TAXATION OF INSURANCE COMPANIES: Insurance Company, though purporting to be organized as an assessment company in foreign states, is taxable under section 5979, where it does business in this State.

June 1, 1933.

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91

Mr. Joseph B. Thompson,
Superintendent of Insurance
Jefferson City, Missouri.

Dear Mr. Thompson:

We are in receipt of your letter of May 22, 1933 as follows:

"A controversy has arisen between the Mutual Benefit Health & Accident Association of Omaha, Nebraska and this Department as to whether that Association is liable for a premium tax on its business transacted in Missouri under section 5779 or section 5979, R. S. Mo. 1929.

I enclose herewith statement and brief prepared by Mr. Fred Boxley of Kansas City on behalf of the Association contending against the tax; an opinion by Mr. Weatherby holding that said Association is taxable under section 5979, supra; also Mr. Boxley's reply to Mr. Weatherby's opinion.

Up until 1933 this Association has been licensed in Missouri as an assessment company. In 1933 shortly before their license was renewed the question arose as to the character and form of policy they were selling in Missouri and after considerable discussion, more as a matter of compromise than anything else, it was agreed that they should be licensed as a stipulated premium company thereafter and that they should pay a premium tax of 1% under said section 5779.

This year, however, the association through Mr. Boxley protested against the payment of any tax whatever and thus the question is before us again.

It will very likely result in a suit unless your office is of the opinion that Mr. Weatherby is wrong in his conclusion. It is almost certain that they will refuse to pay any tax and will drive the Department to an action for its recovery. This being true I feel that the matter should be submitted to you for your opinion. Will you therefore kindly give us your opinion on the subject involved."

Section 5745 R. S. Mo.-1929, provides as follows:

"Every contract whereby a benefit is to accrue to a person or persons named therein, upon the death or physical disability of a person also named therein, the payment of which said benefit is in any manner or degree dependent upon the collection of an assessment upon persons holding similar contracts, shall be deemed a contract of insurance upon the assessment plan, and the business involving the issuance of such contracts shall be carried on in this state only by duly organized corporations which shall be subject to the provisions and requirements of this article."

Section 5779 R. S. Mo. 1929, provides that a foreign insurance company shall pay a tax of 1% on gross premiums received in this state on account of business done in the state.

Section 5979 R. S. Mo. 1929, provides that every insurance company not organized under the laws of this state shall annually pay tax upon premiums received at the rate of 2% per annum.

Under your inquiry the question arises, first, whether or not the Mutual Benefit Health and Accident Association is engaged in business in the state of Missouri as an assessment company. If the company is do engaged, then under Section 5745, it isnot subject to any excise or license tax. If this company is not engaged in Missouri as an assessment company, then the question arises under which section of the Statutes is the company to be taxed.

The Mutual Benefit Health and Accident Association is a foreign corporation, organized under the law of the state of Nebraska. Article IV of the Articles of Incorporation provides as follows:

"The business of this association shall be conducted upon a mutual assessment plan. The board of directors may levy such assessments in such amounts and at such times as may be provided in the certificate of membership."

The sample policy of insurance, which we assume is identical in general terms with all policies issued by this company, fixes definite monthly benefits and definite death benefits. The sample policy provides for a death benefit of $2,000.00, which may be increased upon by the payment of 20 full annual premiums in which event the death benefits increase to $4,000.00 and the policy thereafter may be continued in force at a yearly cost of $4.00 per year. The policy provides that it is issued in consideration of the payment in advance of $22.00 as the first payment, and for payment in advance of quarterly premiums of $12.00. The policy also contains the following provision in regard to premiums:

> "The acceptance of any premium on this policy shall be optional with the association. Should the premium provided for herein be insufficient to meet the requirements of the association, the company may call for the difference as required."

Section 1 of the Standard Provisions provides that the endorsements and attached papers to the policy constitute the entire contract of insurance. At no place in the policy is any reference made to the by-laws being a part of the contract of insurance, and no part of the by-laws are copied in the policy.

The first question to be solved is to determine whether or not this company is doing business within the state of Missouri as an assessment company.

