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HOSPITAL SERVICE CORPORATIONS, NON-PROFIT — SECTIONS 669 ET SEQ. G. C.—INSURANCE COMPANIES—SECTION 5414-9 G. C.—SUBJECT TO TAX LEVY.

SYLLABUS:

*Non-profit hospital service corporations organized and operated pursuant to Sections 669, et seq., General Code, are insurance companies within the meaning of Section 5414-9, General Code, and are subject to the tax levied thereby.*

Columbus, Ohio, April 18, 1940.

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

Dear Sir:

Your recent request for my opinion is as follows:

“A question has arisen as to the duty of the Superintendent of Insurance in the matter of the taxation of non-profit hospital service corporations operating under Sections 669 to 669-12, inclusive.

This Division is collecting the fees for such corporations prescribed by Section 669-3, General Code. Section 669-13 exempts the funds and property of such corporations from taxation. However, in the case of Mutual Hospitalization Association v. Lloyd, Superintendent, recently decided by the Court of Common Pleas of Franklin County, the constitutionality of the latter section was challenged. It is our understanding that the effect of the Court's action in overruling the demurrer to the petition constitutes an adjudication that Section 669-13 is unconstitutional.

Section 5514-8, General Code, contains a comprehensive definition of an insurance company for taxation purposes. If Section 669-13 is inoperative, and if non-profit hospital service corporations come within the definition contained in Section 5514-8, franchise taxes of such corporations should be levied under Section 5514-9, General Code. In such case the duty is imposed upon the Superintendent of Insurance by Section 5514-12 to certify to the Auditor of State on or before the first Monday of May in each year the figures upon which such tax is computed.

I desire your opinion as to whether I should treat the non-profit hospital service corporations now doing business in this state as insurance companies under Section 5514-8, General Code, and proceed to make the certification to the Auditor of State required by Section 5514-12, General Code."

Section 669, General Code, which is part of the act under which non-profit hospital service corporations are organized, provides as follows:

"Any corporation heretofore or hereafter organized not for profit under the general corporation act of the state of Ohio, for the purpose of establishing, maintaining and operating a non-profit hospital plan, whereby hospital care may be provided by a non-profit hospital, or by a group of such hospitals, with which such corporation has a contract for such purpose, to such of the public as become subscribers to said plan under a contract which entitles each subscriber to hospital care, shall be governed by this act, and such corporation, and the hospital or hospitals so contracting with such corporation, shall be exempt from all other provisions of the insurance laws of this state, unless otherwise specifically provided herein."

Such corporations are required to pay certain fees by reason of the provisions of Section 669-3, General Code, which reads as follows:

"Every corporation subject to the provisions of this act shall pay to the superintendent of insurance, upon the filing of its application for a certificate of authority or license, a fee of two hundred fifty dollars, and thereafter on the first day of March of each year, a fee equal to one-tenth of one cent (\$.001) for each contract issued by such corporation and then outstanding."

Section 669-13, General Code, purports to exempt the funds and property of such corporations from taxation in the following language:

"Every corporation subject to the provisions of this act is hereby declared to be a charitable and benevolent institution, and its funds and property shall be exempt from taxation."

If Section 669-13, General Code, be constitutional, the funds and property

of any non-profit hospital service corporation organized under and pursuant to the provisions of Sections 669, et seq., General Code, are exempt from taxation.

Section 5414-8, General Code, provides as follows:

“The term ‘insurance company’ as used in this chapter includes every corporation, association and society engaged in the business of insurance of any character whatsoever, or engaged in the business of entering into contracts substantially amounting to insurance of any character, or of indemnifying or guaranteeing against loss or damage or acting as surety on bonds or undertakings.

The term ‘domestic insurance company’ includes every insurance company organized and existing under the laws of this state, and every unincorporated association and society formed for the purpose of engaging in said business in this state, and excludes every ‘foreign insurance company’ which term includes every insurance company organized or existing under the laws of any other state, territory or country or of the United States.”

Section 5414-9, General Code, levies a tax on the privilege of being an insurance company, as defined in Section 5414-8, General Code, in the following language:

“An annual franchise tax on the privilege of being an insurance company as defined in section 5414-8 of the General Code is hereby levied, measured by (a) the capital and surplus of a domestic insurance company having capital divided into shares or the surplus of a domestic insurance company not having capital divided into shares at the value thereof as reported by the company in its annual statement for the preceding year filed with and approved by the superintendent of insurance setting forth the admitted and non-admitted assets and the liabilities of the company, including in such liabilities (1) the reserve and unearned premium liabilities computed as provided by law, the same being the amount of debts of an insurance company by reason of its outstanding policies in gross, (2) amounts set apart for the payment of dividends to policy holders, and all actual liabilities set forth in the annual statement; or (b) eight and one-third times the gross amount of premiums received by any such domestic insurance company from policies covering risks within this state during the preceding calendar year after making the deductions prescribed by section 5433 of the General Code in the case of foreign insurance companies, whichever basis of measurement shall, in the case of any domestic insurance company, be the smaller. The objects of such tax are those declared in section 5414-19 of the General Code to which only the same shall be applied.”

