

516

FOREIGN CORPORATIONS—FEES TO BE CHARGED NOT CREDITED WITH PAYMENTS MADE BY ANOTHER CORPORATION WHOSE ASSETS FIRST CORPORATION ASSUMES. SECTION 1703.11—OPINION 4249 OAG 1935 APPROVED AND FOLLOWED.

## SYLLABUS:

Where one of two foreign corporations licensed to transact business in Ohio takes over all of the assets and assumes all of the liabilities of the other, the Secretary of State, upon receipt of the annual report of the succeeding corporation, and in determination of the fee to be charged such corporation pursuant to Section 1703.11, Revised Code, is not required or permitted to allow as a credit on such fee, the amount previously paid by the absorbed corporation. Opinion No. 4249, Opinions of the Attorney General for 1935, approved and followed.

Columbus, Ohio, May 25, 1959

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

Dear Sir:

I have before me your request for my opinion reading as follows:

“In order to properly administer Section 1703.11 of the Revised Code of Ohio, I submit to you for your opinion the following two questions:

“(1) Where each of two foreign corporations, H and H. R. have both been licensed to do business in Ohio, and where H surrenders its license to do business in Ohio, and thereafter all of its assets and liabilities are purchased by H. R. Corporation, may the Secretary of State in determining the fee due as a result of the audit of an annual statement of proportion of capital stock for H. R. Corporation give a credit for fees previously paid by H. Corporation while licensed to do business in Ohio, in the absence of a technical merger of the two corporations?

“(2) If the answer is yes to the above question, what type of evidence is required to show the fact that all assets and liabilities of H have been taken over by H. R., where the laws of the two foreign states involved do not require the filing of any documents with the respective Secretaries of State?

“We enclose a thermofax copy of a letter of General Counsel for Heller Roberts Manufacturing Corporation setting forth the position of Counsel and the corporation in this matter.”

While your letter indicates some doubt as to whether the transaction outlined constituted a merger of two corporations, it appears from the letter of counsel for the H. R. Company that they regard the completed transfer of the assets of the H. Company and the surrender of its charter as the equivalent of a merger. Quoting from their letter :

“Under general principles of law, it is recognized that a sale of all assets and assumption of all liabilities of one corporation by another corporation and the dissolution of the former is essentially equivalent to a merger or consolidation of the two corporations and that only technical distinctions based upon different statutory requirements differentiate the two forms of reorganization.”

In my opinion it would make little difference whether the transaction is or is not called a merger. It is a complete consolidation of the two companies under the charter of one, with a transfer of all the properties of one to the other and an assumption by the latter of all of the liability of the former.

Section 1703.03, Revised Code, provides as follows :

“No foreign corporation not excepted from sections 1703.01 to 1703.31, inclusive, of the Revised Code, shall transact business in this state *unless it holds an unexpired and uncanceled license* to do so issued by the secretary of state. To procure and maintain such a license, a foreign corporation shall file an application, *pay a filing fee, file annual reports, pay a license fee in initial and additional installments*, and comply with all other requirements of law respecting the maintenance of such license as provided in such sections. (Emphasis added)

Section 1703.04, Revised Code, sets out matters which must be contained in an application for a license by such foreign corporation and provides for a filing fee of fifty dollars to be paid to the Secretary of State.

Section 1703.07, Revised Code (8625-7 G.C.) requires each foreign corporation for profit licensed to transact business in this state, to file annually with the Secretary of State a report showing, among other things, “the location and value of the property owned or used by the corporation as shown on its books, both within and without the state, given separately.” This report must also show the number of its issued shares.

Section 1703.08, Revised Code, (8625-8 G.C.) provides in part as follows :

“From the annual report and from such other facts as the secretary of state ascertains from any further investigation which he may make, he shall determine *the number of issued shares of the corporation represented by property owned or used and business transacted in this state*, at the beginning of its current annual accounting period, \* \* \*” (Emphasis added)

There follows a formula for ascertaining this number of shares.