It is apparent from the articles of incorporation that the company was incorporated as an assessment company. Under the articles of the association the directors could levy assessments in such amounts and at such times as may be provided in the certificate of membership. The certificate of membership apparently is a policy of insurance issued by the company. The policy of insurance does not contain any language providing for levying of assessments at times or according to stated amounts. If it can be urged that the articles of association determine its character as that of an assessment company, it must be admitted that the articles of association are in conflict with the terms of the policy in that connection. Where there is a conflict between the articles of association and the terms of the policy, the terms of the policy must prevail.

In Elliott v. Safety Fund Life Association, 76 M. A. 562, 566, it is said:

> "It is argued, however, that the by-laws of the company cover the points which have been suggested above and that they provide for assessments upon all policy holders in such manner as to fix the amount each should pay in order to meet mortuary expense as each death may occur. It is sufficient to say of this that the contract of insurance does not make the by-laws of the company a part of the contract. The policy provides that certain provisions on the back thereof shall be a part of the contract and these provisions while embodying terms we have set out omit any reference to assessment of members. On the other hand the policy, front and back, is complete in itself and excludes the idea that it is controlled by matters aliunde."

Again in Miller v. Missouri State Life, 194 M. A. 265, 276, the Court says:

> "We may concede for argument that in this roundabout manner the by-laws mentioned in the application were made a part of the contract of insurance, but we do not share the view of counsel for defendant that by-laws not mentioned or even suggested in this reference were brought into the contract. The only by-laws referred to were those relating to the time and place for the making of the fixed quarterly payments and the application is silent about the by-laws which made provision for the levy and collection of assessments."

It is evident, therefore, from the above decisions that whether or not the policy in question was issued by an assessment company must be determined from the provisions of the policy. The only by-law making any reference to assessments is article IV, which says that the board of directors may levy such assessments in such amounts and at such times as is provided in the certificate of membership. The certificate of membership, which in this case is the policy, makes no reference to the levying of any assessment. The policy itself contains no reference to the by-laws, but contains provisions to the effect that the entire contract is evidenced by the policy issued. We must, therefore, take the view that in determining the kind of business this company is doing within the state of Missouri, that reference must be made only to the policy of insurance, and that the by-laws must be excluded. It is necessary, therefore, to examine the policy to ascertain the kind of business being done by this company. The policy provides definite benefits both for death and accidental indemnities, also for sickness. The consideration of the policy is the payment in advance of $22.00 as the first payment and a quarterly payment of $12.00 thereafter. The policy contains no provision for the levying of an assessment, or any statement to the effect that the fixed sum specified in the policy is dependent upon the collection of the assessments from the other persons holding similar contracts. No where in the policy is the word "assessment" used, but throughout the policy the word "premium" is used. Under the Standard Provisions, section 3, the words "agreed premium" are used. The only clause in the policy which would indicate that the agreed premium might be changed is contained in the following words, "should the premium provided for herein be insufficient to meet the requirements of the association, it may call for the difference as required."

We believe that this latter provision only gives the right to the company to increase the premium called for under the policy in the event such increase is necessary. A similar policy was construed in the case of Aloe v. Fidelity Mutual Life Association, 164 Mo. 675, where the Court says at page 689,

> "In other words, each contract with each insurer is a separate unto itself, wholly independent of any other contract made with any other insurer. Translated into plain words, the

contract is that the company will pay five thousand dollars to the beneficiary of the insured at his death; provided, every year or every quarter during his life the insured will pay the company a fixed premium; provided, further, that if experience shows that the company hasnot charged the insured enough premium it may increase it at any time so as to keep the company solvent. Such a contract lacks the essential elements to bring the defendant company within the meaning of an assessment company under our laws."

In Jacobs v. Life Association, 146 Mo. 533, 538, the court says:

"The primary and controlling principle of the statute is that the benefit is to be paid out of a fund raised by assessment upon other persons holding similar contracts, by which they are made liable for the payment of such assessments. No scheme of life insurance can come within this principle and become insurance upon the assessment plan, unless somewhere along the line of its operations provision is made for such an assessment, and liability for its payment created. The right to have the assessment made must be given to the insured, the duty to make it must be imposed upon the corporation, and liability for its payment upon its members."

