3538

FEE — CONSOLIDATION AGREEMENT, CONSTITUENT CORPORATIONS, DOMESTIC AND FOREIGN — SECRETARY OF STATE — SECTION 176 G.C. — INCREASE, NUMBER OF SHARES — CREDIT TO BE ALLOWED — RATES SET FORTH IN SAID SECTION — AUTHORIZED SHARES, DOMESTIC CONSTITUENT CORPORATIONS.

SYLLABUS:

When the constituent corporations forming a consolidated corporation are both domestic and foreign, the fee to be charged by the Secretary of State for filing the consolidation agreement is a minimum fee of twenty-five dollars plus a further sum, in case of any increase in the number of shares authorized to be issued effected by such agreement, to be determined by the number of shares the consolidated corporation is to be authorized to issue applied to the rates scheduled in paragraph two of Section 176, *General Code. A credit to be allowed on such filing fee is determined by applying the rates set forth in the second paragraph of Section* 176, *General Code, to the total number of authorized shares of the domestic constituent corporations.*

Columbus, Ohio, March 6, 1941.

Hon. John E. Sweeney, Secretary of State,
Columbus, Ohio.

Dear Sir:

This will acknowledge receipt of your request for my opinion which reads as follows:

"Kindly advise us what fee is to be charged by this office in the following situation pertaining to an agreement of consolidation which is to be filed in this office, pursuant to Section 8623-67, General Code.

Four domestic corporations are to be consolidated with three foreign corporations. Section 176, General Code, states that we shall compute a fee —

'. . . . . less credit at said rates for the number of shares previously authorized to be issued by the corporation or by the domestic corporations a consolidation or merger of which is effected by such certificate or agreement.'

In view of the above statutory provisions and inasmuch as Section 8623-67, General Code, has been amended by the 93rd General Assembly, are we to compute the fee for filing the certificate of consolidation by adding together the number of shares authorized to be issued by all four domestic corporations and deduct from this the total number of shares authorized to be issued by the resulting corporation; or are we to deduct the actual fees previously paid by the four domestic corporations.

We are also desirous of knowing whether or not 1932 O.A.G. No. 3946 is controlling in the instant matter, since Section 8623-67, General Code, has been amended."

Authority for the consolidation of two or more corporations is found in Section 8623-67, General Code, which in its present form was enacted by the Ninety-Third General Assembly and, in part, is as follows:

"I. Any two or more corporations for profit organized under this act or any previous corporation act of this state (hereinafter called 'constituent corporations') may merge or consolidate into a single corporation, which (in case of merger) shall be any one of such constituent corporations, or (in case of consolidation) shall be a new corporation to be formed by such consolidation (hereinafter, whether as to merger or consolidation, called 'consolidated corporation'). * * *

(6) A statement of the amount of stated capital with which the consolidated corporation will begin business, which shall be not less than $500.00 and shall be an amount determined in the manner prescribed in section 8623-37 of the General Code with respect to the stated capital of a corporation formed by consolidation. * * *

II. Any one or more such domestic corporations may merge or consolidate with one or more corporations organized under the laws of any other state or states of the United States of America (hereinafter in this and the next succeeding section called 'foreign corporations'), if the laws under which such foreign corporation or corporations exist shall permit such merger or consolidation.

The constituent corporations may merge or consolidate into

a single corporation which (in case of merger) shall be any one of such constituent corporations, or (in case of consolidation) shall be a new corporation to be formed by such consolidation, which new corporation may be a corporation of the state of incorporation or any one of said constituent corporations as shall be specified in the agreement of merger or consolidation. * * *

Said agreement when so adopted, signed and acknowledged by the persons and in the manner prescribed in subdivision I of this section on behalf of each domestic constituent corporation, and signed and acknowledged on behalf of each foreign constituent corporation in the manner prescribed by the laws of the state of incorporation of such foreign constituent corporation (or an executed counterpart thereof or a copy certified to be such by the president or a vice-president and the secretary or an assistant secretary of each of said constituent corporations) shall be filed in the office of the secretary of state, together with a certificate as prescribed by subdivision I hereof. Upon the filing thereof, or at such later date as the agreement may specify, the merger or consolidation shall be and become effective. * * * "

Prior to the amendment of Section 8623-67, General Code, by the Ninety-Third General Assembly, no provision was made in Ohio for the consolidation of foreign and domestic corporations. Commenting on this fact a former Attorney General said in the 1932 Opinion No. 3946 (Opinions of the Attorney General, 1932, Vol. I, page 54), to which reference is made in your letter:

"Section 8623-67, General Code, authorizes the consolidation of two or more domestic corporations."

