previous day, and an extra copy was delivered each morning at the office of the Board in the State House. The day-to-day typed copy of the testimony was thus readily available to all members of the Board.

At each regular meeting of the Board held during the 1942 Central Railroad hearings, I reported to the Board members on the progress of these hearings. On November 4, 1942, I reported to the full membership of the Board and submitted to you my recommendations on these appeals and my reasons therefor. All of the testimony and all of the exhibits taken during the hearings were presented to the Board at that time. A discussion lasting several hours was held on the evidence and on my recommendations and opinion. Maps showing the location of the property under appeal and sales of comparable property were laid on the floor in front

of the Board members. The discussion continued until the Board members themselves brought it to an end and expressed themselves as satisfied and ready to vote on my report. No member of the Board said that he had not had sufficient time to consider either my report or the evidence submitted at the hearings, and nobody expressed any hesitancy in approving my recommendations, report and written opinion.

The judgment of the Board in the 1942 Central Railroad appeal expressly fixes the value of the property covered by the evidence taken during the hearings. The judgment is signed by each member of the Board. In part it reads as follows:

> "And the Board having considered evidence submitted by the parties, and the arguments and briefs submitted by counsel for the petitioners, for the respondent State Tax Commissioner and on behalf of the taxing districts, City of Jersey City and City of Newark, respectively, and the Board being fully advised in the premises;
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> "And it appearing that the said assessments for taxation should be reduced, modified, and cancelled as more particularly hereinafter stated and adjudged, it is, therefore, on this 4th day of November, Nineteen Hundred and Forty-two, at a session of the State Board of Tax Appeals ORDERED, ADJUDGED, and DECREED, under and by virtue of the authority conferred by law, that:"

During the spring and summer of 1943 all the members of the Board were subpoenaed twice by Jersey City to testify in the certiorari proceedings brought by that municipality to review the Board's 1942 Central Railroad

decision. All the Board members, including myself, met twice at Commissioner Huegel's offices in Newark to review the testimony we expected to give. We all agreed that we had given due consideration to the evidence in the 1942 case, that we would so testify, and that our testimony would include the facts concerning the report I made to the Board as I have related them above.

On January 19, 1943, the railroad tax appeals for the years 1940 and 1941 were dismissed because the statutory time for hearing those appeals had passed. I respectfully refer to the opinion filed in connection with the 1940 and 1941 appeals. (29 Atl. Rep. (2d) 716; 21 N. J. Misc. Rep. 36).

On March 23, 1943, I began hearing 276 railroad tax appeals on the third class railroad property of six different railroads. The appeals on the third class property of The Central Railroad had not been heard for seven years, 1936 to 1942 inclusive. I received evidence on these appeals practically every weekday, except Saturday, until May 14, 1943, at which time I adjourned the hearings on the appeals then under consideration until June 22, in order to take up the first and second class railroad appeals which were filed on May 17.

The hearing of the first appeal on first and second class railroad property for 1943 was that of The

Central Railroad and the cross-appeal by Jersey City. As was done in the 1942 appeal of The Central Railroad, an extra copy of the testimony was ordered for the other members of the Board. On October 23, 1943, I mailed to each Board member a copy of my opinion in The Central Railroad 1943 appeal. On October 26, 1943, I officially filed my opinion with the Board, together with the testimony and all exhibits taken at the hearings.

The Board took this appeal up for consideration on October 27, 1943. I spread out on tables before the Board, maps of the property under appeal, which also showed the location of numerous sales of comparable property. The evidence was full of testimony of sales of comparable property. The Board members did not discuss either the value of the property covered by the testimony or the evidence of value, which was limited to the property located in Jersey City and a small amount in Bayonne. Their discussion was concerned only with the total figure at which the State Tax Commissioner, on February 4, 1943, had valued all of the first and second class property of The Central Railroad throughout New Jersey. When that figure was ascertained, it was resolved, on motion of Commissioner Smith, seconded by Commissioner Sharp, that the Board recognize the value of <u>all</u> first and second class property <u>throughout New Jersey</u> as fixed by the State Tax Commissioner in his valuation assess-

ment made on February 4, 1943.

I respectfully refer to my opinion wherein I discuss the State Tax Commissioner's assessment of February 4, 1943, and hold that it was an illegal assessment.

Immediately following the adoption of the motion to accept the Tax Commissioner's valuation assessment made on February 4, 1943, on motion of Commissioner Smith, seconded by Commissioner Sharp, the Board affirmed the total figure fixed by the State Tax Commissioner as the value of all first and second class property of The Central Railroad throughout New Jersey. The issue raised by the evidence was concerned only with the value of the land located in Jersey City and Bayonne. The Board did not attempt to determine the value of these lands except as they are a part of all The Central Railroad property in New Jersey and therefore make up a part of the total value.