Another test laid down in Wall v. Commonwealth C. Co. of Philadelphia, Pa., 39 S. W. (2d), 441, 445, is as follows:

"A policy clearly indicating that payments necessary to continue the same are to be collected wholly or in part from assessments on holders of certificates of like class is one upon the assessment plan. One providing for a fixed regular premium is held to be an old line policy. (Citations omitted). To bring a policy within this section, it must show on its face an understanding that the insurance was to be gathered by assessments."

In Howard v. Missouri State Life Insurance Company, 238 S. W. 863, 864, it is said:

"This policy lacks the essential elements of a contract of insurance on the assessment plan. It nowhere gives the assured the right to have the benefit collected in whole or in part by an assessment upon persons holding similar contracts. Lacking this element, it cannot be classed as an assessment policy, but must be held to be an old-line policy."

It will be seen from the tests laid down in the above cases that the amount to be paid under the policy must come from assessments on members holding similar contracts; that each contract holder shall have the right to require such assessment from other contract holders and shall be under duty to pay assessments for

the benefit of other members. No such provision can be found, either directly or by implication, in the policies of this company. The amount to which he is entitled to recover is fixed, and upon the payment of the initial premium, without more, he is entitled to be paid according to the amounts specified in the contract of insurance. Its premiums are specific amounts specified to be paid at regular intervals, subject, however, to the provision that they might be increased.

The rules announced in the above cases announce the tests made by the courts of this State in construing policies. However loath we might be to follow the holdings of the above cases, we are compelled to adopt such holdings in view of the fact that the Kansas City Court of Appeals in the case of Wollums v. Mutual Benefit Health and Accident Association, 48 S. W. (2d), 259, has construed the policies of the company in question. In construing policies of this company the court holds that it is not doing business as an assessment company and says at page 264 as follows:

> "However, the policy upon its face conclusively shows that this insurance was not issued upon the assessment plan. It is held that the liability of an insurance company is determined by the character of its contracts of insurance and, in order for a contract to be upon the assessment plan, the payments must, in some degree, be dependent upon the collection of assessments upon persons holding similar contracts. Aloe v. Fidelity Mutual Life Association, 164 Mo. 675, 55 S. W. 993; Williams v. St. Louis Life Ins. Co., 189 Mo. 70, 87 S. W. 499. There is nothing in the policy in suit tending to show that the payments are so dependent. The fact that the policy provides that: 'The acceptance of any premium on this policy shall be optional with the Association, and should the premium provided for herein be insufficient to meet the requirements of the Association, it may call for the difference as required,' does not make it an assessment company in the issuance of this policy."

The court held in the above case that the provision giving the company the right to increase the premium did not make the policy one issued by an assessment company. That provision, however, was the only provision in the policy which distinguished it from the regular old-line companies, and since the Kansas City Court of Appeals has held that that provision will not make it a policy by an assessment company, all doubt is resolved against the contention of the insurance company. This Department is bound by that decision in construing a policy of the company in question, and must hold that the Mutual Benefit Health and Accident Association is not doing business within the state of Missouri as an assessment company.

The fact that this company was chartered in Nebraska as an assessment company, is not material in determining its liability under these taxing statutes. The court in Aloe v. Fidelity Mutual

Life Association, 164 Mo. 675, says:

> "The fact that an insurance company was chartered by another state as an assessment company, and was licensed to do business in this State under its laws as an assessment company, does not make it such, nor in anywise change its character or status under the Missouri law. Nor is the liability of the company in anywise affected by its name. That is determined by the character of its contracts of insurance, and by those contracts the law places the company in its proper class, and determines whether or not it is an assessment company."

Neither the fact that heretofore the company has been licensed as an assessment company determines the character of the company in this State. In McDonald v. Life Association, 154 Mo. 618, it is said:

> "The certificate of the State Superintendent of Insurance, authorizing a company to do business as an assessment company, does not determine the character of insurance the company actually does. The policy determines that."