Section 1703.09, Revised Code, (8625-9 G.C.) reads as follows :

“A foreign corporation not licensed before August 7, 1931, to transact business in this state shall pay to the secretary of state, as the *initial installment of its license fee*, a fee based on the number of its issued shares represented in this state, as shown by its first report filed under sections 1703.01 to 1703.31, inclusive, of the Revised Code, and as determined in the manner prescribed by section 1703.08 of the Revised Code, and such fee shall be the same as the fee which a domestic corporation, having authority to issue the same number of shares as such foreign corporation has represented in this state, is required to pay on filing its original articles. In no event, however, shall the fee be less than five dollars. Upon the payment of such fee, the corporation may have such number of shares represented in this state.”

(Emphasis added)

Section 1703.11, Revised Code, (8625-11 G.C.) reads in part as follows :

“In the event that any report filed by a foreign corporation under sections 1703.01 to 1703.31, inclusive, of the Revised Code, subsequent to its first report discloses that such foreign corporation has represented in this state a number of issued shares in excess of the number theretofore determined to be so represented, the corporation shall pay to the secretary of state an additional installment of the license fee based upon such additional number of shares and 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 1703.09 of the Revised Code. He shall then compute a fee, on the same basis, upon the number of issued shares which such corporation has been authorized theretofore to have represented in this state. The fee payable shall be the difference between such two fees.

“\* \* \*”

In answering a question based on facts substantially the same as those which you have submitted, one of my predecessors in Opinion No. 4249, Opinions of the Attorney General for 1935, 554, held :

“Where the number of issued shares of a foreign corporation represented by property owned or used and business transacted in this state is increased as a result of another foreign corporation, heretofore qualified to do business in Ohio, merging with such corporation, in computing the fee based upon such increase under Section 8625-11, General Code, no deduction is authorized on account of such merging corporation having theretofore paid a fee based upon its issued shares being represented by property owned or used and business transacted in this state.”

The General Code statutes then in force and discussed in that opinion were practically identical with the present section of the Revised Code which I have quoted, there having been no amendments of those statutes since that time. After reviewing those statutes and referring particularly to Section 8625-11 General Code (1703.11, Revised Code) the Attorney General said :

“It is observed that the foregoing section requires the payment of a fee as therein set forth when the annual report shows an increase in the number of issued shares of a foreign corporation represented by property owned or used and business transacted in this state, without any exceptions as to whether or not some other corporation which might have merged with the reporting corporation had already paid a fee computed upon such increased shares. The language of the section is clear and unambiguous. The requirement in the first paragraph is ‘the corporation shall pay to the Secretary of State an additional installment of the license fee based upon *such number of additional shares.*’ The additional shares upon which the additional installment of the license fee is based in the event of an increase in the shares represented in this state, can only be the additional shares shown by the report of the reporting corporation. The reference again in the second paragraph of the foregoing section to ‘such corporation’ is clearly to the corporation making the report and not to some other corporation. It would undoubtedly be competent for the legislature to authorize a deduction under such circumstances as are set forth in your communication, but until this is done I find no authority therefor. In the case of a merger the individual corporate entities concerned may not be lost sight of. ‘A’ Company has, as a result of this merger, retained its corporate identity and in the absence of specific provision relating to such transaction, is in the same position as though it had increased the number of its shares represented by property owned or used and

business transacted in this state either by increasing its outstanding shares or increasing the proportion of its property and business in Ohio. \* \* \* ” (Emphasis added)

I fully concur in the opinion above referred to and the reason upon which it is based.

Accordingly, it is my opinion and you are advised that where one of two foreign corporations licensed to transact business in Ohio takes over all of the assets and assumes all of the liabilities of the other, the Secretary of State, upon receipt of the annual report of the succeeding corporation, and in determination of the fee to be charged such corporation pursuant to Section 1703.11, Revised Code, is not required or permitted to allow as a credit on such fee, the amount previously paid by the absorbed corporation. Opinion No. 4249, Opinions of the Attorney General for 1935, approved and followed.

Respectfully,

MARK MCELROY

Attorney General