The opinion of the majority of the members of the Board was filed on November 8, 1943. They reversed the action they took on the 1942 Central Railroad appeals on November 4, 1942. With regard to that action they say in their opinion in the 1943 case that:

> "On November 4, 1942, at a regular meeting of the Board, the president submitted to the members of the Board a written opinion which he had prepared, disposing of the petitions of appeal by fixing very substantial reductions in the assessed valuations of both second class and main stem property of The Central Railroad Company

> in the cities of Jersey City and Bayonne. The Board was advised by the president, that as a matter of law, the Board was required to certify its decision no later than the next day, November 5th, and that it was expeditious that the judgments should be signed that day, November 4th. The members had no choice but to concur in the conclusion of the president that the November 5th date was mandatory. Over two thousand pages of testimony had been taken, many exhibits were introduced in evidence, and briefs had been filed by the railroad company, the City of Jersey City and by the Attorney General. It was impossible for any of the members of the Board on November 4th or 5th to read the testimony and briefs and to examine the exhibits so as to form an independent judgment whether the conclusions and recommendations of the president as stated in his opinion were justified."

The confusion into which the State is drawn by the inconsistency of the majority members of the Board in reversing themselves and confirming the valuation assessments made by the State Tax Commissioner on February 4, 1943, is worse confounded by the decision they made on May 26, 1942, in the appeal from the valuations fixed for the year 1939 by the State Tax Commissioner for the same property of the Central Railroad. The State Tax Commissioner made a 10% over-all reduction in the value of The Central Railroad first and second class property for the year 1939. Jersey City filed an appeal from this reduction on the third Monday in June, 1939. Hearings were conducted on this appeal through 1940 and 1941. The Central Railroad property under the 1939 appeal was the same property covered by the 1942 and 1943 appeals. The Board set aside the 10% reduction in value

made by the State Tax Commissioner on the ground that the proof showed that the value of the property under appeal was greater than the reduced values at which the State Tax Commissioner had assessed them.

The valuations assessed by the State Tax Commissioner on February 4, 1943, on the property of The Central Railroad is the same valuation assessment he made on the same property for the years 1939, 1940, 1941, and 1942. The 1939 valuation assessment made by the State Tax Commissioner the Board held was 10% too low; the valuation assessment he made for the year 1942 the Board held was about 30% too high; the February 4, 1943, valuation assessment levied by the State Tax Commissioner the Board held was just right. The majority opinion specifically points out that the evidence shows that the property under appeal had the same value for the years 1938 to 1943 inclusive.

In their 1943 opinion the majority members of the Board say:

> "We are bound to attach great weight to the point of view of the State Tax Commissioner, since the statute expressly provides that he may use his 'personal knowledge and judgment as to the value of any property he is required to assess, upon original assessment, or upon review thereof.' R.S. 54:29A-67. Assessments made by him should not be interfered with 'except for palpable error'."

In the 1943 hearings the State Tax Commissioner testified and said that he knew nothing about the value of

the property under appeal. (See my opinion in the 1943 appeal).

In the opinion in the 1939 case, the Board said:

> "The action of the State Tax Commissioner, as the assessor, is entitled to the presumption of correctness, United New Jersey R. R. & Canal Co. vs. State Board of Taxes and Assessment, 103 N.J.L. 33 (Sup. Ct. 1926), and the problem before us accordingly is as to whether the exhaustive proofs and full arguments upon the law and the facts submitted on behalf of the city do not sustain the burden it carries, and establish the incorrectness of the action of the commissioner. Upon thorough consideration of the whole case, we have concluded that they do. * * *
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> "A further consideration which must influence the determinations of the Board in this matter, in respect to the tax department's reductions of assessments of the property involved herein, is the fact that the board has decided, in the appeals of the railroad companies for reductions in the valuations fixed by the commissioner upon all classes of railroad property, including the second class properties here under review, for the years 1937 and 1938, that such assessments were not in any instance in excess of true values. The Central Railroad of New Jersey, et al. vs. Martin, 19 N. J. Misc. 427, (State Board 1941). No appeal having been filed by the companies from the judgments of the board in those cases, the valuations there affirmed, while not res judicata in the case sub judice, naturally carry a strongly persuasive influence and evoke an inquiry as to what, if anything, has been here adduced to indicate such a difference in the condition of the properties between the assessing dates in the prior cases, January 1, 1936 and January 1, 1937, and that applicable in the present case, January 1, 1938, as would explain or warrant the over-all reductions made for 1939. (See City of Hoboken vs Morris & Essex Railroad Co., 19 N. J. Misc. 100, (State Board 1941).) Our search of the record herein discloses no such evidence, but on the contrary indicates affirmatively that there was no basis whatever for downward revisions in 1939. * * *

