1844.

CORPORATIONS — OHIO-GULF PETROLEUM COMPANY — WHEN SHARES OF STOCK OF SAID COMPANY ARE "SUBSCRIBED OR REISSUED AND OUTSTANDING CAPITAL STOCK" WITHIN MEANING OF SECTIONS 5495 ET SEQ. G. C.

Shares of capital stock of a domestic corporation returned by the stockholders to the company to go as a bonus to purchasers of the company's preferred stock, and also shares delivered by the company to the commissioner of securities under an arrangement or agreement that they shall be delivered to stockholders on whose account they were issued, when the company shall have earned certain dividends on its capital, are "subscribed or issued and outstanding capital stock," within the meaning of section 5498 *G. C. and subject to the franchise tax therein provided.*

COLUMBUS, OHIO, February 7, 1921.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—Your letter of recent date inquiring whether or not certain shares of The Ohio-Gulf Petroleum Company are "subscribed or issued and outstanding capital stock" within the meaning of sections 5495 et seq. G. C., was duly received.

The facts, as I understand them, are as follows:

"The Ohio-Gulf Petroleum Company, an Ohio corporation, has an authorized capital stock of $1,500,000, divided into 10,000 shares of common and 5,000 shares of preferred of the par value of $100 each.

Certificates representing $250,000 par value of the common stock (hereinafter referred to as treasury stock), were issued and delivered to certain stockholders, and subsequently returned to the company pursuant to an arrangement or agreement between the company, the stockholders and the commissioner of securities that the shares should go as a bonus to purchasers of the company's preferred stock.

Certificates representing $650,000 par value of the common stock (hereinafter referred to as escrowed stock), were issued in favor of, or for the account of, certain stockholders (but whether actually delivered to them or not is not disclosed), and thereafter deposited with the commissioner of securities under and pursuant to an understanding or agreement between the company, the stockholders and the commissioner of securities, that the stock should be held by the commissioner and not released to the owners until certain dividends had been earned.

The understandings or agreements above mentioned were brought about when the company made application to the commissioner of securities under sections 6373-1 et seq. G. C. (Blue Sky Law) for authority to dispose of $900,000 par value of its common stock and $500,000 par value of its preferred stock. The commissioner finally disposed of the application by issuing to the company a "Certificate of Corporate Compliance," which, among other things, provided:

'This certificate of corporate compliance is issued with the understanding that of the $900,000 common capital stock of said company issued in payment of property, etc., $250,000 shall be returned to the treasury of the company to be used as a bonus with the sale of the preferred stock, and that the remaining $650,000 thereof shall be escrowed with this department to be held and not released by it to the owners thereof, their

heirs, executors, administrators or assigns until such time as there shall have been earned on the issued and outstanding common stock of said company, a dividend or dividends aggregating 16 per cent, and the consent of this department to its release is obtained.

This certificate of corporate compliance shall not be deemed to be in full force and effect until such time as the owners of said $650,000 common stock shall accept all the conditions in writing to the department as to the escrowing of same, and a statement in the same manner is received by the department by the treasurer of said company to the effect that the $250,000 common stock to be issued as a bonus has been returned to the treasury and certificates representing the ownership of the said $650,000 common stock are in the actual possession of the department.'

Thereafter, the so-called escrowed stock was deposited with the commissioner of securities, and there was also filed with him the written acceptance of the owners of the stock, and the statement of the company's treasurer, as required by the provisions of the "Certificate of Corporate Compliance" just quoted.

After the several transactions above mentioned were closed, the commissioner of securities released $450,000 par value of the escrowed stock from the conditions imposed by the "Certificate of Corporate Compliance," and the shares were returned to the company's treasury. The arrangement or agreement under which this was returned to the company is not disclosed by the papers."

The contention has been made, I understand, that the stock referred to in the above statement of facts is not subject to the franchise tax imposed by section 5498 G. C., because (1) the possession and control of the escrowed stock is taken from the owners until the happening of a certain event (viz., the earning of certain dividends), and (2) the treasury stock belongs to and is in the possession of the company, and that, by reason thereof, none of the stock can be classed as "subscribed or issued and outstanding capital stock."