Following the holdings of the above cases, therefore it must be held that the kind of insurance issued determines the character of the company. The test is not how the company was incorporated in its home state, nor the view of the Insurance Commissioner in licensing the applicant, but the test is the nature of the business done in this State. The Kansas City Court of Appeals in the Wollums case above, has held that this company is not doing business within the state of Missouri as an assessment company and, therefore, under all tests, can be taxed for the privilege of doing business not on the assessment plan within the state of Missouri.

It appears that this particular company for years past has been licensed as an assessment company and we are aware of the rule that where a statute is ambiguous, that the construction placed thereon by the Departmental heads is persuasive in construing the statute. There is nothing ambiguous, however, in section 5745. That section merely lays down the test which must be complied with in order to become an assessment company. We do not believe there is anything ambiguous in the contract of insurance. We are aware of the rule that where a taxing statute is ambiguous, that the ambiguity must be resolved in favor of the taxpayer. We are of the opinion, however, that these two maxims cannot be invoked to relieve the insurance company from paying the tax in question. There is another rule which must be recognized in dealing with officers of cities and states, regarding taxes. Such rule is announced in Senter v. Lumber Company, 255 Mo. 590, 607, where it is said:

> "The city is a body corporate, clothed with extensive powers for the management of her municipal affairs. She can only

> act through her officers and agents; and if those officers, in violation of her ordinances, do unauthorized acts to her prejudice, it would be hard that she could be bound by them. - - - The State has delegated to St. Louis the powers necessary for her municipal government, thus imposing on her an obligation that would otherwise devolve on the State. The city, in the discharge of this duty, is compelled to act by officers. Now, if the State, acting through her officers, is not bound by their unauthorized acts, we can see no reason why the city, in the exercise of functions pertaining to the State and for the performance of which she is substituted in the place of the State, should not stand, in relation to the agents she may employ on the same ground that the State would to her officers. - - - We must all see the numberless frauds the sanctioning of the principle insisted on would produce. The argument confounds the city with her officers and assumes that they are the city."

It is the opinion of this Department that section 5745 is not ambiguous. It is plain under that section that before a company can be an assessment company that the payment of the benefits in some manner and degree must be dependent upon the collection of assessments from other policy holders. It is equally plain in the policy that the policy itself does not contemplate an assessment within the provisions of section 5745. There is nothing ambiguous in the contract of insurance or in section 5745 which would justify the invoking of the rule regarding the prior construction by the executive officers. As a matter of fact, the Kansas City Court of Appeals, in construing the policies of this company, and the other appellate courts in construing similar policies, have clearly laid down rules destroying any doubt as to the character of the business being done by this company in this state.

It is the opinion of this Department that the fact that this company was heretofore licensed as an assessment company will not prevent the taxing of the company at this time. It is said in State ex rel v. Y. M. C. A. 259 Mo. 233, 238,

> "The neglect of lawfully constituted authorities to assess taxes against defendant's property would be pursuasive evidence that said property is not taxable, if the law were susceptible of more than one construction. However, the mere neglect of public officers, or others, to obey a plain constitutional provision or statute will not effect its repeal."

In Folk v. St. Louis, 250 Mo. 116, 141, the court says:

> "The actual and practical interpretation placed upon constitutions and statutes by public officers charged with their execution is very pursuasive upon the court. When a constitutional provision or statute is unambiguous the acts of citizens of officers in violating its provisions for any

length of time, however long, cannot work its repeal."

The rules regarding construction by executive officers must be that the construction of executive officers is pursuasive where the constitutional or statutory provision is ambiguous, but such construction will not be pursuasive when it is clearly erroneous. There is no ambiguity in the statute under construction, and the courts must construe the statute according to its true meaning, and prior construction by executive officers to the contrary will be of no weight. The statute and the policy in question not being ambiguous, we do not believe that the present construction of those instruments should be influenced by prior interpretation of the Department.

Section 5779 applies to insurance companies on the stipulated premium plan. This company is not on a stipulated premium plan, according to its method of doing business in this State, but comes under section 5979, the general section which applies to other foreign insurance companies. It is, therefore, our opinion that the company should be required to pay a license fee of 2% on premiums received on account of business done within this State, since under the decisions of this State the company is not doing business in this State as an assessment company.

Very truly yours,

Assistant Attorney General.

APPROVED:

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Attorney General.

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