"We can only conclude that, upon the whole case, the valuations approved by us in the 1937-1938 cases, roughly corresponding with the 'primary valuations' set forth above, were not properly subject to the downward revision of ten percent, made by the department for the year 1939, in the light of anything shown in the records either of the prior appeals or of this one, or of the long standing knowledge of the board concerning these properties. We find such values were not in excess of the true value of these lands as of January 1st, 1938, and that their reduction, to the injury of the petitioner taxing district, for the year 1939, was erroneous."

The judgment in the 1939 appeal was signed by all the members of the then Board, except Commissioner Hoff.

The evidence taken at the hearings before me in the 1943 Central Railroad appeal and Jersey City's cross-appeal is inordinately voluminous, consisting of 178 exhibits and eight volumes of type written matter, aggregating about 4000 pages, containing a vast amount of confusing and conflicting testimony relating to a large number of complex and varied real estate transactions extending over a period of more than twenty years last past; describing the various uses to which the land lying within the Jersey City terminal of The Central Railroad is devoted; detailing the income account, operating costs, profits and losses of The Central Railroad for the past ten to fifteen years; explaining the advantages and importance of the location and determining the productivity in railroad use of the land included in the Jersey City terminal of The Central Railroad; and also

relating to many other complicated matters pertaining to the value of the property under appeal. The evidence relates to about sixty parcels of land; the coal pier and a few other structures, all located in Jersey City except for a few in Bayonne. Some of the evidence is very difficult to understand and requires many hours of careful and concentrated study in order to fully comprehend it. The record contains the testimony of many real estate experts, engineers, financial experts, accountants, and other witnesses.

It is a very slow and tedious job to accurately piece together the facts, consider the statements of a cloud of witnesses and determine the weight of the evidence with judicious care in a record as large and as intricate as this record is. It is impossible for any one to do so in a short time. It took me months to do it, and I had the advantage of listening to the testimony as it was given last year and repeated this year.

The 178 exhibits in the case were in my possession from the time they were put into evidence until Commissioner Smith took them from me on Tuesday afternoon, November 2, 1943. He said that he was requested by Commissioners Sharp, Huegel, Hoff and Harrigan to take the exhibits to Mr. Joseph Lippman in Newark, a lawyer who would prepare the opinion for the majority members of the Board. Mineographed copies of their opinion were filed with the Board on Monday,

November 8. It was mimeographed Saturday, November 6. That gave Mr. Lippman only four days, at the most, to study the evidence and write the opinion. The testimony cannot be understood without the exhibits, nor the exhibits without the testimony. It would have been impossible for Mr. Lippman in four days to have studied the evidence and prepared the opinion which was filed by the majority members of the Board.

I have carefully examined the opinion of the majority members of the Board in The Central Railroad appeal and cross-appeal by Jersey City. It contains many statements that I seriously doubt can be supported by the evidence. It contains statements which appear to me to be a gross misrepresentation of the evidence. It contains many statements that do not seem to have any significance on the value of the property as of January 1, 1942, the assessing date. It contains conclusions of fact and law which I certainly do not think can be justified by either the evidence or the law. I am prepared to point out such statements and give the reasons for my conclusions. In fact, great portions of the opinion seem to be based on evidence not contained in the record of the hearings, and on things not seen nor heard by any of those five members of the Board who adopted the opinion as their own. I doubt that those members of the Board who filed the majority opinion understand the full purport of what they have said in their opinion.

It is obvious to any person carefully reading the majority opinion that it was written by a lawyer who was present at the hearings held on the 1943 assessments levied by the State Tax Commissioner on the property of The Central Railroad both before Mr. Focht on primary review and before me on the appeals. It is also obvious that the majority opinion was written by a lawyer who was also thoroughly familiar with the record of the hearings held on the appeals from the assessments levied by the State Tax Commissioner on the property of The Central Railroad for the years 1939, 1942, and 1943.