There is no dispute, I understand, that certificates representing all of the capital stock involved in your inquiry were actually issued that certificates representing the treasury stock were delivered to the stockholders, and by them returned to the corporation; and, that, while the certificates for the escrowed stock may not have been actually delivered to the stockholders for whose account they were intended, they were, however, delivered to the commissioner of securities for ultimate delivery to them pursuant to an understanding or agreement which recognized them as owners and ultimately entitled to possession. It subsequently happened, however, as already stated, that a certain portion of this escrowed stock was turned over to the corporation as treasury stock.

Section 5498 G. C. provides, among other things, that the tax commission shall on the first Monday of July determine "the amount of the subscribed or issued and outstanding capital stock" of each domestic corporation, and that a fee of three-twentieths of one per cent upon such capital stock shall be payable to the treasurer of state on or before the first day of October, etc. Nowhere in that section, nor in any other section of the franchise tax act, is treasury stock, escrowed stock, or stock issued and held under conditions and circumstances hereinabove mentioned, exempted from the franchise tax just mentioned.

It has heretofore been held by this department that treasury stock is subject to the franchise tax provided for and imposed by section 5495 et seq. G. C. (1918 Opinions of Attorney-General, Vol. I, p. 908), and judicial authority is to the same effect. See Knickerbocker Transportation Co. vs. State Board of Assessors, 74 N. J. L. 583, in which the court held that

"Stock once issued is and remains outstanding within the purview of the franchise tax act, although owned by the corporation issuing the same, until retired and cancelled as provided by statute for the reduction of capital stock."

With respect to the escrowed stock, it appears that certificates therefor were issued and deposited with the commissioner of securities for ultimate delivery to stockholders who were, at all times, recognized by the corporation, the stockholders themselves, and the commissioner, as owners thereof.

The status of the commissioner with respect to holding this stock appears to be that of trustee under the agreement pursuant to which it was deposited with him, and the fact that a certain portion thereof was subsequently delivered to the company instead of to the stockholders, as contemplated by the arrangement or agreement referred to, would not in the least affect its liability for the franchise tax.

You are therefore advised on the facts above stated, that the shares of stock involved in the present inquiry are "subscribed or issued and outstanding capital stock," within the meaning of section 5498 G. C., and subject to the franchise fee or tax of three-twentieths of one per cent therein provided.

Respectfully,
JOHN G. PRICE,
Attorney-General.

1845.

MUNICIPAL COURT OF MASSILLON—PROVISIONS OF ACT ESTABLISHING SAID COURT CONSTRUED WITH PROVISIONS OF CRABBE ACT—ONE-HALF OF ALL MONEYS ARISING FROM FINES AND FORFEITURES IN CASES PROSECUTED BEFORE SAID MUNICIPAL COURT FOR VIOLATIONS OF CRABBE ACT SHOULD BE PAID INTO MUNICIPAL TREASURY—WHETHER OFFENSE COMMITTED IN CITY OF MASSILLON OR TOWNSHIP OF COUNTY IMMATERIAL—SECTION 13195 G. C. NOT REPEALED BY CRABBE ACT—PROVISIONS OF CRABBE ACT RELATE TO DISPOSITION OF FINES NOT APPLICABLE TO PROSECUTIONS UNDER SECTION 13195 G. C.

1. *Under the provisions of the act establishing the municipal court of Massillon, construed with the provisions of the Crabbe act, one-half of all moneys arising from fines and forfeitures in cases prosecuted before said municipal court for violations of the Crabbe act should be paid into the municipal treasury, regardless of whether the offense was committed in the city of Massillon or a township of the county.*

2. *Section* 13195 *G. C., providing an offense for keeping a place where intoxicating liquor is sold in violation of law, is not repealed by the Crabbe act. Provisions of the Crabbe act relative to the disposition of moneys arising from fines do not apply to prosecutions under said section. Such moneys, under the requirements of the Massillon municipal court act, should be paid into the municipal treasury.*

COLUMBUS, OHIO, February 7, 1921.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—In your recent communication you request my written opinion upon a state of facts presented by the city solicitor of Massillon in his letter to you, which is as follows: