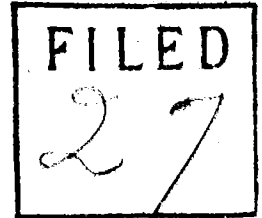


TAXATION AND REVENUE: Corporation continuing to exercise corporate privileges after the beginning of current taxable year liable for tax.



June 4, 1946

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Hon. Clarence Evans, Chairman
State Tax Commission
Jefferson City, Missouri

Dear Sir:

Reference is made to your letter of recent date, requesting an official opinion of this office, and reading as follows:

"We would appreciate an opinion on the following matter:

'A corporation operating in Missouri goes into voluntary dissolution on April 6, 1946. Is said corporation liable for the corporation franchise tax for the current year?'

* * * * *

"However, the new franchise bill No. 540 apparently changes the date of assessment by the State Tax Commission from March 20 as in the old law; to November 1 in the new law.

"We would appreciate an early reply, inasmuch as the returns for this year are practically all in and we have run in to a number of dissolution cases."

May we say at the outset that the General Corporation Code of Missouri was completely revised by an Act of the 62nd General Assembly, appearing in the Laws of Missouri, 1943, at pages 457 to 482, inclusive. In this enactment section numbers were not accorded the new statutes similar to those ap-

pearing in the Revised Statutes of 1939 and we have in this opinion adopted the numbering thereof as found in the Missouri Revised Statutes Annotated.

Section 4997.135 imposes a franchise tax on all corporations organized under or subject to the general corporation laws of the State of Missouri, and upon every foreign corporation engaged in business in Missouri, whether under a certificate of authority issued by the State of Missouri or not. The tax is imposed in these terms:

"For the taxable year of 1943 and thereafter every corporation of this state organized under or subject to this act or under any other laws of this state shall, in addition to all other fees and taxes now required or paid, pay an annual franchise tax to the State of Missouri * * *"
(emphasis ours.)

With respect to foreign corporations, the applicable provision reads:

" * * * Every foreign corporation engaged in business in this state whether under a certificate of authority issued under this act or not, shall pay an annual franchise tax to the state of Missouri * * *"
(emphasis ours.)

Under the provisions of section 4997.136, a report is required from every corporation liable to the tax imposed under the statute mentioned supra, to be made on or before the first day of March in each year. Said section reads, in part, as follows:

"Every corporation liable to the tax prescribed in the foregoing section shall make a report in writing to the Missouri Tax Commission, if it is in existence, and if not, then to the State Board of Equalization annually on or before the first day of March in such form as said Commission or said Board of Equalization may prescribe. * * *"

Section 4997.137, as it appeared in the Laws of Missouri, 1943, required the State Tax Commission, from the facts reported and from any other facts within or coming to its knowl-

edge, to determine the amount of tax due by such corporation on or before the 20th day of March in each year. It is this section which has been repealed by House Bill No. 540 of the 63rd General Assembly. The statute, which appears as Section 137 of the bill mentioned, reenacts Section 4997.137 in its entirety, with the exception of changing the date upon which such tax is to be determined from the 20th day of March to the 1st day of November in each year. It also imposes the duties previously discharged by the State Treasurer upon the Director of Revenue. Section 4997.137, as amended by House Bill No. 540, reads as follows:

"The State Tax Commission shall, on or before the first day of November in each year, determine from the facts reported, and from any facts within or coming to its knowledge the proportion of the outstanding shares and surplus of each corporation employed in business in this state and the amount of tax each corporation is liable to pay under the provisions of this act and shall report the same to the Director of Revenue, who shall make out a tax bill therefor against each corporation and shall notify the proper officials of each corporation of the amount of tax due. The taxes provided for in this article shall be paid on or before the 31st day of December in each year. The Director of Revenue shall deliver a receipt for taxes paid which shall recite that the corporation named therein has paid its annual franchise tax under the provisions of this act for the year ending the 31st day of December." (Emphasis ours.)

This corresponds with the statute as it previously appeared except for the change mentioned transferring the duty to issue the receipt from the State Treasurer to the Director of Revenue.

From the above, we think it quite clear that the tax imposed is upon an annual basis corresponding to the calendar year. This is further borne out by the fact that in the annual report required of corporations under Section 4997.136, Item 10 requires that the report disclose the amount of surplus and undivided profits on the 31st day of the preceding December, or on the last day of the preceding fiscal year of said corporation.