From my study of the majority opinion and knowledge of the proceedings that took place before me during the 1942 and 1943 appeals, I do not hesitate to state that I am reasonably sure that the majority opinion was written by Mr. Milton Conford. He had been legal assistant to the President of the Board for several years before I was appointed to the Board. He continued as my assistant after my induction as President of the Board until March, 1943, when he resigned to become one of the assistants to the Attorney General. During the seven months that he was my legal assistant we had many discussions on the legal problems that came before me as President of the Board. In the beginning he sat alongside of me during the hearings. He prepared many memorandums covering the law and facts in cases heard by me, and I made

use of many of his memorandums in preparing the opinions I filed with the Board in those cases.

Mr. Conford represented the State in the hearings before me of the 1943 railroad tax appeals on first and second class properties. He tried the 1943 Central Railroad appeal and the cross-appeal by Jersey City, on behalf of the Attorney General. The record will show that we had many discussions on both the law and facts during the hearings.

I felt certain that Mr. Conford had written the majority opinion as soon as I had carefully read and analyzed it. I examined it in connection with the two briefs, totalling 200 pages, which he filed in the 1943 Central Railroad case. I can identify this opinion as written by Mr. Conford by his characteristic mode of expression; by his customary use of particular words and phrases, and of parenthetical words and phrases; and by many distinctive sentences. I can also identify this opinion as written by him by the points of argument raised, both legal and fact, and by the reasoning used in support of the arguments. Moreover, as I have already indicated, no one other than Mr. Conford could have written it. He was present during the primary review of the 1943 assessments before Mr. Focht and he was present during the hearings on the 1943 appeals before me. He was familiar with the record of the hearings held on the 1939, 1942, and 1943 appeals.

Mr. Conford was engaged as special counsel by Jersey City to assist the Attorney General in his proceeding in the Court of Chancery to test the constitutionality of the railway settlement act. He was on the payroll of the law department of Jersey City during part or all of 1942 and part of 1943. He was transferred to the payroll of the Attorney General's office about March, 1943, in order to represent the State, in the first and second class railroad appeals.

In the 1942 Central Railroad case, the State Tax Board found and determined that certain bridges used only to support public streets crossing The Central Railroad tracks were not "property used for railroad purposes" and therefore not assessable by the State Tax Commissioner. This decision was a legal interpretation of the statute which says that, "the commissioner shall determine the true value, * * * of all property used for railroad purposes." (See opinion, Pitney, etc., Trustees vs Jersey City, 1942 Tax Reports, pp. 158, 159). The decision of the majority members of the Board in the 1943 Central Railroad case reverses the Board's 1942 decision regarding these bridges and holds that they are property used for railroad purposes and therefore assessable. The point I wish to stress here is that the majority members of the Board blindly accepted a legal decision written for them by some lawyer in no manner connected with the Board

and which reversed a prior decision of the Board.

There are two other points I want to note which I think show a serious lack of consistency on the part of the majority members of the Board. It is important that a judicial board, and particularly a board which by its decisions determines tax policy, should be reasonably consistent in its rulings and determinations.

The law provides that:

> "On or before November first in each year the commissioner shall determine the true value, as of the preceding January first, of all property used for railroad purposes." (N.J.S.A. 54:29A-17).
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> "The State Board of Tax Appeals shall conclude its hearings on all complaints * * * on or before the first day of November following the filing of the complaints, and between November fifth and November tenth following shall certify to the State Tax Commissioner its final determination." (N.J.S.A. 54:29A-34).

In the construction of statutes and on the question of jurisdiction our Board, for many years heretofore, has consistently followed a policy of strict statutory construction. If that policy is not followed, our Board will be making the laws and thereby assuming the functions of the legislature.

In the case of Central Railroad and Other Railroads vs State of New Jersey, 55 N.J.L.J. 23; 1912 to 1934 Tax Reports, page 469, 472, the opinion of the Board, which

was filed on November 17, 1931, said:

> "Taxation is purely a creature of statute. In this State the law is so clearly settled that no citation of authority is necessary to show that statutes must be strictly construed and strictly complied with."

In the case of Bergenfield et al vs Martin, State Tax Commissioner, 19 N. J. Misc. 1; 16 Atl. Rep. (2d) 816, the opinion of the Board, which was filed December 10, 1940, said:

> "In considering any question relating to the jurisdiction of any statutory tribunal, such as is this body, the legislative grant of jurisdiction is strictly construed and must be found to expressly confer the power claimed. Mellor v. Kaighn, 89 N.J.L. 543, 99 A. 207, E. & A. 1916; Washington Township v Mercer County Board of Taxation, 85 N.J.L. 547, 89 A. 1028, Sup. Ct. 1914; City of Newark v Weyerhaeuser Timber Company, New Jersey Tax Reports, 1934-1939, p. 530, 1938. See also Cooley on Taxation, 4th Ed., Vol. 3, Sec. 1220."

