NOVEMBER 30, 1959

HONORABLE JOHN A. KERVICK
State Treasurer
State House
Trenton, New Jersey

MEMORANDUM OPINION 1959—P-24

DEAR MR. KERVICK:

You have asked our legal opinion as to whether a receiver trustee or other court appointed fiduciary is required to file the necessary returns for the corporation represented by him for the period (a) covering all or part of any accounting period prior to appointment and (b) covering all or part of any accounting period subsequent to appointment.

The Corporation Business Tax Act imposes a franchise tax upon "every domestic or foreign corporation which is not hereinafter exempted . . . for the privilege of having or exercising its corporate franchise in this State, or for the privilege of doing business, employing or owning capital or property, or maintaining an office, in this State." R.S. 54:10A-2.

Under the terms of this section, every domestic corporation, whatsoever, and every foreign corporation authorized to do business in New Jersey, and every foreign corporation which, although not authorized to do business in this State, nonetheless does business, employs or owns capital or property or maintains an office in this State is liable to pay a franchise tax. See Regulations 16:10-1.130; 16:10-1.140; 16:10-1.150; 16:10-1.160.

Taxes accruing prior to an adjudication in bankruptcy are debts of the corporation, provable in bankruptcy, and entitled to a fourth priority. Bankruptcy Act, Section 64(a)-4, 11 U.S.C. §104a(4).

Insofar as New Jersey law is concerned, franchise taxes continue to accrue after the filing of a petition in bankruptcy and during the bankruptcy administration. The tax is imposed on the *"privilege"* of having or exercising a corporate franchise, doing business, employing or owning capital, etc. See *Werner Machine Co.* v. *Director of Division of Taxation,* Dept. of Treasury, 17 N. J. 121 (1954) aff'd 350 U.S. 492 (1956). In other words, a corporation is subject to the tax so long as it retains the privilege to do business, etc. and regardless of whether or not it actually utilizes such privilege. *Cf. People of State of Michigan* v. *Michigan Trust Co.,* 286 U.S. 334 (1932). Neither adjudication as a bankrupt nor discharge dissolves a corporation. *In re Town Crier Bottling Co.,* 123 F. Supp. 588 (D. Mo. 1954); See 11 U.S.C. §32. Hence all domestic corporations and such foreign corporations as are authorized to do business in the State continue to be liable for franchise taxes during bankruptcy administration and until the franchise or authorization to do business is forfeited or abandoned, or until the corporation is dissolved. *Cf. In re United States Car Co.,* 60 N.J. Eq. 514 (E. & A. 1900).

A Federal bankruptcy trustee or receiver who conducts a business, either in connection with a corporate reorganization or pursuant to court order as preliminary to liquidation is, by express Federal statute fully subject to State tax laws. The Federal statute provides (28 U.S.C. §960):

> "Any officers and agents conducting any business under authority of a United States Court shall be subject to all Federal, State and local taxes

applicable to such business to the same extent as if it were conducted by an individual or corporation."

Construing this statute, the United States Supreme Court in *Palmer* v. *Webster and Atlas Nat. Bank of Boston,* 312 U.S. 156 (1941) stated (at p. 163):

> "'The purpose of this bill is to subject businesses conducted under receivership in Federal courts to State and local taxation the same as if such businesses were being conducted by private individuals or corporations.'
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> * * *
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> "What Congress intended was that a business in receivership, or conducted under court order, should be subject to the same tax liability as the owner would have been if in possession and operating the enterprise."

The New Jersey Statute, R.S. 54:10A-11, imposes a liability on bankruptcy trustees for corporate franchise taxes in the following terms. The statute provides:

> "Any receiver, referee, trustee, assignee or other fiduciary, or any officer or agent appointed by any court, to conduct the business or conserve the assets of any corporation shall be subject to the tax imposed by this act in the same manner and to the same extent as a corporation hereunder."

The scope of the tax liability which R.S. 54:10A-11 imposes on a trustee in bankruptcy must be construed as identical with the scope of tax liability which 28 U.S.C. §960 permits a State to impose. This is so because Congress, under its paramount power over bankruptcy administration possesses, and by 28 U.S.C. §960 has exercised, the power to define a trustee's tax liability. *In re David Standard Bread Co.,* 46 F. Supp. 841 (D. Cal. 1942), aff'd sub nom. *State Board of Equalization* v. *Boteler,* 131 F. 2d 386 (9th Cir. 1942). It would therefore be improper and probably futile to construe the New Jersey statute to attempt to impose any broader liability on a bankruptcy trustee. *California State Bd. of Equalization* v. *Goggin,* 245 F. 2d 44 (9th Cir. 1957) cert. denied 353 U.S. 961 (1957). Hence the phrase "conduct the business or conserve the assets," which appears in the New Jersey statute, must be construed as no more comprehensive than the phrase, "conducting any business" in the Federal statute.

The weight of authority holds that if a trustee continues to operate a business, or a part thereof, he is "conducting" it within the meaning of 28 U.S.C. §960 and is therefore liable for taxes accruing as the result of his operations; but if he is merely liquidating it, he is not liable for taxes which may accrue as a matter of State Law during the period of liquidation. *In re F. P. Newport Corp., Ltd.,* 144 F. Supp. 507 (D. Cal. 1956); *In re West Coast Cabinet Works,* 92 F. Supp. 636 (S.D. Cal. 1950), aff'd sub nom. *California State Bd. of Equalization* v. *Goggin,* 191 F. 2d 726 (9th Cir. 1951), cert. denied 342 U.S. 909 (1952); *California State Bd. of Equalization* v. *Goggin,* 245 F. 2d 44 (9th Cir. 1957) cert. denied 353 U.S. 961 (1957); *United States* v. *Metcalf,* 131 F. 2d 677 (9th Cir. 1942) cert. denied 318 U.S. 769 (1942). See *Philadelphia Co.* v. *Dipple,* 312 U.S. 168 (1941). A few cases, however, hold that a trustee who is merely liquidating is also "conducting" a business within the meaning of the cited Federal statute and may be liable for taxes. *In re Mid-America Co.,* 31 F. Supp. 601 (S.D. Ill. 1939); *State of Missouri* v. *Gleick,* 135 F. 2d 134 (8th Cir. 1943). However, the reasoning of these minority cases is not persuasive. Furthermore,

Attorney General Formal Opinion 1950—No. 77, holds that the New Jersey corporate franchise tax statute is not intended to tax corporations in the process of liquidation. Whether a trustee is "conducting" a business or liquidating it is a question of fact in each case. *U.S.* v. *Sampsell,* 224 F. 2d 721 (9th Cir. 1955).

A trustee who is "conducting" a business within the meaning of 28 U.S.C. §960 is obligated to file corporate tax returns for the period of his operation. State franchise taxes which accrue during bankruptcy administration as the result of his conducting the business of the bankrupt are entitled to the status of administration expenses and must be given priority over all other unsecured debts. *People of State of Michigan* v. *Michigan Trust Co.,* 286 U.S. 334 (1932). This liability includes any interest or penalties which may arise from the trustee's failure to pay post-bankruptcy franchise taxes as they arise. *Boteler* v. *Ingels,* 308 U.S. 57 (1939). Since a bankruptcy trustee or receiver is subject to being surcharged for unnecessary expenses to the State resulting from his negligence or other misconduct, it seems clear that receivers or trustees operating the business of a bankrupt corporation should file New Jersey corporation franchise tax returns as required by the New Jersey statute and, if they fail to do so, will be compelled to file them by the Federal court upon appropriate application by the State.

