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1. FEE PAID BY FOREIGN CORPORATION—TO SECRETARY OF STATE—SECTION 8625-11 G. C.—PAYMENT CONSTITUTES PAYMENT TO THE TREASURER OF STATE TO THE CREDIT OF THE GENERAL FUND IN THE STATE TREASURY—SECTIONS 8625-30, 1464-3 G. C.

2. ADDITIONAL INSTALLMENT OF THE LICENSE FEE—EXACTED OF FOREIGN CORPORATIONS—A TAX—SECTIONS 8625-11, 1464-3 G. C.

SYLLABUS:

1. Where a fee is paid to the secretary of state by a foreign corporation under the provisions of Section 8625-11, General Code, such payment by virtue of the provisions of Sections 24 and 8625-30, General Code, constitutes payment "to the treasurer of state to the credit of the general fund in the state treasury" within the meaning of Section 1464-3, General Code.

2. The "additional installment of the license fee" exacted of foreign corporations under the provisions of Section 8625-11, General Code, is a tax within the meaning of Section 1464-3, General Code.

Columbus, Ohio, November 13, 1951

Hon. Ted W. Brown, Secretary of State
Columbus, Ohio

Dear Sir:

Your request for my opinion reads:

"The fee for the year 1951 for the G. Company, a Michigan corporation, on the basis of figures set out in their Annual Statement of Proportion of Capital Stock amounted to $3496.26.

"In payment of this fee the above corporation forwarded to this office a Certificate of Abatement issued by the Department of Taxation as provided for in Section 1464-3 of the General Code of Ohio, this Certificate of Abatement was No. 1227 and for the amount of $6976.86.

"This office requests an opinion as to whether this Certificate of Abatement can be accepted in payment of the Annual Fee for the Form 7 Report, Annual Statement of Proportion of Capital Stock mentioned above."

Section 1464-3, General Code, as amended effective August 4, 1951, is, in part, as follows:

"* * * Except as provided in sections 5412-1 and 5414-6 of the General Code the taxpayer's copy of any certificates of abatement heretofore or hereafter issued may be tendered by the payee or transferee thereof to the treasurer of state as payment, to the extent of the amount thereof, of any tax payable to the treasurer of state to the credit of the general fund in the state treasury; * * *"

From an examination of this statutory provision, it is obvious that the questions here presented are:

1. Is the exaction in question "payable to the treasurer of state to the credit of the general fund in the state treasury"?

2. Is the exaction a tax?

Payment of sums due from foreign corporations on the basis of figures set out in the "annual statement of proportion of capital stock" is provided for in Section 8625-1 et seq. You have informed me that the report here in question is not the initial report of this corporation and the amount due the state in this case is, therefore, exacted under the provisions of Section 8625-11, General Code. This section is as follows:

"In the event that any report filed under this act subsequent to the first report shall disclose that any foreign corporation has represented in this state a number of issued shares in excess of the number theretofore determined to be represented, the corporation shall pay to the secretary of state an additional installment of the license fee based upon such number of additional shares, computed as follows:

"The secretary of state shall first compute a fee upon the entire number of issued shares of such corporation represented in this state as shown by such report on the basis set forth in

section 8625-9 of the General Code, and shall then compute a fee on the same basis on the number of issued shares which such corporation has been authorized theretofore to have represented in this state, and the fee payable shall be the difference between such two fees so computed."

The language of this section clearly provides that the "fee" computed as therein provided shall be paid by the corporation "to the secretary of state." It does not necessarily follow, however, that such fee is not "payable to the treasurer of state to the credit of the general fund in the state treasury."

The disposition of funds so collected by the secretary of state is prescribed by Section 8625-30, General Code, which reads:

"The secretary of state shall keep a record of all fees collected under the provisions of this act and pay them into the state treasury to the credit of the general revenue fund."

Section 24, General Code, as amended and reenacted effective September 16, 1943, some years subsequent to the effective date of Section 8625-30, supra, provides in part:

"On or before Monday of each week every state officer, state institution, department, board, commission, college or university receiving state aid shall pay to the treasurer of state all moneys, checks and drafts received for the state, or for the use of any such state officer, state institution, department, board, commission, college or university receiving state aid, during the preceding week, from taxes, assessments licenses, premiums, fees, penalties, fines, costs, sales, rentals or otherwise, and file with the auditor of state a detailed verified statement of such receipts. * * *

"All sections and parts of sections of the General Code which provide for the custody, management and control of moneys arising from the payment to any state officer, state institution, department, board, commission, college or university receiving state aid of any fees, taxes, assessments, licenses, premiums, penalties, fines, costs, sales, rentals or other charges or indebtedness and which are inconsistent with the provisions of section 24 of the General Code as herein amended, are, to the extent of such inconsistency, hereby repealed.

"Immediately upon the taking effect of this act all moneys, checks and drafts in the possession of any state officer, state institution, department, board, commission or institution received for the state or for any such state officer, department, board or commission from the sources mentioned in section 24 of the

> General Code, as herein amended, shall be paid into the state treasury in the manner provided by said section."

