

Applying this rule to the above question, it follows that payments made to a de facto officer for services rendered may not be made the subject of a finding for recovery in the absence of fraud, collusion or excess payments for such services.

Respectfully,

GILBERT BETTMAN,

Attorney General.

4493.

CORPORATION "NOT FOR PROFIT"—DISTRIBUTES ELECTRICITY TO MEMBERS, COLLECTING ASSESSMENTS FOR SUCH SERVICE—LISTED AS A PUBLIC UTILITY.

SYLLABUS:

When a corporation not for profit, purchases electricity at wholesale, measured through a master meter, and distributes this current through its own lines, to its members, and collects from them by assessment in proportion to the current used by each member an amount sufficient to pay for the current, and maintains its lines and its overhead expense, such corporation not for profit, is a public utility, within the purview of Section 5415, General Code.

COLUMBUS, OHIO, July 11, 1932.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I am in receipt of your request for opinion as to whether the G. L. & P. Company, organized under the corporation laws of Ohio as a corporation not for profit, is a public utility, within the meaning of the taxation laws of Ohio.

This corporation purchases electrical current from an electric power company, through a master meter, distributes this current among its members only, and collects from them, by assessment, an amount sufficient to pay for such current and maintain its lines.

The plan of operation of this company it appears, is to charge each member an initiation fee of five dollars, and to charge him for the electrical current used a sum equal to the cost of such current from the power company, and in addition thereto, an assessment for operating expenses equal to his pro rata share.

Section 5415, General Code, reads as follows:

Sec. 5415. "The term 'public utility' as used in this act means and embraces each corporation, company, firm, individual and association, their lessees, trustees, or receivers elected or appointed by any authority whatsoever, and herein referred to as * * electric light company, * * and such term 'public utility' shall include any plant or property owned or operated, or both, by any such companies, corporations, firms, individuals or associations."

In Section 5416, General Code, which was also the next following section in the same act with Section 5415, General Code, I find this language:

"When engaged in supplying electricity for light, heat or power purposes, to consumers within this state, is an electric light company;,"

From the language of these sections it must be deduced that anyone, whether as an individual, partnership, corporation or otherwise, who furnishes electricity to consumers within the State of Ohio, is a public utility, for the purposes of taxation.

The question then arises as to whether a corporation not for profit, which merely acquires electricity for its members is "furnishing electricity to consumers" within the meaning of this section.

It is evidently the contention of the taxpayer that the transaction does not constitute "furnishing" electricity to consumers but is rather a collective buying by the members. If a number of people join together for the purpose of buying a commodity in large quantities and thereby obtain an advantageous price per unit, and thereafter they divide the commodity among themselves in proportion to their respective wants, even though the commodity is electricity, it is highly improbable that such organization would be construed by the court as a "public utility" within the meaning of Section 5415, General Code. However, such question is not before me and I express no opinion thereon. The question before me is: When a "corporation organized not for profit" purchases electricity and through lines owned by it distributes it only to those persons who are members of such corporation, does such corporation constitute a public utility within the definition contained in Section 5415, General Code? There is no question in my mind but that when a corporation "for profit" purchases electricity in such manner and redistributes it to its *stockholders only*, such corporation would be a "public utility" within the meaning of such section. It is uniformly held that a corporation "for profit" is an entity or individuality separate and distinct from that of its stockholders, and if a person, association, or corporation purchases electricity for consumption by an entity other than itself it is clearly a public utility.

But is a corporation not for profit, an entity separate and distinct from its members? There are a number of cases holding that the trustees of a corporation "not for profit" are personally liable for the debts of such type of corporation in the event that the assets of the corporation are insufficient to pay such obligations. *Snyder vs. Chamber of Commerce*, 53 O. S. 1; *Mahaffey vs. Rogers*, 10 O. C. C., 24, affirmed 56 O. S., 767. These decisions are no longer the law in Ohio, for the Legislature has provided in Section 8623-110, General Code, that:

"Neither the *members* nor the *trustees* of a corporation not for profit shall be personally liable for any debt or obligation of a corporation not for profit." (Italics, the writer's.)

Section 8623-99, General Code, defines the statutory powers of a corporation not for profit:

Sec. 8623-99. "Upon filing the articles the incorporators and the other members, if any, designated in the articles, and their successors and assigns, shall, from the date of such filing, be and constitute a body corporate, with perpetual succession and with capacity possessed by natural persons to perform all acts within or without this state not repugnant to law; and in furtherance, but not in limitation, of the foregoing every such corporation shall have authority:

1. To sue and be sued, contract and be contracted with;

2. To adopt, use and at will alter a common seal, but failure to affix a seal shall not affect the validity of any instrument;
3. To acquire, hold, convey, lease, mortgage or dispose of all property, real or personal, necessary or expedient to accomplish its purposes;
4. To borrow money and contract debts to accomplish its purposes;
5. To become an incorporator or member of any other corporation not for profit organized under the laws of this state."

Section 8623-112, General Code, with reference to holding property, reads:

"All property, real or personal, acquired by a corporation not for profit, by purchase, gift or otherwise, shall be the absolute property of such corporation, unless at the time of acquiring such property it be otherwise in writing specified."

From these and other sections of the "General Corporation Act" it is evident that a corporation not for profit, is an entity separate and distinct from its members.

My conclusion is given some support as to legislative intent by the language contained in Section 614-2a, General Code, which is the chapter of the Code relating to public utilities. Said section reads in part, as follows:

"The term 'public utility' as used in this act, shall mean and include every corporation, company, co-partnership, person or association, their lessees, trustees or receivers, defined in the next preceding section, *except such public utilities as operate their utilities not for profit*, etc. * *"
(Italics, the writer's.)

The legislature apparently recognized in this section, the existence of public utilities in the form of corporations not for profit, but did not intend to subject them to regulation by the public utilities commission.

If my deductions are correct, this corporation not for profit, by furnishing electricity to consumers rather than consuming the electricity itself, is a public utility within the meaning of Section 5415, General Code, and is subject to the provisions of that act.

Specifically answering your inquiry I am of the opinion that, when a corporation not for profit, purchases electricity at wholesale, measured through a master meter, and distributes this current through its own lines, to its members, and collects from them by assessment in proportion to the current used by each member, an amount sufficient to pay for the current, and maintains its lines and its overhead expense, such corporation not for profit, is a public utility within the purview of Section 5415, General Code.

Respectfully,

GILBERT BETTMAN,

Attorney General.

4494.

APPROVAL, NOTES OF KILLBUCK RURAL SCHOOL DISTRICT,
HOLMES COUNTY, OHIO—\$3,000.00.

COLUMBUS, OHIO, July 11, 1932.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.