In the four cases of Jersey City, Hoboken, Secaucus and Harrison vs Kelly and several railroad cases the State Board in its opinion filed November 4, 1942, said with regard to the first section of the statute quoted above that:

> "It is the opinion of the Board that insofar as the Railroad Tax Law of 1941 is concerned, all of such dates are mandatory and that this Board must conclude its hearings on or before the 15th day of October following the filing of the complaint." (1942 State Board Reports, p. 164).

On January 19, 1943, our Board dismissed all the 1940 and 1941 railroad appeals on the ground that the Board

had lost jurisdiction to hear them.

On June 15, 1943, the Board dismissed a number of appeals filed by the City of Hoboken, and in its opinion said:

> "The State Board of Tax Appeals is a special statutory tribunal and is therefore strictly limited within the bounds of the jurisdiction prescribed by the Legislature which created it and fixed its powers and duties." (21 N. J. Misc. Rep. 193, 32 Atl. Rep. (2d) 710).

On November 8, 1943, the Board dismissed four 1943 railroad appeals on the ground that it had lost jurisdiction to hear them.

In the case of Sea Isle City vs Cape May, 50 N. J. L. 50, decided in 1887, the Supreme Court said:

> "The board of assessors * * * being a special statutory tribunal, its action is valid only when its functions have been performed in the manner, and in compliance with forms prescribed by the statute which conferred the jurisdiction."

In the opinion filed by the majority members of the Board in the 1943 Central Railroad case the Board refused to be guided by the statutory provision which requires the Tax Commissioner to determine the true value of the property on or before November 1. They accepted the valuation assessment made by the State Tax Commissioner on February 4, 1943 and then confirmed it.

I heard the Pennsylvania Railroad appeal for 1943,

and the cross-appeal by Jersey City and Hoboken. I reported to the Board on November 8. Immediately following my report Commissioner Huegel pulled from his pocket a prepared resolution which recited that the majority members of the Board had been given independent legal advice that the Board was not bound to certify their final determination to the State Tax Commissioner before November 10, and therefore postponed any decision on the case until some future date. This resolution was immediately adopted by Commissioners Huegel, Hoff, Harrigan, Smith and Sharp. If the Board by refusing to act before November 10, has lost jurisdiction to act, as I believe it has, then the majority's action of November 8, indirectly confirmed the valuation assessment made by the State Tax Commissioner.

It seems significant that by refusing to follow the procedure laid down by the statute the majority members of the Board have been able to effect a confirmation of the valuation assessments made by the State Tax Commissioner without considering the evidence relating to the value of the property under appeal.

I am firmly convinced that the evidence will prove to any reasonable person that the property under appeal in both the Central Railroad case and the Pennsylvania Railroad case are valued by the State Tax Commissioner greatly in excess of true value.

I should like to call attention to the opinion of the Board filed on October 26, 1943, in the franchise tax appeal of the New York, Susquehanna and Western Railroad System. That case was concerned with the franchise tax for the year 1943. The statute provides that a "franchise base" shall be computed for each year by deducting $200,000, from the "next preceding year's net railway operating income". The statute also specifically directs that in computing the next preceding year's "net railway operating income" certain deductions shall be made from the railroads' total operating revenues. Among those deductions are railway tax accruals.

One of the questions decided by the above mentioned opinion was that only those tax accruals are deductable which fell due or accrued in the year for which the "net railway operating income" was computed. The railway sought to deduct the 1933 to 1936 tax accruals which were paid in 1942 in computing the railroads 1942 "net railway operating income." By a ruling of the Attorney General, all the railroad were permitted to deduct, in computing their 1942 "net railway operating income," all tax accruals paid in 1942 even though they included payments for taxes which accrued and were due and payable in years prior to 1942. If the decision made by the State Board of Tax Appeals is correct, then New Jersey lost over $400,000. in franchise taxes due for the year 1943 by reason of the ruling of the Attorney General. These

taxes should be re-assessed next year in conformity with the State Board's decision.

The Susquehanna Railroad has obtained a writ of certiorari to take the decision of the State Board to the Supreme Court for review. Since the Attorney General is not in accord with the interpretation of the law made by the State Board, we should recommend that special counsel be appointed to defend the State. Jersey City does not show any interest or take any part in the franchise tax appeals.

Respectfully submitted,

DONALD M. WAESCHE
Donald M. Waesche, President,
State Board of Tax Appeals.