The method of making such payments into the state treasury is provided in Section 248, General Code, which is as follows:

> "All payments into the state treasury shall be by pay-in-order or draft of the auditor of state, and no payment into the state treasury shall discharge a liability to the state unless it is made on such pay-in-order or draft. Such pay-in-order or draft shall specify the amount to be paid, on what account, and to the credit of what fund. The treasurer of state shall file and carefully preserve the pay-in-order or draft and on receiving payment give such payor, if demanded, a receipt for the money so paid."

Here we may note a significant provision in Section 24, supra. This section contemplates that checks and drafts shall be paid, by the state officer receiving them, to the state treasury, and the treasury obviously will then proceed to collect the proceeds thereof in money. Whether, under the provisions of Section 248, supra, the liability to the state of a corporation in every case such as that here under scrutiny remains undischarged until the secretary of state pays into the state treasury the payments received by him, we need not here consider. What is abundantly plain is that, in cases where checks and drafts are submitted in payment, the payment is not actually made by the taxpayer to the state until such instruments are honored by the drawee. In such cases, at least, it is obvious that payment is not made to the secretary of state but to the state treasury.

In this situation, when the several statutes relating to the subject are considered each in relation to the other, I conclude without difficulty, even in those cases involving payment in currency or coin, that the secretary of state is the mere agent of the state treasury in receiving sums which are required by the foreign corporation act to be paid into that office. Specifically, I conclude that where a fee is paid to the secretary of state by a foreign corporation under the provisions of Section 8625-11, General Code, such paymnet by virtue of the provisions of Sections 24 and 8625-30, General Code, constitutes payment "to the treasurer of state to the credit of the general fund in the state treasury" within the meaning of Section 1464-3, General Code.

With respect to the second question presented, it is to be observed that the statute refers to the exaction as a "license fee." This designation,

of course, is not dispositive of the question, since a license fee may be regarded as a tax or otherwise, depending on whether the exaction is made in the exercise of the constitutional taxing power of the legislature. This point is noted in 51 American Jurisprudence, 46, section 13, in the following language:

> "The term 'license fee' or 'license tax' implies an imposition or exaction on the right to use or dispose of property, to pursue a business, occupation, or calling, or to exercise a privilege. Such charges may be imposed either under the police power for purposes of regulation or under the taxing power for purposes of revenue. * * *"

The criteria by which a particular exaction is shown to be a tax or a regulatory license fee are noted in 33 American Jurisprudence, 339, 340, 341, section 19, in the following language:

> "It is well settled that a license tax may not, under the guise of the police power, be imposed for revenue purposes. Therefore, and in view of the fact also that certain constitutional provisions may apply to tax measures, it becomes important in certain cases to determine whether a license is imposed under the police power or as a revenue measure.
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> "The fact that a pecuniary amount is charged and that revenue may result from the enforcement of license requirements does not necessarily mean that the license enactment is a revenue measure. Revenue may result from an undisputed exercise of the police power, which revenue is designed to defray the cost of regulation of the business or occupation for which it is exacted, but that fact does not divest the regulation of its police character and render it an exercise of the taxing power, nor in any proper sense may such an imposition be considered a tax. Whether a license exaction is a tax is not affected by the fact that nonpayment is punishable as a misdemeanor. In ascertaining whether license legislation is a regulatory or a revenue measure, the distribution of moneys received by the state through its operation, while an element to be considered, is not determinative. The name given a license law by the legislature is not controlling, but in the last analysis, whether an imposition is in fact a tax or an aid to regulation is to be determined by the substance of the law imposing it. A license imposition upon a business or occupation which is not one calling for police regulation is a revenue tax. However, a license enactment is a tax when, and only when, revenue is the main purpose for which it is imposed. In general, therefore, *where the fee is imposed for the purpose of regulation, and the statute requires compliance with certain conditions in addition to the payment of the prescribed sum,* such sum is a license

> proper, imposed by virtue of the police power; but where it is exacted solely for revenue purposes and its payment gives the right to carry on the business *without any further conditions,* it is a tax. In this respect, the amount of the license fee or tax is important and is to be considered in determining whether the exaction is one for regulation merely, or for revenue, the reason being that the amount of the fee might in some cases be so large as to suggest of itself, considering the character of the business to which it was applied, that it was in fact a tax for revenue. A legislative enactment under the police power cannot, however, be condemned as a taxing measure and out of harmony with the constitutional rule of uniformity in that regard unless the fees exacted are so clearly excessive that the legislature could not reasonably have had in contemplation an equivalent for the mere expense of executing the law." (Emphasis added.)

It may be conceded here that the state, in enacting laws to exclude foreign corporations entirely, or to impose terms as a condition of admitting them to do business within the state, is imposing a regulation in the exercise of the police power for the purpose of relieving, in a measure, the disadvantages of its citizens in dealing with foreign corporations. 23 American Jurisprudence, 203, Section 234. In the instant case it can be noted that the statute requires a foreign corporation, as a condition of becoming licensed in Ohio, to file with the secretary of state a copy of its articles of incorporation, to designate a principal office within the state, to designate a natural person, resident in Ohio, as its agent, for service of process, and to consent to service of process on the secretary of state in the event such agent cannot be found. This being done, the issuance of a license is provided for in Section 8625-6, General Code, in the following language:

> "The application for a license having been accepted for filing and the filing fee paid, the secretary of state shall issue to such corporation a license certificate authorizing it to transact business in this state (subject to expiration or cancellation of such license as provided by law) until such time as it shall fail to pay installments of the license fee, as in this act required."

In the case at hand it is, of course, one of the "installments of the license fee" with which we are concerned. It is quite clear that at this point the corporation with which we are now concerned has already met all the terms imposed by the statute as a condition of being admitted to the state; and that the payment of further "installments of the license fee"

is the sole condition (except for certain other exactions admittedly imposed under the taxing power) of maintaining such license. In the absence of the imposition of any further conditions under the state's police power, this exaction, under the rule stated above in 33 American Jurisprudence, 339, must be considered a tax.

The point at which a state ceases to act under its police power in the admission of foreign corporations, and begins to impose exactions upon them under the taxing power, is indicated by Mr. Chief Justice Taft in Insurance Co. v. Carr, 272 U. S. 494, 71 L. Ed. 380, in the following language (at pp. 510, 511):

> "In subjecting a law of the state which imposes a charge upon foreign corporations to the test whether such a charge violates the equal protection clause of the 14th Amendment, a line has to be drawn between the burden imposed by the state for the license or privilege to do business in the state and the tax burden which, having secured the right to do business, the foreign corporation must share with all the corporations and other taxpayers of the state. With respect to the admission fee, so to speak, which the foreign corporation must pay to become a quasi citizen of the state and entitled to equal privileges with citizens of the state, the measure of the burden is in the discretion of the state and any inequality as between the foreign corporation and the domestic corporation in that regard does not come within the inhibition of the 14th Amendment; but after its admission, the foreign corporation stands equal and is to be classified with domestic corporations of the same kind."

Here is a clear indication that although the equal protection clause of the 14th amendment is applicable to tax exactions, a somewhat broader discretion is allowed the legislature in exactions, pecuniary and otherwise, in licenses required under the police power.

A New York statute, in many essential respects identical with the Ohio statute here involved, was under scrutiny in New York v. Latrobe, 279 U. S., 421, 73 L. Ed., 776. In the opinion by Mr. Justice Stone in that case the New York statute was described thus (pp. 422, 423):

> "Section 181, article 9, of the Tax Law of New York, chap. 62, Laws of 1909, as amended, imposes on every foreign corporation doing business in that state a tax computed upon the basis of the capital stock employed by it within the state during the first year it does business there; the amount of its stock so employed being that proportion of its total issued capital stock which its

gross assets employed within the state bear to its gross assets wherever employed. In the case of stock having a par value, the tax is fixed at one-eighth of 1 per cent of the par value of its stock so employed; for stock of no par value the fee is 6 cents per share. The tax, denominated a 'license fee,' is paid but once, purports to be imposed on the corporation 'for the privilege of exercising its corporate franchises or carrying on its business in such corporate or organized capacity in this state,' and the obligation to pay it is made a prerequisite to obtaining a certificate of authority from the state and to the continuance of business there. People ex rel. D. W. Griffith v. Loughman, 249 N. Y. 369, 164 N. E. 253. But the foreign corporation is permitted to transact business and make valid contracts within the state prior to payment of the tax, which of necessity cannot be computed or paid until after the first year has elapsed. The tax is evidently the complement of the organization fee, computed in like fashion on the authorized capital stock of domestic corporations by Chapter 143 of the Laws 1886. See People ex rel. Elliott-Fisher Co. v. Sohmer, 148 App. Div. 514, 132 N. Y. Supp. 789 (affirmed in 206 N. Y. 634, 99 N. E. 1115)."

With respect to the constitutionality of the exaction in this case, Mr. Justice Stone said (p. 781):

"We think that the measurement of such a tax upon a foreign corporation at a flat rate upon its corporate stock, either par or nonpar, used within the state, is likewise reasonably related to the privilege granted by the state and to the protection of its own interest in the maintenance of its similar policy of taxation with respect to domestic corporations and so does not infringe any constitutional immunity.

"Nor is such a tax to be deemed a denial of equal protection because a different measure or method of computing the tax is applied to corporations having nonpar stock from that applied to corporations having stock of par value."

It will be noted that throughout this opinion the exaction designated in the state statute as a "license fee," is referred to as a tax, and that the court evidently appreciated the necessity of ascertaining whether such exaction could be deemed a denial of equal protection, a test to which all taxes must be subjected but which is not necessarily applicable to exactions made under the police power. Insurance Co. v. Carr, supra.

In view of this decision, and having in mind the feature therein which imposes a charge on corporations after they have been duly licensed and

without the imposition of any additional terms or conditions of a regulatory nature under the police power, I am led to the conclusion that the exaction in question is a tax imposed under the general taxing power of the state. Specifically, I conclude that it is a tax within the meaning of Section 1464-3, General Code.

Respectfully,

C. WILLIAM O'NEILL
Attorney General