A schedule of the filing fees to be charged by the Secretary of State is found in Section 176, General Code, effective in its present form since October 14, 1931. See 114 O.L., 803. This section, so far as pertinent to the subject of inquiry, is as follows:

"Except as otherwise provided by law, the secretary of state shall charge and collect, for the benefit of the state, the following fees, to wit: * * *

2. For filing and recording a certificate of amendment to or amended articles of incorporation or a certificate of reorganization, or an agreement of consolidation or merger, or a certificate of reduction of stated capital, or a certificate of dissolution or other certificate required or permitted to be filed and recorded by the General Corporation Act; the sum of twenty-five dollars, and in case of any increase in the number of shares authorized to be issued effected by such certificate or agreement the further sum of ten cents for each share authorized up to and including one thousand shares; five cents for each share authorized in excess of one thousand shares up to and including ten thousand shares; two cents for each share authorized in excess of ten thousand shares up to and including fifty thousand

> shares; one cent for each share authorized in excess of fifty thousand shares up to and including one hundred thousand shares; one-half cent for each share authorized in excess of one hundred thousand shares up to and including five hundred thousand shares; one-quarter cent for each share authorized in excess of five hundred thousand shares; less credit at said rates for the number of shares previously authorized to be issued by the corporation or by the domestic corporations a consolidation or merger of which is effected by such certificate or agreement, * * * ."

While Section 8623-67, General Code, has been amended to permit the consolidation of domestic and foreign corporations, it should be noted that no change was made in Section 176, General Code, in providing for the filing fees to be charged by the Secretary of State. There is a twenty-five dollar minimum fee to be charged for filing consolidation agreements with a further sum to be determined by applying the scheduled rates to the number of shares the consolidated corporation is to be authorized to issue. A credit is allowed for the number of previously authorized shares of domestic constituent corporations. Since the section specifically limits the credit to authorized shares of domestic corporations, it must be assumed that the legislature did not intend to include as a part of the credit the authorized shares of foreign constituent corporations. In Elmwood Place v. Schanzle, 91 O.S., 354, Judge Johnson said at page 357:

> "It is equally well settled that where the words of a statute are plain, explicit and unequivocal and express clearly and distinctly the sense of the lawmaking body, there is no occasion to resort to other means of interpretation. In such a situation the question is not, what did the general assembly intend to enact, but what is the meaning of that which it did enact?"

Your inquiry discloses that four domestic corporations contemplate joining with three foreign corporations in the consolidation. Each of the domestic corporations having been authorized to issue stock, it becomes necessary to determine what credit shall be allowed upon consolidation for such authorized issues of stock. Should the total of the incorporation fees paid by the domestic constituent corporations be deducted from the gross fee chargeable to the consolidated corporation? Or, should the total authorized shares of the domestic constituent corporations be deducted from the shares the consolidated corporation will be authorized to issue and the fee determined by applying the rates shown in the second paragraph of Section 176, General Code, to such remainder commencing with the initial rate? Or, should the credit for total shares of domestic

constituent corporations be allowed from the initial rates provided in paragraph two of Section 176, General Code, and the fee computed upon the additional shares of the consolidated corporation, if any, at the respective higher bracket rates? I believe this question was correctly answered in the 1932 Opinion above referred to, the first two branches of the syllabus reading:

> "1. Under Section 176, General Code, no filing fee in addition to the fixed fee of $25.00, is authorized when the consolidation agreement filed with the Secretary of State authorizes a lesser number of shares for the consolidated corporation than the total number of authorized shares of the constituent corporations even though such authorized shares of the new corporation are in excess of the authorized shares of either of the constituent corporations.
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> 2. In computing the filing fees for merged or consolidated corporations the amount should be determined by applying the rates set forth in Paragraph 2, Section 176, General Code, to the authorized shares of the consolidated corporation and deducting therefrom the sum arrived at by applying like rates to the sum total of the authorized shares of the constituent corporations so consolidated. Such sum so arrived at is the filing fee in excess of the minimum filing fee of $25.00."

The provision in the second paragraph of Section 176, General Code, for the allowance of a credit is in the following language:

> "* * * less credit at said rates for the number of shares previously authorized to be issued * * * by the domestic corporations a consolidation * * * of which is effected by such * * * agreement."

The allowable credit clearly is not founded upon the several incorporation fees previously paid by the constituent corporations at the time of their respective organizations. The number of shares previously authorized to be issued apparently refers to the total number of such shares to which total number the sliding scale of rates should be applied and the amount to be determined is the allowable credit. In other words, each Ohio corporation has paid a filing fee based upon a sliding scale and determined by the number of authorized shares. In case of a consolidation involving only domestic corporations with no authorized increase of stock over and above the total previously authorized for the constituent corporations, it would follow that there would be no fee in excess of the specific twenty-five dollars charged in all cases. Where the shares to be authorized for a consolidated corporation exceed the total of shares previously authorized for the domestic constituent corporations, the fee

for filing the consolidation agreement should be calculated on the number of shares the consolidated corporation will be authorized to issue, less credit calculated on the basis of the total of all shares of domestic constituent corporations previously authorized.

In specific answer to your inquiry it is my opinion that when the constituent corporations forming a consolidated corporation are both domestic and foreign, the fee to be charged by the Secretary of State for filing the consolidation agreement is a minimum fee of twenty-five dollars plus a further sum, in case of any increase in the number of shares authorized to be issued effected by such agreement, to be determined by the number of shares the consolidated corporation is to be authorized to issue applied to the rates scheduled in paragraph two of Section 176, General Code. A credit to be allowed on such filing fee is determined by applying the rates set forth in the second paragraph of Section 176, General Code, to the total number of authorized shares of the domestic constituent corporations.

Respectfully,

THOMAS J. HERBERT,
Attorney General.