At least since the adoption of the Chandler Act on June 22, 1938 as an amendment to the Bankruptcy Act, claims for pre-bankruptcy taxes must be filed and proved by the creditor and need not be sought out by the trustee. *In re Ward,* 131 F. Supp. 387, 395 (D. Colo. 1955); *In re Mid-America Co.,* 31 F. Supp. 601 (D. Ill. 1939); *Matter of Lambertville Rubber Co. Inc.,* 111 F. 2d 45 (3d Cir. 1940). See 3 Collier on Bankruptcy par. 64.409. Since a trustee in bankruptcy is not responsible for determining and paying tax claims unless properly proved, he has no duty to file tax returns for years prior to bankruptcy. In the case of *In re Town Crier Bottling Co.,* 123 F. Supp. 588 (E.D. Mo. 1954) the court stated:

> "The trustee in bankruptcy would have no personal knowledge of the income or operations of the bankrupt corporation during the two taxable years prior to his appointment; he could not certify to the correctness of such return; in most instances he would be obliged to burden the estate with the expense of an accountant to make possible the preparation of such returns and such expense should not be authorized by this court. All books and records are available for use by Treasury Department agents from which the substituted returns mentioned in the government's brief could be made. No one is harmed if the trustee does not perform this gratuitous service. I find no legal compulsion for him to do so."

To the same effect see *In re Owl Drug Co.,* 21 F. Supp. 907, 910 (D. Nev. 1937), *Matter of Standard Elec. Med. Corp.,* 38 Am. Bankr. Rep. N.S. 402 (Ref. N.D. Cal. 1938); *Cf. In the Matter of F. P. Newport Corp., Ltd.* 144 F.S. 507 (S.D. Cal. 1956).

Section 64A of the Bankruptcy Act, 11 U.S.C. §104, provides that "in case any question arises as to the amount or legality of any taxes, such question shall be heard and determined by the court"; i.e. by the bankruptcy court. In the case of *New Jersey* v. *Anderson,* 203 U.S. 483 (1906) a domestic corporation which did business only in Illinois failed to file tax returns in New Jersey under the Corporation Stock Act which imposed a tax whose amount was determined by the amount of stock outstanding. The State Board of Assessors therefore assessed a tax on the authorized

stock of the corporation, rather than on the smaller amount which was actually outstanding. The bankruptcy court, however, set aside the assessment on the tax on the basis of the authorized stock and reduced it to an amount appropriate in view of the number of shares actually outstanding. The U.S. Supreme Court upheld the reduction of the assessment by the bankruptcy court. To the same effect, see *In re Monongahela Rye Liquors,* 141 F. 2d 864 (3d Cir. 1944) ; *In re Spier Aircraft Corp.,* 66 F. Supp. 236 (D.N.J. 1945) aff'd 156 F. 2d 62 (3d Cir. 1946) cert. denied 329 U.S. 729 (1946). *Cf. Arkansas Corporation Commission* v. *Thompson,* 313 U.S. 132 (1941).

Very truly yours,

DAVID D. FURMAN
Attorney General

By: MURRY BROCHIN
Deputy Attorney General

DECEMBER 31, 1959

HONORABLE BRENDAN T. BYRNE
Prosecutor of Essex County
Court House
Newark, New Jersey

MEMORANDUM OPINION 1959—P-25

DEAR PROSECUTOR:

You have asked whether the provisions of L. 1959, c. 161, which increase the number of county detectives and the number of county investigators, require approval by the Board of Chosen Freeholders before taking effect.

Section 1 of the act amends N.J.S. 2A:157-3 to increase the authorized number of county detectives in a first class county, such as Essex, from 18 to 24. Section 7 of the act amends N.J.S. 2A:157-11 to increase the authorized number of investigators from 18 to 24. These sections also increase the minimum salaries payable to detectives and investigators.

Section 13 of the act provides that the increases in minimum salaries shall not become operative in any county until adopted by resolution of the Board of Freeholders. However, there is no provision requiring approval by the Freeholders of the increase in the number of detectives and investigators. The failure to require approval by the Freeholders except as to salary changes is indicative of a legislative intention that no such resolution is necessary to make effective the increase in the number of authorized detectives and investigators. In this regard, L. 1959, c. 161 is self-executing.

Very truly yours,

DAVID D. FURMAN
Attorney General

By: WILLIAM L. BOYAN
Deputy Attorney General