

It seems impossible to harmonize section 4450 and section 5660 in such a way that section 4450 would be subservient to section 5660. The former section is a section empowering municipalities to do certain things in cases of emergencies, and if this section is subject to section 5660 it would make it impossible for a municipality to operate under section 4450, as this section is only applicable when there are no funds available to be used in the case of an epidemic or a threatened epidemic.

The health of a municipality and its citizens is one of vital interest not only to the municipality but to the state at large and therefore if it is any way possible we must harmonize the two sections so as to give intendment to both sections if possible.

Section 4450 being a special section and a section which relates to an emergency, it is believed is not repealed by implication by section 5660. This section which is part of the Vorys Budget Bill, is intended primarily to place a check upon the expenditure of political subdivisions in the ordinary course of events and not in the cases of extreme emergencies.

It is therefore my opinion that in case of an epidemic a city board of health may incur obligations under section 4450 of the General Code without having first obtained a certificate of the fiscal office and before funds are actually available or in process of collection.

Respectfully,
C. C. CRABBE,
Attorney General.

3100.

CORPORATION FOR PROFIT—DETERMINATION OF THE FEES
CHARGEABLE TO A BANKRUPT CORPORATION IS A DUTY TO BE
EXERCISED BY AUDITOR OF STATE—MINIMUM FEE.

SYLLABUS:

1. *The determination of the proportion of fees chargeable to a corporation for profit that has been adjudicated a bankrupt, or a receiver has been appointed therefor, or a general assignment has been made for the benefit of creditors, is a duty to be exercised by the Auditor of State.*

2. *Under the provisions of section 5499 as amended in 109 O. L., a minimum fee of \$15.00 must be charged by the Auditor of State, even though the certification of the Tax Commission indicates that there is no fair value of the capital stock on an asset basis.*

COLUMBUS, OHIO, January 27, 1926.

HON. JOSEPH T. TRACY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—In your recent communication you request my opinion on the following:

“In determining the proportions of fees chargeable to corporations under section 1 of section 5495 G. C., that have been adjudicated a bankrupt, or a receiver has been appointed therefor, or a general assignment having been made for the benefit of creditors, should this proportion be based on the number of days or full months which such corporations had the power to exercise its corporate franchise unimpaired, and is it the duty of the Tax Commission or the Auditor of State to determine this appor-

tionment?

"Does the minimum fee provided in section 5 of section 5499 G. C., apply to a corporation whose fair value on an asset basis has been determined by the Tax Commission to be of no value?"

In considering the first inquiry which you present, section 5495 as enacted in 111 O. L. 471, should be considered, which provides:

"Within thirty days after the taking effect of this act and annually, thereafter, during the month of April, except as otherwise provided by law, each corporation, incorporated under the laws of this state for profit, and each foreign corporation for profit, doing business in this state or owning or using a part or all of its capital or property in this state or having complied with the provisions of section 183 of the General Code and having been authorized by the secretary of state to transact business in this state, shall make a report in writing to the tax commission in such form as the commission may prescribe, provided, however, that if any such corporation shall be adjudicated a bankrupt or a receiver shall be appointed therefor or a general assignment shall be made thereby for the benefit of creditors, such corporation shall file the report herein provided but it shall not be charged with any fee as hereinafter specified except for the portion of the then current year and of subsequent years during which such corporation had the power to exercise its corporate franchise unimpaired by such proceedings or act."

The language provides that in the event a corporation shall be adjudicated a bankrupt or a receiver shall be appointed therefor, or general assignments shall be made for the benefit of creditors, the report required by said section shall be filed, but such corporation shall not be charged with any fee except for the proportion of the current year and the subsequent years during which time the corporation had power to exercise its franchise unimpaired by such proceedings. The purpose of the section seems to be clear.

Prior to the amendment of the law, the rule had been that corporations must pay the franchise tax, which was based upon the report that was then required to be filed if it had entered upon any part of the year for which the fee was charged. In other words, the franchise tax was not divisible. See *In the Matter of The Portage Rubber Co., Bankrupt*, 288 Fed., 182.

It is evident that it was the intent of the legislature in the enactment referred to, to change the rule as heretofore enforced by the courts, to the end that a corporation becoming involved in financial difficulties would not be required to pay a franchise fee for that part of the year in which no exercise of the franchise was had. The language of the section provides for the taxing for the portion of the year or subsequent years during which the corporation is unimpaired in the exercise of its franchise. No definite rule is fixed as to whether the proportion shall be computed by using a basis of twelve months in the year or three hundred and sixty days in the year. Undoubtedly, in the determination of the charge against such a corporation a reasonable rule may be used which substantially complies with the provisions of the statute. It is suggested, however, that the rule usually used for the computation of interest, that is, three hundred and sixty days as constituting a year, would suggest itself as a fair and equitable method in the determination of such a case.

