

2703.

FIRE INSURANCE COMPANY — FOREIGN STATE — WHERE IT IMPOSES ORDINARY FRANCHISE TAX ON OHIO COMPANIES — RATE LESS THAN IMPOSED BY OHIO — TAX, MAINTENANCE FIRE MARSHAL'S OFFICE, GREATER THAN IMPOSED BY OHIO — HOW OHIO SHOULD RETALIATE—SECTIONS 841, 5433 G. C.—WHAT OHIO SHOULD CONSIDER TO COMPUTE TAX IMPOSED BY SECTION 841 G. C.

SYLLABUS:

1. *Where a fire insurance company organized under the laws of another state which imposes an ordinary franchise tax on Ohio companies doing business therein at a rate less than that imposed by Ohio on companies of such other state but which imposes a tax for the maintenance of the State Fire Marshal's Department greater than that imposed by Ohio, the State of Ohio should retaliate against such company only in the event that the sum of such taxes imposed by such other state on Ohio companies is greater than the sum of the taxes imposed by Sections 841 and 5433, General Code, on companies of such other state doing business in Ohio.*

2. *In computing the tax imposed by Section 841, General Code, on fire insurance companies, only that portion of the gross premium receipts of such companies derived from fire insurance business, after deducting return premiums and considerations paid for reinsurance in companies admitted to do business in this state, should be considered and premiums derived by such companies from business other than fire insurance should not be considered and should not be used as a base for computing such tax.*

Columbus, Ohio, August 29, 1940.

Hon. John A. Lloyd, Superintendent of Insurance,
State House Annex,
Columbus, Ohio.

Dear Sir:

This will acknowledge your recent request for my opinion wherein you ask my advice with respect to the computation of the franchise tax imposed

by Section 5433, General Code, and the additional tax imposed by Section 841, General Code, for the maintenance of the State Fire Marshal's Department in connection with the retaliatory provision contained in Section 5436, General Code.

You also inquire as to whether Section 841, General Code, imposes a tax of one-half of one per cent on the gross premium receipts of fire insurance companies irrespective of the class of business from which such premiums are derived, or whether such tax should be computed only on premium receipts from fire insurance.

Your first question assumes a specific situation in which another state imposes an ordinary franchise tax on Ohio fire insurance companies doing business therein at a rate lower than that provided by Section 5433, General Code, and also a tax for the support of the Fire Marshal's Department of such state at a rate higher than that imposed by Section 841, General Code, and you ask whether you are to compute the two taxes imposed by the Ohio statute separately and independently of each other and retaliate if either of such taxes is higher than the corresponding tax in Ohio, or whether you should retaliate only if the sum of such two taxes is higher than the sum of the two taxes imposed in Ohio.

Section 5432, General Code, requires every insurance company incorporated by the authority of another state or government in its annual statement to the Superintendent of Insurance to set forth the gross amount of premiums received by it from policies on risks in Ohio during the preceding calendar year without any deductions whatever, and also to set forth as separate items return premiums paid for cancellations and considerations paid and received for reinsurances in this state for such year.

Section 5433, General Code, provides that the Superintendent of Insurance shall compute an amount of two and one-half per cent of the balance of such gross amount after deducting such return premiums and considerations for reinsurance and charge such amount to such company as a tax upon the business done by it in this state for the period shown by such statement and that taxes so collected shall be credited to the general revenue fund of the state.

Section 5436, General Code, provides as follows:

"If the laws of another state, territory or nation authorize charges for the privilege of doing business therein, or taxes against

insurance companies organized in this state, exceeding the charges provided in this chapter, like amounts shall be charged against all insurance companies of such state, territory or nation, doing business in this state, instead of the charges herein provided."

Sections 5432, 5433 and 5436, General Code, are contained in Chapter 6 of Title I of Part Second thereof.

Section 841, General Code, which is contained in Chapter 8 of Division II of Title III of Part First thereof provides as follows:

"For the purpose of maintaining the department of state fire marshal and the payment of the expenses incident thereto, each fire insurance company doing business in this state shall pay to the state in installments at the time of making the payments required by section fifty-four hundred and thirty-three sub-section two of the General Code, in addition to the taxes required to be paid by it, one-half of one per cent. on the gross premium receipts after deducting return premiums and considerations paid for reinsurances in companies admitted to do business in this state as shown by the annual statement of such company made pursuant to section fifty-four hundred and thirty-two and section ninety-five hundred and ninety of the General Code. The money so received shall be placed to the credit of a special fund for the maintenance of the office of state fire marshal. If any portion of such special fund remains unexpended at the end of the year for which it was required to be paid, and the state fire marshal so certifies, it shall be transferred to the general fund of the state."

Strictly speaking, each of these taxes respectively imposed by Sections 841 and 5433, General Code, is a franchise tax assessed for the privilege of doing business in this state. In *Traction Company v. State*, 94 O. S., 24 at page 27, it was said in the opinion by Wannamaker, J.:

" * * * An excise tax is a tax assessed for some special privilege or immunity granted to some artificial or natural person, based upon the grant of such privilege or immunity.

In the case of a corporation it is sometimes spoken of as a franchise tax. * * * "

You will note that Section 5436, General Code, supra, provides that where the laws of another state authorize charges or taxes for the privilege of doing business therein against insurance companies organized in this state exceeding the charges provided in Chapter 6 of Title I of Part Second of the Code, like amounts shall be charged against insurance companies of such other state doing business in this state instead of the charges provided in such chapter. As I have said heretofore, both the tax imposed by Section

841, General Code, and the tax imposed by Section 5433, General Code, are franchise taxes imposed on foreign insurance companies for the privilege of doing business in this state. The literal language of Section 5436, General Code, *supra*, would require the Application of its retaliatory provisions wherever franchise taxes imposed by another state exceed in amount those imposed by Section 5433, General Code. Nevertheless, for the reasons hereinafter stated, I have reached the conclusion that Section 5436, General Code, has no application unless the tax of such other state, which for want of a better term may be denominated ordinary franchise tax as distinguished from the tax imposed for support and maintenance of the Fire Marshal's Department, exceeds that imposed by Section 5433, General Code.

Section 5436, General Code, and the chapter of which it is a part are contained in that Title of the General Code having to do with taxation, while Section 841, General Code, is part of the Title called "executive" and of the division headed "appointive state officers". This would indicate that the General Assembly did not regard the tax imposed by Section 841, General Code, as a franchise tax within the meaning of that term as ordinarily used, but rather regarded it as a special tax imposed upon fire insurance companies for the support and maintenance of the State Fire Marshal's Department. Such is the express purpose of this tax, whereas that imposed by Section 5433, General Code, is for the benefit of the general revenue fund of the state. The Ohio tax imposed for the benefit of the State Fire Marshal's Department is therefore not to be regarded as imposed for the privilege of doing business within this state, and it would seem to follow that a similar tax imposed by another state upon an Ohio corporation is not a tax or charge upon the privilege of doing business in such state as the term is used in Section 5436, General Code, *supra*.

Such a construction is in harmony with the established rule applied to the interpretation of retaliatory statutes. In *State, ex rel. New England Insurance Company v. Reinmund*, 45 O. S., 214 at page 217, it was said in the opinion by Spear, J.:

" * * * In other words, our law is protective in its character, its purpose being to protect Ohio insurance companies from impositions which might be put upon them by other states, and not retaliatory in the sense of first imposing upon foreign companies such taxes as are imposed upon other foreign corporations under like circumstances, and then, in addition, a sum equal to what other states may impose upon our companies doing business there. * * *

This view is in consonance with a recognized policy of this state of long standing, which is to invite, rather than repel, the investment and use here of foreign capital. In this spirit, the obvious interest of the state is to encourage the location here of agencies of companies organized in other states having large experience as insurers and possessed of abundant capital, in order to afford to our people the manifold benefits of the security given by their contracts; and any unnecessary discrimination against those companies would be inconsistent with this enlightened policy, and would tend to injuriously affect our people. * * * ”

Likewise in *State, ex rel. v Insurance Company*, 49 O. S., 440, it was held that retaliatory statutes should be strictly construed and at page 445 it was said in the opinion by Minshall, J.:

“In construing this statute according to its letter, we have, as we believe, given expression to the intention of the legislature. It is a just compliment to human nature to say, that, as a general rule, every man would prefer to have his favors construed largely and his disfavours narrowly: In other words, no one would deliberately do more injury to another than is required by his own interests, and would regard it as an honor to be as generous as he could; and, that such are the sentiments of the civilized man, is apparent from all writers upon public law.”

The purpose of Section 5436, General Code, *supra*, is to protect Ohio companies doing business in other states from unjust discrimination in the imposition of taxes, and in line with the decisions above cited this section should be given such construction as will effectuate this purpose and its scope should not be extended any further. The question is exhaustively treated in a note found in 91 A. L. R., 803, where it is said:

“The view prevailing among the courts is that statutes of the kind under consideration, being penal in their nature, must be strictly construed, and must not be applied to any case which does not plainly fall within the scope of the law.”

If the ordinary franchise tax and the fire marshal tax imposed by another state were both considered as taxes upon the privilege of doing business therein within the meaning of Section 5436, General Code, such construction might compel Ohio to tax companies of such other state in a greater amount than such other state would otherwise tax Ohio companies. For example, let us assume that another state imposes an ordinary franchise tax amounting to two per cent and a fire marshal tax of one per cent. The sum of these two taxes would be the same as the sum of the two taxes imposed by Sections 841 and 5433, General Code. Yet if these two taxes were con-

sidered as assessed for the privilege of doing business in such other state, then Section 5436, General Code, would require the imposition of a tax of three per cent and Section 841, General Code, an additional tax of one-half per cent, making a total tax of three and one-half per cent. This is not the purpose of the retaliatory provisions, the design of which is merely to protect the Ohio companies from discrimination.

If the sum of the ordinary franchise tax and the fire marshal tax of such other state is greater than the sum of the taxes imposed by Sections 841 and 5433, General Code, Section 658, General Code, would require that you collect such excess from companies of such other state. This section provides as follows:

“When by the laws of any other state, district, territory or nation, any taxes, fines, penalties, license fees, deposits of money, securities, or other obligations, or prohibitions are imposed on insurance companies of this state doing business in such state, district, territory or nation, or upon their agents therein, the same obligations and prohibitions shall be imposed upon insurance companies of such other state, district or nation doing business in this state and upon their agents.”

If, on the other hand, the sum of such taxes is equal to or less than those imposed by Sections 841 and 5433, General Code, you should compute the tax on companies of such state according to the provisions of such section without any reference to the laws of such other state.

I come now to your second question wherein you inquire whether the tax imposed by Section 841, General Code, should be computed only on premiums received from fire insurance or whether premiums received from all classes of business transacted by fire insurance companies should be considered. The State Fire Marshal is given authority to investigate the causes of fires and to enter upon and examine any building or premises. Where he finds upon examination that a building for want of proper repair or by reason of age and dilapidated condition or for other cause or reason is especially liable to fire and is so situated as to endanger other buildings, he may order such building repaired or demolished. He may also order combustible or explosive material removed from such buildings. A large part of the duties of the State Fire Marshal's Department therefore is concerned with the investigation of suspicious fires and the preventing of arson and fraud upon insurers against fire.

Since those companies which are engaged in the business of fire insurance

in this state presumably benefit to a large extent because of the operations of the State Fire Marshal's Department, it was natural and just for the General Assembly to place upon such companies the burden of the expense of maintaining the State Fire Marshal's Department and since it would seem that the benefits would be commensurate with the amount of fire insurance business done, it was proper for the General Assembly to adopt the amount of fire insurance premiums received as a base on which to compute the tax.

Fire insurance companies, however, are authorized to carry on other forms of business than fire insurance, the risks of which are in no way related to the hazard of fire. See Sections 9510, 9556 and 9607-2, General Code.

In answering your question it should be remembered that tax statutes are strictly construed against the taxing authority and in favor of the taxpayer and that any doubt must be resolved in favor of the taxpayer and against the taxing power. Thus, in 38 O. Jur., 725, Section 15, it is said:

“ * * * If there is any doubt as to the meaning of a tax statute, the construction must be strict, and the doubt must be resolved in favor of the citizen upon whom or property upon which the burden is sought to be imposed, and against the taxing power. * * * ”

In addition to the cases cited in Ohio Jurisprudence in support of this statement, your attention is directed to *Watson v. Tax Commission*, 135 O. S., 377, where it is held in the first paragraph of the syllabus:

“1. In the construction and application of taxing statutes, their provisions cannot be extended by implication beyond the clear import of the language used; nor can their operation be so enlarged as to embrace subjects not specifically enumerated. A strict construction is required and any doubt must be resolved in favor of the citizen upon whom or the property upon which the burden is sought to be imposed.”

Having in mind the functions and duties of the State Fire Marshal and the benefits derived from his operations and in view of the rules of strict construction which apply to taxing statutes, it appears to me that Section 841, General Code, when fairly construed, imposes a tax on fire insurance companies only upon their fire insurance business, and that premiums received by fire insurance companies on account of risks other than fire are not contemplated by this statute and should therefore not be used as a base in computing the tax imposed thereby.

I therefore advise you in specific answer to your questions:

1. Where a fire insurance company organized under the laws of another state which imposes an ordinary franchise tax on Ohio companies doing business therein at a rate less than that imposed by Ohio on companies of such other state but which imposes a tax for the maintenance of the State Fire Marshal's Department greater than that imposed by Ohio, the State of Ohio should retaliate against such company only in the event that the sum of such taxes imposed by such other state on Ohio companies is greater than the sum of the taxes imposed by Sections 841 and 5433, General Code, on companies of such other state doing business in Ohio.

2. In computing the tax imposed by Section 841, General Code, on fire insurance companies, only that portion of the gross premium receipts of such companies derived from fire insurance business, after deducting return premiums and considerations paid for reinsurance in companies admitted to do business in this state, should be considered and premiums derived by such companies from business other than fire insurance should not be considered and should not be used as a base for computing such tax.

Respectfully,

THOMAS J. HERBERT,
Attorney General.