It is therefore necessary to determine whether non-profit hospital service

corporations are "engaged in the business of insurance of any character whatsoever, or engaged in the business of entering into contracts substantially amounting to insurance of any character, or of indemnifying or guaranteeing against loss or damage." It will be noted that Section 669, General Code, provides that such corporations establish, maintain and operate a non-profit hospital service plan whereby hospital care is provided to such of the public as become subscribers to said plan.

In the case of *State, ex rel. Duffy, v. Western Auto Supply Company*, 134 O. S., 163, at 169, it was said in the opinion of the court:

"It seems well settled that to constitute insurance the promise need not be one for the payment of money, but may be its equivalent or some act of value to the insured upon the injury or destruction of a specified property."

It would therefore seem that the promise and obligation of the hospital service corporation to furnish hospital care to its subscribers is insurance and that when such corporation enters into such contracts it is engaged in the business of insurance or at least in the business of entering into contracts substantially amounting to insurance within the meaning of such terms as used in Section 5414-8, General Code, and such corporation is therefore subject to the tax imposed by Section 5414-9, General Code, unless exempted by some other provisions of law. Section 669, General Code, exempts non-profit hospital service corporations from all provisions of the insurance laws except as provided in Sections 669 to 669-13, both inclusive, General Code. However, Sections 5414-8 and 5414-9, General Code, are contained in Title I of Part Second of the General Code which has to do with taxation and not with insurance and such corporations are therefore not exempted by Section 669, General Code, from the operation of Sections 5414-8 and 5414-9, General Code, and it would therefore follow that the provisions of Section 669-property of such corporations from taxation but the tax levied by Section 5414-9, General Code, is not a tax on property or funds but is a tax on the privilege of being an insurance company as defined in Section 5414-8, General Code, and it would therefore follow that the provisions of Section 669-13, General Code, could not operate to exempt such corporations from the tax imposed by Section 5414-9, General Code. This tax is not a tax on property but is a tax levied pursuant to Section 10 of Article XII of the Constitution which provides:

“Laws may be passed providing for excise and franchise taxes and for the imposition of taxes upon the production of coal, oil, gas and other minerals.”

Section 669-3, General Code, which requires that such non-profit hospital corporations pay a fee of one-tenth of one cent on the first day of March of each year for each contract issued by the corporation and then outstanding, cannot exempt such a corporation from the tax imposed by Section 5414-9, General Code. This section merely imposes an additional requirement upon this type of corporation but does not purport to exempt it from the operation of Section 5414-9, General Code.

In view of the conclusion I have reached, it is unnecessary for me to determine the constitutionality of this section in order to answer your question. As I have stated, the tax imposed by Section 5414-8, General Code, is not a tax on funds or property and non-profit hospital service corporations are subject to this tax irrespective of the validity of Section 669-13, General Code.

Section 5414-12, General Code, provides as follows:

“On or before the first Monday of May in each year the superintendent of insurance shall certify to the auditor of state the amount of the capital and surplus of each domestic insurance company having capital divided into shares and the surplus of each domestic insurance company not having capital divided into shares or as the case may require, the amount equal to eight and one-third times the gross amount of premiums received by any such domestic insurance company from policies covering risks within this state during the preceding calendar year after making the deductions prescribed by section 5433 of the General Code in the case of foreign insurance companies, and as the same shall be reported in such annual statement of the company and approved by the superintendent of insurance.”

This section, considered together with Section 5414-9, General Code, requires you to certify to the Auditor of State the amount of surplus of each non-profit hospital service corporation or eight and one-third times the gross amount of premiums received by any such corporation from its contracts during the preceding calendar year as shown in the annual report of the corporation, whichever amount shall be the smaller.

You are therefore advised that non-profit hospital service corporations organized and operated pursuant to Sections 669 to 669-13, both inclusive,

General Code, are insurance companies within the meaning of Section 5414-9, General Code, and that such corporations are subject to the tax levied thereby, and that you should certify to the Auditor of State with respect to such corporations as required by Section 5414-12, General Code.

Respectfully,

THOMAS J. HERBERT,  
Attorney General.