Section 5496 (section 2 of the act) provides the manner in which a report shall be executed. Section 5497 (section 3 of the act) sets forth what such statement shall

include. Among other things which are included is "a statement of the amount of the fair value of the capital stock of the company on an asset basis."

Section 5498, which is section 4 of the act, provides :

"Upon the filing of the report provided for in the last preceding sections, the tax commission, if it shall find such report to be correct, shall, on the first Monday in September, determine the amount of the fair value on an asset basis of the capital stock of every domestic corporation, required to file a report under section 1 of this act; and the proportionate amount of the fair value on an asset basis of the capital stock of every foreign corporation, required to file a report under section 1 of this act, represented by the sum of all the property owned or used and business done by it, located or transacted within this state. On the first Monday in October the tax commission shall certify to the auditor of state the amount so determined by it for each such corporation."

Section 5499, which is section 5 of the act, provides :

"On or before October 15th the auditor of state shall charge for collection from each such corporation a fee of one-twelfth of one per cent upon such amount so certified, which fee shall not be less than fifteen dollars in any case and shall immediately certify the same to the treasurer of state. Such fee shall be charged for the privilege of exercising its franchises and doing business within the state in the calendar year in which the tax is payable. Promptly upon receipt of the certificate of the auditor of state the treasurer of state shall mail to each such corporation at its principal office in the state of Ohio a statement showing the portion of the value of the capital stock upon which such fee is charged and the amount of the fee. Such fee shall be payable to the treasurer of state on or before the first day of the following December."

Coming to the second branch of your first inquiry as to who shall determine the apportionment where the company is in process of liquidation or being operated by a receiver, it will be observed that section 4 above referred to, makes it the duty of the Tax Commission, if it finds that such report is correct, to determine the amount of the fair value on an asset basis based upon the report. The following section requires the Auditor of State to charge the fee provided for therein on or before October 15th, the Auditor determining the amount upon the amount certified to him by the Tax Commission.

It would therefore follow that the apportionment should be made by the Auditor, for the reason that the statute imposes the duty upon him to make the charge for collection, and the provision in section 1 specifically provides that a fee "shall not be charged" when the company is in the hands of a receiver or in bankruptcy, etc., except for the proportion of the then current year. The Auditor being required to make the charge, and the inhibitions being directed against a charge under the conditions mentioned, it would seem to follow that the Auditor would be obligated to determine his duties in this respect. Of course, the Tax Commission undoubtedly should furnish the Auditor with any information possible that will enable him to determine the status of such corporation.

In considering your further inquiry as to whether a minimum fee should be charged when the Tax Commission has determined the fair value on an asset basis to be of no value, it is believed that a consideration of the statutes as a whole will disclose the intent and purpose of the legislature in this enactment to fix a minimum

fee, which is to be paid under any circumstances.

To support this view it may be noted that even though there is no value as determined by the Tax Commission, the corporation still has a right of franchise which it may exercise for the period for which a tax is charged. The policy of the corporation law has heretofore always been to maintain a minimum fee; in fact, the language of this section in reference to the minimum fee is substantially what it was in the former law. However, it does appear that under the method of determining the tax under the former law there could not be a situation in which there would be no tax upon a capital stock basis.

However, it will be observed that if the Commission should certify the fair value on an asset basis of a given corporation to be \$5.00 or any definite amount, no matter how insignificant then the minimum fee under such circumstances would be required to be paid. In the event a corporation which has a nominal fair value is required to pay the minimum fee of \$15.00, it would be discriminatory against competing companies whom the Tax Commission had certified as having no value if no fee be charged. It is not believed that this view was the intention of the legislature.

The tax is assessed upon the report which is required to be filed by section 5495 heretofore set forth. The language is clear that "each corporation incorporated under the laws of this state for profit, and each foreign corporation for profit, doing business in this state, or owning or using a part or all of its capital or property in this state," etc., shall file a report.

It would therefore seem that the phrase in section 5499 "which fee shall not be less than \$15.00 in any case," relates to a case in which a report is filed.

In view of the foregoing, you are advised that it is the opinion of this department that:

(1) The determination of the proportion of fees chargeable to a corporation for profit that has been adjudicated a bankrupt, or a receiver has been appointed therefor, or a general assignment has been made for the benefit of creditors, is a duty to be exercised by the Auditor of State.

(2) Under the provisions of section 5499 as amended in 109 O. L., a minimum fee of \$15.00 must be charged by the Auditor of State, even though the certification of the Tax Commission indicates that there is no fair value of the capital stock on an asset basis.

Respectfully,

C. C. CRABBE,
Attorney General.

3101.

GASOLINE TAX MONEY—MAY NOT BE USED BY MUNICIPALITY FOR PURCHASE OF STREET REPAIR EQUIPMENT, TOOLS AND MACHINERY.

SYLLABUS:

The proceeds derived from the gasoline tax may not be used by a municipality for the purchase of street repair equipment, tools and machinery.

COLUMBUS, OHIO, January 28, 1926.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—I am in receipt of your communication propounding the following inquiry: