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SENATE BILL No. 22—IS A TAX LEVY AND WENT INTO IMMEDIATE EFFECT—SAVING CLAUSE ENTITLES DELINQUENT CORPORATIONS TO BE REINSTATED UPON PAYMENT OF TAXES, FEES AND PENALTIES.

SYLLABUS:

1. *The amendment of Section* 5511 *of the General Code found in Amended Substitute Senate Bill No.* 22, *is a law providing for the levy of a tax and, by virtue of Section* 1d *of Article* II *of the Constitution of Ohio, went into immediate effect.*

2. *Section* 11 *of Amended Substitute Senate Bill No.* 22 *is a saving clause and, by virtue of its provisions, corporations, delinquent at the time of the effective date of such act, are entitled to reinstatement upon payment of the taxes, fees and penalties provided in Section* 5511 *of the General Code prior to the amendment thereof in such act.*

COLUMBUS, OHIO, July 11, 1927.

HON. CLARENCE J. BROWN, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—This will acknowledge receipt of your recent communication as follows:

"The M. D. K. Realty Company, of Akron, incorporated June 1, 1922, and canceled upon certificate of the Tax Commission of Ohio February 15, 1927. The authorized capital of the company was ten thousand dollars common, par value ten dollars per share.

The company in question now desires to reinstate its articles.

Under date of June 24th the department advised to the effect that the reinstatement fee was the maximum of one hundred dollars due to the fact that the company has one thousand shares of common stock.

A. S. S. B. 22, which carries the penalty Section 5511, covering reinstatements according to the records of this department, went into effect May 10, 1927.

Attorneys for the company are now taking the position that the proper reinstatement fee for the subject company is ten dollars, basing their calculations on the original Section 5511 before amended. Their position is to the effect that Section 5511 of the Act in question does not become effective until after ninety days. The company's position is set out in full in a letter from their attorneys under date of June 27th. A copy of this is enclosed for your information.

There seems to be two questions involved—first, whether or not the penalty section is or is not now in effect, and the second, whether or not Section 11 of the act, the saving clause, is broad enough to secure to the company its right to reinstate for the old penalty rather than the penalty as provided in the S. B. 22.

Your advice is respectfully requested as to whether or not the penalty is to be computed in the instant and similar cases under the original Section 5511 or under the new bill."

Amended Substitute Senate Bill No. 22 has the following title:

"To provide for the determination, charging and collection of a cor-

poration franchise tax for the privileges of exercising the corporate franchise and of doing business within this state, by amending Sections 5491, 5493, 5494, 5505, 5506, 5507, 5509, 5510, 5511, 5512, 5513, 5514, 5520, 5522 and 5524, and to repeal Sections 5495, 5496, 5497, 5498, 5499, 5500, 5501, 5502, 5503 and 5519 of the General Code."

Unless this bill is subject to referendum, it is already in effect. As suggested by your letter, the question for determination is whether or not it is a law "providing for tax levies" within the meaning of Section 1d of Article II of the Constitution. If it is such a law, it goes into immediate effect and, if not, it must await the expiration of the referendum period. The title, standing alone, would clearly demonstrate that this is a law providing for a tax levy. However, we may not be governed solely by the title of an act but must look further to the substantive provisions thereof in order to determine whether or not its provisions are subject to a referendum.

It is somewhat difficult to apply the principles announced by the Supreme Court of Ohio in the case of *State ex rel vs. Forney*, 108 O. S. 463, to the present law. That case involved the question as to whether the Taft act was subject to a referendum and the court, in the third branch of the syllabus, expresses its conclusions as follows:

"The express language 'laws providing for tax levies', is limited to an actual self-executing levy of taxes, and is not synonymous with laws 'relating' to tax levies, or 'pertaining' to tax levies, or 'concerning' tax levies, or any agency or method provided for a tax levy by any local subdivision or authority."

Without quoting from the opinion, it is sufficient to say that the court held that the Taft act was not an act providing for a tax levy, but merely provided the method or machinery by which levies might be made by subdivisions of the state. For this reason the court concluded that it was subject to the referendum. In the last paragraph of the opinion it is indicated that an act might include certain provisions expressly providing for a tax levy and thereby prevent a referendum on the act as a whole.

It is unnecessary, however, in the consideration of your question, to go further than to discuss the specific provisions with relation to the penalty imposed by Section 5511, as amended in this act. It is argued by attorneys for the company that this is not a law providing for a tax levy and therefore that this particular section is subject to referendum although other sections of the act which do specifically provide for a levy have already gone into effect.

In the view that I take, it is unnecessary to pass upon this question, although I might say that I am of the opinion that the penalty is so bound up with the payment of taxes and fees as a condition precedent to reinstatement of a corporation, that the section may well be regarded as actually levying a tax. The section in question is as follows:

"Any corporation whose articles of incorporation or certificate of authority, to do business in this state, has been canceled by the secretary of state, as provided by law for failure to make report or return or to pay any tax or fee, upon the filing, with the secretary of state, of a certificate from the tax commission that it has complied with all the requirements of law as to reports and paid all taxes, fees or penalties due from it for each and every year of its delinquency, and upon the payment to the secretary of state of an additional penalty of ten cents for each share of its authorized capital stock, such penalty not to exceed one hundred dollars nor be less than ten dollars in any case, shall be entitled again to exercise its rights, privileges and franchises in this state, and the secretary of state shall cancel the entry of cancellation so

made by him and shall issue his certificate entitling such corporation to exercise its rights, privileges and franchises; provided, however, that if such application for reinstatement be not made within two years from the date of the cancellation of its articles of incorporation, and it appears that articles of incorporation shall have been issued to a corporation of the same or similar name, the applicant for reinstatement shall be required by the secretary of state as a condition pre-requisite to such reinstatement, to amend its charter by changing its name. For the purpose of computing the penalty hereinabove provided for, and for no other purpose, all shares of capital stock without nominal or par value shall be taken to be the par value of one hundred dollars each."

You will observe that this section in reality prescribes a readmission fee for corporations which have become delinquent and I feel that its provisions go into immediate effect. In so construing the penalty provision, it is necessary to treat the penalty as in substance a part of the tax. While it is true that in many respects the penalty is distinct in principle from the tax, yet in this instance I am of the opinion that the penalty is in reality a part of the readmission fee of the corporation.

You direct my attention to Section 11 of the act, however, which is as follows:

"Nothing in this act shall be held or construed to affect pending actions, prosecutions or proceedings, civil or criminal, or causes of such actions, prosecutions, or proceedings, or the liability of any corporation for any franchise taxes existing at the time it takes effect."

This saving clause expressly provides that nothing in the act shall be held and construed to affect the liability of any corporation for any franchise taxes existing at the time it takes effect. If, therefore, a consistent attitude is to be adopted, it necessarily follows that the provision for penalty is in reality and substance, a part of the obligation for a franchise tax within the meaning of the saving clause. The corporation in question was delinquent prior to the passage of the act. Its right to reinstatement upon the payment of a certain amount to the state was fixed by the law then in existence. I believe that a fair construction of the saving clause is that this right is unaffected by the amendment of Section 5511 and that the company, therefore, has a right to reinstate, upon the payment of the fee as provided in that section prior to its amendment. It must be borne in mind, however, that under the provisions of Section 5511 of the General Code, prior to its amendment, the right of reinstatement was limited to two years following the cancellation of the right to do business. The corporation in the present instance became delinquent in this year and therefore it still has corporate power to reinstate within two years after the date of the cancellation of its authority.

If I were to adopt the conclusion that the penalty provision is not a part of the franchise tax within the meaning of the saving clause, in order to be consistent I might be compelled to likewise hold that the penalty provision in Section 5511 is no part of the tax and therefore such section might be subject to a referendum. I believe that logically the tax and the penalty for reinstatement should be treated as one general provision for taxes and that therefore, while Section 5511 is already in effect, any corporation delinquent at the time of the effective date of the new act, is permitted by virtue of the saving clause to reinstate upon payment of the fees provided in Section 5511 of the General Code, prior to its amendment.

I direct your attention to Opinion No. 661 of this department, rendered to you on June 24, 1927. The major question there under consideration was whether or not the penalty clause should be based upon the entire authorized capital stock or only

the proportion represented by property owned and business done within the state. The conclusion was reached that the entire amount and not a proportion thereof should be the basis of the penalty. It was, however, indicated in the opinion that, in the specific instance under consideration, the penalty should be determined in accordance with the terms of Section 5511 of the General Code, as amended in Amended Substitute Senate Bill No. 22. The corporation in that instance having become delinquent prior to the effective date of the amendment of Section 5511 of the General Code, the reinstatement fee and penalty would be controlled by that section prior to its amendment. In so far as the language therein contained is inconsistent with this opinion, it is modified. The conclusion there reached, however, to the effect that the corporation in question is liable for the maximum fee of one hundred dollars, remains unchanged.

Respectfully,
EDWARD C. TURNER,
Attorney General.

715.

FILING OF PETITION TO TRANSFER PUBLIC FUNDS—PETITIONERS MAY FIX TENTATIVE DATE FOR HEARING—POWER OF COURT TO CHANGE DATE—NOTICE OF FILING OF PETITION—HOW PUBLISHED.

SYLLABUS:

1. *Upon the filing of a petition in the Court of Common Pleas for the purpose of transferring public funds, as provided by Sections* 2296, *et seq., of the General Code, the petitioners are authorized to fix a tentative date for the hearing of said petition. If the date fixed by the petitioners is not convenient to the court, the court may by virtue of its inherent power over its docket, fix such time as will be convenient, guided by the exigencies of the situation and the directory provision of Section* 2299, *General Code, to the effect that the "cause shall be heard upon request of the petitioners in preference to all other cases on the docket." Any abuse of discretion by the court in fixing the date for hearing may be reviewed on appeal to the Court of Appeals, and on proceedings in error in the Supreme Court.*

2. *Notice of the filing, objects and prayer of the petition, and of the time when it will be for hearing, if published in a newspaper, shall be given by one publication in two newspapers of opposite politics, having a general circulation in the territory to be affected by such transfer, preference being given to newspapers published within the territory. If there be no such newspapers, the notice must be posted in ten most conspicuous places within the territory for the period of four weeks.*

COLUMBUS, OHIO, July 11, 1927.

HON. HERMAN F. KRICKENBERGER, *Prosecuting Attorney, Greenville, Ohio.*

DEAR SIR:—This will acknowledge receipt of your communication requesting my opinion in answer to two questions as follows:

> "(1) Under Section 2298, are the petitioners to set the day for hearing said petition according to their own discretion?
>
> (2) Within what time should the petition be heard after the publication of the notice required by Section 2298?"