

A delinquent assessment when thus placed on the general duplicate comes within the letter, at least, of section 2624 "On all moneys collected * * * on any tax duplicate of the county," with the result that the auditor is entitled to the percentage thereon as named in said section. The percentage to which the county auditor thus becomes entitled should be charged to the general county fund and credited to the fee fund—this for the reason that there is no authority in the new ditch code or in section 2624 for charging the percentage against the lands assessed or against the ditch improvement fund.

Specific answer to your questions is therefore as follows:

(1) Under the new ditch code (108 O. L. 926) the services of the county surveyor and of such employes as chairmen, axemen and rodmen in connection with a ditch improvement, are not to be calculated on a fee basis, but are to be calculated and assessed against affected lands at actual cost to the county as represented by the proportionate part of the salary of the surveyor and the proportionate part of the compensation of his assistants and employes as fixed by him under the provisions of section 2788 G. C. The amount of such salary and compensation so assessed is to be returned to the general fund out of the general ditch improvement fund.

(2) County auditors are not under the new ditch code entitled to any fees; nor are they entitled to a percentage on ditch assessment collections, except in the event that an assessment on becoming delinquent is carried to the general duplicate and collected as provided in section 31 of said code, in which event the auditor is entitled to the percentage on such delinquent assessment named in section 2624 G. C. said percentage to be charged to the general county fund and credited to the fee fund.

Respectfully,

JOHN G. PRICE,
Attorney-General.

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TAXES AND TAXATION—TIME FOR LISTING PERSONAL PROPERTY OF CORPORATIONS—THE WORDS "AS OF THE FIRST DAY OF JANUARY" IN SECTION 5404-1 G. C. CONSTRUED

The words "as of the first day of January" occurring in section 5404-1 of the General Code, referring to the time for listing the personal property of corporations, indicate the state of affairs existing at the beginning of the business day, if any, on the first day of January, or at the close of business on December 31st.

COLUMBUS, OHIO, January 23, 1920.

HON. ALLEN J. SENEY, *Prosecuting Attorney, Toledo, Ohio.*

DEAR SIR:—You have requested the opinion of this department on the following question:

"Several days ago Ritter & Gardner, of this city, submitted an inquiry to me with the request that I get your opinion with respect to the interpretation of section 5404-1 of the General Code, as amended by the legislature in the year 1919. Through some oversight on my part I neglected to address you at that time.

The opinion that they are seeking is upon the interpretation of that section and is expressed by them in the following words:

"The inquiry naturally arises as to whether this means the close of business

on December 31st, or the close of business on January 1st, or at what time on January 1st consideration would be required.'

If this request from Ritter & Gardner is a proper one, will you kindly give it your early consideration?"

Section 5404-1 of the General Code, as enacted by the General Assembly in 1919 (108 Ohio Laws, part I, p. 131), changes the date as of which the tangible and intangible personal property of incorporated companies shall be listed and valued to "the first day of January." Does this mean that this class of property of a corporation shall be taken as of the close of business on January 1st? Another way of stating the same question suggested in your letter is:

"As of what time on January 1st consideration will be required."

I think it is not improper to take into account the obvious legislative motive in making this change, even though the act in which the change was made contains no intrinsic evidence on this point.

Indeed, quotation of the new section will hardly be necessary in discussing the question.

It is well known that the majority of the corporations doing business in the state and having taxable property therein conduct their accounting on the basis of the calendar year and that for the purpose of their own convenience, as well as for Federal income tax purposes, inventories are taken and balance sheets are struck off as of the end of the calendar year. I think it is not going too far to take this well known fact into account in the interpretation of the statute under consideration, especially since it is also a fact that the tax commission by administrative ruling has been appending to the forms of returns to be made by incorporated companies balance sheets to aid in the assessment of the personal property of the corporation, which balance sheets are similar in form to those which would be struck off for the purposes just indicated.

If we take these facts into account, it would follow that the statute is to be construed so as to conform its operation to the actual practices with which it was intended to articulate. The words "as of the first day of January," though perhaps not patently ambiguous, are really so in a sense. Though the first day of January is a legal holiday for some purposes (see section 8301, a part of the negotiable instrument act), yet it is not so for all purposes, and it may be regarded, broadly speaking as a "business day." Of course, if it were to be regarded as a holiday for all purposes much of the difficulty would disappear, because the legislature would be deemed to have taken this fact into account in enacting the statute just as it has taken the fact that the first day of the week, commonly called "Sunday," is not a business day in providing for the listing of the personal property of other taxpayers "on the day preceding the second Monday of April." In other words, the legislature would be deemed to have chosen a day on which business transactions did not ordinarily take place. If business transactions did not take place on such day, then the natural result would be that the real basis of listing and valuation would be the state of affairs as of the close of the preceding business day.

As observed, an assumption that the first day of January is not a business day, which may indeed have been the basis on which the legislature acted, would itself have produced the result that the property of corporations as it existed at the close of business on December 31st, the last preceding business day, would be the basis of the assessment.

But, as stated, it would perhaps be going too far to predicate a conclusion upon the assumption that the first day of January is not a business day. Once we lay

aside this assumption, however, we encounter the latent ambiguity above suggested in that exactness would require some particular hour at which the state of affairs aimed at by the law is to be arrived at. Thus, a corporation might convert intangible personal property into land at noon on the first day of January and at two o'clock in the afternoon it might convert other land into intangible personal property. The question being as to what amount of intangible personal property it possessed on the first day of January, an answer would be required upon the question as to whether the first amount of intangible personal property which it had at the beginning of the day but did not have at the end thereof was to enter into the assessment; and also the additional question would be encountered as to whether or not the intangible personal property involved in the second transaction, which it did not have at the beginning of the day but did have at the end thereof, was to be taken into consideration.

To avoid just such questions the law has constructed a presumption which is expressed in the formula that parts of days are disregarded. Thus, an officer entitled to a per diem fee has earned the fee when he has performed the official service to which the fee relates on any given calendar day, regardless of the number of hours devoted by him to the performance of such service. As a further corollary to this principle, it might be argued with considerable force that the natural meaning of the section in the light of the presumption is that the end of the business day, if any, on January 1st shall be taken as the time of listing. This, however, would be a result arrived at by building an inference on a presumption, and it is submitted that it would yield to any extrinsic evidence of legislative intention which might be available. In this case such extrinsic evidence is available, and rather clearly points to the beginning of the business day, if any, which would take place on January 1st of any year, rather than the end thereof. This is giving full play to the principle that the law does not regard parts of a day, but is reversing what might be the virtual operation of that principle in a given case because of the practical background of the statute.

It is therefore the opinion of this department that the words "as of the first day of January" connote the state of affairs existing on the first day of January without the effect of any transactions consummated on that day in such fashion as to change the amount of the personal property of the corporation. In other words, a listing of property under this section "as of the first day of January" requires that such property be listed as of the opening of business on that day, and not the close of business on that day; but because the usual way of speaking of inventories, financial statements and the like is to refer to conditions as existing at the close of a business day, the same result can be expressed in the form of words used in business transactions by referring to it as the state of affairs existing as of the close of business on December 31st.

Respectfully,
JOHN G. PRICE,
Attorney-General.