TAXATION: The liability for the payment of a corporation franchise tax of domestic corporations attaches as soon as a certificate of authority to do business is granted.

January 5, 1939.

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State Tax Commission
Jefferson City, Missouri

Attention: Clarence Evans, Chairman

Gentlemen:

This is to acknowledge receipt of your request for an opinion reading as follows:

> "Will you kindly furnish this Commission an opinion as to liability for corporation franchise tax under the following conditions:
>
> "A corporation is organized and commences business in Missouri after January 1, 1939. Is such corporation liable for a franchise tax for the year 1939?"

The solution to your request for an opinion depends on a construction of Section 4641 of R. S. Missouri 1929. We set forth that part of the statute which imposes the tax. It reads as follows:

> "For the taxable year of 1929 and thereafter <u>every corporation organized under the laws of this state shall</u>, in addition to all other fees and taxes now required or paid, pay an annual franchise tax to the state of Missouri equal to one-twentieth of one percent of the par value of its outstanding capital stock and surplus, or if the capital stock of such corporation or any part thereof con-

> sists of no par value stock, then in that event, for the purposes herein contained such stock shall be considered a s having a value of $5.00 per share unless the actual value of such shares should exceed $5.00 per share, in which case the tax shall be levied and collected on the actual value and the surplus."

Other provisions of the section relate to the method and manner of the levy of the tax, where the corporations transacts business within and without the state and the levy of a tax on foreign corporations doing business within this state.

In the earliest case construing the Franchise Tax Law of this state, the Supreme Court had before it the above quoted statute and in passing upon this statute, in the case of State ex rel. Marquette vs. State Tax Commission, 282 Mo. 213, 220 (1920), said:

> "It clearly appears, by reference to Sections 1 and 2, that the fundamental idea in the mind of the Legislature was that a corporation doing business wholly in this State should be taxed under the provisions of this act upon two things, first, upon the amount of its outstanding capital stock, regardless of the value of its assets, whether moreor less than the amount of the outstanding capital stock, and, second, upon any surplus property employed in its business in this State. <u>The tax is levied</u> not upon the property itself, but <u>upon the right of the corporation to transact business in this State.</u>"

Then again the Court, so as not to be misunderstood with respect to the levying of the tax upon the

right of the corporation to transact business in this state, said, at page 225:

> "It is upon the franchise, we reiterate, that the statute here in question levies a tax."

Again in 1927, the Supreme Court reaffirmed the object and purpose for which the tax was imposed, in the case of State vs. Pierce Petroleum Corp. 318 Mo. 1020, and said:

> "The tax is not a property tax, but an excise levied upon the privilege of transacting business in this State as a corporation."

In the case of Missouri Athletic Asso. vs. Delk Investment Corp. 20 S. W. (2d) 51-55 1929, our Supreme Court again reaffirmed the rule, that the franchise tax law of this state was an excise levied upon the privilege of transacting business in this state as a corporation. To the same effect was the ruling in the case of Ozark Pipe Line Corp. vs. Monier, 266 U. S. 537, 69 L. Ed. 439.

From these considerations it will be noticed that our franchise tax act imposes a tax upon a corporation because of its existence and of its right to do business within this state. Since the tax is directed at the existence of the right, rather than the exercise of the right, then it would seem to follow that a corporation becomes liable for the payment of the tax, as soon as it has received its license to do business within this state. This interpretation, it is believed, fully expresses the purpose of the act. To further substantiate this view, it will be noted that the statute further provides:

> "Every corporation, not organized under the laws of this state, and

> engaged in business in this state, shall pay an annual franchise tax * * *."

From this portion of the statute it will be noticed that foreign corporations only have to pay a tax in the event they are engaged in business within this state.

This leads us to a consideration of your precise question as to whether or not a corporation that is organized and commences business after January 1, 1939, is liable for a franchise tax for the year 1939.

In the case of New York vs. Jersawit, 263 U. S. 493, 68 L. Ed. 405, the Supreme Court of the United States had before it, for consideration, a franchise tax that was assessed under the laws of the State of New York. The act provided that for the privilege of exercising its franchise of the state, that every domestic corporation should annually pay a tax in advance, for the year beginning November 1st, to be computed upon the business of its entire income for its preceding year. The company was adjudicated a bankrupt on December 22, 1920. Thereafter, the state filed a claim for a tax, for the year between November 1, 1920 and October 31, 1921. Mr. Justice Holmes, in ruling the case, said:

> "We are of opinion that the tax is a tax upon the right conferred, not upon the actual exercise of it; that, it was due when the petition in bankrupt was filed (cases cited), and that the claim of the state for the whole sum should have been allowed." (Underscoring ours).

In the case of Michigan vs. Michigan Trust Company, 286 U. S. 334, 76 L. Ed. 1136, the Supreme Court of the United States had before it, for consideration, the franchise tax of the state of Michigan, and in discussing the Franchise Tax Law of the State of Michigan, which is very similar to our Franchise Tax Law, Mr. Justice Cordozo, said:

> "These privilege fees were charges of the nature there described. Taxes owing to the Government, whether due at the beginning of a receivership or subsequently accruing, are the price that business has to pay for protection and security."

In the case of State vs. Pierce Petroleum Corp., supra, the court, in speaking of the privilege and burden imposed upon the corporation, said:

> "In accepting the privilege granted, such a corporation voluntarily assumes the burden imposed."

The court, in making the above statement, was speaking with reference to a non-resident corporation that had been licensed to do business within this state. We think that, in analogy, the above statement is equally true as respects the organization of domestic companies.

In an opinion directed to your department under date of March 21, 1938, we said that:

> "When the taxes provided for have been paid that the receipt made out for such taxes shall recite that the corporation, paying the tax, has paid its annual franchise tax for the year ending the 31st day of the following December. The amount of taxes to be paid annually by every corporation, is determined by the amount of their outstanding capital stock and surplus as of December 31st of each year. This date is but the "yardstick" for determining the amount of tax. Section 4642 of R. S. Mo. 1929.
>
> "If a corporation is organized and

existing under the laws of this state, it is required to file a report, as provided for in Section 4642, supra, on or before the 1st day of March of each year. Thereafter, on the 20th day of March on each year, it is the duty of the State Tax Commission to assess the amount of franchise tax based upon the report filed."

CONCLUSION

In view of the above, it is the opinion of this department that a corporation that is organized after January 1, 1939, is liable for the payment of a franchise tax for the year 1939.

Respectfully submitted,

RUSSELL C. STONE
Assistant Attorney General

APPROVED:

(Acting) Attorney General

RCS:JMW