With these factors in mind, your question resolves itself into this: Does a corporation, by continuing the exer-

cise of any of its corporate franchises or privileges into the current taxable year, become liable for the payment of the annual franchise tax, even though such activities are terminated prior to the date when the determination of the tax is to be made by the State Tax Commission?

We think the question must be answered in the affirmative. It has been uniformly held that the very nature of a corporation franchise tax is the exaction by the sovereign state granting the right to exercise corporate privileges of a payment therefor. It is only because the corporate privileges are exercised that the tax may be validly imposed. It has been equally as uniformly held that a corporation does not become liable for the payment of franchise taxes in taxable years during which none of the corporate privileges are exercised. We think the converse to be true with equal force.

While the precise question has not been passed upon by an appellate court of the State of Missouri, yet a similar question, and one involving an almost identical set of facts, has been decided by the Circuit Court of Appeals, 6th Circuit, in the case of *Bates v. Archer, State Treasurer of Ohio*, 288 Fed. 182. In that case the court had for determination the question of whether or not a corporation exercising its corporate privileges in the State of Ohio in a portion of the tax year prescribed under the applicable Ohio statutes was subject to payment of the corporation franchise tax imposed thereunder. The Ohio statutes required such corporations to file with the Tax Commission during the month of May of each year a report from which the Tax Commission was empowered to determine the basis for the computation of the tax. Such basis was then certified to the Auditor of the state on the first Monday in August. The Auditor thereafter determined the tax due upon the basis certified to him, and the tax was payable to the Treasurer of the state on or before the first day of the following October. The facts in the case then under consideration disclosed that the corporation had gone into bankruptcy on June 21, 1921. The contention was made by the receiver that inasmuch as the corporation was not in existence on the date when the assessment was to be made, no tax could lawfully be imposed. However, there was no dispute but that for a period of the then taxable year the corporate privileges had been exercised. In disposing of this contention, the court said:

"The corporation franchise tax imposed by the Ohio statute is an annual tax for the right and privilege of exercising a corporate franchise within the state for the cur-

rent year for which such tax is imposed. The taxing period is the year, and not any part thereof. The tax is not severable, but is levied as a unit, regardless of the possibility that the franchise may be exercised for only a portion of the year. Whether this current tax year is for the calendar year, or for the year commencing on the 1st day of the month on which the report is required to be filed, is wholly unimportant in this case. In either event, the tax attached while the corporation was exercising its corporate franchise.

"The question as to when this current tax year begins being one primarily for the Supreme Court of Ohio, and wholly unnecessary to the disposition of this case, this court expresses no opinion in reference thereto. This corporation became liable for the payment of this franchise tax when it exercised its corporate franchise in any part of the tax year, although the amount of that tax was not ascertained and charged by the auditor of state until after the corporation was adjudged bankrupt."

We think that a similar result would be reached in Missouri. While the Federal Court in the case of *Bates v. Archer*, cited supra, was construing the Ohio corporation franchise tax statutes in relation to the rights conferred thereunder on the state of Ohio to collect such tax in a bankruptcy proceeding, yet we feel that the result reached therein would be strongly persuasive in determining a similar question in Missouri. That the General Assembly placed such construction upon this statute, which action is entitled to some weight in interpreting the same, under the authority of *State ex rel. v. Baker*, 9 S. W. (2d) 539, is indicated by the enactment of section 5113, R. S. No. 1939, as amended, Laws of Missouri, 1943, page 406. In the amendment the following proviso was added:

" * * * Provided, that no tax shall be imposed on corporations organized under the laws of this state on or after January 1, in any year, or on foreign corporations that commence business in this state on or after January 1, in any year, for the year in which said domestic corporations were organized, or the year in which said for-

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eight corporations commenced business in
this state: " * * * "

This, to us, is clearly indicative of a construction being placed upon the taxing statute which would have required such corporations to pay a franchise tax for the portion of the year in which they engaged in business, were it not for the exemption granted.

We have reviewed a prior opinion of this office delivered under date of October 20, 1941, to the Honorable Jesse A. Mitchell, Chairman, State Tax Commission, Jefferson City, Missouri, wherein a contrary conclusion was reached to that arrived at in this opinion. We believe such prior opinion to be erroneous, and it is hereby overruled and withdrawn.

CONCLUSION

In the premises, we are of the opinion that a corporation continuing to exercise any of its corporate franchises and privileges in the State of Missouri subsequent to the inception of the current taxable year is liable for the Missouri corporation franchise tax, without regard to the date when the exercise of such corporate franchises and privileges be terminated.

Respectfully submitted,

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APPROVED:

J. E. TAYLOR
Attorney General

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